

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (Qwest) files these reply comments in connection with the Federal Communications Commission's (Commission) *Notice of Proposed Rulemaking (NPRM)* regarding the preservation of an open Internet.¹

I. INTRODUCTION AND SUMMARY

Since its inception, this proceeding has been a philosophical debate between those who support regulation of the Internet and those who oppose it. Supporters of regulation claim it is necessary to prevent potential future market abuses by network owners. Those opposed contend that such regulations are unnecessary because market abuses are not occurring, and that unnecessary regulation will impede critical investment in Internet infrastructure. The April 6, 2010 decision by the D.C. Circuit Court of Appeals in *Comcast Corporation v. FCC (Comcast v. FCC)*,² now clearly calls into question the authority of the Commission to adopt the regulatory framework proposed in the *NPRM*. The Commission must clarify its regulatory jurisdiction in this area before any new regulations are adopted.

If there is one indisputable component of the Commission's recently released National Broadband Plan, it is that America requires massive investments in broadband infrastructure.

¹ *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

² *Comcast Corporation v. FCC*, Case No. 08-1291, decided Apr. 6, 2010 (D.C. Cir. (slip op.)).

Whether the appropriate goal is 100 Mbps service to 100 million homes, or 4 Mbps service to every home, or both, hundreds of billions of dollars will have to be invested. And, this investment -- if it occurs -- is not going to come from the public coffers. It's going to come from the network owners most impacted by the proposed Internet regulations.

It should be equally indisputable that regulatory uncertainty is one of the most crippling factors which negatively impact private investment.³ *Comcast v. FCC* has the potential to throw this industry into a state of regulatory chaos from which it might not recover for many years. Already, pro-regulation advocates are calling for 1930s style regulation of the Internet, far beyond anything seriously considered to date. They propose price regulations and unbundling regulations which, if adopted, would place all investment decisions under a cloud of litigation uncertainty for years. It cannot be reasonably disputed that critical broadband investment would be significantly and negatively impacted.

The Commission must resist these calls for new regulatory theories, and instead seek Congressional definition of its proper role in this industry. If it does so, the Commission will continue to be well served by the fact that Qwest and virtually all major broadband providers support the policy principles outlined in the Commission's 2005 Internet Policy Statement principles (FCC Internet Policy Principles) and voluntarily abide by those principles as good

³ See, e.g., *In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules; Carriage of the Transmissions of Digital Television Broadcast Stations; Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Order on Reconsideration of the Third Report and Order, 16 FCC Rcd 21633, 21645-46 ¶ 21 (2001) ("As we have recognized in other contexts, 'regulatory certainty is critical to providing the industry with incentives to make investments, including in new technologies such as 3G service.'") (citations omitted); *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, 21 FCC Rcd 5516, 5525 ¶ 22 (2006) (stating, in granting further extension of separations freeze, that "[m]aintaining the stability and regulatory certainty of the freeze will allow carriers to make investment decisions without fear that a reversion to the earlier rules would create radically different cost recovery requirements than they would currently expect.").

policy.

At the very least, *Comcast v. FCC* demonstrates that any action the Commission takes in this proceeding should be narrowly tailored to fit within its limited Title I authority. It should not attempt to apply Title II solutions -- or, as in the case of a strict nondiscrimination obligation, solutions that exceed even its Title II authority -- to competitive Title I services.

In the event the Commission determines it does have Title I ancillary jurisdiction authority to take any action in this proceeding or in the event the Commission obtains such authority from Congress, Qwest submits the following reply comments regarding the best policy approach to the concerns raised in the *NPRM*:⁴

The voluminous initial comments submitted in response to the *NPRM* make abundantly clear just what is and what is not at stake in this proceeding. There is no real question that a robust and open Internet is desirable and, in fact, necessary. All members of the Internet ecosystem agree on this point. Nor is there any question whether broadband providers should be free to block the transmission of lawful Internet traffic based on the identity of the sender or recipient. That bogeyman has been put to rest. No party suggests that such a practice should ever be permitted. Indeed, the initial round comments further demonstrate that the Internet is, in fact, open and free today.⁵ There is also no real dispute about whether the FCC Internet Policy

⁴ These comments assume, *arguendo* and without waiving Qwest's constitutional and other arguments, that the Commission possesses jurisdictional and legal authority to take the action being discussed. As it did in its initial comments, Qwest also includes a section at the end of its comments addressing certain specific comments in the initial round regarding the Commission's limited legal authority in this area.

⁵ It is now also clear that the debate here is not about whether broadband providers have market power or whether other market failures currently exist. No party suggests that this is the case and, indeed, the record now contains overwhelming evidence that competition is increasingly robust in the absence of any intrusive regulation and that any purported market failure concerns are speculative at best. Accordingly, Qwest will not address these issues further in any detail in this reply.

Principles bolstered by a new transparency principle are a good idea as a policy matter. An overwhelming majority of comments support these aspects of the regulatory framework proposed in the *NPRM*.

Rather, the record demonstrates that two key issues now lie at the core of this proceeding:

First, the Commission must resolve whether any new network openness regulatory framework should mandate that end users alone fund all future network investment, through the imposition of a strict nondiscrimination obligation in the onerous form described in the *NPRM*. The alternative is to recognize that there is a benefit to allowing broadband providers to have at least some ability to charge content and application providers and provide some differentiated services. This approach recognizes that there is a balance of interests at stake here and that the *NPRM*'s proposed strict nondiscrimination obligation would stifle investment and growth in network infrastructure, not allow the economic deployment of the robust Internet that will be expected in the future, and have a negative impact on broadband adoption. This alternative approach also recognizes that the *NPRM*'s proposed strict nondiscrimination rule would prevent broadband providers from deploying a vast array of desirable products and services. This includes offerings of content and application providers who seek to compete with the likes of Google, Microsoft and other large providers that already have the means to prioritize their services. Additionally, this alternative approach recognizes that, whatever the Commission does in this proceeding, it should err on the side of caution and give itself adequate flexibility to accommodate future innovation in products and services -- recognizing that the impact of new regulation on innovation simply can not be known in advance. Indeed, all of these factors are critical if the Commission is to: (1) meet the National Broadband Plan's central goal of ensuring that any governmental action encourages more private innovation and investment in broadband;

and (2) succeed in meeting the key National Broadband Plan benchmarks.⁶

Second, assuming the Commission is to impose new openness rules of any kind, it must also determine whether those new rules should apply on a technology neutral basis to any and all Internet gatekeepers with the potential ability to impede end user access to the Internet ecosystem or to only a subset of that universe. The former approach would continue the level playing field framework of the FCC Internet Policy Principles and recognize that search engine operators and other entities have at least as much ability as broadband providers to impact end user access to the Internet.

In these reply comments, Qwest echoes the majority of initial comments supporting a more balanced overall approach to the issues raised in the *NPRM*. A large and diverse group of commenting parties that includes unions concerned with job creation, citizen interest groups concerned with broadband affordability and adoption, and a broad variety of businesses (content and application providers, manufacturers, and broadband providers) that invest and employ in this area, all support the following pro-consumer approach: codification of the FCC Internet Policy Principles in their current neutral form, adoption of a new flexible end user disclosure rule, rejection of a nondiscrimination rule (or at most adoption of a more flexible reasonable discrimination rule), and adoption of broad managed services and reasonable network management exceptions. In other words, these parties share Chairman Genachowski's view that transparency is the emerging common ground here.⁷ Conversely, the proposals of a small number of commenting parties calling for particularly onerous versions of the *NPRM*'s strict

⁶ See National Broadband Plan, Connecting America, Chapter 2, Goals for a High-Performance America; Chapter 17-A, Exhibit 17-A Broadband Performance Dashboard, Goals for 2020; and Chapter 8 Availability.

⁷ See Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, "Consumers, Transparency and the Open Internet" Workshop, Tuesday, Jan. 19, 2010 (Genachowski Jan. 19 Remarks).

nondiscrimination framework or other even more extreme regulatory models such as structural separation, clearly strike the wrong balance and would work against the important National Broadband Plan goals outlined above.

Qwest also echoes the majority of commenting parties contending that, should the Commission establish new openness requirements, those rules should be applied in a technology neutral fashion. There is simply no justification for extending such requirements to broadband providers while exempting other gatekeepers in the Internet ecosystem. Nor is there any basis for extending such new rules to wireline broadband providers while exempting other broadband providers who happen to utilize a wireless platform.⁸

The initial comments also reflect an emerging consensus on numerous other important underlying issues raised in the *NPRM*, including the following:

- Any new network openness rules for broadband providers should be applied narrowly to a defined universe of last mile Internet architecture.
- Any new rules should, at a minimum, allow broad end user-directed traffic differentiation.
- The Commission should narrowly define the public Internet (versus private network) functionality covered by any new nondiscrimination rule.

Certain proposals contained in other parties' initial comments also have merit, including the following proposals:

- New end-user disclosure requirements defined by industry fora - as a potential alternative to Qwest's proposed rule.
- A rebuttable presumption that certain network management practices are reasonable.

⁸ As explained in the legal authority section of these comments, in addition to the fact that there is no good policy reason to distinguish among these entities, such a framework would also be legally defective.

- The use of industry technical advisory groups (TAGs) to define reasonable network management practices, as jointly proposed by Google and Verizon.
- A narrow definition of “public broadband Internet access” as an alternative to a fixed definition for managed services.

These proposals can also serve as valuable tools in helping ensure that the rules adopted in this proceeding strike the right balance between addressing potential network openness concerns and providing adequate flexibility to broadband providers and minimizing harm to investment and broadband adoption. In some cases, these proposals represent adequate alternatives to specific proposals made by Qwest in its initial comments.

On the other hand, the Commission should reject extreme positions championed by certain proponents of proscriptive regulation on a variety of underlying issues that clearly overreach, including:

- Proposed overly-detailed end-user disclosure rules -- for example, proposals that broadband network operators, before they implement a given management practice, satisfy onerous evidentiary requirements, publicly disclose sensitive network diagnostics data, or meet detailed advance notice requirements.
- Proposed additional rules requiring additional disclosures to content and application providers and the government.
- Attempts to broaden the universe of architecture covered by any new rules well beyond what was envisioned in the *NPRM*.
- Proposals that the Commission eviscerate the reasonable network management exception and eliminate the proposed managed services exemption, both key components of the *NPRM*'s proposed framework that the Commission intended to provide a critical level of flexibility to what is otherwise a very rigid regulatory framework.

II. THE COMMISSION SHOULD RE-EVALUATE ITS PROPOSED APPROACH TO NETWORK OPENNESS REGULATION IN LIGHT OF *COMCAST v. FCC*

The Commission should re-evaluate its proposed approach to potential network

openness regulation in light of *Comcast v. FCC*.

A. *Comcast v. FCC* Calls Into Question The Commission’s Authority To Adopt The Regulatory Framework Proposed In The *NPRM*

In the *NPRM*, the Commission suggested that it could impose the proposed regulatory framework as reasonably ancillary to “the federal Internet policy set forth by Congress in section 230(b),” “the broadband goals that section 706(a) of the Telecommunications Act of 1996 charges the Commission with achieving,” and the Commission’s authority under Section 201(b) “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act.”⁹ Qwest and numerous other parties demonstrated in their initial comments that these provisions do not provide an adequate basis for such Title I ancillary jurisdiction and authority -- particularly as it relates to the proposed strict nondiscrimination obligation.¹⁰ Specifically, these comments demonstrated that the Commission fails to satisfy the second part of the legal standard for Title I ancillary jurisdiction -- the requirement that the regulations at issue be reasonably ancillary to the Commission’s effective performance of statutorily-mandated responsibilities.

As it rejected the very same ancillary jurisdiction arguments that the Commission proffers in the *NPRM*, *Comcast v. FCC* now clearly calls into question the Commission’s authority to adopt the broader regulatory framework proposed in the *NPRM*. The D.C. Circuit directly addressed the question of whether the Commission “has authority regulate an Internet service providers’ network management practices.”¹¹ In the underlying Commission order, the Commission had ruled that a Comcast network management practice directed at peer-to-peer

⁹ *NPRM*, 24 FCC Rcd at 13099 ¶ 84.

¹⁰ *See, e.g.*, Qwest at 58-60; Verizon at 98-100; AT&T at 214-19; CenturyLink at 20-22.

¹¹ *Comcast*, slip op. at 2.

applications had violated the FCC Internet Policy Principles and the “federal policy” reflected therein because the practice “significantly impeded consumers’ ability to access the content and use the applications of their choice” and failed to utilize alternative protocol agnostic methods available to it.¹² In *Comcast v. FCC*, the D.C. Circuit held that the Commission’s action was not a proper exercise of its Title I ancillary jurisdiction.¹³ In doing so, the court found that the statutory language cited by the Commission in section 230(b) was a mere statement of policy and not a statutorily-mandated responsibility.¹⁴ The court also rejected the Commission’s arguments that section 706 and section 201 supported its exercise of ancillary authority over Comcast.¹⁵ The court ruled that prior Commission decisions have established that section 706 is not an independent grant of authority.¹⁶ The court rejected the Commission’s section 201 argument on procedural grounds.¹⁷ But, Qwest and others have demonstrated in their initial comments that the section 201 language cited in the *NPRM* is also clearly not an independent grant of authority¹⁸ These comments demonstrate that section 201 does not support an exercise of ancillary jurisdiction in the manner sought in the proposed rules.

Comcast v. FCC, thus, unquestionably confirms that the Commission lacks authority to impose at least the more onerous aspects of its proposed regulatory framework -- the strict nondiscrimination standard. It also suggests that the Commission lacks authority to adopt the

¹² *Id.* at 4.

¹³ *Id.* at 14-16.

¹⁴ *Id.* at 27-28.

¹⁵ *Id.* at 31, 33-34. The court also rejected other purported statutory bases -- namely, sections 256 and 257, Title III broadcasting provisions, and section 623 language relating to cable rates -- not relied upon by the Commission in the *NPRM*.

¹⁶ *Comcast*, slip op. at 30-31.

¹⁷ *Id.* at 34.

¹⁸ *See, e.g.*, Qwest at 56-57; AT&T at 218-19; SureWest at 16-17.

FCC Internet Policy Principles as enforceable rules and possibly even the other aspects of the *NPRM*'s proposed framework. Indeed, the crux of the decision is the court's finding that the authority the Commission sought to exercise did not simply exceed the limits of its Title I ancillary authority, it "shatter[ed]" them and, in effect, asked the court to accept an unlawful unbounded view of that authority.¹⁹

B. The Commission Should Re-Evaluate Its Approach To Network Openness Regulation And Should Consider Seeking Congressional Action

Given the holding in *Comcast v. FCC*, the best course of action for the Commission is to step back and re-evaluate its proposed approach to network openness regulation. The D.C. Circuit has now expressly rejected the Commission's proffered grounds for enacting the proposed regulatory framework. The Commission should now consider seeking legislation in Congress that will more clearly define the appropriate role for it in any further Internet regulation. If it does so, the Commission will continue to be well served by the fact that Qwest and virtually all major broadband providers support the FCC Internet Policy Principles and voluntarily abide by those principles as good policy. At the very least, *Comcast v. FCC* demonstrates that any action the Commission takes in this proceeding should be narrowly tailored to fit within its limited Title I authority. In other words, *Comcast v. FCC* does not, as proponents of intrusive regulatory models suggest, stand for the proposition that the Commission is powerless to act regarding the Title I services at issue in the *NPRM*. It simply reinforces the long-established limits of the Commission's Title I authority and demonstrates that the Commission should not attempt to apply Title II solutions -- or, as in the case of a strict nondiscrimination obligation, solutions that exceed even its Title II authority -- to competitive Title I services. The alternative is to adopt rules that would be cast in doubt immediately and

¹⁹ *Comcast*, slip op. at 24.

subject the industry to years of uncertainty as the inevitable legal challenges play out.

III. IN THE ALTERNATIVE, IF THE COMMISSION DETERMINES IT HAS AUTHORITY TO PROCEED OR OBTAINS SUCH AUTHORITY FROM CONGRESS, A MORE BALANCED APPROACH MAKES BETTER SENSE AS A POLICY MATTER

A. The Majority Of Commenting Parties Support A More Balanced Overall Approach To The Issues Raised In The *NPRM*

The majority of initial comments come from a large and diverse group of parties that generally urge caution and support a balanced overall approach to the issues raised in the *NPRM*. This group includes unions concerned with job creation, citizen interest groups concerned with employment and broadband affordability and adoption, and a broad variety of businesses (content and application providers, manufacturers, and broadband providers) and business interests that invest and employ in this area. To the extent they address specifics, these parties support: (1) codification of the FCC Internet Policy Principles in their current neutral form; (2) adoption of a new flexible end-user disclosure rule; (3) rejection of a strict nondiscrimination rule (or at most adoption of a more flexible reasonable discrimination rule); and (4) adoption of broad managed services and reasonable network management exceptions. This group, thus, shares Chairman Genachowski's view that transparency is the emerging common ground in this proceeding.²⁰ While Qwest does not agree with every aspect of each of these comments, this group supports a more balanced overall approach along the lines of what Qwest proposes in its comments. The Commission should give the views of these parties considerable weight.

The size and diversity of this group is impressive:

²⁰ In his remarks at the January 19, 2010 "Consumers, Transparency and the Open Internet" Workshop in this proceeding, Chairman Genachowski noted that "a large and diverse group of commenters believe that transparency can go far to preserve the Internet's openness" and cited this as "an encouraging example of the growing common ground in our open Internet proceeding." Genachowski Jan. 19 Remarks at 1.

Unions. The **Communications Workers of America**²¹ generally supports the FCC Internet Policy Principles in their original neutral form (*i.e.*, made applicable to content and applications providers as well).²² It opposes the strict nondiscrimination standard proposed in the *NPRM* and advocates that the Commission adopt a reasonable discrimination standard.²³ It also calls for broad exemptions under any new rules for managed services and reasonable network management.²⁴ While its specific proposal goes further than Qwest would suggest, the CWA also supports additional consumer transparency.²⁵

Citizens groups. Numerous citizen interest groups support a more balanced approach, including:

National Organizations, a joint filing by a large coalition of minority rights organizations²⁶ (urges caution; supports the FCC Internet Policy Principles and Commission efforts to encourage greater transparency to consumers; expresses concern that additional rules such as strict nondiscrimination rule would “increase the price of broadband for minorities, reduce the quality or availability of broadband offerings, impede the infrastructure investments necessary to fully bridge the digital divide, and limit job growth.”)²⁷

²¹ Representing over 300,000 employees in the communications industry and 400,000 employees in other industries. CWA at 1. As CWA also notes, broadband network companies overall employ approximately 800,000 people while content and applications providers employ approximately 80,000. *Id.* at 7.

²² *Id.* at 13.

²³ *Id.* at 16.

²⁴ *Id.* at 23.

²⁵ *Id.* at 21.

²⁶ “National Organizations” consists of The ASPIRA Association, Black College Communications Association, The Hispanic Institute, Hispanic Technology and Telecommunications Partnership, Labor Council for Latin American Advancement, Latinos in Information Sciences and Technology Association, Lawyers’ Committee for Civil Rights Under Law, League of United Latin American Citizens, MANA, A National Latina Organization, National Association of Black County Officials, National Black Caucus of State Legislators, National Conference of Black Mayors, The National Coalition on Black Civic Participation-Black Women’s Roundtable, National Organization of Black Elected Legislative Women, National Puerto Rican Coalition, and the United States Hispanic Chamber of Commerce.

²⁷ National Organizations at 14.

American Civil Rights Union (generally urges caution; states that “government interference with the internet via regulation would be contrary to the best interest of its users.”)²⁸

American Consumer Institute (urges caution; states there is “no compelling evidence of market failure to justify the regulations being proposed in this NPRM.”)²⁹

American Indian Chamber of Commerce of WI (urges caution; calls for a balanced regulatory framework).³⁰

National Puerto Rican Coalition (generally urges caution; states that “[b]urdensome regulations, such as those proposed in the NPRM, would deter private investment and slow if not stop the building of broadband infrastructure.”)³¹

Older Adults Technology Services (states that *NPRM* proposal threatens imperative that “FCC continue to focus on crafting policies that seek to spur adoption and usage of broadband by non-adopters....”)³²

Latino Coalition (“Given the economic consequences of broadband for all Americans and especially for low-income Hispanic households, we urge the FCC to eliminate counter-productive ‘net neutrality’ regulations from your vision of the broadband future.”)³³

U.S. Hispanic Chamber of Commerce (states that incentives, not regulations, are needed “to ensure that broadband technology continues to reach and benefit the Hispanic community and other communities in the U.S.”)³⁴

Association of Washington State Hispanic Chambers of Commerce (urges caution; any new rules could have unintentional consequences).³⁵

China Latin Trade Center (urges cautious restraint in the adoption of net neutrality regulations).³⁶

²⁸ American Civil Rights Union (ACRU) at 2.

²⁹ American Consumer Institute (ACI) at 1-3.

³⁰ American Indian Chamber of Commerce of WI (AICCW) at 1.

³¹ NPRC at 1.

³² Older Adults Technology Services (OATS) at 2.

³³ See Latino Coalition at 1.

³⁴ See U.S. Hispanic Chamber of Commerce, see <http://www.prnewswire.com/news-releases/minority-chambers-of-commerce-aim-to-amplify-message-to-the-fcc-whats-next-for-internet-regulation-and-the-national-broadband-plan-83363827.html>, Feb. 2, 2010.

³⁵ Association of Washington State Hispanic Chambers of Commerce (AWSHCC) at 1-2.

³⁶ China Latin Trade Center at 2.

Equipment manufacturers. Major equipment manufacturers also support a more balanced approach. These include:

Cisco (supports FCC Internet Policy Principles and a new end-user transparency principle, but opposes the *NPRM*'s strict nondiscrimination requirement as it "would severely limit the ability of providers to respond to fast-changing market conditions and evolving consumer needs;" calls for Commission to "preserve a wide berth for the provision of managed and specialized services" free from any new rules; also calls for the Commission to "allow for maximum flexibility in any rules pertaining to network management....")³⁷

Alcatel-Lucent (generally supports FCC Internet Policy Principles, and broad managed services and reasonable network management rules and opposes strict nondiscrimination rule).³⁸

Adtran (advocates for continued "light touch" approach of FCC Internet Policy Principles and supports some greater disclosure rules; also calls for broad managed services exemption and reasonable network management rules).³⁹

Corning (urges the Commission to take great care when developing Internet policy regulations to ensure that they do not further erode the investment climate and that reasonable network management functions and managed/specialized services are permissible).⁴⁰

National Association of Manufacturers (advocates for regulatory "light touch," including broad reasonable network management and managed services exemptions).⁴¹

Broadband providers. Major broadband providers, of all shapes and sizes and regardless of underlying technological platform, also support this balanced approach. These include:

American Cable Association (supports reasonable and flexible network management practices and managed services exemptions).⁴²

Bright House Networks (supports high level consumer disclosure requirements and opposes strict nondiscrimination; and proposes alternative "unreasonable and anticompetitive" discrimination standard and broad reasonable network management and managed services exemptions).⁴³

³⁷ Cisco at 5, 12, 14.

³⁸ Alcatel-Lucent, *generally*.

³⁹ Adtran, *generally*.

⁴⁰ Corning Incorporated at 12, 16-17.

⁴¹ National Association of Manufacturers, *generally*.

⁴² American Cable Association (ACA) at 10-12, 17-18.

⁴³ Bright House at 10.

Charter (supports reasonable disclosure requirements and broad reasonable network management and managed services exemptions).⁴⁴

Cincinnati Bell Wireless (urges flexibility in the definition of “reasonable network management.”)⁴⁵

Comcast (supports FCC Internet Policy Principles and a new end-user transparency principle; opposes strict nondiscrimination obligation and proposes alternate prohibition on “unreasonable and anticompetitive discrimination; calls for broad reasonable network management and managed services exceptions).⁴⁶

Cox (generally supports FCC Internet Policy Principles and a new flexible end-user transparency rule; advocates for broad flexibility in network management).⁴⁷

Time Warner Cable (supports “minimally intrusive” end-user disclosure requirements as well as FCC Internet Policy Principles; opposes strict nondiscrimination standard and supports alternative unreasonable discrimination standard; calls for broadband flexibility for reasonable network management and approach that leaves managed services unregulated).⁴⁸

AT&T (proposes continued application of the FCC Internet Policy Principles and a fifth transparency principle; opposes strict nondiscrimination rule as overreaching line-of-business restriction, while acknowledging “[o]ne could imagine a ‘nondiscrimination’ rule that ... would ban unreasonable and anticompetitive discrimination.”)⁴⁹

CenturyLink (supports FCC Internet Policy Principles and opposes strict non-discrimination standard).⁵⁰

USTelecom (supports FCC Internet Policy Principles and a transparency principle; proposes flexible discrimination rule in alternative to proposed rule; supports broad managed services and reasonable network management rule).⁵¹

NTCA (supports FCC Internet Policy Principles and a fifth transparency principle with high level requirements and without standardized disclosure method; opposes strict

⁴⁴ Charter at 7-12, 18-25.

⁴⁵ Cincinnati Bell Wireless LLC (CBW) at 5.

⁴⁶ Comcast at 27-28, 37-44, 50-54, 60-61.

⁴⁷ Cox at 1-4, 7-12, 30-33.

⁴⁸ Time Warner at 100.

⁴⁹ AT&T at 1-2, 103-09, 183-88.

⁵⁰ CenturyLink at 16-17.

⁵¹ USTelecom at 39-55.

nondiscrimination rule and supports, in the alternative, a reasonable discrimination standard; supports broad flexibility for network management and managed services).⁵²

OPASTCO (supports codification of FCC Internet Policy Principles, a transparency principle and permitting prioritization via a reasonable network management rule where competitively neutral; supports broad managed services exemption).⁵³

Sprint (supports codification of portions of FCC Internet Policy Principles it believes are appropriate for wireless carriers and new flexible transparency rule; opposes strict nondiscrimination standard, but supports reasonable discrimination standard; supports broad managed services exemption).⁵⁴

Satellite Broadband Commenters (“providers of managed broadband access services should have flexibility to provide meaningful transparency as to network management practices.”)⁵⁵

Industry organizations. Industry organizations support a similar approach. For example, **Alliance for Telecommunications Industry Solutions (ATIS)** calls for the Commission to ensure that available management tools are not unduly constrained by regulatory mandates.⁵⁶

Broader business interests. Broader business interest groups echo these contentions. For example, the **U.S. Chamber of Commerce**, the world’s largest business federation that represents over three million businesses and organizations of every size and variety, “urges the Commission to refrain from imposing a new, burdensome regulatory regime.”⁵⁷

Content and applications providers. Even a number of content and application providers support a more balanced approach. This includes providers such as **Amazon** and **Yahoo** who, while not fully embracing all the positions supported by this group of commenting parties, call

⁵² NTCA at 3-11.

⁵³ OPASTCO at 1-2, 8-14.

⁵⁴ Sprint at 18-29.

⁵⁵ Satellite Broadband Commenters at 11.

⁵⁶ ATIS at 4-5.

⁵⁷ U.S. Chamber of Commerce at 8.

for the Commission to permit some kind of discrimination.⁵⁸ Other content and application provider interests, such as **Arts+Labs**, more fully support the positions detailed above calling for reliance upon the FCC Internet Principles together with a new disclosure principle.⁵⁹

Overall, this broad group uniformly rests its advocacy on a common set of concerns. First, there is a shared concern that the proposed rules may harm network investment, preclude the construction of adequate next generation networks and negatively impact broadband affordability and adoption.⁶⁰ Members of this group also uniformly demonstrate that the proposed rules will likely have a negative impact on existing or future products and services and,

⁵⁸ *See, e.g.*, Amazon Jan. 14, 2010 letter (proposing that broadband Internet access service providers be permitted to favor some content so long as harm is not done to other content); Yahoo January 21, 2010 letter (recognizing need for broadband providers to have flexibility in offering proprietary services).

⁵⁹ Arts+Labs at 2 (detailing the technical challenges likely to result and new content delivery models likely blocked as a result of strict nondiscrimination rule). Arts+Labs is a partnership consisting of entertainment companies, software providers, telecommunications providers, artists and creators committed to delivering innovative and creative digital products to consumers. Members include Viacom, NBC Universal, AT&T, Broadcast Music, Inc. (BMI), Verizon, Auditude, Microsoft, Songwriters Guild of America, Cisco, Jib Jab, Blue Pixel, and the American Society of Composers, Authors and Publishers (ASCAP).

⁶⁰ *See, e.g.*, Cisco at 5 (rules would “threaten to depress investment in networks, applications or both”); Comcast at 11-12 (detailing evidence of likely harm to investment from proposed rules); Verizon at 40-44 and attached declarations (detailing potential harm to investment from proposed rules); Adtran at 9-11 (describing its own experience with past reductions in investment following Commission initiation of burdensome rules such as post-1996 Act unbundling rules); CWA at 5-8 and Appendix (detailing the need to avoid “unintended consequence of delayed or deferred broadband network investment and job creation”); NAM at 3-4; Charter at 15-17 (detailing likely harm to investment); National Organizations at 14-23 (detailing likely impact to consumer prices and minority broadband adoption); USTelecom at 43 (discussing impact of proposed rules on broadband affordability and adoption); American Legislative Exchange Council at 1-2; Nevada Hispanic Services at 1; Alcatel at 22-23; CenturyLink at 9-12; Manufacturer Coalition at 2-3; Cox at 17-19; National Organizations at 14-17, 19-23. *See also* The American Consumer Institute report, rel. Jan. 28, 2010 (demonstrating that proposed regulation would have a dramatic impact on investment and jobs creation; demonstrating that, while non-network companies like Google and eBay created approximately 1,200 jobs for every \$1 billion in revenue, non-network companies create approximately 2,300 jobs for every \$1 billion; also demonstrating that network businesses reinvest 64 percent of cash flow, while non-network companies invest 28 percent of cash flow).

in particular, IP video deployment.⁶¹ As discussed extensively throughout the comments, many of these products and services require broadband network support that might be argued to be non-neutral in some way. This includes offerings of content and application providers who seek to compete with the likes of Google, Microsoft and other large providers that already have the means to prioritize their services.⁶²

B. Only A Small Number Of Commenting Parties Support An Extreme Overall Approach That Clearly Strikes The Wrong Balance

In contrast to the balanced approach described above, a small number of commenting parties call for particularly onerous regulatory frameworks. These parties either call for even more onerous versions of the *NPRM*'s strict nondiscrimination framework than that proposed in the *NPRM*⁶³ or call for a return to such extreme monopoly era frameworks as structural separation. These comments clearly strike the wrong balance.

⁶¹ See, e.g., Cisco at 6-7 (value of product offerings to American broadband users “depends in a very concrete way on the ability of a provider to ‘discriminate’ between different packets based on the class of service, the source of the content, or other factors.”); Verizon at 44-49 (outlining products and services potentially impacted by proposed rules); Alcatel-Lucent at 14-20 (discussing video, voice, gaming and other offerings requiring enhanced or prioritized services); Bright House at 12-13 (detailing variety of potentially impacted services, including “certified” P2P for stock research and trading firms, secure connections to consumers for banking and financial institutions, cloud computing for government agencies, desktop security, remote storage; emergency priority services, etc.); NTCA at 10-11 (discussing particular significance of IP video services); MetroPCS at 11-13; Qwest at 28-29.

⁶² See, e.g., Cisco at 12 (citing irony of a nondiscrimination rule that would prevent smaller content and application providers from obtaining services that would allow them to compete with larger providers who can build their own CDNs.); Bright House at 12 (new entrants do not “have the resources to build CDNs or an OpenEdge platform of the kind that has allowed Google to prioritize itself on the Internet”); AT&T at 118-19 (Net neutrality proponents like Google are asking that broadband providers and Internet access providers be prohibited from providing the types of service-enhancement tools they use which is “anticompetitive and inimical to the interest of the application and content providers that would benefit from the alternative QoS strategies...”).

⁶³ Indeed, it is noteworthy that virtually no commenting parties support the *NPRM*'s proposed framework as is.

At the extreme, NASUCA argues that the Commission jettison the regulatory framework proposed in the *NPRM* and impose structural separation instead.⁶⁴ Others, such as Free Press and the Center for Media Justice, *et al.*, essentially argue that any intended flexibility in the proposed strict nondiscrimination framework be eliminated or absolutely minimized.⁶⁵ Even Google, whose comments in other areas are less extreme, advocates that the Commission not create its proposed managed services exemption at this time.⁶⁶ All of these parties share the common theme that the Commission should adopt a new regulatory framework that is even more onerous than that proposed in the *NPRM*.

These comments also share another common denominator -- the absence of any real factual support for the underlying contentions of their advocacy. For example, these parties, without any record support whatsoever, contend that there is no such thing as broadband provider network congestion or a need otherwise to prioritize Internet traffic on last mile networks.⁶⁷ However, Qwest and numerous other parties have submitted extensive and uncontraverted record evidence to the contrary.⁶⁸ This evidence belies continued contentions by

⁶⁴ NASUCA at 23.

⁶⁵ Free Press and Center for Media Justice, *et al.*, *generally*.

⁶⁶ Google at 74-77.

⁶⁷ *See, e.g.*, Free Press at 34-43 (in a section entitled “The Truth About Congestion and Network Investment,” makes specious claims that even annual bandwidth increases as high as 45% are not evidence of existing or future congestion challenges, asserts inexplicably that transit cost levels are probative as to relevant congestion levels, asserts despite overwhelming evidence to the contrary in this docket that broadband provider capital expenditure levels do not indicate increased bandwidth consumption, asserts without any factual support the wholly non-credible contention that large bandwidth consumers do not use disproportionate amounts of bandwidth, and overall continues to push unsupported claims that additional capacity build-out can always solve congestion issues).

⁶⁸ *See, e.g.*, Qwest Comments at 35-36, 39; Cisco at 9-11 (documenting usage forecasts driven by high bandwidth application and insufficiency of new capacity alone as a solution); AT&T at 183-84 (documenting increases in usage and congestion and, among other things, 49,000 failures and 1.4 million planned outages on relevant networks per month); Verizon at 81-84 and attached

proponents of extreme new Net neutrality models that any congestion can simply be resolved by additional capacity build-out.

Others in this group contend, again without any factual support, that a strict non-discrimination obligation will have no impact on network investment.⁶⁹ Free Press is perhaps the worst offender here. In its 17-page discussion entitled “The True Relationship Between Network Neutrality and Investment,” Free Press cites no factual support of any kind⁷⁰ for its wholly non-credible contention that intrusive regulation will either have no impact or will in fact have a positive impact on investment. Free Press’ claims about the potential impact of regulation on investment by content and application providers are also totally unsubstantiated.⁷¹

Notably, not one of these parties attempts to make the case that broadband providers have market power or that other market failures currently exist warranting intrusive regulatory intervention. In fact, the evidence in the record is now overwhelming that competition is

Network Management Declaration (documenting capacity constraints); Alcatel-Lucent at 5-7 (describing “perfect storm” of exponential growth in bandwidth demand, unprecedented increases in number of Internet devices attached to networks and usage behavior changes that require that broadband providers have more tools than simply increasing capacity); Charter at 8-12 (detailing congestion challenges); Cox at 20-22 (same).

⁶⁹ See, e.g., Free Press at 12-29, 43-45; Center for Media Justice, *et al.* at 29-30 (entire argument on impact of regulation on network investment consists of a single paragraph speculating without any support about what a broadband provider might do); Open Internet Coalition at 32-33; Google at 37-40 (in the FCC’s NBP proceeding “broadband providers acknowledge that the *Internet Policy Statement* has not deterred their incentives to make network investments.”).

⁷⁰ It presents a very high level discussion of certain broadband provider macro financial numbers, but ultimately concedes itself that no reliable conclusions can be drawn from this single perspective. Free Press at 26.

⁷¹ *Id.* at 43-45. Ironically, Free Press accuses broadband providers of using “hysterical rhetoric” when they demonstrate through extensive factual record submissions the common sense conclusion that intrusive regulation will have a negative impact on investment. *Id.* at 69. This from a party whose comments are laden with a variety of name calling. See, e.g., *id.* at 53 (accusing broadband providers of having “pending desires to gouge their customers using overcharging billing schemes”); 128 (“such behavior indicates that AT&T believes the Commission is a bunch of rubes”).

increasingly robust in the absence of any intrusive regulation and that any purported market failure concerns are speculative at best.⁷² Recognizing this, proponents of proscriptive new openness regulation shift their arguments in the initial comments. They now contend that intrusive new regulation no longer needs to be justified based on a demonstration that broadband providers have market power, but can be justified based solely upon sweeping generalizations about the significance of the Internet.⁷³ Ironically, Google's unsubstantiated comments regarding

⁷² See, e.g., American Consumer Institute at 9-10; American Legislative Exchange Council at 2; Charter Communications at 4-6; Cisco Systems, Inc. at 7-8; Comcast at 9-10, 18-19; Free State Foundation at 4-5; Institute for Policy Innovation at 3, 5; MetroPCS Communications, Inc. at 13, 15, 18, 19; Motorola, Inc. at 12; NCTA at 2-3; Time Warner Cable Inc. at 5-11. This record has been further bolstered by data made available since the January 2010 initial comment filing date. For example, the Commission's own "Broadband Adoption and Use in America" report, released in February 2010, demonstrates that 75% of Americans either already have broadband or are "near converts" and that the remaining 25% non-adoption level is explained more by factors such as lack of access to computers or lack of interest and other adoption challenges than by price or other competition factors. See *Broadband Adoption and Use in America*, OBI Working Paper Series No. 1, by John B. Horrigan, PH.D. (survey indicating, among other things, that even a \$10 a month broadband offering would only boost penetration rates to 73%). Similarly, the International Telecommunication Union's "Measuring the Information Society 2010" report, also released in Feb. 2010, showed that the United States had one of the lowest price levels in the world for broadband and other telecommunications services relative to income levels. See *Measuring the Information Society, 2010*, ITU-D, Embargo Until 15:00 CET, 23 February 2010 by the International Telecommunication Union. Likewise, a U.S. Census report shows that broadband usage rose from 51% in October 2007 to 64% in October 2009 -- an increase of 25%. See "Broadband usage up 25% since 2007, U.S. Census says," *Connected Planet*, February 16, 2010. See also, "The Economic Impact of Broadband Investment," Robert W. Crandall and Hal J. Singer (demonstrating that, in a largely deregulatory climate, broadband penetration skyrocketed to nearly 65 percent penetration and quality-adjusted prices fell; also concluding that, given the amount of investment that continues to be deployed in this sector and the precarious current state of the U.S. economy and given the linkage between that investment and jobs/output, "regulators must diligently avoid taking any steps that might undermine the industry's incentives to invest."). Finally, the Commission's latest High-Speed Services for Internet Access report released in Feb. 2010, the first based on new census tract-based Form 477 data collection requirements, only confirmed all previously documented trends demonstrating a robust competitive environment. See *High-Speed Services for Internet Access, Status as of December 31, 2008*, Industry Analysis and Technology Division, Feb. 2010.

⁷³ See, e.g., Google at 13-26; Free Press at 45-62 (entitles relevant discussion section "Open Internet Protections are Essential Regardless of the State of Last Mile ISP Competition;" now justifying intrusive regulatory proposals on contentions like "two-way communications networks

alleged difficulty of entry into the broadband provider market were followed quickly by Google's announcement that it intends to construct a broadband access network itself.⁷⁴ Free Press, in one of the strangest departures from logic contained in the initial round of comments, argues that the fact that the Commission tends to resist forbearance from far less onerous reasonable discrimination obligations on less competitive Title II services somehow justifies the imposition of a more onerous strict nondiscrimination obligation/line-of-business restriction on more competitive Title I services.⁷⁵

C. Any New Rules Should Apply Neutrally To All Members Of The Internet Ecosystem

Qwest also echoes the majority of commenting parties contending that any new rules created in this proceeding should be applied on a technology neutral basis to any and all Internet gatekeepers with the ability to impede end-user access to the Internet ecosystem. All gatekeepers who operate in the Internet ecosystem should comply with the FCC Internet Policy Principles and provide increased transparency with regard to customer information. As noted, certain aspects of the regulatory framework proposed in the *NPRM* -- namely, the strict nondiscrimination obligation -- should be eliminated (or at least significantly modified). However, regardless of what new openness requirements the Commission determines to extend here, any new rules should be applied in a technology neutral fashion. It is critical that the Commission, in implementing any new regulation in this area, ensure an even playing field. Additionally, as explained in the legal authority discussion below, a framework that arbitrarily

are so essential to the basic functioning of society"); Center for Media Justice, *et al.* at 22-23 (contending that arguments for new regulation exist independently of conclusions around the state of competition).

⁷⁴ See Google Plans for Ultra High-Speed Broadband Testbed Praised, Washington Internet Daily, Feb. 11, 2010.

⁷⁵ Free Press at 45-48.

picks and chooses winners within a universe of similarly situated parties would also be legally defective for that reason alone.

1. There is no basis for distinguishing between broadband providers and content and application providers that serve as gatekeepers

There is no justification for extending new Internet openness requirements to broadband providers while exempting search engine operators and others who operate at other layers of the Internet and have at least as much ability to impact end-user access to the Internet. Numerous commenting parties join Qwest in noting the irony of an approach that would impose a strict nondiscrimination rule on broadband providers while leaving in place existing arguably non-neutral practices of large content and application providers -- for example, CDN deployment and search engine prioritization.⁷⁶ There is also extensive evidence in the initial comments of existing non-neutral practices by content and application providers.⁷⁷ In this context, any regulatory framework that sought to address speculative concerns about broadband provider non-neutral practices while ignoring existing concerns about already-occurring practices at other layers of the Internet ecosystem can not be justified.

⁷⁶ Cisco at 11-12; Comcast at 34-36; AT&T at 27-40; Verizon at 36-39; Adtran at 16; CWA, *generally*; National Association of Manufacturers at 4; CenturyLink at 22-23; Vonage at 29-31; Time Warner Cable at 39-41, 90.

⁷⁷ AT&T at 197-207 (detailing non-neutral practices of Google and other content and application providers); CWA at 14 (discussing search engine prioritization and other non-neutral practices of content and application providers); OPASTCO at 1-2 (discussing problems with non-discriminatory access to content); National Organizations at 28-29 (“Certainly, though, a reasonable case has been made that any argument the Commission advances for applying net neutrality rules to broadband providers could apply with even more force to certain content, applications, and service providers -- entities that have both the ability and a demonstrated willingness to shape the Internet experience of all consumers, including minorities, in some decidedly un-neutral ways.”); Time Warner at 74-90 (detailing non-neutral practices of Google and others). *See also*, Foundem Feb. 23, 2010 Reply Comments at 3 (demonstrating how Google’s Universal Search functionality “transforms Google’s ostensibly neutral search engine into an immensely powerful marketing channel for Google’s other services. When coupled with Google’s 85% share of the global search market, this gives Google an unparalleled and virtually unassailable competitive advantage, reaching far beyond the confines of search.”).

2. **There is also no basis for distinguishing between wireline and wireless broadband providers**

There is also no basis for extending such new rules to wireline broadband providers while exempting other broadband providers who happen to utilize a wireless platform.⁷⁸ Thus, the Commission rightly concludes in the *NPRM* that any new rules it ultimately imposes in this proceeding should “apply to all platforms for broadband Internet access.”⁷⁹ Despite this conclusion, the *NPRM* raises the question of whether there are differences between mobile wireless broadband platforms and wireline platforms that justify differences in how any Internet openness principles are applied.⁸⁰ However, the potential concerns identified in the *NPRM* with respect to wireless networks apply equally to wireline networks. The Commission’s recognition of how these concerns impact wireless providers, if anything, only further supports the case for the Commission proceeding with caution as it contemplates new regulation for any broadband provider. In all events, these concerns do not create a basis for arbitrarily choosing to regulate one platform differently from another. At most, they call for recognition that any new rules must allow broad flexibility for various technology platforms to apply different network management practices depending on the limitations of their platform.

Each of the potential concerns raised in the *NPRM* and initial comments as purported bases for distinguishing wireless networks from wireline networks apply equally to wireline networks. For example, the Commission asks whether, because of certain factors, wireless broadband providers should be treated differently for purposes of the “any device” rule proposed

⁷⁸ Comcast at 32; Bright House at 11; CCIA at 15-15; Google at 77-80.

⁷⁹ *NPRM*, 24 FCC Rcd at 13117-18 ¶ 154.

⁸⁰ *Id.*

in the *NPRM*.⁸¹ Wireless broadband providers commenting in the first round similarly point to this as a potential area where wireless broadband networks should be treated differently for purpose of any new rules.⁸² But, the factors discussed - (1) that wireless broadband devices attach to a wireless broadband network through built-in radios/modems that support other services; (2) that different wireless providers have different network standards and “air interfaces;” and (3) the challenges created by tethering -- all have their analogs in the wireline world.⁸³ First, wireline broadband modems also serve as the conduit for a variety of other services in addition to broadband Internet access as defined in the *NPRM*.⁸⁴ Second, wireline networks also have different standard interfaces to manage for devices that connect to their networks. Third, wireline networks also face similar challenges to tethering, the practice by which wireless devices become modems through which other devices access the network. Attempts by end users to use broadband Internet services to create Wi-Fi hot spots or attempts by wireless networks to download wireless data traffic onto wireline networks through Femtocell arrangements create analogous network management problems in the wireline world.⁸⁵

The potential factors cited in the *NPRM* and initial comments as purported bases to distinguish between wireless and wireline networks for purposes of application of a nondiscrimination obligation and/or a reasonable network management exception are also only

⁸¹ *Id.* at 13118 ¶ 157.

⁸² Wireless Communications Association International at 17-20; Clearwire at 9-10.

⁸³ *NPRM*, 24 FCC Rcd at 13121-22 ¶¶ 163-67.

⁸⁴ As the Commission itself recognizes elsewhere in the *NPRM*, wireline broadband networks provide a variety of managed or specialized services over the same network as is used to provide broadband Internet access. *NPRM*, 24 FCC Rcd at 13116 ¶ 148.

⁸⁵ Femtocells are low-power wireless access points that operate in licensed spectrum to connect standard mobile devices to a mobile operator’s network using residential DSL or cable broadband connections.

distinctions without a difference. Both wireless and wireline networks are shared networks that are dynamic in nature.⁸⁶ Similarly, while wireless networks may require steps to address radio interference or propagation effects such as signaling loss with increasing distance,⁸⁷ wireline networks face similar dynamic challenges. For example, bandwidth-gobbling applications such as P2P regularly interfere with normal network engineering assumptions in unpredictable ways. Signaling loss with distance is common to wireline technologies such as DSL. Similarly, capacity issues impact wireless and wireline networks alike. While wireless providers have finite spectrum, wireline providers face capacity limitations that are only solved by costly network build-out. Nor does the mobility of wireless broadband end users distinguish wireline networks for purposes of these proposed obligations. Wireline networks must also deal with bandwidth demand swings due to certain applications (*e.g.*, P2P), certain content (*e.g.*, video), and user dynamics (*e.g.*, sudden usage increases due to a major snowstorm).

In short, none of the concerns outlined in the *NPRM* or in the initial round of comments create a basis for arbitrarily choosing to regulate wireline broadband platforms while treating wireless broadband platforms differently. All broadband providers, regardless of the technology platform, face significant network management challenges and require flexibility in operating their networks. The fact that these significant concerns expressed by the Commission and others are faced by wireline providers as well only illustrates the need for the Commission to proceed with caution with any new regulation in this area. Regardless, any regulatory framework that arbitrarily distinguishes between broadband platforms would be unwise as a policy matter.

⁸⁶ *NPRM*, 24 FCC Rcd at 13119 ¶ 159.

⁸⁷ *Id.*

D. There Is Also An Emerging Consensus On Numerous Key Underlying Issues Raised In The *NPRM*

In addition to the overarching consensus described above with regard to the best overall framework approach in this proceeding, the initial comments also reflect an emerging consensus on numerous important underlying issues raised in the *NPRM*. These comments address specific questions raised in the *NPRM* regarding the universe of last mile Internet architecture that should be subject to new network openness rules,⁸⁸ the types of differentiation that should be permitted even under a strict nondiscrimination standard,⁸⁹ and how the Commission should define the public Internet (versus private network) functionality that would be covered by any new rules.⁹⁰

1. Any new rules should be applied narrowly to a defined universe of last mile Internet architecture

In its initial comments, Qwest demonstrated why a prohibition of all discrimination, regardless of its reasonableness, is inappropriate and why a reasonable discrimination standard makes more sense as a policy matter.⁹¹ As discussed above, the reasoning for that advocacy was echoed by a large and diverse group of commenting parties.⁹² Qwest also articulated why, regardless of what new rules are put in place through this proceeding, any network openness rules for broadband access providers should be applied narrowly to a defined universe of last mile Internet architecture.⁹³ This concern was also shared by numerous other parties in the initial

⁸⁸ *Id.* at 13088-89 ¶ 63.

⁸⁹ *Id.*

⁹⁰ *See, e.g., id.* n.103.

⁹¹ Qwest Comments at 29-48.

⁹² *See, supra,* at 11-18.

⁹³ Qwest Comments at 45-47.

round of comments.⁹⁴

2. Any new rules should allow, at a minimum, broad end-user directed differentiation

In its initial comments, Qwest also demonstrated why any new rules, in addition to being applied to a narrowly defined universe of broadband architecture, should also clearly exempt one specific type of differentiation -- namely, traffic differentiation directed by an end user.⁹⁵ There is considerable consensus on this issue in the initial comments.⁹⁶ Indeed, even proponents of intrusive regulation recognize that consumer-directed prioritization or enhancement should be permitted.⁹⁷

3. The Commission should also narrowly define the public Internet (versus private network) functionality covered by any new rules

The Commission, in the *NPRM*, excludes private network functionality from the definition of last mile broadband Internet access facilities to be covered by any new rules. The *NPRM* appears to recognize that private network versus public Internet functionality should be defined by whether a given facility is used to create a communications path for the purpose of accessing the public Internet and not whether public or private IP addresses are utilized. As

⁹⁴ See Charter at 13 (limit application of new rules to best efforts residential Internet service); Verizon at 79-81 (any rules adopted by the Commission “should be limited by their terms only to traditional wireline public Internet access services -- i.e., services that are expressly sold as offering the public access to all lawful endpoints on the public Internet -- as well as providers of lawful content, applications, and services on the public Internet.”); Ad Hoc at 21-22.

⁹⁵ Qwest Comments at 47-48.

⁹⁶ Amazon at 2-3 (in addition to proposing a more flexible nondiscrimination rule for broadband provider-initiated prioritization or enhancement, proposes a special rule enabling user-initiated prioritized or enhanced services); Alcatel-Lucent at 19 (advocating increased flexibility for “customer-requested enhanced treatment”). See also, Testimony from Jan. 13, 2010 FCC Workshop: Marcus Weldon, Alcatel-Lucent, Innovation and Investment in the Internet: Past, Present and Future at slide 8.

⁹⁷ Center for Media Justice, *et al.* at 48-49; CCIA at 12-13; Center for Democracy and Technology at 26-27. See also, Testimony from January 13, 2010 FCC Workshop: Barbara Van Schewick, Stanford Law School, Factors that Foster Application - Innovation at slides 32 and 41.

Qwest discussed in its initial comments,⁹⁸ while this is the right approach, it is also important that the Commission clarify its definition and narrowly define the public Internet (versus private network) functionality that would be covered by any new nondiscrimination rule created in this proceeding. A significant number of diverse commenting parties in the initial round also recognized the importance of this issue.⁹⁹

E. Qwest Supports Numerous Specific Proposals In The Initial Comments That Would Accomplish The Commission's Objectives In An Effective, Balanced Manner

Qwest also supports numerous proposals contained in the initial comments that also have merit as potential tools to be utilized in helping ensure that the rules adopted in this proceeding strike the right balance. In some cases, these proposals represent adequate alternatives to specific proposals made by Qwest in its initial comments.

1. Using industry fora to define new end-user disclosure requirements

In its initial comments, Qwest proposed a specific new end user disclosure rule for broadband providers and advocated that a similar rule be established for other entities that would be subject to the new regulatory framework here.¹⁰⁰ Specifically, Qwest proposed the following rule for broadband providers:

⁹⁸ Qwest Comments at 11-12.

⁹⁹ Comptel at 5-6 (advocating that proposed public Internet definition based on IP addresses is too broad; calling for a rule that clearly distinguishes between private networks and other managed services); CWA at 9-11 (proposed definition sweeps too broadly; should be revised to encompass only "access to all or substantially all publicly accessible end points that have an" IANA IP address); AT&T at 96-102 (proposing to distinguish open-ended Internet connectivity and all content, applications and services that flow over that connectivity from all else and adopting a rule that limits application of new rules to those services); Verizon at 79-81 (any rules adopted by the Commission "should be limited by their terms only to traditional wireline public Internet access services -- i.e., services that are expressly sold as offering the public access to all lawful endpoints on the public Internet -- as well as providers of lawful content, applications, and services on the public Internet.").

¹⁰⁰ Qwest Comments at 11-22.

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

As Qwest explained, this approach would incorporate the two key features any new transparency rule should have. First, it would impose basic, flexible disclosure requirements, rather than prescriptive, detailed disclosure requirements. Second, it would apply to content and application providers, as well as broadband providers. Qwest also detailed the facts that competitive market forces already supply consumers with extensive information about broadband services.¹⁰¹ Qwest also demonstrated that, while a flexible disclosure rule would provide clear benefits to consumers and further the Commission's policy objectives, mandating disclosure of detailed information would provide little, if any, additional benefit to consumers and may actually be harmful.¹⁰²

Various other parties propose, in the initial round, that any new end-user disclosure requirements be defined by industry fora.¹⁰³ Qwest could also support these proposals as a potential alternative to Qwest's proposed rule. Either approach has the potential to strike the appropriate balance between giving end users the transparency they need and avoiding the legal and practical challenges outlined in Qwest's comments.¹⁰⁴

¹⁰¹ *Id.* at 14.

¹⁰² *Id.* at 11.

¹⁰³ See Netflix at 8-9; ATIS at 4-5; RCA at 23-24 ("to further its transparency goals the FCC should work with the industry (and their associations) to come up with voluntary 'safe harbor' industry standards . . . that would guarantee a provider's compliance with the transparency principle.")

¹⁰⁴ Qwest Comments at 11-12.

2. Establishing a rebuttable presumption rule for reasonable network management practices

Qwest's initial comments also demonstrated, in particular, the likelihood that a strict nondiscrimination standard would: (1) impede investment generally in broadband networks; (2) preclude the necessary investment and innovation to build next-generation networks as desired and have a negative impact on broadband adoption; (3) ignore the needs of broadband providers for flexibility in managing their networks; and (4) prevent development and deployment of a broad array of innovative IP products and services.¹⁰⁵ Because of these concerns, Qwest's comments also emphasized the critical need, regardless of what new rules the Commission adopts, for reasonable network management rules to give broadband providers flexibility in managing their networks.¹⁰⁶ To accomplish this, Qwest outlined important clarifications that the Commission should adopt with respect to these rules and several specific characteristics that would be essential to accomplishing the appropriate balance in network management rules.¹⁰⁷

Other parties advocate, in their initial comments, that the Commission address these concerns by creating a rebuttable presumption that certain network management practices are reasonable.¹⁰⁸ As those comments demonstrate, this could be done in a variety of ways. For example, the Commission could create a rebuttable presumption that certain types of practices or

¹⁰⁵ *Id.* at 30.

¹⁰⁶ *Id.* at 34-36.

¹⁰⁷ *Id.* at 3-7.

¹⁰⁸ *See, e.g.*, Comcast, 58-60 (proposing that practices approved by certain industry groups be deemed reasonable network management practices and that, for practices approved by other industry groups, there be a rebuttable presumption that certain types of practices or practices approved by certain industry groups be deemed reasonable network management practices); AT&T at 187 (proposing that practice "intended to address a legitimate provider interest... is reasonable, unless and until a complainant demonstrates otherwise"); Bright House at 10 (place burden of proof on complainants challenging any network management practice); NTCA at 4-5 (complainants should have burden of proving a practice is unreasonable); Cox at 30-32 ("properly disclosed" management practices should be presumed reasonable); Corning at 16-17.

practices approved by certain industry groups be deemed reasonable network management practices. Alternatively, the Commission could establish that practices intended to address a legitimate provider interest are presumptively reasonable unless and until a complainant demonstrates otherwise. Such rules could also help ensure that broadband providers have adequate flexibility in their network management practices.

3. Creating safe harbors for practices conforming with standards established by industry TAGs

Qwest also supports the proposals in the Verizon-Google joint statement and other initial comments regarding industry TAGs and reasonable network management practices. These parties propose that the Commission confirm, as part of any new rules, that network management practices conforming with standards established by specified groups would constitute safe harbors for broadband providers.¹⁰⁹ These proposals also have the potential to address the critical need for broadband providers to have adequate flexibility in their network management practices. In identifying the groups that could establish such safe harbors, the Commission should start with existing bodies. For example, ATIS, given its historic focus, would be an ideal organization to provide guidance on network management practices.

4. Narrowly defining “public broadband Internet access” as an alternative to creating a fixed definition for managed services

As Qwest outlined in its initial comments and as is discussed at length above, another

¹⁰⁹ See Google and Verizon Joint Statement on the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010 (proposing the identification of various technical advisory groups that would identify best practices on network management; a practice that is consistent with these best practices or principles would be presumed to satisfy the values outlined above and any regulatory requirements, but the fact that a given practice differs from these best practices would not show the opposite); Comcast at 51-57 (proposing a safe harbor for network management practices that conform with standards promulgated by the IETF and other standard development organizations); CCIA at 12 (“the FCC should create a safe harbor provision that ensures IAPs that their network management practices will be deemed presumptively reasonable under certain circumstances.”).

critical aspect of any new rules adopted here is the need to exempt a broadly defined category of managed services from those rules and, relatedly, the need to narrowly define the public Internet (versus private network) functionality that would be covered by those rules.¹¹⁰ Qwest detailed in its comments the types of services that would need to be included in any managed services definition.¹¹¹ Qwest also proposed that the Commission include an open-ended catch-all category of managed/special services.¹¹² Qwest's proposed approach seeks to account for the need for flexibility to address future services and the impossibility of identifying the full range of existing and yet-to-be-imagined products and services that could be impacted by the *NPRM*.

Various other parties, in their initial comments, propose that these same concerns be addressed by an alternative approach -- by having the Commission narrowly define "public broadband Internet access rather than attempt to establish a fixed definition for managed services."¹¹³ Provided an appropriate definition of public broadband Internet access can be developed, Qwest also supports these proposals. If this approach is taken, it will be necessary to ensure that the definition of public Internet access excludes some services that may entail some level of public Internet connectivity -- for example, business enterprise services. If not, the new framework will have to otherwise enable adequate flexibility to allow prioritization in connection with such services. This concern could potentially be addressed through the use of a more flexible discrimination rule or reasonable network management rule for public Internet traffic in the first place, as Qwest has proposed.¹¹⁴ But, if the Commission proceeds with a strict

¹¹⁰ See Qwest Comments at 24-28; *see also, supra*, at 12, 14-15, 29.

¹¹¹ Qwest Comments at 24-27.

¹¹² *Id.* at 28.

¹¹³ See, e.g., AT&T at 96-102; CWA at 24; Verizon at 80-81.

¹¹⁴ Qwest Comments at 48-50.

nondiscrimination framework as proposed in the *NPRM* and such services fall within the scope of the services subject to that framework, either an express managed services exemption for such services or some other accommodation will be necessary.

F. Extreme Proscriptive Network Openness Rules Proposed By Certain Parties Clearly Overreach

In addition to proposing extreme overall regulatory frameworks as described above, a small number of proponents of proscriptive regulation also overreach on a variety of specific issues raised in the *NPRM*. The Commission should reject these proposals as well.

1. Proposed overly-detailed end-user disclosure rules would be harmful

A few parties propose overly-detailed end-user disclosure rules that greatly exceed what even the *NPRM* proposes. The vast scope of these proposals is mind-boggling.¹¹⁵ These proposed rules would impose extensive costs on broadband providers and create unnecessary roadblocks to broadband provider efforts to maintain the fluidity, security and other characteristics necessary for effective network management. As detailed at great length in the initial comments of Qwest and other parties, overly detailed and standardized mandatory

¹¹⁵ See, e.g., Free Press at 112-18 (contending that “[t]he Commission’s proposed disclosure rule does not go far enough,” proposes, among other things, that broadband providers be required to disclose for every network practice it deploys “1) the specific problem or issue requiring the network interference, including evidence to demonstrate the existence of congestion or other problems that mandate interference; 2) any and all limits imposed on or direct changes made to a customer’s upstream or downstream traffic, such as blocking traffic, delaying traffic, deprioritizing or prioritizing traffic, reordering traffic, redirecting traffic, discriminating for or against certain traffic, or inserting traffic into the stream; 3) technical details of the methods used; 4) exact details of all thresholds, such as time of day or exact levels of congestion or bandwidth consumption, that trigger any network interference, as well as the effects in the network as a result of the chosen thresholds, such as a general percentage of users affected and the duration of effect for those users; and 5) exact details of thresholds that trigger a cessation of network interference” (*id.* at 115-16 n. 232); also proposing requirement for advance notice of any changes to these extensive details and that disclosures be provided in a standardized manner) (*id.* at 117); Center for Media Justice, *et al.* at 64-65 (similar proposal). See also; CCIA at 33-34; and Center for Democracy & Technology at 31-36.

disclosures along the lines of these proposals are both excessive as a matter of policy and unlawful -- among other things, violating the First Amendment.¹¹⁶ These proposals would go too far and should be rejected.

2. Additional disclosure rules for content and application providers and the government are unnecessary

A few parties also propose additional rules mandating detailed disclosures by broadband providers to content and application providers and the government above and beyond that which would be required for end users.¹¹⁷ These proposals are also unnecessary for the reasons discussed in Qwest's and other parties' initial comments¹¹⁸ and should be rejected.

3. Attempts to broaden the universe of architecture covered by any new rules also overreach

Certain parties also call for the Commission to extend its proposed new rules well beyond the last mile architecture described in the *NPRM*. The Commission should reject these overreaching proposals as well. Some of these comments provide yet another example of a

¹¹⁶ Qwest Comments at 51-72; Bright House at 15, (“there are also constitutional free speech issues that compel the narrowest construction of any net neutrality rule that may be adopted”); AT&T at 235-37.

¹¹⁷ Free Press at 117-18 (requiring that incredibly detailed disclosures be provided to content and application providers and government as well); Center for Media Justice, *et al.* at 66-67 (in addition to being required to provide end-user disclosures described above to Commission, would also be required to provide detailed disclosures, with supporting “detailed technical discussions,” of the following: description of the practice being employed, as well as the need for it and its purpose and effect; identification of whether or not it results in any discrimination or preference; in the case of a practice that results in any degree of discrimination or preference, a demonstration that the practice is designed to address the need and achieve the purpose and effect in question and nothing else, establishment that the practice results in discrimination or preference as little as reasonably possible, a demonstration that any harm to an end user or any other party is as little as reasonably possible, and an explanation of why in the case of a technical practice network investment or economic approaches alone would not reasonably address the need and effectively achieve the same purpose as the practice); New Jersey Rate Counsel at 12-13 (the Commission should gather from ISPs “the actual disclosures made available to consumers...”).

¹¹⁸ Qwest Comments at 4, 11, 19-22; AT&T at 13, 188-91.

knee-jerk tendency to overreach by certain proponents of proscriptive regulation as a philosophical choice.¹¹⁹ Other such proposals originate from more narrow perspectives of self-interest.¹²⁰ Such proposals are a bad idea as a policy matter, but, more importantly, exceed the scope of the *NPRM*.

4. The Commission should reject proposals to eviscerate the reasonable network management exception and eliminate the managed services exemption

The Commission should also reject proposals that the Commission eviscerate the reasonable network management exception and eliminate the proposed managed services exemption. The Commission, in the *NPRM*, proposes a strict nondiscrimination framework to be accompanied by a flexible reasonable network management exception. It also proposes that a variety of managed services be exempted from its proposed strict nondiscrimination framework. In fact, the Commission states in the *NPRM* that it believes that these exceptions are essential components of the proposed strict nondiscrimination framework.¹²¹ According to the Commission, these exemptions will provide the necessary flexibility that any new rules must possess.¹²² Certain parties, in their initial comments, present extreme views of the reasonable network management exception that would eviscerate the flexibility that exception was intended to provide.¹²³ These same parties also advocate that the Commission not create any managed

¹¹⁹ See, e.g., Free Press at 127 (rules “should apply to broadband Internet access services, on the portion of an ISPs [sic] network that serves the end-user up to the Internet exchange point”).

¹²⁰ For example, OPASTCO asks that the Commission reach beyond the scope of the *NPRM* to address purported issues with middle mile and Internet backbone access. OPASTCO at 6-7.

¹²¹ *NPRM*, 24 FCC Rcd at 13106 ¶ 109.

¹²² *Id.*

¹²³ See, e.g., Free Press at 78, 84-104 (while giving lip service to notion expressed in the *NPRM* that a flexible network management is critical particularly in a strict nondiscrimination framework, then proposes that the *NPRM*'s proposed list of acceptable types of practices not be adopted, particularly quality of service practices, that an amorphous “public interest” standard be

services exemption, or worse, regulate that category of services even more heavily.¹²⁴ These proposals plainly strive to make it as difficult as possible for broadband providers to sustain the legitimacy of network management practices which, by definition, must be adaptive and timely. The Commission should reject these proposals.

G. Qwest Echoes The Additional Concerns Of Numerous Other Parties Regarding The Commission’s Limited Legal Authority Here

In its initial comments, Qwest provided an exhaustive demonstration of why the Commission’s legal authority in this area is limited. As discussed in detail in the first section of these comments, *Comcast v. FCC* now clearly calls into question the authority of the Commission to adopt the broader regulatory framework proposed in the *NPRM*. In the following section, Qwest also addresses specific initial comments regarding the limits of the Commission’s legal authority here.

1. Broadband provider First Amendment rights can not be “outweighed” by purported speech-enabling benefits of open Internet regulation

Qwest and numerous other commenting parties demonstrated overwhelmingly in the initial round of comments that applicable constitutional requirements, including First Amendment protections, limit the Commission’s ability to impose certain of the proposed rules

adopted instead, and that the burden be on broadband providers to defend practices should they be challenged); Center for Media Justice, *et al.* at 35-53 (advocating that proposed reasonable network management rule be eliminated and replaced with an amorphous distinction between management practices driven by technical versus legal purposes; essentially proposing a bar against any network management done for quality of service purposes or provided to content and application providers for a fee); New Jersey Rate Counsel at 12-13 (advocating for very narrow network management rules).

¹²⁴ Free Press at 105 (managed services “should be carefully supervised and regulated as needed”); Center for Media Justice, *et al.* at 32 (“Commission should not define or classify such managed services...”); Google at 74-77 (advocating that Commission not create a managed services category at this time; Open Internet Coalition at 92-93 (opposing creation of a framework “for so-called ‘managed services.’”)

contained in the *NPRM*. Other parties appear to suggest that any burden on broadband provider expression is “outweighed” by supposed speech-enabling benefits of an open Internet.¹²⁵ This argument also rings hollow.

The Supreme Court recently reiterated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹²⁶ This principle applies with equal force to speech on the Internet. Indeed, the Court observed that, “[w]ith the advent of the Internet and the decline of print and broadcast media, . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”¹²⁷ And the Commission itself has recognized the principle in prior proceedings.¹²⁸

Similarly, in a wide range of contexts, the Supreme Court has rejected as “antithetical to the First Amendment” “the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers.”¹²⁹ Otherwise, the communications of all speakers would be at risk: “One might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to ‘enhance the relative voices’ of smaller and less influential

¹²⁵ Free Press at 137-38; Center for Media Justice, *et al.* at 3-5; Center for Democracy and Technology at 30-31.

¹²⁶ *Citizens United v. Federal Election Comm’n*, 130 S. Ct. 876, 904 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*)).

¹²⁷ *Id.* at 905-06.

¹²⁸ *E.g.*, *In the Matter of Fox Television Stations Inc. License of Television Station WNYW, New York, New York, Request for Waiver of the Broadcast-Newspaper Cross-Ownership Rule*, 9 FCC Rcd 5246 (1994) (separate statement of Chairman Quello).

¹²⁹ *Davis v. Federal Election Comm’n*, 128 S. Ct. 2759, 2773 (2008) (citation and internal quotation marks omitted).

members.”¹³⁰ “As a general matter, the American First Amendment tradition requires that the financial, political, or rhetorical imbalance between the proponents of competing arguments is insufficient to justify government intervention to correct that imbalance.”¹³¹

2. Any attempt to reverse past rulings regarding the Title I status of broadband Internet access would be unlawful and would only create uncertainty at this critical juncture

No doubt recognizing the absence of adequate Commission authority to impose the rules proposed in the *NPRM*, particularly the more extreme aspects, certain parties argue that the Commission should simply re-classify broadband services as Title II services.¹³² This issue was not raised in the *NPRM* and, therefore, in order to even consider this approach, the Commission would be required under the Administrative Procedure Act (APA) to provide notice and an opportunity for comment.¹³³ Additionally, as discussed more fully below, any attempt to reverse its past rulings regarding the Title I status of broadband Internet access (*e.g.*, to try and reinstate broadband Internet access as a Title II service) would be reversible error. It would also reflect a bad policy choice. Among other things, this approach would introduce tremendous uncertainty and instability to the Internet ecosystem at a critical juncture in the Commission efforts to complete the National Broadband Plan and address the considerable broadband deployment and adoption challenges before it.

Any reversal of the Commission’s past rulings regarding the classification of broadband

¹³⁰ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n. 30 (1978).

¹³¹ *Emily’s List v. Federal Election Comm’n*, 581 F.3d 1, 6 n. 2 (D.C. Cir. 2009) (citation and internal quotation marks omitted).

¹³² *See, e.g.*, Center for Media Justice, *et al.* at 21; Vonage at 10-15; Free Press at 31-32; *and see* Google at 45.

¹³³ 5 U.S.C. § 551, *et seq.* The remainder of Qwest’s comments assumes, *arguendo* and without waiving Qwest’s arguments to the contrary, that this issue is properly before the Commission in this *NPRM* as a procedural matter.

Internet access under Title I would be legally untenable. The Commission, in its *Cable Modem Order* and its subsequent decisions addressing the regulatory status of other broadband technologies, ruled that broadband Internet access is an information service with an inseparable telecommunications component.¹³⁴ It follows, said the Commission, that broadband Internet access is not a telecommunications service within the Commission's Title II jurisdiction.¹³⁵ As Qwest and others have already amply demonstrated, the factual underpinnings to these rulings have not changed.¹³⁶ Indeed, the conclusion that the telecommunications component of broadband Internet access can not be segregated from the overall information service is even more accurate today.¹³⁷ Moreover, the industry, particularly broadband providers who have invested billions of dollars in network build-out since the Commission's rulings, has relied

¹³⁴ *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Order*), *rev'd*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies 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 (2005) (*Wireline Broadband Order*), *aff'd sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and cons. cases), 507 F.3d 207 (2007); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Order*).

¹³⁵ *Cable Modem Order*, 17 FCC Rcd at 4823 ¶ 39; *Wireline Broadband Order*, 20 FCC Rcd at 14902 ¶ 93; *Wireless Broadband Order*, 22 FCC Rcd at 5908 ¶ 18.

¹³⁶ See letter to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket Nos. 09-191 and 09-51 and WC Docket No. 07-52, from Steve Davis, Qwest, *et al.*, dated Feb. 22, 2010 (Feb. 22 letter to Genachowski).

¹³⁷ *Id.* at 2-6.

heavily on these rulings in making significant financial outlays.¹³⁸ In this context, the Commission can not simply cast aside its prior rulings. The courts have made clear that an additional burden applies where a reversal by the Commission would require it to make factual findings that contradict its earlier rulings and where its policy has engendered serious reliance interests such as those at stake here.¹³⁹ Thus, it is likely that any attempt to reverse its past rulings and now declare broadband Internet access as subject to Title II would be overturned as arbitrary and capricious.

Nor do proponents of Title II re-classification present a credible case for such a reversal. To begin with, these parties self-servingly misstate the applicable legal standard. In its recent filing in the National Broadband Plan proceeding advocating for Title II reclassification, Public Knowledge suggests, citing the Supreme Court's *Fox Television* decision, that the Commission would not carry an additional burden should it attempt such a reclassification.¹⁴⁰ However, when purporting to provide the Commission with the applicable legal standard, Public Knowledge omits the following italicized language:

This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. *Sometimes it must -- when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.... It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.*¹⁴¹

It is also clear that this legal standard can not be met here. Public Knowledge's entire

¹³⁸ *Id.* at 3.

¹³⁹ *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1810-1811 (2009).

¹⁴⁰ See Reply Comments – NBP Public Notice #30 of Public Knowledge, GN Docket Nos. 09-47, 09-51, 09-137, filed Jan. 26, 2010 at 4 (Public Knowledge NBP #30 Reply).

¹⁴¹ *Fox Television Stations*, 129 S. Ct. at 1811.

case for changed circumstances warranting a change in course breaks down to its baseless contention that the transmission component of broadband Internet access is somehow less integrated into the finished service than at the time of the Commission's prior broadband decisions.¹⁴² Public Knowledge cites, as the factual basis for this contention, the fact that broadband providers market and compete vigorously based on speed and have invested significant amount of capital in network build-out.¹⁴³ In contrast, Qwest and others have submitted a considerable factual record demonstrating that the transmission component of broadband Internet access is, if anything, more integrated into the finished service.¹⁴⁴ Various parties also seek to justify Title II re-classification by presenting a false choice suggesting that, if the Commission doesn't have the jurisdiction and authority to impose the more onerous aspects of its proposed regulatory framework, it can do nothing in this area.¹⁴⁵ This is pure smokescreen. As noted above, the Commission is not powerless to act regarding the Title I services at issue in the *NPRM*. But, whatever action it takes must remain within the long-established limits of its Title I authority. Moreover, the Commission should not attempt to apply Title II solutions -- or, as in the case of a strict nondiscrimination obligation, solutions that exceed even its Title II authority -- on Title I services. This is not only what the law requires, but is the best policy result for services that operate in the competitive broadband provider market.

Perhaps most importantly, a Commission Title II reversal at this time would introduce tremendous uncertainty and instability to the Internet ecosystem at a critical juncture. Because of the likely legal challenge to such an action, it is self-evident that Commission efforts to

¹⁴² Public Knowledge NBP #30 Reply at 8-10.

¹⁴³ *Id.*

¹⁴⁴ Feb. 22 letter to Genachowski at 7.

¹⁴⁵ Public Knowledge NBP #30 Reply at 1-5.

implement its National Broadband Plan will suffer a serious setback if the Commission reverses its position on Title II and is then itself reversed by the courts years down the road. Additionally, as was also detailed in the recent filing by Qwest and other parties, such a reversal would have dramatic consequences for the broader Internet ecosystem in the meantime.¹⁴⁶ A Title II reversal decision would necessarily subject to Title II jurisdiction all information service providers that use a telecommunications input to provide information services to the public.¹⁴⁷ This includes Internet search advertising services, Internet transport and a variety of other services. Moreover, contrary to claims of certain parties, the impact of this result can not be avoided by the Commission employing selective application of Title II through its forbearance authority.¹⁴⁸

In short, a Commission reversal of its past rulings establishing the Title I status of broadband Internet access would be reversible error and would introduce numerous harmful policy consequences.

3. The Commission can not find the necessary legal authority to implement the *NPRM*'s proposed rules in sections of the Act not specified in the *NPRM*

In the *NPRM*, the Commission contended that it can impose the proposed regulatory framework, including the proposed strict nondiscrimination rule, as reasonably ancillary to its responsibilities contained in section 230(b), section 706(a), and section 201(b). As discussed above, Qwest and numerous other parties demonstrated in their initial comments that these provisions do not provide an adequate basis for such authority and *Comcast v. FCC* has confirmed this fact.¹⁴⁹ In yet another indication of the depth of doubt about the Commission's

¹⁴⁶ Feb. 22 letter to Genachowski at 7.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 12-13.

¹⁴⁹ *Comcast*, slip op. at 17-36.

authority to impose the proposed framework, numerous parties have suggested that the Commission can find this authority in other sections of the Act not specified in the *NPRM*.¹⁵⁰ In addition to the fact that these issues were also not raised in the *NPRM* and are therefore not yet properly before the Commission,¹⁵¹ these arguments also lack merit and should be rejected.

By way of example, Center for Media Justice, *et al.*, in their initial comments, argue alternatively that the Commission has adequate Title I authority to impose the regulatory framework proposed in the *NPRM*, including the proposed strict nondiscrimination standard, as a result of its “traditional regulation” of the transmission element of facilities based broadband providers.¹⁵² Specifically, Center for Media Justice, *et al.* cite the Commission’s historic *Computer Inquiry* decisions and the D.C. Circuit’s decision in the *Computer and Communications Industry Association (CCIA)* case.¹⁵³ Center for Media Justice, *et al.* misses the point. The Commission’s regulation of the transmission component of information services in its *Computer Inquiry* decisions was based on the regulatory classification of that transmission component as a separate Title II service. But, the Commission has ruled that there is no

¹⁵⁰ The *NPRM* contends that the proposed rules will “advance the federal Internet policy set forth by Congress in section 230(b) as well as the broadband goals that section 706(a) of the Telecommunications Act of 1996 charges the Commission with achieving” and fall within the Commission’s specific authority under Section 201(b) “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act.” *NPRM*, 24 FCC Rcd at 13099 ¶ 84.

¹⁵¹ As with the Title II reclassification argument discussed above, notice and comment would be required under the APA in order for the Commission to even consider these new arguments. 5 U.S.C. § 551, *et seq.* The remainder of Qwest’s comments assumes, *arguendo* and without waiving Qwest’s arguments to the contrary, that this issue is also properly before the Commission in this *NPRM* as a procedural matter.

¹⁵² Center for Media Justice, *et al.* at 7.

¹⁵³ *Id.* at 6-8.

severable Title II telecommunications service entailed in broadband Internet access.¹⁵⁴ And, as described above, any attempt to reverse that decision would be reversible error. Similarly, the D.C. Circuit's discussion of the Commission's Title I ancillary jurisdiction authority in the *CCIA* case addressed that same context -- *i.e.*, where the Commission found the existence of a separate telecommunications service and information service.¹⁵⁵ Since the Commission has determined that broadband Internet access is a Title I service without a separate telecommunications service, the Commission's Title I ancillary jurisdiction is more limited here.

Similarly, Center for Media Justice, *et al.*, argue, without any supporting factual or legal authority, that section 254(b)(2) somehow supports the proposed nondiscrimination rule. That provision states:

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles ... (2) Access to advanced services. Access to advanced telecommunications and information services should be provided in all regions of the Nation.

Center for Media Justice, *et al.* are grasping at straws. Clearly, the proposed rules, particularly the proposed strict nondiscrimination rule, are not reasonably ancillary to any responsibilities

¹⁵⁴ See *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies 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 (2005), *aff'd sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and cons. cases), 507 F.3d 207 (2007).

¹⁵⁵ The *Comcast* decision reinforces this reading of the *CCIA* case. In it, the D.C. Circuit expressly finds that “[t]he crux of our decision in *CCIA* was that in its *Computer II Order* the Commission had linked its exercise of ancillary authority to its Title II responsibility over common carrier rates – just the kind of connection to statutory authority missing here.” *Comcast*, slip op. at 25.

mandated by this provision. Nor do Center for Media Justice, *et al.* make any case to support their contentions.

Several parties also correctly point out the fallacies underlying the Commission's own arguments elsewhere that Internet regulation might be reasonably ancillary to sections 256 or 257 or the Commission's broad Title II, III, and Title VI jurisdiction under the Act.¹⁵⁶

Qwest echoes the other initial comments debunking arguments that ancillary Title I jurisdiction for the proposed strict nondiscrimination framework is established simply by reference to these or other generalized statutory delegations. As numerous parties detail in their initial comments and as *Comcast v. FCC* reinforces, ancillary Title I jurisdiction is narrowly limited. The comments demonstrate that, among other limitations, proponents of an ancillary jurisdiction theory must actually make the case, with reference to substantial supporting evidence, that each specific rule is adequately tied to a specific statutory duty.¹⁵⁷ Similarly, ancillary Title I jurisdiction will generally not lie where it is asserted as a basis for the Commission to act in contravention of a basic regulatory parameter of the Act (for example, the basic parameter that information services shall not be regulated as a common carrier service).¹⁵⁸ It will also not lie where an exercise of ancillary jurisdiction would essentially give the Commission *carte blanche* to impose any type of regulation it may seek and, essentially, permit it to read away the Act's clear intent that certain express obligations will apply only to certain

¹⁵⁶ *See, e.g.*, Barbara S. Esbin at 66-71; Comcast at 26. Notably, the *Comcast* decision also expressly rejected contentions by the Commission that sections 256 and 257 could support an exercise of ancillary jurisdiction like that asserted by the Commission here. *Comcast*, slip op. at 32-33.

¹⁵⁷ *See, e.g.*, Comcast at 22-26.

¹⁵⁸ *See, e.g.*, AT&T at 210; Verizon at 107-09.

types of services.¹⁵⁹ In the end, these limitations prevent the Commission from finding the necessary legal authority to implement the *NPRM*'s proposed nondiscrimination rule in any of the various sections of the Act cited by proponents of those rules.

4. Application of Internet openness rules to just one type of gatekeeper in the Internet ecosystem would also be arbitrary and capricious

Qwest echoes the comments of AT&T¹⁶⁰ and others demonstrating that the technology distinctions proposed in the *NPRM* -- imposing onerous new regulations on broadband providers while exempting other Internet gatekeepers -- would be arbitrary and capricious. As discussed above, there is simply no justification for extending new Internet openness requirements to broadband providers while exempting search engine operators and others who operate at other layers of the Internet.¹⁶¹ These parties have at least as much ability to impact end-user access to the Internet and, in fact, have demonstrated a track record of engaging in “non-neutral” conduct that is far more concerning than even the speculative future conduct imagined of broadband providers. Similarly, any new regulatory framework that arbitrarily chose to regulate one broadband platform differently from another would also be legally defective as arbitrary and

¹⁵⁹ See, e.g., AT&T at 209-14; Verizon at 10, 106. This, too, was reinforced by the *Comcast* decision where the court, responding to a contention by Commission counsel at oral argument, rejected the theory that the Commission could subject Comcast's Internet service to pervasive rate regulation to ensure that the company provides the service at “reasonable charges” consistent with section 1. The court held: “were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers.” *Comcast*, slip op. at 23-24.

¹⁶⁰ AT&T at 230-31 (D.C. Cir. 2005 (quoting *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777) (“Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious.”)).

¹⁶¹ See *supra* at 5, 23-24.

capricious.¹⁶²

IV. CONCLUSION

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

Respectfully submitted,

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April 26, 2010

¹⁶² *Burlington N. & Santa Fe Ry. V. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**
COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. to be: 1) filed
with the FCC via its Electronic Comment Filing System in GN Docket No. 09-191 and WC
Docket No. 07-52; 2) served via email on the Competition Policy Division, Wireline
Competition Bureau, Federal Communications Commission, at cpdcopies@fcc.gov; and 3) the
FCC's duplicating contractor, Best Copy and Printing, Inc., at fcc@bepiweb.com.

/s/Richard Grozier

April 26, 2010