Date: October 2, 2014

To: Federal Communications Commission

From: Meredith Hochhalter J.D Candidate 2015, University of Arizona, James E. Rogers College of Law.

Re: Docket Number 14-61, Docket Number 10-127.

Response to Comments

Commentators assert it is "clear" that there is a "gray area" between private carriage and common carriage per se.[1] While this is true, the gray area is not only necessarily uncertain but very narrow.[2] First, *Brand X* decided *only* whether the FCC's determination that cable companies that provide broadband access are not telecommunications services (and thereby exempted from Title II common carrier regulation) was "a lawful construction of the Communications Act" under Chevron.[3] Relying on *Brand X* for anything further is at best relying on dicta. The FCC is therefore faced with the somewhat daunting task of regulating the internet with very little direct Supreme Court Guidance.

It is clear that the FCC may exempt broadband providers from Title II regulation.[4] However, the appropriate question is *should the FCC do so*? I agree that the 2010 Rules are sufficient to protect the openness of the internet, but the safer route for the FCC to take would be to rely on Title II rather than Section 706.[5]

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[1] AT&T comments at 8.
[2] *Verizon v. F.C.C.*, 740 F.3d 623, 652 (D.C. Cir. 2014)
[3] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 974, 125 S. Ct. 2688, 2695, 162 L. Ed. 2d 820 (2005)
[4] *Id.*
[5] *See generally* Meredith Hochhalter Comments.

While the DC Circuit did state that there is a gray area between common and private carriage, it also held that within that grey area there must be "substantial room for individualized bargaining and discrimination in terms."[6] It is hard to imagine a realistic situation without paid prioritization that includes both individualized bargaining, and discrimination and terms. This is most likely why the FCC proposed a rule which would allow the practice of paid prioritization.[7] Even if the FCC believes that it can find such a narrow balance, it would make far more sense to do under Title II authority.[8]

Further, the FCC is not bound by factual judgments that broadband is not a telecommunication service as long as the FCC determines that broadband providers are, in fact, telecommunications services "premised on demonstrated—and reasonable—evidential support."[9] The facts in such a technologically charged industry are constantly changing, and even those that have remained constant must be evaluated in light of *Verizon.* I would urge the FCC to adopt the 2010 rules under Title II.

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[6] *Verizon, supra* note 2.
[7] Any reasonable interpretation of Verizon that includes a roadmap or blue print to future regulation under 706 would be based on paid prioritization practices. See generally *Verizon, supra* note 2.
[8] Hochhalter, Supra note 5.
[9] *Verizon v. F.C.C.*, 740 F.3d 623, 662 (D.C. Cir. 2014)