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October 3, 2014

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The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

Last week, the Federal Communications Commission announced that it will hold a roundtable to explore "new ideas for protecting and promoting the open Internet." I strongly support this initiative and am writing to suggest a promising approach. The vitality of the Internet is inextricably linked to its openness. I believe this vitality can be protected by reclassifying broadband providers as telecommunication services and then using the modern authority of section 706 to set bright-line rules to prevent blocking, throttling, and paid prioritization.

The current proceeding to re-establish open Internet protections in the wake of the D.C. Circuit decision in *Verizon v. FCC* has divided the public and key stakeholders into two primary camps: those who support regulations under section 706 of the Telecommunications Act without Title II reclassification and those who favor regulations under Title II without reliance on section 706. I believe the FCC should also be considering a hybrid approach. A combination of section 706 and Title II can establish a truly robust framework for open Internet protections that will withstand judicial scrutiny.

The problem with using exclusively section 706 is that the court in *Verizon* held that the Commission's broad authority under section 706 is limited by the common carrier prohibition in section 153 of the Communications Act, which prohibits the FCC from establishing bright-line rules for entities that are not telecommunications service providers. To address this constraint and to enable the agency to use the full authority of section 706, the FCC needs to reclassify broadband Internet access service as a telecommunication service under Title II.

Concerns have also been raised about relying exclusively on Title II. The broadband providers are vociferously opposed to regulation under Title II because they view its provisions as traditional utility-style regulation that is unsuited to the modern Internet. Others have pointed

out that Title II has been interpreted to allow paid prioritization arrangements in telephone services, which creates precedents that would need to be distinguished.

Rather than choosing between section 706 and Title II, I encourage the FCC to consider using both authorities at once. Specifically, I recommend that the FCC consider reclassifying broadband Internet access service as a "telecommunications service" under Title II and then using section 706 to adopt three open Internet protections: a "no blocking" rule, a "no throttling" rule, and a "no paid prioritization" rule.

This approach would provide the bright-line protections that advocates of Internet openness are seeking. The "no blocking" rule would prevent broadband providers from stopping the transmission of lawful Internet traffic. The "no throttling" rule would prohibit broadband providers from slowing down or degrading lawful Internet traffic on the basis of content, applications, services, or devices. And the "no paid prioritization" rule would prohibit broadband providers from entering into "pay for play" schemes with content providers and bar the use of access charges for the purpose of obtaining preferential treatment, including faster speeds or other favorable terms or conditions. Both the "no blocking" and the "no throttling" rules should be subject to a "reasonable network management" exception.

At the same time, this approach would address the major concerns of the broadband providers because the main substantive provisions of Title II would not be invoked. Under the concept I am suggesting, the FCC would forbear from using sections 201 and 202 and most other sections of Title II, as the FCC is authorized to do under section 10 of the 1996 Telecommunications Act. The rationale for forbearance would be that regulation under these sections is not necessary because consumers and the public interest are protected by the rules promulgated under section 706.

The rest of this letter provides more details about my thinking. I hope the ideas I am raising will assist you and the other Commissioners as you deliberate on this critical issue.

BACKGROUND

The public comment period on the FCC's open Internet proposal closed on September 15 with over 3.7 million comments, a record-breaking level that reflects the significance of protecting the open Internet and the high-level of public involvement. The next week, the FCC announced that as a part of its series of "Open Internet Roundtables," it will hold a discussion on October 7 to consider "new ideas for protecting and promoting the open Internet."[1] As the FCC explained, this roundtable will address "some of the ideas in the record that the Commission staff

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[1] Federal Communications Commission, *Exploring New Ideas for Protecting and Promoting the Open Internet* (Sept. 22, 2014) (online at fcc.gov/blog/exploring-new-ideas-protecting-and-promoting-open-internet).

has identified as adding to the potential ways that an Open Internet can be preserved."[2] The ideas to be considered include "hybrid" approaches that combine the strengths of section 706 and Title II. According to the FCC, "the Commission is looking for a rainbow of policy and legal proposals, rather than being confined to … limited 'monochromatic' options."[3]

This is exactly the right approach for the FCC to be taking. The FCC has twice before tried to establish open Internet rules. The first FCC attempt relied on a theory of "ancillary jurisdiction" under Title I of the Communications Act. This approach was rejected by the D.C. Circuit in *Comcast Corp. v. FCC,* 600 F.3d 642 (D.C. Cir. 2010). The second FCC attempt relied exclusively on section 706 of the Communications Act, which gives the FCC authority to encourage broadband deployment. This approach was rejected by the D.C. Circuit in *Verizon v. FCC*, 740F.3d 623, (D.C. Cir. 2014). After these failed attempts to craft legally sustainable rules, the FCC must get it right this time.

In the *Verizon* case, Verizon challenged the FCC's 2010 Open Internet Order. This order included a prohibition on blocking Internet content. It also included an "anti-discrimination" requirement that stated broadband providers "shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service."[4] Both rules were promulgated under section 706 of the Communications Act, which provides that the FCC:

> shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[5]

Verizon brought two challenges to the Open Internet Order. First, Verizon argued that section 706 did not authorize the FCC to issue substantive requirements and that even if the provision does give the FCC substantive authority, "the scope of that grant is not so expansive as to permit the Commission to regulate broadband providers in the manner that the Open Internet Order rules do."[6] The D.C. Circuit rejected this argument, holding:

> The Commission … has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for

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[2] *Id.*

[3] *Id.*

[4] Federal Communications Commission, *In the Matter of Preserving the Open Internet,* GN Docket No. 09-191, *Broadband Industry Practices,* WC Docket No. 07-52, *Report and Order* ¶ 68 (Dec. 21, 2010).

[5] 47 U.S.C. § 1302.

[6] *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014).

the specific rules at issue here – that they will preserve and facilitate the "virtuous circle" of innovation that has driven the explosive growth of the Internet – is reasonable and supported by substantial evidence.

Second, Verizon argued that the Open Internet Order treated broadband providers as common carriers because it required them to carry all Internet content indiscriminately and that this violated section 153(51) of the Communications Act, which provides that "[a] telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services." The court agreed with Verizon on this point. According to the court, the FCC anti-discrimination requirement left "no room for 'individualized bargaining'" by broadband providers and instead "compels those providers to hold themselves out 'to serve the public indiscriminately.'"[7] Since the FCC had not classified broadband providers as providers of telecommunications services subject to Title II requirements, the court held that the agency was barred from regulating them as common carriers.[8] The court struck down the no-blocking rule because the FCC relied on the same legal arguments for the no-blocking rule as the anti-discrimination rule.[9]

Following the decision, most stakeholders have urged the Commission to take one of two approaches to reinstate open Internet protections. Some have asserted that the FCC lost the *Verizon* case because its lawyers used the wrong arguments or the rule was framed as a ban on "unreasonable discrimination" that was indistinguishable from the "unjust or unreasonable discrimination" standard under Title II. According to this school of thought, the FCC could protect the open Internet using just its section 706 authorities if it developed a new rule that does not resemble common carriage regulation. The FCC's May 15, 2014, Notice of Proposed Rulemaking (NPRM), takes this approach by proposing a "commercially reasonable" standard.[10]

Other commentators have taken the opposite approach. They have argued that the *Verizon* decision forecloses the option of using section 706 to protect an open Internet. Instead, they have urged the FCC to reclassify broadband Internet access service as a telecommunications service and utilize the Commission's Title II authority to regulate broadband providers as common carriers, in whole or in part.[11] Specifically, they have urged the FCC to use sections

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[7] *Verizon v. FCC*, 740 F.3d 623, 653 (D.C. Cir. 2014).

[8] *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

[9] *Id.*

[10] Federal Communications Commission, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Notice of Proposed Rulemaking* (May 15, 2014) at ¶ 116.

[11] *See e.g. Comments of Free Press, In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Framework for Broadband Internet Service,* GN Docket No. 10-127, *Preserving the Open Internet,* GN Docket No. 09-191 (February 19, 2014); *Comments of Public Knowledge, In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, *Framework for Broadband Internet Service,* GN Docket No. 10-127, *Preserving the*

201 and 202 of Title II to adopt rules prohibiting "unjust or unreasonable discrimination" by broadband providers.

I want to suggest a different view. I do not believe the FCC needs to choose between section 706 and Title II. Instead, I think combining the two authorities in a hybrid approach can provide a robust framework for the restoration of open Internet protections at a level that will promote innovation and investment, protect consumers and the public interest, and withstand judicial scrutiny.

THE PROBLEMS WITH SECTION 706 ALONE

While the D.C. Circuit in *Verizon* recognized that the Commission has broad authority to regulate broadband providers under section 706, it simultaneously concluded that the Commission is prohibited from using section 706 to impose common carriage-style rules. According to the court, the FCC must "leave sufficient 'room for individualized bargaining and discrimination in terms' so as not to run afoul of the statutory prohibitions on common carrier treatment."[12]

This is a potentially insurmountable obstacle to using section 706 by itself to protect the open Internet. An essential element of strong open Internet rules is preventing broadband providers from negotiating individual terms of service with content providers that could undermine the Internet's level playing field. Yet this is precisely what the court said the FCC could not do under section 706 alone.

In its Notice of Proposed Rulemaking, the FCC proposes "creating a new rule that would bar commercially unreasonable actions from threatening Internet openness."[13] There is support in the *Verizon* decision for using a commercially reasonable standard because the court stated that it would allow latitude for individualized negotiation.[14] As envisioned by the FCC, the agency would assess whether an arrangement meets the commercially reasonable standard by evaluating it against factors such as the impact on competition, the impact on consumers, and the

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Open Internet, GN Docket No. 09-191, *Broadband Industry Practices,* WC Docket No. 07-52 (Jul. 15, 2014).

[12] *Verizon v. FCC,* 740 F.3d 623, 658 (D.C. Cir. 2014)(*quoting* Cellco P'ship v. FCC, 700 F.3d 534, 548 (D.C. Cir. 2012)).

[13] Federal Communications Commission, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Notice of Proposed Rulemaking* (May 15, 2014) at ¶ 3.

[14] *See Cellco P'ship v. FCC,* 700 F.3d 534 (D.C. Cir. 2012).

impact on speech and civic engagement.[15] The FCC also seeks comment on whether it could establish "rebuttable presumptions" to guide its application of the factors.[16]

The difficulty with this approach is reconciling the need for bright-line rules that promote innovation and investment by content providers, especially start-ups, with the court's requirement that the FCC rule allow for individualized bargaining. The safest legal ground for the FCC is an approach that provides broadband providers wide latitude to negotiate arrangements with content providers. The FCC may be able to use the commercially reasonable standard to invalidate an agreement between a broadband provider and a content provider that gives the content provider exclusive rights to faster service. It would be much harder, however, for the FCC to justify under *Verizon* a prohibition on both exclusive and nonexclusive arrangements, since the FCC would be leaving the broadband providers with limited opportunity to negotiate. The result could be a two-tiered Internet, with faster service available to established content providers willing to pay for prioritized service.

These problems are compounded by the uncertainty that a commercial reasonable standard could engender. A multi-factor test lacks precision. Case-by-case adjudication could require complaints to be brought before the FCC, which would be costly and time consuming for consumers and content providers. Clear rules protecting an open Internet are needed to support the investments and innovation that have propelled the growth of the Internet. Yet the clearer a stand-alone section 706 rule becomes, the more its survivability in court will be in question.

Rebuttable presumptions seem unlikely to solve this dilemma. The anti-discrimination requirement invalidated in *Verizon* was not a categorical prohibition on paid prioritization. By its terms, the rule allowed "reasonable discrimination" by broadband providers. In the preamble to the rule, FCC announced that it would interpret this standard as in effect creating a presumption against paid prioritization. As the court wrote, "[a]lthough the Commission never expressly said that the rule forbids broadband providers from granting preferred status or services to edge providers who pay for such benefits, it warned that 'as a general matter, it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard.'"[17] Reinstating the same policy under a different banner is not a promising approach for surviving judicial scrutiny.

CONCERNS RAISED ABOUT TITLE II

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[15] Federal Communications Commission, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, *Notice of Proposed Rulemaking* (May 15, 2014) at ¶ 124-131.

[16] *Id.* at ¶ 126.

[17] *Verizon v. FCC*, 740 F.3d 623, 633 (D.C. Cir. 2014)(*quoting* Federal Communications Commission, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices,* WC Docket No. 07-52, *Report and Order* (Dec. 21, 2010) ¶ 76).

Because of the limitations inherent in the FCC's section 706 authority, many open Internet supporters have turned to Title II as a means to establish the FCC's legal authority to reinstate open Internet protections. Section 201 of the Communications Act requires "[a]ll charges, practices, classifications, and regulations" in the provision of communications service to be "just and reasonable."[18] Section 202 prohibits "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."[19] Advocates of Title II point to these two core common carriage provisions as the source of the FCC's legal power to outlaw discrimination by broadband providers following their reclassification as telecommunications service providers.

The broadband providers have raised many concerns with this approach. They argue that the imposition of Title II provisions renders broadband Internet access service a public utility service that has "typically led to chronic under-investment in basic infrastructure."[20] They contend that the Title II framework is rooted in 1880s railroad regulation and that applying such out-of-date obligations to broadband providers is "fundamentally at odds with the dynamic nature of the marketplace."[21] They also assert that the application of price and service regulation inherent in Title II is a "radical departure" from how broadband Internet has traditionally been treated by the FCC and that such an approach would inevitably endanger investment in the entire Internet ecosystem.[22]

Some experts in communications law have flagged problems with the precedents under Title II. The FCC has historically found instances of "inherently unjust or unreasonable" conduct that should be treated as "per se unreasonable" and therefore prohibited. But as I understand it, these examples have generally involved blocking of content. In the *Carterfone* decision, for example, the FCC found it inherently unjust and unreasonable for a carrier to ban third party equipment from its networks.[23] Similarly, the FCC brought enforcement action under section 201 against Madison River Telephone Co. for preventing its DSL customers from

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[18] 47 U.S.C. § 201(b).

[19] 47 U.S.C. § 202(a).

[20] *Comments of the National Cable and Telecommunications Association, In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, *Framework for Broadband Internet Service,* GN Docket No. 10-127 (Jul. 15, 2014) at 23.

[21] *Comments of the United States Telecom Association, In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, *Framework for Broadband Internet Service,* GN Docket No. 10-127 (Jul. 16, 2014) at 16.

[22] *Comments of Verizon and Verizon Wireless, In the Matter of Framework for Broadband Internet Service,* GN Docket No. 10-127, *Open Internet Rulemaking,* GN Docket No. 14-28 (Jul. 15, 2014) at 4.

[23] Federal Communications Commission, *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service,* Docket No. 16942 (Jun. 26, 1968).

accessing Vonage's Voice over Internet Protocol (VOIP) service.[24] The FCC has also recently found it inherently unjust and unreasonable for long distance phone carriers to block, restrict, or degrade calls to rural customers in an attempt to avoid transport and termination charges.[25]

In other contexts, however, the FCC has interpreted section 201 and section 202 as allowing differentiated services and pricing so long as "like" services are offered to similarly situated customers under reasonable terms and conditions. Indeed, section 201(b) expressly permits the creation of "different classes of communications" with different charges so long as they are deemed "just and reasonable" by the Commission. Under this standard, the FCC has permitted tiered pricing structures based on volume and term discounts, different levels of quality of service, and customer-specific "contract tariffs" involving individualized pricing.[26] Some of these Title II precedents resemble the paid prioritization arrangements that advocates of Internet openness want to prohibit.

I do not believe the precedents mean that sections 201 and 202 are unworkable. If common carriage regulation under Title II were the only alternative, its vigorous application to broadband Internet access service would be essential. The FCC could change its interpretations or differentiate broadband service from telephone service. The FCC could use a "virtuous circle" argument to assert that any paid prioritization arrangements are inherently unreasonable in the broadband context. But the FCC will not be writing on a blank slate if it uses sections 201 and 202 as the foundation for its open Internet rules. It would need to explain why prior precedents are not applicable, which could create additional litigation risks.

The open Internet is a vital public good and Title II regulation is one way to protect it, even if it means overcoming the opposition of broadband providers and distinguishing past precedents. But I also believe that there is an alternative way to achieve equivalent or stronger protections and that it should be closely examined.

A HYBRID APPROACH

Instead of choosing between section 706 and Title II, I urge the FCC to consider using both authorities. Specifically, I propose that the FCC reclassify broadband Internet access

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[24] Federal Communications Commission, *In the Matter of Madison River Communications, LLC and affiliated companies,* File No. EB-05-IH-0110, *Consent Decree* (Mar. 3, 2005).

[25] Federal Communications Commission, *Rural Call Completion,* 78 Fed. Reg. 76218 (Dec. 17, 2013) (Final Rule).

[26] *See Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

service as a "telecommunications service" and then adopt a set of bright-line, prophylactic open Internet protections under the agency's section 706 authority.

The court's decision in *Verizon* invites this approach. As discussed above, the court rejected Verizon's contention that section 706 does not give the FCC authority to adopt broad protections of Internet openness. Instead, the court held both that the FCC "has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic" and that the agency's "justification for the specific rules at issue here – that they will preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet – is reasonable and supported by substantial evidence."[27]

The problem in the *Verizon* case was that the FCC had not classified broadband Internet access service as a telecommunications service. As a result, the common carrier prohibition prevented the FCC from using the full extent of its authority under section 706. If broadband Internet access service is reclassified as a telecommunications service, the common carrier prohibition disappears and the FCC does not need to allow "individualized bargaining" between broadband providers and content companies. The FCC can then use the full authority of section 706 to promulgate categorical rules to protect the open Internet.

Several commenters have addressed in detail the authority of the FCC to reclassify broadband Internet access service as a telecommunications service, so I will not elaborate on this point here.[28] As these commenters point out, broadband Internet access service meets the definition of a telecommunications service under section 153 because it involves "the offering of telecommunications for a fee directly to the public." Moreover, advanced broadband service has evolved and typically does not include a functionally integrated "information service" component that requires broadband service to be treated as information service.[29]

Once broadband Internet access is reclassified, I believe the FCC can use its authorities under section 706 to adopt three bright-line rules: a "no blocking" rule, a "no throttling" rule, and a "no paid prioritization" rule. These bright-line rules constitute the heart of the open Internet and will advance the "virtuous circle" that encourages broadband deployment. They

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[27] *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

[28] *Comments of Public Knowledge, In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, *Framework for Broadband Internet Service,* GN Docket No. 10-127, *Preserving the Open Internet,* GN Docket No. 09-191, *Broadband Industry Practices,* WC Docket No. 07-52 (Jul. 15, 2014); *Comments of Free Press, In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, *Framework for Broadband Internet Service,* GN Docket No. 10-127, *Preserving the Open Internet,* GN Docket No. 09-191 (Mar. 21, 2014).

[29] To the extent that a domain name system (DNS) remains a functionally integrated service, the Commission should treat it as a capability "for the management, control, or operation of a telecommunications system or the management of a telecommunications service" and thus not an information service. *See* 47 U.S.C. § 153(24).

will also lower costs for broadband providers and content providers by reducing regulatory ambiguity and increase overall consumer welfare by preventing harmful practices from occurring in the first instance.

The "No Blocking" Rule. Upon classifying broadband Internet access as a telecommunications service, the FCC can reinstate the "no blocking" rule struck down in *Verizon* using its full section 706 authority. Specifically, the FCC should prevent the blocking of any lawful content, applications, services, or devices, subject to reasonable network management. Child pornography, copyright-infringing materials, and other illegal content would be outside the scope of this rule and thus not subject to its protection.

The "reasonable network management" exception should be crafted along the lines of the FCC's 2010 Open Internet Order, which enabled practices that are "appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."[30]

The 2010 Open Internet Order also created an exception for addressing the needs of public safety, including emergency communications, law enforcement, and national security. I advise the FCC to retain this exception as well.

The "No Throttling" Rule. The FCC should separately adopt a "no throttling" rule that prohibits broadband providers from slowing down or degrading lawful Internet traffic on the basis of content, applications, services, or devices, subject to exceptions for reasonable network management and public safety.[31] This bright-line, prophylactic rule would prohibit broadband providers from singling out specific content for discriminatory treatment as long as the traffic is legal. It would prevent broadband providers both from restricting free speech and from engaging in anticompetitive behaviors by throttling Internet traffic in order to favor content affiliated with the broadband provider.[32]

Broadband providers would remain free under this rule to adopt "content-agnostic" policies. For example, data caps or other network management techniques applied equally to all Internet traffic of a subscriber would be permissible under the rule. In its comments, AT&T

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[30] Federal Communications Commission, *In the Matter of Preserving the Open Internet,* GN Docket No. 09-191, *Broadband Industry Practices,* WC Docket No. 07-52, *Report and Order* (Dec. 21, 2010) at ¶ 82.

[31] Hereinafter, the term "content" in this context refers collectively to content, applications, services, and devices, or classes of content, applications, services, and devices.

[32] The term "throttling" is not limited to the technique of slowing down or delaying Internet packets, but more broadly refers to methods that can be used to differentiate, or "shape," Internet traffic.

made a case for allowing user-directed prioritization.[33] If these arrangements could be structured without violating the separate ban on paid prioritization, they might also be permissible. Furthermore, the "reasonable network management" exception would allow broadband providers to ensure quality of service for latency-sensitive applications and services in times of network congestion.

The "No Paid Prioritization" Rule. Finally, the FCC should adopt a separate bright-line rule that outlaws paid prioritization. The rule would prohibit broadband providers from entering into "pay-for-play" schemes with content providers and bar the use of access charges for obtaining preferential treatment such as faster speeds, guaranteed quality of service, exemptions from data plan limits, or other favorable terms or conditions. Arrangements between a broadband provider and an affiliate that give the affiliated entity prioritization should also be considered a violation of this ban.[34]

Unlike the "no blocking" and the "no throttling" rules, the "no paid prioritization" rule does not need a "reasonable network management" exception, since economic considerations rather than legitimate technical reasons would be the force behind paid prioritization arrangements.

Services Covered. Under this hybrid approach, I recommend that the three open Internet rules apply to the same service as the FCC's 2010 Open Internet Order. Specifically, the rules should apply to a mass market retail service or its functional equivalent with the capability to "transmit data to and receive data from all or substantially all Internet endpoints."[35] This approach would exclude enterprise service offerings such as private network services, hosting, or data storage services because they are not considered "mass market" services. In addition, the rules would not apply to "specialized services" that are offered by a broadband provider over the same last-mile connections used to provide retail broadband services, so long as these services do not jeopardize or undermine investment in, and capacity made available to, the public, best effort Internet.

Waiver Requests. I recommend that the FCC consider establishing a process to consider applications by the broadband providers for waivers of the new rules under section 706. I doubt that waivers will be consistent with the goals of section 706 because no blocking, no throttling, and no paid prioritization are the heart of an open Internet. But I also realize that the Internet is

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[33] *Comments of AT&T Services, Inc., In the Matter of Protecting and Promoting the Open Internet,* GN Docket No. 14-28, *Framework for Broadband Internet Service,* GN Docket No. 10-127 (Jul. 15, 2014) at 27.

[34] Affiliates of broadband providers already have a monetary relationship with the provider and thus subject to the ban on paid prioritization.

[35] Federal Communications Commission, *In the Matter of Preserving the Open Internet,* GN Docket No. 09-191, *Broadband Industry Practices,* WC Docket No. 07-52, *Report and Order* (Dec. 21, 2010) at ¶ 44.

dynamic and that it could be valuable to allow broadband providers to seek waivers or permission to conduct trials if the providers can demonstrate that a prohibited practice would actually further the goals of section 706.

In administering this process, the FCC should be guided by the principles of section 706. The test should be whether a broadband provider's practice or arrangement furthers the "virtuous circle" that encourages investment in broadband infrastructure and expedites broadband deployment. Public comment should be allowed on any requests.

Forbearance from Title II Provisions. The no blocking, no throttling, and no paid prioritization rules I recommend will provide the bright-line protection that advocates of Internet openness have been seeking. At the same time, I think a hybrid approach can address many of the concerns of the broadband providers because it does not require invoking the authorities of Title II that the providers have found problematic.

If the FCC adopts a hybrid approach, I recommend that the agency simultaneously forbear from applying most of the provisions of Title II to broadband providers, including sections 201 and 202. Forbearing from these provisions will help assure broadband providers that the FCC does not plan to regulate the rates of broadband Internet access service. It also allows the FCC to avoid the Title II precedents that were initially developed for regulation of telephone services. One of the most common criticisms lodged against broadband reclassification is that the Title II provisions were developed to protect the public interest during monopoly-era regulation of phone services. This criticism does not apply to the hybrid approach because this approach uses the modern regulatory authority of section 706, not Title II, as the basis for the open Internet rules.

Congress has granted the FCC broad authority to forbear from applying specific Title II obligations to a telecommunications carrier. The FCC may do so under section 10 of the Telecommunications Act if it determines:

> (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations … are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[36]

Courts have traditionally reviewed the FCC's forbearance decisions under the "arbitrary and capricious" standard of the Administrative Procedure Act and accorded great deference to Commission decisions under this authority. In this case, forbearance would be justified because the no blocking, no throttling, and no paid prioritization rules promulgated under section 706 would render the Title II provisions unnecessary. Section 706 gives the FCC a broad canvas for writing rules that protect the open Internet and its virtuous circle of innovation and investment.

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[36] 47 U.S.C. § 160.

Once the FCC has exercised that authority, further regulation under most of the provisions of Title II would be duplicative at best. Reinstating open Internet protections without relying on sections 201 and 202 also advances the "virtuous circle" that accelerates broadband deployment because it avoids the specter of price regulation under Title II that critics argue could stifle broadband investment.[37]

Some may suggest that it is counter-intuitive to reclassify broadband Internet access service as a telecommunication service under Title II and then immediately forebear from application of its core provisions. But the statute contemplates such an outcome because the statutory factors used to determine whether a service is a telecommunications service are different than statutory factors used to assess the appropriateness of forbearance. The classification decision turns on the statutory definition of a "telecommunications service," which looks at the manner in which providers offer their services. The separate determination as to whether section 10 allows forbearance turns on an unrelated set of factors comprising what might broadly be described as a public interest test. There is no inconsistency in finding that broadband service fits the technical definition of a "telecommunications service," while simultaneously concluding that the public interest mandates forbearance from applying provisions of Title II.

While I believe the FCC should forbear from the majority of Title II provisions, there are some provisions that would be appropriate to retain. One example is the privacy protections in section 222. If the FCC classifies broadband Internet access service as a telecommunications service, the Federal Trade Commission could lose its authority to protect the privacy of broadband consumers. Section 222 may be needed to fill this regulatory gap. Likewise, I believe section 255 may continue to be necessary to ensure broadband Internet service remains accessible to individuals with disabilities.

My view is that the FCC should carefully examine the remaining provisions of Title II to determine where additional forbearance may not be warranted under the standards set forth by section 10. I believe the "Third Way" Notice of Inquiry adopted by the FCC in 2010 provides a good starting point for such an examination.[38]

Application to Mobile Broadband. I believe the Commission should apply the same open Internet rules to both fixed and mobile broadband services, but structure and interpret the "reasonable network management" exception differently for mobile broadband to account for unique bandwidth management challenges of a mobile network. I can think of no legitimate reasons why wireless carriers would need to block or throttle lawful content outside of their

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[37] *Comments of Verizon and Verizon Wireless, In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, *Open Internet Rulemaking*, GN Docket No. 14-28 (Jul. 15, 2014).

[38] Federal Communications Commission, *In the Matter of Framework for Broadband Internet Service,* GN Docket No. 10-127, *Notice of Inquiry* (Jun. 17, 2010).

network management needs. Any technical and architectural limitations unique to cellular networks can be addressed through the flexibilities provided under the reasonable network management exception, without resorting to content-specific throttling aimed at specific applications or services. To the extent congestion management practices must target specific "bandwidth hog" applications or services, the FCC can consider adopting additional safe harbors within the "no blocking" or "no throttling" rules.

Wireless broadband carriers should also be subject to the same ban on paid prioritization as fixed broadband providers. A ban on paid prioritization in wireless broadband prohibits the creation of "fast lanes" or "slow lanes" that could limit consumer choice and competition. At the same time it would not prohibit prioritized arrangements between unaffiliated companies that do not involve throttling of Internet traffic or access charges to content providers. Such arrangements could help a wireless carrier differentiate its products or services and enhance its competitiveness in the wireless market.

Applying the no blocking, no throttling, and no paid prioritization rules to mobile broadband will require reclassifying mobile broadband as a telecommunications service and as a "commercial mobile service" within the meaning of section 332 and thus subject to common carrier requirements.[39] I recognize that section 332(c)(1)(A), which was adopted by Congress in 1993, provides that the FCC cannot forbear from applying sections 201, 202, and 208 to commercial mobile services. But section 10, which was adopted in 1996, explicitly overturns that restriction because it provides that the FCC can waive these sections "notwithstanding section 332(c)(1)(A)." The FCC could therefore treat mobile broadband in the same way as fixed broadband.[40]

CONCLUSION

I hope you will give this hybrid proposal serious consideration. Using a combination of reclassification under Title II and section 706 would give the FCC broad authority to establish strong rules to protect the open Internet. This approach can produce the bright-line protections that advocates are seeking while avoiding the invocation of the Title II authorities most strongly opposed by the broadband providers. A hybrid approach also avoids putting vitally important open Internet protections in jeopardy through legal gymnastics. It can be a pathway to ensuring that the Internet remains an engine for innovation, commerce, and self-expression.

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[39] Federal Communications Commission, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* WT Docket No.07-53, Declaratory Ruling (2007).

[40] To the extent mobile broadband service does not fit the existing definition of "commercial mobile service," the FCC should update the definition, especially in light of efforts by several incumbent phone service providers to retire the public switch telephone network and replace it with Internet Protocol based networks.

I also ask that this letter be included in the public docket in the Matter of Protecting and Promoting the Open Internet (Docket No. 14-28).

Sincerely,

Henry A. Waxman
Ranking Member