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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Protecting and Promoting the Open Internet; Framework for Broadband Services* – GN Docket Nos. 14-28 & 10-127

Dear Ms. Dortch:

In a series of orders, the Commission classified broadband Internet access services as information services under Title I. *See, e.g., Wireline Broadband Order*¹ ¶¶ 12-17; *Wireless Broadband Declaratory Ruling*² ¶¶ 19-34. Those Commission rulings were correct. We have discussed in other filings why broadband Internet access was then — and remains today — an integrated service that satisfies the statutory definition of information service and, therefore, cannot be re-classified as a telecommunications service.³

Here, we explain why, even if the Commission could identify a broadband Internet access service that does not meet the statutory definition of information access, the Commission could not require that *every* provider in *every* geographic market, nationwide, offer that service on a common carrier basis. As we demonstrate, that is true regardless of whether the service the Commission identifies is one broadband providers offer to their retail customers or one involving the interconnection of IP networks for the exchange of Internet traffic.

Under the Communications Act, a provider of telecommunications can be subject to common carrier duties only if that provider voluntarily assumes those duties by offering its service indifferently, or if the provider is compelled to do so by law. Broadband Internet access

¹ Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”), *petitions for review denied, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

² Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

³ *See, e.g.,* AT&T Comments at 19-25, 44-49, GN Docket Nos. 14-28 & 10-127 (July 15, 2014); AT&T Reply Comments at 24-42, 60-90, GN Docket Nos. 14-28 & 10-127 (Sept. 15, 2014).

providers have not voluntarily assumed such duties with respect either to their retail services or their interconnection with other IP networks. At a minimum, the Commission would have to make evidentiary findings as to each provider in each product and geographic market before it could conclude that any has voluntarily undertaken such duties. Furthermore, because there are no statutes compelling common carrier provision of either broadband service or IP interconnection, the Commission could mandate common carriage only upon a finding of market power. There is no basis in the record for the Commission to find that any provider has market power, whether in a retail market or a market for interconnection. Moreover, the market power inquiry also requires the Commission to make individualized findings as to each provider in each product and geographic market. It would be absurd for the Commission to conclude that every provider in every market has market power, as would be necessary to support a blanket determination that all broadband Internet access and IP interconnection providers must act as common carriers under Title II.

In sum, and as shown below, the Commission cannot — consistent with the governing law and the evidence in the record — impose common carrier duties on all providers, nationwide, of whatever broadband Internet access service or Internet interconnection service the Commission concludes is not an information service.

A. Prerequisites to Common Carrier Regulation

The Communications Act defines a telecommunications service as “the offering of [1] telecommunications [2] for a fee directly to the public.” 47 U.S.C. § 153(53). As the courts have recognized, this definition creates two distinct prerequisites that the Commission must meet in order to regulate a service as a telecommunications service, and a provider of that service as a common carrier.⁴

The first, on which proponents of reclassification have focused, is that the service offer “telecommunications” — that is, “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); *see also NARUC v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) (“*NARUC II*”) (describing this as an independent “prerequisite to common carrier status”).⁵ Thus, this first prerequisite focuses on whether the service is an offer of telecommunications or is, instead, an information service. *See* 47 U.S.C. § 153(24).⁶

⁴ *See* 47 U.S.C. § 153(51) (defining a telecommunications carrier as a “provider of telecommunications service,” and providing that a “telecommunications carrier shall be treated as a common carrier,” though “only to the extent that it is engaged in providing telecommunications services”).

⁵ Although *NARUC II* predated the Telecommunications Act of 1996, the Commission long-ago found — and the D.C. Circuit agreed — that the definition of telecommunications carrier added to the Communications Act in 1996 has “essentially the same [meaning] as common carrier” under the *NARUC* decisions and “does not introduce a new concept” to the Communications Act. *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) (internal quotation marks omitted).

⁶ For purposes of this *ex parte*, we assume *arguendo* that the Commission could support a finding that broadband Internet access or IP interconnection satisfies this first prerequisite.

The second prerequisite considers whether a service that meets the first prerequisite is, or must be, offered on a common carriage basis. *See NARUC II*, 533 F.2d at 609. To meet this second prerequisite, the Commission must satisfy the D.C. Circuit’s *NARUC I* and *II* standard for common carriage by showing that the provider (1) is under a “legal compulsion . . . to serve indifferently” or (2) has voluntarily assumed common carrier duties by engaging in “an indifferent holding out [of telecommunications] to the eligible user public.” *NARUC v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“*NARUC I*”); *accord NARUC II*, 533 F.2d at 608-09. The Commission bears the burden on these issues; if the Commission cannot carry that burden, the provider is free to offer its service on a private carriage basis. *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481, 1484 (D.C. Cir. 1994) (finding that the Commission had failed to carry that burden and remanding and suspending the Commission’s ruling requiring four carriers to provide dark fiber on a common carrier basis). Moreover, the Commission does not have “any significant discretion” — much less “unfettered discretion” — to impose “common carrier status” on a provider based “upon the regulatory goals it seeks to achieve.” *NARUC I*, 525 F.2d at 544; *see Southwestern Bell*, 19 F.3d at 1481 (holding that the Commission “may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance”). Instead, the Commission must faithfully apply the two-part *NARUC* test to the record evidence. *See Southwestern Bell*, 19 F.3d at 1484.

The Commission cannot impose common carrier obligations unless it satisfies *both* prerequisites. As shown below, the Commission cannot meet the second prerequisite for any provider in any market — much less every provider in every market — for either broadband Internet access service or Internet interconnection.

B. Broadband Internet Access

1. There Is No Statutory Compulsion To Provide Any Broadband Internet Access Service Indifferently and No Basis in the Record for the Commission To Adopt Such a Rule

A legal compulsion to serve indifferently can be “statutory” or can be found in an “other legal commandment.” *NARUC II*, 533 F.2d at 608. There is no statutory obligation to provide broadband Internet access on a common carrier basis.⁷ Furthermore, the Commission has a long-standing and consistently applied test for determining when to mandate by rule the provision of a service on a common carrier basis in the absence of a statutory mandate. Specifically, in determining whether to impose common carrier duties on a provider that is not voluntarily holding itself out to serve the public indifferently, the Commission considers “whether the service provider faces competition” or “will possess market power.”⁸ Put differently, when determining whether “the public interest . . . require[s]” operation “on a common carrier basis,” the Commission’s “focus” is on whether the provider “has sufficient market power” to be able

⁷ *See Wireline Broadband Order* ¶ 103 (“Nothing in the Communications Act compels a facilities-based provider to offer the transmission component of wireline broadband Internet access service as a telecommunications service to anyone.”).

⁸ Report and Order and Request for Supplemental Comment, *Policies and Rules Concerning Local Exchange Carrier Validation & Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528, ¶ 25 (1992).

“to charge monopoly rents” for the service.⁹ A provider that does “not have market power” “should not be regulated as a common carrier.”¹⁰

Applying this test, the Commission required the common carrier provision of services — such as access to the SMS/800 database — only where it has found that the service is a “monopoly service.”¹¹ In contrast, the Commission has rejected claims that it should mandate common carrier service where the record evidence showed that the provider’s service is not a “bottleneck facility or the sole available means for a . . . user to obtain” service¹² or the provider does “not possess sufficient market power to justify such treatment” because of the presence of existing and potential other providers.¹³

The Commission did “not conduct a market power analysis” in the 2010 *Open Internet Order* and made no findings about whether any broadband provider — much less every broadband provider — has market power in the provision of broadband Internet access service to end user customers.¹⁴ Nor could the Commission make a nationwide finding that all providers of broadband Internet access service in all geographic markets have market power. As the Commission has recognized, any market power analysis would, among other things, have to be specific to the relevant geographic market.¹⁵ Notably, the Commission’s own data show increasing levels of broadband competition — even looking only at wireline service. In the *Open Internet NPRM*, citing December 2012 data, the Commission noted that only 34 percent of households were located in census tracts where three or more providers offer service at 6 Mbps

⁹ Memorandum Opinion and Order, *AT&T Submarine Sys., Inc. Application for a License To Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, 13 FCC Rcd 21585, ¶ 9 (1998) (“*Virgin Islands Order*”).

¹⁰ *Id.* ¶¶ 9-11.

¹¹ Order, *Provision of Access for 800 Service*, 8 FCC Rcd 1423, ¶¶ 28-29 (1993); see also Report and Order and Notice of Proposed Rulemaking, *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, ¶ 163 (1992) (requiring LECs to offer physical collocation in their central offices on the ground that “[n]o competing space provider” could offer an alternative service).

¹² Cable Landing License, *Cable & Wireless plc Application for a License To Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, 12 FCC Rcd 8516, ¶ 16 (1997).

¹³ Declaratory Ruling, *NorLight Request for Declaratory Ruling*, 2 FCC Rcd 132, ¶ 19 (1987).

¹⁴ Report and Order, *Preserving the Open Internet*, 25 FCC Rcd 17905, ¶ 32 n.87 (2010) (“*Open Internet Order*”); see also *id.* ¶ 22 n.49 (“we are not performing a market power analysis in this proceeding”). Although the D.C. Circuit found that a finding of market power is not necessary for the Commission to invoke its authority under § 706, see *Verizon v. FCC*, 740 F.3d 623, 647-48 (D.C. Cir. 2014), the Commission has always held that a finding of market power is a prerequisite to imposing common carrier duties on a provider that offers service on a private carriage basis. See *supra* notes 7-12 (citing decisions).

¹⁵ See, e.g., *Open Internet Order* ¶ 32 (“risk of market power is highest in markets with few competitors”); Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561, ¶ 48 (2014) (“*Open Internet NPRM*”) (“In many areas of the country, with respect to fixed Internet access, consumers may have only limited options, i.e., one or two fixed providers available.”).

downstream and 1.5 Mbps upstream or faster.¹⁶ As of December 2013 — just one year later — nearly twice that percentage of households (65 percent) were located in census tracts where three or more providers offer service at 10 Mbps downstream and 1.5 Mbps upstream or faster.¹⁷ Those same data show that customers virtually everywhere have three or more choices of providers of wireless broadband Internet access at 10 Mbps downstream and 1.5 Mbps upstream or faster.¹⁸

The differences in the number of providers in different areas of the country just scratches the surface of the determinations the Commission would have to make before it could find that any broadband provider has market power. As the Commission has explained, its “market power analysis begins by defining the relevant product and geographic markets and by identifying the market participants.”¹⁹ To define the relevant product market, the Commission would need to determine, among other things, the extent to which intermodal broadband providers and providers offering different speeds of service are competing in the same product market.²⁰ Even after the Commission has answered those questions, it must next “evaluate available evidence regarding market shares, including trends in market share, and other factors, including supply substitutability, elasticity of demand, and the cost structure, size, and resources of the carrier,” as well as “evaluate whether potential entry could occur in a timely, likely, and sufficient manner.”²¹ Most importantly, in conducting this multi-faceted analysis, it is the Commission that would bear the burden of proving that any given broadband provider has market power in a particular geographic market to justify imposing common carrier duties on that provider. *See Southwestern Bell*, 19 F.3d at 1481. Even assuming the Commission could carry that burden as to some broadband providers in some geographic markets — and nothing in the record suggests

¹⁶ *Open Internet NPRM* ¶ 48 & n.108.

¹⁷ *See* Industry Analysis and Technology Division, Federal Communications Commission, *Internet Access Services: Status as of December 31, 2013*, at 9 (Fig. 5(a)) (Oct. 2014), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-329973A1.pdf; *see also* Andres V. Lerner & Janusz A. Ordovery, *The “Terminating Access Monopoly” Theory and the Provision of Broadband Internet Access* ¶ 45 (Jan. 2015) (“[C]ompetitive conditions in the wireline industry vary across geographic areas, and wireline broadband providers compete on a local or regional basis, [so] it is inappropriate to draw universal conclusions regarding an alleged lack of competition among wireline broadband [service] providers.”), attached to Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (Jan. 15, 2015).

¹⁸ *See id.* at 10 (Fig. 5(b)) (93 percent of households are located in census tracts where three or more providers offer service at this speed level or faster).

¹⁹ Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622, ¶ 42 (2010) (footnotes omitted).

²⁰ For example, the Commission’s recent update of the broadband benchmark to 25 Mbps downstream and 3 Mbps upstream raises the question whether service at those speeds or higher are in a separate product market from service at lower speeds. A market power finding specific to a provider offering service at speeds of 25/3 Mbps or higher would provide no basis for imposing common carrier requirements on any provider with regard to a lower speed service, as those providers would be operating in a separate market, as to which the Commission would need to make separate market power findings.

²¹ *Id.* ¶ 42 & n.144.

it could — the Commission could not carry that burden as to *all* providers in *all* markets. Yet that is what would be required to adopt a generally applicable legal compulsion to provide broadband Internet access service on a common carrier basis, assuming the Commission could identify such a service that does not meet the definition of information service.

2. *Broadband Internet Access Providers Do Not Hold Themselves Out Indifferently*

Absent a legal compulsion, a provider of telecommunications — rather than of an information service — is subject to common carrier obligations only where that provider has voluntarily held itself out as providing that service indiscriminately to the consuming public. *See NARUC I*, 525 F.2d at 641-42. That voluntary action is an “essential element” that is used to “draw a coherent line between common and private carriers.” *Id.* at 642. Where a provider offers service as a private carrier, “the Commission is not at liberty to subject the entity to regulation as a common carrier.” *Southwestern Bell*, 19 F.3d at 1481.

As when it adopts a legal compulsion to require a provider to offer a service on a common carrier basis, the Commission bears the burden to “support its conclusion” that a provider has voluntarily held itself out to provide a service on a common carrier basis. *Id.* In *Southwestern Bell*, the D.C. Circuit found that the Commission had not carried that burden. There, the Commission found that, by filing individual-case-basis contracts for dark fiber service with the Commission, four Bell Operating Companies had voluntarily assumed common carrier duties for their dark fiber service.²² The D.C. Circuit rejected the Commission’s conclusion that the mere filing of those contracts, “without more, reflects a conscious decision to offer the service to all takers on a common carrier basis.” *Southwestern Bell*, 19 F.3d at 1481. The court explained that the Commission had impermissibly “short-circuited any analysis of whether petitioners held themselves out indifferently to all potential users of dark fiber, by pronouncing an insupportable *per se* rule that a filing of a piece of paper with the FCC constitutes an offer of common carriage.” *Id.* at 1484.

Southwestern Bell thus makes clear that the Commission must assess whether each provider of whatever broadband Internet access service the Commission seeks to reclassify has made “a conscious decision” to offer that service indifferently to the public. *Id.* at 1481. The Commission must undertake that analysis on a provider-by-provider basis and cannot “short-circuit [that] analysis” through the use of “*per se* rule[s].” *Id.* at 1484. The Commission could not find that *every* broadband provider has made that conscious decision, which would be required to subject all broadband providers to common carrier duties. There is no record evidence from which the Commission could draw that conclusion as to any provider, much less as to every provider.

In fact, the Commission has previously recognized that “broadband provider[s] may make individualized decisions” with respect to “end users who [seek to] subscribe to broadband Internet access services.”²³ As the Commission noted, broadband providers may “decide on a

²² *See* Memorandum Opinion and Order on Reconsideration, *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings*, 5 FCC Rcd 4842, ¶ 33 & n.15 (1990).

²³ *Open Internet Order* ¶ 79.

case-by-case basis whether to serve a particular end user, what connection speed(s) to offer, and at what price.”²⁴ As the Commission noted, this “flexibility to customize service arrangements for a particular customer is the hallmark of private carriage, which is the antithesis of common carriage.”²⁵ Taking advantage of this flexibility, AT&T, for example, reserves the right to refuse to provide its wireline broadband Internet access service to potential customers that it perceives as credit risks.²⁶

Finally, although some have claimed that broadband Internet access service providers have a terminating access monopoly, those claims are irrelevant in this context. The theory of the terminating access monopoly is *not* that a provider has market power with respect to the services it offers to its retail customers, but rather that it has market power with respect to its interactions with third parties.²⁷ As explained below, providers of broadband Internet access service do not have market power with regard to Internet interconnection. Even if that were not the case, claims about a terminating access monopoly could not be used to find that broadband providers have market power in any properly defined market for the sale of broadband Internet access service to retail customers and, therefore, no basis for mandating that providers offer such a service on a common carrier basis.²⁸

C. Internet Interconnection

1. Internet Interconnection Occurs Today Through Privately Negotiated Agreements

What is commonly referred to as “the Internet” is actually a loose confederation of thousands upon thousands of IP networks. These networks interconnect for the exchange of Internet traffic through private agreements. Whether these agreements take the form of “peering,” “transit,” or “on-net-only” agreements,²⁹ they are “voluntary, market-negotiated

²⁴ *Id.*

²⁵ *Id.*; see also Final Decision, *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 123 (1980) (“Inherent in the offering of enhanced services is the ability of service providers to custom tailor their offerings to the particularized needs of their individual customers.”).

²⁶ See AT&T High Speed Internet Terms of Service / att.net Terms of Use, available at <http://www.att.com/shop/internet/att-internet-terms-of-service.html>.

²⁷ See, e.g., Lerner & Ordovery, *supra* note 16, ¶ 29.

²⁸ See, e.g., *Virgin Islands Order* ¶¶ 10-11 (separately analyzing market power in each of the two “relevant markets” and finding, as to each, that AT&T lacked market power and, therefore, should not be required to offer common carrier service in either market).

²⁹ See AT&T Reply Comments at 95-97, 104 GN Docket Nos. 10-127, 14-28 (Sept. 15, 2014) (explaining that, in a transit agreement, network A pays network B to route packets to or from any destination on the Internet; in an “on-net-only” agreement, network A pays network B to route only packets exchanged between customers of the two networks; in a peering agreement, the payment between the two networks takes the form of barter, and these agreements require traffic to remain roughly in balance between the two networks).

agreements.”³⁰ Providers “independently make decisions about interconnection by weighing the benefits and costs on a case-by-case basis.”³¹ For example, AT&T’s peering policy expressly states that “[m]eeting the peering guidelines set forth herein is not a guarantee that a peering relationship with AT&T will be established,” that AT&T will “evaluate a number of business factors” before entering into a peering agreement, and “reserves the right not to enter into a peering agreement with an otherwise qualified applicant.”³²

These “private commercial arrangements define [the] terms of interconnection.”³³ The Commission “historically has chosen not to monitor or exercise authority over [these] interconnection” arrangements, noting that doing so could create “structural impediments to the natural evolution and growth process which has made the Internet so successful.”³⁴ Because the practice of providers when interconnecting with other IP networks for the exchange of Internet traffic “is to make individualized decisions, in particular cases, whether and on what terms to deal,” providers have plainly not voluntarily assumed common carrier duties. *NARUC I*, 525 F.2d at 641.

Accordingly, the only plausible conclusion here is that AT&T and other providers are not voluntarily acting as common carriers in dealing through these individually negotiated, private agreements. Indeed, the D.C. Circuit reversed the Commission when it relied on individually negotiated contracts that were filed with the Commission to impose common carrier duties on providers of dark fiber. *See Southwestern Bell*, 19 F.3d at 1483-84. There can be no question that a reviewing court would reach the same result if the Commission relied on the *private*, individually negotiated peering, transit, and on-net-only agreements to impose common carrier duties on networks regarding Internet interconnection.

2. *Providers of Broadband Internet Access Service Do Not Have Market Power with Respect to Internet Interconnection*

There is no statutory mandate to provide Internet interconnection on a common carrier basis: in fact, “interconnection between Internet backbone providers has never been subject to direct government regulation.”³⁵ To the contrary, Congress has expressly announced that it is “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation.” 47 U.S.C.

³⁰ Federal Trade Commission, *Broadband Connectivity Competition Policy* at 25 (June 2007), available at <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

³¹ *Id.*

³² AT&T Global IP Network Settlement-Free Peering Policy, available at <http://www.corp.att.com/peering>.

³³ Kevin Werbach, *Only Connect*, 22 Berkeley Tech. L.J. 1233, 1253 (2007).

³⁴ Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶ 1338 (2011) (internal quotation marks omitted).

³⁵ Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 133 (2005).

§ 230(b)(2). Regulating Internet interconnection as a common carrier service would conflict directly with congressional policy. Nor could the Commission find that any participant in the marketplace for Internet interconnection has market power, including those that also provide broadband Internet access.³⁶

Although Internet interconnection arrangements are privately and individually negotiated, the marketplace has settled on a number of norms. One is that peering agreements are appropriate where traffic is roughly in balance, with a traffic ratio requirement that is usually 2:1.³⁷ This norm applies throughout the IP interconnection marketplace. There is no record evidence that companies that operate their own last-mile broadband networks insist on lower traffic balance ratios in their peering contracts than those without last-mile networks.

Those peering agreements, moreover, are a substantial reason why transit rates have plummeted with year-over-year price reductions of 25% to 44% over the past six years, as transit prices fell from \$9 per Mbps in 2009 to \$0.94 per Mbps in 2014 — and are expected to fall further, to \$0.63 per Mbps in 2015.³⁸ AT&T, for example, has peering agreements with 23 partners. Each of those peers competes with AT&T's own transit offerings — as well as with other transit providers and Content Delivery Networks — for delivery of traffic on the Internet and to AT&T's broadband customers, pushing prices lower. Networks that do “not compete on price lose business.”³⁹

At the same time that transit rates are declining rapidly, the volume of Internet traffic flowing over peering and transit arrangements has been growing at a remarkable pace.⁴⁰ This combination of falling prices and increased output is exactly the opposite of what occurs where providers have market power, which is the ability “to raise price and restrict output.”⁴¹ On the contrary, these facts lead inexorably to the conclusion that there is robust competition among competing networks of all types, fueled by massive continuing investments in fiber and IP platforms — investments that were made in reliance on the Commission's long-standing, hands-off policy with respect to Internet access services and Internet interconnection arrangements.

³⁶ Many providers of retail broadband Internet access also have extensive backbone networks, and their exchange of traffic with other IP networks and edge providers often takes place very far upstream from the last-mile networks that they use to deliver traffic to their end-user customers. *See* AT&T Reply Comments at 94 & n.340, GN Docket Nos. 10-127, 14-28 (Sept. 15, 2014).

³⁷ *See, e.g.,* Peyman Faratin *et al.*, *The Growing Complexity of Internet Interconnection*, 72 *Communications & Strategies* 51, 56 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374285.

³⁸ Dr. Peering, *What are the Historical Transit Pricing Trends?*, available at <http://drpeering.net/FAQ/What-are-the-historical-transit-pricing-trends.php>.

³⁹ Dr. Peering, *Why do Internet Transit Prices Drop?*, available at <http://drpeering.net/FAQ/Why-do-Internet-Transit-Prices-Drop.php>.

⁴⁰ *See, e.g.,* Cisco, *Cisco Visual Networking Index: Forecast and Methodology, 2013–2018* at 1 (June 10, 2014).

⁴¹ *E.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) (internal quotation marks omitted).

Nor could the Commission rely on the so-called “terminating access monopoly” to justify mandating that last-mile providers offer Internet interconnection on a common carrier basis. As AT&T and others have demonstrated, there is no “terminating access monopoly” in the context of Internet traffic. Among other things, the regulatory rules that create the terminating access monopoly in the context of legacy long-distance voice services simply do not exist in the context of Internet traffic. Specifically, the combination of unilaterally filed tariffs by CLECs and rules preventing long-distance carriers from blocking calls to CLECs with outrageous rates and requiring long-distance carriers to charge averaged rates to their own customers is what imbued CLECs with market power in their dealings with long-distance carriers.⁴² None of these factors is present in the context of Internet interconnection.

At bottom, those that urge the Commission to regulate Internet interconnection under Title II have a dispute with the marketplace consensus that peering arrangements are appropriate only when traffic is roughly in balance and that, in other circumstances, networks should enter individually negotiated transit or on-net only arrangements.⁴³ This marketplace norm has prevailed for more than two decades — among IP networks of all types — with “free” peering in fact a barter transaction predicated on both IP networks having comparable infrastructure and exchanging traffic on a roughly equal basis. Absent proof of market power — and there is none in the record here — the Commission has no authority to intervene in this functioning marketplace to restructure the rates, terms, or conditions on which traffic is exchanged under privately negotiated, commercial agreements.⁴⁴

Finally, as numerous commenters have noted, the Commission provided no notice that it might subject Internet interconnection arrangements to Title II.⁴⁵ On the contrary, the Commission made clear that the new “rules [it] propose[d]” — like those it adopted in 2010 — applied only “to broadband provider conduct within its own network” and that Internet interconnection “is beyond the scope of this proceeding.” *Open Internet NPRM* ¶¶ 51 n.113, 52 n.118. The Commission never suggested that it was contemplating displacing the existing system of privately negotiated Internet interconnection arrangements with Title II, common

⁴² See AT&T Reply Comments at 99-102, GN Docket Nos. 10-127, 14-28 (Sept. 15, 2014); AT&T Comments at 27-32, WC Docket Nos. 10-90 *et al.* (Feb. 24, 2012); Lerner & Ordober, *supra* note 16, ¶¶ 29-44; see also Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, ¶ 84 (2001) (finding that “CLECs are positioned to wield market power with respect to access service”).

⁴³ See, e.g., Letter from Angie Kronenberg, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3-5 (Jan. 21, 2015).

⁴⁴ See AT&T Reply Comments at 102-06, GN Docket Nos. 10-127, 14-28 (Sept. 15, 2014).

⁴⁵ See, e.g., Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28, at 6-7 (Dec. 17, 2014); Letter from Matthew A. Brill, Counsel to NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28, at 8 (Jan. 14, 2015); Letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 & 14-28, at 1-2 (Jan. 23, 2015).

carrier obligations. Courts have repeatedly prohibited agencies from pulling such a “surprise switcheroo on regulated entities.”⁴⁶

* * *

In sum, even assuming that the Commission could — consistent with the text of the Communications Act, applicable precedent, and the record in this proceeding — identify a broadband Internet access or Internet interconnection service that does not meet the statutory definition of information access, the Commission could not mandate that all providers nationwide offer that service on a common carrier basis. This is yet another reason why the Commission should reject misguided calls for Title II regulation of Internet access services and of the Internet itself.

Sincerely,

/s/Gary L. Phillips

⁴⁶ *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014) (internal quotation marks omitted).