

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

In the Matter of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127

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

Matthew A. Brill
Matthew T. Murchison
Jonathan Y. Ellis
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Rick C. Chessen
Neal M. Goldberg
Michael S. Schooler
Steven F. Morris
NATIONAL CABLE & TELECOMMUNICATIONS
ASSOCIATION
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001

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The National Cable & Telecommunications Association (“NCTA”) submits these comments in response to the Notice of Proposed Rulemaking adopted and released on May 15, 2014 and the Public Notice released on May 30, 2014 in the above-captioned proceedings.¹

INTRODUCTION AND SUMMARY

This rulemaking—prompted by the D.C. Circuit’s decision in *Verizon v. FCC* to vacate significant portions of the Commission’s *2010 Open Internet Order*²—presents the Commission with an important opportunity to reframe its open Internet rules in a manner that both comports with governing law and advances the policy goals of promoting Internet openness and encouraging continued investment in and deployment of broadband networks. NCTA stands ready to work closely with the Commission on accomplishing these important objectives.

As discussed below, the Internet has experienced unprecedented growth in recent years while the Commission generally has pursued a policy of “vigilant restraint” in the regulation of

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) (“NPRM”); Public Notice, *Wireline Competition Bureau Seeks To Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service*, GN Docket No. 10-127, DA 14-748 (WCB rel. May 30, 2014).

² *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) (“*2010 Open Internet Order*”).

broadband Internet access service. The Commission has rightly rejected calls to impose overly burdensome and prescriptive mandates on broadband Internet service providers (“ISPs”)—most notably by adopting and then repeatedly reaffirming its classification of broadband Internet access service as an “information service,” thus precluding the imposition of common-carrier obligations under Title II of the Communications Act of 1934, as amended (the “Act”). Thanks to the Commission’s light regulatory touch, consumers have reaped the benefits of staggering levels of private investment in broadband networks and technologies. In turn, these private investments have prompted the rise of new applications and services that can take advantage of the ever-improving broadband infrastructure.

The *Verizon* court set forth a relatively simple and straightforward roadmap for the Commission to adopt new rules under Section 706 of the Telecommunications Act of 1996—rules that will advance the Commission’s policy objectives while avoiding the unwise and unlawful imposition of common-carrier obligations on providers of broadband Internet access service. The NPRM appropriately focuses on proposals that would follow the path laid out by the *Verizon* court. Nevertheless, the NPRM also unnecessarily and troublingly strays from that path in a number of respects—most notably by reopening the possibility of reclassifying broadband Internet access service as a Title II telecommunications service, and by otherwise proposing to expand on the previously adopted rules in ways that would do more harm than good. The Commission now stands at a crossroads, and the continued vibrancy of the Internet is at stake.

As a threshold matter, the Commission should steer clear of pursuing a Title II reclassification theory in adopting any new rules. The Commission’s consistent, fact-based, and judicially validated findings that broadband Internet access service is properly classified as an

information service were the product of bipartisan consensus and have fueled the unprecedented growth and dynamism of the Internet. The last thing the Commission should do is to jettison that established classification and start over by introducing heavy-handed common-carrier regulation under Title II. Such an approach would be a disastrous policy reversal. Title II reclassification not only is unnecessary to achieve the Commission's policy objectives, but would affirmatively *undermine* those objectives by significantly deterring the ongoing investments necessary to deploy broadband further and support the Internet's continuing evolution. Moreover, as a legal matter, such an approach would impermissibly ignore the "factual particulars" of broadband Internet access service and trample on broadband providers' reliance interests, and thus would present a serious risk of being set aside by a reviewing court. After two court reversals of the Commission's attempts to establish binding open Internet rules, it would make no sense to eschew the clear guidance provided by the D.C. Circuit in order to pursue a risky and destabilizing reclassification strategy. The Commission also should reject the latest twists on Title II regulation floated in the NPRM, such as the proposal to separate out and reclassify "remote delivery services" that ISPs purportedly provide to edge providers, and the proposal to rely on a so-called "springing Title II" theory to deter legal challenges to the rules.

Moreover, the Commission should ensure that the new rules adopted under Section 706 do not thwart the very innovation and deployment that the Commission seeks to promote. The current transparency regime is sufficient to ensure that the marketplace disciplines conduct that conflicts with core values of Internet openness, and there is no basis to conclude that enhanced transparency rules are needed. To the contrary, several of the contemplated expansions to the transparency regime would impose significant, unwarranted burdens on broadband providers without meaningfully helping consumers. In addition, any new no-blocking rules must adhere to

the limitations identified by the *Verizon* court and should avoid dictating what minimum levels of service would be deemed “effectively usable” for purposes of the rule; indeed, market forces obviate the need for such a prescriptive mandate. By the same token, it is likely premature for the Commission to impose “commercial reasonableness” obligations on ISPs when engaging in individualized negotiations with edge providers, and the Commission certainly should not adopt an outright ban on all “paid prioritization” arrangements between edge providers and broadband ISPs unless and until the benefits and potential harms of such arrangements are fully understood. The Commission also should ensure that any enforcement mechanisms it adopts are efficient and fair.

Just as important as getting the substance of the rules right is ensuring that their scope is appropriately tailored to the policy interests at stake. In particular, the Commission should harmonize its regulatory treatment of fixed and mobile broadband providers. While it is questionable whether there was ever a legitimate basis to subject fixed and mobile broadband providers to differential regulatory burdens, there is plainly no factual or legal basis to do so in today’s increasingly competitive marketplace. The Commission also should address the fact that ISPs do not entirely control the consumer Internet experience and that edge providers, particularly “hyper-giant” edge providers, can have a significant impact on consumers’ access to Internet content and services. To the extent the Commission is concerned that consumers’ access to online content and services could be blocked or degraded, it makes no sense to focus exclusively on Internet access providers and ignore conduct by edge providers that threatens similar harms. By contrast, as the NPRM tentatively concludes, the Commission should reject calls to expand the scope of any new rules to arrangements and services that do *not* involve the provision of broadband Internet access service to end users, such as commercially negotiated

peering and other traffic-exchange arrangements and so-called “specialized services.” And in adopting any new rules, the Commission should make clear that states are preempted from imposing overlapping and potentially conflicting open Internet requirements.

As is always the case whenever the Commission considers new rules for the Internet, the Commission has been bombarded with apocalyptic predictions that the vibrancy of the Internet will somehow be destroyed unless the Commission subjects providers of broadband Internet access service to more heavy-handed regulation. But the dynamism of the broadband marketplace, fostered by the Commission’s consistent policy of *avoiding* the imposition of unduly burdensome regulations on the Internet ecosystem, has proven these naysayers wrong every time. Advocacy groups darkly warned in 1998 that the entry of cable operators into the broadband marketplace would, “quite literally, change the character of the Internet as an engine of creative technological and marketplace innovation, open entry, economic growth, and free expression.”³ But as the NPRM recognizes, “the Internet has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social benefits that follow.”⁴ Others grimly predicted in the late 1990s that “[i]f the Commission [took] no action at [that] time, . . . nothing [would] prevent cable operators from limiting content their subscribers see via the Internet in the same way that cable operators select cable channels today,”⁵ and that cable ISPs “[would] censor content, control placement of news, entertainment, information, hyperlinks, and commerce on the portal, and impose content restrictions or filtering on the basis

³ See Consumers Union et al. Petition to Deny the Merger of AT&T and TCI, CS Docket No. 98-178, at 12 (Oct. 29, 1998) (“Consumers Union Petition to Deny”).

⁴ NPRM ¶ 1.

⁵ Center for Media Education *et al.* Reply Comments, CC Docket No. 98-146, at 15 (Oct. 10, 1998).

of technical, aesthetic, and commercial factors.”⁶ But ISPs today plainly do *not* engage in such blocking or censorship of Internet content, and indeed have powerful incentives to ensure that customers have full access to the open Internet. In short, proponents of overly invasive broadband regulation have cried wolf before; the Commission has declined to credit these predictions in the past, and should continue to do so in crafting appropriately tailored rules for the 21st-century broadband marketplace.

DISCUSSION

I. THE INTERNET HAS FLOURISHED UNDER A LIGHT REGULATORY TOUCH

The Commission’s longstanding classification of broadband Internet access service as an “information service”—and the light regulatory touch that has accompanied that classification—has allowed the Internet to grow and prosper, nourished by private investment. For nearly two decades, the Commission rightly and repeatedly has rejected calls to subject broadband Internet access to the sort of heavy-handed, innovation-squelching, common-carrier regulation under Title II of the Act that has traditionally applied to public utilities.⁷ Instead, through Democratic and Republican administrations alike, the Commission has consistently concluded as a factual and legal matter that broadband Internet access service is properly classified as a Title I “information service” not subject to the onerous regulatory burdens imposed on telecommunications carriers.

The Commission’s bipartisan treatment of Internet access as an information service has yielded overwhelming benefits for American consumers. Chairman Kennard remarked at the

⁶ Consumers Union Petition to Deny at 14-15 (internal quotation marks and alterations omitted).

⁷ See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 46 (1998) (“1998 Report to Congress”) (declining to subject information service providers to common carrier regulation under Title II).

dawn of the broadband era that, “with competition and deregulation as our touchstones, the FCC has taken a hands-off, deregulatory approach to the broadband market,” and that “the marketplace has responded with enormous investment” in broadband services for consumers.⁸ More than a decade later, the Commission’s *National Broadband Plan* found that “the American broadband ecosystem has evolved rapidly,” and that this evolution has been “[f]ueled primarily by private sector investment and innovation” with “limited” government oversight.⁹ And today, it is more apparent than ever that the Commission’s light regulatory touch with regard to broadband Internet access service has been a resounding success. Indeed, under this market-oriented framework, broadband has become the fastest growing and most transformative technology in history.

The Commission’s restrained approach has spurred unprecedented levels of investment in our nation’s broadband infrastructure in recent years. Broadband providers in the U.S. have invested an astounding *\$1.2 trillion* in private capital since 1996 to develop and deploy advanced broadband networks.¹⁰ Over the past two decades, the broadband industry has invested an average of \$70 billion a year in our nation’s wired and wireless broadband networks.¹¹ And this

⁸ Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar Northern California Chapter, San Francisco, CA, Jul. 20, 1999, at 4, *available at* <http://transition.fcc.gov/Speeches/Kennard/spwek924.doc>.

⁹ Federal Communications Commission, *Connecting America: The National Broadband Plan*, at xi, 5 (2010).

¹⁰ See USTelecom, “Broadband Investment,” *available at* <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>; *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eighth Broadband Progress Report, 27 FCC Rcd 10342 (2012).

¹¹ See USTelecom, *Updated Capital Spending Data Shows Rising Broadband Investment in Nation’s Information Infrastructure*, Nov. 4, 2013, at 2, *available at*

investment is only accelerating; in fact, since 2012, broadband providers in the United States have laid more high-speed fiber cables than in any similar period since 2000.¹² The upshot has been the creation of networks that now fuel America’s economic growth, facilitate civic participation like never before, and enable a dizzying array of communications, entertainment, and educational options. In short, broadband providers’ massive investment of private risk capital has spurred the development of an Internet ecosystem that now occupies a central place in our lives.

These sustained investments in broadband far outstrip the level of investment in other industries. A recent White House report found that just two broadband providers “account for greater combined stateside investment than the top five oil/gas companies, and nearly four times more than the big three auto companies combined.”¹³ Moreover, in recent years, five of top 20 U.S. companies by capital expenditures have been broadband providers—Verizon, AT&T, Comcast, Sprint, and Time Warner Cable.¹⁴ Simply put, no industry has invested as much in capital improvements over the past 15 years as the broadband industry, and if the current

<http://www.ustelecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf>. The top six broadband providers invested over \$50 billion into our nation’s broadband infrastructure in 2011 alone. Progressive Policy Institute, *Investment Heroes: Who’s Betting on America’s Future*, at 8 (Jul. 2012), available at http://progressivepolicy.org/wp-content/uploads/2012/07/07.2012-Mandel_Carew_Investment-Heroes_Whos-Betting-on-Americas-Future.pdf (“PPI, *Investment Heroes*”).

¹² White House, Office of Science and Technology Policy & The National Economic Council, *Four Years of Broadband Growth*, at 5 (Jun. 2013) (“White House Report”).

¹³ *Id.*

¹⁴ Progressive Policy Institute, *The State of U.S. Broadband: Is It Competitive? Are We Falling Behind?*, at 8 (Jun. 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/06/2014.06-Ehrlich_The-State-US-Broadband_Is-it-competitive-are-we-falling-behind.pdf (“PPI, *State of U.S. Broadband*”); see also PPI, *Investment Heroes*, at 3.

regulatory structure holds, there is no reason to think that this breathtaking pace of investment will abate anytime soon.

These substantial capital expenditures over the years by our nation’s ISPs—buoyed by the Commission’s market-based approach to broadband Internet access services—have positioned the United States as a global leader in broadband investment. America has only four percent of the world’s population yet is home to nearly 25 percent of global broadband investment.¹⁵ Broadband providers in the United States are investing more than twice as much as their counterparts in the European Union on a per-household basis.¹⁶ Moreover, as a share of gross domestic product, our nation’s broadband investment rate exceeds that of several E.U. countries, including Italy, Germany, and France, as well as other highly developed countries like Japan and Canada.¹⁷ As discussed further below, several analysts have directly linked the superior levels of broadband investment in the U.S. to the Commission’s restrained regulatory approach as compared to the European model, which has treated broadband providers as public utilities.¹⁸ Thus, while it has become fashionable in some circles to disparage U.S. broadband

¹⁵ See Roslyn Layton, *The European Union’s Broadband Challenge*, American Enterprise Institute for Public Policy Research, at 2 (Feb. 2014), available at http://www.aei.org/files/2014/02/18/-the-european-unions-broadband-challenge_175900142730.pdf (“Layton Study”); see also Roslyn Layton, *When It Comes To High-Speed Internet, The Grass Isn’t Greener In Europe*, *Forbes*, Feb. 7, 2014, available at <http://www.forbes.com/sites/realspin/2014/02/07/when-it-comes-to-high-speed-internet-the-grass-isnt-greener-in-europe/> (“Layton Article”).

¹⁶ See Prof. Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* (Jun. 2014), available at <https://www.law.upenn.edu/live/files/3353-us-vs-european-broadband-deployment-summary> (“Yoo Study”).

¹⁷ PPI, *State of U.S. Broadband*, at 2.

¹⁸ See, e.g., Yoo Study at 1 (“Disparities between European and U.S. broadband networks stemmed from differing regulatory approaches. Europe has relied on regulations that treat broadband as a public utility and focus on promoting service-based competition, in which new entrants lease incumbents’ facilities at wholesale cost (also known as unbundling). The U.S. has generally left buildout, maintenance, and modernization of Internet

investment as compared to other developed nations, the facts clearly show that “[t]he U.S. leads the world in broadband investment,” thanks in no small part to the light regulatory touch maintained by the Commission.¹⁹

The result of this unprecedented level of investment has been an astounding leap forward in broadband speeds in the United States, with top speeds increasing by a staggering 1,500 percent over the past decade.²⁰ Several broadband providers, including Cox, AT&T, and Google Fiber, have either begun to offer or announced plans to offer residential customers speeds of up to 1 gigabit per second (Gbps) in a growing number of cities, with other providers sure to follow suit in the near future.²¹ Comcast likewise has announced plans to expand the availability of next-generation, fiber-based residential service, with speeds exceeding 500 megabits-per-second (Mbps), from its Northeast region to Chicago, Miami, Atlanta, and other urban areas.²² Such capabilities, once unthinkable in the era of 14.4 or 28.8 kbps modems, are now a reality in a rapidly increasing array of municipalities.

infrastructure to private companies and focused on promoting facilities-based competition, in which new entrants are expected to construct their own networks.”); *see also* Layton Article (noting that, because of greater level of broadband investment in the U.S., “European leaders are abandoning their regulatory approach and looking to the American broadband framework”).

¹⁹ Layton Article at 1.

²⁰ *See* John Sununu and Harold Ford, Jr., *Don’t Make the Internet a Public Utility*, SFGate, May 14, 2014, <http://www.sfgate.com/opinion/openforum/article/Don-t-make-the-Internet-a-public-utility-5478946.php>.

²¹ *See* Edmund Lee, *Cox Plans Faster Web Service in 2014 to Challenge Google*, Bloomberg, Apr. 30, 2014, available at <http://www.bloomberg.com/news/2014-04-29/cox-plans-faster-web-service-in-2014-to-challenge-google.html> (reporting that “Cox is joining AT&T Inc. and Google Inc., which are racing to introduce fiber-optic broadband services with speeds as fast as 1 gigabit a second in cities across the U.S.”).

²² *See* Jeff Baumgartner, *Comcast To Expand 505-Meg Broadband Service*, Multichannel News, Feb. 20, 2014, available at <http://multichannel.com/news/distribution/comcast-expand-505-meg-broadband-service-source/260593>.

In addition, higher speeds are now reaching an ever-growing number of Americans. A report released by the Commission and the National Telecommunications and Information Administration (“NTIA”) found that, as of June 2013, a sizeable majority of the U.S. population has access to download speeds of 100 Mbps or more.²³ More recent reports indicate that this percentage has jumped to 85 percent of the U.S. population just in the past year.²⁴ Meanwhile, networks providing baseline broadband speeds have become ubiquitous in this country. The Commission and NTIA reported that over 99 percent of the U.S. population has access to broadband service with at least a 3 Mbps download speed and a 768 kilobit-per-second (kbps) upload speed,²⁵ and nearly 98 percent of the population has access to download speeds of at least 10 Mbps.²⁶ Indeed, almost the same percentage of the population has access to 10 Mbps download speeds today as had access to 3 Mbps speeds just two years ago.²⁷ These speeds are becoming increasingly consistent as well; according to a report released by the Commission this June, ISPs on average are delivering 101 percent of advertised maximum download speeds during peak usage hours, up from 80 percent in 2011.²⁸

²³ FCC and NTIA, *National Broadband Map: Broadband Statistics Report*, at 4 (Feb. 2014), available at <http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf> (“FCC/NTIA Feb. 2014 Report”).

²⁴ See Layton Article at 1; see also Anna-Maria Kovacs, *The Internet is Not a Rotary Phone*, Re/code, May 12, 2014, available at <http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/>.

²⁵ FCC/NTIA Feb. 2014 Report at 3.

²⁶ *Id.* at 4.

²⁷ Cf. PPI, *State of U.S. Broadband*, at 16 (noting earlier government data indicating that 98 percent of the population had access to 3 Mbps speeds in June 2012).

²⁸ See Federal Communications Commission, *2014 Measuring Broadband America, Fixed Broadband Report*, at 14 (Jun. 2014) (“2014 Measuring Broadband America Report”).

Here, too, the comparison to broadband service in other developed countries is illuminating. While, as noted above, 85 percent of the U.S. population now has access to broadband networks capable of providing 100 Mbps speeds, “just over half of European homes can access speeds of 30 Mbps or greater.”²⁹ Relatedly, while a dwindling number of Americans—only 34 percent—continue to rely on traditional DSL service, 74 percent of Europeans still do so.³⁰ The U.S. also has “roughly twice the percentage of homes with access to advanced fiber-optic networks as does the E.U.”³¹—a testament to the power of private investment, unfettered by overly restrictive common-carrier regulation, to deliver rapidly improving broadband service in response to consumer demand.

At the same time, the price for broadband service, as measured on a per-Mbps basis, has decreased sharply in the United States in the last decade-plus. For instance, Comcast recently noted that, since 1996, the speed of connections offered under Comcast’s standard broadband Internet service tier has increased by approximately 900 percent, while the price that subscribers to this service pay per Mbps has declined by at least 87 percent.³² Other broadband providers have reported similar reductions in the price per Mbps for broadband service over the years.³³ It should therefore come as no surprise that broadband prices in the United States, like the broadband speeds and investment levels discussed above, compare favorably to those found in other highly developed nations. According to one recent study, fixed wireline broadband service

²⁹ Layton Article at 1; *see also* Yoo Study at 1 (finding that only 52 percent of E.U. households have access to broadband networks delivering more than 25 Mbps).

³⁰ Layton Article at 1; Layton Study at 4.

³¹ Layton Article at 1.

³² Comments of Comcast Corp., GN Docket No. 12-228, at 12 (filed Sep. 20, 2012).

³³ *See, e.g.*, Comments of Time Warner Cable, GN Docket No. 09-51, at 9 (filed Jul. 21, 2009) (reporting that TWC subscribers could experience 10 to 20 times more speed than they could have received at the same price a decade earlier).

in the United States is more affordable than comparable services in Germany, Italy, France, the United Kingdom, Japan, South Korea, and Canada.³⁴ As the study concludes, “[o]ur networks are faster, our prices more competitive, and our investments larger than most of the world’s other major industrial nations,” and any “assertions that the U.S. broadband industry is underperforming are off base.”³⁵

The U.S. broadband industry also is becoming increasingly competitive and differentiated. According to the Commission, 99 percent of U.S. households are in census tracts where at least two fixed wireline broadband providers offer service, and 78 percent of U.S. households are in census tracts with at least three.³⁶ Moreover, roughly 100 percent of U.S. households are in census tracts in which two providers (either fixed or mobile) offer service, and 99 percent of U.S. households are in census tracts in which three providers (either fixed or mobile) offer service.³⁷ The number of mobile wireless broadband subscribers with download speeds above 3 Mbps leapt from 43 million in June 2012 to over 93 million in June 2013.³⁸ Satellite providers are joining the broadband arms race as well, with some “offer[ing] download speeds of 12-15 Mbps or more.”³⁹ And consumers’ choice among broadband providers will only grow in the future, as existing wireline providers continue to expand their broadband footprints,

³⁴ PPI, *State of U.S. Broadband*, at 7.

³⁵ *Id.*

³⁶ See FCC, *Internet Access Services: Status as of June 30, 2013*, at 9 & Fig. 5(a) (Jun. 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf (“Jun. 2014 Internet Access Services Report”).

³⁷ *Id.* at 10 & Fig. 5(b).

³⁸ *Id.* at 1.

³⁹ PPI, *State of U.S. Broadband*, at 14.

wireless providers roll out LTE service throughout the country, satellite and other alternative providers improve their networks, and new players like Google Fiber enter the fray.

Against this backdrop, broadband providers have every incentive to continue promoting the open Internet in any way they can. It would be irrational for broadband providers to undermine the very openness that has long buoyed their businesses for some short-term gain, or to block or degrade access to Internet content that competing providers make readily available. Contrary to some extremists' apparent belief that broadband ISPs are bad actors bent on destroying the Internet, broadband ISPs have powerful business incentives that are aligned with the Commission's policy objectives.⁴⁰ Indeed, as the Commission recognized in its *2010 Open Internet Order*, the very investment and innovation that the Commission seeks to promote is driven, in the first instance, by "increased end-user demand for broadband"⁴¹—demand that broadband providers have no interest in diminishing through the blocking of lawful Internet content. And given that the deployment of broadband networks entails the outlay of substantial fixed costs, broadband providers have an economic imperative in today's marketplace to recoup those costs by maximizing the usage of such networks—and not to degrade the experience provided over those networks.

Moreover, any suggestion that a cable operator offering broadband service might have an incentive to degrade its customers' online experience in order to preserve its legacy video revenues is fundamentally at odds with marketplace realities. Cable operators' video businesses are contributing less and less to the recovery of broadband costs—the result of continuing

⁴⁰ See NPRM ¶ 44 (asking whether "broadband providers today have economic incentives and mechanisms to block or disadvantage a particular edge provider or class of edge providers").

⁴¹ *2010 Open Internet Order* ¶ 14.

subscriber losses and shrinking profit margins.⁴² Accordingly, as Chairman Wheeler acknowledged in his remarks at the 2014 NCTA Cable Show, the cable industry’s “principal business . . . has become, and will continue to be, broadband.”⁴³ It would make little sense for cable operators to take actions that might steer customers away from their growing broadband services in order to prop up video services that are declining in profitability.

Even if broadband providers had an incentive to degrade their customers’ online experience in some circumstances, they have no practical ability to act on such an incentive. Today’s Internet ecosystem is dominated by a number of “hyper-giants” with growing power over key aspects of the Internet experience—including Google in search, Netflix and Google (YouTube) in online video, Amazon and eBay in e-commerce, and Facebook in social media.⁴⁴

⁴² See *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496 ¶ 129 (2013) (finding that “cable MVPDs lost video subscribers and market share” between 2010 and 2011 and citing data indicating that this downward trend was continuing); Robin Flynn, *SNL Kagan, Special Report: U.S. Multichannel Subscriber Update and Programming Cost Analysis* at 3 (Jun. 2013), available at <http://go.snl.com/rs/snlfinanciallc/images/SNL-Kagan-US-Multichannel-Subscriber-Update-Programming-Cost-Analysis.pdf>

⁴³ Remarks of Chairman Tom Wheeler, 2014 NCTA Cable Show, at 3 (Apr. 30, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf.

⁴⁴ 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. 2014), at 4-6, available at <http://entropyeconomics.com/wp-content/uploads/2014/02/How-the-Net-Works-A-Brief-History-of-Internet->

If a broadband provider were to approach one of these hyper-giants and threaten to block or degrade access to its site if it refused to pay a significant fee, such a strategy almost certainly would be self-defeating, in light of the immediately hostile reaction of consumers to such conduct. Indeed, it is more likely that these large edge providers would seek to extract payment *from ISPs* for delivery of video over last-mile networks. Nor is there any realistic prospect that ISPs would seek payment for prioritizing certain content over last-mile broadband Internet access networks. To NCTA’s knowledge, no broadband provider is engaging in such activity or plans to do so, even apart from the fact that edge providers appear highly unlikely to agree to such payments. Accordingly, consistent with broadband providers’ long history of adhering to openness and their firm commitments (backed by enforceable consumer disclosures) to preserve the open Internet, they have neither the incentive nor any practical ability to block or degrade access to online content and services.

II. IMPOSING TITLE II REGULATION WOULD BE DISASTROUS AS A POLICY MATTER AND UNTENABLE AS A LEGAL MATTER

In spite of this flourishing, dynamic, and competitive Internet ecosystem, the NPRM alarmingly raises the specter of subjecting broadband to monopoly-style utility regulation under Title II of the Act—the very approach the Commission has consistently found would destroy the Internet’s dynamism, dramatically reduce investment and innovation, and derail the Commission’s broadband adoption and deployment goals. Proponents of Title II regulation largely view it as a way to address one aspect of one proposed rule: the treatment of “paid prioritization” arrangements for the delivery of edge-provider traffic over last-mile broadband networks under a non-discrimination or “commercial reasonableness” standard. Setting aside the fact that broadband providers have never entered into such arrangements and have expressed no

[Interconnection-EE-02.21.14.pdf](#) (providing updated findings on power of “hyper-giants” over hosting and distribution of Internet content).

desire to do so, an approach that radically changes the regulatory model to Title II for such a limited purpose would be akin to burning a house down to frighten a mouse away. As explained below, the putative benefits of such an approach are essentially zero, and the harms would be monumental.

Reclassification also likely would be unlawful, given that the factual particulars of broadband Internet access service have not materially changed since the Commission adopted and then reaffirmed its current “information service” classification for this service. For similar legal and policy reasons, the Commission should not entertain the various back-door proposals for importing Title II obligations into the broadband arena, such as the proposal to separate out and classify the return-path element of broadband Internet access service under Title II, or the proposal to adopt a Title II theory as a “backstop” to rules adopted under Section 706 of the Telecommunications Act. Instead, the Commission should recognize that Title II does not offer a viable regulatory approach in the broadband arena, close the pending proceeding devoted to reclassification, and return to the more productive endeavor of considering possible regulatory measures under Section 706, as prompted by the *Verizon* court.

A. Subjecting Broadband Providers to Common-Carrier Regulation Would Be Profoundly Unwise as a Policy Matter

Any reclassification of broadband Internet access service as including a distinct Title II telecommunications service would be a calamitous reversal of policy. As explained herein, reclassification would be devastating to broadband investment and innovation, as numerous policymakers and analysts agree and as experience with utility-style regulation confirms. Such an approach also would reduce consumer protections by divesting the Federal Trade Commission (“FTC”) of authority to review commercial practices in the broadband marketplace. These harms cannot be remedied through selective forbearance action, as some have argued. And

ironically, reclassification would trigger these harms without bringing any cognizable policy benefits.

1. *Title II reclassification would cripple broadband investment and stifle innovation*

The dynamism, innovation, and rapid growth that characterize today’s Internet would be lost if the Commission were to reclassify any component of broadband Internet access service as a Title II telecommunications service. As noted above, broadband providers have poured more than a trillion dollars into expanding and enhancing their networks over the years, relying on the Commission’s repeated confirmation that such providers would not be required to unbundle those networks or incur the various other regulatory costs that would flow from the classification of broadband Internet access service under Title II. Reversing course now and subjecting current and future broadband services and networks to common-carrier regulation would dramatically upset the private sector incentives that have fueled the explosive growth of the Internet. The burdens and uncertainty associated with Title II regulation—or even the threat of such regulation—would deter broadband providers from making the substantial additional investments required to deploy new and upgraded broadband infrastructure. This chilling effect, in turn, would endanger efforts to meet the Commission’s broadband deployment goals and disrupt the “virtuous circle” of deployment, innovation, and adoption that the Commission has long sought to promote.

The Commission itself has consistently recognized the investment-inhibiting and innovation-curtailling effects of Title II requirements in the broadband arena. When the Commission addressed the regulatory status of Internet access service in 1998 under Chairman Kennard’s leadership, it explained that regulating broadband Internet access providers as common carriers could “seriously curtail the regulatory freedom that . . . was important to the

healthy and competitive development of the enhanced-services industry.”⁴⁵ Similarly, when the Commission and Department of Justice (“DOJ”) sought Supreme Court review in the *Brand X* case to prevent the imposition of common-carrier regulation on broadband services, they identified a host of potentially crippling regulatory burdens that would result from Title II reclassification, including “a new federal duty to furnish ‘communication service upon reasonable request therefor’; to charge ‘just and reasonable’ rates; to refrain from engaging in ‘unjust or unreasonable discrimination’; to comply with FCC requirements for filing and abiding by written tariffs; and to interconnect with other carriers”⁴⁶—in addition to obligations to contribute to universal service and other funding mechanisms as well as other requirements created for the world of voice telephony.⁴⁷ The Commission and DOJ emphasized in their petition that imposing such regulatory burdens on broadband could force providers “to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas.”⁴⁸ These risks remain just as serious today.

Numerous policymakers and industry analysts concur with the Commission’s historical assessment of the dangers of Title II reclassification—observing that the threat of common-carrier regulation would damage broadband providers, discourage infrastructure investment, stifle job growth, and harm consumers. In a recent letter to Chairman Wheeler, several leading Members of the House of Representatives warned that reclassification would lead to “[d]ecreased investment[,] . . . deferred maintenance, infrequent upgrades, and stalled

⁴⁵ *1998 Report to Congress* ¶ 46.

⁴⁶ Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 25 (Aug. 27, 2004) (“*FCC Brand X Cert Petition*”) (internal citations omitted).

⁴⁷ *Id.* at 26.

⁴⁸ *Id.*

deployment, which, at best, leads to higher consumer prices and at worst leaves consumers with fewer, if any, reliable choices.”⁴⁹ As the letter explains, “[s]imply raising the prospect of such stifling regulation harms broadband providers, the American economy, and ultimately broadband consumers – actually doing so would be fatal to the Internet as we know it.”⁵⁰

Industry observers and analysts have echoed these warnings, noting that reclassification “would dramatically slow the pace of advance in the technologies, business models, and network and service innovations of the future,”⁵¹ and that the burdens and uncertainty posed by reclassification would have “a profoundly negative impact on capital investment.”⁵² Some analysts have highlighted the stark difference in investment and innovation between broadband services accorded a light regulatory touch and telephone services regulated under Title II. One recently observed that, “[a]s the mostly unregulated Internet piles success upon success, boosting bandwidth and transforming each industry it touches, with no end in sight, the old, heavily regulated, Title II network is barely an afterthought and is rapidly approaching full retirement.”⁵³ Others have appropriately pointed to the European experience with imposing public-utility-style regulation on broadband as a cautionary tale. As noted above in Section I, Europe has continued to regulate broadband “along the lines of Title II, with a heavy emphasis on infrastructure

⁴⁹ See Letter of Reps. Fred Upton, Marsha Blackburn, Greg Walden, and Bob Latta to Tom Wheeler, Chairman, FCC, May 13, 2014, at 2, available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140513FCC.pdf>.

⁵⁰ *Id.* at 1.

⁵¹ Brett Swanson, *The Real ‘Slow Lane’ Threat to the Internet*, Forbes, Jun. 2, 2014, available at <http://onforb.es/1p1z0vM>.

⁵² Craig Moffett, *Quick Take-U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear*, Bernstein Research (2010).

⁵³ Bret Swanson, *Title II Communications Is the ‘Slow Lane’*, Tech Policy Daily, May 13, 2014, available at <http://www.techpolicydaily.com/communications/title-ii-communications-slow-lane/>.

sharing,” and now “lags the U.S. in both investment and broadband deployment.”⁵⁴ A recent study by Professor Christopher Yoo confirmed that the European Union’s regulation of broadband as a public utility has resulted in significantly lower investment in and slower deployment of next-generation broadband services than in the United States.⁵⁵ On top of these concerns, a growing number of analysts also have voiced legitimate worries that a Title II approach could lead to the reclassification of services provided by many other participants in the Internet ecosystem as common-carrier services—thereby dampening investment and innovation well beyond last-mile broadband networks.⁵⁶

These risks are not merely hypothetical. The financial markets’ response to the Commission’s 2010 proposal to reclassify broadband Internet access service under Title II powerfully demonstrates that even the threat of reclassification can seriously undermine broadband investment. The day the Commission came forward with its “third way” proposal to classify broadband as a telecommunications service but forbear from certain Title II requirements, shares of cable and telecom stocks were trading “300 to 400 basis points lower

⁵⁴ Anna-Maria Kovacs, *The Internet Is Not a Rotary Phone*, Re/code, May 12, 2014, available at <http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/>; see also Martin H. Thelle & Bruno Basalisco, Copenhagen Economics, *Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models* 3 (June 2013) (found that “the US generally comes out better in terms of broadband supply, quality and price” than the E.U., due largely to the divergent regulatory approaches); Layton Article at 1 (“Europe’s ‘leased-access’ approach where ISPs lease transmission lines at regulated rates from incumbent telecom firms, [provides] no incentives to invest in the underlying facility.”).

⁵⁵ See Yoo Study at 1-2.

⁵⁶ See, e.g., Robert E. Litan, *Regulating Internet Access as a Public Utility: A Boomerang on Tech If It Happens*, Brookings Institute, Jun. 2, 2014, at 2, available at <http://www.brookings.edu/research/papers/2014/06/regulating-internet-access-public-utility-litan> (“Litan Paper”) (noting the “very slippery slope” presented by the reclassification of broadband Internet access service under Title II, and explaining that the logic of such a classification “opens up the possibility that other tech services meet the same test”).

than the overall market.”⁵⁷ Over the course of the next two weeks, the four largest ISPs in the U.S.—Comcast, Verizon, AT&T, and Time Warner Cable—had lost nearly a combined \$18 billion in market capitalization. Comcast dropped \$8.3 billion (15 percent) during that time period, while AT&T dropped \$4.78 billion (3.1 percent), Verizon lost \$2.4 billion (3.2 percent), and Time Warner Cable lost \$2.14 billion (11 percent). At the same time, a number of investment analysts cut ratings on cable operators based only on the prospect of such regulation,⁵⁸ and several others sounded warnings that stock prices would fall much further if the Commission followed through with its 2010 reclassification proposal. A report from Bank of America and Merrill Lynch expressed concern that “the potential for lower investment [is] likely and the ramifications will be felt not just in telecom and cable, but potentially in the vendor sector as well.”⁵⁹ Similarly, a Standard and Poor’s analyst stated that the prospect of reclassification created “potential long-term negative investment (and competitive) implications for major cable broadband providers.”⁶⁰

This serious financial impact inevitably and significantly impairs the ability of broadband providers to raise the capital necessary to invest in new networks and to bring innovative

⁵⁷ Cecilia Kang, *A Look at How the FCC’s Move Can Affect Stocks*, Washington Post, May 7, 2010, available at http://voices.washingtonpost.com/posttech/2010/05/a_look_at_how_the_fccs_move_ca.html.

⁵⁸ See, e.g., Jeffrey Bartash, *Comcast, Cablevision Stocks Decline on Cloudy Outlook*, Wall St. J. (May 10, 2010) (“Bernstein analyst Craig Moffett cut his rating on the [U.S. cable-television] sector to neutral from outperform, citing last week’s [proposal] by the Federal Communications Commission to tighten regulations on high-speed Internet service.”).

⁵⁹ See Phoenix Center Policy Paper No. 40: *The Broadband Credibility Gap* (Jun. 2010), available at <http://www.phoenix-center.org/pcpp/PCPP40Final.pdf> (quoting Bank of America/Merrill Lynch, *Internet Regulation Back on the Front Burner* (May 2010)).

⁶⁰ William Spain, *FCC Chief Broaches New Approach on “Net Neutrality,”* MarketWatch, May 6, 2010, available at <http://www.marketwatch.com/story/cable-shares-hit-by-fcc-move-on-net-neutrality-2010-05-06> (quoting Standard & Poor’s analyst Tuna Amobi).

services to market. A report released several months after the Commission’s 2010 reclassification proposal analyzed these “cable stock losses and ratings downgrades that occurred in the wake of the FCC’s announcement that it will seek to reclassify broadband Internet access as a service regulated by Title II of the Communications Act,” concluding that “[a] causal relationship exists between onerous FCC regulation and negative economic activity in the immediate communications sector and the broader U.S. economy.”⁶¹ Notably, these adverse effects came when the Commission merely *proposed* to reclassify broadband Internet access service under Title II. Actually *adopting* such a reclassification likely would prove far more harmful.

The dangers of Title II reclassification also are apparent from other contexts in which the government has imposed public-utility-style regulation, as such an approach has typically led to chronic under-investment in basic infrastructure. One need only look to the nation’s woefully underfunded and increasingly vulnerable electrical grid and its crumbling transportation infrastructure to appreciate the dangers of such a regulatory approach. A recent study found that most of America’s drinking water infrastructure is nearing the end of its useful life and will need \$1 trillion in investment in the coming decades, and that America’s electric grid will require a \$736 billion shot in the arm by 2020 to keep it from failing.⁶² The same study found that one in three major U.S. roads is in poor or mediocre condition and that repairing and maintaining these roads will require an estimated \$170 billion in annual investment, and that one in four bridges is

⁶¹ Charles M. Davidson & Bret T. Swanson, *Net Neutrality, Investment & Jobs: Assessing the Potential Impacts of the FCC’s Proposed Net Neutrality Rules on the Broadband Ecosystem*, Advanced Communications Law & Policy Institute (Jun. 2010), at 37, available at http://www.nyls.edu/user_files/1/3/4/30/83/Davidson%20&%20Swanson%20-%20NN%20Economic%20Impact%20Paper%20-%20FINAL.pdf.

⁶² See American Society of Civil Engineers, *2013 Report Card for America’s Infrastructure*, available at <http://www.infrastructurereportcard.org>.

either functionally obsolete or structurally deficient.⁶³ Subjecting broadband Internet service providers to Title II regulation would bring with it the same stagnation and underinvestment, and would rob the Internet marketplace of its current dynamism.⁶⁴

Any reclassification approach also would put the Commission on a slippery slope toward the imposition of Title II regulation on a wide array of other services in the Internet ecosystem. As AT&T pointed out in a recent letter to the Commission, “once the Commission separates transmission from information processing, there is no way logically to limit that rationale to one segment of the Internet and not others.”⁶⁵ Rather, “the logic behind reclassification would dictate that . . . [e]very entity that provides an over-the-top communications capability, whether it’s voice, text, or video, becomes either a facilities-based provider or a reseller (or both) of a telecommunications service.”⁶⁶ Indeed, reclassifying the services provided by ISPs but not other Internet-based services might well be deemed arbitrary and capricious. And as noted above, if

⁶³ *Id.*; see also Diana G. Carew *et al.*, Progressive Policy Institute, *Infrastructure Investment and Economic Growth: Surveying New Post-Crisis Evidence*, at 2 (Mar. 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/03/2014.03-Carew_Mandel_Infrastructure-Investment-and-Economic-Growth_Surveying-New-Post-Crisis-Evidence.pdf (“Taking all of the sources of funding together, real public investment in transportation infrastructure by state and local governments has fallen by about 20 percent since 2005. At the same time, while public investment was falling, real private investment in communications equipment, a measure of broadband infrastructure, increased by almost 50 percent. This is astonishing considering the severity of the 2007-2008 economic crisis.”).

⁶⁴ *Cf.* Yoo Study at 1 (explaining that, as between the relatively light regulatory touch for broadband in the U.S. and the European model of regulating broadband providers as public utilities, “[r]egression analysis indicates that the U.S. approach has proven more effective in promoting [next-generation broadband network] coverage than the European approach”).

⁶⁵ See Letter of Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 6 (filed May 9, 2014).

⁶⁶ *Id.*; see also Litan Paper at 2 (“Reclassifying Internet access as a ‘telecommunications service’ within the meaning of Title II, as supplemented by the provisions of the Telecommunications Act of 1996, opens up the possibility that other tech services meet the same test.”).

Title II were to apply much more broadly throughout the Internet ecosystem, that would further deter investment and chill innovation and risk ossifying the economy's most dynamic sector.⁶⁷

2. *Title II reclassification also would divest the FTC of jurisdiction and leave consumers less protected*

Reclassifying broadband providers as common carriers would actually *reduce* regulatory protections for broadband subscribers in other ways, most notably by divesting the FTC of authority to protect consumers in the broadband arena. The FTC has jurisdiction “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management” of broadband service providers.⁶⁸ Employing this authority, the FTC has developed a long track record of consumer protection efforts in the Internet and broadband space, including the release of an influential report in 2007 on net neutrality principles and recent enforcement actions that have shut down rogue Internet service providers and addressed other harmful activity.⁶⁹ The FTC has been able to engage in these broadband consumer protection efforts and to develop a high degree of institutional expertise regarding the Internet precisely because the Commission has declined to classify broadband providers as “common carriers,” which are expressly *excluded* from the scope of the FTC’s

⁶⁷ See *supra* at 21 & n.56.

⁶⁸ 15 U.S.C. § 46(a).

⁶⁹ See Federal Trade Commission, *Broadband Competition Connectivity Policy* (2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>; Press Release, *FTC Shuts Down Notorious Rogue Internet Service Provider*, Jun. 4, 2009, available at <http://www.ftc.gov/news-events/press-releases/2009/06/ftc-shuts-down-notorious-rogue-internet-service-provider-3fn>; see also John Eggerton, *FTC Steaming Over Streaming Video ‘Cramming’*, *Broadcasting & Cable*, May 8, 2012, available at <http://www.broadcastingcable.com/news/washington/ftc-steaming-over-streaming-video-cramming/60119>.

jurisdiction under the agency’s organizing statute.⁷⁰ But if the Commission were to adopt the reclassification proposed by some advocacy groups, it would remove the broadband industry from the FTC’s purview and abruptly terminate the agency’s ability to protect consumers in this rapidly evolving marketplace.⁷¹

3. *The Commission cannot avoid these policy harms through forbearance proceedings*

These dangers cannot be mitigated through selective application of the Commission’s forbearance authority, as the NPRM seems to suggest.⁷² The Commission has acknowledged in the past that 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.⁷³ Similarly, in the petition for certiorari in *Brand X* filed jointly with DOJ, the Commission explained that “the FCC’s forbearance authority is not in this context an effective means of removing regulatory uncertainty” and likely would only contribute to the uncertainty presented by reclassification.⁷⁴ The petition correctly recognized that “[f]orbearance proceedings would be time-consuming and hotly contested and would assuredly lead to new rounds of litigation, and there is no way to

⁷⁰ See 15 U.S.C. § 45(a)(2) (exempting “common carriers” from the scope of the FTC’s regulatory authority).

⁷¹ See FTC Commissioner Maureen K. Ohlhausen, *100 Is the New 30: Recommendations for the FTC’s Next 100 Years*, Feb. 7, 2014, at 8, available at http://www.ftc.gov/system/files/documents/public_statements/100-new-30-recommendations-ftcs-next-100-years/140207gcrantitrust-mko.pdf (“[R]eclassifying broadband as a common carrier service . . . would hamper the FTC’s efforts in both the competition and consumer protection areas.”).

⁷² See NPRM ¶ 153.

⁷³ *1998 Report to Congress* ¶ 47.

⁷⁴ FCC *Brand X* Cert Petition at 28.

predict in advance the ultimate outcome of such proceedings.”⁷⁵ Moreover, as a practical matter, the Commission’s ability to forbear necessarily would be impeded by factual findings that, as discussed below, it likely would need to make to justify Title II reclassification. And in any event, any near-term forbearance relief the Commission might grant would provide little comfort to ISPs, in light of the opportunities for direct or collateral attacks by future Commissions and other parties.

4. *Title II reclassification would not advance its proponents’ asserted policy objectives*

The ultimate irony of the renewed calls for Title II reclassification is that, for all the harms such an approach would cause, it would not even achieve the policy objectives that proponents of reclassification seem to favor. As noted above, many who push for reclassification see it as a basis for adopting an outright ban on so-called “paid prioritization” arrangements between broadband ISPs and edge providers. These proponents apparently believe that such a ban could be imposed under Section 202(a) of the Act, which prohibits a telecommunication carrier from engaging in “unjust and unreasonable discrimination” in connection with its telecommunications service or providing any person “undue or unreasonable preference or advantage [or] ... disadvantage,”⁷⁶ or under Section 201(b), which requires all “charges, practices, classifications, and regulations” for and in connection with a telecommunications service to be “just and reasonable.”⁷⁷ But neither of these provisions can bear the weight that proponents of a ban on paid prioritization would have them carry.

⁷⁵ *Id.*

⁷⁶ 47 U.S.C. § 202(a).

⁷⁷ *Id.* § 201(b).

Section 202(a), by its plain language, bars only “*unjust and unreasonable* discrimination” and “*undue or unreasonable* preference[s],” and according to the D.C. Circuit, prevents telecommunications carriers from charging “*unjustifiably* different rates for the same service.”⁷⁸ Service providers thus remain free to offer customers different levels of service at different rates—as may be the case in a hypothetical paid prioritization arrangement—and may even charge different prices for similar services where there is a “neutral, rational basis underlying [the] apparently disparate charges.”⁷⁹ The Commission itself acknowledged this limitation in the *2009 Open Internet NPRM*, when distinguishing between a proposal to adopt an “unqualified prohibition[] on discrimination” and the “general prohibition on ‘*unjust or unreasonable* discrimination’ by common carriers in section 202(a) of the Act.”⁸⁰ Indeed, courts and the Commission have often found that alleged “discrimination” or “preferences” accorded by service providers in particular circumstances *were* “reasonable” after a careful examination of the facts at issue.⁸¹ Thus, far from supporting an outright ban on an entire class of prioritization arrangements between ISPs and edge providers, Section 202(a) would at most authorize the Commission to undertake a fact-specific, case-by-case analysis of the reasonableness of any

⁷⁸ *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) (emphasis added).

⁷⁹ *Id.*

⁸⁰ *Preserving the Open Internet; Broadband Industry Practice*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 ¶ 109 (2009) (“*2009 Open Internet NPRM*”) (emphasis in original).

⁸¹ *See, e.g., Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (upholding carriers’ ability to offer differential discounts to retail customers); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (upholding carriers’ ability to enter into individualized contracts); *Ameritech Operating Cos. Revisions to Tariff FCC No. 2*, Order, DA 94-1121 (CCB 1994) (upholding reasonableness of rate differentials based on cost considerations).

particular prioritization arrangement—authority that the Commission already appears to possess in the broadband arena under Section 706 of the Telecommunications Act.⁸²

Section 201(b) likewise would not support a categorical ban on paid prioritization arrangements. In applying the “just and reasonable” requirement of this provision, the Commission has focused largely on addressing discrete consumer protection issues, such as prohibiting “blocking or otherwise restricting or degrading” communications to rural consumers,⁸³ or preventing deceptive billing practices by telecommunications carriers.⁸⁴ These issues bear no resemblance to potential “paid prioritization” arrangements between edge providers and ISPs, particularly when such arrangements do not diminish or degrade the quality of existing broadband Internet access service. In fact, such arrangements more closely resemble the “limited, customer-specific service[s]” offered under “private contractual relationships” that courts and the Commission have long permitted telecommunications carriers to undertake without “vitiat[ing their] common carrier status.”⁸⁵ Nor is there any factual basis for concluding that all “paid prioritization” arrangements would be *per se* unjust and unreasonable under Section 201(b) in a manner that could support a blanket ban, especially given that no broadband providers have entered into such arrangements or even have plans to do so. Section 201(b) therefore would be no more effective than Section 202(a) at sustaining the prohibition on “paid prioritization” that proponents of reclassification seek. The Commission may be able to justify adopting certain presumptions of unreasonableness in connection with particular practices under

⁸² See *Verizon*, 740 F.3d at 657 (contrasting the Commission’s vacated non-discrimination rule from a potentially permissible, case-by-case “commercial reasonableness” standard).

⁸³ See *Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154 ¶ 29 (2013).

⁸⁴ See *NOS Communications, Inc., and Affinity Network Incorporated*, Notice of Apparent Liability and Forfeiture, 16 FCC Rcd 8133 ¶ 6 (2001).

⁸⁵ *Southwestern Bell*, 19 F.3d at 1481.

Title II, just as it could under Section 706, but a reclassification theory aimed at supporting a categorical ban would be fundamentally misplaced.

B. Abandoning the Commission’s Long-Held Classification of Broadband Internet Access Service as an Information Service Would Be Counterfactual and Unlawful

Even if, in the face of all of these policy harms, the Commission still decided to pursue the nuclear option of Title II reclassification, it would face significant and likely insurmountable legal hurdles in adopting such an approach. At bottom, any Title II approach would require explaining, as a factual matter, how broadband providers actually “offer” consumers “telecommunications” on a *stand-alone basis*—and in doing so, contradicting the long-held factual findings and legal conclusions that have undergirded the Commission’s previous decisions and spurred the unprecedented level of investment in the nation’s broadband infrastructure over the past two decades. While it is true that the Commission can change course to pursue a new policy direction if it can provide a sufficiently cogent rationale for doing so, the Commission would be extremely hard-pressed to articulate such a rationale here, particularly given that the factual details surrounding the provision of broadband Internet access service have not materially changed since the Commission’s prior determinations, and in light of the significant reliance interests engendered in the industry by those prior determinations.

As the Supreme Court made clear in *Brand X*, “[t]he entire question” in classifying broadband Internet access service “turns not on the language of the Act, but on the *factual particulars* of how Internet technology works and how it is provided.”⁸⁶ Accordingly, the Commission has recognized that the classification of a service “turns on the nature of the

⁸⁶ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005) (emphasis added).

functions that the end user is offered” by the service.⁸⁷ And in analyzing the “functions” and “factual particulars” of broadband Internet access provided over cable, wireline, and wireless platforms, the Commission has consistently found that such services entail the *use* of, rather than the *offering* of, telecommunications, because the telecommunications and information-processing elements are inextricably combined in the service furnished to end users. In the 2002 *Cable Modem Order*, the Commission explained that cable modem service “is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications” and supporting functions including e-mail, web browsing, and Domain Name System (“DNS”) service.⁸⁸ According to the Commission, while “cable modem service provides the[se] capabilities . . . ‘via telecommunications,’” that telecommunications component is not “separable from the data-processing capabilities of the service.”⁸⁹

The Commission vigorously and successfully defended the “information service” classification for cable modem service before the Supreme Court in *Brand X*. Opponents of the *Cable Modem Order* argued that the Commission “could not permissibly construe the Communications Act to exempt cable companies providing Internet service from Title II regulation.”⁹⁰ But the Court sided with the Commission, pointing specifically to a variety of integrated, information-processing functions inherent in the provision of Internet access service that supported the Commission’s interpretation. In particular, the Court noted that “[a] user

⁸⁷ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 ¶ 38 (2002) (“*Cable Modem Order*”).

⁸⁸ *Id.* ¶ 38.

⁸⁹ *Id.* ¶ 39.

⁹⁰ *Brand X*, 545 U.S. at 979.

cannot reach a third-party's Web site without DNS" functionality made available as part of the service,⁹¹ and that "the Internet service provided by cable companies [also] facilitates access to third-party Web pages by offering consumers the ability to store, or 'cache,' popular content on local computer servers."⁹² For these and other reasons, the Court found that "[t]he service that Internet access providers offer to members of the public is Internet access,' not a transparent ability (from the end user's perspective) to transmit information," and accordingly held that "the Commission's construction was reasonable."⁹³

In the wake of the Supreme Court's affirmation of the Commission's "information service" classification for cable modem service, the Commission applied this classification to other Internet access services having the same material factual characteristics. A few months after the *Brand X* decision, the Commission adopted the 2005 *Wireline Broadband Order*, which clarified that "[w]ireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."⁹⁴ In the years that followed, the Commission reaffirmed the relevant findings with respect to BPL-enabled⁹⁵ and wireless Internet access services.⁹⁶

⁹¹ *Id.* at 999.

⁹² *Id.* at 999-1000.

⁹³ *Id.* at 1000 (quoting *1998 Report to Congress* ¶ 79).

⁹⁴ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 9 (2005) ("*Wireline Broadband Order*").

⁹⁵ *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 ¶ 1 (2006) ("*BPL Order*") (addressing the classification of "Broadband over Power Line" or "BPL" services and finding that "the transmission component underlying BPL-enabled Internet access service

The Commission would face a heavy burden in attempting to reverse these prior, fact-based determinations. According to the Supreme Court, in certain circumstances where the Commission seeks to depart from a prior policy, it must “provide a more detailed justification than what would suffice for a new policy created on a blank slate”—specifically, 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.”⁹⁷ Indeed, the Supreme Court has made clear that “[i]t would be arbitrary or capricious to ignore such matters.”⁹⁸ And, critically, both of these circumstances are present here. Any decision to classify broadband Internet access service under Title II necessarily would rest on factual findings that would conflict with findings on which the Commission has repeatedly relied in adopting its “information service” classification numerous times in the past. Moreover, there is no question that the Commission’s prior decisions that avoided the burdens of Title II have engendered significant reliance interests. As detailed in Section I above, broadband providers have invested more than \$1.2 trillion in broadband infrastructure based on the reasonable understanding that the Commission would continue to treat broadband as a lightly regulated “information service” under Title I—an outcome that the Commission expressly anticipated and

is ‘telecommunications,’ and that the offering of this telecommunications transmission component as part of a functionally integrated, finished BPL-enabled Internet access service offering is not a ‘telecommunications service’”).

⁹⁶ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 26 (2007) (“*Wireless Broadband Order*”) (“Like cable modem service, wireline broadband Internet access service, and BPL-enabled Internet access service, wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications.”).

⁹⁷ *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

⁹⁸ *Id.*

embraced each time it reaffirmed that classification.⁹⁹ After persuading broadband providers that they could safely commit unprecedented levels of private investment to developing and deploying the world-class broadband networks that this nation now enjoys, the Commission cannot now pull a bait-and-switch and subject these networks to burdensome common-carrier regulation without offering a compelling justification for such a reversal.

It is doubtful that the Commission could articulate a justification that could meet this high hurdle, as the “factual particulars” that informed the Commission’s prior decisions—and that *must* underlie any future classification of broadband Internet access services¹⁰⁰—have not changed in any material way. The broadband Internet access service offered to consumers continues to be “a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission,”¹⁰¹ and still involves the same e-mail, web browsing, DNS functionality, caching, and other functionally integrated services cited by both the Commission and the Supreme Court. The provision of broadband Internet access service also includes other capabilities that were not a focus of the Commission’s earlier orders but go well beyond mere transmission, including Dynamic Host Configuration Protocol

⁹⁹ See, e.g., *Cable Modem Order* ¶¶ 4, 5 (explaining that “broadband services should exist in a minimal regulatory environment that promotes investment” and limits “unnecessary and unduly burdensome regulatory costs”); *Wireline Broadband Order* ¶ 3 (explaining that a “lighter regulatory touch ... will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms”); *BPL Order* ¶ 2 (“[A] minimal regulatory environment for BPL-enabled Internet access service ... promotes our goal of ubiquitous availability of broadband to all Americans.”); *Wireless Broadband Order* ¶ 27 (“Through this classification, we provide the regulatory certainty needed to help spur growth and deployment of these services.”).

¹⁰⁰ *Brand X*, 545 U.S. at 991.

¹⁰¹ *Wireline Broadband Order* ¶ 9.

(“DHCP”) functionality,¹⁰² cable modem termination systems (“CMTS”),¹⁰³ and a variety of integrated security features (spam filtering, anti-virus services, distributed denial-of-service protection, and the like). In recent years, broadband providers have *expanded* the information-processing functionality of their services to include parental controls,¹⁰⁴ and online connection management.¹⁰⁵

The mere fact that broadband customers sometimes rely on third parties to varying degrees for some of these functions does not somehow transform broadband Internet access service into a telecommunications service, as some have argued.¹⁰⁶ As an initial matter, it is nothing new that end users can employ features from independent entities rather than utilize these functions as offered by their broadband provider. For instance, broadband customers have

¹⁰² See Comments of Time Warner Cable Inc., GN Docket No. 10-127, at 21-22 (filed Jul. 15, 2010) (explaining the ability of DHCP to assign dynamic IP addresses in processing network traffic, and noting that “[t]he use of DHCP satisfies the definition of ‘information service’ many times over, as it includes capabilities for ‘generating,’ ‘acquiring,’ ‘storing,’ ‘retrieving,’ ‘utilizing,’ and ‘making available’ information ‘via telecommunications,’ when any one of these functions would suffice”).

¹⁰³ See *id.* at 22-23 (explaining that CMTS, which “relies on inspection of IP packets and filtering of certain protocols to protect against unauthorized users and various attacks,” is necessarily distinct from “telecommunications services, which by definition must transmit *all* information of a user’s choosing” (internal quotations and citations omitted)).

¹⁰⁴ See, e.g., Xfinity Parental Controls, *available at* <http://www.comcast.com/Corporate/Customers/ParentalControls.html> (“Constant Guard™ from XFINITY offers Norton™ Security Suite which provides powerful parental controls to help filter out inappropriate content and monitor Internet activity to help keep children safe.”).

¹⁰⁵ See, e.g., Xfinity Connect, *available at* <http://xfinity.comcast.net/learn/internet/xfinityconnect/> (describing Comcast’s Xfinity Connect Online service, a single online platform that enables users to check email and voicemail, monitor Facebook and Twitter feeds, and manage DVR recordings, among other functions).

¹⁰⁶ See, e.g., Letter from Tejas Narechania and Tim Wu to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28, at 16-17 (filed Apr. 14, 2014) (“Narechania & Wu *Ex Parte* Letter”).

been able to avail themselves of non-ISP e-mail providers since at least the mid-1990s,¹⁰⁷ and yet the Commission has repeatedly pointed to the e-mail functionality made available by broadband providers as evidence that they *offer* an integrated information service.¹⁰⁸ Indeed, the Commission’s prior decisions expressly recognize that the ability to choose third-party applications over those offered by the ISP is irrelevant to the classification of the broadband service used to access those online applications.¹⁰⁹ As the Commission explained in the *Wireline Broadband Order*, “[t]he information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.”¹¹⁰ Thus, the notion that the availability of third-party applications somehow requires reclassification of broadband Internet access service under Title II is a red herring.

Absent any showing that broadband ISPs are in fact operating as “telecommunications carriers” by *offering* “telecommunications” to the public indiscriminately, the Commission could not impose common-carrier status on ISPs unless it were to conclude that ISPs should have a

¹⁰⁷ See Paul Wood, Symantec, “Reflections on the Fifteen Year Anniversary of Hotmail,” Jul. 4, 2011, available at <http://www.symantec.com/connect/blogs/reflections-fifteen-year-anniversary-hotmail> (noting that Hotmail was launched on July 4, 1996, “to symbolize freedom from ISP-based email”).

¹⁰⁸ See, *e.g.*, *Cable Modem Order* ¶ 38 (pointing to the fact that “cable modem service supports such functions as e-mail” in adopting the information services classification for cable modem service); *Wireline Broadband Order* ¶ 14 (same for wireline broadband).

¹⁰⁹ See, *e.g.*, *Cable Modem Order* ¶ 25 (“The subscriber is free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft’s ‘Hotmail.’ Whether the subscriber chooses to utilize functions offered by his cable modem service provider or obtain them from another source, these functions currently are all included in the standard cable modem service offering.”).

¹¹⁰ *Wireline Broadband Order* ¶ 15.

“legal compulsion . . . to serve [the public] indifferently.”¹¹¹ The NPRM casually raises the possibility of compelling broadband providers to operate on a common-carrier basis, presumably by extracting one or more telecommunications services from the integrated information-service offering and forcing providers to offer those services on a stand-alone basis.¹¹² But the Commission rightly rejected such an approach in the *Cable Modem Order*—noting that “[s]uch radical surgery is not required”¹¹³—and should do so again here. Although some advocates appear to believe (mistakenly) that such an about-face is necessary to support their preferred policy outcome, the Commission is prohibited from “impos[ing] common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.”¹¹⁴ Rather, the D.C. Circuit has held that the Commission may compel a private carrier to operate pursuant to Title II *only* if it “has sufficient market power to warrant regulatory treatment as a common carrier.”¹¹⁵ But the Commission did not and could not find that ISPs had market power when it adopted the *2010 Open Internet Order* or when it defended that order before the D.C. Circuit, and plainly could not make such a finding in today’s increasingly competitive environment. Because the NPRM expressly disclaims the notion that a market power showing is necessary to support the proposed open Internet rules,¹¹⁶ there is accordingly no basis for making a finding of

¹¹¹ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976).

¹¹² See NPRM ¶ 150.

¹¹³ *Cable Modem Order* ¶ 43.

¹¹⁴ *Southwestern Bell*, 19 F.3d at 1481; see also *Nat’l Ass’n of Regulatory Util. Comm’rs*, 525 F.2d at 644 (holding that the Commission does not have unfettered discretion to confer or not confer common-carrier status “depending upon the regulatory goals it seeks to achieve”).

¹¹⁵ *Virgin Islands Tele. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (quoting *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21589 (1998)).

¹¹⁶ See NPRM ¶ 49.

market power or attempting to justify a compulsion to provide a stand-alone telecommunications service.

For all these reasons, if the Commission were to pursue a Title II reclassification theory, it would face the considerable risk of being reversed yet again in its efforts to impose open Internet requirements. An order based on Title II would be far more likely to attract a legal challenge than an order based on Section 706, given the sheer magnitude of the harms that such reclassification would present. Such an order also would be far *less* likely to survive such a challenge. As noted above, the Commission would need to provide “a more detailed explanation” in adopting a new “telecommunications service” classification where, as here, the prior classification was based on contrary factual findings and engendered significant reliance interests.¹¹⁷ The Commission thus may not be accorded the same degree of deference in adopting a new “telecommunications service” classification as it enjoyed when defending its “information service” classification in *Brand X*, and may well find such a determination intensely scrutinized and ultimately vacated by a reviewing court.

C. The Commission Should Reject Proposals To Reclassify the Return-Path Element of Broadband Internet Access Service Under Title II

The NPRM also seeks comment on proposals that aim to impose Title II obligations on broadband providers by attempting to sidestep the Commission’s historical classification of broadband Internet access as an information service.¹¹⁸ The NPRM cites two largely overlapping proposals from Mozilla and Professors Narechania and Wu, both of which urge the Commission

¹¹⁷ See *supra* at 33 (quoting *Fox*, 556 U.S. at 515); cf. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view.”); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (same).

¹¹⁸ See NPRM ¶¶ 150-51.

to recognize a distinct “remote delivery service”¹¹⁹ or “response transaction”¹²⁰ supposedly provided by ISPs to edge providers for the transmission of edge-provider content. According to their theory, the transmission of edge-provider traffic in response to end user requests purportedly falls “outside the category of services previously designated by the Commission”¹²¹ and thus provides a blank slate on which the Commission supposedly can adopt a Title II classification and impose common-carrier restrictions without the need to overturn Commission precedent.¹²²

Such proposals should be rejected for several reasons. As an initial matter, the premise that the classification of “response” transmissions is an open question is simply wrong. The Commission has consistently made clear that, when classifying broadband Internet access service as an information service, it understood the service to include not only the end user’s request for online content, but also the delivery of such content to end users in response to such requests. In the 1998 *Report to Congress*, when applying the “information service” label to “Internet-based offerings” and other “mixed or hybrid services,” the Commission described such services as those “in which a provider offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, *and as*

¹¹⁹ See Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-91, 14-28, WC Docket No. 07-52, at 7 (filed May 5, 2014) (“Mozilla Petition”).

¹²⁰ Narechania & Wu *Ex Parte* Letter at 13.

¹²¹ Mozilla Petition at 9.

¹²² See Narechania & Wu *Ex Parte* Letter at 13 (asserting that “[c]lassifying such ‘sender-side’ traffic as a telecommunications service is, perhaps surprisingly, consistent with the *Cable Modem Order*”).

an inseparable part of that service transmits information supplied or requested by the user.”¹²³

Similarly, in the *Cable Modem Order*, the Commission described the cable modem service being classified as including “the ability to *retrieve* information from the Internet, including access to the World Wide Web.”¹²⁴ The Commission again declined to distinguish between “request” and “delivery” functions in broadband Internet access service in the *Wireline Broadband Order*, finding that “wireline broadband Internet access service” is “a single, integrated service” that “provides the user with the ability to *send and receive* information at very high speed, and to access the applications and services available through the Internet.”¹²⁵ Therefore, far from sidestepping the Commission’s past orders, the theory of reclassification advanced by Mozilla and Professors Narechania and Wu would run headlong into this precedent.

Some proponents of this approach also assert—based on a gross misreading of *Verizon* decision—that the D.C. Circuit found that ISPs are *already* providing a severable telecommunications service to edge providers.¹²⁶ But such an assertion overlooks the fact that the *Verizon* court’s decision to vacate the no-blocking and non-discrimination rules was premised on the notion that ISPs *are not* providing a telecommunications service and cannot be forced by the Commission to do so. And as noted above, absent a showing of market power, the

¹²³ *1998 Report to Congress* ¶ 56 (emphasis added); *see also id.* ¶ 63 (describing “Internet-based offerings” as a service that enables “end users to obtain access to and send information”).

¹²⁴ *Cable Modem Order* ¶ 10; *see also* ¶ 17 (“Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet.”).

¹²⁵ *Wireline Broadband Order* ¶¶ 14, 39.

¹²⁶ *See, e.g.*, NPRM ¶ 151 (citing language from *Verizon* that “broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers’ ‘carriers’”).

Commission is precluded from performing “radical surgery” by compelling broadband providers to offer some distinct “remote delivery service” as a Title II telecommunications service.¹²⁷

It is no answer for Mozilla and others to retort that broadband Internet access service necessarily involves “telecommunications” of some kind.¹²⁸ The very definition of “information service” is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*.”¹²⁹

The Commission has recognized that “[a]ll information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulating information.”¹³⁰ Indeed, every time the Commission has classified broadband Internet access service as an information service, it has done so recognizing that the various integrated functions involved are provided “via telecommunications.”¹³¹ Thus, even if it were possible (and consistent with precedent) to separate out a return-path service distinct from the integrated information service offered by broadband ISPs, the fact that such a service involves “telecommunications” would not, on its own, transform the service into a common-carrier “telecommunications service.” Such a standalone service could be a private carrier service as well. Indeed, as the Commission recognized in the *Cable Modem Order*, “[t]o the extent that [a broadband provider] is making an offering of pure telecommunications to ISPs, it is dealing with each ISP on an individualized basis and is not offering any transmission service

¹²⁷ See *supra* at 36-37.

¹²⁸ See Mozilla Petition at 10.

¹²⁹ 47 U.S.C. § 153(24) (emphasis added).

¹³⁰ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, Order on Remand, 16 FCC Rcd 9751 ¶ 36 (2001).

¹³¹ See *Cable Modem Order* ¶ 38; *Wireline Broadband Order* ¶ 14; *BPL Order* ¶ 9; *Wireless Broadband Order* ¶ 30.

indiscriminately to all ISPs”—thus making such an offering “a private carrier service, not a ‘telecommunications service.’”¹³²

Furthermore, any attempt to accord differential regulatory treatment to “request” and “delivery” transmissions would make little sense as a practical matter. The nature of packet-switched communications, the mechanism on which Internet Protocol communications are based, would render such distinctions utterly unworkable. Nearly every online operation—from accessing a website to downloading a file to viewing a video to engaging in online gaming—entails numerous and often nearly simultaneous signals between the website and the end user. These signals are further subdivided into packets—information that is broken up into small pieces for transmission across the network. The process of sorting out the “call” and “response” transmissions in these circumstances for the purpose of ensuring compliance with differing regulatory regimes would be entirely unmanageable, as it presumably would require an ISP to physically inspect the contents of each and every packet to evaluate whether it contains only the information from the so-called “remote service.” Even Mozilla implicitly recognizes the intractability of this approach, conceding that a transmission service to edge providers is at most “logically and legally distinguishable,” because the remaining transmission functions are not “physically separable.”¹³³ But here, too, Mozilla runs up against the realities of how the Internet functions. Broadband providers simply do not have direct relationships with the edge providers whose content their subscribers are seeking; in other words, there is no “service” being offered to edge providers that is distinguishable in any way from the “service” being offered to end users. The artificiality of the approach advanced by Mozilla and Professors Wu and Narechania is only underscored by the way broadband Internet access service is marketed to consumers, who choose

¹³² *Cable Modem Order* ¶ 55.

¹³³ Mozilla Petition at 7.

a service based on the speed at which it delivers edge providers' responses (*i.e.*, download speed), not the end user's request.

Finally, as with the broader reclassification proposals, the approach suggested by Mozilla and Professors Wu and Narechania would not even accomplish the policy objectives that they and other proponents of reclassification seem to desire. These parties appear to believe that imposing Title II requirements on broadband ISPs' transmissions of edge-provider content to end users would preclude ISPs from seeking payment in connection with those transmissions. But even setting aside the fact the ISPs have not entered into and have no plans to explore paid arrangements with edge providers, the Commission could not combine any Title II classification of so-called "remote delivery services" with a ban on payments between edge providers and ISPs, as a common carrier is, by definition, one who provides service "for a fee."¹³⁴ In short, these proposals are riddled with fundamental factual and legal misconceptions and should be rejected.

D. Adopting a "Springing" or "Backstop" Title II Theory Would Be Arbitrary and Capricious

As the NPRM notes, some have argued that if the Commission proceeds to adopt open Internet rules under Section 706, it should nevertheless "use Title II as a 'backstop authority.'"¹³⁵ One proposal cited in the NPRM would have the Commission "issu[e] one order under [S]ection 706 and a contingent order under Title II" that would automatically spring into being if a court

¹³⁴ 47 U.S.C. § 153(53) (defining "telecommunications service" as "the offering of telecommunications *for a fee* directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used") (emphasis added).

¹³⁵ NPRM ¶ 150.

were to invalidate the order under Section 706.¹³⁶ The apparent aim of such an approach would be to “ward off court challenges” to any rules adopted under Section 706.¹³⁷

But the legal and policy ills presented by a Title II approach are just as true whether imposed affirmatively or dangled like the sword of Damocles over broadband providers. As noted above, the mere threat of Title II reclassification can bring about disastrous policy harms, including greatly diminished broadband investment, deployment, and innovation. Moreover, in adopting Title II as a “backstop,” the Commission still would need to overcome the significant legal hurdles that such a classification necessarily would entail. Indeed, it is impossible to see how the Commission could write an order that, on the one hand, concludes that the “factual particulars” of broadband Internet access service support continued classification as an information service regulated under Section 706, but on the other hand states that, if any new rules are invalidated, the “factual particulars” support the conclusion that broadband is best classified as a telecommunications service. This is particularly true in light of the Commission’s repeated holding that the categories of “telecommunications service” and “information service” are “mutually exclusive.”¹³⁸

At bottom, the notion that Title II could spring into effect for purely policy reasons would all but assure that such a classification would be found to be arbitrary and capricious, as it would

¹³⁶ Letter from Rep. Henry Waxman, Ranking Member, Committee on Energy and Commerce, to Thomas Wheeler, Chairman, Federal Communications Commission at 2 (May 14, 2014), *available at* <http://democrats.energycommerce.house.gov/sites/default/files/documents/Wheeler-Title-II-Backup-Option-2014-5-14.pdf> (“Waxman Letter”).

¹³⁷ *Id.* (quotation marks and citation omitted).

¹³⁸ *See, e.g., 1998 Report to Congress* ¶ 13 (“[W]e find that Congress intended the categories of ‘telecommunications service’ and ‘information service’ to be mutually exclusive, like the definitions of ‘basic service’ and ‘enhanced service’ developed in our Computer II proceeding . . .”).

clearly *not* be based on the “factual particulars” of the service. The Commission cannot manipulate the service classifications by toggling back and forth between “telecommunications service” and “information service” labels solely to determine the level of regulation that should apply.¹³⁹ The D.C. Circuit has made clear that the Commission is prohibited from “impos[ing] common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.”¹⁴⁰ It would be inappropriate and unlawful for the Commission to decide what ultimate power it seeks, and only then to determine how to conduct a functional analysis in such a manner as to ensure that it obtains its desired consequences. Indeed, given the obvious legal infirmities of any “springing” or “backstop” Title II theory, such an approach would not “ward off court challenges” in any way,¹⁴¹ and if anything would make such challenges more likely.

III. SECTION 706 PROVIDES A WORKABLE PATH FORWARD TO ADOPT NEW RULES, BUT SHOULD NOT BE USED TO IMPOSE OVERLY RESTRICTIVE MANDATES

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. The *Verizon* court left no doubt that “[S]ection 706 of the 1996 Telecommunications Act . . . furnishes the Commission with the requisite affirmative authority to adopt the [open Internet] regulations.”¹⁴² Section 706(a), it explained, “vest[s] the

¹³⁹ Further compounding this arbitrariness is the fact that, as noted above, the premise that Title II would support a categorical ban on paid prioritization is false. *See supra* at 27-30.

¹⁴⁰ *Southwestern Bell*, 19 F.3d at 1481.

¹⁴¹ Waxman Letter at 2.

¹⁴² *Verizon*, 740 F.3d at 635.

Commission with actual authority”¹⁴³ to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”¹⁴⁴ Moreover, upon a finding that “advanced telecommunications capability” is not being “deployed to all Americans in a reasonable and timely fashion,” Section 706(b) provides the Commission additional authority to “take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁴⁵

The D.C. Circuit upheld the Commission’s 2010 conclusions that promoting and protecting the open Internet fell within these grants of authority. The court characterized as “both rational and supported by substantial evidence” the Commission’s finding that Internet openness is crucial to edge-provider innovation and drives end-user demand, which in turn stimulates investment in broadband infrastructure—*i.e.*, the “virtuous circle.”¹⁴⁶ That core justification thus plainly empowers the Commission to adopt rules under Section 706(a) to protect and provide for such openness as a way to “encourage the deployment” of advanced telecommunications capability.¹⁴⁷ The court also held that the Commission can rely on its past determination that “broadband deployment to *all* Americans is not reasonable and timely”¹⁴⁸ in justifying new rules protecting Internet openness under Section 706(b) as a means of

¹⁴³ *Id.* at 637-38.

¹⁴⁴ 47 U.S.C. § 1302(a); *see Verizon*, 740 F.3d at 636-40.

¹⁴⁵ 47 U.S.C. § 1302(b); *see Verizon*, 740 F.3d at 640-42.

¹⁴⁶ *Verizon*, 740 F.3d at 644.

¹⁴⁷ *Id.* at 642.

¹⁴⁸ *Id.* at 640 (quoting *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Sixth Broadband Deployment Report, 25 FCC Rcd 9556 ¶ 2 (2010)).

“accelerat[ing] [broadband] deployment” by “removing ‘barriers to infrastructure investment’ and promoting ‘competition.’”¹⁴⁹

As discussed below, however, the Commission should take care to use this authority prudently and in a manner that actually advances the goals of Section 706. Most fundamentally, the Commission should avoid imposing overly prescriptive mandates that would thwart rather than promote the “virtuous circle” on which the Commission’s authority under Section 706 is premised. As NCTA noted in its comments in response to the Public Notice, the existing transparency regime adopted under Section 706 provides an appropriate mechanism for ensuring that the marketplace disciplines conduct that conflicts with core values of Internet openness.¹⁵⁰ But to the extent the Commission modifies its transparency requirements or imposes new no-blocking rules and “commercial reasonableness” obligations, it should ensure that such rules do not undermine the very innovation and deployment that the Commission seeks to promote, and that the rules otherwise comport with the limitations identified by the *Verizon* court.

A. The Current Transparency Regime Is Sufficient To Protect Internet Openness and Should Not Be Expanded in an Unwarranted and Unduly Burdensome Manner

The transparency rules adopted in the *2010 Open Internet Order* and upheld by the *Verizon* court create an important foundation for ensuring that Internet openness will be protected and fulfilled. While NCTA has expressed concerns in the past about the potential burdens of complying with overly prescriptive disclosure mandates,¹⁵¹ NCTA supported the transparency regime ultimately established by the Commission, given the Commission’s stated

¹⁴⁹ *Id.* at 642 (quoting 47 U.S.C. § 1302(b)).

¹⁵⁰ Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28, at 6 (filed Mar. 26, 2014) (“NCTA PN Comments”).

¹⁵¹ *See* Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, at 42 (filed Jan. 14, 2010).

commitment at the time “to allow flexibility in [the] implementation of the transparency rule.”¹⁵² For all the reasons explained below, the Commission should find that the current rules have been effective and that additional disclosure obligations for ISPs would be unwarranted.

1. *There is no basis for the Commission’s tentative conclusion that enhanced transparency rules are needed*

Although the NPRM proposes to adopt a variety of “enhancements” to the transparency regime established in 2010, there is no factual basis for taking such a step. The NPRM acknowledges that there have been *no* formal complaints regarding inadequate disclosure in the three years that the rules have been in effect.¹⁵³ While the NPRM suggests that there have been “hundreds” of informal complaints—a relatively low number given the *163 million* broadband Internet access connections reported by the Commission¹⁵⁴—the mere existence of these filings, absent any indication that they resulted in actual findings of wrongdoing, plainly does not justify additional transparency rules.¹⁵⁵ Indeed, in most cases, it is not clear whether a particular complaint pertains to an ISP’s disclosures or its provision of service—a fact the NPRM acknowledges.¹⁵⁶ The only rational conclusion the Commission could draw from such data is that, by and large, ISPs *are* disclosing the information consumers need to make intelligent decisions about which providers and tiers of service to choose.

The NPRM also raises a concern about ISPs’ supposed failure to deliver advertised speeds. But in doing so it relies on a single informal complaint,¹⁵⁷ and ignores the rigorous

¹⁵² *2010 Open Internet Order* ¶ 56.

¹⁵³ NPRM ¶ 161.

¹⁵⁴ *See* Jun. 2014 Internet Access Services Report at 17 & Table 2.

¹⁵⁵ NPRM ¶ 69.

¹⁵⁶ *See id.* ¶ 69 n.163.

¹⁵⁷ *See* NPRM ¶ 69 n.164.

testing the agency has been conducting for three years under the Measuring Broadband America project. The most recent report issued by the Commission, based on over 8 billion observations conducted using third-party routers and test servers, demonstrates conclusively that cable operators and other broadband providers are delivering the services they advertise and that no additional disclosure obligations are necessary.¹⁵⁸

The NPRM likewise points to scattered informal complaints about applications or services that do not function as anticipated by the customer as a purported basis for increased disclosure obligations.¹⁵⁹ But this discussion ignores the Commission’s consistent recognition that there are a variety of factors outside an ISP’s control that affect performance, including the equipment used in the home and various decisions made by content providers.¹⁶⁰ The unsurprising fact that some consumers occasionally experience a problem with a particular application or service does not give the Commission sufficient information to determine whether responsibility for such problems rests with the content provider, the ISP, some intermediate network, or the customer’s home network. Absent such information, informal complaints like the ones cited in the NPRM provide no basis for imposing additional disclosure obligations on ISPs.

¹⁵⁸ See *2014 Measuring Broadband America Report* at 15 (finding that cable operators deliver 102 percent of advertised download speeds and 111 percent of advertised upload speeds at peak periods).

¹⁵⁹ See NPRM ¶ 69 n.166.

¹⁶⁰ See, e.g., *2014 Measuring Broadband America Report* at 5-6; see also Net Forecast, *How the Netflix ISP Speed Index Documents Netflix Congestion Problems* at 10 (Jun. 2014), available at http://www.netforecast.com/wp-content/uploads/2014/06/NFR5117_How_the_Netflix_ISP_Speed_Index_Documents_Netflix_Congestion_Problems.pdf (“NetForecast Report”) (“Users who spring for high-end home entertainment systems and who choose ‘best quality’ via the Netflix interface, experience a higher streaming rate. In contrast, users who watch a movie or old sitcom on an iPhone, and do not actively select ‘best quality,’ experience lower streaming rates.”).

2. *There is no need to enhance the disclosures ISPs make to retail customers*

The Commission should not adopt any of its proposals to enhance the disclosures that ISPs must make to retail customers. As explained below, each of these proposals would impose significant new burdens without providing customers with any meaningful new information.

For example, the Commission should reject its proposal to “require disclosures that permit end-users to identify application-specific usage or to distinguish which user or device contributed to which part of total data usage.”¹⁶¹ Such a requirement likely would necessitate significant use of deep packet inspection in an attempt to determine the user or device responsible for originating or receiving particular Internet traffic. Even if it were feasible to implement the necessary network changes, tracking usage at a user- or device-specific level would require significant ISP resources as well as significant customer coordination.

The Commission also should reject the proposal by Cogent that ISPs be required to report performance at a local level, rather than the national level currently measured by the Measuring Broadband America project.¹⁶² This proposal is utterly impractical and would be extremely burdensome for ISPs. The expense of recruiting a sufficient number of volunteers to obtain a statistically valid sample in each local community and then distributing the requisite equipment to each of those volunteers would be overwhelming.

Along the same lines, Cogent’s proposal that ISPs report the performance received by the 250 most popular edge providers could not be implemented in any meaningful or accurate manner.¹⁶³ As with the Commission’s proposal to require reporting of application-specific usage

¹⁶¹ NPRM ¶ 73.

¹⁶² *Id.* ¶ 79; *see also* Comments of Cogent Communications Group, Inc., GN Docket No. 14-28, at 12-13 (Mar. 21, 2014) (“Cogent PN Comments”).

¹⁶³ NPRM ¶ 83; Cogent PN Comments at 20-21.

to consumers, such a requirement would impose tremendous burdens on ISPs and could raise significant concerns because it likely would require the substantial use of deep packet inspection to track the delivery of all Internet traffic to determine which edge providers are the 250 most popular. Moreover, as with other elements of the enhanced transparency rules proposed in the item, such an approach erroneously assumes that all responsibility for the performance experienced by consumers rests with ISPs and ignores the significant role that edge providers may play in that performance.

Finally, the Commission should not mandate the use of standardized formats for disclosures by ISPs.¹⁶⁴ NCTA previously has identified a number of concerns that would arise in connection with any mandatory labeling program for broadband services.¹⁶⁵ The Open Internet Advisory Committee report that the Commission cites as the basis for this proposal also recognized that there are numerous complexities associated with standardized labels and potential concerns about such labels misleading consumers.¹⁶⁶ Consequently, that report did not suggest mandatory labels, but instead proposed that the Commission “work with the industry to develop a voluntary labeling program.”¹⁶⁷ If the Commission decides to pursue standardized disclosures, NCTA would welcome the opportunity to participate in the development of a voluntary program, just as we did in connection with the Measuring Broadband America program.

¹⁶⁴ NPRM ¶ 72.

¹⁶⁵ See Comments of the National Cable & Telecommunications Association, CG Docket No. 09-158 (filed May 26, 2011).

¹⁶⁶ Open Internet Advisory Committee, 2013 Annual Report, at 85-87 (Aug. 20, 2013) (“2013 OIAC Report”).

¹⁶⁷ *Id.* at 87-88 (“The Transparency Working Group recommends that the FCC work with the industry to develop a voluntary labeling program, in which ISPs would disclose in a simple and consistent manner, relevant information about their broadband Internet access services.”).

3. *The Commission should not require ISPs to provide tailored disclosures for edge providers*

The Commission also should reconsider and ultimately reject its tentative conclusion that ISPs should be required to make disclosures that are specifically geared to the business needs of edge providers.¹⁶⁸ There is no sound reason to impose such a one-sided requirement and no practical manner by which ISPs could cater to the needs of millions of different edge providers. As an initial matter, the NPRM does not provide any basis to conclude that the disclosures currently made by ISPs are somehow inadequate to meet the needs of edge providers. Edge providers of all sizes have thrived in the three years since the transparency rules took effect, and the NPRM does not cite a single example of an edge provider whose business was affected, let alone harmed, in any way by insufficient disclosure by ISPs.

As compared to the negligible benefits that might arise from requiring ISPs to make specific disclosures to edge providers, the burdens would be substantial. As NCTA and others explained when the transparency rules were adopted in 2010, it is completely impractical to require ISPs to make disclosures that are specifically tailored to the business needs of edge providers.¹⁶⁹ ISPs have no way to anticipate the needs of millions of content providers nor should the Commission hold ISPs responsible for the successful operation of businesses with whom they have no contractual relationship. The one-sided nature of the proposed obligation compounds these problems. The notion that ISPs should have a disclosure obligation running to every edge provider on the Internet, while those edge providers have no obligation to provide

¹⁶⁸ See NPRM ¶ 68.

¹⁶⁹ See Comments of the National Cable & Telecommunications Association, GN Docket No. 09-191, at 4 (filed Apr. 11, 2011) (explaining that a “vague, open-ended disclosure obligation could be read to require ISPs to provide virtually any information that any content, application, service, or device provider anywhere in the world decides is helpful to its business”).

any information to ISPs, is patently unfair. This lopsided approach would be particularly harmful to small ISPs, which would be at a huge disadvantage in any dealings with large content providers like Google, Amazon, and Netflix, all of which operate networks that are far more extensive than those operated by many small ISPs.

4. *The Commission’s proposal to require ISPs, and only ISPs, to report on network congestion is impractical and unwarranted*

The Commission likewise should reject the proposal to require ISPs to “disclose meaningful information regarding the source, location, timing, speed, packet loss, and duration of network congestion.”¹⁷⁰ As an initial matter, congestion at a particular point in the network is not necessarily evidence that the quality of service to consumers has been degraded, because ISP networks are built with redundant paths that enable Internet traffic to be routed around points of congestion. Furthermore, as the NPRM acknowledges, network congestion can occur at any point in the Internet, not just the last-mile portion controlled by ISPs.¹⁷¹ And as demonstrated by a number of studies, edge providers have significant control over how they deliver their traffic to ISPs.¹⁷² For example, some large content providers like Netflix may choose to route traffic over congested links from transit providers rather than spending more money to route traffic over

¹⁷⁰ NPRM ¶ 83; *see also* 2014 *Measuring Broadband America Report* at 5-6.

¹⁷¹ NPRM ¶ 82.

¹⁷² *See, e.g.*, Massachusetts Institute of Technology, Information Policy Project, *Measuring Internet Congestion: A Preliminary Report*, available at <https://ipp.mit.edu/sites/default/files/documents/Congestion-handout-final.pdf> (“MIT Report”); Sandvine, *Exposing Technical and Commercial Factors Underlying Internet Quality of Experience*, at 29-33 (Sep. 2013), available at <https://www.sandvine.com/downloads/general/global-internet-phenomena/2013/exposing-the-technical-and-commercial-factors-underlying-internet-quality-of-experience.pdf> (“Sandvine Report”); *see also, e.g.*, Letter from Joseph E. Young, Mediacom, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed May 22, 2014) (“Mediacom Letter”).

open links from CDNs.¹⁷³ Performance also can be affected significantly by equipment in the home. For example, the Commission has recognized that Wi-Fi performance in the home and various other types of equipment used to access online content can have a substantial effect on the performance experienced by an end user.¹⁷⁴

Even if there were a basis for imposing a congestion-reporting obligation only on ISPs, and there is not, such a requirement would be utterly impractical and tremendously burdensome. The Commission has not defined the term “congestion” or offered any explanation as to how it would establish a reporting threshold that would be appropriate for all different types of ISPs. Based on NCTA’s experience helping the Commission develop the Measuring Broadband America testing regime, attempting to devise a new metric for congestion that would be meaningful and accurate across different technologies would be extremely challenging. Moreover, network congestion often is ephemeral and occurs in a highly specific manner with respect to time and location,¹⁷⁵ and thus does not lend itself to any sort of meaningful reporting to the Commission or to the public.

The bottom line is that requiring ISPs to report network congestion but ignoring all these other relevant factors would not provide the information necessary to perform a proper analysis

¹⁷³ Mediacom Letter at 6-8.

¹⁷⁴ See Srikanth Sundaresan and Nick Feamster, *Locating Performance Bottlenecks in Home Networks*, attached to Letter from James Miller, Office of Engineering and Technology, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-264 (filed May 20, 2013) (“[R]epresentatives of broadband providers, public interest groups, companies, and other organizations met in person and via conference call with Commission staff to discuss the technical details of the in-home performance bottleneck special study proposal from Prof. Nick Feamster, Assoc. Professor Georgia Institute of Technology.”); NetForecast Report at 10; Sandvine Report at 25-26.

¹⁷⁵ See MIT Report at 2 (“Congestion does not always arise over time, but can come and go essentially overnight as a result of network reconfiguration and decisions by content providers as to how to route content.”).

of why any particular application or service is not working properly. To accomplish that goal, the Commission would need to take a more holistic view of the marketplace and gather data from all the relevant participants, not just ISPs.

5. *The Commission's proposals to expand its oversight and enforcement of transparency mandates are unjustified*

Lastly, while the NPRM proposes a variety of oversight and enforcement mechanisms to ensure that ISPs are complying with the Commission's transparency rules,¹⁷⁶ none of these new mechanisms is necessary, and they would serve only to increase the burdens imposed on ISPs. For example, the proposal to permit anonymous reporting of transparency concerns based on supposed retaliation concerns is misplaced. Just as the NPRM does not identify a single instance of any formal complaint alleging a transparency violation, there are no known examples of retaliation by ISPs. Moreover, ISPs have no practical ability to retaliate against edge providers and no reason to retaliate against consumers.¹⁷⁷ There simply is no legitimate basis for imposing rules on ISPs due to this unsupported fear of retaliation.¹⁷⁸

¹⁷⁶ NPRM ¶¶ 87-88.

¹⁷⁷ Conversely, many large edge providers, such as Amazon and YouTube, recently have demonstrated the ability and willingness to harm other companies and their customers by withholding or delaying the delivery of content. *See, e.g.,* Jon Fingas, *YouTube Confirms Music Service, Will Block Holdout Labels' Videos Within 'Days'*, Engadget, Jun. 18, 2014, available at <http://www.engadget.com/2014/06/17/youtube-confirms-music-service/> (reporting that YouTube has warned music labels that if they don't submit to standardized licensing terms, YouTube "will start blocking clips from holdouts within a 'matter of days,'" and that "viewers . . . may soon be denied videos from Adele, The XX and many other top-tier musicians" as a result); Carolyn Kellogg, *Amazon Update: Time Warner Faces Hachette-style Order Delays*, L.A. Times, Jun. 12, 2014, available at <http://www.latimes.com/books/jacketcopy/la-et-jc-amazon-time-warner-hachette-20140611-story.html> (reporting on disputes between Amazon and multiple publishers and content providers that have prompted Amazon to block the ability to pre-order certain material).

¹⁷⁸ *See also infra* Section III.D (explaining that retaliation concerns in connection with other kinds of complaints are similarly unsupported).

Similarly, the proposal to require ISPs to report on instances of blocking or throttling is unnecessary and impractical. While some ISPs may manage traffic in some circumstances as part of their efforts to address network congestion, such policies already are subject to disclosure under the existing transparency rules. Expanding the existing requirements by requiring disclosure of individual applications of providers' policies would be extremely burdensome and would not provide meaningful information to consumers.

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

The NPRM also proposes to reinstate—with some modifications—the no-blocking rule vacated by the *Verizon* court. The proposed text of the new no-blocking rule for fixed broadband providers largely tracks the language of the old rule, and would prevent “[a] person engaged in the provision of fixed broadband Internet access service” from “block[ing] lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”¹⁷⁹ Unlike the prior rule, however, the proposed new rule would be accompanied by a clarification that the standard “would allow individualized bargaining above a minimum level of access to a broadband provider’s subscribers—the revised rationale the court suggested would be permissible rather than *per se* common carriage.”¹⁸⁰

¹⁷⁹ NPRM ¶ 94. Notably, the NPRM also proposes adopting a less restrictive no-blocking rule for mobile wireless providers, as the Commission did in the *2010 Open Internet Order*. *Id.* As discussed in Section IV.A below, however, the Commission should seek to harmonize rather than maintain unwarranted distinctions in any rules it adopts for fixed and mobile broadband providers, particularly now that mobile broadband services are maturing into increasingly viable alternatives to fixed broadband services.

¹⁸⁰ *Id.* ¶ 95.

As a general matter, and as NCTA has explained previously, a reinstated no-blocking rule is likely unnecessary.¹⁸¹ 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.¹⁸² Indeed, as noted above in Section I, broadband ISPs benefit from an open Internet as much as other participants in the Internet ecosystem, and thus have a powerful incentive to ensure that lawful Internet content remains available to all.

Nevertheless, if the Commission chooses to reinstate a no-blocking requirement, it should refrain from establishing rigid, quantitative or qualitative measures for the “minimum level of access” that would be deemed “effectively usable” under the rule.¹⁸³ The Commission has acknowledged that the Internet has always operated under a flexible “best effort” standard for the

¹⁸¹ See NCTA PN Comments at 6-12.

¹⁸² 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 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”).

¹⁸³ See NPRM ¶¶ 98.

delivery of Internet traffic to end users,¹⁸⁴ and the NPRM appropriately contemplates incorporating this standard into any reinstated no-blocking rule.¹⁸⁵ The Commission should adopt this proposal, which contemplates the negotiation of “‘better than typical’ delivery with edge providers,” while prohibiting ISPs “from delivering ‘worse than typical’ service in the form of degradation or outright blocking” subject to “reasonable network management.”¹⁸⁶ Although, as discussed below, ISPs have no plans to enter into arrangements for prioritized delivery of Internet content over last-mile networks,¹⁸⁷ there is no basis for the Commission to preclude such arrangements. Such restraint would appropriately recognize that “best effort” delivery has always been and will continue to be sufficient to ensure end users’ access to the entire Internet, as competition and consumer demand continue to drive broadband providers to invest in and improve the quality and speed of their networks. A “best effort” standard also would take into account the possibility, inherent in all networks, that performance may vary according to traffic load or other issues beyond the network provider’s control. Ultimately, the competitive marketplace, and not the Commission, is in the best position to establish appropriate levels of service.

For similar reasons, the Commission should decline to establish “specific technical parameters, such as a minimum speed,” that an ISP would need to maintain in order to avoid being deemed to have “blocked” online content under the rule.¹⁸⁸ Such a mandate is completely

¹⁸⁴ *Id.* ¶ 102 n.226 (noting that “[t]he Internet has traditionally relied on an end-to-end, open architecture, in which network operators use their ‘best effort’ to deliver packets to their intended destinations without quality-of-service guarantees”) (internal citations omitted).

¹⁸⁵ *Id.* ¶ 102.

¹⁸⁶ *Id.*

¹⁸⁷ *See infra* at 62-63.

¹⁸⁸ *See* NPRM ¶ 103.

unnecessary in today's marketplace, where broadband providers continue to have powerful incentives to increase speeds and deploy advanced networks throughout their footprint absent any regulatory requirement to do so. Indeed, in light of the steady, market-driven advances in broadband performance over the years, it is evident that any minimum speed imposed by the Commission would quickly become obsolete. Establishing such rigid technical parameters also would entirely ignore the inevitable variations in performance that can affect broadband networks, and could unfairly expose broadband providers to liability for network performance issues that are outside of their control.

In addition, a rule that mandates a specific level of service to edge providers, such as a minimum speed or other quantitative performance standard, would present a serious risk of being deemed a common-carrier requirement. In vacating the Commission's earlier no-blocking rule, the *Verizon* court explained that a rule that inflexibly "requir[es] that all edge providers receive [a] minimum level of access for free" would appear to "impose *per se* common carrier obligations with respect to that minimum level of service."¹⁸⁹ On the other hand, the *Verizon* court also noted that minimum service standards may not constitute common carriage if "the relevant 'carriage' broadband providers furnish . . . [is] not the minimum required service," but merely "access to end users more generally."¹⁹⁰ While a "best effort" standard could plausibly be defended as the latter kind of requirement, a minimum speed standard likely would be held to constitute the former, and thus would risk being struck down as an impermissible common-carrier obligation.¹⁹¹ Notably, even when the Commission under Chairman Genachowski was

¹⁸⁹ *Verizon*, 740 F.3d at 658.

¹⁹⁰ *Id.*

¹⁹¹ Indeed, a Commission-imposed requirement to provide a baseline minimum speed to all edge providers, even when paired with an ability to negotiate faster speeds with particular

considering pursuing reclassification of the telecommunications component of broadband Internet access under Title II, it was determined to *avoid* imposing service-quality regulation on the ground that such prescriptive mandates should not apply in the dynamic Internet ecosystem.¹⁹²

The concept of imposing a standard based on the expectations of a “reasonable person” is similarly flawed.¹⁹³ Such a standard would be fraught with ambiguity, particularly given the amorphous and constantly changing needs of a “reasonable” broadband customer, and would provide virtually no certainty to ISPs in their efforts to comply with any reinstated no-blocking rule. Judge Silberman acknowledged the difficulties inherent in such an approach in his dissenting opinion in the *Verizon* case, noting that “[i]f a faster speed were to become standard, [consumers] would likely consider a slower speed to be effectively unusable.”¹⁹⁴ Such a standard, inevitably dependent on subtle shifts in consumer expectations, would be entirely unadministrable and thus should be rejected. Instead, if the Commission adopts a no-blocking rule, it should focus on preventing *actual* blocking of content rather than on micromanaging

parties, would be akin to a requirement to serve all comers, at a minimum, “‘on the same or standardized terms’”—a hallmark of common carriage. *Id.* at 652 (quoting *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012)).

¹⁹² See, e.g., *Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114, Separate Statement of Chairman Julius Genachowski (rel. Jun. 17, 2010) (describing the Third Way approach as “reject[ing] . . . the extreme of applying extensive legacy phone regulation to broadband”); Chairman Julius Genachowski, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010) (detailing regulation that the Commission should not undertake, including price and service-quality regulation); Austin Schlick, General Counsel, Federal Communications Commission, *A Third-Way Legal Framework For Addressing the Comcast Dilemma*, at 7-8 (May 6, 2010).

¹⁹³ See NPRM ¶ 104.

¹⁹⁴ *Verizon*, 740 F.3d at 668.

ISPs' network management practices and second-guessing ISPs' efforts to meet consumer expectations.

C. It Would Be Premature To Impose “Commercial Reasonableness” Obligations on ISPs

The Commission also should be cautious in evaluating proposals to impose new “commercial reasonableness” obligations on ISPs.¹⁹⁵ As NCTA has explained, there is no basis for the Commission to pursue 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.¹⁹⁶ 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.¹⁹⁷ 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 “two-sided market” involving usage-based pricing arrangements between ISPs and edge providers.¹⁹⁸ And

¹⁹⁵ See NPRM ¶ 116.

¹⁹⁶ See NCTA PN Comments at 13-16.

¹⁹⁷ 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.”); *2010 Open Internet Order* ¶ 92 (recognizing 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 reaffirming that “[b]roadband providers should have flexibility to experiment, innovate, and reasonably manage their networks”).

¹⁹⁸ 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>.

both the Department of Justice and Federal Trade Commission have warned about the risks of premature and overbroad regulation chilling procompetitive and pro-consumer arrangements¹⁹⁹—concerns that are echoed in several economist reports submitted to the Commission.²⁰⁰

For these reasons, the Commission should not frame any “commercial reasonableness” mandate in a manner that categorically prohibits any and all “paid prioritization” arrangements between edge providers and broadband ISPs. There is scant evidence that any broadband provider or edge provider is even exploring such an arrangement, and, based on statements by leading broadband providers, it is unlikely that most forms of paid prioritization would gain

¹⁹⁹ See Federal Trade Commission, *Broadband Connectivity Competition Policy: A Federal Trade Commission Staff Report*, at 125, 157 (2007), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf> (noting “the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace”); Ex Parte Filing of the United States Department of Justice, WC Docket 07-52, at 2-3 (filed Sep. 6, 2007) (cautioning against “prophylactic ‘neutrality’ regulations” and explaining that “[h]owever well-intentioned, regulatory restraints can inefficiently skew investment, delay innovation, and diminish consumer welfare”).

²⁰⁰ 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 (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”).

traction in the marketplace.²⁰¹ Notwithstanding that broadband providers generally have little interest in seeking fees to prioritize the delivery of certain edge providers' traffic, there is no sound reason to ban commercial deals that do not (and may never) exist. The predicate for any regulation—and especially an effort to prohibit an entire category of commercial arrangements—should be concrete evidence of likely harm, rather than rank speculation. As the DOJ and FTC recognized, categorical bans run a serious risk of deterring beneficial arrangements that could benefit consumers, and those risks are even greater where the nature of the arrangements in question is so poorly understood.

Indeed, there are several potential examples of socially beneficial prioritization of Internet traffic that could emerge if experimentation were permitted. Few would quibble with prioritizing traffic associated with remote heart surgery or other telemedicine applications, or emergency 911-like communications placed using an Internet connection, over email traffic or other applications for which high speed and low latency are not critical.²⁰² Chairman Wheeler provided another model for beneficial prioritization in his remarks after the NPRM was released, noting that his Government Emergency Telecommunications Service card allows him to “go to any phone in America and type in this number, and get priority access that you can use in a case

²⁰¹ See, e.g., AT&T Blog, *Net Neutrality and Modern Memory*, Jun. 6, 2014, available at <http://www.attpublicpolicy.com/fcc/net-neutrality-and-modern-memory/> (“No one has any plan or intent to introduce such paid prioritization practices. ISPs have all posted policies that prohibit them.”); Comcast Blog, *Clarifying Data Caps & Prioritization*, May 15, 2014, available at <http://corporate.comcast.com/comcast-voices/clarifying-data-caps-prioritization> (“To be clear, Comcast has never offered paid prioritization, we are not offering it today, and we’re not considering entering into any paid prioritization creating fast lane deals with content owners.”).

²⁰² See Brent Sokrup, *In Defense of Broadband Fast Lanes*, Re/code, May 13, 2014, available at <http://recode.net/2014/05/13/in-defense-of-broadband-fast-lanes/> (listing several other beneficial services that could be enhanced through prioritization, including “cloud-hosted virtual desktops” and “teleteaching”).

of emergency.”²⁰³ According to the Chairman, the Commission plainly should not “rule out something like that.”²⁰⁴ In light of the potential benefits of prioritization, the only viable means of regulating such arrangements is through a case-by-case analysis of the likely benefits and costs—an analysis that relies on a set of specific factors, as in the data roaming context, to provide as much guidance as possible to regulated parties.²⁰⁵

While the Commission therefore should tread carefully in imposing any “commercial reasonableness” restrictions on direct wholesale arrangements between ISPs and edge providers, it should roundly reject the significantly broader concept of regulating all “*practices*” employed by ISPs “in the provision of broadband Internet access service.”²⁰⁶ Contrary to the suggestion in the NPRM that such a rule would be “more focused and more flexible than the vacated 2010 non-discrimination rule,”²⁰⁷ a rule targeting all broadband provider “practices” would go well beyond the scope of the 2010 non-discrimination rule—which prohibited ISPs only from discriminating unreasonably in their wholesale relationships with edge providers and expressly addressed “commercial arrangement[s] between a broadband provider and a third party.”²⁰⁸ Such a rule also would be far more sweeping than the “commercial reasonableness” standard in

²⁰³ Matthew S. Schwartz, *Along Party Lines, FCC Votes To Explore Idea of Internet Fast Lanes*, Communications Daily, May 16, 2014, at 3.

²⁰⁴ *Id.*

²⁰⁵ *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 ¶ 86 (2011) (listing factors applicable in data roaming context).

²⁰⁶ NPRM ¶ 116 (emphasis added, internal quotation marks omitted).

²⁰⁷ *Id.*

²⁰⁸ *2010 Open Internet Order* ¶¶ 75, 76.

the data roaming context—the stated basis of the NPRM’s proposal.²⁰⁹ The standard in the data roaming context applies only to direct, wholesale commercial relationships between buyers and sellers of data roaming services.²¹⁰ But a rule subjecting all ISP “practices” to a “commercial reasonableness” rubric presumably would create substantive obligations for ISPs running to every website in the country (and perhaps the world), and could even be construed to govern conduct that concerns only ISPs’ *retail* relationships, including billing, service calls, and other customer-facing operations and practices.

The NPRM offers no explanation as to why any purported benefits of such a seemingly limitless standard would outweigh the serious harms that overbroad regulation would inflict on the broadband marketplace,²¹¹ or how subjecting all ISP “practices” to Commission oversight would be consistent with and advance the goals of Section 706. Indeed, such an approach would go well beyond the scope of Section 706 as interpreted by the *Verizon* court, and also likely would exceed any authority the Commission might attempt to assert under Title II.²¹² Accordingly, if the Commission decides to adopt a “commercial reasonableness” standard at all, it should make clear that the standard governs only actual or proposed commercial relationships

²⁰⁹ NPRM ¶ 122 (suggesting that any “commercial reasonableness” rule adopted in this proceeding would be “[s]imilar to the Commission’s approach in the data roaming context”).

²¹⁰ See 47 C.F.R. § 20.12(e)(1) (“A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions . . .”).

²¹¹ See *supra* at 18-26.

²¹² For example, Section 201(b) does not require that *all* of a carrier’s “practices” be “just and reasonable” and instead addresses only “practices . . . in connection with [the carrier’s] communication service.” 47 U.S.C. § 201(b); see also, e.g., *Pinney v. Nokia, Inc.*, 402 F.3d 430, 450 (4th Cir. 2005) (holding that, for purposes of Section 201(b), “a ‘practice in connection with’ wireless service does not . . . include tortious conduct” by a service provider).

between broadband providers and edge providers, in keeping with the 2010 non-discrimination rule and the standard upheld by the D.C. Circuit in the data roaming context.

The chilling effects of an overbroad “commercial reasonableness” standard—*i.e.*, one that extends beyond potential commercial arrangements with edge providers and reaches every “practice” implemented by an ISP—would inflict profound harm on the dynamism of the Internet. Indeed, ISPs have been developing innovative new practices and must retain the flexibility to do so absent regulatory micromanagement to successfully manage the constantly increasing demands placed on their networks. One recent and prominent example of such innovation is the emergence of “software-defined networks,” which enable network providers to end their reliance on “hardware devices like routers to direct traffic across network infrastructure” by replacing such devices with a centralized software solution that “makes decisions based on an end-to-end view of the network.”²¹³ These software-defined networks allow traffic loads to be managed far more flexibly and efficiently, and offer new and exciting ways for broadband providers to work with edge providers to enhance the online experience of end users.²¹⁴ There is nothing in the record that would justify interfering with this beneficial experimentation through the imposition of overbroad regulation of all broadband provider practices.

D. The Commission Should Ensure That Any New Enforcement Mechanisms Are Fair and Not Unduly Burdensome

Finally, the Commission should ensure that any procedural mechanisms its adopts to enforce its open Internet rules do not impose undue burdens on regulated entities or otherwise

²¹³ See Justine Brown, *Software-Defined Networking Is Being Driven by Broadband and Cloud Computing*, Government Technology, Nov. 27, 2013, available at <http://www.govtech.com/network/Software-Defined-Networking-Driven-by-Broadband-and-Cloud.html>.

²¹⁴ *Id.*

preclude parties from defending themselves adequately against complaints. As the NPRM notes, the *2010 Open Internet Order* provided that enforcement of the rules could occur via self-initiated investigations, informal complaints, and formal complaints.²¹⁵ Importantly, however, the Commission made clear that parties should avail themselves of the complaint process only as a last resort and “encourage[d] parties to endeavor to resolve disputes through direct negotiation,” with the expectation that “many of the disputes that will arise regarding alleged open Internet violations—particularly those centered on engineering-focused questions—will be resolvable by the parties without Commission involvement.”²¹⁶ This approach appropriately harnesses industry experience and practice to resolve disputes and thus should be maintained by the Commission.

The Commission also should continue to explore other ways of streamlining its enforcement procedures in a manner that provides “legal certainty” to regulated entities.²¹⁷ The NPRM appropriately recognizes that, in addition to its power to issue declaratory rulings, the Commission may employ less formal methods of providing clarity on the Commission’s view of the law—including business review letters, non-binding staff opinions, or enforcement advisories.²¹⁸ Such mechanisms may well prove useful to regulated entities as they endeavor to comply with any new rules (so long as these methods do not give rise to conflicting guidance). This same interest in “legal certainty” also militates in favor of the Commission’s proposal to work with technical advisory groups, such as the Open Internet Advisory Committee, the

²¹⁵ NPRM ¶ 161.

²¹⁶ *2010 Open Internet Order* ¶ 151.

²¹⁷ NPRM ¶ 165.

²¹⁸ *Id.*

Internet Engineering Task Force, and the Broadband Internet Technical Advisory Group, in developing a set of presumptive safe harbors based on industry practices.²¹⁹

At the same time, the Commission should ensure that parties that are the subject of any complaints receive the information they need to respond. In particular, regulated parties should not be required to respond to or face penalties pursuant to complaints that leave out critical information about the relevant facts and the identity of the complainant. Allowing anonymous or insufficiently detailed complaints not only would be patently unfair to parties accused of violating the rules, but also would impede the Commission's ability to make well-informed factual findings in adjudicating these claims. Nor is there any basis for allowing anonymous complaints based on concerns that ISPs will engage in "retaliation."²²⁰ There is no evidence that any informal complaints filed under the *2010 Open Internet Order* led to retaliation of any sort. The NPRM likewise cites no evidence of retaliation under *any* of the various formal and informal complaint mechanisms administered by the Commission *outside* of the open Internet context, notwithstanding the fact that the Commission forwards thousands of complaints each year to regulated entities.

IV. THE COMMISSION SHOULD ENSURE THAT THE SCOPE OF ANY NEW RULES IS TAILORED TO THE POLICY INTERESTS AT STAKE

The NPRM appropriately seeks comment on the proper scope of the Commission's open Internet rules.²²¹ To promote the Commission's interest in openness, those rules should apply evenhandedly to any entity that poses a potential threat to consumers' access to online content and services. Accordingly, the Commission should harmonize the open Internet rules applicable

²¹⁹ *Id.* ¶ 176.

²²⁰ *See id.* ¶ 172.

²²¹ *Id.* ¶¶ 54-62.

to fixed and mobile broadband providers; indeed, given the increasing prevalence and importance of mobile services, it is hard to fathom how the Commission could justify according diminished protections to consumers who access the Internet over a mobile platform. By the same token, the Commission should carefully consider extending similar open Internet rules to edge providers, whose conduct can impede the virtuous circle of innovation at least as much as broadband providers' practices. By contrast, as the NPRM recognizes, neither the emerging class of "specialized services" (which, however they are ultimately defined, are distinct from broadband Internet access) nor commercial arrangements governing the exchange of Internet traffic *between* networks present the concerns that gave rise to this proceeding. Accordingly, the Commission should continue to exclude specialized services and traffic-exchange arrangements from the scope of the open Internet rules.

A. The Commission Should Harmonize the Treatment of Fixed and Mobile Broadband Providers in Adopting Any New Rules

The fundamental goals of Internet openness do not and should not turn on the type of technology platform that consumers use to access online content and services. The Commission's initial *Internet Policy Statement* and earlier recognitions of essential "Internet freedoms" were appropriately framed in terms of *consumer* expectations, and did not vary based on the technological method used to access the Internet.²²² And even in the *2010 Open Internet*

²²² 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 – 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); see also Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5 (2004) (articulating four "Internet freedoms"—

Order, the Commission recognized that “[t]here is one Internet, which should remain open for consumers and innovators alike, although it may be accessed through different technologies and services.”²²³ As the Commission rightly observed, “[c]onsumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission are as important when end users are accessing the Internet via mobile broadband as via fixed.”²²⁴

Nevertheless, the *2010 Open Internet Order* adopted two different sets of rules governing access to the Internet, imposing more onerous restrictions on fixed providers than on mobile providers.²²⁵ And the NPRM suggests that the Commission should maintain this bifurcated approach,²²⁶ even as it acknowledges that the few incidents since 2010 that have raised potential Internet openness concerns have been concentrated in the mobile wireless sector.²²⁷ But the NPRM provides no justification for such disparate treatment, and there is none in today’s marketplace. While technological differences in some circumstances might be relevant in *applying* the open Internet rules—for example, in determining whether a particular network management practice is reasonable—such differences should not have any bearing on whether a given obligation applies in the first place. Rather, if the Commission determines that it is necessary to protect consumers from particular types of conduct, then it should not make any difference whether the entity responsible for that conduct operates a fixed or mobile platform.

freedom to access content, to use applications, to attach personal devices, and to obtain service plan information).

²²³ *2010 Open Internet Order* ¶ 93.

²²⁴ *Id.*

²²⁵ *Id.* ¶¶ 97-106.

²²⁶ NPRM ¶ 62.

²²⁷ *Id.* ¶ 41.

The *2010 Open Internet Order* offered several purported justifications for subjecting fixed and mobile broadband to different sets of rules. But even assuming differential treatment made sense in 2010, it cannot be justified today.

First, the 2010 order suggested that different rules might be justified by the fact that mobile broadband was “an earlier-stage platform than fixed broadband” and, at that time, “most consumers used their mobile phone primarily to make phone calls and send text messages.”²²⁸ But as the current NPRM recognizes, we are well past those days now.

As the NPRM recognizes, “[a]nnual investment in U.S. wireless networks grew more than 40 percent between 2009 and 2012, from \$21 billion to \$30 billion, and exceeds investment by the major oil and gas or auto companies.”²²⁹ Moreover, the market for mobile content has exploded. The NPRM notes that “[a] total of \$8.33 billion has been raised since 2007 on mobile media ventures, a majority of the funds (\$4.7 billion) to companies that provide software services, including mobile Web development, carrier-backend software, app development, and cloud-based services in the United States.”²³⁰

Investment in mobile applications, in particular, has skyrocketed in recent years, with “over \$1 billion in venture capital funding ... invested in mobile media startups” in 2013 alone.²³¹ And this investment has paid huge dividends for mobile broadband providers and app developers; as of March 2013, “Apple and Google each offered about 700,000 apps” in their respective app stores, and “application sales were approaching \$25 billion.”²³²

²²⁸ *2010 Open Internet Order* ¶ 94.

²²⁹ NPRM ¶ 30.

²³⁰ *Id.* ¶ 31.

²³¹ *Id.*

²³² *Id.*

The result is that consumers are using mobile broadband services as never before. As the Supreme Court recently noted, mobile apps now “offer a range of tools for managing detailed information about *all aspects* of a person’s life.”²³³ According to a recent report by Mary Meeker of Kleiner Perkins, “mobile data consumption is up 81 percent as the world turns more to tablets and smartphones, especially to watch video,” and “mobile now accounts for 25 percent of web usage, up from 14 percent a year ago.”²³⁴ Fixed broadband might have gotten a head start in supplying broadband Internet access to the nation, but mobile broadband is catching up fast.

The *2010 Open Internet Order* also sought to justify differential treatment of mobile broadband by noting that its “speeds, capacity, and penetration” were lower than fixed broadband, and that mobile networks faced “operational constraints that fixed broadband networks do not typically encounter.”²³⁵ As an initial matter, with regard to capacity and operational constraints, the *2010 Open Internet Order* overlooked the fact that many of the same challenges have long affected wireline broadband networks.²³⁶ And distinguishing between fixed and mobile broadband service based on network constraints today would be illogical, given that some of the very same networks support both fixed and mobile services.²³⁷

²³³ *Riley v. California*, No. 13-132, slip op. at 20 (U.S. Jun. 25, 2014).

²³⁴ Vindu Goel, *State of the Internet: Still Growing but More Mobile Than Ever*, N.Y. Times, May 28, 2014, available at <http://bits.blogs.nytimes.com/2014/05/28/state-of-the-internet-still-growing-but-more-mobile-than-ever/>.

²³⁵ *2010 Open Internet Order* ¶ 95.

²³⁶ See Comments of Time Warner Cable Inc., GN Docket No. 09-191, at 68-69 (filed Jan. 14, 2010) (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”).

²³⁷ See, e.g., Verizon HomeFusion Broadband, available at <http://www.verizonwireless.com/b2c/homefusion/hf/main.do> (“Introducing a high-speed

In any event, whatever differences between fixed and mobile broadband may have existed in terms of capacity and other quality-of-service metrics in 2010 are increasingly vanishing today. When the Commission adopted the *2010 Open Internet Order*, there was effectively no 4G LTE wireless service available in the United States, but since then, mobile operators have upgraded their networks to 4G LTE technology, which can provide for peak download rates of 300 Mbps and uplink speeds of 75 Mbps. Some providers now offer broadband speeds in excess of 50 Mbps,²³⁸ with others promising to leapfrog to 200 Mbps in the near future.²³⁹ Such advances now put wireless on par with the speeds and capabilities of many fixed wireline broadband Internet access services. Even data-intensive services like high-definition video, which requires bandwidth of 5-6 Mbps, can be as easily delivered over a mobile broadband connection as over some fixed connections.²⁴⁰ Moreover, the four national wireless providers collectively have deployed 4G LTE networks that blanket the country. As the NPRM

Internet service that harnesses the power of the Verizon 4G LTE Network to give you a lightning-fast Internet connection in your home.”).

²³⁸ See Dan Graziano, *AT&T's 4G LTE Network Found to Be the Fastest in the U.S.*, BGR, Jun. 17, 2013, available at <http://bgr.com/2013/06/17/4g-lte-speeds-att-verizon-sprint-t-mobile/>.

²³⁹ See, e.g., Phil Goldstein, *Softbank's Son Vows Broadband Speeds of 200 Mbps, More Competition in U.S. Market*, FierceWireless, Mar. 11, 2014, available at <http://www.fiercewireless.com/story/softbanks-son-vows-broadband-speeds-200-mbps-more-competition-us-market/2014-03-11>.

²⁴⁰ Again, to the extent that any relevant technical differences remain between fixed and mobile services, the Commission can take those differences into account in assessing the commercial reasonableness of the arrangements at issue. Such differences would not warrant separate open Internet rules.

notes, LTE subscriptions grew by a factor of nearly 500 during this period.²⁴¹ And analysts project that there will be 224 million 4G subscriptions in the United States by 2018.²⁴²

Finally, the *2010 Open Internet Order* relied on the fact that “most consumers have more choices for mobile broadband than for fixed.”²⁴³ But that distinction too is of rapidly diminishing significance, and its relevance is questionable in any event, given the Commission’s determination that the open Internet rules do not hinge on a market power theory.²⁴⁴ As mobile broadband has continued to improve, mobile providers have begun advertising their services as a substitute for fixed broadband services.²⁴⁵ And an ever-growing number of consumers view them as such.²⁴⁶ Indeed, the Commission recently found that more than a third of all Americans now live in wireless-only households.²⁴⁷

The distinction between fixed and mobile broadband from the *2010 Open Internet Order* is therefore left without any sound foundation. And it is made even shakier by the proliferation

²⁴¹ See NPRM ¶¶ 48 n.110.

²⁴² See SNL Kagan, *Covered Pops & Subscribers by Technology in U.S. Wireless* (Jul. 2013).

²⁴³ *2010 Open Internet Order* ¶¶ 95.

²⁴⁴ NPRM ¶¶ 49.

²⁴⁵ See, e.g., FreedomPop, available at <http://www.freedompop.com> (“Replace your at-home DSL and cable broadband Internet service today and enjoy the speed, mobility and low cost of FreedomPop’s 4G wireless broadband Internet service.”).

²⁴⁶ 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 (“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 . . .”).

²⁴⁷ See *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, FCC 14-63, ¶¶ 23 (rel. Jun. 2, 2014).

of Wi-Fi access services, which are capable of delivering speeds comparable to wired broadband Internet access services. Making matters worse, the discussion of Wi-Fi services in the *2010 Open Internet Order* is ambiguous and could be read to suggest that unlicensed services are subject to the fixed broadband rules in all cases (notwithstanding the illogic of such an outcome).²⁴⁸ If the Commission were to endorse such a reading in this renewed proceeding, it would be entirely unworkable, as Wi-Fi services now are widely used to complement the licensed wireless services offered by mobile broadband providers.²⁴⁹ The incoherence of such a regime is evident from the fact that a single data stream could be subject to different regulatory standards depending on whether it was being delivered via the mobile provider's licensed wireless service or had been offloaded to an unlicensed Wi-Fi service. Treating such services differently only becomes less tenable as mobile broadband providers supplement their CMRS networks with small cells that closely resemble Wi-Fi access points.²⁵⁰

²⁴⁸ See *2010 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)”).

²⁴⁹ See NPRM ¶ 108; see also 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 Wi-Fi Initiative to Deploy More Hotzones in Key Markets*, Dec. 28, 2010, available at <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”).

²⁵⁰ See, e.g., AT&T, *Small Cells Big Step*, available at http://www.att.com/Common/about_us/pdf/small_cell.pdf (“By 2015, AT&T plans to deploy more than 40k small cells in the network.”); Kevin White, *Small Cells: Small, but Valuable Addition to 4G LTE Network*, May 21, 2013, available at <http://www.verizonwireless.com/news/article/2013/05/4G-LTE-network-small-cells.html> (“[S]mall cells enable mobile network operators to strategically add capacity to high traffic areas and extend coverage to hard-to-reach locations and indoor sites.”).

In short, today’s marketplace realities make it untenable to maintain regulatory distinctions between fixed and mobile broadband providers. Any such regime would almost certainly be arbitrary and capricious.²⁵¹

B. The Commission Should Address Edge-Provider Conduct That Threatens Internet Openness

In a similar vein, any Commission rules regarding Internet openness must address the holistic nature of the Internet and the fact that ISPs are not entirely in control of the consumer Internet experience. While the NPRM tentatively concludes that any rules should not apply to “edge provider activities, such as the provision of content on the Internet,”²⁵² it would not accomplish the Commission’s objectives to focus solely on conduct by broadband ISPs.

It is well documented that a relatively concentrated group of large edge providers—such as Google, Netflix, Microsoft, Apple, Amazon, and Facebook—have enormous and growing power over consumers’ ability to access the content of their choice on the Internet.²⁵³ As of 2013, “50% of traffic c[ame] from 35 sites/services.”²⁵⁴ Regulating only the conduct of ISPs, many of which the Commission recognizes as “small entities,”²⁵⁵ while declining to regulate blocking or similar anticompetitive conduct carried out by these so-called “hyper-giants,” would

²⁵¹ See, e.g., *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (holding that an agency acts arbitrarily and capriciously when it “applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record”).

²⁵² NPRM ¶ 58.

²⁵³ See *supra* at 15 & n.44.

²⁵⁴ 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>.

²⁵⁵ See NPRM, App. B, ¶ 12.

fail to advance the Commission’s stated objectives.²⁵⁶ Google, for example, handles 68 percent of the nation’s search traffic.²⁵⁷ Its conduct has a far more significant impact on consumers’ access to other Internet services (and other aspects of their online experience) than the behavior of a single ISP. And that is especially the case given that every major broadband provider has committed to refrain from blocking access to online content and services,²⁵⁸ and no hyper-giant has yet to make such a commitment.

In fact, in contrast to the largely theoretical threats to Internet openness from broadband providers, these hyper-giants have demonstrated the ability and a willingness to harm other companies and their customers by, for example, manipulating search results.²⁵⁹ Such conduct is every bit as harmful to the “virtuous circle” of innovation and broadband deployment as the hypothesized conduct by broadband providers that justify the proposed rules.²⁶⁰ Under that rationale, regulation of broadband providers to promote the open Internet is justified by its effect

²⁵⁶ By the same token, if the Commission adopts its proposal to create an “ombudsperson” to represent the interests of small entities on Internet openness issues, *see id.* ¶ 171, it should ensure that small ISPs are eligible for the same assistance as small edge providers.

²⁵⁷ *See* Press Release, *comScore Releases April 2014 U.S. Search Engine Rankings*, May 16, 2014, available at <https://www.comscore.com/Insights/Market-Rankings/comScore-Releases-April-2014-US-Search-Engine-Rankings>.

²⁵⁸ *See supra* at 57.

²⁵⁹ *See, e.g.*, Naomi Shavin, *Are Google and Amazon the Next Threat to Net Neutrality?*, *Forbes*, Jul. 2, 2014, available at <http://www.forbes.com/sites/naomishavin/2014/07/02/are-google-and-amazon-the-next-threat-to-net-neutrality/> (reporting on a panel discussion by Tim Wu and others “warn[ing] against ‘Internet behemoths’ like Amazon and Google that control if and how information on the Internet is deemed relevant and whether or not it is easy to find”); Adam Raff, *Search, But You May Not Find*, *N.Y. Times*, Dec. 27, 2009, available at <http://www.nytimes.com/2009/12/28/opinion/28raff.html> (“Google impos[es] covert ‘penalties’ that can strike legitimate and useful Web sites, removing them entirely from its search results or placing them so far down the rankings that they will in all likelihood never be found.”).

²⁶⁰ NPRM ¶ 26; *see also* 2010 *Open Internet Order* ¶ 14.

on edge-provider innovation, which drives user demand for broadband access, which stimulates the “expansion and improvement of broadband infrastructure.”²⁶¹ If the Commission hopes to craft a national framework to address these policy concerns, it makes no sense to focus exclusively on Internet access providers and ignore conduct by edge providers that threatens similar harms.²⁶²

C. The Commission Should Not Expand This Proceeding To Encompass Peering and Other Traffic-Exchange Arrangements

In contrast to mobile broadband and edge-provider services, peering and other commercial arrangements governing the exchange of Internet traffic between networks do not entail the provision of broadband Internet access service to end users and should not be addressed in this proceeding. Such arrangements have never been the focus of the Commission’s open Internet initiatives, or subject to any industry-specific regulation, for that matter. And they raise fundamentally different considerations. The Commission therefore was correct to tentatively conclude that it should exclude such arrangements from any new rules, as was the case under the *2010 Open Internet Order*.²⁶³

The Commission recently undertook to gather information on traffic-exchange arrangements to gain a more complete understanding of the marketplace for peering arrangements and transit and CDN services.²⁶⁴ Although NCTA expects that the information provided by marketplace participants will confirm that the traffic-exchange marketplace is

²⁶¹ *Verizon*, 740 F.3d at 623.

²⁶² Any application of new open Internet rules to edge providers should be based on evidence of actual harm within the ambit of Section 706, just as should be the case with the application of the rules to access providers.

²⁶³ NPRM ¶ 59.

²⁶⁴ FCC News Release, *Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion*, Jun. 13, 2014, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327634A1.pdf.

robustly competitive and operating efficiently, if the Commission ultimately identifies any policy concerns as a result of that review, it should address them separately from this rulemaking. As NCTA and others have explained, peering and transit arrangements present fundamentally different considerations than the proposed open Internet rules. Traffic-exchange arrangements concern the economics of transporting Internet traffic across Internet backbones to broadband providers' networks and exchange of that traffic with those networks. They do not involve how that traffic is delivered to the end-user once it arrives. And they are negotiated based on a variety of factors concerning the exchange of traffic between networks, including the amount of traffic one network delivers to another, but not on the type, source, or content of that traffic.²⁶⁵ They do *not* concern end users' ability to access particular content, the quality of the broadband Internet access service offered to end users, or the priority with which content is delivered to end users over the last mile. For these reasons, Chairman Wheeler undoubtedly was correct when he recently explained that "peering is not a net neutrality issue."²⁶⁶ Notwithstanding some parties' self-serving efforts to muddy the waters,²⁶⁷ the Commission should not treat it as such.

Parties seeking to shoehorn traffic-exchange arrangements into this proceeding ignore both history and the competitive realities of that distinct marketplace. Since the birth of the Internet, peering and interconnection agreements for Internet traffic have *never* been subject to

²⁶⁵ See Dan Rayburn, *How Transit Works, What It Costs & Why It's So Important*, Streaming Media, Feb. 24, 2014, available at <http://blog.streamingmedia.com/2014/02/transit-works-costs-important.html>.

²⁶⁶ Bryce Baschuk, *Wheeler: Peering Not a Net Neutrality Issue But FCC Spokesman Says It Will Be Watched*, Bloomberg BNA, Apr. 2, 2014, available at <http://www.bna.com/wheeler-peering-not-n17179889335/>.

²⁶⁷ See, e.g., See Comments of Level 3 Communications, LLC, GN Docket No. 14-28, at 11 (Mar. 21, 2014) ("Level 3 PN Comments") (proposing to address Internet interconnection arrangements though an expansion of the open Internet rules, in a manner that would upend longstanding commercial practices); Cogent PN Comments at 25 (same).

industry-specific regulation. One analyst recently described such arrangements as “the Internet’s effective free-market substitute for mandatory and regulated interconnection” of the monopoly telephone era.²⁶⁸ They have “ma[de] the competitive backbone ‘market’ work”²⁶⁹ for decades with no threat to consumer welfare or need for regulatory intervention.

The Commission has repeatedly expressed the same view. In a 2000 working paper for the Office of Plans and Policy (now Office of Strategic Planning & Policy Analysis), Michael Kende observed that “in the absence of a dominant backbone, market forces encourage interconnection between backbones and thereby protect consumers from any anti-competitive behavior on the part of backbone providers.”²⁷⁰ Accordingly, he recognized, “any calls to intervene in the Internet market would require a correspondingly high burden of proof.”²⁷¹ In the context of the 2005 SBC/AT&T transaction, the Commission reiterated that “the Internet backbone is sufficiently competitive and will remain so post-merger.”²⁷² And in reviewing the

²⁶⁸ Ev Ehrlich, Progress Policy Institute, *A Brief History of Internet Regulation*, at 13 (Mar. 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/03/2014.03-Ehrlich_A-Brief-History-of-Internet-Regulation1.pdf.

²⁶⁹ *Id.*

²⁷⁰ Michael Kende, FCC Office of Plans and Policy, *The Digital Handshake: Connecting Internet Backbones*, at 1 (Sep. 2000), available at http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf.

²⁷¹ *Id.* at 31.

²⁷² *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 ¶ 132 (2005).

Global Crossing/Level 3 transaction in 2011, the Commission concluded the same.²⁷³ There is no evidence that the Commission should be any more concerned today.²⁷⁴

In the face of explosive growth of Internet traffic in recent years, network operators and other industry participants have devised “new and creative ways to interconnect.”²⁷⁵ And the financial arrangements have similarly “take[n] a wide variety of forms.”²⁷⁶ These developments have led some industry participants, like Level 3 and Cogent, to call for the Commission to begin regulating these interconnection relationships.²⁷⁷ But far from providing a rationale for an unprecedented intrusion into the highly competitive Internet backbone marketplace, the constantly evolving and technically complicated nature of these agreements is all the more reason for the Commission to allow market forces to determine their terms. Regulation of such complex relationships likely would prove immensely costly and complex.²⁷⁸ And without perfect knowledge, regulators are likely to create opportunities for gamesmanship, diminish incentives to efficiently share and minimize costs, and (consequently) increase the price of

²⁷³ *Global Crossing Ltd. and Level 3 Communications, Inc. Applications for Consent to Transfer Control*, Memorandum Opinion and Order and Declaratory Ruling, 26 FCC Rcd 14056 ¶ 27 (2011) (rejecting arguments that a combined company would have incentive to engage in anticompetitive transit and peering practices).

²⁷⁴ *See, e.g.*, Rayburn, *supra* note 265 (“From a business standpoint, there are many backbone and transit providers to choose from in a highly competitive market Transit pricing has and continues to get cheaper every quarter, and it is expected it will decline in price once again this year.”).

²⁷⁵ Stanley M. Besen & Mark A. Israel, *The Evolution of Internet Interconnection from Hierarchy to “Mesh”*: Implications for Government Regulation, at 1 (Jul. 2012), available at <http://ssrn.com/abstract=2104323>.

²⁷⁶ *Id.*

²⁷⁷ *See, e.g.*, Level 3 PN Comments at 11; Cogent PN Comments at 25.

²⁷⁸ *See* Besen & Israel, *supra* note 275, at 23-26 (cataloging such myriad questions sophisticated regulation of interconnection agreements would pose).

Internet access to end users, rather than improving on the arrangements a free market produces.²⁷⁹

D. The Commission Also Should Decline To Extend Any Rules to Specialized Services

Finally, the Commission should adopt the tentative conclusion in the NPRM that so-called “specialized services” should remain outside the scope of any new rules.²⁸⁰ In the *2010 Open Internet Order*, the Commission recognized that, while broadband providers offer services that “share capacity with broadband Internet access service over providers’ last-mile facilities,”²⁸¹ those services are not themselves broadband Internet access services and should not be regulated as such.²⁸² Rather, the order explained, they provide end users with distinct “valued services” that “supplement[] the benefits of the open Internet.”²⁸³ Indeed, such specialized services may actually serve to “drive additional private investment” in deploying and upgrading broadband networks—benefiting consumers of the specialized service and broadband Internet access service alike.²⁸⁴ The 2010 order thus declined to adopt specific policies to regulate these services, choosing instead to “closely monitor . . . market developments to verify that specialized services promote investment, innovation, competition, and end-user benefits without undermining or threatening the open Internet.”²⁸⁵

That approach was the correct one then, and the ensuing years have provided no reason to reverse it now. In the years since the *2010 Open Internet Order* was adopted, there is no

²⁷⁹ See *id.* at 16-29.

²⁸⁰ NPRM ¶ 60.

²⁸¹ *2010 Open Internet Order* ¶ 112.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* ¶ 113.

evidence that specialized services have been used to sidestep the Commission’s rules or produced anticompetitive effects, and they obviously have not displaced the public Internet. In fact, the Commission’s Open Internet Advisory Committee (“OIAC”)—assigned to “closely monitor” these services—confirmed last year that the ability to offer multiple services over the facilities used to deliver broadband Internet access service has been an important driver of broadband investment. As the OIAC explained, the business cases for expanding fiber optics or for improving cable, for example, were “fundamentally predicated upon the assumption that the operator would offer multiple services” over the same network, whether they be Title VI IP cable services or yet-to-be-developed IP specialized services.²⁸⁶ It was only the projected value that consumers would place on such multiple offerings that “promised an acceptable return on the investment in the expansion of the overall broadband infrastructure.”²⁸⁷

And, as the OIAC recognized, the same is true today. In deciding to build out its new Google Fiber cable service, for instance, Google executive Milo Medin told cnet that “TV service was a must in attracting residential customers.”²⁸⁸ Google Fiber now offers 1 Gbps broadband service and IP cable service in two different cities, with plans to expand to many more.²⁸⁹ The same would be true for the offering of yet-to-be-developed specialized services, which would further incentivize investment in broadband networks.

Departing from the Commission’s restrained approach towards specialized services would only risk undermining further investment incentives, as well as the valued benefits

²⁸⁶ 2013 OIAC Report at 67.

²⁸⁷ *Id.*

²⁸⁸ Marguerite Reardon, *Google Exec Sees Google Fiber as a ‘Moneymaker’*, cnet, May 30, 2013, available at <http://www.cnet.com/news/google-exec-sees-google-fiber-as-a-moneymaker/>.

²⁸⁹ See Google Fiber, <http://fiber.google.com/cities> (last visited Jun. 27, 2014).

specialized services could provide, for no apparent gain. In the *2010 Open Internet Order*, the Commission noted potential concerns that specialized services *could* be used to “bypass[] open Internet protections, supplant[] the open Internet, [or] enabl[e] anticompetitive conduct.”²⁹⁰ But there is no evidence that any of these hypothetical harms has occurred, or is even remotely threatened. To the contrary, the open Internet has thrived alongside specialized services.²⁹¹

Moreover, the existing definition of broadband Internet access service, which the D.C. Circuit left untouched in *Verizon*, already includes any service “that is used to evade the protections set forth in this part.”²⁹² Should a broadband provider ever attempt to use specialized services to circumvent any new open Internet rules, that provision will provide ample authority for Commission to act. Without evidence of any concrete harms or indication that that authority is insufficient to the task, it would be wholly unjustified and profoundly unwise to impose on broadband providers anything more.

V. THE COMMISSION SHOULD CONFIRM THAT STATES ARE PREEMPTED FROM REGULATING BROADBAND INTERNET ACCESS SERVICE

However the Commission ultimately decides to proceed, it should make clear that it has exclusive jurisdiction to adopt open Internet rules and that the states are preempted from adopting separate rules addressing the provision of broadband Internet access service. As the *2010 Open Internet Order* explained, “[t]he Commission historically has recognized that services carrying Internet traffic are jurisdictionally mixed, but generally subject to federal regulation.”²⁹³

²⁹⁰ *2010 Open Internet Order* ¶ 112.

²⁹¹ See generally Section I *supra*.

²⁹² 47 C.F.R. § 8.11(a).

²⁹³ *2010 Open Internet Order* ¶ 121 n.374 (citing *Nat’l Ass’n of Regulatory Util. Comm’rs Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, Memorandum Opinion and Order, 25 FCC Rcd 5051 ¶¶ 8-9 & n.24 (2010)); see also *Cable Modem Order* ¶ 59 (“The Commission has

Accordingly, “[w]here, as here, ‘it is not possible to separate the interstate and intrastate aspects of the service,’ the Commission may preempt state regulation where ‘federal regulation is necessary to further a valid federal regulatory objective.’”²⁹⁴ The Commission long ago exercised that preemptive authority to ensure that Internet access would be regulated exclusively at the federal level.²⁹⁵

Although the Commission’s reexamination of the appropriate authority for promoting the open Internet has led some parties to call for the imposition of state regulation, the Commission should reaffirm that the states are preempted from regulating the provision of broadband Internet access service. One basis for the traditional preemption of state authority over broadband Internet access has been the Commission’s information-service classification.²⁹⁶ To the extent the Commission relies on Section 706 as authority for the open Internet rules, any state attempt

found that traffic bound for information service providers (including Internet access traffic) often has an interstate component. The Commission [has] concluded that although such traffic is both interstate and intrastate in nature, it is properly classified as interstate and it falls under the Commission’s jurisdiction.” (internal quotation marks, citations, and alterations omitted).

²⁹⁴ 2010 *Open Internet Order* ¶ 121 n.374 (citing *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007)).

²⁹⁵ See, e.g., *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 FCC 2d 512 ¶ 83 n.34 (1981) (“*Computer II Further Reconsideration Order*”) (“States . . . may not impose common carrier tariff regulation on a carrier’s provision of enhanced services [*i.e.*, information services.]”); see also *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry) et al.*, Report and Order, 104 FCC 2d 958 ¶ 343 (1986) (explaining that the Commission “preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings”).

²⁹⁶ See, e.g., *Petition for a Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum and Order, 19 FCC Rcd 3307 ¶ 20 (2004) (“Unless an information service can be characterized as ‘purely intrastate,’ or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component, exclusive Commission jurisdiction has prevailed.”).

to subject broadband Internet access service to state common carrier regulation plainly would conflict with the federal prohibition against the imposition of common carrier obligations on information services, as the *Verizon* court recognized.²⁹⁷ But even in the event the Commission sought to reclassify broadband Internet access under Title II—leaving aside the many overwhelming reasons why the Commission should not pursue that course—the service would remain inherently *interstate* in nature and would continue to be subject to exclusive federal jurisdiction on that basis.²⁹⁸

Failing to preempt state authorities from imposing separate regulations on the provision of broadband Internet access service would prove disastrous. Absent a clear statement of continued preemption by the Commission, some parties likely will take the position that Section 706(a), which refers to “the Commission and each State commission,”²⁹⁹ authorizes states to layer on additional Internet rules. Even apart from the fact that Section 706 does nothing to alter the Commission’s exclusive jurisdiction over interstate communications services, such a reading would lead to a morass of differing and potentially conflicting state and federal regulatory

²⁹⁷ See *Verizon*, 740 F.3d at 650 (characterizing as “obvious” the principle that regulating “broadband providers as common carriers” would violate the Communications Act, given “the Commission’s still-binding decision to classify broadband providers not as providers of ‘telecommunications services’ but instead as providers of ‘information services’”).

²⁹⁸ See, e.g., *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (“The FCC has exclusive jurisdiction to regulate interstate common carrier services”); *Vonage Holdings Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 16 (2004) (“*Vonage Order*”) (stating that the Commission has “exclusive jurisdiction over ‘all interstate and foreign communication’”); *Mobile Telecommunications Technologies Corp.*, Memorandum Opinion and Order, 6 FCC Rcd 1938, 1941 n.6 (1991) (“[T]he Communications Act . . . grants this Commission exclusive authority to regulate the charges and services of interstate common carriers.”). Unfortunately, even this classification would not necessarily insulate broadband from having new state and local taxes and assessments, over which the Commission may have limited control, levied on newly classified “telecommunications” property and services.

²⁹⁹ 47 U.S.C. § 1302(a).

obligations governing the same integrated, end-to-end, multijurisdictional service. Compliance with such overlapping regimes would not just be burdensome, it would be impossible, as even a single IP packet transmitted by an ISP could be subject to differing regimes as it passes from state to state.³⁰⁰ The Commission has consistently recognized that a patchwork of inconsistent state regulation would represent the wrong policy for Internet access services,³⁰¹ and it should reaffirm that important principle as it adopts new open Internet rules by expressly preempting state regulation of broadband Internet access service.

³⁰⁰ Indeed, as noted above, the proposal by Mozilla and Professors Wu and Narechania to separate out and separately classify “call” and “response” transmissions flies in the face of the Commission’s repeated conclusion that, under its end-to-end analysis, broadband Internet access service is properly treated as an integrated, interstate communications service.

³⁰¹ *See, e.g., Computer II Further Reconsideration Order* ¶ 83 n.34 (explaining that “the efficient utilization and full exploitation of the interstate telecommunications network” for the provision of enhanced services “would best be achieved if these services are free from public utility-type regulation” by the states); *cf. Vonage Order* ¶ 32 (explaining that “the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation” and in favor of “preempt[ing] state regulation”).

