

2. **A strict nondiscrimination standard will likely preclude the necessary investment to build next-generation networks and negatively impact broadband adoption**

By barring charges to content and application providers for prioritized or enhanced services, a strict nondiscrimination obligation effectively mandates an exclusively end-user funded network.

Experts have opined that the proposed nondiscrimination rule would impede broadband network investment. By way of example, a recent study by Balhoff and Williams, LLC states that the proposed strict nondiscrimination rule would be viewed as a negative for capital formation in an arena that is already viewed as relatively high risk.⁵⁹

Relatedly, a strict nondiscrimination approach will likely preclude the necessary investment and innovation to build next-generation networks as desired and have a negative impact on broadband adoption. An exclusively end-user funded network will not allow the economic deployment of the robust Internet that will be expected by consumers and content and application providers in the future. In one widely cited report, EDUCAUSE, a higher-education technology group, estimated that providing “big-broadband” to every home and business with sufficient bandwidth to meet demand would cost an additional \$100B over the next 3-5 years and larger investments in capacity going forward.⁶⁰ The Commission’s own estimates suggest that this estimate may be

⁵⁹ See Balhoff and Williams, LLC “Financial Market Perspectives, Network Neutrality Principle 5,” dated December 15, 2009. See also **Factual Record Appendix** at 25-26.

⁶⁰ “The Consequences of Net Neutrality Regulations on Broadband Investment and Consumer Welfare, a Collection of Essays (ACI)” at 5: “The Role of Pricing Flexibility in Achieving Universal Broadband.” Posted at <http://www.educause.edu/>.

understated,⁶¹ but the most significant point of such studies is clear. By limiting broadband providers to end-user rates as the only revenue source for network investment, the proposed nondiscrimination rule will necessarily restrict both the level of robustness in broadband capacity that is reached and the pace at which it is achieved. By way of example, the EDUCAUSE article referenced above demonstrates that, while some of these additional investments could be funded by fees paid by new subscribers, demand for bandwidth is growing much faster than increases in end-user uptake rates.⁶² And, since a significant portion of the additional costs will have to be passed on to current broadband subscribers, the link between prices and broadband adoption suggests that higher costs for all consumers will slow the drive to universal broadband and expand the gaps that separate wealthier citizens from the less affluent.⁶³ Without another source of revenue, these additional investments will require broad price increases which will, in turn, have a negative impact on broadband adoption. Reliance on end-user rates as the sole source of revenue for network build-out will necessarily impact the Commission's goal of charting a course to the most robust broadband experience possible in the United States.

Notably, this issue (the inability of consumers to pay all the costs of tomorrow's network) and the issue discussed immediately below (the impact of growing bandwidth demand on network management) are, to some extent, interrelated. The unavoidable reality presented by both is that, ultimately, the growth of traffic in the aggregate, the

⁶¹ See Preliminary Report on National Broadband Plan, presented at Sept. 29, 2009 FCC Open Meeting, p. 45 (estimating a \$20B cost of universal deployment of capability in the .768 to 3 mps range and a \$350B cost of universal deployment of 100+ mps capability).

⁶² *Id.* at 8.

⁶³ *Id.*

variable peak demands of different traffic as a function of time, its concentration in certain types of users and bandwidth hungry applications, and other factors, drive capacity requirements that are not necessarily tied to current revenue sources, rate of growth, or cost causers. This leads to the potential need for both flexible network management techniques and enhancement/prioritization practices based on “premium service” concepts directed at both content and application providers and end users.

3. A strict nondiscrimination standard largely ignores the need of broadband providers for flexibility in managing their networks

A strict nondiscrimination standard also largely ignores the need of broadband providers for flexibility in managing their networks. As discussed more fully below, it is critical that broadband providers have flexibility in managing their networks to manage growing bandwidth demand and otherwise provide a quality customer experience.

All broadband networks, regardless of the type of technology platform used, are engineered on certain assumptions regarding end-user usage and require network management to ensure an adequate quality of experience. A recent study performed by Cisco entitled “Cisco Visual Networking Index: Usage Study,” gives an indication of the complexities facing network engineers:

Global Internet usage is highest during the evening hours and lowest during the morning hours. The traffic pattern of visual networking applications are widely fluctuating in comparison with P2P (*e.g.*, Bittorrent, eDonkey, gnutella, etc.) applications. P2P applications are often run in the background, producing a steady stream of traffic throughout the day. Video and communications applications have more pronounced peaks and valleys. These fluctuations cause a variance in peak-to-average ratios, which the study is tracking as a long term indicator.

When taking into account such peaks in traffic as revealed by the Cisco VNI Usage study and applied to the Cisco VNI Forecast, peak Internet traffic may grow seven-fold by 2013, compared to a five-fold increase of average Internet traffic. Cisco VNI Usage study results reveal that

different applications have very different ratios of peak hour to average hour. For example, video and communications have a higher peak-to-average ratio than peer-to-peer file-sharing, and as video grows to represent a larger portion of Internet traffic, the overall peak-to-average ratio will increase accordingly.⁶⁴

These concepts of the “bursty” nature of network activity and variable peak demand were further documented in the Commission’s initial technical workshop in this proceeding.⁶⁵

As a result of these issues, broadband providers, regardless of the underlying technology, often find their networks overwhelmed by occasional and short-lived periods of congestion and other traffic management challenges, necessitating different techniques of traffic management.⁶⁶ It is simply not reasonable to anticipate that broadband providers will build enough capacity to satisfy peak demand, which, by definition, is not going to be used very often.⁶⁷ Nor is it desirable that the problem be addressed solely by charges to end-users or other restrictions on customer behavior. For example, there is always the option of addressing this problem of peak and off-peak congestion with peak and off-peak customer charges. Under this approach, customers could be signaled as to levels of congestion before being assessed a “peak charge” to continue service at that point in time. These charges were common in long-distance markets and in electric power markets in the past as a method of shifting demand to off-peak periods. But, this approach hardly fosters the innovation and growth sought for Internet products and services. Also, as has been demonstrated in other Commission proceedings, different

⁶⁴http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/Cisco_VNI_Usage_WP.html.

⁶⁵ See Traffic Management and the Open Internet, Scott Jordan, Department of Computer Science, University of California, Irvine, from the Dec. 8, 2009 Open Internet Workshop, Technical Advisory Process on Broadband Network Management.

⁶⁶ *Id.*

⁶⁷ *Id.*

types of traffic require different quality of service.⁶⁸ Indeed, the sheer magnitude of the challenges presented to broadband providers by IP video alone is mind boggling. For example, Nielsen Online announced in May of 2009 that YouTube continued to rank as the No. 1 video Web brand with 5.5 billion total streams.⁶⁹ The same report reflects that Hulu continued its explosive growth trajectory, increasing 490 percent in total streams year-over-year, from 63.2 million in April 2008 to 373.3 million in April 2009.⁷⁰ Using this Nielsen data, it can be estimated that online video usage alone increased from 115 petabytes to 156 petabytes from April 2008 to April 2009 and that it can be expected to reach as high as 200 petabytes of overall usage by April of 2010.

In light of these challenges, it is critical that the Commission give broadband providers great flexibility in managing their networks. While investment to increase bandwidth capacity is part of the solution, there will always be a need for network management. By way of example, even in Japan, often cited as having the world's highest capacity broadband networks, congestion and other network management challenges continue to be significant.⁷¹ Broadband providers are also uniquely capable of

⁶⁸ See, e.g., AdTran, *Defining Broadband Speeds: An Analysis of Required Capacity in Network Access Architectures*, White Paper, (describing constraints on different last mile network technologies) ; *Defining Broadband: Network Latency and Application Performance*, White Paper, attached to Letter from Stephen L. Goodman, Counsel for ADTRAN, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (filed June 23, 2009).

⁶⁹ "YouTube Maintains Top Ranking by Total Streams and Hulu Grows 490 Percent Year-Over-Year, According to Nielsen Online," http://en-us.nielsen.com/main/news/news_releases/2009/may/youtube_maintains.

⁷⁰ *Id.*

⁷¹ See, e.g., "More bandwidth no cure for network management -- Japan experience shows," <http://precursorblog.com/node/696> ("Despite Japan having some of the fastest and cheapest broadband in the world, they still have to worry about network congestion and need to manage their networks and shape traffic, according to Adam Peake, a fellow

determining the ideal methods for assuring the best possible customer experience.

Broadband providers must be able to implement intelligent traffic management practices, and no type of practice -- whether based on time of day, individual subscriber usage levels, type of traffic, type of service, or other factors -- should be automatically off the table.⁷² Indeed, the desirability for network operator flexibility to address the multitude of issues they face is yet another reason why *ex post* versus *ex ante* solutions are more desirable in this context.

4. A strict nondiscrimination standard will likely have a harmful impact upon the array of IP products and services at issue

A strict nondiscrimination standard will likely prevent the development and deployment of a host of products and services, existing and yet-to-be-imagined.

a. It is inherently impossible to accurately calculate the impact of a strict nondiscrimination rule on the broad range of products and services yet-to-be-imagined

To begin with, it is inherently impossible to accurately calculate the impact of a strict nondiscrimination rule on products and services yet-to-be-imagined. In the *NPRM*, the Commission recognizes that “[a]s recently as twenty years ago, it would have been

at the International University of Japan who spoke yesterday at the Freedom to Connect Conference.”). “Broadband Network Management Benefits Consumer Welfare When Congestion Present, Phoenix Center Demonstrates,” http://www.redorbit.com/news/technology/1288421/broadband_network_management_benefits_consumer_welfare_when_congestion_present_phoenix/index.html (“For example, in Japan, which is reputed to boast some of the highest broadband speeds in the world, a small number of users and P2P applications consume the vast majority of bandwidth available, to the point that some Japanese Internet service providers curb or restrict P2P traffic,” the study observes.).

⁷² In addition to these traffic management issues, broadband providers must also manage their network to address a variety of security concerns. Common practices that address these areas include practices to detect and manage denial of service attacks and other malicious traffic, practices designed to ensure the confidentiality and security of network traffic, and management of spam. And, law enforcement needs drive still other needs for broadband provider network management flexibility.

difficult to imagine the profound benefits the Internet routinely provides today.”⁷³ This observation also flags another significant factor weighing in favor of caution about potential regulatory intervention in this area. It is difficult to accurately estimate the potential impact of the broad-reaching regulatory obligations proposed in the *NPRM* precisely because it is difficult if not impossible to conceive of what future innovation and products and services will be impacted or even prevented by the choices the Commission makes here. This is the public policy counterpart to the Heisenberg Uncertainty Principle in Physics.⁷⁴ The very presence of the regulator irrevocably alters the course of the market’s transition.⁷⁵

b. A strict nondiscrimination rule will likely have a harmful impact on a host of desirable products and services currently deployed or soon to be deployed

A strict nondiscrimination standard will likely have a harmful impact on a host of desirable IP products and services currently deployed or soon to be deployed. As noted, the products and services potentially impacted by the *NPRM* include IP video products and services such as IP TV and video conferencing; next generation IP voice services, including both fixed VoIP and “over-the-top” VoIP services; gaming and other specialized “over-the-top” Internet applications and services; potentially certain cloud computing products and services; a multitude of business enterprise services; and a variety of existing and potential specialized services in the areas of telemedicine,

⁷³ *NPRM*, 24 FCC Rcd at 13065 ¶ 1.

⁷⁴ See, e.g., Dennis L. Weisman, PRINCIPLES OF REGULATION AND COMPETITION POLICY FOR THE TELECOMMUNICATIONS INDUSTRY - A GUIDE FOR POLICYMAKERS. The Center for Applied Economics, KU School of Business, Technical Report 06-0525, 2006, Section 3.1.2.

⁷⁵ *Id.*

smartgrid, public safety, distance learning and the like. Many of these products and services can and should be permitted as managed/special services consistent with the discussion at pages 22 through 29 above.⁷⁶ However, some will not, and it will be critical to the viability of many of those products as well that broadband providers have flexibility in network management and, at least in some cases, the ability to provide prioritization or other network enhancement in broadband provider last-mile architectures.

The sheer mass of bandwidth demand and other potential quality of service challenges facing broadband providers for these services is self-evident. Over-the-top public Internet video services are just one prime example. There is abundant evidence beyond the overall bandwidth totals discussion above. A quick survey of the extensive offerings of OVGuide.com, Hulu, YouTube, Veoh, TiVo, Netflix, Roku, and Amazon demonstrates the existing and potential capacity demands of video-on-demand.⁷⁷ The

⁷⁶ For this reason, discussion of services such as IP video delivery services, business enterprise services and specialized services such as telemedicine and smartgrid are omitted in this section. Those services should be largely or entirely excluded from coverage by a strict nondiscrimination rule as exempted managed/special services. *See, supra*, at 24-27.

⁷⁷ OVGUIDE, <http://www.ovguide.com/> (site reports receiving more than 35 million visitors, 150 million page views, and 36 million searches per month); HULU, <http://www.hulu.com/> (advertising a library that includes thousands of videos, from full episodes of new and classic TV shows to full-length movies, web originals and clips); YouTube, <http://www.youtube.com/> (“UMG’s YouTube video channel has more than 3.5 billion views, making the UMG channel the most watched on YouTube.”); VEOH, <http://www.veoh.com/corporate/aboutus> (“With a simple broadband connection Veoh gives you free access to all of the great TV and film studio content, independent productions, and user-generated videos on the Web. From hit series on CBS, ABC, MTV Networks to content from Warner Bros., Sony Pictures and ESPN to your favorite YouTube clips, Veoh turns the vast universe of Internet video into an easy-to-use, high-quality, personalized experience that entertainment fans everywhere can enjoy.”); TIVO On-Demand, <http://www.tivo.com/whatistivo/on-demand/index.html> (“TiVo turns your TV into the world’s largest video store -- with hundreds of titles now available in crystal-

offerings of Discovery Education, Ireel, YouTube, CNN, and Elgato give a similar view for streaming video.⁷⁸ The trend toward integration of these offerings with consumer video equipment sold on a mass scale will only expand the impact of these services

clear HD! Watch the hit movies, TV shows, music videos and cool web videos you want to see -- all in a moment's notice! Your broadband-connected TiVo DVR offers you a vast library of video-on-demand choices from a who's-who list of online entertainment partners."); Netflix <http://www.netflix.com/> ("Choose from over 17,000 movies & TV episodes. With an Unlimited plan, you can watch as often as you want, anytime you want..."); Roku, *see* " (Amazon On Demand, <http://www.amazon.com/gp/video/ontv/start> ("With a new, internet connected device, you get access to over 50,000 titles on Amazon Video On Demand streamed directly to your television. Order hit new releases and the latest episodes in HD, right from your couch and begin watching immediately. With Amazon Video On Demand you'll never need to visit a video store again.")).

⁷⁸ Discovery Education, <http://www09.discoveryeducation.com/products/streaming/> ("Discovery Education streaming Plus integrates seamlessly into any curriculum with 9,000 full-length videos segmented into 71,000 content-specific clips tied directly to state and national standards."); IREEL, <http://www.ireel.com/> ("It's QUICK. It's EASY. And best of all, it's FREE. Here are just a few reasons to join today...Instant PLAY - no waiting to download movies. Just click play and instantly start watching a movie...Comprehensive library of movies in HD Quality."); YouTube, *see* n. 78, *supra*; CNN, "Online Video News Milestone: CNN Has Live Streaming Video Widget...HuffPost Gets it First," <http://www.beet.tv/2008/08/online-video-ne.html> ("At CNN.com, the consumption of live streaming continues to grow. Monthly streams have averaged 4.3 million, according to internal numbers provided to Beet.TV. That number will surely grow this month with the Beijing Olympics, the Democratic National Convention and the Republican National Convention."); ELGATO, <http://www.elgato.com/elgato/na/mainmenu/home.en.html> ("Elgato is the home of internationally acclaimed EyeTV, the world's leading television solution for Mac computers. Elgato produces award-winning TV software together with a complete range of TV tuners to watch, record, and edit TV and HDTV on the Mac."); TV over the Internet, <http://www.makeuseof.com/tag/the-best-tools-to-watch-tv-on-your-computer/>; TvChannelsFree.com ("The largest resource available on the web for viewing Free Internet Television. Live streaming TV, News, broadband internet TV stations, and video from all over the world. About 3,552 Online TV Channels from 60+ countries in Europe, North America, Africa, Asia, The Caribbean, Latin America, Middle East all in one website."); TVWeb360, <http://tvweb360.com/> ("TVWeb360 provides a large collection of free Internet TV channels. Watch free TV Stations from around the world on your computer. Channel categories include News, Business, Entertainment, Music, Movies, Sports, Lifestyle, Educational, Shopping, Cartoons, Weather, Government, Religion and General").

exponentially.⁷⁹ Bandwidth hungry music and gaming offerings over the public Internet also continue to proliferate.⁸⁰

⁷⁹ See, e.g., discussion of Amazon on Demand and Netflix in n. 78, *supra*. See also “LG and Samsung Blu-ray players stream from Netflix in HD resolution,” Netflix Blog, Tuesday, December 9, 2008, <http://blog.netflix.com/2008/12/lg-and-samsung-blu-ray-players-stream.html> (“LG Electronics and Samsung Electronics have each created firmware updates for their Netflix ready Blu-ray disc players, giving these devices the ability to stream movies & TV episodes from Netflix in HD resolution.”); Slingbox, <http://www.slingbox.com> (“Sling Media launched their video entertainment web site, Sling.com, on November 24th, giving Slingbox customers access to their home TV through a new, innovative video on demand web site. Sling.com is open to the public as well and gives even non-Slingbox customers access to a vast library of premium video content including popular and classic TV shows, movies, news, sports, etc.... [t]he SlingCatcher, launched in October, 2008, is a universal media that seamlessly delivers broadcast TV, Internet video and personal content to the TV.”).

⁸⁰ See, e.g., “iTunes reps 1 in every 4 songs sold in U.S.,” http://news.cnet.com/8301-13579_3-10311907-37.html (“For the first half of 2009, iTunes itself snagged a 69 percent share of the overall digital music arena, trailed far behind by Amazon.com with 8 percent.”); Rhapsody, <http://www.rhapsody.com/welcome.html>, “Rhapsody Teams with Vizio, Cisco and Yahoo! on New Streaming Music Products for the Home,” January 8, 2009 (“This week at the Consumer Electronics Show 2009, Rhapsody®, the leading digital music service from RealNetworks® Inc. (Nasdaq: RNWK) and MTV Networks, announced three key partnerships with VIZIO®, Cisco and Yahoo! to deliver instant access to Rhapsody streaming music in the home, and a new program offering consumers a free song each day.”); “Xbox 360 Sees Record Growth in 2009,” <http://www.microsoft.com/presspass/press/2009/may09/05-28XboxGrowthPR.msp> (“Microsoft Corp. announced today that sales of Xbox 360 consoles have passed the 30 million mark globally, with its Xbox LIVE community swelling to more than 20 million active members. After the biggest year in its history in 2008, Xbox 360 achieved the highest percentage growth in hardware sales of any console so far in 2009, up 28 percent over the previous year. Activity on Xbox LIVE, the industry-leading online gaming and entertainment service, surged following the launch of the New Xbox Experience in November 2008. Since that time, the community has recorded a 136 percent increase in new members, TV and movie downloads have more than doubled, and purchases of games, Game Add-ons and more on Xbox LIVE Arcade have increased by 70 percent.”); “Online Gaming Continues Strong Growth in U.S. as Consumers Increasingly Opt for Free Entertainment Alternatives,” http://www.comscore.com/Press_Events/Press_Releases/2009/7/Online_Gaming_Continues_Strong_Growth_in_U.S._as_Consumers_Increasingly_Opt_for_Free_Entertainment_Alternatives (reporting “online gaming category among U.S. Internet users... showed a significant increase in the size of its audience during the past year as consumers increasingly opt for cheaper entertainment alternatives, driven in part by the reality of economic challenges. The category attracted 87 million U.S. visitors in May 2009, up 22

It is conceivable that future applications and services may not be created in the first place or may not work adequately unless broadband providers have the ability to differentiate and in some cases pass to content and application providers some of the cost of the broadband access functionality that may be needed to make them work. This could potentially result in a huge loss in terms of consumer welfare. There are numerous illustrative historical examples where regulation in other contexts precluded new services in a similar fashion. By way of example, the welfare losses associated with regulatory delays in offering voice messaging in the United States were estimated to be in excess of \$5.1 billion.⁸¹ Similarly, the loss to the United States economy associated with the ten to fifteen year delay in approving cellular telephony is estimated at \$86 billion, or 2 percent of the GNP in 1983.⁸²

percent versus year ago.”); “Video game sales on winning streak, study projects (June 18, 2008),” <http://www.reuters.com/article/idUSN1840038320080618> (“The video game industry is expected to shoot from \$41.9 billion in global sales last year to \$68.3 billion in 2012, a compound annual growth rate of 10.3 percent and better than all other media sectors except for online advertising and access...Online and wireless games will grow the fastest at 16.9 percent and 19 percent, respectively. Online will jump from \$6.6 billion last year to \$14.4 billion in 2012, while wireless games go from \$5.6 billion to \$13.5 billion in the same frame.”); “Will OnLive Kill The Game Console?,” <http://www.forbes.com/2009/03/24/onlive-steve-perlman-technology-internet-onlive.html> (describing new online gaming service that lets players stream games on computers and TVs, “...OnLive, can deliver the latest games, instantly, on any TV with a cheap “microconsole” or on a Mac or PC via a conventional DSL or cable broadband connection. No need for the latest machine equipped with a powerful multi-core processor or a pricey graphics card...”).

⁸¹ See Jerry Hausman and Timothy Tardiff, “Valuation and Regulation of New Services In Telecommunications.” Paper presented at the OECD Workshop on the Economics of the Information Society. Toronto, Canada, June 1995.

⁸² See Jeffrey H. Rholfs, Charles L. Jackson, and Tracey E. Kelly. “Estimate of the Loss to the United States Caused By the FCC’s Delay in Licensing Cellular Telecommunications.” NERA, November 8, 1991.

5. If the Commission imposes a nondiscrimination standard, that standard should permit reasonable discrimination

If the Commission concludes that a nondiscrimination principle is essential to a properly functioning Internet, a far less intrusive regulatory approach can address reasonable content and application provider concerns while reducing negative impacts on investment and innovation in the network and the other harmful consequences of a strict nondiscrimination rule. Specifically, the Commission could adopt a nondiscrimination principle mirroring that applicable to Title II telecommunications services.

Such a rule would state:

Subject to reasonable network management, a provider of broadband Internet access service may not privilege or degrade lawful content, applications, and services on an unreasonably discriminatory basis.

Alternatively, the Commission could accomplish the same result by clarifying that it is a reasonable network management practice for broadband providers to charge content and application providers for enhancement or prioritization, except when broadband providers do so on an unreasonably discriminatory basis. Either way, a reasonable nondiscrimination standard would permit broadband providers to charge content and application providers if they do so in a manner that is not unreasonably discriminatory. The Commission has decades of experience with the prohibition against “unreasonable discrimination” imposed by section 202 of the Act.⁸³ This standard has proved equal to the task of providing the Commission with adequate authority to prevent harmful forms

⁸³ 47 U.S.C. § 202. Under Section 202(b), the Commission or a reviewing court looks at three-factors in a two-step process. First, it will determine: (1) whether “like” facilities are used to provide both services using a functional equivalency test from the customer’s perspective; and (2) whether the price paid for demonstrably “like” services is different. If both of these factors are satisfied, it will then determine whether any price disparity is “just and reasonable.” The discriminating carrier has the burden of justifying any differences.

of discrimination while permitting desirable forms of discrimination.

It is well recognized that price and other term discrimination can be legitimate tools.⁸⁴ For example, it enables providers to recover front-end investments. It accounts for the fact that, in some contexts, a firm may be able to choose only one preferred customer or provider -- *e.g.*, for marketing or technical reasons.⁸⁵ Discrimination can also reflect the varied cost of serving different customers or different content and application providers. Indeed, one would be hard pressed to find any market without different grades of services, with different prices for each. It is easy to foresee a variety of over-the-top video, gaming, voice or other IP applications where front-end or other costs related to deploying the technology with a high quality user experience warrant reasonable price or other term discrimination. A reasonable discrimination standard would account for these business realities and, for that reason, is preferable to a strict nondiscrimination standard.

By permitting broadband providers to charge content and application providers for enhanced or prioritized services under at least certain permissible circumstances, a reasonable discrimination standard would also eliminate one of the most harmful aspects of the proposed rules -- the total prohibition on broadband provider charges to content and application providers. This approach, thus, would enable the necessary investment and innovation to build next-generation networks.

Notably, to the extent that the Commission had any lingering concerns about employment of a reasonable discrimination standard, those concerns could be addressed by an additional disclosure requirement for a broadband provider's prioritization or other

⁸⁴ *See, e.g.*, discussion at paragraph 66 of the *NPRM*, 24 FCC Rcd at 13091. *See also* **Factual Record Appendix** at 27-28.

⁸⁵ *See id.* *See also* Philip J. Weiser, University of Colorado Law School, "The Next Frontier for Network Neutrality, May 15, 2008 at 42-43.

enhancement practices. Specifically, the Commission could impose a requirement that broadband providers also disclose, along with the other information detailed at pages 14 to 16 above, any prioritization or enhancement practices deployed by the provider. In that way, if a broadband provider applies a particular prioritization practice or enhancement to only certain content or applications in a “reasonably discriminatory” manner, consumers would once again be able to vote with their feet.⁸⁶

6. In all cases, the Commission should make important clarifications regarding any nondiscrimination rule

In all cases, the Commission should make two important clarifications regarding any nondiscrimination rule it adopts.

a. The Commission should clarify that any new nondiscrimination rule applies solely to the last mile of covered broadband networks

The Commission should clarify that any new nondiscrimination obligation, and indeed any part of a new regulatory framework, applies solely to activities performed on mass market last mile broadband access architecture -- defined as those facilities between but not including the NID or its equivalent⁸⁷ and the port on the end-user side of a broadband provider’s aggregation router or its equivalent -- and only to the extent such facilities physically support the connection between a user and the public Internet. The

⁸⁶ In the event the Commission takes this approach, the proposed language above would be modified as follows:

Broadband providers must post in one central location on their website the publicly available information regarding their services (*e.g.*, for broadband providers, customer agreements, acceptable use policy, excessive use policy, online privacy policy, information regarding network functionality such as online speed tests) and must give a description of their network management practices. The latter should include, at a minimum, a description of any bandwidth caps, usage charges and throttling policies *or prioritization/enhancement practices* employed by the broadband provider.

⁸⁷ That is, the demarcation point that separates the broadband provider outside plant from the customer’s inside wiring.

diagram and related discussion at paragraph 106 of the *NPRM* suggests that this is the Commission's intent.⁸⁸ It speaks to activities performed on the link between the broadband Internet access provider and the mass market customer.

Thus, the proposed rules should not apply to other aspects of Internet architecture, such as Internet backbone facilities or access provided to content and service providers to a broadband provider's Internet backbone or other broadband provider Internet network architecture. The only conceivable area for potential market concern that can even be argued⁸⁹ is with regard to the alleged broadband provider bottleneck in mass market last mile Internet access markets. It therefore makes more public policy sense for the Commission to take a hands-off approach to the broader Internet network architecture of broadband providers where no case whatsoever can be made that they possess any kind of advantage. Moreover, it is, in the public interest to foster all possible innovation and investment in those broader networks -- for example, innovation and investment to move data closer and closer to users in order to foster a higher quality experience.

Similarly, any new rules should also not apply to last mile infrastructure that does not physically support the mass market user's connections to the public Internet. Qwest and other broadband providers offer services that provide IP last mile transport for other providers on other facilities. For example, a wireless provider may purchase point-to-point facilities to provide transport from a cell site. Those services should not be reached by the rules.

Additionally, certain last mile facilities may physically support both mass market

⁸⁸ *NPRM*, 24 FCC Rcd at 13105 ¶ 106.

⁸⁹ And, again, the evidence suggests that there is no concern there. *See Factual Record Appendix* at 20-32.

public Internet access and other services. For example, business enterprise customers may purchase ethernet services that are physically supported, in part, by the same ethernet facilities that support mass market public Internet access. The rules should not apply to network activities on those facilities to support these business enterprise services.

In light of these important distinctions, the Commission should expressly spell these concepts out in the rules to avoid any confusion.

b. The Commission should clarify that any form of end-user directed prioritization or enhancement is always permitted

The Commission should also clarify that any form of end-user directed enhancement or prioritization is always permitted. In other words, even under the strict nondiscrimination framework proposed in the *NPRM*, discrimination should always be permitted if it is done at the specific direction of an end user. The *NPRM* specifies that the proposed nondiscrimination rule would “not prevent a broadband Internet access service provider from charging subscribers different prices for different services.”⁹⁰ And, it would permit reasonable network management practices to accomplish adequate quality of service.⁹¹ Thus, the *NPRM* makes clear that, even under the proposed strict nondiscrimination standard framework, broadband providers could deploy enhancements or prioritization as necessary to accomplish a differentiated service paid for by end users. And, it appears to be clear that broadband providers could deploy those enhancements or prioritization in a discriminatory manner as necessary to accomplish these differentiated services. In other words, a broadband provider could sell a service that accomplishes the

⁹⁰ *NPRM*, 24 FCC Rcd at 13105 ¶ 106.

⁹¹ *Id.* at 13015 ¶ 108 and 13113-14 ¶ 137.

following: end-user A directs the broadband provider to queue her traffic in order of priority with VoIP from a certain content provider first, video from a certain content provider second, and all else third; end-user B directs the broadband provider to queue video traffic first, VoIP second and all else third; and end-user C directs the broadband provider to queue gaming traffic from a certain application provider first, VoIP second and all else third. This should be permitted under the framework proposed in the *NPRM*. But, the Commission should clarify that these and similar arrangements would be permitted under the new rules.

E. Qwest Supports The Flexible Reasonable Network Management Framework Proposed In The *NPRM*

Qwest also supports the flexible reasonable network management framework proposed in the *NPRM*. It is critical that the reasonable network management rules provide broad flexibility regardless of what new rules the Commission adopts, but this is particularly so if the Commission adopts a strict nondiscrimination obligation.

Reasonable network management rules also account for the fundamental need of broadband providers to have flexibility in managing their networks. But, the Commission should clarify that the rules provide as much flexibility as possible when broadband providers enhance or prioritize particular services to ensure quality of service and that the universe of practices that may be deployed as a quality of service reasonable network management is not limited solely to prioritization of packets.

1. The Commission should permit broadband providers to deploy reasonable network management practices to ensure quality of service

The Commission should provide as much flexibility as possible with regard to the use of reasonable network management practices to ensure the quality of service of

services provided over the broadband network. As described at pages 43 through 45 above, this could best be assured by permitting broadband providers to use such network management practices so long as they do not do so on an unreasonably discriminatory basis and by clarifying that broadband providers are permitted to charge content and application providers for reasonable network management practices. If the Commission chooses not to take that path, it should at least provide as much flexibility as possible with regard to those practices. The *NPRM* correctly recognizes that, even for broadband Internet access services -- *i.e.*, those services that would not qualify as managed/special services, enhancing or prioritizing service in order to assure a desired level of quality of service is appropriate for some products and services. However, it leaves as an open question what standard should guide whether any given activity is a reasonable network management practice. The *NPRM* appears to recognize that certain differentiation should be permitted -- *e.g.*, “a network management practice of prioritizing classes of latency-sensitive traffic over classes of latency-insensitive traffic (such as prioritizing all VoIP, gaming, and streaming media traffic).”⁹² Thus, the Commission should, at the very least, expressly clarify that prioritizing or enhancing classes of traffic based upon sensitivity to latency, jitter, bandwidth capacity constraints or other characteristics relative to quality of service that can be addressed by network management is presumptively permitted.

2. The Commission should clarify that reasonable network management in the name of quality of service encompasses more than traffic prioritization

The Commission should also clarify that the universe of practices that may be deployed as quality of service reasonable network management is not limited to

⁹² *Id.* at 13113 ¶ 137.

prioritization of packets. It is inherently impossible to craft an exhaustive list of what network management practices should be permitted. But, it is easy to envision the desirability of a broad variety of potential practices -- for example, security enhancements for online customers of a financial services company -- that could fall into this category.

F. Qwest Also Supports Expedited Enforcement Rules In This Area

As discussed above, the better course, as a general matter, is to deal with potential market imperfections on an *ex post* basis -- that is, a case-by-case basis through enforcement of the FCC Internet Policy Principles. And, to do so, the government already has the benefit of its existing complaint process. Additional end-user transparency obligations will also help that process to be more efficient. Qwest also supports the use of new expedited enforcement procedures to address complaints alleging violations of the Commission's new openness rules. As described above, Qwest advocates herein that the Commission: (a) codify the FCC Internet Policy Principles in their current form and impose a new, flexible end-user transparency rule as an alternative to the strict nondiscrimination rule proposed in the *NPRM*; or (b) codify the FCC Internet Policy Principles in their current form and impose a new, flexible end-user transparency rule in conjunction with a reasonable discrimination standard. In either case, expedited enforcement procedural rules for alleged violations of those new rules will act as an adequate protective measure against any lingering concerns in this area. The Commission should, for example, impose a shortened conversion date rule for informal complaints alleging violations of the new rules, as it does today for slamming complaints

under Section 1.719 of its rules.⁹³ Qwest suggests a 90-day rule in this context. The Commission should also establish a new administrative rule requiring that formal complaints alleging violations of the new rules be resolved within six months.

IV. WHATEVER THE COMMISSION DOES IN THIS PROCEEDING, IT MUST PROCEED WITH A CLEAR UNDERSTANDING OF APPLICABLE LEGAL REQUIREMENTS

A. Any New Disclosure Rule Must Satisfy Applicable First Amendment Requirements

Qwest addresses the best policy approach with respect to the Commission's proposed new disclosure rules, above. But, in the end, any disclosure rule must satisfy applicable First Amendment requirements. And, notably, a detailed and rigid new disclosure mandate, in addition to being less desirable as a policy matter, would also violate the First Amendment.

The Supreme Court has made clear that disclosure requirements trigger First Amendment scrutiny every bit as much as prohibitions on speech. The Court has opined that “[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”⁹⁴ The Court has rejected any distinction between “compelled statements of opinion” and “compelled statements of ‘fact’”: “either form of compulsion burdens protected speech.”⁹⁵

Accordingly, any information mandate considered by the Commission would

⁹³ 47 C.F.R. § 1.719.

⁹⁴ *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis in original).

⁹⁵ *Id.* at 797-98.

need to pass First Amendment review. On the basis of the current record, it does not appear that a detailed end-user disclosure mandate such as those proposed in the *NPRM* would survive such scrutiny.⁹⁶ There are only a very small number of anecdotal examples where broadband access providers have taken actions that the Commission has found objectionable with respect to peer-to-peer and other congestion-producing traffic. In each case, the Commission has been able to proceed under its existing legal authority, and the provider has voluntarily taken corrective action. Quite simply, there is no factual predicate for a sweeping new information disclosure mandate because there is no evidence of a systematic or enduring problem.

The Supreme Court has never upheld the constitutionality of a governmentally-imposed disclosure requirement in the absence of evidence that the regulation was reasonably necessary to address a potential problem. In *Riley v. National Fed'n of the Blind of N.C., Inc.*,⁹⁷ for example, the Supreme Court invalidated a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually given to the charities for whom the fundraisers worked, even though certain donors might have an abstract interest in learning such information.

Similarly, in *Ibanez v. Florida*, the Court invalidated the punishment of a Certified Financial Planner (CFP) under a state rule requiring CFPs to disclose in their advertisements that CFP status was conferred by an unofficial private organization. The Court explained that the State's "concern about the possibility of deception in

⁹⁶ See, e.g., *NPRM*, 24 FCC Rcd at 13109 ¶ 121 and 13110 ¶ 125.

⁹⁷ See *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. at 797-98.

hypothetical cases is not sufficient” and demanded actual evidence of harm.⁹⁸

In *Int'l Dairy Foods Ass'n v. Amestoy*,⁹⁹ the Second Circuit invalidated a Vermont statute requiring dairy manufacturers who used a synthetic growth hormone to disclose that fact in the label of their milk. The court of appeals held that the State's asserted justifications for the statute -- “strong consumer interest and the public's ‘right to know’” -- were “insufficient to justify compromising protected constitutional rights.”¹⁰⁰ The court added:

We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product.¹⁰¹

The court noted further that, if the government were not required to adduce a factual predicate for a mandatory disclosure rule, there would be no limit on its authority to impose such mandates:

Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered. Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern, the manufacturers cannot be compelled

⁹⁸ *Ibanez v. Fla. Dept. of Bus. and Professional Regulation*, 512 U.S. 136, 145 n.10 (“Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled” in the absence of the disclosure.). “Given the state of this record -- the failure of the Board to point to any harm that is potentially real, not purely hypothetical -- we are satisfied that the Board's action is unjustified.” *Id.* at 146.

⁹⁹ *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

¹⁰⁰ *Id.* at 73.

¹⁰¹ *Id.*

to disclose it.¹⁰²

Mandated information-disclosure requirements are, therefore, unconstitutional in the absence of a documented governmental justification. “The First Amendment does not permit a remedy broader than that which is necessary to prevent deception, or correct the effects of past deception.”¹⁰³

On the basis of the current record, the First Amendment standard cannot be met for a detailed and rigid disclosure rule as proposed in the *NPRM*.

B. Constitutional And Other Legal Requirements Limit The Commission’s Ability To Impose A Nondiscrimination Rule And Likely Prevent The Commission From Imposing A Strict Nondiscrimination Obligation

Constitutional and other legal requirements also limit the Commission’s ability to impose a nondiscrimination rule and likely prevent the Commission from imposing the strict nondiscrimination obligation proposed in the *NPRM*. Broadband providers are not common carriers. In fact, the Commission has long made clear that broadband providers fall *outside* Title II of the Communications Act. The Commission has classified cable modem service,¹⁰⁴ wireline broadband Internet access service,¹⁰⁵ wireless-enabled

¹⁰² *Id.* at 74.

¹⁰³ *National Committee on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977).

¹⁰⁴ *In the Matters of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff’d*, *NCTA v. Brand X*, 545 U.S. 967 (2005).

¹⁰⁵ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review--Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies*

broadband Internet access service,¹⁰⁶ and broadband-over-powerline-enabled Internet access service as information services,¹⁰⁷ which removed them from potential regulation under Title II. The Commission also freed wireline broadband providers from *Computer Inquiry* obligations.¹⁰⁸ This approach is consistent with and, indeed, arguably mandated by the Act. As the *NPRM* acknowledges, “it has long been U.S. policy to promote an Internet that is both open and unregulated. This approach is reflected in more than two decades of FCC decisions.”¹⁰⁹ The proposed principle of nondiscrimination would represent a radical change in federal policy. It would essentially impose common-carrier obligations on broadband access service providers and require them to transmit all Internet traffic on their networks on an equal footing. Indeed, it would impose a nondiscrimination obligation that is more onerous than the current Section 202 prohibition imposed on Title II common carrier services. It would compel them to dedicate their privately owned networks for the use of third-party content providers. Although in responding to competitive market forces Qwest and many other access

for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, CC Docket Nos. 02-33, 95-20, 98-10, 01-337, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (Wireline Broadband Order), aff'd, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

¹⁰⁶ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (Wireless Broadband Classification Order).*

¹⁰⁷ *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).*

¹⁰⁸ *Wireline Broadband Order, 20 FCC Rcd at 14887-88 ¶ 65.*

¹⁰⁹ *NPRM, 24 FCC Rcd at 13082 ¶ 47.*

service providers are committed to affording consumers the best possible Internet experience, which in many cases may include nondiscriminatory traffic management, there is a world of difference between what access service providers will decide as a matter of business policy and what government may compel as a matter of law.

As detailed below, the nondiscrimination standard proposed in the *NPRM* exceeds the Commission legal authority in several respects.

1. A nondiscrimination rule exceeds the Commission’s Title I ancillary jurisdiction and authority

To begin with, the proposed nondiscrimination obligation, and indeed any nondiscrimination obligation, exceeds the Commission’s jurisdiction and authority. The *NPRM* contends that the Commission has jurisdiction and authority to impose the new rules it proposes for broadband Internet access under its “ancillary jurisdiction over matters not directly addressed in the Act when the subject matter falls within the agency’s general statutory grant of jurisdiction and the regulation is ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities.’”¹¹⁰ Specifically, it posits, quoting from the Supreme Court’s 1972 *United States v. Midwest Video Corp.* (*Midwest Video I*) decision that the Commission’s exercise of ancillary authority over facilities-based Internet access will “promote the objectives for which the Commission has been [specifically] assigned jurisdiction” and “further the achievement of . . . [legitimate] regulatory goals.”¹¹¹ The *NPRM* further contends that the proposed rules will “advance the federal Internet policy set forth by Congress in section 230(b) as well as the broadband goals that section 706(a) of the Telecommunications Act of 1996 charges the

¹¹⁰ *Id.* at 13099 ¶ 83.

¹¹¹ *United States v. Midwest Video Corp.*, 406 U.S. 649, 667 (8th Cir. 1972).

Commission with achieving” and fall within the Commission’s specific authority under Section 201(b) “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act.”¹¹² Qwest respectfully disagrees.

In fact, *Midwest Video I* and other decisions in the line of cases beginning with the Supreme Court’s 1968 decision in *United States v. Southwestern Cable Co.*¹¹³ make clear that the Commission does not have jurisdiction and authority to impose the proposed nondiscrimination rule. Those cases establish that ancillary Title I authority exists where: “(1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹¹⁴ The proposed nondiscrimination rule is not reasonably ancillary to the Commission’s effective performance of any of its statutorily mandated responsibilities.

Certainly this is the case for the three bases cited in the *NPRM* -- Sections 230(b), 706(a) and 201(b). Subsection (b) of Section 230 (“Protection for private blocking and screening of offensive material”) states:

(b) Policy. It is the policy of the United States --

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control

¹¹² *NPRM*, 24 FCC Rcd at 13099 ¶ 84.

¹¹³ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

¹¹⁴ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citing *Southwestern Cable*, 392 U.S. at 177-78).

over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.¹¹⁵

To begin with, it's not clear that Section 230(b) imposes any kind of statutorily mandated responsibility. But, if it does, the only reasonable reading is that it mandates that the Commission ensure that the Internet remain "unfettered by Federal or State regulation." Thus, a nondiscrimination obligation, particularly the onerous nondiscrimination standard proposed in the *NPRM*, can not be considered reasonably ancillary to the Commission's effective performance of any of its responsibilities mandated by Section 230(b).

The same is true for Section 706(a). That Section states:

(a) In general. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.¹¹⁶

The Commission, itself, has held that this Section is also not an independent grant of statutory authority to the Commission.¹¹⁷ Additionally, the better reading of Section

¹¹⁵ 47 U.S.C. § 230(b).

¹¹⁶ 47 U.S.C. § 1302(a).

¹¹⁷ See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to*

706(a), like Section 230(b), is that it expresses a pro-competition, de-regulatory guidance. In all events, it is clear from the plain language of Section 706(a) that a nondiscrimination standard is also not reasonably ancillary to any responsibilities mandated by Section 706(a).

Finally, Section 201(b) also plainly fails to independently provide a statutory mandate that supports a nondiscrimination standard for broadband providers.

The Supreme Court's ruling in its 1979 *FCC v. Midwest Video* decision (*Midwest Video II*) also emphatically demonstrates that a nondiscrimination standard such as that proposed here does not fall within the Commission's Title I ancillary jurisdiction authority.¹¹⁸ In that case, the Court upheld a decision by the Eighth Circuit that set aside certain of the Commission's cable access, channel capacity, and facilities rules.¹¹⁹ The rules at issue in that case "prescrib[ed] a series of interrelated obligations ensuring public access to cable systems of a designated size and regulat[ed] the manner in which access is to be afforded and the charges that may be levied for providing it."¹²⁰ The issue in that case was whether these rules were "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television

Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24047 ¶ 76 (1998).

¹¹⁸ *FCC v. Midwest Video*, 440 U.S. 689 (1979).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 692.

broadcasting.”¹²¹ The Commission had argued that its rules would promote “the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public’s choice of programs.”¹²² The Court rejected this argument, finding:

With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status. A common-carrier service in the communications context is one that “makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing”¹²³

Similarly, imposition of a nondiscrimination obligation on the services at issue in this *NPRM* would effectively relegate them to common carrier status and would thereby exceed the Commission’s jurisdiction.

2. The proposed nondiscrimination rule also violates the Fifth Amendment

Mandating that broadband access service providers open their networks to all comers, on an equal basis, appropriates private property and therefore also constitutes a taking within the meaning of the Fifth Amendment. Such a rule would effectively grant third-party content providers the use of a portion of an access provider’s network and thereby represent an occupation of that property. It would cede to a third party what would amount to an easement to intrude its content onto the access provider’s transmission equipment, computers, and cables. The government-compelled occupation

¹²¹ *Id.* at 697, citing *Southwestern Cable Co.*, 392 U.S. at 178.

¹²² *Id.* at 694-95.

¹²³ *Id.* at 700-701, citing *Report and Order, Industrial Radiolocation Service*, 5 FCC 2d 197, 202 (1966) (footnotes omitted).

and use of access provider property would strip the provider of its right to exclude others -- perhaps the most fundamental element of the bundle of rights known as “property.”

In the related context of the cable must-carry rules, the courts in *Turner Broadcasting*¹²⁴ noted the potential Fifth Amendment question even though the issue of a taking was not before them. *See Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 56 (D.D.C. 1993) (Sporkin, J., concurring) (“No challenge has been made under the taking provision of the Fifth Amendment or any other legal provision.”). Judge Williams raised the Fifth Amendment issue in the three-judge district court:

Because of my conclusions on the First Amendment challenge to the must-carry provisions, I do not reach the contention . . . that those provisions also represent an unconstitutional taking of cablecasters’ property in violation of the Fifth Amendment. I do not, however, regard that claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) where the Court struck down a statute entitling cable companies to place equipment in an owner’s building so that tenants could receive cable television. The NAB responds that *Loretto* is limited to “physical” occupations of “real property”. But the insertion of local stations’ programs into a cable operator’s line-up presumably is not a metaphysical act, and presumably takes place on real property.

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

Similarly, in *Turner I*, four Justices noted “possible Takings Clause issues” from a hypothetical government mandate to transform cable systems into common carriers. 512 U.S. at 684 (O’Connor, J., concurring in part and dissenting in part, joined by Scalia, Thomas, and Ginsburg, JJ.). These concerns are equally relevant here.

The touchstone is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court applied the Takings Clause to a state law compelling apartment

¹²⁴ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

building owners to permit cable operators to place a small cable box and about 30 feet of one-half inch cable on their apartment buildings. *Id.* at 422. Explaining that the “power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights,” *id.* at 435, the Court held that even such a “minor” occupation of an owner’s property authorized by government “constitutes a ‘taking’ of property for which just compensation is due.” *Id.* at 421. This *per se* rule is warranted because “constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.” *Id.* at 436. “An owner is entitled to the absolute and undisturbed possession of every part of his premises. . . .” *Id.* at 436 n.13 (brackets, quotation marks and citation omitted). Therefore, “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” *Id.* at 426.

The Supreme Court specifically held that a government-authorized invasion by a private party is treated no differently than a trespass by the government itself. “A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.” *Loretto*, 458 U.S. at 432 n.9. Indeed, “an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property.” *Id.* at 436 (original emphasis). To force an owner to permit a third party to use and control part of his property “literally adds insult to injury.” *Id.* at 436.

Following *Loretto*, the D.C. Circuit in *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), invalidated the FCC’s physical co-location rules, which granted competitive telephone providers “the right to exclusive use of a portion of

the [local exchange carrier's] central offices.” The FCC’s rules “directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a ‘permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). The court had no occasion to consider the FCC’s virtual co-location rules because it deemed them a mere exception to the physical co-location requirement; it therefore vacated the virtual co-location rules as a matter of severability and did not consider their constitutionality. *Id.* at 1447.

Similarly, in *TCI of North Dakota v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993), the Eighth Circuit indicated that granting cable companies broad access to telephone company easements would give rise to “serious questions” under “the Takings Clause of the federal constitution.” *Id.* at 815.

By the same token, a nondiscrimination rule mandating that a broadband access service provider accept the intrusion of all network traffic onto the provider’s property -- its transmission equipment, computers, and cables -- is not a mere *regulation* of the provider’s property. A “regulatory taking . . . does not give the government [or its agent] any right to use the property, nor does it dispossess the owner or affect her right to exclude others.” *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 n.19 (2002). In contrast, a nondiscrimination requirement leads to a physical invasion of a cable operator’s transmission facilities and a “practical ouster of [its] possession.” *Loretto*, 458 U.S. at 428 (citation and quotation marks omitted). It compels “an intrusion so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it.” *Id.* at 431

(citation and quotation marks omitted). The *Loretto* Court stated that a *per se* taking occurs when the government authorizes a third party to “‘regularly’ use, or ‘permanently’ occupy, . . . a thing which theretofore was understood to be under private ownership.” *Id.* at 427 n.5 (citation and quotation marks omitted). A nondiscrimination rule would have these harmful impacts. Indeed, given the study of broadband provider *q* ratios discussed at pages 24-26 through of the **Factual Record Appendix**, these prohibitions may serve to preclude a reasonable opportunity to recover their costs. Hence, the restrictions themselves constitute a taking, particularly in light of empirical evidence that supra-normal returns are not being earned.

The taking cannot be avoided by describing the invasion as “electronic” rather than “physical.” Just as the law recognizes many forms of property (such as real, personal, intellectual), so the forms of physical encroachment are equally varied. In fact, an invasion need not even physically touch the property in order to “occupy” it: the placement of telephone lines suspended above another’s real estate or building or right-of-way constitutes a compensable physical invasion, “even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land.” *Loretto*, 458 U.S. at 430; *see also id.* at 422 (intruding cable company wires were suspended above rooftop of plaintiff’s building); *id.* at 429-30 (“construct[ing] and operat[ing] telegraph lines over a railroad’s right of way” would “be a compensable taking”).

In the case of a communications network, an electronic invasion or occupation is every bit as real as a physical one. Otherwise, the government could appropriate the entire network by, for example, commanding it to carry only content supplied by the

government or designated third party, and then claim that no “taking” of private property had occurred. The Fifth Amendment may not be circumvented through such subterfuge. *E.g., Kimball Laundry v. United States*, 338 U.S. 1, 12 (1949) (government must pay just compensation “where public-utility property has been taken over for continued operation by a governmental authority”). Even the famous “seizure” of the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630-31 (1952), did not involve physical invasion as such of the mills by government agents. Rather, the presidents of the various mills were deputized as “operations managers” and directed to carry on their activities in accordance with regulations and directions of the Secretary of Commerce. 343 U.S. at 583.

Thus, a nondiscrimination requirement qualifies as a *per se* taking whether the invasion is described as “physical” or “electronic.” Further, the nondiscrimination rule would violate the Fifth Amendment even if it were analyzed not under *Loretto* but as a regulatory taking. In *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), for example, the Supreme Court held that a nondiscrimination rule requiring open access to a privately developed marina constituted a compensable taking. Although the Supreme Court has “been unable to develop any ‘set formula’” for such regulatory takings, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), it has “identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action -- that have particular significance.” *Kaiser Aetna*, 444 U.S. at 175.

Starting with the character of the government action, here -- as in *Kaiser Aetna* -- the challenged action is the government’s imposition on the property owner of a servitude

or easement allowing others to use the property and preventing the owner from exercising the right to exclude. In *Kaiser Aetna*, the government tried to impose a navigational servitude that would have allowed the public free access to private property. 444 U.S. at 169, 178. There, the public -- like a third-party content provider here -- was “an interloper with a government license.” *Florida Power*, 480 U.S. 245, 253 (1987). The Supreme Court found a taking:

[W]e hold that the “right to exclude,” so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Kaiser Aetna, 444 U.S. at 179-80 (internal citations and footnotes omitted); *see also Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (state could not, without paying compensation, require beachfront property owners to grant an easement allowing members of the public to pass across their property). The same result would obtain in this case.

The economic impact of the government-licensed invasion imposed by a nondiscrimination rule would be far greater than that of the navigational servitude at issue in *Kaiser Aetna*. There, the public would have enjoyed “free access” to the marina “while [the property owners’] agreement with their customers call[ed] for an annual \$72 regular fee.” 444 U.S. at 180. Under a nondiscrimination rule, content providers throughout the country would enjoy free use of a broadband access service provider’s facilities and free access to the provider’s customers -- property rights worth considerably

more.

Finally, there are the access service provider's reasonable, investment-backed expectations. Broadband access service providers have invested billions of dollars to upgrade their systems to handle increased capacity and to offer a host of innovative services, all to the end of offering their customers a better product. For the government to take advantage of the access service providers' own market-driven improvements to their property to impose a nondiscrimination rule in order to subsidize and encourage "a budding entrepreneur in a dorm room"¹²⁵ would upset reasonable, investment-backed expectations and violate basic norms of fairness.¹²⁶

3. The proposed nondiscrimination rule violates the First Amendment

The proposed nondiscrimination rule would also be unconstitutional because it would eliminate broadband providers' editorial control over their networks.

The First Amendment protects the process of editorial control and selection of information, as well as the transmission of content of one's own creation. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995), for example, the Supreme Court made clear that the process of choosing among messages was itself an act of expression:

Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected

¹²⁵ *NPRM*, 24 FCC Rcd at 13065-66 ¶ 4.

¹²⁶ Investments have been made on the basis of a belief that the Internet was free from the very sort of regulation that the government proposes here. Gregory J. Sidak and Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract*. Cambridge University Press: Cambridge MA, 1997, pp. 12, 224-226 and 275-276. ("The utility placed the assets in service in expectation of the earnings that would be received. The expected returns of the firm constitute *investment-backed expectations*. P. 276.)

speech activities even when they only select programming originally produced by others. For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. The selection of contingents to make a parade is entitled to similar protection.

Id. at 570 (citations omitted).

Similarly, in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”), and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), the Supreme Court held that the First Amendment protects the right of cable operators to decide what channels to carry, whether or not the programming involved is produced by the cable operator or an affiliate: “Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’” *Turner I*, 512 U.S. at 636 (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

This vital First Amendment principle applies to the Internet as well as everywhere else. The Supreme Court has made clear that Internet speech enjoys full First Amendment protection. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-69 (1997) (“Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry”).

Even the Commission recognizes that Internet access service providers wield editorial control. It acknowledges that they may exercise editorial discretion in deciding, for example, whether to block spam, malware, child pornography, pirated material, and

other content.¹²⁷

Outside these limited exceptions, however, the proposed nondiscrimination principle would strip the ability of Internet access service providers to exercise editorial control over their networks, which, as noted, are not common carrier networks. Although Qwest and other Internet access providers have heretofore chosen to disseminate speech on an open and equal basis, their voluntary choice to do so cannot be replaced by a government mandate that effectively turns them into common carriers. A nondiscrimination principle applied to the Internet would be like a rule requiring a cable operator to carry all broadcast stations, but see *Turner I* and *II*, or a parade organizer to admit all applicants on a lottery basis, but see *Hurley*, or a newspaper to carry replies to its editorials. But see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The Supreme Court has held that nondiscrimination or mandatory carriage rules that interfere with a communications provider's expression are deemed to abridge "speech" within the meaning of the First Amendment. In *Turner I* and *II*, the must-carry requirements were defended as nondiscrimination rules to prevent cable operators from disfavoring the content of local broadcasters. Nevertheless, the Court explained that, "[b]y requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Turner I*, 512 U.S. at 636-37. A bare majority of the Supreme

¹²⁷ *NPRM*, 24 FCC Rcd at 13114 ¶¶ 138-39.

Court upheld this must-carry regime even though all agreed that it substantially infringed the First Amendment rights of both cable operators and cable programmers: “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner I*, 512 U.S. at 641.¹²⁸ The must-carry regime invaded the cable companies’ constitutionally guaranteed autonomy to choose “what to say and what to leave unsaid.” *Pacific Gas & Elec. Co. v. Public Utilities Comm’n*, 475 U.S. 1, 11 (1986) (plurality opinion).

In the wake of *Turner Broadcasting*, lower courts have continued to apply the same principle. In *Time Warner Ent’t Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001), for example, the court of appeals held that the Commission’s 30% subscriber cap on cable operators did not satisfy intermediate scrutiny under the First Amendment because it limited the ability of cable companies to speak with their customers. In *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009), the D.C. Circuit vacated the subscriber cap limit without the opportunity for further proceedings because of the substantial First Amendment principles involved:

Were the Rule left in place while the FCC tries a third time to rationalize the cap, however, it would continue to burden speech protected by the First Amendment. “Cable programmers and cable operators engage in and

¹²⁸ The Supreme Court upheld the must-carry regime on the basis of detailed factual findings made by Congress, *see Turner II*, 520 U.S. at 190-224, and expressly opined that Congress is due a measure of deference that an agency is not. *Id.* at 195 (“substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency”). The Court made clear that speculation about hypothetical market dysfunction is not enough. “*Turner I* demands that the [government] do more than ‘simply “posit the existence of the disease sought to be cured.”’ It requires that the [government] draw ‘reasonable inferences based on substantial evidence.’” *Time Warner Ent’t Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (quoting *Turner I*, 512 U.S. at 664, 666) (internal citation omitted). Such a standard cannot be satisfied here.

transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” Because “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas ... the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences through the medium of broadcasting ... may not constitutionally be abridged either by Congress or by the FCC.”

Id. at 9.

4. At a minimum, the Fifth and First Amendments arguably mandate a reasonable discrimination standard

As discussed above, the Fifth and First Amendments likely bar both a strict nondiscrimination obligation and a reasonable discrimination standard. But, at the very least, these constitutional protections arguably mandate a reasonable discrimination standard rather than the strict nondiscrimination standard proposed in the *NPRM*. This is because, assuming *arguendo* that there is a legitimate governmental interest at issue for any nondiscrimination obligation, a prohibition only against discrimination that is not reasonable is at least more narrowly tailored. While Qwest reserves its rights and does not waive its legal arguments with respect to even a reasonable discrimination standard, it is at least arguable that a reasonable discrimination standard stands a greater chance of passing constitutional muster.

C. At A Minimum, A Broad Managed/Special Services Exemption Is Required To Pass Constitutional Muster

Similarly, even if a nondiscrimination obligation were not barred by the First Amendment as discussed above, First Amendment constraints would, at a minimum, require the Commission to ensure that any new rules did not interfere with the ability of Internet access service providers to communicate their own content -- *i.e.*, their own speech -- through their networks. At the very least, constitutional principles require that the Commission ensure that the category of managed/specialized services is sufficiently

broad and robust to protect the First Amendment rights of broadband access service providers to communicate speech of their own creation or selection (including video service, cable service, or other content of their choosing) over their networks.

Such services represent speech, pure and simple, and a broad definition of managed/specialized services is necessary to protect the right of Internet access service providers to engage in them. As noted in *Turner I* and *II*, the First Amendment extends to content created by other parties as well to content created by the speaker itself. In addition, the Commission must be sure to leave access providers with the *option* of carrying their own speech on their networks, even if they are not currently exercising that option.

Similarly, the Commission should construe any nondiscrimination principle narrowly to ensure that it does not interfere with First Amendment rights by denying a broadband access provider the practical ability to transmit its own speech. A nondiscrimination requirement that did not leave a broadband access provider with adequate capacity for its own communication would run afoul of the First Amendment.

V. CONCLUSION

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

Respectfully submitted,

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