Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Preserving the Open Internet	)	**GN Docket No. 09-191**
	)	
Broadband Industry Practices	)	**WC Docket No. 07-52**

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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I. INTRODUCTION AND SUMMARY

The United States Telecom Association (USTelecom)[1] is pleased to submit these reply comments on the Notice of Proposed Rulemaking (Notice)[2] issued by the Federal Communications Commission (Commission) regarding draft rules intended to preserve an open Internet. USTelecom's member companies are committed to an open Internet and support the Commission principles, the competitive market structure and existing regulatory balance among the broadband, computing, content and applications sectors that have safeguarded an open and dynamic Internet for years.

The record in this proceeding identifies a theme shared by a broad range of commenters. As noted by an overwhelming number of commenters, the Internet in the United States is a tremendous success story that has developed largely outside of regulatory constraints with a speed and scope unparalleled by any prior network technology. With an estimated half trillion

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[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.
[2] Notice of Proposed Rulemaking, *Preserving the Open Internet*, 24 FCC Rcd. 13064, 74 Fed. Reg. 62638 (November 2009) (*Notice*).

dollars in investment – predominantly from the private sector – the Internet has created jobs, spurred innovation, and revolutionized the way Americans learn, work, communicate and shop.

The Commission also states in its National Broadband Plan that "[w]e should lead the world where it counts – in the use of the Internet and in the development of new applications that provide the tools that each person needs to make the most of his or her own life."[3] The Internet in the United States today has been an unparalleled success in this regard. U.S. Internet users and our broadband networks are among the world leaders in the amount that Internet consumers are actually making use of their broadband connections to pull value from the Internet – whether education, government services or entertainment.[4] In addition, the innovations taking place throughout the Internet ecosystem – in terms of services and applications – are originating within our nation's borders.

Instrumental to the creation of this thriving Internet ecosystem was the decision by Congress and the Commission to adopt a light-touch regulatory approach for such services. The Commission's existing Internet principles have been essential to fostering dynamic growth throughout an Internet ecosystem that is characterized by rapid changes in technology, shifting consumer preferences and constantly evolving opportunities for businesses and consumers. As the Commission stated in its National Broadband Plan, "[t]echnologies, costs and consumer preferences are changing too quickly in this dynamic part of the economy to make accurate predictions."[5] Based on its own observation, the Commission should preserve the flexibility afforded by its currents principles, which are fostering technological innovation, driving massive

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[3] *See*, Federal Communications Commission Report to Congress, *Connecting America: The National Broadband Plan*, March 17, 2010, p. 4 (*National Broadband Plan*).
[4] USTelecom Comments, pp. 20 – 23. *See infra*, pp. 6 – 7.
[5] *See*, *National Broadband Plan*, p. 42.

investment and creating competitive business models throughout the entire broadband Internet ecosystem – all to the benefit of consumers.

However, as the Commission ponders adoption and implementation of prescriptive rules for this ecosystem, it must conduct a thorough and candid assessment of its legal authority to implement its proposed rules. In this regard, a review of the current record in this proceeding demonstrates that there are a host of legal obstacles facing the Commission and that there are substantial Constitutional hurdles that should give the Commission pause. Moreover, there is currently insufficient legal analysis by the Commission in its Notice for it to make an informed decision on the legal validity of its proposals.

While the record in this proceeding amply demonstrates why it would be a mistake for the Commission to replace today's open and dynamic environment with a government-managed approach to innovation, should the Commission nevertheless decide to craft regulations, it should carefully consider the record evidence detailing possible approaches. In particular, there is strong consensus that a broad exception should be adopted for managed services, based on their ability to deliver substantial consumer benefits and motivate increased deployment of and enhancements to broadband networks. Similarly, there is clear and strong consensus for a broad definition of network management.

In addition, there is strong opposition to the Commission's ex ante ban on business agreements between content rights holders and broadband providers. This opposition was voiced by stakeholders throughout the Internet ecosystem, with many of these stakeholders citing the inherent benefits of such agreements for consumers and content rights holders, as well as the favorable impact of such agreements on broadband deployment.

In the comments, strong consensus emerged among the majority of stakeholders for clear consumer disclosure. USTelecom believes that the Commission should build on this consensus as it formulates its approach to the Internet. There is broad support amongst many stakeholders for clear consumer disclosure, which improves competition and enables to consumers to make informed decisions and get the service that best fits their needs. Industry best practices should apply evenly across all real and potential "gatekeepers" (all stakeholders that comprise the Internet ecosystem), due to their shared influence over consumers' Internet experiences.

II. THERE IS WIDESPREAD ACKNOWLEDGEMENT OF THE INTERNET'S EXISTING VIRTUOUS INVESTMENT AND INNOVATION CYCLE

There is widespread acknowledgement by diverse interests in this proceeding that today's Internet ecosystem is benefitting from massive investment, substantial consumer adoption and remarkable innovation throughout the entirety of the network under the current regulatory framework. These collective observations have been made by consumer groups, industry leaders, academics and governmental entities at the local and state level. And the Commission's recently released National Broadband Plan reaches these same conclusions.[6]

Industry stakeholders across the Internet ecosystem uniformly acknowledge the thriving innovation and massive investment taking place. The economics of today's vast Internet marketplace is measured by numerous commenters in terms of trillions of dollars. The Computing Technology Industry Association (CompTIA) speaks of "the world's $3 trillion

[6] *See e.g.*, *National Broadband Plan*, p. xi (stating that the American broadband ecosystem has "evolved rapidly" and is "[f]ueled primarily by private sector investment and innovation."); *id*., p. 3 (noting that "[d]ue in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade. More Americans are online at faster speeds than ever before. The number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million last year.").

information technology industry."[7] The National Association of Manufacturers (NAM) notes that in 2005, manufacturers in the United States led *all* industry sectors in eCommerce activity, "accounting for almost half (48 percent) of all eCommerce – over $1.86 trillion in sales."[8] The Telecommunications Industry Association (TIA) places expenditures by broadband providers alone between 2000 and 2008 at "over a half trillion dollars,"[9] and Google acknowledges that today's Internet ecosystem "adds as much as $2 trillion to our Gross Domestic Product (GDP)."[10] Google put it most succinctly when it stated that the economic and social opportunities created by the current open Internet "can't be overstated."[11]

The remarkable economic vitality that characterizes today's Internet ecosystem leads numerous commenters to characterize its unparalleled success in glowing terms. The Computer & Communications Industry Association (CCIA) – which counts Google, Yahoo and eBay amongst its members – states that the open Internet today is "thriving in America," as the entire ecosystem has "burgeoned to meet longstanding consumer and business demand."[12] It goes on to call the Internet "an undeniable success.[13] The Information Technology and Innovation Foundation emphasizes the "explosion of investment, innovation, and consumer benefit," occurring in this marketplace.[14] Even Free Press acknowledges that "[n]o other technology even

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[7] *CompTIA Comments*, p. 2.
[8] *NAM Comments*, p. 2. The NAM goes on to note that this trend is increasing, with eShipments "account[ing] for 35 percent of all manufacturing shipments between 2006 and 2007 alone." *Id.*
[9] *TIA Comments*, p. 19.
[10] *Google Comments*, p. i. Google goes on to address how the Internet ecosystem is a major driver for job creation, stating that "global information technology employment will grow to 42 million jobs by the end of 2013 (from approximately 36 million now)." *Id.*, p. 6. It also notes that the consumer electronics component of the ICT sector is "expected to generate more than $166 billion in 2010," and that jobs in the Internet content marketplace "have grown exponentially," with Internet advertising alone responsible for $300 billion of U.S. economic activity and the generation of "more than 3 million jobs that did not exist two decades ago." *Id.*, pp. 6, 7.
[11] *Google Comments*, p. i.
[12] *CCIA Comments*, p. 1.
[13] *Id.*, p. 2.
[14] *ITIF Comments*, p. 3.

comes close to competing with" the pace of adoption for broadband Internet access service, "not the telephone, television, the automobile, cable TV, cellphone, or even the computer itself,"[15] all under today's light-touch regulatory policy.

The Commission also states in its National Broadband Plan that "[w]e should lead the world where it counts – in the use of the Internet and in the development of new applications that provide the tools that each person needs to make the most of his or her own life."[16] The Internet in the United States today has been an unparalleled success in this regard. As USTelecom noted in its initial comments in this proceeding,[17] U.S. Internet users and our broadband networks are among the world leaders in the amount that Internet consumers are actually making use of their broadband connections to pull value from the Internet – whether education, government services or entertainment.

For example, the United States consumes more bandwidth per user at 14.25 GB per month, as compared to Western Europe at 13.35 GB per month and Japan at 9.90 GB per month.[18] The United States (taken as a whole) is essentially on par with France in its per-user consumption of the Internet and uses more bandwidth per user than Germany, Italy, the United Kingdom, and Japan.[19] Only South Korea appears to consume a substantially larger amount of bandwidth per user at 24.5 GB per month.[20]

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[15] *Free Press Comments*, p. 9.
[16] *National Broadband Plan*, p. 4.
[17] *USTelecom Comments*, pp. 20 – 23.
[18] *Id.*, p. 21.
[19] *Id.*, p. 21.
[20] *See*, Letter of Walter B. McCormick, Jr., United States Telecom Association, to FCC (December 22, 2009). When comparing country performance, it may make sense to normalize consumption per Internet user, as opposed to per capita, because variation in Internet adoption rates across countries can be significant. The traffic data we use include all IP traffic – business and residential; fixed and mobile; IP voice, video, and data; and private and public Internet. This inclusion is necessary because all of these types of traffic contribute to the economic and consumer impacts of IP data usage and the Internet World Stats Internet user figures do not distinguish business and residential users. We note that regions with widespread legacy multi-channel video adoption (i.e., North America) undercount

Importantly, many of the applications and services that are driving this usage both domestically and internationally are developing here in the United States. eBay, which was founded in San Jose, California in 1995 and sold its first item on the Internet for $14.83,[21] delivered $8.7 billion in revenues to its shareholders in 2009 and has 81 million active registered accounts across the globe.[22] Facebook, which started in a dorm room at Harvard University in February 2004, currently has 400 million users, 70% of which are outside the United States.[23] Countless other companies based in the United States are driving this global innovation and investment that is measured in the trillions of dollars.

This global leadership was not lost on the Commission in its *National Broadband Plan*, where it noted that "global trade in information and communications technology (ICT) is almost $4 trillion and growing," with companies in the United States playing a "leading role in bringing technologies to market that support a worldwide ICT ecosystem through the development of software, devices, applications, semiconductors and network equipment."[24] The Commission concludes that this trade and investment is supporting "tremendous growth in international Internet traffic, which increased at a compound annual growth rate of 66% over the past five years."[25]

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a great deal of video traffic currently delivered via traditional means, while such traffic are more likely to be delivered over an IP connection in other areas. Finally, while Cisco provides aggregate data for Western Europe and selected countries, it does not provide data for several Western European countries that are generally ranked highly in broadband rankings, such as Finland, Sweden, Denmark, and the Netherlands.

[21] The first item sold on e-Bay was a "broken laser pointer" purchased by a collector. *See*, eBay website (available at: http://www.ebayinc.com/list/milestones).

[22] eBay Annual Report 2009, p. 3. In addition, eBay notes that net revenues outside the U.S. accounted for approximately 54% of its net revenues in both fiscal year 2008 and 2009. eBay Annual Report 2009, p. 31 (available at: http://files.shareholder.com/downloads/ebay/881145110x0x361552/b45137ee-aa41-4c2c-94ca-d72d5b0844be/eBay_77655_BANNERLESS.pdf) (visited March 31, 2010).

[23] *See* Facebook Statistics website (available at: http://www.facebook.com/press/info.php?statistics#!/press/info.php?statistics) (visited March 29, 2010).

[24] *National Broadband Plan*, p. 59.

[25] *Id.*

Moving from the macro-level to the micro-level, additional comments illustrate how this massive investment throughout the entire Internet ecosystem is fueling local investment, creating jobs and securing opportunities for small businesses, minorities and even stay at home parents. In Nevada, the Humboldt Chamber of Commerce notes how its businesses depend on today's Internet to place them on "equal footing with our more urban neighbors," and providing these same businesses with "quick access to customers and suppliers."[26] In Michigan, the Grand Rapids Chamber of Commerce emphasizes how in the past decade, broadband Internet "has changed how we do business," by allowing its members to "serve new customers almost anywhere in the world with very little investment in capital or inventory."[27]

Along these lines, the NAM identifies American manufacturers as the "beneficiaries of a globally-deployed broadband infrastructure, which has transformed the way they operate."[28] As the NAM points out, "high-speed broadband access has made the world a smaller place, allowing even the smallest of businesses to operate on a global scale."[29] The investment necessary to meet this growing demand for manufacturing businesses requires tremendous investment that, in the words of the NAM, are "critical to American job creation and growth, especially as our economy continues to shed jobs and the unemployment rate hovers at 10.0 percent."[30]

This reality was recognized by the Commission in its National Broadband Plan, where it acknowledged that broadband "can provide significant benefits to the next generation of American entrepreneurs and small businesses—the engines of job creation and economic growth

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[26] *Humboldt Chamber of Commerce Comments*, p. 2. The Humboldt Chamber of Commerce goes on to state that any rules and regulations that "inhibit the growth of new technologies, decrease access or increase costs would be abhorrent to us." *Id*.
[27] *Grand Rapids Area Chamber of Commerce Comments*, p. 1. It attributes these opportunities to "the very competitive marketplace that has allowed the [I]nternet to constantly improve over the years." *Id.*
[28] *NAM Comments*, p. 2.
[29] *Id.*
[30] *Id.*, p. 4.

for the country."[31] This is especially the case, since small and medium enterprises "employ more than half of America's private sector workers and create roughly 64% of net new private sector jobs each year." The Commission's National Broadband Plan acknowledges that broadband Digital Subscriber Line (DSL) services have reached 96% of all business locations,[32] with 99% of physicians' offices having access to some form of broadband service.[33]

This increased access to broadband for the nation's small businesses is furthering their potential for increased production and job growth. Given the significant investment now planned by carriers to upgrade that infrastructure to second-generation access technologies, this too will favorably impact job creation and growth.

Just last week, the Wall Street Journal's front page headline trumpeted "Tech Sector in Hiring Drive."[34] The article noted that "[t]he technology industry, an engine of innovation and U.S. prosperity for more than half a century, is accelerating its recovery from the recession with surging earnings that have spurred companies to sharply ramp up their hiring."[35] The article also notes that "[n]ewer tech products such as videoconferencing systems and electronic medial records are also gaining traction," which, according to one analyst, suggests that "this tech recovery has legs."

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[31] *National Broadband Plan*, p. 266. In particular, the Commission notes in its *National Broadband Plan* that chief among the benefits of broadband for business is that it allows small businesses to achieve operational scale more quickly, can help lower company start-up costs through faster business registration and improved access to customers and suppliers, and provides small companies with "access to new markets and opportunities by lowering the barriers of physical scale and allowing them to compete for customers who previously turned exclusively to larger suppliers." *Id*.
[32] *Id.*, p. 20.
[33] *Id.*, p. 211 (noting that "across all locations, only approximately 1% of physician offices face a connectivity gap.")
[34] Cari Tuna, Jessica E. Vascellaro and Pui-Wing Tam, *Tech Sector in Hiring Drive*, Wall Street Journal, April 16, 2010, p. A-1 (*WSJ Article*) (available at: http://online.wsj.com/article/SB10001424052702304628704575186362957042220.html) (visited April 16, 2010) (*WSJ Article*).
[35] *WSJ Article*.

One recent study concludes that direct investments in broadband infrastructure between 2003 and 2009 created some 434,000 jobs; and over the next five years, the same process should produce more than 509,000 more jobs.[36] Another recent publication by Dr. Robert J. Shapiro emphasizes, each dollar invested by broadband providers "creates about twice as many jobs as each dollar invested by the content providers."[37]

Other groups, particularly minorities and working women, express deep reservations about the impact the Commission's proposed rules on the tremendous job creation capabilities of the Internet. The Central California Hispanic Chamber of Commerce notes that broadband technology "is an economic growth catalyst," and urges the Commission to focus less on its proposed rules – which it believes "threatens to stifle much-needed investment and increased deployment – and more on broadband deployment to rural areas.[38] The National Association for Moms in Business notes the "importance of a broadband connection in helping working moms do it all." It goes on to point out that since "60 million mothers work, flexible solutions like self-employment and telework are welcome to help busy moms manage a work-life balance."[39] Each of these groups mentioned, and countless others, uniformly express concern "about the consequences that the FCC's Open Internet Notice of Proposed Rulemaking could have on the millions of entrepreneurs who rely on broadband for their livelihood."[40]

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[36] Robert W. Crandall and Hal J. Singer, *The Economic Impact of Broadband Investment*, pp. 2-3, February 23, 2010 (available at: http://www.broadbandforamerica.com/blog/broadband-america-study-shows-importance-investment) (visited March 31, 2010).
[37] Dr. Robert J. Shapiro, *Broadband and American Jobs*, p. 1 (March 4, 2010) (available at: http://ndn.org/blog/2010/03/broadband-and-american-jobs) (visited March 31, 2010).
[38] *Comments of the Central California Hispanic Chamber of Commerce*, p. 1.
[39] *Comments of the National Association for Moms in Business*, p. 1.
[40] *Id.*, p. 2. *See also*, *Comments of East Chicago Mayor George Pabey*, p. 1 (stating that "[n]ow is not the time to do anything that would discourage Internet companies
from investing in America."); *Comments of the Johnson County Board of Commissioners*, p. 1 (urging the Commission to "avoid implementing any regulations" that could impede investment); *Comments of North Chicago Mayor Leon Rockingham*, p. 1 (stating that "[t]o over-regulate Internet and wireless now would harm an industry

The comments submitted in the initial round of this proceeding are further testament to the tremendous success story of the Internet in the United States. The prevalent acknowledgement of the vibrancy in today's Internet ecosystem under today's policies presents a high bar to those calling for changes to the current regulatory structure. The existing record evidence should give pause to the Commission as it considers whether to change a regulatory environment that has been so successful for consumers and our economy, and that has produced so much innovation so quickly, in favor of a regime that would undermine this success.

III. MANY COMMENTERS CORRECTLY ASSERT THAT THE COMMISSION'S EXISTING PRINCIPLES ARE SUFFICENT FOR ENSURING THAT THE BROAD INTERNET ECOSYSTEM CONTINUES TO THRIVE AND INNOVATE

The acknowledgement of such a robust and diverse Internet ecosystem begs the question, 'How did we get here?' The resounding answer in numerous comments emphasizes the critical role the Commission's light-touch regulatory approach has played in creating this thriving Internet ecosystem. This approach was best summed by the words of former Commission Chairman William Kennard who characterized the Commission's decision *not* to regulate the Internet in general, or broadband Internet access in particular, as "the best decision government ever made with respect to the Internet."[41]

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that is expanding and hiring."); *Comments of the Missouri Black Legislative Caucus*, p. 1 (stating the Commission's 'light touch' regulatory approach results in investment that "brings jobs to communities large and small . . . helps entrepreneurs start small business . . . [and] ushers in opportunities for minority-owned businesses, families and students alike."); *Comments of the Latin Chamber of Commerce of Nevada*, p. 2 (expressing its concern "that the results of these rules will be anything but neutral and will increase costs for small businesses and individuals.").

[41] William Kennard, *The Road Not Taken: Building a Broadband Future for America*, FCC (June 15, 1999), http://www.fcc.gov/Speeches/Kennard/spwek921.html (visited March 29, 2010).

Numerous comments emphasize how the Commission's "vigilant restraint" has supported the robust, flourishing, ever-expanding and "open" Internet that it seeks to preserve.[42] CCIA states that the open Internet today is "thriving in America," as the entire ecosystem has "burgeoned to meet longstanding consumer and business demand;"[43] and it attributes this success to "Congress's and the Commission's moderate regulatory approach paired with its measured responses to demonstrated malfeasance."[44]

Many emphasize how Congress and the Commission repeatedly determined that the potential adverse effects of imposing a prophylactic regulatory regime on broadband service providers outweighed any potential benefits. Indeed, several highlight the language in the Telecommunications Act of 1996 where Congress established that "[i]t is the policy of the United States . . . 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*."[45]

As the Commission grapples with the consideration of its proposed rules, it faces a stark challenge – noted throughout the record – of attempting to regulate an ecosystem characterized by rapid changes in technology, shifting consumer preferences and constantly evolving

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[42] *See e.g.*, NCTA Comments, p. 17 (voicing its opposition to the Commission proposal to "abandon the policy of vigilant restraint that has until now supported the robust, flourishing, ever-expanding and 'open' Internet that it seeks to preserve."); *NAM Comments*, p. 3 (stating that "A major factor in the success of the Internet is the government's light regulatory touch."); Comments of the Independent Telephone & Telecommunications Alliance (ITTA), p. 5 (concluding that regulation "should be reserved for instances in which the market fails to provide adequate protection, and noting the Commission's recognition of "the need for a 'hands-off' approach to regulation."); *ComptTIA Comments*, p. 5 (stating that the Commission's principles are "already working in the marketplace."); *Comments of the National Rural Health Association*, p. 1 (stating its belief that "the existing principles are sufficient to allow proper management of broadband networks while deterring unwanted behavior by the service providers."); *Comments of the National Telecommunications Cooperative Association*, p. 2 (concluding that the Commission's existing principles "will help to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.").
[43] *CCIA Comments*, p. 1.
[44] *Id.*
[45] 47 U.S.C. § 230 (emphasis added). *See e.g.*, *Comments of CTIA*, p. 23; *GSM Association Comments*, n. 23; *ITTA Comments*, p. 2; *NCTA Comments*, pp. 2-3; *AT&T Comments*, p. 18; *Bright House Networks Comments*, p. 3; *CenturyLink Comments*, p. 3; *MetroPCS Communications Comments*, p. 31; *Qwest Comments*, p. 57; *SureWest Comments*, p. 12; *Verizon Comments*, p. 100.

opportunities for businesses and consumers. As the Commission stated in its National Broadband Plan "[t]echnologies, costs and consumer preferences are changing too quickly in this dynamic part of the economy to make accurate predictions."[46] Elsewhere the Commission notes the "need to recognize that government cannot predict the future," since "[m]any uncertainties will shape the evolution of broadband, including the behavior of private companies and consumers, the economic environment and technological advances."[47]

Based on its own observations, the Commission should preserve the flexibility afforded by its currents principles, which are fostering technological innovation, driving massive investment and creating competitive business models throughout the entire broadband Internet ecosystem – all to the benefit of consumers. The merits of just such an approach explain why 72 Democratic Congressmen submitted a joint letter to the Commission in this proceeding, urging it to "reiterate, and not repudiate, its historic commitment to competition, private investment and a restrained regulatory approach."[48]

Alcatel-Lucent, which helped formulate and submit the Connectivity Principles to the Commission in 2003 through its involvement in the High Tech Broadband Coalition, maintains that the Commission's record lacks "any compelling evidence that the existing four principles are inadequate."[49] It expresses concern that the Commission's adoption of these principles as

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[46] *National Broadband Plan*, p. 42.
[47] *Id.*, p. 5.
[48] Joint Letter from Members of Congress, to Commission Chairman, Julius K. Genachowski, dated October 15, 2009 (available at: http://fjallfoss.fcc.gov/ecfs/document/view.action?id=7020396354) (visited March 31, 2010).
[49] *Alcatel-Lucent Comments*, p. 4. *See also*, *GSM Association Comments*, p. iii (urging the Commission not to adopt its proposed regulations citing the "lack of evidence of market failure."); *ITTA Comments*, p. 4 (stating that "[t]here is no evidence to support the type of intrusive regulations the Commission proposes."); *NCTA Comments*, p. 5 (concluding that "[t]here is no evidence of a "discrimination" problem that is harming openness and innovation on the Internet and warrants a rule."); *Telecommunications Industry Association (TIA) Comments*, p. ii (stating that "[g]iven the lack of any real compelling evidence of misconduct under the Commission's current regulatory regime, there is little need to tighten the regulatory environment in the name of preserving the open Internet."); *Center for Individual Freedom Comments*, p. 8 (pointing out that "Net Neutrality advocates cannot cite factual evidence of any

prescriptive rules could have "significant, negative consequences on the very innovation and investment the Commission seeks to protect."[50]

Additional commenters note that the current Broadband Policy Statement is "suited aptly" to the current broadband marketplace, since it "establishes broad guidelines that can accommodate with flexibility the evolving broadband Internet market."[51] The existing principles, coupled with existing statutory authority and general antitrust law are more than sufficient to address potential concerns as they arise. This same conclusion was reached by several other commenters reflecting a broad range of interests.[52]

Other commenters urge the Commission to carefully consider the international impact of any decision in this proceeding. Nippon Telegraph and Telephone Corporation (NTT), for example, notes that the global nature of the Internet "ensures that the Commission's actions will have broad effects worldwide."[53] NTT goes on to state that any direct regulation of the Internet by the Commission may "encourage interventionist Internet manipulation by other nations – some with little or no commitment to openness, competition or free speech."[54] Telefonica, S.A. (Telefonica), expresses concerns about the regulation of a "complex system in continuous

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substantive market-wide failure."); *Competitive Entertprise Institute Comments*, p. 7 (stating that the Commission "hasn't provided fact-based evidence of market failure."); *Heritage Foundation Comments*, p. 8 (concluding that "in the absence of evidence of abuse, new regulations are not required."); *Information Tehcnology and Innovation Foundation*, p. 27 (concludling that "evidence that the contemporary *status quo* harms the citizenry, society, or the economy is sorely lacking, so there is little justification to move aggressively into the Internet access marketplace with six guns blazing.") (emphasis in original).

[50] *Alcatel-Lucent Comments*, p. 4.

[51] *ITTA Comments*, p. 15.

[52] *See e.g.*, Comments of the National Rural Health Association, p. 1 (stating its belief that "the existing principles are sufficient to allow proper management of broadband networks while deterring unwanted behavior by the service providers.); Charter Comments, p. 4; Cox Communications Comments, pp. 4 – 7; Comments of Alcatel-Lucent, p. ii (stating that the Commission "should continue to rely on its existing principles to protect consumers."); CenturyLink, pp. 15 – 16; Qwest Comments, p. 9 (stating that the "current Internet Policy principles have been widely embraced and have proved to be an adequate policy tool for the Commission.").

[53] *NTT Comments*, p. 2.

[54] *Id.*

evolution and changing characteristics," for the purpose of solving "ill-defined or hypothetical problems."[55] Telefonica concludes that replacing flexible principles with prescriptive regulation, "could hinder the development of the Internet and hold back innovation and the deployment of new communications infrastructure."[56]

Ultimately, the Commission's proposed rules appear to be a solution in search of a problem. The most jarring evidence of this is that of the nearly 1,000 comments filed in this proceeding (consisting of over 10,000 pages in aggregate) only two significant instances of network discrimination are mentioned.[57] In both instances, the Commission quickly resolved the issues through its current principles and existing statutory framework.

IV. SOME COMMENTS IN THE RECORD MISCONSTRUE, OR INACCURATELY ADDRESS, ISSUES OF CENTRAL CONCERN IN THIS PROCEEDING

Based on the volume of contents received, and the diversity of parties represented, there is strong interest in the Commission's proceeding. While the vast majority of commenters in this proceeding demonstrate their depth of experience and knowledge in these issues, certain comments submitted into the record misconstrue or inaccurately address issues of central concern in this proceeding. In order for the Commission to ensure that it is working with accurate information as it formulates a response, USTelecom feels obliged to set the record straight on some of the more inflammatory and wholly inaccurate submissions.

In particular, the submission by Free Press is rife with hyperbole, riddled with inaccuracies and lacking in any serious factual analysis. Almost one quarter of Free Press's submission – relating to its view of the "true" relationship between open Internet regulation and

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[55] *Telefonica Comments*, pp. 3 – 4.
[56] *Id.*, p. 9.
[57] Most of the commenters calling for prescriptive regulation reference Madison River Communications' blocking of VoIP and complaints regarding Comcast's network management practices.

investment – merely regurgitates a previous study that was referred to by one economist as "flimsy and self-serving," and reflective of a "lack of competence in empirical analysis."[58] In response to the same report, Larry Darby, a former Chief of the Commission's Common Carrier Bureau, stated that many of Free Press's statements "lack foundation in investment theory, principles or practice" and "fly in the face of common sense," and he concluded that any "intelligent policy maker can safely ignore its principal conclusions."[59]

To begin with, Free Press asserts that ISPs investment decisions are not negatively impacted by network neutrality.[60] Its "analysis" rests on a simplistic comparison of AT&T's aggregate investment levels before and after its merger with Bell-South. The Commission's order approving the merger included strictly time-limited conditions imposing neutral network obligations on the merging companies. As noted by others, the crude approach adopted by Free Press fails to take into account a host of other factors that would shed a fairer light on investment rates. Indeed, elsewhere in its comments, Free Press identifies six factors outside of regulatory environment that it claims impact service provider investment: expectations about demand, supply costs, competition, interest rates, corporate taxes, and general economic confidence.[61]

Nevertheless, in its analysis Free Press attributes *all* changes in AT&T's investment decisions based on the presence of a *single*, voluntary and time-limited merger commitment.[62] As noted by former Bureau Chief Larry Darby, in his critique of the Free Press Analysis,

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[58] George S. Ford, PhD, Phoenix Center For Advanced Legal & Economic Public Policy Studies, *Finding the Bottom: A Review of Free Press's Analysis of Network Neutrality and Investment*, p. 1, October 29, 2009 (available at: http://www.phoenix-center.org/perspectives/Perspective09-04Final.pdf) (visited April 1, 2010) (*Ford Analysis*).
[59] Larry F. Darby, American Consumer Institute, The Informed Policy Maker's Guide to Regulatory Impacts on Broadband Network Investment, pp. 1, 3, November 11, 2009 (available at: http://www.theamericanconsumer.org/wp-content/uploads/2009/11/fp-report1.pdf) (visited April 1, 2010) (*Darby Analysis*).
[60] *Free Press Comments*, p. 23 – 30.
[61] *Id.*, p. 13.
[62] *Ford Analysis* , p. 2.

"[i]ncreases in AT&T's investment during the cited period were relatively small by historical standards and it might very well have increased more, but for the net neutrality conditions. Further, the behavior of AT&T investment during that period was subject to myriad sources of incentives and constraints that very likely surpassed the merger conditions in their impact on capital expenditures."[63] He ultimately concludes that the Free Press analysis amounts to nothing more than "pure conjecture."[64]

Moreover, Free Press's unfounded assertion ignores the elephant in the room: *the billions of dollars invested by all members of the ICT sector to deploy broadband technology absent Commission regulation*. Volumes have been submitted to the Commission in this and other proceedings that document this massive and unprecedented investment in broadband infrastructure.[65] Yet Free Press makes only passing mention of the "relatively inexpensive cost" associated with cable upgrades and the "relatively higher level of upfront investment" associated with fiber deployment.[66] In fact, in a single contradictory statement, Free Press seems to reject its own thesis when it claims that only by reversing the past decade of hands-off regulatory approach to the Internet can the Commission be sure to continue the level of investment throughout the entire Internet ecosystem – a level of investment characterized by Free Press as "[u]nprecedented."[67]

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[63] *Darby Analysis*, p. 6.
[64] *Id.*, p. 7.
[65] *See e.g.*, *USTelecom Comments*, pp. 4 – 28; *GSM Association Comments*, pp. 9-10; *Independent Telephone & Telecommunications Alliance Comments*, pp. 15-16; *Comments of ADTRAN, Inc.*; pp. 9 – 15; *AT&T Comments*, pp. 80 – 87; *Bright House Network Comments*, pp. 4 – 6; *CenturyLink Comments*, pp. 3 – 15; *See CWA Comments, Exhibit A*; *Ericsson, Inc. Comments*, pp. 27 – 29; *MIT Comments*; pp 17 - 20.
[66] *Free Press Comments*, p. 14. For the record, since passage of the of the Telecommunications Act of 1996, cable operators have invested more than $150 billion to upgrade and rebuild their systems (NCTA Comments, p. 21). Similarly, all broadband providers invested $64.2 billion in 2008 alone to deploy and upgrade their networks. (USTelecom Comments, p. 6).
[67] *Id.*, p. 43.

Free Press also makes the absurd argument that the absence of Network Neutrality rules will provide ISPs with a "strong incentive" to "reduce investment and make congestion commonplace," for the sole purpose of extracting revenues from content providers willing to pay to avoid traffic delays.[68] Of course, Free Press provides not a single scintilla of evidence to support its claim.[69] Indeed, the fact of the matter is, broadband providers have a strong incentive to continue to increase investment and provide high-quality service. Further investment and good service equates to more customers and buttress the long term reputation of the broadband service provider.

Elsewhere, Free Press asserts that the Commission must establish clear, unambiguous rules against "all" discrimination, stating that "*[a]ny discrimination slows or blocks some traffic*."[70] Using the logic espoused by Free Press, the recent explosion in the deployment of content distribution networks (CDNs) – which alone currently account for 10% of all Internet traffic[71] – must surely be wreaking havoc on the delivery of Internet traffic. Of course, Free Press is not calling for government intervention to neutralize this traffic "disparity" currently taking place on Internet networks – nor should it. Numerous parties have thoroughly debunked the notion that prioritized networks are harmful to the Internet ecosystem.[72]

As AT&T notes in its comments, "passive management of the IP platform would produce non-neutral outcomes among the packets associated with different applications, because it would

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[68] *Free Press Comments*, pp. 4, 14.
[69] In making this statement, Free Press offers no underlying factual support whatsoever in support of its conclusion.
[70] *Free Press Comments*, p. 75 (emphasis in original).
[71] Annual Report by the ATLAS Internet Observatory, Arbor Networks Inc., University of Michigan, Merit Networks, Inc., p. 15 (available at: http://www.eecs.umich.edu/eecs/about/articles/2009/Observatory_Report.html (visited April 1, 2010).
[72] *See e.g.*, George Ou, *Debunking the myth that prioritized networks are harmful*, Digital Society website (available at: http://www.digitalsociety.org/2009/11/debunking-the-myth-that-prioritized-networks-are-harmful/) (visited March 23, 2010).

allow applications with 'selfish' protocols to trump those with 'polite' protocols in the contest for finite bandwidth."[73] This view is shared by Dr. William Lehr and his colleagues from the Massachusetts Institute of Technology (MIT), who note that "[a]buse is a two-way street."[74]

Dr. Lehr notes that certain application designers "can try to defeat the commonly understood 'rules of the road' in order to improve their performance at the expense of other applications."[75] Dr. Lehr and his colleagues acknowledge the "growing consensus" within the Internet Engineering Task Force (IETF) – the principle standardization body for the Internet – is that "ISPs need to play a *bigger* role in traffic management to deal both with issues of abuse *and simple usage*."[76] Ultimately, Dr. Lehr and his colleagues are "not convinced that the potential for abusive discrimination is manifest enough to require a rule."[77] As it moves forward in this proceeding, the Commission must be guided by evidence, not rhetoric.

V. SUBSTANTIAL QUESTIONS REMAIN AS TO WHETHER THE COMMISSION HAS SUFFICIENT LEGAL AUTHORITY TO IMPOSE BROAD NEW RULES REGULATING THE INTERNET

With the recent decision of the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) in *Comcast Corporation v. Federal Communications Commission*,[78] it has become clear that the Commission's discussion of its legal authority, occupying a scant four paragraphs in its Notice, is insufficient. Prior to the Court of Appeals decision, commenters raised a host of legal questions, including serious Constitutional issues and debate about the scope of the Commission's jurisdiction. In addition, calls for regulating

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[73] *AT&T Comments*, p. 39.
[74] Comments of David Clark, William Lehr, and Steve Bauer, Massachusetts Institute of Technology, p. 18 (*MIT Comments*).
[75] *MIT Comments*, p. 18.
[76] *Id.*, p. 19 (emphases added).
[77] *Id.*, p. 22.
[78] *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. April 6, 2010).

broadband Internet access service as a Title II service for the first time would be an unprecedented policy and economic shift that lacks any legally sustainable foundation. As it examines the record in this proceeding, and assesses the impact of the Court of Appeals decision, it has become clear that the Commission must conduct a more thorough and candid assessment of its legal authority to implement its proposed rules. Further, the record to date should give the Commission pause. There is compelling evidence suggesting that the Commission faces substantial Constitutional hurdles and lacks the necessary statutory authority to adopt its proposed rules.

A. The Recent Court of Appeals Decision Confirms that the Commission Has Conducted an Insufficient Analysis of Its Legal Authority Regarding Adoption of Its Proposed Rules.

Just days before the scheduled filing deadline for reply comments in this proceeding, the Court of Appeals released its opinion in *Comcast Corporation v. Federal Communications Commission*.[79] In it, the Court of Appeals concluded that the Commission "cannot support its exercise of ancillary authority" over the network management practices at issue in that case.[80] It remains unclear from the Court of Appeal's opinion the extent of existing statutory authority the Commission has to regulate network management practices.

While the Court of Appeals flatly rejected certain of the Commission's jurisdictional arguments, the opinion did not, consistent with settled precedent, rule on Commission arguments made for the first time on appeal.[81] Of course, in other areas, the Commission's legal authority may be unaffected by the Comcast decision. For example, the Commission would appear to

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[79] *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. April 6, 2010).
[80] *Id.*, p. 3.
[81] In addition, the Court of Appeals noted that the Commission's own prior decision with respect to Section 706 of the Communications Act barred its assertion of jurisdiction under that section. *Id.*, pp. 30 – 31.

retain broad authority regarding reforming the current Universal Service Fund given the explicit grant of authority in Section 254 of the Communications Act.[82]

The "four short paragraphs on legal authority" that the Commission relies on its Notice for legal authority, have clearly been rendered inadequate by the Court of Appeals opinion.[83] The Commission would be unwise to continue along its current course, by adopting prescriptive rules for the Internet ecosystem.

Moreover, there are a host of other Constitutional and statutory authority issues raised by numerous commenters, largely unaddressed in the Commission's Notice. Many commenters raise substantial First and Fifth Amendment concerns arising from the Commission's proposed regulations, yet the Commission's Notice only makes passing mention of First Amendment concerns,[84] and no mention of Fifth Amendment issues. It is therefore difficult for stakeholders in this proceeding to analyze the Commission's understanding of its own legal authority with respect to its proposed rules.

The Court of Appeal's opinion, combined with the Commission's scant consideration of other legal issues in this proceeding, has created a record that is simply too terse to provide commenters with a reasoned basis for assessing Commission jurisdiction in this area. Without this discussion, the Notice fails to give stakeholders the information they need to make an accurate and thorough assessment of the Commission's rationale for exerting authority, or how the Commission intends to avoid Constitutional questions. As it seeks to implement the important policy proposals contained in its highly ambitious National Broadband Plan, the

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[82] *See, e.g.*, Letter from Gary Phillips, AT&T, to Marlene Dortch, FCC, GN Docket No. 09-51 (April 12, 2010).
[83] *CenturyLink Comments*, p. 18.
[84] *Notice*, ¶ 116 (asking whether the Commission's proposed rules would "impose any burdens on access providers' speech that would be cognizable for purposes of the First Amendment."). Elsewhere the Commission concludes – without any detailed analysis – that "[b]ecause broadband Internet access service providers are not government actors, the First Amendment does not directly govern their actions."). *Id.*, ¶ 75.

Commission should avoid engaging in the significant legal experimentation that adoption of its open network proposed rules would necessitate.

B. It Would be Unprecedented for the Commission to Classify Broadband Internet Access Under Title II.

In the wake of the Comcast decision, calls have intensified to "*re*classify" broadband Internet access service[85] as a "telecommunications service" regulated under Title II. But calling for "*re*classification" is misleading. Broadband Internet access service has **never** been subject to legacy Title II regulation by the Commission nor did Congress ever intend that it would be. Classifying broadband Internet access service as a Title II service for the first time would be an unprecedented policy and economic shift that lacks any legally sustainable foundation.

Those advocating this unprecedented and unwise move ignore history and defy common sense. They substitute rhetoric for reality by harkening "back" to a mythic Arcadia in which the Internet once flourished under a Title II regime. These halcyon days supposedly ended when a revisionist FCC departed from this wise path and turned down a deregulatory road that now threatens to destroy the open Internet as we know it.

Nothing could be further from the truth. In the history of Commission regulation, the integrated broadband Internet access service sold to the public has never been regulated under Title II, whether the Internet access service was provided by a wireline, cable, wireless, or broadband-over-powerline service provider.

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[85] The Commission provided a definition of Internet access services in *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress (1998 Report to Congress), 13 FCC Rcd 11501, 11516-17 ¶ 33 (1998) ("Internet access services . . . alter the format of information through computer processing applications such as protocol conversion and interaction with stored data.").

Instead of rhetoric, it is worth taking the time to look at the Commissions decisions regarding the intersection between information services and telecommunications and at the rationale underpinning these decisions. This precedent precedes and explicates the definitions in the Telecommunications Act of 1996 of "telecommunications," "telecommunications service" and "information service."[86] The Commission has consistently interpreted these definitions, and the Commission's view has been affirmed by the courts and left undisturbed by the Congress ever since.

From its earliest pronouncements about these definitions in the 1996 Act,[87] the Commission understood Congress to have followed the well-established definitional path that the agency and the courts had set more than a dozen years before the 1996 Act, rather than to have created new (and potentially ambiguous) definitional categories. As the Commission stated in its 1998 Report to Congress:

> Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our *Computer II* proceeding and the definitions of "telecommunications" and

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[86] The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Communications Act § 3(46), 47 U.S.C. § 153(46). "Telecommunications" is defined in turn as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Communications Act § 3(43), 47 U.S.C. § 153(43). "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." Communications Act § 3(20), 47 U.S.C. § 153(20).

[87] *See* 1998 Report to Congress, citing *United States v. Western Electric Co*., 673 F. Supp. 525 (D.D.C.1987) (*1998 Report to Congress*), *and* 714 F. Supp. 1 (D.D.C. 1988), *rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990). The Commission has confirmed that the two terms – enhanced services and information services – should be interpreted to extend to the same functions. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56 ¶ 102.

"information service" developed in the Modification of Final Judgment breaking up the Bell system.[88]

In its Computer Inquiry decisions[89] the Commission first looked at the relationship between the nascent computer industry and communications. With the development of remote computing and timesharing, telecommunications had becomes the means by which data processing capabilities were delivered to the end-user. From 1966 to 1980, the Commission struggled to determine how to treat the interrelationship between these two services.

In Computer I, the Commission recognized that computer services could be characterized either as data processing, message switching or a "hybrid service "comprised of both elements. In Computer I, the Commission determined that data processing would remain an unregulated Title I service information service, while message switching was best regulated under Title II as a traditional common carrier service. The Commission also recognized that there were "hybrid services" – in some, data processing dominated, while in others telecommunications was more prevalent. But the Commission did not provide a line of demarcation between these two hybrid services. Instead, it left the distinction to be determined on a case-by-case basis and declined to provide any further guidance.[90]

In Computer II, the Commission found that with the incorporation of digital technology into the telephone network, and voice and data no longer provided over separate transmission

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[88] *1998 Report to Congress*, at ¶ 21.
[89] *Regulatory & Policy Problems Presented by the Interdependence of Computer and Communications Services & Facilities* (Computer I), 7 FCC 2d 11, 13 (1966) (*Notice of Proposed Rulemaking*); 28 FCC 291(1970) (*Tentative Decision*); 28 FCC 2d 267 (1971) (*Final Decision*), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973); *Amendment of Section 64.702 of the Commission's Rules and Regulations* (Computer II), Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (*Tentative Decision)*, 77 FCC 2d 384 (1980) (*Final Decision*), *recon*., 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon*., 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).
[90] *See generally*, Computer I *infra*.

links, it was impossible to determine where to draw the line between information and telecommunications services. Instead, the Commission defined two separate and mutually exclusive categories "basic" and "enhanced" services. A "basic" service was an offering made on a common carrier basis of pure "transmission capacity for the movement of *information*."[91] This bandwidth could be used to carry analogue or digital "voice, data, video, facsimile," or other types of information.[92]

In contrast to "basic service," an "enhanced service was "any offering over the telecommunications network which is more than a basic transmission service."[93] In other words, everything else. Enhanced services involve "communications and data processing technologies . . . ***intertwined*** *so thoroughly as to produce a form different from any explicitly recognized in the Communications Act of 1934.*"[94] The Commission further explained that enhanced services included services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that "act[] on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[95] While in an enhanced service information is carried to its destination by means of telecommunications, that does not make the enhanced service itself a telecommunications service.

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[91] *Computer II Final Decision*, 77 FCC 2d at 419, ¶ 93. *See also id*. at 420, ¶ 97(defining basic transmission service as "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information") (emphasis added).
[92] *Id.* at 419 ¶ 94.
[93] *Id.* at 420-21 ¶ 97.
[94] *Id.* at 430 ¶ 120 (emphasis added).
[95] *Id.* at 387 ¶ 5. *See also Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, Order, 10 F.C.C. Rec. 13,770-13,774 (1995) (noting that, among the services that the Commission has treated as enhanced are voice mail, e-mail, fax store-and-forward, interactive voice response, protocol processing, gateway and audio-text information services).

The Commission recognized that some "enhanced services" have a greater element of telecommunications than others but explained that that there was no principled way of parsing the difference. No regulatory scheme would be able to "rationally distinguish and classify enhanced services as either communications or data processing."[96] Trying to do so would "result in an unpredictable or inconsistent scheme of regulation."[97]

The Commission's treatment of the transmission component of information services provided by wireline carriers in the Computer Inquiry decisions deserves separate discussion because it is so frequently misunderstood and mischaracterized. As the Commission explained in the *Cable Modem Declaratory Ruling*, at the time of the Computer Inquiries when the transmission component of DSL was first required to be provided as a separate, tariffed telecommunications service, "the core assumption … was that the *telephone network* [was] the primary, if not exclusive, means through which information service providers [could] gain access to their customers."[98] For that reason, the Commission required wireline providers to strip out transport component to be sold separately as a regulated as a Title II service. However, the management functions of handling the traffic through the transmission pipe were always

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[96] *Computer II* at ¶ 113.
[97] *Id.* at ¶110.
[98] *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, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*) citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019(2002) (*Wireline Broadband NPRM*) ¶ 36. When the Commission addressed this same question in the Cable Modem Order, it declined to require cable modem service providers to strip out a "transmission component" from their integrated broadband Internet access service and offer it separately from their provision of broadband Internet access service. This decision was affirmed by the Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (*Brand X*). In keeping with its decision in the Cable Modem Declaratory Ruling, shortly after Brand X, the Commission leveled the playing field between wireline and cable broadband Internet access providers by eliminating the requirement for wireline companies to separate out from their integrated broadband Internet access service the transport element of that service and offer it as a stand-alone "telecommunications service."

considered a Title I service from the time that computer services were classified under Title I and the requirement to sell transmission separately had nothing to do with the distinction between basic and enhanced services.[99]

And, as we explain in further detail below, when, shortly after *Brand X*, the Commission examined the proper classification of wireline broadband Internet access service, it clarified that "[w]ireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."[100] The Commission also found that the monopoly conditions that had led to the requirement in the Computer Inquiry decisions that the transmission component be stripped out and sold separately were long gone.[101]

In its 1998 Report to Congress, the Commission for the first time applied the Computer II framework specifically to Internet access service, demonstrating how the 1996 Acts definitions of "telecommunications service," "telecommunications," and "information service" paralleled and grew out of the Commission's Computer II decision. As the Commission stated, "Congress intended to maintain a regime in which information service providers are not subject to

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[99] As the Court explained in *Brand X*, "[i]n the *Computer II* rules, the Commission subjected facilities-based providers to common carrier duties not because of the nature of the 'offering' made by those carriers, but rather because of the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the 'bottleneck' local telephone facilities they owned." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 996, 125 S.Ct. 2688, 2708 (2005).

[100] 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 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, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 ¶ 9 (Wireline Broadband Internet Access Service Order).

[101] *Id.* at ¶¶ 18-19.

regulation as common carriers merely because they provide their services 'via telecommunications.'"[102]

In the 1998 Report, the Commission found that Internet access service is appropriately classified as an information service, because the provider offers a single, integrated service, Internet access, to the subscriber.[103] The service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications, thereby offering "end users information-service capabilities that are *inextricably intertwined* with data transport."[104]

In its Computer Modem Declaratory Ruling, the Commission drew directly on this framework in making its decision whether that service should be classified as information service, a question left open in the 1998 Report to Congress when a cable provider offers Internet access service over its own facilities. The Commission maintained the same analytic framework. As the Commission stated:

> The cable operator providing cable modem service over its own facilities, is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service. Our analysis, like the relevant statutory definitions, focuses …on the single, integrated information service that the subscriber to cable modem service receives.[105]

The Commission noted that cable modem operators do not offer a separate telecommunications service.[106] It declined to require providers of cable modem service to strip out the transport element from the integrated broadband Internet access service offering provided to the customer

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[102] *1998 Report to Congress*, ¶ 13.
[103] *Id.* at ¶ 21. *See also id.* at ¶¶ 73-80.
[104] *Id.* at ¶ 80 (emphasis added).
[105] Cable Modem Declaratory Ruling at ¶ 41.
[106] *Id.* at ¶ 40 ("We are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public. Further, there is no Commission requirement that such an offering be made.").

and offer it as a separate "telecommunications service." To do so, in the Commission's view, would be " in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required."[107]

In its Wireline Broadband Internet Access Order,[108] the Commission followed this consistent approach to defining broadband Internet access service. Once again, the Commission explained:

> the term 'Internet access service' refers to a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups. Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission *such that the consumer always uses them as a unitary service*.[109]

Because wireline broadband Internet access service "*inextricably combines* the offering of powerful computer capabilities with telecommunications," the Commission concluded that it falls within the class of services identified in the Act as "information services."[110]

The Commission recognized that the Computer II requirement that wireline carriers provide the transport element of information service as a stand-alone "telecommunications

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[107] *Id.* at ¶ 42.
[108] 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 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, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, 14855, para. 1 (2005) (Wireline Broadband Internet Access Order).
[109] *Id.* at ¶ 9 (emphasis added).
[110] Wireline Broadband Order ¶ 15 (emphasis added).

service" was completely outmoded[111] In the interim, cable modem Internet access services had been classified under a different regulatory framework, a decision affirmed by the Supreme Court just months before the Wireline Broadband Internet Access Service Order. To establish parity "across platforms by regulating like services in a similar functional manner,"[112] the Commission determined that "the use of the transmission component as part of a facilities-based provider's offering of wireline broadband Internet access service to end users using its own transmission facilities is 'telecommunications' and not a 'telecommunication service' under the Act."[113] The Commission left facilities-based wireline carriers free to offer broadband Internet access transmission on a common carrier or non-common carrier basis.[114]

The Commission's subsequent declaratory rulings with respect to broadband over power line Internet access service and wireless broadband Internet access service provide further examples of the Commission's consistently held determination that broadband Internet access service as provided to the consumer is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission and is therefore properly classified as an information service.

The facts plainly stand in the way of any attempt to rewrite the Commission's decisions that cable modem, wireline, wireless and broadband-over-powerline Internet access services are Title I information services. The Commission cannot persuasively argue that the integrated broadband Internet access service offered to the consumer, in which intelligence resides both in the core network and the access layers and complex traffic management, security, and other data

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[111] *See id.* at ¶ 1 (Those regulations were created over the past three decades under technological and market conditions that differed greatly from those of today.). *See also id.* at ¶ 42.
[112] *Id.* at ¶ 1.
[113] *Id.* at ¶ 5.
[114] *Id.* at ¶ 6.

processing functionalities are "inextricably interwoven" with the transmission of information has a separate "pure transmission component."

Were this Commission to repudiate this long-held view and venture into the uncharted territory of classifying broadband Internet access service under Title II, it would have ***no*** precedent to rely upon. The Commission would have to explain how (despite all its prior analysis to the contrary) a service could simultaneously be both an "information service" and "telecommunications service."

In the world of IP-based services, it would create an uncertainty principle of enormous legal and practical consequence. If the integrated broadband Internet access service delivered to the consumer is suddenly classified as a "telecommunications service," then where would the Commission now draw the line between a Title I "information service" and a Title II "broadband Internet access service"? This Commission would be painting itself into the same regulatory corner that the FCC found itself after its Computer I decision, looking for some principled way of determining where (the now Title II) broadband Internet access service ends and the Title I information service begins. Either the statute's definition of "information service" would become a null set or the Commission would have to find some limiting principle that leaves the "information service" definition with some discernable contours. This would also raise a substantial question whether such a radical shift is in keeping with the commonly understood meaning of these definitions as the Commission has consistently interpreted them since the passage of the 1996 Act, an interpretation which the Commission has previously declared is supported by the legislative history of the 1996 Act.

C. There Are Substantial First Amendment Concerns Surrounding the Commission's Proposed Rules.

Numerous comments focus on the significant First Amendment concerns that arise under the Commission's proposal. The Commission's imposition of broad rules preventing private decision-making about what content is communicated to Internet users, and the manner in which it is presented, would be exerting an unprecedented degree of control over a private marketplace for speech.[115]

The framework for this debate was succinctly articulated when it was noted that while many stakeholders – including the Commission[116] – seek to justify prescriptive rules on the theory that they further First Amendment rights or values, the First Amendment "does not regulate private parties – it protects them," and only comes into play "when the government imposes restrictions affecting speech."[117] As noted by one expert in this area, arguments that government regulation will promote free speech "turns First Amendment protections on their head."[118]

The First Amendment, which states that "*Congress* shall make no law … abridging the freedom of speech, or of the press,"[119] protects against government censorship. The Commission's proposed rules would "infringe the rights of broadband ISPs, which, to the extent they provide either original or aggregated content as part of their services, are First Amendment speakers."[120]

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[115] *NCTA Comments*, p. 45.
[116] *Notice*, p. 41 (seeking comment "on whether and how codifying these principles will promote free speech.").
[117] *Verizon Comments*, p. 111.
[118] Barbara Esbin, Progress and Freedom Foundation Report, *Net Neutrality: A Further Take on the Debate*, p. 13, December 2009 (available at: http://www.pff.org/issues-pubs/pops/2009/pop16.26-net-neutrality-further-take-on-debate.pdf) (visited April 1, 2010) (*Esbin Article*).
[119] U.S. Const. amend. I. (emphasis added).
[120] *Esbin Article*, p. 14.

Broadband Internet access providers – as well as other members in the Internet ecosystem – engage in protected speech much in the same way as newspapers, publishers, and members of the media generally. As such, the proposed rules would restrict the free speech of those private parties in violation of the First Amendment.

The National Cable & Telecommunications Association (NCTA) demonstrates how the Commission's rules would significantly curtail the choices available to participants in a private marketplace for speech, and the complete absence any legitimate justification for the proposed rules.[121] Similarly, Verizon notes that the Commission's rules "could infringe broadband providers' First Amendment rights both directly, by regulating the speech in which providers engage, and indirectly, by increasing costs associated with broadband providers' means of communication."[122]

The adverse effect on First Amendment rights, which would stem from the Commission's proposed rules, would extend far beyond broadband service providers. By prohibiting content providers from entering into arrangements that would allow them to pay for improvements to their ability to reach online users, the Commission's proposed rules circumscribe the First Amendment rights of content rights holders.[123] As AT&T notes, while the Commission's prohibition on arrangements between content providers and ISPs is designed to "ensure that *other*, 'unenhanced' voices on the Internet are heard," the Supreme Court has previously concluded that, "the concept that government may restrict the speech of some elements of our

[121] *NCTA Comments*, pp. 49 – 63.
[122] *Verizon Comments*, p. 111.
[123] *NCTA Comments*, p. 52.

society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[124]

At a minimum, the Commission's proposed rules raise serious questions under a straightforward analysis of the First Amendment. The Commission's proposed rules are devoid of justification that would support narrowing free speech rights and limiting the protected speech of broadband providers and their partners, and therefore would not survive First Amendment scrutiny.

D. The Commission's Proposed Rules Constitute a Taking Under the Fifth Amendment.

Several commenters also conclude that the Commission's proposed rules would constitute a prohibited taking of private property in violation of the Constitution's Fifth Amendment.[125] In sum, the proposed rules could force network broadband providers to carry unwanted data on their physical facilities and force them to build out more bandwidth capacity in order to support third-party providers' data. As a result, network broadband providers would be forced to "surrender their property for third-party use without an opportunity for just compensation."[126]

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[124] *AT&T Comments*, p. 242 (emphasis in original) (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). *See also Meyer v. Grant*, 486 U.S. 414, 424 (1988) (same); *Tornillo*, 418 U.S. 241). In a similar vein, Verizon notes that rules "limiting potential business models or sources of revenue that are necessary for providers to fund broadband networks (and their expansion) would have such an effect. If rules were to prohibit providers from featuring paid content on their networks or providing managed or specialized services in addition to traditional Internet access or charging application and content providers for various services they might provide, they would unlawfully limit revenue needed to pay for network investment. And that type of economic burden could make it uneconomical to expand broadband coverage, thereby limiting the reach and capacity of network providers' "microphones" and thus the ability of those providers and their partners to speak." Verizon Comments, p. 114.
[125] *See e.g.*, Qwest Communications Comments, pp. 60 – 67; AT&T Comments, pp. 244 – 246, Verizon and Verizon Wireless Comments, pp. 119 – 124.
[126] *AT&T Comments*, p. 244.

There is a wealth of case law – including in the telecommunications context – demonstrating that the Takings Clause prohibits the government from compelling a party to allow physical occupation of its property without just compensation. For example, various commenters note the precedent established in *Bell Atlantic Telephone Cos. v. FCC*, where the D.C. Circuit concluded that "[t]he Commission's decision to grant [competitive access providers] the right to exclusive use of a portion of the petitioners' central offices directly implicates 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.'"[127]

Several commenters also note that the Commission's proposed rules would effect a *regulatory* taking of broadband service providers' property.[128] As Verizon notes in its comments, the Commission may not adopt rules that raise a substantial takings issue "unless Congress has expressly and specifically directed the Commission to impose such requirements, and the Commission or Congress has established a mechanism to provide just compensation for any taking."[129] Neither of these conditions is met in the Commission's current proposal, and as such, the Commission lacks the necessary authority to adopt the proposed rules.

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[127] *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), 458 U.S. at 426). *See also*, *AT&T Comments*, p. 245, *Qwest Comments*, p. 62-63.

[128] The Supreme Court has identified three factors that can be used to determine whether an administrative action impermissibly takes property. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). These factors include the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action. *Qwest Comments*, p. 65 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, at 175).

[129] *Verizon Comments*, p. 121-122.

VI. THE FCC'S PROPOSED RULES

The record in this proceeding amply demonstrates why it would be a mistake for the Commission to replace today's open and dynamic environment with a government-managed approach to innovation. New rules constraining only one set of firms in this highly competitive environment are likely to tip today's balance, to the detriment of all. Should the Commission nevertheless decide to craft regulations, it should carefully consider the record evidence detailing possible approaches. In particular, there is strong support for excluding managed services from open Internet-type regulations. In addition, there is growing consensus that any definition of network management should be broad. There is also widespread opposition to any regulations that would prohibit broadband providers from entering into mutual agreements with content providers regarding the delivery of content. Finally, the Commission should encourage industry efforts to foster and improve logical transparency efforts that apply evenly across all participants in the ecosystem. Each of these issues is discussed in greater detail below.

A. There Is Strong Support for Excluding Managed Services from Open Internet Regulation.

There is strong consensus among key stakeholders that the Commission should adopt a broad exception for managed services. Numerous commenters note that managed services can provide substantial consumer benefits, including greater competition among voice and subscription video providers, and promote increased deployment of broadband networks. With today's Internet delivering voice, video and data over a single end-user Internet connection, management of services is more necessary than ever before.

The American Cable Association (ACA), which represents predominantly smaller cable companies, identifies managed services as encompassing a "growing array" of networking and

IP-based services that are vastly different from traditional broadband Internet access.[130] ACA notes that such services – which include VoIP service, IPTV, website hosting, advertising, virtual private networks for business, institutional and government users, telemedicine and distance learning applications – "represent an important subset of services ACA members provide, from which they derive revenue, in turn, supporting further investment and innovation."[131] ACA further notes that these services deliver "palpable public interest benefits," including "more competition in video and voice service, lower cost and more robust networking, and a growing array of innovative communications and data transfer technologies for businesses, institutions, governments and schools."[132]

Several commenters encourage the Commission to do all it can to *encourage* the growth of managed and specialized services in the competitive marketplace. COMPTEL, which represents competitive communications service providers, states that by encouraging such innovation in managed services, the Commission will be "fostering competition in the development" of VoIP services and other such managed services."[133]

The National Emergency Number Association (NENA) expresses strong support for a flexible managed services approach, "because Next Generation 9-1-1 (NG9-1-1) and advanced IP-based public safety systems will involve managed networks as well as other applications and functions operating over those managed networks."[134] In a similar vein, Dr. Elizabeth Cowboy of the Via Christi Health System, notes the importance of managed services to telemedicine. She states that "[m]uch of telemedicine's advances rely on the security, timeliness and accuracy of

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[130] *ACA Comments*, p. 13.
[131] *Id.*, p. 17.
[132] *Id.*, p. 17.
[133] *COMPTEL Comments*, p. 7.
[134] *NENA Comments*, p. 5. *See also*, *Intrado Communications Inc. Comments*, pp. 2-3.

patient data transmitted over broadband networks," and that such techniques "not only rely on intelligent network management practices they require it." She views it as "unacceptable to expect or require a network provider to regard the data of a Netflix video stream equal to the data of a patient's vital signs when people's lives are at stake."[135]

While the Commission in its Notice asks "what managed services may be offered in the near future or what content, applications, or services may require enhanced quality-of-service offerings,"[136] numerous commenters note the inherent difficulty in adequately and fully defining the precise services that constitute managed services. The GSM Association says it is "unlikely that the Commission could craft an adequate definition of 'managed services' that allows for the development of innovative services and business models," since it is "impossible to predict today the many ways IP-based networks may improve efficiency and productivity tomorrow."[137]

While the Commission notes the obvious examples, such as specialized telemedicine, smart grid, or eLearning applications,[138] USTelecom agrees with the GSM Association's assessment that it is impossible to predict what future applications and services could constitute managed services. Ultimately, any Commission effort to adopt a definition of managed services based on the products and services available today will stifle the innovation necessary for tomorrow's products and services. At least one commenter notes that it is "not in a position to make such predictions and is skeptical of any parties that claim they can."[139] For this reason alone, it is imperative that the Commission exclude managed services from application of any

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[135] *Dr. Elizabeth Cowboy Comments*, p. 2.
[136] *Notice*, ¶ 150.
[137] *GSM Association Comments*, p. ii – iii.
[138] *Notice*, ¶ 150.
[139] *NTCA Comments*, p. 11.

regulations it seeks to adopt and avoid adopting a definition of managed services that is restricted to a precise set of services that are currently available.

The development and deployment of such services will almost certainly increase investment in broadband network deployment and upgrades, as competitive providers seek to differentiate their networks. Such a broad exception for managed services will foster a favorable investment environment for managed services, which will result in increased investment, innovation and deployment by competitive network providers.

B. It Is Clear that Network Management Should Be Broadly Defined.

In its Notice, the Commission recognized that an exception from any rules must be made for what it termed reasonable network management in order to ensure that providers have the ability to protect consumers from such harms as malware, spam, denial of service attacks, and from problems that would degrade users' Internet experience, such as traffic congestion and spam.[140] The Commission tentatively set out a multi-part definition of reasonable network management, but recognized that it would be impossible to catalogue all the practices that could be deemed reasonable now and into the future, given the rapid changes in technology and patterns of use.[141] Most important, the Commission recognized that there must be sufficient flexibility in any definition to ensure that providers can innovate and experiment with different models that meet changing user needs.[142]

Numerous comments have been filed emphasizing the need for flexibility and urging the Commission to adopt a broad and flexible definition of network management to give providers

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[140] *See Notice*, ¶¶ 133-140. ,
[141] *Id.* at 140 ("[W]e do not presume to know now everything that providers may need to do to provide robust, safe, and secure Internet access to their subscribers, much less everything they may need to do as technologies and usage patterns change in the future.").
[142] *Id*.

substantial latitude to determine how best to safeguard their networks and protect consumers.[143] Such commenters have advised the Commission to eschew narrow categorizations or confusing multi-part tests that could chill providers' efforts to protect consumers or to create innovative offerings that would benefit consumers.

The approach recently adopted by the European Union (EU) with respect to network management is illustrative.[144] The EU took a very different approach to network management than proposed by the Commission in this proceeding. In its Directive on Universal Service and Users' Rights,[145] the EU reinforced a strong preference for using competition policy law (*ex post* as opposed to *ex ante* regulation) to protect consumers against potential anti-competitive conduct by Internet Service Providers.[146] Rather than establishing a set of proscriptive rules, the EU determined that the best ways to ensure an open Internet were through increased transparency[147] and providing national regulatory authorities (NRAs) with the power to set quality of service standards only in instances where anti-competitive conduct occurs.[148]

The EU's approach does not ban reasonable discrimination or define reasonable network management. Instead, the revised Electronic Communications Framework permits traffic

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[143] *See, e.g. Comments of Alcatel-Lucent*, p. 24; *Comments of American Legislative Exchange Council*, pp. 1-2; *Comments of Americans for Tax Reform*, p. 4; *Comments of Consumer Policy Solutions*, p. 5; *Comments of Digital Society*, p. 3.

[144] The revised EU Framework was enacted following over eighteen months of review by the European Commission, Council of Ministers and the relevant European Parliament Committees. This approach was considered the right way to promote a key goal in the revised Framework: "the ability of end users to access and distribute information or run applications and services of their choice." *See* Directive 2009/140/EC, on a Common Regulatory Framework for Electronic Communications Networks and Services, amending Directive 2002/21/EC, O.J. vol. 52, L337/37, Article 8(4)(g).

[145] *See* Directive 2009/136/EC, on Universal Service and Users' Rights relating to Electronic Communications Networks and Services, amending Directive 2002/22/EC, O.J. vol. 52, L 337/11 *et seq*. (Universal Service Directive).

[146] *See, e.g.*, Framework Directive, Recital 5.

[147] *See* Universal Service Directive Articles 20(1)(b) and 21(3)(c) and (d.).

[148] *See* Framework Directive, Recital 34. *See also* Annex II, describing the effectiveness of the requirements for transparency and quality of service and stating that the EU would continue to monitor developments regarding net freedoms and "will invoke its existing competition law powers to deal with any anti-competitive practices that may emerge."

management practices that prioritize traffic to "allow premium high-quality services (such as IPTV) to develop."[149] The EU also permits network operators to "use procedures to measure and shape traffic on a network link so as to avoid filling the link to capacity or overfilling the link, which would result in network congestion and poor performance."[150] To address potential anti-competitive use of network management tools, "under the new EU rules, national telecoms authorities will have the powers to set minimum quality levels for network transmission services,"[151] in the event that anti-competitive use of network management tools should occur.[152]

Critically, the EU recognized that anti-competitive network management practices have not been observed in the marketplace and empowered NRAs to monitor to ensure that such conduct does not occur. *Only* in response to a finding of "anti-competitive behavior" may the NRA seek to impose minimum quality standards and, before doing so, an NRA would have to present the EU with evidence of anti-competitive conduct and the need to impose a remedy.[153] In the revision of its Electronic Communications Framework, the EU sought, among other things

> to provide appropriate incentives for investment in new high-speed networks that will support innovation in content-rich Internet services and strengthen the international competitiveness of the European Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the European Union. It is therefore vital to promote sustainable investment in the development of these new networks, while safeguarding competition and boosting consumer choice through regulatory predictability and consistency.[154]

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[149] *See* Europa Release, "EU Telecoms Reform: 12 reforms to pave way for stronger consumer rights, an open internet, a single European telecoms market and high-speed internet connections for all citizens," MEMO/09/568 (Dec. 18, 2009) (Telecoms Reform Release). Universal Service Directive, Recital 34.
[150] Universal Service Directive, Recital 34.
[151] *See* Telecoms Reform Release, at § 4.
[152] *Id.*
[153] *See, e.g.*, Universal Service Directive, Recital 34 and Article 22(3) (noting that an NRA setting minimum quality standards shall first supply the Commission with "a summary of the grounds for action, the envisaged requirements, and the proposed course of action" before setting requirements). *See also* Framework Directive, Recital 8.
[154] Framework Directive, Recital 8.

The United States shares these goals. In order to achieve them, USTelecom encourages the Commission to consider how the EU approached network management in the revised Electronic Communications Framework.

Some commenters question the need for the Commission to define reasonable network management and the wisdom of any attempt to do so. For example, three noted MIT Internet scholars advise the Commission that it would be "premature" to attempt to define appropriate network management practices."[155] They caution that "overly aggressive attempts to provide ex ante limits on ISP network management practices may prevent useful and beneficial behavior and, paradoxically, may be anti-innovation and actually interfere with the evolution of a healthy and open Internet."[156] Similarly, George Ou of the Digital Society points out that "the NPRM in its current form would ban good network management practices in the name of stopping potential ISP abuses."[157] In addition, the American Legislative Exchange Council declares that trying to enumerate specific exceptions as reasonable network management would not only be extremely difficult, but would lead to ambiguity that would chill innovation and investment:

> Currently, competing broadband network operators have freedom to pursue innovative new ways to deliver high-speed data services to their customers and maximize end users' experiences. However, the draft rules threaten to interfere with the innovative process that benefits consumers. Under the draft rules, network innovation must take place in the shadow of the Commission's multi-part "reasonable network management" standard or its undefined "nondiscriminatory" prohibition. Innovative edge is blunted whenever

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[155] Comments of David Clark, William Lehr, and Steve Bauer at 4 ("It is premature to attempt to specify appropriate network management practices for ISPs. The technical and business communities are in the process of evolving new technologies, standards, and business practices to manage the rapidly evolving broadband Internet. ISPs are expected to play an important role in traffic management in a healthy Internet. While bad practices may be employed and cautious policy oversight is warranted, we believe that the market is generally better suited for guiding the determination of what constitute acceptable practices at this time.").
[156] *Id.* at 5-6.
[157] *Comments of George Ou*, p. 3.

> engineering complexities and trade-offs have to be designed to meet ambiguous government specs.[158]

The need for a broad definition is supported by the examples relating to providers' ability to protect against cybersecurity threats,[159] deal with increased traffic (*e.g.*, over the top video),[160] obtain necessary investment,[161] continue the evolution of innovative, intelligent networks, and provide other benefits to consumers. As Consumer Policy Solutions' comments point out, definitional flexibility is necessary to allow network operators to respond to new problems as they arise:

> While there must be vigilant efforts by network operators to provide the management necessary for network and consumer protection from harms of known problems such as spam mail and the potential threat it poses to the entire network, it is of great importance that network operators be able to manage the online consumer and network threats of tomorrow. The Commission should consider an approach to defining reasonable network management that allows Internet Service Providers the maximum flexibility needed for ongoing management and protection of the network and the consumers they serve.[162]

In short, the Commission can best achieve its goals of protecting and promoting consumer welfare and encouraging competition, investment and innovation[163] by granting providers flexibility in network management.

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[158] *American Legislative Exchange Council Comments*, p. 1. *See also AT&T Comments*, p. 186 (Even if accompanied by amorphous "exceptions," broad prohibitions that can trigger significant penalties will obviously chill investment and innovation. Providers will be less likely to invest in cutting-edge network-management technology if they fear that an unpredictable regulator could latter strip that technology of its value by deeming its use "unreasonable." And such regulatory unpredictability could induce providers to respond with undue conservatism to new threats or challenges. As the Commission recognized in the NPRM [at ¶ 133], limiting providers' network-management incentives could therefore harm all users, eroding the very goals the principles are designed to protect.").
[159] *See, e.g.*, *AT&T Comments*, p. 184 (citing GAO Report on growing threats of cybersecurity incidents, which GAO reports have increased by 206 per cent between 2006 and 2008). *See also Comments of Consumer Policy Solutions*, p. 5; *see also*, *Fiber to the Home Council Comments*, p. 14.
[160] *See e.g.*, *SureWest Comments*, p. 34.
[161] *See e.g.*, *Google and Verizon Joint Submission*, p. 3 (stating that "continued private investment is essential to increase the reach and capabilities of advanced intelligent networks, which will in turn support the development of ever more sophisticated applications." *See also*, *Verizon and Verizon Wireless Comments*, p. 40.
[162] *Consumer Policy Solutions Comments*, p. 5.
[163] *See Notice*, ¶133.

C. There Is Strong Opposition to the Commission's Ex Ante Ban on Business Agreements Between Content Rights Holders and Broadband Providers.

The Commission's proposal to prohibit cost sharing between ISPs and content rights holders would significantly impair the development of innovative value-added services, prevent new lower-priced offerings and hinder broadband deployment and adoption. This is a view widely shared by numerous stakeholders in the initial comment round of this proceeding.

Of particular note, three faculty members at the Massachusetts Institute of Technology (MIT) submitted detailed comments to the Commission in this proceeding. The group – comprised of Dr. David D. Clark, William Lehr and Steve Bauer, all of whom are world-recognized Internet scholars and innovators – addressed head-on the issue of business arrangements between ISPs and content rights holders. The MIT faculty members note at the outset that the construction of last-mile access facilities is "capital-intensive," and financing such investments "presents a difficult challenge."[164]

Turning to arrangements between ISPs and content-rights holders, the group concludes that such arrangements "brings benefit to the consumer," since the consumer gains increased access to premium content. Even in scenarios where the ISP agrees to give certain content "preferential delivery treatment," the group concludes that "such an agreement might be beneficial to all parties,"[165] and concludes by stating that they "oppose an ex ante ban on such contracts."[166]

Similarly, the Distributed Computing Industry Association (DCIA) states that it "would not be inappropriate for ISPs to receive appropriate compensation from content providers," since

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[164] *MIT Comments*, p. 17.
[165] *Id.*, p. 18.
[166] *Id.*

such "[a]lternate, flexible financial arrangements may assist ISPs by providing the appropriate financial incentives to add significant capacity for such services in better alignment with traffic demands."[167] The DCIA likewise concludes that the Commission should "avoid adopting strict network management rules that could preclude new opportunities for collaboration and new business models between ISPs and application providers that would help to improve the experience of end users accessing the applications and content of their choice over the Internet."[168]

Even certain content rights owners express support for such arrangements. For example, Amazon.com notes that such arrangements can benefit consumers, content-rights holders and ISPs, resulting in a "win-win-win outcome."[169] In particular, Amazon.com notes that broadband Internet access service providers would be able to pursue new business models with users and content providers, while content providers would have opportunities to better serve their customers by using the network operators' new services. And "[m]ost importantly," consumers and other users would "realize the benefits of service improvements from broadband Internet access service providers."[170] Amazon's Kindle book reader provides a real world example of this concept where Kindle users enjoy wireless down load of books and content without purchasing service from a wireless service provider. Instead, the wireless service provider sells wireless Internet access and a portion of its network capacity to the content provider, Amazon.

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[167] *DCIA Comments*, p. 9.
[168] *Id.*
[169] *Amazon.com Comments*, p. 1.
[170] *Id.*, pp. 1-2.

While some have called for an even broader application of the Commission's proposed nondiscrimination standard,[171] the Commission had the good sense to discount such schemes. Indeed, the Commission itself acknowledges that promoting the online distribution of high quality digital content is important to driving widespread consumer adoption of broadband, and certain quality of service assurances could well "provide consumer benefits" by improving the quality of distribution of creative content.[172]

Similarly, the Motion Picture Association of America (MPAA) states that content owners and broadband service providers should be afforded the "ability to experiment and create new business models and to deliver the best available quality of service for existing ones."[173] Importantly, MPAA notes that "new means of distribution of legitimate content will provide consumers with meaningful alternative choices to web sites that unlawfully distribute creative works."[174]

In this regard, the MPAA urges the Commission to ensure that any rules allow content creators the ability to work with network providers to develop and maintain content delivery services that will "delight consumers and fuel economic growth."[175] Moreover, MPAA notes that such agreements will "spur the very type of innovation and continued investment in the digital distribution business that the Commission is striving to stimulate."[176] USTelecom shares the MPAA's view that such "consumer-enhancing arrangements would also assist in combating

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[171] *See e.g.*, Letter from Larry Lessig, Professor, Harvard Law School, *et. al.*, to Chairman Julius Genachowski, dated November 2, 2009.
[172] *Notice*, ¶148.
[173] *MPAA Comments*, p. 15.
[174] *Id.*, p. 16.
[175] *Id.*, pp. 16-17.
[176] *Id.*, p. 18.

copyright infringement."[177] The Commission's proposed ex ante ban, however, would impede such pro-consumer developments.

D. Transparency Efforts Should Apply to Any Real or Potential "Gatekeepers" that Can Significantly Influence Consumers' Internet Experiences.

There is broad support amongst commenters in this proceeding for industry efforts throughout the Internet ecosystem designed to provide consumers with clear and informative disclosure mechanisms that improve competition, while also enabling consumers to make informed decisions and get the service that best fits their needs. Indeed, the EU's approach to open network issues – which refrains from prescriptive network management provisions – focuses instead on the important role of transparency.[178] The Commission should continue to encourage transparency efforts that apply not only to broadband Internet access providers, but also to any real or potential "gatekeepers" that have market power and can significantly influence the Internet experiences of consumers.

For example, the Communications Workers of America (CWA) notes that while public disclosure and transparency are "essential to maintain competitive and effective markets,"[179] it concludes that any such rules "should *not* be limited only to broadband Internet access providers."[180] CWA points out that while consumers should be apprised of their broadband network service offerings, they are also "entitled to know the relevant prioritization, management

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[177] *MPAA Comments*, p. 18.
[178] The EU telecoms reform package focuses on transparency to protect consumers. Under the EU's approach to transparency, consumers are informed about the "nature of the service to which they are subscribing, including traffic management techniques and their impact on service quality, as well as any other limitations (such as bandwidth caps or available connection speed)." Telecoms Reform Release, §4 (transparency elements further described in the Annex II to the Universal Service Directive). In addition, consumers receive "information on any procedures put in place by the undertaking to measure and shape traffic so as to avoid filling or overfilling a network link, and information on how those procedures could impact on service quality." *Id. See also id.* at Article 21(d). Customers are also notified of any changes in any of these terms or conditions. *Id*. at Article 21(c).
[179] *CWA Comments*, p. 21.
[180] *Id.*, p. 22 (emphasis in original).

and (in some cases) blocking practices of other large and dominant participants in the Internet ecosystem."[181]

Those calling for increased transparency only for broadband service providers ignore their own lofty rhetoric. Google for example, states that "markets rely on information in order to function properly,"[182] and providing such access allows consumers to "make informed choices, and to hold private actors accountable for their actions."[183] It then states that transparency is a "consumer protection issue," and consumers should "know what they are paying for, and should get what they pay for."[184]

Calls for increased transparency obligations on only a limited portion of Internet ecosystem stakeholders ignore the reality of today's Internet and would effectively shield other key stakeholders from similar obligations. As USTelecom noted in its comments, *any* company participating in the Internet ecosystem can effect or introduce innovations with respect to traffic en route to the end consumer.[185] Approaches that favor one segment of the Internet ecosystem over another, or prevent one segment from participating in innovation in content delivery will handicap new services and reduce the ability of the Internet to evolve.

Given the variety of approaches to adequately addressing transparency issues, and the complexity and variety of the Internet ecosystem, many commenters note the importance of building consensus among stakeholders in this area. For example, SureWest agrees that transparency concerns are best resolved through voluntary "best practice" standards developed

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[181] *Id.*, pp. 22-23.
[182] *Google Comments*, p. 64.
[183] *Id.*
[184] *Id.*
[185] *USTelecom Comments*, pp. 35-36.

by "all of the stakeholders involved in this issue."[186] Even Google believes that "the creation of industry best practices and standards can greatly enhance transparency."[187] Such logic applies equally to all members of the broad Internet ecosystem.

VII. CONCLUSION

USTelecom's member companies are committed to an open Internet and support the Commission principles, competitive market structure and balance among the broadband, computing, content and applications sectors that have safeguarded an open and dynamic Internet for years. As noted by an overwhelming number of commenters, the Internet in the United States is a tremendous success story that has developed largely outside of regulatory constraints with a speed and scope unparalleled by any prior network technology.

The current record in this proceeding highlights the absence of any persuasive justification that would support the adoption of the Commission's proposed prescriptive regulations. Moreover, the presence of significant legal questions surrounding its proposal suggest that there is no compelling reason for the Commission to reverse its current course, which has been so successful for consumers, our economy and our national security. Rules governing the operation of broadband networks pose a tremendous risk of undermining the environment that thus far has been a major driver of the United States economy. Such rules could stifle the tremendous innovation and investment taking place across the entire Internet ecosystem, while at the same time failing to achieve its principal goal of ensuring an open Internet. It would be a mistake to effectively replace today's open and dynamic environment with a government-managed broadband network.

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[186] *SureWest Comments*, p. 42.
[187] *Google Comments*, p. 67.

Respectfully submitted,

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