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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:

AT&T files this letter to highlight some of the basic legal flaws revealed by the "Fact Sheet" that Chairman Wheeler made public on February 4, 2015. As demonstrated below, and as previously demonstrated in prior AT&T filings, the proposals in the Fact Sheet are unlawful in multiple respects.

This letter makes four specific points. *First*, the conclusion that retail "broadband Internet access" is a telecommunications service is contrary to the plain text of multiple provisions of the Communications Act, decades of Commission decisions, and the views of all nine Supreme Court Justices in *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005). *Second*, any attempt to classify a separate service offered to edge providers as a "telecommunications service" likewise disregards the statutory text and longstanding precedent in multiple ways. *Third*, the vague suggestions in the Fact Sheet that "commercial considerations" cannot be relevant to reasonable network management and that the Commission should ban any conduct that somehow "harms consumers or edge providers" are arbitrary and contrary to Congress's direction in § 706. Not only do such vague pronouncements fail to provide adequate guidance for business, but also, to the extent they can be understood, they suggest irrationally that financial considerations are irrelevant to the reasonableness of business judgments involving network management. *Fourth*, although the Fact Sheet is unclear on this point, to the extent the Chairman proposes to regulate broadband Internet access for *enterprise* customers, that service, like mass-market service, is not offered on a common carrier basis and there is no basis for the Commission to mandate that it be provided as common carriage.

1. Retail Broadband Internet Access Cannot Lawfully Be Defined as a Telecommunications Service

The Fact Sheet asserts (at 1) that the Chairman intends to classify "broadband Internet access service," which it describes as the "retail broadband service Americans buy from cable,

phone, and wireless providers," as a "telecommunications service under Title II." Notably, however, the Fact Sheet never identifies any legal authority to take that unprecedented action. There is none. Such a result would be contrary to the binding decisions of the Supreme Court, the clear text of the Communications Act, and decades of regulatory history. Indeed, as discussed below, if the Commission were correct that retail Internet access is a telecommunications service, that would mean that at the time of the 1996 Act, dial-up ISPs were telecommunications carriers, not information service providers. That conclusion is absurd on its face and has no legal support.

In this regard, we emphasize that ***no Supreme Court Justice*** has adopted the conclusion the Fact Sheet suggests — that retail Internet access is itself a telecommunications service. In *Brand X*, the majority understood that "cable modem service" was an "information service" because, among other things, "[t]hat service enables users . . . to browse the World Wide Web, to transfer files . . . and to access e-mail and Usenet newsgroups." 545 U.S. at 987; *see id.* (explaining how the service also offered access to the Domain Name System ("DNS")). Indeed, the conclusion that Internet access service was an "information service" was so clear it was "unchallenged." *Id.* The only question was whether cable providers were *also* offering a telecommunications service. *See id.* at 987-89.

Importantly, the dissent likewise understood that cable modem service was an information service. Indeed, Justice Scalia quoted with approval a Commission staff paper stating that Internet access service "'is an enhanced service provided by an ISP.'" *Id.* at 1009 (Scalia, J., dissenting) (quoting FCC, Office of Plans and Policy, *The FCC and the Unregulation of the Internet* 13 (1999)). The dissent differed from the majority only insofar as it argued that broadband Internet access providers *also* offered a "delivery service" between "the customer's computer and the cable company's computer-processing facilities," and that this separate offering qualified as a "telecommunications service." *Id.* at 1010.[1] Thus, even the dissent did not argue that broadband Internet access service was a telecommunications service. Instead, the dissent believed that the connection from the end user to the ISP was a telecommunications service. *See id.* The majority, of course, did not accept even that view. Accordingly, the position that the "computer-processing" ISP functions are *themselves* a "telecommunications service" is contrary to the understanding of both the majority and the dissent in *Brand X*.[2]

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[1] AT&T has separately explained why the distinction drawn by the dissent, even if correct (which it is not), would not support the rules the Fact Sheet proposes. *See* Letter from Christopher Heimann, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Dockets. 14-28 & 10-127 (FCC filed Feb. 2, 2015) ("Heimann Letter").

[2] That conclusion is also contrary to the Ninth Circuit decision that the Supreme Court reversed in *Brand X*. The Ninth Circuit erroneously believed it was bound by its prior decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). *See Brand X Internet Serv. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). In *City of Portland*, the Ninth Circuit was quite clear that it understood broadband Internet access to be composed of two services, one of which was a "conventional ISP" function, which was an "information service." 216 F.3d at 878. The second service, which "link[s] the user and the ISP," was what the Ninth Circuit understood to be a "telecommunications service." *Id.* at 877, 878.

There is a good reason that no Supreme Court Justice suggested that Internet access is a telecommunications service: such a result would conflict with the text of the 1996 Act and with decades of regulatory understanding. The statutory definition of an "information service," includes any offering that provides the "*capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[3] Internet access unquestionably meets that definition: among other things, it offers consumers the capability to acquire and retrieve information from web sites, to store information in the cloud, and to make available information to other users by setting up their own web pages or, as discussed further below, engaging in file sharing.[4] Most basically, a consumer receives the capability to "retrieve files from the World Wide Web" precisely because Internet access is not just "transparent transmission," but instead provides the "'capability for . . . acquiring, . . . retrieving, [and] utilizing . . . information.'"[5] Consumers are also offered the capability to "mak[e] available" information, such as by broadcasting content from their own computers using file sharing or other programs that allow third parties to acquire and retrieve whichever of that information those other parties choose to access.[6] As the Commission itself has acknowledged, Internet access thus provides, among other things, the capabilities of the "gateway[]" services that were held to be "information services" under the MFJ definition that is indistinguishable in pertinent part from the definition of that term in the 1996 Act.[7] Likewise, before the 1996 Act, "gateways to online databases" were classified as "enhanced services."[8] The Commission has explicitly determined that the status of gateway services as information services under the MFJ and enhanced services under the pre-1996 Act regime is dispositive of

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[3] 47 U.S.C. § 153(24) (emphasis added); *see also infra* note 16 (explaining why the statutory exception for management, control, or operation of a telecommunications system does not change the analysis).

[4] *See* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 76 (1998) ("*Universal Service Report to Congress*").

[5] *Universal Service Report to Congress* ¶¶ 74, 76; *see id.* ¶ 76 ("When subscribers utilize their Internet service provider's facilities to retrieve files from the World Wide Web, they are . . . interacting with stored data . . . ."); Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 38 (2002) (quoting 47 U.S.C. § 153(24)) ("*Cable Modem Declaratory Ruling*").

[6] The file sharing capability that is part of Internet access does not even involve telecommunications — "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content," 47 U.S.C. § 153(50) — much less a telecommunications service. In using that capability, an end user does not choose the point to which the information is sent, nor does he or she identify the specific information that will be sent from among the information that he or she chooses to make available to others. *See Universal Service Report to Congress* ¶ 76 (explaining why the use of home pages is neither "transmission, between or among points specified by the user" nor "without change in the form or content").

[7] *Universal Service Report to Congress* ¶ 75; *see United States v. Western Elec. Co.*, 673 F. Supp. 525, 587-97 & n.275 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990); Heimann Letter at 10 & n.30 (demonstrating that the MFJ and 1996 Act definition of "information services" were indistinguishable).

[8] *Universal Service Report to Congress* ¶ 75; Memorandum Opinion and Order, *Bell Operating Companies' Joint Petition for Waiver of* Computer II *Rules*, 10 FCC Rcd 1724, ¶ 1 n.3 (1995).

their status under that statute. As the Commission put it, Congress's definition of information services includes "*all of the services that the Commission has previously considered to be 'enhanced services'*" as well as additional services not covered by the pre-1996 Act definition of that term.[9]

Because Internet access fits so squarely within the definition of an information service — indeed, it is the quintessential example of a service that offers the capability of generating, acquiring, storing, transforming, processing, retrieving, or utilizing information via telecommunications — the Commission has recognized that the classification of the service does not depend on analyzing in isolation particular information processing, retrieval, or storage functionalities offered by ISPs, much less on whether consumers "use all of the functions" that are offered.[10] Nonetheless, those distinct functionalities provide further, independent bases for the conclusion that Internet access continues to be an information service. Through caching, for example, an Internet access provider stores information that consumers want from the Internet and provides that information upon request from within the providers' own network. Indeed, that caching function is the same one that content delivery networks such as Akamai have explained are not telecommunications services subject to Title II.[11] Additionally, the DNS capability that consumers receive as part of broadband Internet access has always been a "general purpose information processing and retrieval capability."[12] That is especially the case today, when providers such as AT&T offer "DNS Assist" as part of Internet access.[13] That computer processing functionality suggests to Internet access customers the sites they may want to reach when they enter an incomplete or inaccurate web address.[14] And email, to give another example, remains a core part of the broadband Internet access service that AT&T still features in its advertising ("AT&T Mail with up to 11 email accounts and virtually unlimited storage"[15]) and that nearly 50 percent of AT&T broadband customers actively use.[16]

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[9] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, ¶¶ 102-103 (1996) ("*Non-Accounting Safeguards Order*") (emphasis added), *modified on recon.*, 12 FCC Rcd 2297, *further recon.*, 12 FCC Rcd 8653 (1997).

[10] *Cable Modem Declaratory Ruling* ¶ 38; *Universal Service Report to Congress* ¶ 79.

[11] Letter from Scott Blake Harris, Counsel for Akamai, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (FCC filed Feb. 9, 2015).

[12] *Cable Modem Declaratory Ruling* ¶ 37.

[13] 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. Approximately 89 percent of AT&T customer's DNS requests use AT&T's DNS service.

[14] *Id.*

[15] https://www.att.com/shop/internet/u-verse-internet.html ("key features" tab).

[16] The 1996 Act excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service" from the class of information services. 47 U.S.C. § 153(24). AT&T has already explained why that text does not support reclassification. *See* Heimann Letter at 7 n.14. Indeed, the "telecommunications management exception" in the statutory definition of "information service" is identical to the corresponding exception in the

In all events, nothing material has changed as to broadband Internet access since the Commission issued the *Cable Modem Declaratory Ruling* in 2002. In that order, as noted above, the Commission concluded that, as long as the functionalities of Internet access are offered to consumers — that is, as long as the offering contains more than what the Commission has called a "pure transmission path"[17] — broadband Internet access is an information service.[18] That is as true today as it was then. Indeed, third-party email and DNS were available to, and used by, consumers at the time of the 2002 decision.[19] The Commission explicitly recognized as much, [20]

MFJ's definition of the same term. *Compare* 47 U.S.C. § 153(24) *with United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982). Notably, as discussed in the text, that exception did not prevent the MFJ court from holding that "gateway services" were "information services." Nor can Internet access be understood to fit within that exception on the theory that the services functions are all "adjunct to basic." *See Non-Accounting Safeguards Order* ¶ 107 (so-called "adjunct-to-basic" services are "covered by the 'telecommunications management exception' to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act"). The Commission has expressly distinguished Internet access from adjunct-to-basic functions. *See* Second Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd 8061, ¶¶ 72-73 (1998) (explained that a provision of the statute "covers services like those formerly characterized as 'adjunct-to-basic,' in contrast to the information services such as . . . Internet access services" that certain parties proposed to bring within that provision), *vacated on other grounds by U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999). The Commission did so for good reason. The adjunct-to-basic category includes only functions that "serve but one purpose[:] facilitating establishment of a transmission path over which a telephone call may be completed." Memorandum Opinion and Order, *North American Telecommunications Association Petition for Declaratory Ruling*, 101 F.C.C.2d 349, ¶ 27 (1985); *see* Report and Order and Further Notice of Inquiry, *Implementation of Sections 255 and 251(a)(2) of the Communications Act*, 16 FCC Rcd 6417, ¶ 77 (1999) ("Adjunct-to-basic services are services which literally meet the definition of enhanced services . . . but which the Commission has determined facilitate the completion of calls through utilization of basic telephone services facilities"); *Non-Accounting Safeguards Order* ¶ 107 (defining adjunct-to-basic as services that "facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service"). For all the reasons discussed in the text and in the Commission's prior orders, the capabilities offered by Internet access services go far beyond that, and permit storage, acquiring, using, and making available information. *See, e.g.*, Memorandum Opinion and Order on Reconsideration, *US West Communications, Inc. Petition for* Computer III *Waiver*, 11 FCC Rcd 7997, ¶ 12 (1996) ("access to a database for purposes other than to obtain the information necessary to place a call will generally be found to be an enhanced service").

[17] *Universal Service Report to Congress* ¶ 73.

[18] *Cable Modem Declaratory Ruling* ¶ 38.

[19] Public statements demonstrate that third parties offered DNS in 2002. *See, e.g.*, *UltraDNS Gives Vehix.com Ultimate Control Over Its DNS Helping to Eliminate Costly Downtime*, Business Wire (July 16, 2002) ("As an ISP agnostic DNS provider, UltraDNS allows Vehix.com to control its DNS by allowing the IT administrator to specify primary and secondary data centers should one go offline."); *iGlobalSales.com Debuts Xoasis.com, a Premier Free Service Provider*, Business Wire (Aug. 9, 2000) ("DNSPointer.com, which launched in April 2000, has taken the dynamic DNS market by storm adding 80,000 customers in less than 5 months of operation."). And, when the Commission issued the *Cable Modem Declaratory Ruling*, Microsoft Hotmail *alone* had more than 100 million third-party email users worldwide. *See* http://answers.google.com/answers/threadview?id=531868.

and it held that broadband Internet access service is an information service "*regardless* of whether subscribers use all of the functions provided as part of the service."[21]

Finally, if there were any doubt, the text of § 230 further confirms that Congress understood Internet access to be an information service that was and should remain largely unregulated, and thus that it could not be a "telecommunications service" subject to Title II. Section 230 establishes the congressional policy 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." 47 U.S.C. § 230(b)(2). The term "interactive computer service," in turn, is defined to mean "***any information service***, system, or access software provider that provides or enables computer access by multiple users to a computer server, ***including specifically a service*** or system ***that provides access to the Internet***." *Id.* § 230(f)(2) (emphases added). Thus, Congress understood that a "service . . . that provides access to the Internet" is an "information service."[22] Congress further established that such services were part of a "vibrant and competitive market" and should — unlike highly regulated telecommunications services — ***remain*** "unfettered by Federal or State regulation." which demonstrates that Congress understood these services to be unregulated at the time and directed that they should remain that way.[23]

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[20] *See Cable Modem Declaratory Ruling* ¶ 38 n.153.

[21] *Id.* ¶ 38 (emphasis added).

[22] In fact, because of the definition of "interactive computer service," if Internet access is not an "information service," then it could not be an "interactive computer service," which means that § 230(d)'s requirement regarding notice of parental control protections would not apply to providers of broadband Internet access service. That would strip § 230(d) of nearly all meaning and cannot be squared with congressional intent. It would be no response to argue that this provision was written solely to reflect the status at the time of Internet access; if Congress thought that status could change, it presumably would have accounted for that possibility in the definition of "interactive computer service."

[23] Based on a recent statement by an FCC spokesperson, it appears that the Commission may seek to avoid Congress's clear direction in § 230 that the Commission should not regulate Internet access services by attempting to differentiate between the "Internet" *qua* Internet and the networks and services ISPs use to provide end users the capability for acquiring, retrieving, utilizing, or making available (among other things) information from and to other users and content providers connected to the Internet. Amy Schatz, *Republican Complaints About FCC Net Neutrality Plan Grow*, RECODE.NET, Feb. 10, 2015, *available at* http://recode.net/2015/02/10/republican-complaints-about-fcc-net-neutrality-plan-grow/ (last visited Feb. 17, 2015) (reporting that, in response to complaints by Commissioner Pai that Chairman Wheeler's proposed order would regulate the Internet, "FCC spokeswoman Kim Hart said in a emailed statement that 'broadband providers are not the Internet: they simply provide access to it.'"). But, as demonstrated in the text, § 230 specifically identifies "a service . . . that provides access to the Internet" as an information service and directs the Commission to retain its unregulated status. Beyond that, as the federal government's expert agency on matters relating to the Internet should be aware, the Internet is a network of computer networks that interconnects hundreds of millions (if not billions) of computing devices throughout the world, and ISP networks (including residential ISPs such as cable and telephone networks, corporate ISPs, university ISPs, and ISPs that provide WiFi access) are essential and core components of that network of networks, which connect Internet end systems (including end users and content providers) to each other. *See* James F. Kurose and Keith W. Ross, *Computer Networking; A Top-Down Approach*, at 2-5 (6th ed. 2013). Indeed, that is how Congress itself defined the "Internet" in

In short, there is simply no statutory or factual basis for the Commission to reverse these long-held and plainly correct conclusions. Indeed, as noted above, if broadband Internet access is a telecommunications service, and not an information service, under the 1996 Act, dial-up Internet access service would also be a telecommunications service, as it involves the same (though fewer) functionalities in providing the capability to acquire, use, store, and make available information. No party can reasonably say that Congress intended that result. On the contrary, the Commission concluded soon after the 1996 Act's passage that "[i]n essential aspect," those providers "look like other enhanced — or information — service providers."[24] The *Brand X* dissenters likewise made quite clear their understanding that dial-up Internet access is an information service. *See* 545 U.S. at 1008-09.[25]

2. Any Service that Broadband Providers Furnish to Edge Providers Is Not a Telecommunications Service

In *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), the D.C. Circuit concluded that "broadband providers furnish a service to edge providers," which is the "ability to access end users if those end users so desire." *Id.* at 653, 656.[26] Although the D.C. Circuit described this as a "communication service," *id.* at 653 (internal quotation marks omitted), the court did not consider — much less hold — that this service qualifies as a telecommunications service under § 153(53). Even aside from the fact that the same information processing features that make retail broadband Internet access possible are also an integral part of this service furnished to edge

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§ 230. 47 U.S.C. § 230(e)(1) ("The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks."). The purported distinction between edge/content providers (and the networks that connect them to the rest of the Internet) and end users (and the networks connecting them to other users and content providers) is wholly artificial and illusory. As applications like file sharing clearly demonstrate, end-users in many cases are edge providers, and edge providers also are end-users. The service provided to one is no less part of the Internet than the service provided to the other.

[24] *Universal Service Report to Congress* ¶ 81.

[25] One cannot distinguish dial-up services on the basis that they are not sold together with a transmission component. Under the statute, information services are provided "via telecommunications." 47 U.S.C. § 153(24). Thus, as the Commission explained even as to the narrower class of enhanced services, they were "not to be regulated under Title II of the Act, no matter how extensive their communications components." *Universal Service Report to Congress* ¶ 27.

[26] This service is *not* the service of Internet interconnection, which operators of Internet networks offer to each other, and which can take the form of peering, transit, and on-net-only contracts. Although edge providers can obtain Internet interconnection from broadband providers that also offer retail broadband Internet access service, many (if not most) edge providers buy their own Internet access service from a company that is then interconnected — directly or indirectly — with the multitude of other IP networks that comprise the Internet. As AT&T has explained, Internet interconnection arrangements are currently offered on an individualized, negotiated basis and no provider of Internet interconnection has market power. Therefore, the Commission cannot — as the Fact Sheet states the Commission intends to do — interfere with this functioning marketplace and impose common carrier duties on all (or any) providers of Internet interconnection. *See* Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 7-11 (FCC filed Feb. 2, 2015) ("Phillips Letter").

providers,[27] this service cannot meet the definition of telecommunications service for at least four independent reasons.

First, absent direct interconnection or a contract between the edge provider and the retail broadband Internet access provider, the retail provider does not "offer[]" any service to the edge provider, even if it could be said to be "furnish[ing]" a service to a provider with which it has no contractual relationship.[28] As the D.C. Circuit has recognized, the "1996 Act is framed in terms of 'offerings' made by 'service'-providers *to consumers*." *American Council on Educ. v. FCC*, 451 F.3d 226, 232 (D.C. Cir. 2006) (emphasis added). The Commission has similarly noted that providers "offer . . . service to their customers."[29] Although the Supreme Court in *Brand X* divided over whether the service cable companies offer their consumers is a single, integrated service, or is two separate services,[30] there was no dispute that "a company 'offers'" the services that it "'offers' to a consumer." *Brand X*, 545 U.S. at 990; *see id.* at 1006 (Scalia, J., dissenting).

Second, any service furnished to a non-customer edge provider is not offered "directly" to that edge provider. By definition, the service that the *Verizon* court concluded that broadband Internet access providers furnish to edge providers is one they furnish *indirectly*. The edge provider uses its own broadband Internet access provider to connect its servers to the Internet or provides its content to a third-party content distribution network that is connected to the Internet. Those third-party providers then connect — directly or indirectly — to the networks of the broadband Internet access providers that have end user customers who requested the edge provider's content. Indeed, in the growing number of instances in which an edge provider sends traffic over an encrypted connection (whether HTTPS or a VPN) the broadband Internet provider serving the end user customer has no way even of knowing which edge provider's traffic is traversing its network. Thus, any service furnished to edge providers is not being furnished to them "directly," as the definition of telecommunications service requires. Ironically, under the

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[27] *See* Heimann Letter at 6-8.

[28] Indeed, notwithstanding the *Verizon* court's contention, it makes no sense to speak of a retail broadband Internet access provider "furnish[ing] a service to [an] edge provider[]," 740 F.3d at 653, when it has no contractual relationship with an edge provider that obtains Internet access from a third party IP network that may then, itself, connect indirectly to the retail broadband provider's network. For example, when two local telephone companies and one or more long-distance carriers cooperate to complete a long-distance call from California to New York, no one would suggest that the local telephone company in California is furnishing any service to the person in New York who answered the phone (nor the local telephone company in New York to the person in California who dialed the phone). The various telephone companies involved in carrying the call furnish services to other telephone companies in the chain, but not to the individuals at the call's edges, absent a direct contractual relationship with those edge (or end) users. The same is true of the relationship between retail broadband Internet access providers and edge providers. Absent a contract between the two, the retail provider has no relationship with — and furnishes no service to — the edge provider.

[29] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 20 (2002).

[30] *See supra* page 2.

Commission's analysis, this alleged service would be regulated even though, according to press reports, the service that the edge provider obtained from its own ISP generally would not be.

Third, the service the *Verizon* court concluded is furnished to edge providers is not offered "for a fee." The Commission has previously found — correctly — that, "in order to be a telecommunications service, the service provider must assess a fee for its service" and, therefore, a service that "is free of charge to users" is "not a 'telecommunications service.'"[31] Applying this reasoning, the Commission has repeatedly rejected efforts by CLECs to collect their tariffed switched access charges for delivering traffic to "customers" that receive service for free. The Commission explained that, because "the Commission defines 'end user' [in the switched access context] to mean a customer of a 'telecommunications service,' which, under the statute, is 'the offering of telecommunications *for a fee*,'" an end user is "clearly . . . a *paying* customer."[32] Here, broadband Internet access providers are not charging any fee to the edge providers for the service the *Verizon* court concluded they are furnishing. To the contrary, consumers' broadband Internet access providers frequently must *pay* a fee for transit in order for their customers to interact with distant Internet hosts.[33] It would be nonsensical to suggest, under the circumstances, that the Internet access provider is nonetheless somehow offering service for a fee to the edge provider. Indeed, the Fact Sheet makes clear that the Commission proposes to preclude broadband Internet access providers from ever charging such a fee, further confirming that this service is *not* a telecommunications service.[34]

Finally, the service the *Verizon* court identified is not even telecommunications, because it does not transmit "information of the user's choosing," "between or among points specified by the user." 47 U.S.C. § 153(50). Because a telecommunications service is "the offering of telecommunications for a fee directly to the public," the edge provider service is not a telecommunications service for this reason as well. As the D.C. Circuit explained, the service that it found is furnished to edge providers is the "ability [of the edge provider] to access end users [of the broadband Internet access service] *if those end users so desire*." *Verizon*, 740 F.3d at 656 (emphasis added). Therefore, it is the end user of the retail broadband service — and not

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[31] Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶ 10 (2004).

[32] *E.g.*, Memorandum Opinion and Order, *Qwest Communications Co. v. Northern Valley Communications, LLC*, 26 FCC Rcd 8332, ¶ 10 (2011) (quoting 47 U.S.C. §§ 69.2(m), 153(53)).

[33] It is likely that, in the aggregate, Internet access providers incur far greater transit expenses associated with the receipt of traffic, than any revenue they might receive from content delivery networks or others for carrying "on-net" traffic. Claims that Internet access providers are "terminating monopolists" cannot be squared with the fact that Internet access providers routinely participate in this market as buyers, not sellers.

[34] The Commission's reasoning in mandating a bill and keep intercarrier compensation regime is inapposite. In that situation, the Commission was addressing the service that two local exchange carriers provide to each other when they exchange traffic; the Commission was in no way suggesting that a local exchange carrier is providing service for a fee simultaneously to its own customer and to the end user of another carrier with which it exchanges traffic.

the edge provider — who specifies the points between or among which the information is sent. And it is the end user — again, not the edge provider — who chooses the information to be sent. The service furnished to the edge provider, therefore, may be a communication service, as the *Verizon* court concluded, but it is not telecommunications and, therefore, is not a telecommunications service for this reason as well.

3. On their Face, the Fact Sheet's Proposals as to a Standard of Conduct and Reasonable Network Management Are Arbitrary and Contrary to § 706

The Fact Sheet suggests that the Chairman intends to propose several requirements that, at least as stated there, do not meet basic standards for administrative rationality and, even more to the point, are contrary to Congress's direction in § 706. In particular, the Fact Sheet suggests that the Chairman will propose a "standard for future conduct" based on whether ISPs' actions "harm consumers or edge providers." Fact Sheet at 2. Similarly, the Chairman has suggested that, going forward, "reasonable network management" will only include conduct that is "primarily used for and tailored to achieving a legitimate network management — *and not commercial* — purpose." *Id.* (emphasis added).

Although further details about these standards have not been provided, as described thus far, neither of those standards is adequate to provide guidance to regulated parties.[35] Consumers may be "harmed" by many entirely legitimate practices, including, for instance, a price increase or a requirement that they pay for what they use, or restrictions on excessive use that can compromise network quality for other users. Edge providers may be "harmed" in the strict sense of the word by requirements that they optimize traffic or by interconnection arrangements that adhere to the age-old principle that costs should be borne by the cost causer. At least on the face of the Fact Sheet, there is no way to determine how the Commission would distinguish such wholly appropriate actions from other claims of alleged "harm." And that seems to be the point: the Commission is crafting rules that are, by design, intended to provide the Commission with maximum discretion to find rule violations on an *ad hoc* basis.

The revised "reasonable network management" exception is equally vague; indeed, it is incoherent. Network management decisions inevitably involve significant "commercial" concerns: for example, if a broadband Internet access provider were willing to spend $10,000 per customer to expand capacity, it might well not be required to take other actions to address network congestion. The reason for not taking such an action is "primarily" commercial. Suggesting that reasonable network management is somehow distinct from "commercial" concerns is thus both vague and irrational.[36]

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[35] *See, e.g., FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (regulation must give a "person of ordinary intelligence fair notice of what is prohibited") (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)) (internal quotation marks omitted); *Southwesten Bell Tel. Co. v. FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993) ("[E]lementary fairness requires . . . 'that, based on a "fair reading" of its order, the petitioners knew or should have known what the Commission expected of them.'") (quoting *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).

[36] *See, e.g., Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 536 (2002) (approving regulatory provision that included technical feasibility term where agency had explicitly clarified meaning of "technical

Even more to the point, by preventing providers from relying on "commercial" decisions in managing their networks (or by reserving to itself discretion to decide whether network management decisions are commercial in nature) and allowing providers to be sued any time a party alleges ill-defined "harm" to consumers or edge providers, the Commission would be acting in direct conflict with Congress's directive in § 706. That provision requires the Commission, having determined that broadband is not "being deployed to all Americans in a reasonable and timely fashion,"[37] to take "immediate action to accelerate such deployment by removing barriers to infrastructure investment and by promoting competition in telecommunications markets." 47 U.S.C. § 1302(b). The requirements contemplated by the Chairman will erect "barriers to infrastructure investment," as providers will have sharply reduced incentives to deploy new facilities if they cannot rely primarily on commercial considerations in managing their networks, or they have to guess whether decisions that are *inherently* commercial may subsequently be deemed unreasonable by the Commission based on an ill-defined (or undefined) standard. The same is true if they can be subject to litigation any time a consumer or edge providers can allege what they consider to be "harm."

It is beyond dispute that regulatory uncertainty deters investment, and the Commission has previously sought to minimize regulatory uncertainty for this very reason. Unfortunately, and ironically, under the ostensible authority of a statutory provision that directs the Commission to promote broadband deployment, the Commission is now poised to introduce massive uncertainty into the marketplace and thereby deter the very investment Congress told it to promote. The open-ended assertion of authority invoked by its new rules is thus directly contrary to Congress's directive in § 706.

4. The Commission May Not Subject Enterprise Broadband Internet Access to Common Carrier Regulation

AT&T has previously explained that, even if the Commission could reverse its prior determination that retail broadband Internet access service is an information service, the Commission could not subject that service to common carrier obligations without finding — on a provider-by-provider and market-by-market basis — that the provider (1) has market power in the relevant market or (2) has voluntarily assumed common carrier duties by holding itself out indifferently to serve the eligible public.[38] AT&T demonstrated further that the Commission

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feasibility" and had explained that it does not mean what is "possible in an engineering sense," and stating further: "If 'technically feasible' meant what is merely possible, it would have been no limitation at all."); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997) (approving FCC's definition of "technically feasible" that did not incorporate commercial reasonableness in part because economic concerns were taken into account by other components of regulation, ensuring that final regulatory scheme "will not unduly burden" regulated parties), *aff'd in part, rev'd in part*, 525 U.S. 366 (1999).

[37] *See* 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action To Accelerate Deployment, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126 (rel. Feb. 4, 2015).

[38] *See* Phillips Letter at 1-3.

could not make those findings as to any provider — much less every provider — of retail broadband Internet access service.[39]

Although some accounts indicate that the Chairman's proposal seeks to reclassify only consumer broadband Internet access, it is not clear from the Fact Sheet whether the Commission also intends to impose common carrier duties on broadband Internet access services sold to enterprise customers. Accordingly, AT&T clarifies that its prior filing was not limited to consumer broadband Internet access services and applies with equal (if not greater) force to enterprise broadband Internet access services. The Commission could not mandate common carrier provision of enterprise broadband Internet access services without making one of the two findings above (as well as abandoning its prior information services classification). Moreover, it is even clearer in the enterprise context that providers lack market power and are engaging in the kind of individualized decisions that are the hallmark of a provider of a private carriage service.

First, the Commission has repeatedly found that there "are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services" and that the "sophistication of the enterprise customers" that purchase those services are "aware of the choices available to them" and use "experts" in making their purchasing decisions.[40] No provider has market power with respect to the broadband Internet access services sold to these customers. Second, AT&T and other providers make customized offerings to enterprise customers seeking broadband Internet access service. For example, AT&T's Managed Internet Service offers enterprise customers customized solutions to meet their individual business needs.[41] Therefore, just as with broadband Internet access services sold to consumers, the Commission could not mandate that providers sell broadband Internet access services to enterprise customers on a common carrier basis, even if it could reclassify that service as an information service (which it cannot, as explained above).

Sincerely,

/s/ Gary L. Phillips

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[39] *See id.* at 3-7.

[40] *E.g.*, Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance*, 22 FCC Rcd 18705, ¶¶ 22, 24 (2007).

[41] *See* AT&T Managed Internet Service, *available at* http://www.business.att.com/content/productbrochures/att-managed-internet-service.pdf.