

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Protecting and Promoting the Open Internet ) GN Docket No. 14-28

**COMMENTS OF  
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) submits these comments in response to the Public Notice initiating the above-captioned proceeding.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

NCTA and its members are committed to preserving a vibrant and open Internet; indeed, we view that objective as central to broadband providers’ ability to succeed in the marketplace.<sup>2</sup> NCTA accordingly welcomes the opportunity to comment on “how the Commission should proceed” in light of the D.C. Circuit’s recent decision vacating certain aspects of the Commission’s 2010 *Open Internet Order* in *Verizon v. FCC*.<sup>3</sup> In keeping with the open-ended nature of the Public Notice, these comments set forth basic principles that in NCTA’s view should guide the Commission’s consideration of further rules in light of the *Verizon* decision.

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<sup>1</sup> See Public Notice, *New Docket Established To Address Open Internet Remand*, GN Docket No. 14-28, DA 14-211 (rel. Feb. 19, 2014) (“Public Notice”).

<sup>2</sup> See John Eggerton, *NCTA On Open Internet: Court Decision Won’t Change How We Operate*, Jan. 14, 2014, available at <http://www.multichannel.com/distribution/ncta-open-internet-court-decision-wont-change-how-we-operate/147683> (reporting on commitments from NCTA, Broadband for America, and individual ISPs to refrain from blocking access to Internet content and to continue to operate networks consistent with Internet openness in the wake of the *Verizon* decision).

<sup>3</sup> See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), *affirming in part, vacating and remanding in part, Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 7905 (2010) (“*Open Internet Order*”).

NCTA believes that the transparency rule—which the *Verizon* court unanimously upheld—provides a practicable means of promoting Internet openness. There is no need for the Commission to establish overly prescriptive mandates unless concrete evidence of market failure or actual consumer harm emerges. There is no evidence of such harms. Indeed, overbroad and premature regulation might well do more harm than good—by chilling the very innovation and investment in broadband services that Congress directed the Commission to foster under Section 706 of the Telecommunications Act of 1996, and by preventing the marketplace experimentation the Commission has recognized as procompetitive and socially beneficial.

Assuming the Commission will initiate rulemaking proceedings to seek further comment on reinstating certain limits on blocking access to lawful content and services and/or on potentially harmful discrimination, the Commission should avoid an exclusive focus on the conduct of broadband ISPs that employ fixed wireline technologies. In particular, the Commission should undertake a fresh assessment of how to harmonize—to the greatest extent possible—the regulatory requirements for fixed and mobile broadband services in recognition of evolving technological capabilities, as discussed below.

NCTA also suggests that, if the Commission’s goal is to protect the open Internet for the American consumer and advance the deployment of broadband by managing the relationship between ISPs and edge providers, it should ensure that its inquiry explores the ability of edge providers to frustrate those objectives. This will provide the Commission with the information necessary to tailor the scope of any new regulatory requirements to the policy interests at stake. At the same time, the Commission should reaffirm its longstanding view that open Internet principles do not justify the extension of regulation to the competitive marketplace of Internet

peering or transit arrangements. As Chairman Wheeler recently acknowledged, such arrangements simply are beyond the scope of net neutrality regulation.<sup>4</sup>

Finally, the Commission should decline to pursue Title II reclassification proposals. As NCTA has long maintained, seeking to reclassify broadband Internet access as entailing the offering of a distinct “telecommunications service” to end users would be legally suspect and enormously destabilizing, and would dampen the very infrastructure investment the Commission seeks to foster. Reclassification is simply the wrong regulatory tool for the Commission to use. Indeed, now that the D.C. Circuit has expressly held that the Commission can regulate participants in the Internet ecosystem short of resorting to common carrier restrictions, there is no need and no conceivable justification for reclassifying broadband Internet access in order to achieve the Commission’s policy objectives.

## DISCUSSION

### I. THE COMMISSION’S EXISTING TRANSPARENCY REQUIREMENTS PROVIDE AN IMPORTANT FOUNDATION FOR PROMOTING INTERNET OPENNESS

As the Public Notice recognizes, the *Verizon* court upheld the transparency requirements established in the *Open Internet Order* under which “broadband Internet access service providers must continue to disclose their network management practices, performance characteristics, and terms and conditions of their broadband service.”<sup>5</sup> NCTA has long supported the principle that

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<sup>4</sup> See Richard Greenfield, *Forget Net Neutrality, Peering and Interconnection Set To Be the Internet Issue of 2014*, BTIG Research, Feb. 11, 2014, available at <http://www.btigresearch.com/2014/02/11/forget-net-neutrality-peering-and-interconnection-set-to-be-the-internet-issue-of-2014/> (quoting Chairman Wheeler as saying, “A lot of people seem to think the whole peering and interconnection topic is the same as net neutrality. It’s not. It’s a different issue.”).

<sup>5</sup> Public Notice at 1; see also *Open Internet Order* ¶ 54 (“A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial

transparency effectively “discourages inefficient and socially harmful market behavior.”<sup>6</sup> Indeed, even before the Commission adopted its transparency regime, NCTA’s members were providing extensive information on a purely voluntary basis to the public about network management, performance, and commercial terms for their broadband Internet access services.<sup>7</sup> To be sure, NCTA has expressed concerns in the past about the potential burdens of complying with overly prescriptive disclosure mandates,<sup>8</sup> and about some of the open-ended language used by the Commission in adopting disclosure requirements in the *Open Internet Order*.<sup>9</sup> But given the Commission’s commitment “to allow flexibility in [the] implementation of the transparency rule,”<sup>10</sup> NCTA supports the transparency regime adopted in the *Open Internet Order* and affirmed by the *Verizon* court—particularly as an alternative to more intrusive restrictions on broadband ISPs.

The Commission’s transparency regime creates an important foundation for ensuring that the core values underlying the *Open Internet Order*—which date back to the *2005 Internet Policy Statement*<sup>11</sup> and earlier recognitions of essential “Internet freedoms”<sup>12</sup>—will be protected

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terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.”).

<sup>6</sup> See Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, at 41 (filed Jan. 14, 2010) (“2010 NCTA Open Internet Comments”) (quoting *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 ¶ 118 (2009) (“2009 Open Internet NPRM”).

<sup>7</sup> See 2010 NCTA Open Internet Comments at 42-43.

<sup>8</sup> See *id.* at 42.

<sup>9</sup> See *id.*

<sup>10</sup> *Open Internet Order* ¶ 56.

<sup>11</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; 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 –*

and fulfilled. As the Commission’s Public Notice observes, the transparency rule “helps consumers make informed choices about their broadband service.”<sup>13</sup>

To the extent that parties believe that the transparency rules should be refined further, NCTA is open to a dialogue about how to do so.<sup>14</sup> But in exploring rule changes, the Commission should be mindful of the need to balance the intended benefits of any new disclosure obligations against the increased regulatory burdens that would result, particularly as applied to smaller broadband providers. In particular, the Commission should continue to “allow flexibility in [the] implementation of the transparency rule,” and should remain wary of proposals that seek to impose rigid, “one-size-fits-all” mandates on broadband ISPs.<sup>15</sup> In addition, the Commission should maintain its presumption that “disclosures sufficient to enable consumers to make informed choices regarding use of broadband services will also generally

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*Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986 ¶ 4 (2005) (“2005 Internet Policy Statement”).

<sup>12</sup> See, e.g., Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5 (2004) (“2004 Powell Speech”) (articulating four “Internet freedoms”—freedom to access content, to use applications, to attach personal devices, and to obtain service plan information).

<sup>13</sup> Public Notice at 1; see also 2010 NCTA Open Internet Comments at 41 (“In a well-functioning marketplace, high speed Internet consumers would, as the Commission suggests, have sufficient information to enable them ‘to understand and take advantage of the technical capabilities and limitations of the services they purchase.’ And Internet content and application providers would have access to sufficient information ‘needed to develop and market new Internet offerings.’” (internal citations omitted)).

<sup>14</sup> If the Commission decides to revisit the existing rules, it should consider examining the potential benefits of disclosure requirements for other participants in the Internet ecosystem, so that consumers have the information they need to use Internet services effectively and efficiently.

<sup>15</sup> *Open Internet Order* ¶ 56.

satisfy the portion of the transparency rule regarding disclosures to edge providers.”<sup>16</sup> And, in all events, the Commission should ensure that any additional disclosure requirements it adopts are carefully tailored to advancing the goals of promoting broadband adoption and deployment under Section 706.<sup>17</sup>

**II. IF THE COMMISSION DETERMINES THAT REINSTATING A NO-BLOCKING RULE IS NECESSARY, THEN IT SHOULD CONSIDER HOW SUCH A RULE MAY BE APPLIED IN A COMPETITIVELY AND TECHNOLOGICALLY NEUTRAL MANNER**

As explained above, the marketplace will discipline conduct that conflicts with core values of Internet openness, and the Commission’s existing transparency regime provides an appropriate mechanism for ensuring that the marketplace functions effectively in this regard. NCTA also appreciates, however, that in the wake of the *Verizon* decision, the Commission might be inclined to adopt a revised no-blocking rule as a regulatory backstop to the disclosure requirements that were upheld. A reinstated no-blocking rule is unnecessary, given that NCTA and its members and other leading broadband providers have consistently pledged that they will not block subscribers’ access to lawful Internet content and services, both before the Commission adopted the no-blocking rules in the *Open Internet Order* and after those rules were vacated by the *Verizon* court.<sup>18</sup> Indeed, broadband ISPs benefit from an open Internet as much as

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<sup>16</sup> Public Notice, *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, GN Docket No. 09-191, DA 11-1148, at 7 (rel. Jun. 30, 2011) (internal citations, alterations, and quotation marks omitted).

<sup>17</sup> 47 U.S.C. § 1302.

<sup>18</sup> See Press Release, *Statement of NCTA President & CEO Michael Powell Regarding Today’s Decision by the U.S. Court of Appeals for D.C. Circuit*, Jan. 14, 2014, available at <https://www.ncta.com/news-and-events/media-room/content/statement-ncta-president-ceo-michael-powell-regarding-today%E2%80%99s-decision-us-court-appeals-dc> (“The cable industry has always made it clear that it does not – and will not – block our customers’ ability to access lawful Internet content, applications or services.”); *Net*

other participants in the Internet ecosystem, and thus have a powerful incentive to ensure that lawful Internet content remains available to all.

If the Commission nevertheless seeks to devise a new prohibition against blocking access to lawful Internet content and services, it should ensure that such rules comport with the limitations identified by the *Verizon* court. In particular, any new no-blocking rule should give regulated parties sufficient flexibility to reach individualized agreements so as to avoid imposing common carrier-style obligations. Moreover, in considering such rules, the Commission should explore more consistent treatment among fixed and mobile broadband providers, in light of the growing cross-platform competition and substitutability of these services. In a similar fashion, the Commission should also explore whether edge providers should be included in any new regime designed to preserve consumer access to lawful Internet content and services..

**A. Any New No-Blocking Rules Must Comport with the Limitations Identified by the *Verizon* Court**

If the Commission were to consider adopting a revised no-blocking requirement, it would need to ensure that any new no-blocking requirement gives regulated parties sufficient flexibility in reaching individualized agreements, in order to avoid running afoul of the common carrier prohibition identified by the *Verizon* court. In particular, because an obligation to carry all edge

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*Neutrality: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 109th Cong. 21 (Feb. 7, 2006) (statement of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association) (“[L]et me be clear, NCTA’s members have not, and will not, block the ability of their high-speed Internet service customers to access any lawful content, application, or services available over the public Internet.”); *see also, e.g.*, Press Release, *Broadband for America Statement on U.S. Court of Appeals for the District of Columbia Circuit Decision in the Case of Verizon v. FCC*, Jan. 14, 2014, available at <http://www.broadbandforamerica.com/blog/bfa-statement-us-court-appeals-district-columbia-circuit-decision-case-verizon-v-fcc> (stating, on behalf of its members, including virtually every major broadband ISP, that “[w]e believe passionately in the open Internet and in the right of our customers to access lawful websites and information when, where and how they choose” and “pledge that our commitment to those principles will continue”).

provider traffic indiscriminately inherently amounts to common carriage, Judge Tatel’s opinion for the court indicates that a reinstated no-blocking rule would pass muster only if it “permit[s] broadband providers to distinguish somewhat among edge providers” and leaves “sufficient room for individualized bargaining and discrimination in terms.”<sup>19</sup>

Moreover, as Judge Silberman’s separate opinion illustrates, even a revised no-blocking rule could run afoul of the statutory limits if applied too broadly. For instance, if the Commission sought to rely on a “no blocking” rubric to mandate minimum levels of service that are deemed effectively usable for certain purposes, such requirements could constitute the kinds of “common carrier” obligations that the court held were unlawful.<sup>20</sup> The Commission thus should carefully explore these issues as part of any future rulemaking proceeding regarding the reinstatement of a no-blocking requirement.

**B. Any New No-Blocking Rules Should Harmonize the Commission’s Treatment of Fixed and Mobile Broadband Providers**

The *Verizon* decision also affords the Commission the opportunity to reexamine the Commission’s decision in the *Open Internet Order* to impose a heavier no-blocking prohibition on fixed providers than on mobile broadband providers.<sup>21</sup> Under the rules vacated by the court, fixed broadband providers were subject to a broad prohibition on “block[ing] lawful content, applications, services, or non-harmful devices, subject to reasonable network management,”<sup>22</sup> while mobile broadband providers faced narrower prohibitions on “block[ing] consumers from

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<sup>19</sup> *Verizon*, 740 F.3d at 658.

<sup>20</sup> *See id.* at 667-68 (Silberman, J., concurring in part and dissenting in part).

<sup>21</sup> *See id.* at 633.

<sup>22</sup> *Open Internet Order* ¶ 63.

accessing lawful websites” and on “block[ing] applications that compete with the provider’s voice or video telephony services, subject to reasonable network management.”<sup>23</sup>

As a policy matter, the Commission has correctly sought to encourage greater cross-platform competition between fixed and mobile platforms, and more heavily regulating fixed platforms frustrates that objective. Mobile broadband has continued to improve, and an ever-growing number of consumers view mobile broadband service as a substitute for fixed service.<sup>24</sup> While the *Open Internet Order* attempted to justify differential treatment for fixed and mobile providers by pointing to “capacity” issues faced by mobile wireless broadband networks, it overlooked the fact that the very same challenges affect fixed broadband networks.<sup>25</sup> Such distinctions are even less tenable in light of the proliferation of Wi-Fi access services, which now are increasingly used to complement the licensed wireless services offered by mobile broadband providers.<sup>26</sup> Yet the *Open Internet Order* subjected Wi-Fi access services to the rules that

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<sup>23</sup> *Id.* ¶ 99.

<sup>24</sup> See *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2013–2018*, Feb. 5, 2014, at 16, available at [http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white\\_paper\\_c11-520862.pdf](http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.pdf) (“*Cisco Study*”) (“As mobile network capacity improves, and the number of multiple-device users grows, operators are more likely to offer mobile broadband packages comparable in price and speed to those of fixed broadband. This is encouraging mobile broadband substitution for fixed broadband . . .”).

<sup>25</sup> See Comments of Time Warner Cable Inc., GN Docket No. 09-191, at 68-69 (filed Jan. 14, 2010) (“2010 TWC Open Internet Comments”) (noting that “cable operators, no less than wireless carriers, operate using a finite amount of capacity and have service groups that share the available bandwidth on a node-by-node basis,” and that “[a]s in the wireless context, network performance within each node depends entirely on the number of users and the types of applications they are running”).

<sup>26</sup> See, e.g., Wireless Broadband Alliance, *Industry Report 2013: Global Trends in Public Wi-Fi*, Nov. 18, 2013, at 3, available at <http://www.wballiance.com/wba/wp-content/uploads/downloads/2013/11/WBA-Industry-Report-2013.pdf> (reporting on advances in “technologies which enable public Wi-Fi to be integrated far more seamlessly with other networks such as 3G/4G”); Press Release, *AT&T Launches Major*

govern fixed wireline services, rather than to the rules governing mobile wireless services.<sup>27</sup> As a result, a single data stream could be subject to different regulatory standards depending on whether it was being delivered via the provider’s licensed mobile wireless service or had been off-loaded to an unlicensed Wi-Fi service. Such a framework is unworkable.

Indeed, marketplace distortions flowing from differential regulations might well hamper cross-platform broadband competition and therefore undermine the policy objectives underlying Section 706. A dynamic and competitive broadband marketplace depends on the Commission’s imposing the lightest regulation possible to address its concerns, and doing so in a technologically neutral manner that maintains a level playing field among competitors. Consistent with Chairman Wheeler’s recognition that the Commission should seek to “ensur[e] that consumers can continue to access *any* lawful content and services they choose,”<sup>28</sup> a harmonized no-blocking requirement for providers of fixed and mobile broadband services would be more defensible.

**C. The Commission Should Holistically Examine the Relationship Between ISPs and Edge Providers When Considering Any New No-Blocking Requirements**

In addition, if the Commission decides that new no-blocking requirements are needed, it should undertake a balanced examination of both sides of the relationship between broadband ISPs and edge providers. It would make little sense as a matter of policy to focus solely on

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*Wi-Fi Initiative to Deploy More Hotzones in Key Markets*, Dec. 28, 2010, available at 1 <http://www.att.com/gen/press-room?pid=18866&cdvn=news&newsarticleid=31458> (announcing deployment of Wi-Fi “hotzones” to “supplement mobile broadband in urban areas”).

<sup>27</sup> See *Open Internet Order* ¶ 49 (explaining that the no-blocking and non-discrimination rules for fixed broadband services “encompasses fixed wireless broadband services (including services using unlicensed spectrum)”).

<sup>28</sup> Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules, Feb. 19, 2014, at 1, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-325654A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-325654A1.pdf) (“Wheeler Statement”) (emphasis added).

potential blocking of lawful content by broadband ISPs while ignoring comparable conduct by other entities. In recent years, several economists and industry analysts have expressed deepening concerns over the growing power of so-called “hyper-giants”—edge providers such as Google, Netflix, Microsoft, Apple, Amazon, and Facebook, along with their numerous affiliated entities—over the hosting and distribution of content on the Internet.<sup>29</sup> According to a study released last month, two edge providers account for over 50 percent of all Internet traffic during peak usage periods: Google accounts for “up to 25 percent” of all Internet traffic, and Netflix “accounts for up to a third of the data flowing over U.S. broadband access networks in evening hours.”<sup>30</sup>

Edge providers may have both the power and ability to affect the “openness” of the Internet—and by extension the “virtuous cycle” of innovation and deployment cited by the Commission in justifying its previous rules for broadband providers.<sup>31</sup> As the *Verizon* court explained, the Commission’s theory under Section 706 for imposing no-blocking requirements on ISPs is that such blocking *indirectly* affects end-user demand for lawful broadband services

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<sup>29</sup> See, e.g., Arbor Networks, *Two-Year Study of Global Internet Traffic Will Be Presented At NANOG47*, Oct. 2009, available at <http://www.arbornetworks.com/news-and-events/press-releases/2009-press-releases/1810-two-year-study-of-global-internet-traffic-will-be-presented-at-nanog47> (finding that, since 2004, “most content has increasingly migrated to a small number of very large hosting, cloud and content providers,” and coining the term “hyper-giants” to describe such providers); Dr. Craig Labovitz, *Massive Ongoing Changes in Content Distribution*, Spring 2013, at 8-9, available at <http://conferences.infotoday.com/documents/172/2013CDNSummit-B102A.pdf> (stating that, as of 2013, “50% of traffic comes from 35 sites/services,” and listing “hyper-giants” like Google, Netflix, and others that now dominate Internet traffic); Bret Swanson, Entropy Economics, *How the Net Works: A Brief History of Internet Interconnection*, Feb. 21, 2014, at 4-6, available at <http://entropyeconomics.com/wp-content/uploads/2014/02/How-the-Net-Works-A-Brief-History-of-Internet-Interconnection-EE-02.21.14.pdf> (“2014 Entropy Economics Study”) (providing updated findings on power of “hyper-giants” over hosting and distribution of Internet content).

<sup>30</sup> 2014 Entropy Economics Study at 6.

<sup>31</sup> *Open Internet Order* ¶ 14.

and undermines broadband deployment by stifling innovation at the edge.<sup>32</sup> But blocking of online access to lawful content or services by edge providers themselves could also dampen end-user demand and thereby pose a comparable risk to investment in broadband deployment.

Unlike broadband providers, edge providers have never made a voluntary commitment to refrain from blocking lawful Internet content. Moreover, edge providers are not subject to the same transparency requirements that continue to apply to broadband providers in the aftermath of the *Verizon* decision, and so may engage in blocking of lawful content or other harmful conduct without Commission or public scrutiny.

Accordingly, any forthcoming exploration of a new no-blocking rule should expressly include requests for comment on the need to apply such restrictions to edge providers. The Commission should seek comment on both the policy rationale for a more broadly applicable no-blocking requirement and its legal authority to restrict blocking of lawful content by edge providers.

### **III. IT WOULD BE PREMATURE TO PURSUE REINSTATEMENT OF NON-DISCRIMINATION RULES ON FIXED BROADBAND PROVIDERS**

As explained above, NCTA believes the Commission can best balance its interest in preserving Internet openness with the legal and policy imperatives to avoid undue restrictions on broadband ISPs by relying on market forces, backed principally by the existing transparency rule. Layering on additional non-discrimination restrictions may well be unnecessary to further the Commission's goals, and also has the potential to undermine the very innovation and experimentation by broadband ISPs that the Commission has sought to cultivate. If,

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<sup>32</sup> See *Verizon*, 740 F.3d at 642 (noting the Commission's assertion that restrictions on ISPs "protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband").

notwithstanding these concerns, the Commission proceeds to explore the possible reinstatement of non-discrimination requirements in some form, it should carefully consider how to craft such rules in light of the *Verizon* court’s analysis and to ensure that a case-by-case approach would advance the relevant legal and policy considerations.

**A. New Regulations To Prevent Unreasonable Discrimination Would Be Premature and Potentially Counterproductive**

There is probably no need for the Commission to pursue additional regulations restricting broadband ISPs’ ability to reach individualized agreements with different edge providers unless a demonstrable need arises based on actual marketplace experience of harmful discrimination. As a threshold matter, the notion that regulation is needed to make the Internet “neutral” and “non-discriminatory” ignores the reality that, to meet consumer expectations, the Internet has *never* been neutral. To the contrary, the concept of prioritized delivery has long been an inherent feature of network design. And even where traffic has not been prioritized, edge providers have long relied on—and have been willing to pay additional fees for—content delivery networks to provide an end-to-end solution for delivering content, including closer caching of content, regional traffic exchange, and other enhancements that enable more robust delivery of video, music, and other content to broadband end users.<sup>33</sup> Several of the “hyper-giants” noted above are now racing to construct ever larger and more powerful “server farms” and proprietary networks to host and distribute Internet content, thus obtaining advantages over smaller edge

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<sup>33</sup> See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496 ¶ 308 (2013) (describing contractual relationships between online video distributors and content delivery networks in order to “ease[] Internet traffic congestion and improve[]the viewing experience”); see also 2010 TWC Open Internet Comments at 90 (explaining that “CDNs have built a business model on making Internet fast lanes available only to those willing and able to pay for them” and that “there can be no legitimate justification for permitting CDNs to deliver content on a non-neutral basis, if broadband Internet access service providers are barred from offering the same service enhancements”).

providers that lack comparable transmission and storage facilities.<sup>34</sup> The Commission should remain mindful of these fundamental network attributes, consumer benefits, and established business practices in considering whether to restrict paid prioritization and other forms of traffic differentiation.

Moreover, in the past, the Commission has acknowledged the importance of promoting innovative business arrangements and experimentation in meeting consumer demand for an increasingly robust online experience.<sup>35</sup> Indeed, even as the Commission adopted rules burdening some such business arrangements in the *Open Internet Order*, it expressly recognized that the Commission cannot “presume to know now everything that providers may need to do to provide robust, safe, and secure Internet access to their subscribers, much less everything they may need to do as technologies and usage patterns change in the future,” and reaffirmed that “[b]roadband providers should have flexibility to experiment, innovate, and reasonably manage their networks.”<sup>36</sup> Chairman Wheeler endorsed this core principle in his first policy speech after joining the Commission, signaling that such experimentation could take the form of a beneficial

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<sup>34</sup> See Rolfe Winkler and Shira Ovide, *Google Wants Its Server Farm to Be as Fertile as Amazon's*, Wall St. J., Dec. 3, 2013, available at <http://blogs.wsj.com/digits/2013/12/03/google-wants-its-server-farm-to-be-as-fertile-as-amazons/>.

<sup>35</sup> See, e.g., 2009 *Open Internet NPRM* ¶ 9 (“[W]e recognize the importance of preserving and protecting broadband providers’ flexibility to manage their networks in a way that benefits consumers and will further the safety, security, and accessibility of the Internet. We also recognize the importance . . . of preserving and protecting the ability of broadband providers to experiment with technologies and business models to help drive deployment of open, robust, and profitable broadband networks across the nation.”).

<sup>36</sup> *Open Internet Order* ¶ 92.

“two-sided market” involving usage-based pricing arrangements between ISPs and edge providers.<sup>37</sup>

The adoption of rigid rules proscribing entire categories of economic arrangements would threaten to foreclose such innovation and experimentation. Both the Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) have warned about the risks of premature and overbroad regulation chilling procompetitive and pro-consumer arrangements. The FTC has observed that “it is not possible, based on generalized data or predictions of future business arrangements, to conclude that the online content and applications market suffers or will suffer from anticompetitive conduct,”<sup>38</sup> and has noted “the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace.”<sup>39</sup> The DOJ has similarly cautioned against “prophylactic ‘neutrality’ regulations” and explained that “[h]owever well-intentioned, regulatory restraints can inefficiently skew investment, delay innovation, and diminish consumer welfare, and there is reason to believe that the kinds of broad marketplace restrictions proposed in the name of ‘neutrality’ would do just that with respect to the Internet.”<sup>40</sup> These warnings dovetail with several economic studies submitted to the Commission explaining that, in dynamic and still-developing industries like this one, consumer welfare is enhanced most effectively through the natural operation of two-sided markets—in

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<sup>37</sup> See Edward Wyatt, *New F.C.C. Chief Promises He Will Protect Competition*, N.Y. TIMES, Dec. 2, 2013, at B4, available at <http://www.nytimes.com/2013/12/03/technology/tom-wheeler-of-fcc-vows-to-champion-competitiveness.html>.

<sup>38</sup> Federal Trade Commission, *Broadband Connectivity Competition Policy: A Federal Trade Commission Staff Report*, at 125 (2007), available at <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

<sup>39</sup> *Id.* at 157.

<sup>40</sup> Ex Parte Filing of the United States Department of Justice, WC Docket 07-52, at 2-3 (filed Sept. 6, 2007).

which competition drives market participants to use innovative business arrangements to allocate costs and benefits efficiently—rather than through the *ex ante* adoption of prescriptive regulations based on imperfect information and hypothesized harms.<sup>41</sup>

This commonsense policy prescription is all the more compelling in light of the analysis of the *Verizon* court in vacating the non-discrimination rules adopted in the *Open Internet Order*. According to the court, the Commission may not compel broadband providers to carry all edge providers' traffic at no charge, as eliminating ISPs' flexibility to strike individualized arrangements unlawfully transforms them into common carriers.<sup>42</sup> While it is possible that the Commission could devise restrictions on differentiating Internet traffic that fall short of constituting common carrier regulation, any such effort would entail significant legal risk and could engender uncertainty rather than foster the “predictability” Chairman Wheeler has

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<sup>41</sup> See, e.g., Declaration of Marius Schwartz, Exhibit 3 to Comments of AT&T Inc., GN Docket No. 09-191, at 23 (filed Jan. 14, 2010) (explaining that the dynamics of two-sided markets “are highly sensitive to conditions about which regulators are likely to have highly imperfect information,” and that because “market conditions are rapidly changing” in the broadband marketplace, “it would be entirely premature to conclude that prohibiting content charges is likely to raise social welfare”); *id.* at 11 (explaining that “[p]olicy makers would be unwise to prejudge such engineering and economic tradeoffs by banning” entire classes of business arrangements between ISPs and edge providers, and that “[e]xperimentation with alternative solutions should be encouraged, not discouraged,” where “[n]etwork management tools, including prioritization, can help economize on capacity while maintaining good overall network performance during times of congestion”); Dennis Weisman and Robert Kulick, *Price Discrimination, Two-Sided Markets and Net Neutrality Regulation*, at 26-28 (Mar. 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1582972](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1582972) (reviewing the literature on two-sided market structures and concluding that “[t]here is no basis for presuming that regulatory intervention to alter the price structure in such markets would prove to be welfare-enhancing”).

<sup>42</sup> See *Verizon*, 740 F.3d at 657 (finding that, unlike the “commercial reasonableness” standard adopted in the data roaming context, the non-discrimination rules adopted in the *Open Internet Order* provided “no room at all for ‘individualized bargaining’” and therefore constituted “common carrier” obligations).

identified as an important goal<sup>43</sup>—an outcome that, in turn, would directly undercut the “virtuous cycle” of investment and innovation that the Commission is tasked with promoting under Section 706.

**B. Any Proposals for New Non-Discrimination Rules Should Avoid an Exclusive Focus on Providers of Fixed Broadband Services**

If the Commission chooses to pursue new restrictions on ISPs’ differentiation of Internet traffic at this stage, it should develop a rulemaking record that, at a minimum, addresses the following key legal and policy issues.

*First*, the Commission should seek comment on whether and to what extent restrictions against discrimination can be squared with the limitations recognized by the *Verizon* court. In particular, the court held that the Commission has the burden of demonstrating that “any regulations” it adopts under Section 706 are “designed to achieve a particular purpose: to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”<sup>44</sup> The court also held that the traditional prohibition against “unjust and unreasonable discrimination” embodied in Section 202(a) of the Communications Act cannot lawfully be extended to broadband providers.<sup>45</sup> While the court suggested that the “commercial reasonableness” standard employed in the data roaming context might provide a model for regulating economic arrangements between broadband providers and edge providers, it also recognized that any such restrictions would need to permit a substantial degree of differential treatment.<sup>46</sup> Thus, before imposing new rules to promote “non-discrimination,” the

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<sup>43</sup> Wheeler Statement at 1.

<sup>44</sup> *Verizon*, 740 F.3d at 640 (quoting 47 U.S.C. § 1302(a)).

<sup>45</sup> *Id.* at 657.

<sup>46</sup> *Id.*; *see also id.* at 652 (noting that the “commercial reasonableness” standard in the data roaming context “expressly permitted providers to adapt roaming agreements to

Commission would need to demonstrate that such rules advance the goals of Section 706 *and* permit greater room for individualized arrangements than it signaled would be permissible under the *Open Internet Order*. Relatedly, the Commission would need to ensure that the content and scope of any new rules would directly and meaningfully advance the broadband deployment and investment goals embodied in Section 706.

*Second*, as in the no-blocking context, the Commission should try to harmonize and avoid any regulatory distinctions between fixed and mobile broadband providers in adopting non-discrimination rules. As noted above, it is increasingly unclear that there is any meaningful basis for imposing rules on fixed providers that are materially different from those applied to mobile broadband providers, particularly as mobile broadband continues to improve and an ever-growing number of consumers view mobile broadband service as a substitute for fixed service.<sup>47</sup>

*Third*, to the extent the Commission intends to establish a case-by-case adjudication process for evaluating claims of unreasonably discriminatory conduct (assuming an appropriate legal standard could be devised consistent with the proscription against common carrier regulation), the Commission should establish clear guidelines and safe harbors to provide meaningful “guidance and predictability to edge providers, consumers, and broadband providers alike.”<sup>48</sup> Case-by-case adjudication can be appropriate to resolve disputes regarding particular practices, but a regime that is too open-ended will create paralyzing uncertainty that chills the development of procompetitive and pro-consumer arrangements. Establishing clear norms and

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individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms”) (internal citations and quotation marks omitted).

<sup>47</sup> See *Cisco Study* at 16 (“As mobile network capacity improves, and the number of multiple-device users grows, operators are more likely to offer mobile broadband packages comparable in price and speed to those of fixed broadband. This is encouraging mobile broadband substitution for fixed broadband . . .”).

<sup>48</sup> Wheeler Statement at 1.

safe harbors *in advance of* authorizing complaints will be vital to the success of any case-by-case regime. And in establishing these norms, the Commission should ensure that any adjudicatory mechanism is narrowly tailored to achieve the “particular purpose” of Section 706—that is, “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>49</sup>

#### **IV. THE COMMISSION SHOULD NOT EXTEND ANY NEW RULES TO INTERNET PEERING OR TRANSIT MARKETS**

In all events, the Commission should reaffirm its long-held view that Internet peering and transit arrangements are entirely beyond the scope of net neutrality regulation, which has targeted only the relationship between ISPs and edge providers with respect to the ISP’s delivery of traffic to the consumer over its broadband Internet access service. As Chairman Wheeler has correctly explained, peering is simply “not the same issue” as net neutrality.<sup>50</sup> Peering and transit arrangements concern the *economics* of transporting Internet traffic across Internet backbones.<sup>51</sup> Such economic arrangements do *not* concern end users’ ability to access content, the quality of the broadband Internet access service offered to end users, or the priority with

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<sup>49</sup> *Verizon*, 740 F.3d at 640 (quoting 47 U.S.C. § 1302(a)).

<sup>50</sup> See Richard Greenfield, *Forget Net Neutrality, Peering and Interconnection Set To Be the Internet Issue of 2014*, BTIG Research, Feb. 11, 2014, available at <http://www.btigresearch.com/2014/02/11/forget-net-neutrality-peering-and-interconnection-set-to-be-the-internet-issue-of-2014/> (quoting Chairman Wheeler’s statements at the State of the Net Conference on January 28, 2014); see also Dan Rayburn, *Inside the Netflix/Comcast Deal and What the Media Is Getting Very Wrong*, Seeking Alpha, Feb. 24, 2014, available at <http://seekingalpha.com/article/2042543-inside-the-netflix-comcast-deal-and-what-the-media-is-getting-very-wrong> (“Commercial interconnect deals have nothing to do with net neutrality. Implying otherwise shows a complete lack of regard in understanding how traffic is and has been exchanged across networks for the past twenty years.”).

<sup>51</sup> Because they concern Internet traffic, these arrangements are distinct from regulated interconnection arrangements between telecommunications carriers for the exchange of voice traffic.

which content might be delivered to end users. Accordingly, the Commission appropriately made clear in the *Open Internet Order* that the rules adopted therein were not intended “to affect existing agreements for network interconnection, *including existing paid peering arrangements*”<sup>52</sup>—a ruling consistent with a long line of Commission precedent treating Internet backbone services as distinct from broadband Internet access service.<sup>53</sup> While the Commission should refrain from imposing regulations on these historically unregulated and efficient marketplace transactions in *any* context, the Commission certainly should reject calls to shoehorn these issues into the net neutrality proceeding.<sup>54</sup>

## V. THE COMMISSION SHOULD NOT FURTHER PURSUE TITLE II RECLASSIFICATION PROPOSALS

Finally, while Chairman Wheeler’s preliminary statement accompanying the Public Notice suggests that the Commission will “keep Title II authority on the table” as a possible means for reimposing the vacated no-blocking and non-discrimination rules,<sup>55</sup> the best course of action would be to abandon the notion of Title II reclassification once and for all.<sup>56</sup> NCTA has

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<sup>52</sup> *Open Internet Order* ¶ 67 n.209 (emphasis added); *see also id.* ¶ 47 (defining “broadband Internet access service” to exclude, among other things, “content delivery network services” and “Internet backbone services”).

<sup>53</sup> *See, e.g., Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶¶ 62-63 (1998) (distinguishing services offered by Internet backbone providers and Internet access providers); *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 ¶¶ 125, 133 (2007) (distinguishing Internet backbone services from mass market Internet access services).

<sup>54</sup> *See, e.g.,* Letter of Joseph C. Cavender, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Feb. 21, 2014).

<sup>55</sup> Wheeler Statement at 2.

<sup>56</sup> Unlike incumbent phone companies, cable operators’ broadband Internet access service has never been regulated as a Title II telecommunications service. Thus, for cable operators, it would not be a *re*-classification of broadband Internet access service as a Title II service, but classification for the first time.

long maintained that seeking to reclassify broadband Internet access as entailing the offering of a distinct “telecommunications service” to end users—in direct contravention of the Commission’s consistent findings in a series of classification orders dating back over a decade and the technical, legal, and policy arguments it successfully advanced before the Supreme Court—would be enormously and needlessly destabilizing. Any such effort would dampen the very infrastructure investment the Commission seeks to foster. In particular, and as the Commission itself has recognized, imposing such a regulatory model on broadband networks would require providers to divert substantial time and resources to design and implement the numerous systems and processes necessary to comply with the various requirements and obligations of Title II.<sup>57</sup> Nor could the Commission realistically avoid such a result through selective application of its forbearance authority; as the Commission has noted in the past, reclassification “would effectively impose a presumption in favor of Title II regulation” of broadband providers, which “would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act” and would “chill innovation” in the process.<sup>58</sup>

Moreover, Title II reclassification would entail considerable legal risk for the Commission. The *Verizon* decision in no way suggested that the Commission could viably reverse its long-held and consistently asserted position that broadband Internet access services

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<sup>57</sup> See Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 25-26 (Aug. 27, 2004) (explaining that classifying broadband ISPs as “telecommunications carriers” would subject such providers to various burdensome Title II obligations, and that “[t]he effect of the increased regulatory burdens could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas”) (“*FCC Brand X Petition*”).

<sup>58</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 47 (1998); see also *FCC Brand X Petition* at 28 (explaining that “the FCC’s forbearance authority is not in this context an effective means of ‘remov[ing] regulatory uncertainty that in itself may discourage investment and innovation’”).

are not governed by Title II. And indeed, the Supreme Court has made clear that an agency must “provide a *more* detailed justification than what would suffice for a new policy created on a blank slate” when “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.”<sup>59</sup> In light of this controlling precedent, a court is unlikely to disregard the Commission’s prior rulings regarding the technical attributes of broadband Internet access, or the substantial reliance interests of industry participants that have built their businesses around established Commission precedent.

In contrast to the serious legal and policy obstacles to pursuing Title II reclassification, the *Verizon* court’s decision upholding the Commission’s broad authority under Section 706 provides a much more certain and reliable legal foundation for any further requirements to promote Internet openness. Indeed, the *Verizon* decision suggests that the Commission could have imposed obligations that would have achieved many of the same policy objectives as the rules that were vacated without framing them as common carrier obligations.<sup>60</sup> As a result, any attempt to reclassify broadband Internet access as a Title II “telecommunications service” is wholly unnecessary to achieve the Commission’s open Internet goals. While NCTA accordingly believes that it would be appropriate to terminate the docket addressing reclassification issues, the Commission in all events should focus on devising and implementing an appropriately tailored regulatory framework under Section 706, rather than pursuing proposals that would destabilize and upend any possibility of reaching a broad consensus regarding appropriate rules.

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<sup>59</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis added).

<sup>60</sup> *See Verizon*, 740 F.3d at 658 (describing a possible framing of a no-blocking rule that would not “run afoul of the statutory prohibitions on common carrier treatment”).

