

**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 UNITED STATES TELECOM ASSOCIATION**

Its Attorneys:	Jonathan Banks 607 14th Street, NW Suite 400 Washington, D.C. 20005 (202) 326-7300
----------------	--

July 16, 2014

**TABLE OF CONTENTS**

**PAGE**

- I. SUMMARY AND INTRODUCTION ..... 1
- II. THE CURRENT BROADBAND MARKETPLACE PROVIDES CUSTOMERS WITH MORE OPTIONS, FASTER SPEEDS, AND LOWER PRICES. .... 4
- III. IN TODAY’S BROADBAND MARKETPLACE, CONCERNS ABOUT THE INCENTIVE OR ABILITY OF BROADBAND PROVIDERS TO LIMIT INTERNET OPENNESS ARE UNFOUNDED. .... 10
- IV. THE COMMISSION SHOULD NOT IMPOSE TITLE II REGULATION ON BROADBAND SERVICES. .... 15
  - A. Imposing Title II Regulation On Broadband Services Would Be Bad Policy. .... 15
    - 1. Applying 19th Century Regulation To 21st Century Broadband Would Undermine The Commission’s Broadband Objectives..... 16
    - 2. Imposing Title II Regulation On Broadband Internet Access Services Would Not Solve Any Alleged Problems In The Marketplace. .... 18
  - B. Imposing Title II Regulation On Broadband Services Would Be Unlawful..... 22
    - 1. The Commission’s Departure From Established Precedent Would Be Arbitrary And Capricious. .... 23
    - 2. The Commission Is Judicially Estopped From Denying The Functionally Integrated Nature of Broadband Internet Access Services. .... 28
  - C. The Commission Could Not Lawfully Classify Any Service That Broadband Providers May Offer To Edge Providers As A Title II “Telecommunications Service.” ..... 31
    - 1. The Capability Of Edge Providers To Send Traffic To End Users Is Functionally Integrated With Broadband Internet Access Service Provided to End Users. .... 32
    - 2. Broadband Providers Do Not Offer Telecommunications For A Fee To An Edge Provider When Their End Users Request Content From That Edge Provider..... 35
    - 3. Any Theoretical Service That Broadband Providers May Offer To Edge Providers Would Not Be Offered On A Common Carriage Basis And Broadband Providers Could Not Be Compelled To Do So. .... 39
    - 4. The Commission Could Not Ban Paid Prioritization Arrangements With Edge Providers Even If Any Service Offered By Broadband Providers Were Classified As A Title II “Telecommunications Service.” ..... 41
- V. THE COMMISSION HAS SUFFICIENT AUTHORITY TO PRESERVE THE OPEN INTERNET WITHOUT THE NEED FOR TITLE II REGULATION..... 44

A.	Two Courts Have Construed Section 706 To Provide The Commission With Authority To Adopt Open Internet Rules That Promote Broadband Deployment.	45
B.	The Proposed Rules, On Their Face, Do Not Appear To Constitute Per Se Common Carriage Under D.C. Circuit Precedent.	48
C.	The Commission Should Ensure That Its Rules Do Not Amount To Common Carriage In Application.	51
D.	The Commission Should Not Regulate The Internet Beyond Broadband Internet Access Services.	53
VI.	CONCLUSION	54

**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 UNITED STATES TELECOM ASSOCIATION**

**I. SUMMARY AND INTRODUCTION**

The United States Telecom Association (“USTelecom”)<sup>1</sup> submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) proposing new rules to ensure an open Internet and the Wireline Competition Bureau’s Public Notice seeking to refresh the record concerning the proper framework to regulate broadband Internet access services.<sup>2</sup>

In assessing the need for open Internet rules and in determining the regulatory paradigm under which any such rules should be adopted, the Commission should be mindful of the successes that have been achieved in the broadband marketplace under the current Title I framework. Broadband services have been deployed and adopted at an unparalleled speed, with over a trillion dollars in investment predominantly from the private sector. The investment in broadband network infrastructure has created jobs, spurred innovation, and revolutionized the

---

<sup>1</sup> USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

<sup>2</sup> *Protecting & Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28 (rel. May 15, 2014); *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*, Public Notice, GN Docket No. 10-127 (rel. May 30, 2014).

way Americans learn, work, communicate, and shop. Today, customers enjoy more options, faster speeds, and lower prices in selecting a broadband service provider. And, the evidence is clear that customers can and do change broadband providers, as underscored by the significant churn experienced by some broadband providers.

One of the greatest risks to altering the regulatory framework for broadband is the potential to undermine the environment that thus far has achieved such success and has been a major driver of the United States economy. In particular, substituting Title II's 19th Century-style narrowband one-wire regulatory regime for the current Title I modern broadband framework would put a cloud of uncertainty over the broadband marketplace. Such a drastic reversal of course would be fundamentally at odds with Congress's directive to "preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."<sup>3</sup> It also would represent bad policy, as Title II regulation would undermine the Commission's broadband objectives and would not solve any purported problems in the marketplace.

Moreover, the Commission would be acting unlawfully if it attempted to regulate broadband Internet access services as Title II "telecommunications services." Over the past decade, the Commission consistently has found that broadband Internet access services are "information services" based on fact that the transmission and data processing components of these services are functionally integrated and are not offered separately. The Commission lacks any evidentiary basis to reach a contrary finding in these proceedings. Indeed, broadband Internet access services have become even more functionally integrated than they were when the Commission first considered their appropriate regulatory classification more than a decade ago.

---

<sup>3</sup> 47 U.S.C. § 230(b)(2).

USTelecom members increasingly have integrated more computer processing, content, and applications into their broadband Internet access services, which only reinforces the functionally integrated nature of these offerings.

Nor could the Commission lawfully classify under Title II any “service” that broadband providers may offer edge providers in sending information to a broadband provider’s end user customers. Consistent with Commission precedent and common sense, this service is functionally integrated with the service provided to end users and cannot be separately identified. Even if an edge provider’s transmission of data to the end user could be separately parsed, it is not a “telecommunications service” because broadband providers do not “offer” this capability to edge providers “for a fee” on an indiscriminate basis. There currently are no examples of broadband providers entering into commercial arrangements with an edge provider to facilitate the delivery of their content for a fee. Even if there were, broadband providers would not likely offer such a service on an indiscriminate basis; rather, they would decide whether to deal with a particular edge provider, and on what terms, on an individualized basis, which would be antithetical to common carriage.

The Commission need not go down the factually problematic and legally unsustainable Title II route. To the extent the Commission decides to adopt the text of the open Internet rules proposed in the NPRM, recent decisions of two United States Courts of Appeals indicate that the Commission would have the requisite authority under Section 706. There simply is no reason for the Commission to act on the legally dubious proposal to regulate broadband services as telecommunications services under Title II. However, to ensure consistency with D.C. Circuit precedent, the Commission should make modest changes to the proposed rules to ensure that

they do not amount to prohibited common carriage in application and provide flexibility for innovative new broadband services arrangements to emerge.

## **II. THE CURRENT BROADBAND MARKETPLACE PROVIDES CUSTOMERS WITH MORE OPTIONS, FASTER SPEEDS, AND LOWER PRICES.**

As it considers the need for open Internet rules and the appropriate regulatory authority upon which such rules should be predicated, the Commission should not lose sight of the fact that the broadband marketplace has developed in a manner unparalleled by any prior communications technology under the current Title I regime. Based on the Commission's own data, for the ten-year period from June 2003 through June 2013, the number of fixed broadband connections grew from 23 million to 94 million connections – an annual compound growth rate of 15 percent.<sup>4</sup> Mobile broadband connections increased even more dramatically, growing from 380,000 in June 2005 to more than 181 million connections in June 2013 – an annual compound growth rate in excess of 116 percent.<sup>5</sup>

When it addressed the regulatory classification of cable modem service offered by cable operators in 2002 and the broadband Internet access services offered by telephone companies in 2005, the Commission concluded that the Title I regime would facilitate broadband investment.<sup>6</sup> This conclusion turned out to be correct.

---

<sup>4</sup> Federal Communications Commission, Industry Analysis and Technology Division of the Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2013* at 11, (June 2014) (“FCC Internet Access Report”).

<sup>5</sup> FCC Internet Access Report, at 24, Table 6; Federal Communications Commission, Industry Analysis and Technology Division of the Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2009*, at 6, Table 1 (September 2010).

<sup>6</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798, ¶ 5 (2002) (finding that Title I regulation would ensure that broadband services “exist in a minimal regulatory environment that promotes investment and innovation” and would “remove regulatory uncertainty that in itself may discourage investment and innovation”) (“Cable Modem Order”); *Appropriate Framework for Broadband Access to the Internet Over*

During the time period from 2003 until 2012, broadband providers invested more than \$650 billion in network infrastructure.<sup>7</sup> In 2012 alone, broadband network investments totaled \$68 billion, as compared to \$64 billion in 2009.<sup>8</sup> As the NPRM notes, \$250 billion in private capital was invested in American wired and wireless broadband networks between 2009 and 2012, with annual investments in wireless networks exceeding the total investments by the major oil, gas, and auto companies combined.<sup>9</sup> In 2013, investment by cable and telecommunications companies represented 33 percent of the \$149.8 billion total investment in the United States economy.<sup>10</sup>

---

(footnote cont'd.)

*Wireline Facilities*, 20 FCC Rcd 14853, ¶ 1 (2005) (explaining that treating wireline broadband Internet access service as an “information service” would “allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans”) (“*Wireline Broadband Order*”).

<sup>7</sup> Patrick Brogan, *Updated Capital Spending Data Showing Rising Broadband Investment in Nation’s Information Infrastructure*, USTelecom, at 2, Chart 1 (Nov. 4, 2013), <http://www.ustelecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf>; see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 27 FCC Rcd 10342, 10344, ¶ 2 (2012) (“*Eighth Broadband Deployment Report*”) (noting that broadband providers have invested “tens of billions of dollars annually in the networks that make broadband possible, and since the 1996 Act, they are reported to have invested more than \$1 trillion dollars combined”).

<sup>8</sup> NPRM ¶ 30 (citing USTelecom, *Historical Broadband Provider Capex* [http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex\\_](http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex_); Patrick Brogan, Vice President – Industry Analysis, USTelecom, *Updated Capital Spending Data Showing Rising Broadband Investment in Nation’s Information Infrastructure*, at 1 (Nov. 4, 2013), available at <http://www.ustelecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf>).

<sup>9</sup> NPRM ¶ 30 (citing White House Office of Science and Technology Policy & The National Economic Council, *Four Years of Broadband Growth* at 2, 5 (June 2013), available at [http://www.whitehouse.gov/sites/default/files/broadband\\_report\\_final.pdf](http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf)) (“White House Report”).

<sup>10</sup> National Cable and Telecommunications Association, *Industry Data*, available at <https://www.ncta.com/industry-data> (last visited June 23, 2014).

The investment by broadband providers under the Title I regime has propelled a “virtuous cycle” of complementary investments in information and communications technology (“ICT”) across the economy. During the time period from 2003 until 2012, inclusive of broadband network investment, U.S. firms invested in excess of \$4.3 trillion in ICT, including software, hardware, and communications equipment and structures.<sup>11</sup> In 2012 alone, ICT investment totaled approximately \$474 billion.<sup>12</sup> Under the current Title I regime, edge and content providers have thrived, and the United States leads the world in this key sector of the economy.

These investments have led to tangible customer benefits. First, end users are making significantly greater use of the Internet – usage that broadband networks are more readily able to accommodate. U.S. Internet Protocol (“IP”) traffic in 2012 was 13.1 exabytes, per month, which is the equivalent of 3 billion DVDs per month or 36 billion DVDs per year.<sup>13</sup> In 2012, the U.S. generated three hundred sixty times more IP traffic than it generated in the year 2000, eight thousand times more than 1996, and twelve and a half million times more than 1990.<sup>14</sup> Furthermore, Cisco projects U.S. IP traffic will nearly triple to 37.1 exabytes per month in the 2012-2017 time period.<sup>15</sup>

---

<sup>11</sup> United States Department of Commerce, Bureau of Economic Analysis, National Economic and Product Accounts, *available at* <http://www.bea.gov/national/index.htm>.

<sup>12</sup> *Id.*

<sup>13</sup> Patrick Brogan, Vice President – Industry Analysis, USTelecom, *Internet Usage Data Show U.S. Expanding International Leadership*, at 1 (Nov. 7, 2013), *available at* <http://www.ustelecom.org/sites/default/files/documents/110613-usage-research-brief.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3. Internet usage has catapulted the U.S. to near the top of the pack in global Internet usage comparisons. The U.S. consumes more data per user than Japan, Western Europe, and Australia. The U.S. also has closed much of the gap with the global leader in data consumption, South Korea. From 2010 to 2012, the U.S. traffic per user grew 98 percent, from 26 GB/user/month to 51 GB/user/month, while South Korea only grew by 17 percent, from 49

Second, customers increasingly have more options when selecting a broadband service provider. Currently, 1,712 companies offer broadband services in the United States through a variety of technology platforms.<sup>16</sup> As investment has flourished, cable, DSL, fiber, mobile, and even satellite networks have expanded rapidly throughout the country, creating new sources of competition and giving consumers more choices. For fixed broadband service, the FCC estimates that 92 percent of households have access to two or more providers offering broadband with speeds of at least 10 Mbps downstream and 1.5 Mbps upstream.<sup>17</sup> When wireless broadband service is taken into account, the FCC estimates that 98 percent of households have access to two or more providers offering broadband with speeds of at least 10 Mbps downstream and 1.5 Mbps upstream (and 91 percent of households have a choice among three or more broadband providers).<sup>18</sup>

Third, broadband providers have extended network coverage to those regions of the country that previously had limited broadband access. The National Telecommunications and Information Administration (“NTIA”) reported that almost 98 percent of Americans had access to broadband speeds of at least 6 Mbps downstream and 1.5 Mbps upstream in 2013.<sup>19</sup> Progress also has been made in economically challenging service areas. For example, 89 percent of

---

*(footnote cont’d.)*

GB/user/month to 58 GB/user/month. In 2010 there was a 48 percentage point gap between the U.S. and South Korea; by 2012 the gap had narrowed to 12 percentage points. *Id.* at 6, Chart 6.

<sup>16</sup> USTelecom, *Broadband Industry Stats: Broadband Providers*, available at <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/providers> (last visited June 26, 2014).

<sup>17</sup> FCC Internet Access Report at 9, Figure 5(a).

<sup>18</sup> *Id.*, at 10, Figure 5(b).

<sup>19</sup> Anne Neville, *Working to Provide a Better Broadband Map*, National Telecommunications & Information Administration (Feb. 20, 2014), available at <http://www.ntia.doc.gov/blog/2014/working-provide-better-national-broadband-map>.

Americans living in rural areas have access to broadband.<sup>20</sup> Likewise, 54 percent of those on tribal lands have broadband access, as compared to 45 percent in 2011.<sup>21</sup>

Fourth, broadband providers are offering faster broadband speeds. Wired broadband services routinely are able to achieve download speeds between 25 and 100 Mbps, while mobile broadband services increasingly can provide download speeds between 6 and 10 Mbps.<sup>22</sup> Gigabit fiber networks are expanding rapidly to homes and businesses. And, mobile broadband speeds are only expected to increase as network operators upgrade to 4G/LTE networks<sup>23</sup> and seamlessly integrate Wi-Fi into their networks,<sup>24</sup> while broadband providers build out fiber to thousands of cell sites across the country.<sup>25</sup> The White House Office of Science and Technology Policy reported that, in the fourth quarter of 2012, broadband speeds in the United States were the fastest when compared to similar countries.<sup>26</sup> According to the Commission's own data, the number of connections with downstream speeds of at least 10 Mbps increased by 188 percent between June 2012 and June 2013.<sup>27</sup>

---

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> National Broadband Map, *Broadband Statistics Report: Access to Broadband Technology by Speed*, (Feb. 2014), available at <http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf>.

<sup>23</sup> *Sixteenth Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 28 FCC Rcd 3700, 3857, ¶ 248 (2013).

<sup>24</sup> Caroline Gabriel and Maravedis-Rethink, *Wireless Broadband Alliance Industry Report 2013: Global Trends in Public Wi-Fi* at 8, Maravedis Rethink (Nov. 18, 2013), available at <http://www.wballiance.com/wba/wp-content/uploads/downloads/2013/11/WBA-Industry-Report-2013.pdf>

<sup>25</sup> Sean Buckley, *CenturyLink's Ewing: We'll Bring Fiber to 19-20,000 Towers This Year*, FierceTelecom (Aug. 15, 2013), available at <http://www.fiercetelecom.com/story/centurylinks-ewing-well-bring-fiber-19-20000-towers-year/2013-08-15>.

<sup>26</sup> White House Report, *supra*, at 7.

<sup>27</sup> FCC Internet Access Report at 4.

Indeed, the Commission has found that average advertised download speeds increased 36 percent from 15.6 Mbps in 2012 to 21.2 Mbps in 2013.<sup>28</sup> Equally important, broadband providers are delivering those advertised speeds, and even surpassing them. In 2013, the Commission reported that broadband providers on average delivered 97 percent of their advertised download speeds during peak periods.<sup>29</sup> A 2014 Commission report found that broadband providers currently deliver an average of 101 percent of advertised download speeds.<sup>30</sup>

Because customers value speed and price and will switch to a competitor that offers better value, as discussed below, broadband providers constantly strive to improve their network performance as a matter of competitive necessity. While less than half of the American population in 2010 had access to broadband speeds greater than 25 Mbps, that number grew to more than three-quarters by mid-2012 – an 11 percent annual growth rate.<sup>31</sup> High speed broadband is so important to customers that more Americans today have access to a 100 Mbps connection than had access to a 25 Mbps connection almost three years ago.<sup>32</sup>

---

<sup>28</sup> Federal Communications Commission, *2014 Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the U.S.* at 13 (June 18, 2014), available at <http://www.fcc.gov/reports/measuring-broadband-america-2014> (“2014 Measuring Broadband Report”).

<sup>29</sup> Federal Communications Commission, *2013 Measuring Broadband America February Report: A Report on Consumer Wireline Broadband Performance in the U.S.* at 9 (February 2013), available at <http://www.fcc.gov/measuring-broadband-america/2013/February>.

<sup>30</sup> 2014 Measuring Broadband Report, *supra*, at 14. Upload performance is equally impressive, as the Commission reports that the average upload speeds during peak periods were 108 percent of providers’ advertised speeds. *Id.* at 15.

<sup>31</sup> Everett Ehrlich, *The State of U.S. Broadband: Is It Competitive? Are We Falling Behind?*, Progressive Policy Institute at 16 (June 12, 2014), available at <http://www.progressivepolicy.org/2014/06/the-state-of-u-s-broadband-is-it-competitive-are-we-falling-behind> (“Ehrlick Report”).

<sup>32</sup> *Id.*

Fifth, in addition to increased performance, broadband providers also are offering attractive prices to retain existing consumers and attract new ones. The Bureau of Labor Statistics has found that the price of “internet services and electronic information” dropped 25.4 percent between 1998 and 2012.<sup>33</sup> Indeed, broadband prices have been falling for 15 years.<sup>34</sup> Internationally, broadband prices in the United States are among the lowest. According to the International Telecommunications Union, the United States’ wired broadband services rank as the third most affordable in the world.<sup>35</sup>

In short, the broadband marketplace is functioning like a competitive market –with providers driving each other to invest in better networks, creating more choices, increasing performance, and offering lower prices. Under the circumstances, the Commission should be wary of making any decisions that could adversely impact that marketplace.

### **III. IN TODAY’S BROADBAND MARKETPLACE, CONCERNS ABOUT THE INCENTIVE OR ABILITY OF BROADBAND PROVIDERS TO LIMIT INTERNET OPENNESS ARE UNFOUNDED.**

In “analyzing broadband providers’ incentives to engage in practices that would limit the open Internet,”<sup>36</sup> the Commission should not overlook the incentives of broadband providers to ensure that their customers can access lawful Internet content of their choosing. Broadband providers are in the business of carrying traffic, including the traffic that their customers want. As the Commission has recognized previously, broadband providers “have a business interest in

---

<sup>33</sup> Bureau of Labor Statistics, *Spotlight on Statistics: Media-Related Consumer Price Indexes*, available at <http://www.bls.gov/spotlight/2013/media/> (last accessed June 24, 2014).

<sup>34</sup> *Id.*

<sup>35</sup> Ehrlich Report, *supra*, at 7; International Telecommunications Union, *Measuring the Information Society 2013* at 84 (2013), available at [http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2013/MIS2013\\_without\\_Annex\\_4.pdf](http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2013/MIS2013_without_Annex_4.pdf).

<sup>36</sup> NPRM ¶ 39.

maximizing the traffic on their networks, as this enables them to spread fixed costs over a greater number of revenue-generating customers.”<sup>37</sup> The Commission should not ignore the economic incentives of broadband providers to promote an open Internet, as it did in the *Open Internet Order*.<sup>38</sup>

Furthermore, given the current state of the broadband marketplace, there is no reason to believe that broadband providers have any unique incentive or ability to limit Internet openness.<sup>39</sup> A broadband customer who is unable to access particular content or use a particular application on the Internet will not be a customer of that broadband provider for very long. Should a broadband provider take action to limit or prevent consumers from enjoying the benefits of an open Internet, the provider undoubtedly would suffer the competitive consequences.

In the *Open Internet Order*, the Commission expressed concern that broadband providers have market power and, even if they do not, that the high costs of switching from one provider to another create “terminating monopolies” for edge providers that need high-speed broadband connections to reach end users.<sup>40</sup> These concerns are unfounded.

First, as noted above, customers today have multiple choices for broadband Internet access service and can choose from a variety of providers and platforms. Broadband providers

---

<sup>37</sup> *Wireline Broadband Order* ¶ 64; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 184 (2002) (noting the “significant up-front, fixed investment” associated with broadband, which provides incentives for greater investment because the provider has “a greater ability to spread those fixed costs across a larger customer base ...”).

<sup>38</sup> *Preserving the Open Internet*, 25 FCC Rcd 17905, ¶¶ 20-34 (2010) (“*Open Internet Order*”).

<sup>39</sup> NPRM ¶¶ 42-50.

<sup>40</sup> *Open Internet Order* ¶ 34.

are investing substantial sums to upgrade their networks, offering more vibrant services to meet customer demand, and are lowering prices in an effort to compete. These actions are hallmarks of a competitive marketplace, not indicia of market power.

Second, switching costs do not deter consumers from changing broadband providers.<sup>41</sup> Consumers do not hesitate to change broadband providers, particularly when it means lower prices or faster download speeds, as evidenced by the annualized churn rates between 28.8 percent and 36 percent experienced by some broadband providers.<sup>42</sup> Indeed, a recent study found that 71 percent of Americans would switch broadband providers if their existing provider attempted to interfere with bandwidth-intensive services.<sup>43</sup> In short, end users can readily buy broadband service from a different provider – and are not deterred by the costs of switching service providers – if their current broadband service does not meet their needs.

Although the Commission found in the *Open Internet Order* that high costs deterred consumers from switching broadband providers, the data cited by the Commission do not support that conclusion.<sup>44</sup> In fact, the report upon which the Commission relied found that “63% of

---

<sup>41</sup> A recent study of Europeans and Americans found that faster speeds are an important indicator of whether a customer would change broadband providers. The study explained that broadband service providers would reduce their annual customer churn rates by 3 percent if the providers began to provide “superfast” broadband services. Martin Scott, *The Connected Consumer 2013 Survey*, Analysys Mason (July 8, 2013).

<sup>42</sup> J. Gregory Sidak and David J. Teece, *Innovation Spillovers and the “Dirt Road” Fallacy: The Intellectual Bankruptcy of Banning Optimal Transactions for Enhanced Delivery over the Internet*, 6 J. COMP. L. & ECON. 521, 564-65 (2010) (.

<sup>43</sup> Glenn Derene, *71% of U.S. households would switch from providers that attempt to interfere with Internet*, Consumer Reports (Feb. 18, 2014), available at <http://www.consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm>.

<sup>44</sup> *Open Internet Order*, ¶ 34 (2010) (citing Federal Communications Commission, *Broadband Decisions: What Drives Consumers to Switch—Or Stick With—Their Broadband Internet Provider* at 3 (FCC Working Paper, Dec. 2010) (finding that, of broadband end users

broadband adopters with a choice of multiple providers said it would be easy to switch providers, with 33% saying it would be *very easy* and 30% saying it would be *somewhat easy*.<sup>45</sup> That report also found that 36 percent of Internet users switched providers over the preceding three year period.<sup>46</sup> “For the most part, switchers found doing so easy, with 56% saying it was ‘very easy’ and 30% saying it was ‘somewhat easy.’ . . . These figures are very much in line with figures for those who have switched cell phone providers in the past three years; among that group, 56% said switching was ‘very easy’ and 28% said it was ‘somewhat easy.’”<sup>47</sup> By contrast, only ten percent found that changing providers was “somewhat difficult,” and only three percent stated that it was “very difficult.”<sup>48</sup> Thus, the Commission’s own data do not support the conclusion that switching costs deter customers from changing broadband providers.

Indeed, switching is now so commonplace—and the market so competitive—that broadband providers routinely target offers to competitors’ customers and boast in their advertisements about how easy it is for customers to switch service providers. For example, Comcast routinely makes available special offers to new customers and advertises its EasyChange service as a way to “simplif[y] the process of switching Internet Service Providers (ISPs) and email providers. It transfers information from your current email account to your XFINITY account—keeping you in touch with friends and contacts while your email address is

---

*(footnote cont’d.)*

with a choice of broadband providers, “32% said paying termination fees to their current provider was a major reason why they have not switched service”) (“FCC Working Paper”).

<sup>45</sup> FCC Working Paper at 3.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 10.

<sup>48</sup> *Id.*

being updated.”<sup>49</sup> Other providers also promote their “simplified” process for changing ISPs,<sup>50</sup> and many offer online appointments to schedule the installation of new service<sup>51</sup> or allow customers to self-install modems right out of the box to get online immediately.<sup>52</sup> Some have eliminated early termination fees<sup>53</sup> and activation fees,<sup>54</sup> while others offer to pay early termination fees to entice customers to switch.<sup>55</sup> Indeed, many broadband providers no longer require a contract, which eliminates any requirement for termination fees as well as any corresponding concern that termination fees pose an obstacle to a customer changing providers.<sup>56</sup> At bottom, switching between broadband providers is now as easy as switching between dial-up providers – a fact that the Commission must take into account in assessing the need for open Internet rules.<sup>57</sup>

---

<sup>49</sup> See Appendix A, Exhibit 3 – Comcast; *see also* Appendix A, Exhibit 1 – AT&T (advertising special promotions for new customers).

<sup>50</sup> See Appendix A, Exhibit 4 – DSL Extreme (“We’ve gone ahead and simplified that process [of changing ISPs]. It’s as easy as choosing an option when you place your Order!”).

<sup>51</sup> See Appendix A, Exhibit 7 – Verizon.

<sup>52</sup> See Appendix A, Exhibit 5 – Sonic.net (“Switching from your current carrier is easy ...”).

<sup>53</sup> See Appendix A, Exhibit 6 – Time Warner Cable (“No Early Termination Fees”).

<sup>54</sup> See Appendix A, Exhibit 7 - Verizon.

<sup>55</sup> See Appendix A, Exhibit 2 – Charter Communications (“Stuck in a contract? We’ll pay your early termination fees up to \$500!”).

<sup>56</sup> See Appendix A, Exhibit 5 – Sonic.net (offering broadband at up to 20 Mbps without “an annual contract. It’s simply a month to month term.”); Exhibit 7 – Verizon (“No Annual Contract + 2-YR Price Guarantee”).

<sup>57</sup> *Open Internet Order*, ¶ 51 (declining to impose similar rules on “dial-up Internet access service because telephone service has historically provided the easy ability to switch among competing dial-up Internet access services”).

#### **IV. THE COMMISSION SHOULD NOT IMPOSE TITLE II REGULATION ON BROADBAND SERVICES.**

As noted above, the Internet ecosystem is flourishing under the current Title I regime. Broadband investment and innovation continue to thrive, and consumers are reaping the corresponding benefits. Despite the tremendous success achieved in the broadband marketplace under the current Title I regime, the Commission has inquired, as it did in 2010, whether it should classify broadband Internet access service as a “telecommunications service” under Title II of the Communications Act. In particular, the NPRM seeks comment on how to classify (1) broadband Internet access services offered to end users, which the Commission has long held are “information services;” and (2) any service that broadband providers purportedly offer to edge providers.<sup>58</sup> The Commission should decline misguided calls to resort to Title II regulation, which would be a bad idea from a public policy standpoint and would be unlawful in any event.

##### **A. Imposing Title II Regulation On Broadband Services Would Be Bad Policy.**

Imposing Title II’s monopoly-era regime on broadband Internet access services would harm investment in broadband infrastructure and threaten the continued success of the Internet. Furthermore, there is a dearth of evidence that the hammer of Title II would solve any current problem in the broadband marketplace. Nor would Title II regulation of broadband Internet access services even forbid commercial arrangements between broadband providers and edge providers about which net neutrality advocates are so concerned.

---

<sup>58</sup> NPRM ¶ 148.

1. Applying 19th Century Regulation To 21st Century Broadband Would Undermine The Commission's Broadband Objectives.

Regulating the Internet under a Title II framework would be a profound mistake. As the Commission is aware, Title II has its roots in 1880s railroad regulation<sup>59</sup>—a regulatory regime that bankrupted the railroads, left communities without service, led to the nationalization of rail carriers in the Northeast, and was repealed by the Congress in order to save the nation's railroad networks and stimulate investment in railroad infrastructure.<sup>60</sup> Title II regulation of broadband services is fundamentally at odds with the competitive and dynamic nature of the marketplace.<sup>61</sup> As the Clinton-era FCC observed in 1998, “classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.”<sup>62</sup>

Application of Title II to broadband services would do nothing to promote investment in network infrastructure. Financial and economic analysts have noted that Title II regulation—even after partial forbearance—will exert negative pressures on the ability of broadband providers to invest capital in their networks. When Title II reclassification was proposed in

---

<sup>59</sup> *Cellco P'ship v. FCC*, 700 F.3d 534, 545-46 (D.C. Cir. 2012).

<sup>60</sup> Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31.

<sup>61</sup> *See, e.g., Competition in the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2641-42, ¶¶ 123-25 (1990) (noting the inability of Title II regulation adapt “to the dynamics of expanding competition in the interstate long-distance marketplace”); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 432, ¶ 123 (1980) (refusing to apply Title II regulation to enhanced services because it “would negate the dynamics of computer technology in this area”).

<sup>62</sup> *Federal-State Joint Board on Universal Services*, 13 FCC Rcd 11830, 11540, ¶ 82 (1998).

2010, analysts sounded alarms about the negative implications for investment. One analyst wrote that “Title II designation would . . . call into question virtually every assumption about the terminal value of networks, as they would be subject to enormous and unpredictable regulatory risk going forward. . . . In the face of this uncertainty, capital investment—and, therefore, employment in the sector—would decline, and perhaps precipitously.”<sup>63</sup>

Other analysts confirmed the risk, uncertainty, and negative investment pressures Title II regulation would spawn. “What is inevitable is a lengthy period of uncertainty, first about the precise shape of the order, then about its fate in court, and then about the ways it will be implemented, and then about the fate of the implementation orders in court,” wrote one analyst.<sup>64</sup> According to another analyst, “Markets abhor uncertainty. Today we got uncertainty in spades. . . . We would expect a profoundly negative impact on capital investment. . . .”<sup>65</sup> Yet another analyst noted that “[t]he FCC’s move is likely to lead to a lengthy and unnecessary legal battle, create needless uncertainty in the market, and detract from the FCC’s important work in implementing the recently unveiled national Broadband Plan.”<sup>66</sup>

The Commission should heed the advice of Senators Wyden and Kerry, among other Senators, who urged 16 years ago that the Commission not impose Title II regulation on the

---

<sup>63</sup> Craig Moffett, *Weekend Media Blast: Internet En-title-ment*, Bernstein Research (April 16, 2010).

<sup>64</sup> Anna-Maria Kovacs, *FCC update: Title II reclassification and net neutrality*, Regulatory Research Associates (May 6, 2010).

<sup>65</sup> Craig Moffett, *Quick Take - U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear*, Bernstein Research (May 5, 2010).

<sup>66</sup> Robert D. Atkinson, *FCC Goes Too Far (Once Again)*, Information Technology & Innovation Foundation (May 6, 2010).

Internet.<sup>67</sup> As they wrote in a March 20, 1998 letter to former Chairman Kennard, “nothing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.”<sup>68</sup> “While questions have been raised as to whether certain information service providers now should be subject to telephone regulation, . . . we urge the FCC to be mindful of the success of its long standing policies that have created an atmosphere where advanced services can thrive and the American public can benefit.”<sup>69</sup> They concluded:

Some have argued that Congress intended that the FCC’s implementing regulations be expanded to reclassify certain information service providers, specifically Internet Service Providers (ISPs), as telecommunications carriers. Rather than expand regulation to new service providers, a critical goal of the 1996 Act was to diminish regulatory burdens as competition grew. Significantly, this goal has been the springboard for sound telecommunications policy throughout the globe, and underscores U.S. leadership in this area. The FCC should not act to alter this approach.<sup>70</sup>

Their advice is just as sound today as when it was first offered 16 years ago.

2. Imposing Title II Regulation On Broadband Internet Access Services Would Not Solve Any Alleged Problems In The Marketplace.

Nothing in the marketplace remotely suggests a need to impose Title II’s antiquated regime on broadband Internet access services. Indeed, nothing in the NPRM even hints at a current problem in the retail market for broadband Internet access services that application of Title II would purport to solve. For example, there is no evidence that broadband Internet access

---

<sup>67</sup> Letter from Sens. John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, Ron Wyden, to Chairman William E. Kennard (Mar. 20, 1998).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

providers are charging unjust or unreasonable rates.<sup>71</sup> Nor is there evidence that broadband providers have been unreasonably discriminating against similarly situated customers in offering broadband Internet access services.<sup>72</sup> The NPRM’s failure to identify a single problem in the retail broadband market that Title II would address undermines calls to subject broadband Internet access services to Title II regulation.<sup>73</sup>

To the extent commercial arrangements between broadband providers and edge providers to prioritize traffic over the last mile are the concern, the NPRM does not cite a single example of such an arrangement in effect today. That is not surprising given that many broadband providers have disclaimed any interest in offering such a service<sup>74</sup> or are otherwise still bound by the *Open Internet Order*’s effective ban on paid prioritization arrangements.<sup>75</sup>

The irony of the proposal to subject broadband Internet access services to Title II regulation is that doing so would not address any commercial arrangements that may eventually be made available to edge providers. Broadband Internet access service is a “mass market retail service” offered to end users,<sup>76</sup> and the Commission made clear that its rules did not extend “to

---

<sup>71</sup> 47 U.S.C. § 201.

<sup>72</sup> 47 U.S.C. § 202.

<sup>73</sup> NPRM at 99 (Dissenting Statement of Commissioner O’Rielly).

<sup>74</sup> Jim Cicconi, *Net Neutrality and Modern Memory*, AT&T Public Policy Blog (June 6, 2014), available at <http://www.attpublicpolicy.com/fcc/net-neutrality-and-modern-memory/> (“Mind you, not a single ISP then or now has asserted a desire or right to engage in any of these practices to create ‘fast lanes and slow lanes.’ AT&T certainly has no plans or intent to change its position on this. . . . No one has any plan or intent to introduce such paid prioritization practices. ISPs have all posted policies that prohibit them. And the FCC can act against anyone who might nonetheless try to do that. In short, the Internet today is totally safe from fast lanes and slow lanes.”).

<sup>75</sup> NPRM ¶ 14.

<sup>76</sup> NPRM ¶¶ 54-55.

edge provider activities, such as the provision of content or applications over the Internet.”<sup>77</sup> Thus, while classifying broadband Internet access service as a “telecommunications service” would subject broadband providers to Title II common carrier obligations in dealing with their end user “customers,”<sup>78</sup> Title II would not provide the Commission with any authority to regulate the relationships between broadband providers and edge providers or to address discrimination among edge providers. Thus, to the extent the goal is to regulate relationships between broadband providers and edge providers, classifying broadband Internet access service as a telecommunications service under Title II would do nothing to accomplish this goal.

Furthermore, the industry should be free to experiment with value added services provided by broadband providers to consumers, businesses, and edge providers because such innovations may support new or improved content, applications and services, creating additional marketplace choices for all participants. In addition, the revenues from such offerings, to the extent they are adopted in the marketplace, may be essential to paying for the vibrant broadband networks that are being deployed now and that will be required in the future. Requiring that broadband providers recover all their costs directly from end users may have the practical, albeit unintended, effect of rendering broadband services unaffordable to millions of Americans. This could occur, for instance, if rates needed to recoup broadband network costs proved to be out of

---

<sup>77</sup> *Open Internet Order* ¶ 50.

<sup>78</sup> *Z-Tel Communications, Inc. v. SBC Communications Inc.*, 331 F. Supp. 2d 513, 556 (E.D. Tex. 2004) (“The bottom line is that the focus of a § 202 inquiry is on discrimination among customers” of the common carrier, not third parties); *accord Petition for Forbearance of the Indep. Tel. & Telecomms. Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840, ¶ 10 (1999) (“section 202 of the Act . . . prohibits unreasonable discrimination among customers and rates that are unjust and unreasonable”); *Bundling of Cellular Customer Premises Equip. and Cellular Serv.*, Notice of Proposed Rulemaking, 6 FCC Rcd 1732, ¶ 2 n.2 (1991) (“Section 202(a) of the Act prohibits carriers from discriminating unreasonably among customers in the ‘charges, practices, classifications, regulations, facilities, or services’ for ‘like’ communication service”).

reach for certain households, either because of limits on disposable income or because value derived from the Internet is simply not worth the cost of a broadband connection. In those instances, it may be in everyone's best interest – broadband providers and edge providers, and, certainly, their customers – to find ways of making affordable broadband connections to the Internet more widely available. Doing so would allow carriers to spread their (largely fixed) network costs over a larger base of customers, thereby reducing the average cost of providing service to individual households and small businesses and maximizing the base of broadband users that can be reached by edge providers. More users, in turn, translates to potentially greater advertising revenue or other fees for edge applications or services. As such, the Internet ecosystem may find it mutually beneficial to ensure that adequate flexibility exists to ensure that innovative broadband services can develop, including those that could help defray the cost of broadband connections for at least some customer groups.

In addition, end users may benefit from commercial agreements between broadband providers and edge providers from a quality of service perspective. For example, some service offerings may involve a broadband provider providing quality of service guarantees for an edge provider's video offerings or VoIP telephony service, which are extremely sensitive to packet loss and latency. Such arrangements would ultimately benefit end users. Likewise, end users would enjoy a superior broadband experience as the result of freely negotiated commercial arrangements between broadband providers and edge providers by which end users accessing that edge provider's website would receive faster download speeds or other enhanced service.

There is nothing evil or anticompetitive about exploring or implementing new business models. Indeed, as an MIT working group consisting of academics and representatives of British Telecom, Cisco, Comcast, Deutch Telecom/T-Mobile, Intel, Motorola, Nokia and Nortel

warned, “The broadband value chain is headed for a train wreck.”<sup>79</sup> With broadband intensive applications continuing to grow, the MIT working group recognized that business models need to evolve as the Internet evolves in order to ensure that network operators maintain incentives to invest in additional capacity.<sup>80</sup>

Title II regulation would do nothing to promote such evolution and would destroy incentives for broadband providers to continue to invest in network capacity and performance. As the brief history of the Internet conclusively demonstrates, competition and innovation are best served by letting the marketplace decide what products, services, and prices will be offered, rather than constraining market forces by government regulation.

**B. Imposing Title II Regulation On Broadband Services Would Be Unlawful.**

Even assuming it made policy sense to subject broadband Internet access services to Title II regulation (which is not the case), the Commission faces substantial legal hurdles in changing the regulatory classification of such services – hurdles that the Commission could not lawfully overcome.<sup>81</sup> First, any departure from the Commission’s historical classification of broadband Internet access services as information services would be arbitrary and capricious. Second, the

---

<sup>79</sup> “The Broadband Incentive Problem,” MIT Broadband Working Group (Sept. 2005) (“Any business that expects to reach its customers or employees through ever-better mass-market broadband Internet access, whether wired or wireless, is in for a rude awakening. Unless the broadband incentive problem is recognized and dealt with now ...”) available at <http://cfp.mit.edu/docs/incentive-wp-sept2005.pdf>.

<sup>80</sup> *See id.* at 1 (“[A] critical problem exists which, unless solved, will ultimately stunt the growth of the industries that constitute the broadband value chain.... Good solutions to this problem need to align the incentives of network operators and upstream stakeholders.... Solutions that achieve this alignment will produce the revenues necessary to support ongoing operator investments in more capable networks, enabling innovation and growth to continue in all parts of the broadband value chain.”).

<sup>81</sup> *See* Letter from Seth P. Waxman, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 09-47, 09-137 (Apr. 28, 2010).

Commission would be judicially estopped from denying the functionally integrated nature of broadband Internet access services simply in order to achieve its policy objectives.

1. The Commission's Departure From Established Precedent Would Be Arbitrary And Capricious.

An agency's decision will be vacated as arbitrary and capricious when the agency departs from established precedent without a reasoned explanation.<sup>82</sup> Particularly instructive is *FCC v. Fox Television Stations, Inc.*,<sup>83</sup> in which the Supreme Court held that an agency must satisfy an even higher burden of explanation when it departs from established precedent in two circumstances, both of which are present here. Specifically, *Fox* requires an agency to "provide a more detailed justification [for its departure from established precedent] than what would suffice for a new policy created on a blank slate" when: (i) the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy"; or (ii) "its prior policy has engendered serious reliance interests that must be taken into account."<sup>84</sup> According to the Supreme Court, under such circumstances, "[i]t would be arbitrary or capricious to ignore such

---

<sup>82</sup> See, e.g., *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) ("If the [Commission] changes course, it 'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed.") (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)); see also *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.").

<sup>83</sup> 129 S. Ct. 1800 (2009) (noting that, in order to survive APA review, when an agency decision departs from established precedent it must "display awareness that it *is* changing position" and may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.") (emphasis in original).

<sup>84</sup> *Id.*, at 1811.

matters.”<sup>85</sup> Such would be the case if the Commission were to alter dramatically its regulatory approach to broadband Internet access services.

The Commission’s holdings over the past decade that broadband Internet access services are “information services” turned on its factual determination that the transmission and data processing components of these services are functionally integrated and are not offered separately. In *Brand X*, the Supreme Court held that the question whether broadband Internet access services “are functionally integrated (like the components of a car) or functionally separate (like pets and leashes) . . . turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided[.]”<sup>86</sup> As the Commission recognized in 1998 and confirmed multiple times in intervening years, broadband Internet access services are integrated offerings that “combine[] the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.”<sup>87</sup>

Consistent with *Fox*, in order to change course and now determine that broadband transmission is a standalone “telecommunications service,” the Commission must find that there has been some seismic change in the Internet landscape and the manner by which broadband services are offered. However, the facts would not support any such finding. Indeed, broadband Internet access services are even more functionally integrated today than when the Commission first considered the matter more than a decade ago.

Broadband Internet access services continue to involve functionally integrated offerings that combine transmission with data processing, retrieval, storage, and similar capabilities. DNS

---

<sup>85</sup> *Id.*

<sup>86</sup> *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

<sup>87</sup> *Cable Modem Order* ¶ 38.

look-up remains at the core of broadband Internet access service. DNS is often referred to as the “phone book” of the Internet because it allows consumers to “tell the computer” what websites they want to visit in human language. In other words, DNS translates domain names that consumers can understand into binary identifiers which can be understood by computers. This service is what makes the World Wide Web and modern Internet navigation possible. An inextricable part of this service involves network operators enabling consumer access to information by changing the physical hosts with which consumers communicate, even though consumers may not intend or expect to communicate with those hosts. Consumers need this information service so they can use the Internet without having to utilize IP coded addresses. DNS, which is by definition an information service, has been and remains today part and parcel of broadband Internet access service.

Broadband Internet access service integrates other capabilities that involve “generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing” information.<sup>88</sup> When the Commission compiled the record for its various classification orders, the most recent of which was issued in 2007, “broadband Internet service was offered with various services—such as e-mail, newsgroups, and the ability to create and maintain a web page.”<sup>89</sup> The same is true today, and these “information-processing capabilities” are “inextricably intertwine[d]” with broadband transmission.<sup>90</sup> Then, as now, these “Internet applications”—including various forms of e-mail, personal web pages, virus protection, to name just a few—are offered on a functionally

---

<sup>88</sup> 47 U.S.C. § 153(20) (defining “information service”).

<sup>89</sup> *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, 7890, ¶ 55 (2010).

<sup>90</sup> *Wireline Broadband Order* ¶ 9.

integrated basis by broadband providers, and customers are not required to contract separately for such “discrete services or applications.”<sup>91</sup>

USTelecom member companies are integrating more features, functionalities and content as part and parcel of their broadband service offerings. For example, broadband providers are increasingly integrating security capabilities and technologies into every level of the Internet so that they can prevent, detect, mitigate, and respond to any security threats. Security capabilities and technologies are inextricably linked to the end user’s Internet experience, helping to ensure that end users enjoy an overall sense of security and privacy.<sup>92</sup> These security capabilities and technologies involve data processing and, whether employed in the end user’s computer or in the network, include processing Internet access traffic flows. These capabilities and technologies are fully integrated with the broadband Internet access service that providers offer to end users, who cannot access the Internet without also benefitting from such capabilities and technologies.

For example, many broadband providers are integrating Google applications into their broadband Internet access services offerings, including Gmail, Google Docs, and Google Drive.<sup>93</sup> In addition, as Internet usage continues to grow exponentially, broadband providers are

---

<sup>91</sup> *Cable Modem Order* ¶ 11.

<sup>92</sup> USTelecom Comments at 57-58, GN Docket No. 10-127 (July 15, 2010). For example, GVTC makes available ID Vault to its broadband customers, which is specifically engineered to create a direct and fully secure connection to a customer’s financial, shopping and any password-protected online accounts. This service: (i) logs into the customer’s accounts and enters information without typing, protecting the customer from keylogger programs that record keystrokes; (ii) constantly monitors more than 8,000 financial and shopping websites to provide extra protection to the customer; and (iii) encrypts the customer’s usernames and passwords so they are only available to the customer. See <http://gvtc.com/residential/internet/internet-premiums/id-vault-protection>.

<sup>93</sup> See, e.g., Home Telecom, available at <http://www.homesc.com/google-apps> Alaska Communications, available at <http://www.alaskacommunications.com/Online-Care/Support-Center/FAQs/About-AlaskaMail-Our-Upgraded-Email-Service.aspx>; Big Bend Broadband, available at <http://www.bigbend.net/broadband-pricing>; Darien Telephone, available at

expanding storage capacity that is available as an integrated part of their broadband Internet access offerings.<sup>94</sup>

Broadband providers do not offer a separate transmission component to end users, who instead are able to purchase a unitary service comprised of broadband transmission and data processing capabilities that include a host of features, functionalities, and content. Because consumers are offered increasingly more robust data processing capabilities as a functionally integrated part of broadband Internet access service, the same reasons that led the Commission to classify the service as an information service under Title I more than a decade ago apply equally today.

The Commission's finding that broadband Internet access service is an information service was premised, at least in part, upon the Commission's desire to encourage broadband providers to invest heavily in broadband networks so that broadband services would be widely deployed across the United States.<sup>95</sup> As demonstrated above, broadband providers responded to the Commission's "light touch" regulatory regime, investing hundreds of billions of dollars in their networks, just as the Commission hoped and expected that they would. This has led to a broadband "arms race," as providers have deployed robust networks in an effort to keep up with their competitors and offer faster broadband speeds and greater network coverage in an attempt

---

*(footnote cont'd.)*

<http://www.darientel.net/corporate/index.php?display=detail&sp=0&id=81964f83dcd62fd08296caad9e3e59f7>.

<sup>94</sup> Home Telecom, available at <http://www.homesc.com/google-apps> (offering broadband customers 15 Gigabytes of storage).

<sup>95</sup> *Wireline Broadband Order* ¶ 1 (explaining that treating wireline broadband Internet access service as an "information service" would "allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans").

to secure a competitive advantage. Any decision by the Commission to now regulate broadband under Title II would trigger heightened review under *Fox* because it would disrupt “serious reliance interests that must be taken into account.”<sup>96</sup>

2. The Commission Is Judicially Estopped From Denying The Functionally Integrated Nature of Broadband Internet Access Services.

In the *Cable Modem Order*, the Commission determined that broadband Internet access is an “information service” because the transmission and data processing components of the service are functionally integrated.<sup>97</sup> The Commission’s counsel made this same factual representation to the Supreme Court in its successful defense of the *Cable Modem Order* in *Brand X*.<sup>98</sup> The Commission could not so easily disavow these factual representations in an effort to advance its regulatory agenda. Rather, the Commission remains bound by those representations because the doctrine of judicial estoppel bars the agency from opportunistically changing its view of the facts simply because its interests may have changed.

As the D.C. Circuit has explained, “[c]ourts may invoke judicial estoppel ‘[w]here a party assumes a certain position in a legal proceeding . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position.’”<sup>99</sup> Judicial estoppel is a judicially created doctrine intended “to protect the integrity of the judicial process” by “prohibiting parties from deliberately changing positions according to the exigencies of the

---

<sup>96</sup> *Fox*, 129 S. Ct. at 1811.

<sup>97</sup> *Cable Modem Order* ¶¶ 38-39.

<sup>98</sup> *Brand X*, 545 U.S. at 990-91.

<sup>99</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

moment.”<sup>100</sup> “Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party’s inconsistent position, then at least one court has probably been misled.”<sup>101</sup> The doctrine’s “underlying rationale is that a party should not be allowed to convince unconscionably one judicial body to adopt factual contentions, only to tell another judicial body that those contentions were false.”<sup>102</sup>

Judicial estoppel applies with equal force to governmental agencies. According to the D.C. Circuit, “[t]he doctrine will be invoked against the government when it conducts what appears to be a knowing assault upon the integrity of the judicial system.”<sup>103</sup> Indeed, courts have applied judicial estoppel to bar agencies, including the Commission, from conveniently disavowing positions they had successfully asserted for the sake of a subsequent litigation advantage.<sup>104</sup> For example, in connection with its rules implementing the local competition

---

<sup>100</sup> *New Hampshire*, 532 U.S. at 749-50; see also Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.) (“The most central purpose is to protect all courts against becoming victims of excessive but potentially effective adversary inconsistency . . . Courts also focus on the sheer effrontery of advocates who, by playing ‘fast and loose’ with the courts, seem in the pursuit of wanton self-interest to trifle with the dignity of judicial truth-finding efforts.”).

<sup>101</sup> *Id.*

<sup>102</sup> *Konstantinidis v. Chen*, 626 F.2d 933, 938-39 (D.C. Cir. 1980).

<sup>103</sup> *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995).

<sup>104</sup> *Massachusetts v. United States*, 522 F.3d 115, 118, 130 (1st Cir. 2008) (stating that the Nuclear Regulatory Commission would be bound “to its litigation position” in a future proceeding and that “if the agency were to act contrary to these representations in this matter, a reviewing court would most likely consider such actions to be arbitrary and capricious” (citing *New Hampshire*, 532 U.S. at 749-51)); *Valentine-Johnson v. Roche*, 386 F.3d 800, 810-12 (6th Cir. 2004) (holding that judicial estoppel barred the Department of the Air Force from changing its position regarding judicial review of an unexhausted termination claim); *Owens*, 54 F.3d at 275-76 (holding that the Postal Service was judicially estopped from making certain arguments that the Freedom of Information Act applied to investigatory records); *Reynolds v. Comm’r of Internal Revenue*, 861 F.2d 469, 474 (6th Cir. 1988) (holding that judicial estoppel barred the

provisions of the Telecommunications Act of 1996, the Commission established proxy prices that state commissions must use for interconnection and network element charges, wholesale rates, and the rates for termination and transport. These rules were challenged in the Eighth Circuit by petitioners who argued that the rules should be vacated, because the Commission “expressly disavowed the proxy prices before the Supreme Court in order to support the FCC’s position that it was not trying to set specific prices but rather it was merely designing a pricing methodology.”<sup>105</sup> In *Iowa Utilities Board v. FCC*, the Eighth Circuit agreed that the Commission was “estopped from trying to now revive the proxy prices,” because it “represented to the Supreme Court that it was not establishing rates and depriving the state commissions of their role in implementing the Act.”<sup>106</sup>

Likewise here, the requirements for judicial estoppel would be satisfied if the Commission were to conveniently find, “simply because [its] interests have changed,”<sup>107</sup> that the facts it represented to the Supreme Court in *Brand X* had changed.<sup>108</sup> The Commission successfully defended the *Cable Modem Order* before the *Brand X* Court by correctly explaining, as a factual matter, that broadband is a functionally integrated offering without a separately-offered transmission component. The Commission specifically added that “Internet access service generally includes using the ‘DNS’ (*i.e.*, the domain name system), which is a

---

(footnote cont’d.)

Commission of Internal Revenue from repudiating its position with respect to responsibility to pay taxes).

<sup>105</sup> *Iowa Utilities Board v. FCC*, 219 F.3d 744, 756 (8th Cir. 2000), *aff’d in part, rev’d in part on other grounds sub norm.*, *Verizon Commcn’s Inc. v. FCC*, 535 U.S. 467 (2002).

<sup>106</sup> *Id.* (citing Reply Br. for Federal Pet’rs at 7, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *see also id.* (“We are not persuaded by the FCC’s explanation to this court of its position before the Supreme Court.”)).

<sup>107</sup> *Comcast*, 600 F.3d at 647 (quoting *New Hampshire*, 532 U.S. at 749).

<sup>108</sup> *Brand X*, 545 U.S. at 990-91.

‘data retrieval and directory service’ that is ‘most commonly used to provide an IP address associated with the domain name (such as www.fcc.gov) of a computer.’”<sup>109</sup> Noting that DNS provides “‘a general purpose information processing and retrieval capability,’”<sup>110</sup> the Commission represented that DNS “does not involve pure telecommunications functions.”<sup>111</sup> The Commission further argued that “information-processing capabilities, such as the DNS and caching,” should not be excluded from the statutory definition of “information service,” because they “are not used ‘for the management, control, or operation’ of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access.”<sup>112</sup> The Supreme Court relied on these representations in affirming the *Cable Modern Order*. The Commission would be judicially estopped if it were to conveniently find that the facts have changed simply to advance a new regulatory or political agenda.

**C. The Commission Could Not Lawfully Classify Any Service That Broadband Providers May Offer To Edge Providers As A Title II “Telecommunications Service.”**

The NPRM also questions whether the Commission should separately identify the service that broadband providers purportedly furnish to edge providers.<sup>113</sup> Mozilla and two individuals at Columbia Law School have argued that the Commission could classify this alleged service as a “telecommunications service” under Title II.<sup>114</sup> They are wrong.

---

<sup>109</sup> Reply Brief for the Federal Petitioners at 5, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (No. 04-277) (“*FCC Brand X Reply Br.*”) (quoting *Cable Modem Order*, 17 F.C.C.R. at 4821, ¶ 37).

<sup>110</sup> *FCC Brand X Reply Br.* at 5 (quoting *Cable Modem Order*, 17 F.C.C.R. at 4821, ¶ 37).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 5 n.2 (quoting 47 U.S.C. § 153(20)).

<sup>113</sup> NPRM ¶¶ 151-52.

<sup>114</sup> *Id.* ¶ 152 (citing Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of

1. The Capability Of Edge Providers To Send Traffic To End Users Is Functionally Integrated With Broadband Internet Access Service Provided to End Users.

The proposal advanced by Mozilla and others would have the Commission “split broadband Internet access service into two components: first, the subscriber’s request [for] data from a third-party provider; and second, the content provider’s response to the subscriber. The proposal would classify the latter ‘sender-side’ traffic, sent in response to a broadband provider’s customer’s request as a telecommunications service, subject to Title II. According to the proposal, this is a stand-alone offer of telecommunications—transmission between points specified by the end-user.”<sup>115</sup>

This proposal is fatally flawed because the two “components” are in fact functionally integrated. In other words, any “service” provided to an edge provider by which its content is transmitted to the end user is essential to the “service” provided to the end user requesting the content – a service the Commission repeatedly has classified as an information service.<sup>116</sup> As the Supreme Court explained in *Brand X*, it “is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product, even to the exclusion of discrete components that compose the product.”<sup>117</sup> Just as DNS is essential to the operation of broadband Internet access service, the content provider’s response to the

---

(footnote cont’d.)

the Communications Act, GN Docket Nos. 09-91, 14-28, WC Docket No. 07-52, at ii, 10-13 (filed May 5, 2014); Letter from Tim Wu and Tejas Narechania, Columbia University to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Apr. 14, 2014) (“Wu & Narechania Ex Parte Letter”).

<sup>115</sup> NPRM ¶ 151 (Wu & Narechania Ex Parte Letter, Attach. at 13-14).

<sup>116</sup> See *Open Internet Order*, App. A, § 8.11(b) (defining “broadband Internet access service” as the “capability to *transmit data to and receive data* from all or substantially all Internet end points ...”) (emphasis added).

<sup>117</sup> *Brand X*, 545 U.S. at 990.

subscriber's request for data is "part and parcel" of "a single, integrated offering" to the end user because broadband Internet access service could not function without the transmission of data back from the edge provider.<sup>118</sup> As a result, broadband Internet access service is a functionally integrated service that includes the transmission of an edge provider's content requested by an end user to that end user.

Moreover, from the end user's perspective, it would be anomalous to describe an Internet transaction as involving two separate components because the entire transaction begins and ends with the initial request submitted by the end user. Just as it would "be odd to describe a car dealership as 'offering' . . . engines when it offers cars,"<sup>119</sup> it would be odd to describe a broadband provider as offering distinct services to edge providers and end users when the end user has purchased a "functionally integrated" service. Because the transmission of content to an end user is not a distinct offering, this component cannot be separated out from broadband Internet access service, as some seek to do.

The proposal to parse Internet traffic into two separate components also is impossible to reconcile with traditional telecommunications regulation. For example, when a calling party served by CenturyLink places a long distance call to a called party served by Silver Star Communications, CenturyLink is providing its end user customer with a telecommunications service. CenturyLink's service to its customer includes the transmission of telecommunications, which necessarily encompasses communications to and from the Silver Star end user. CenturyLink is not offering or providing a separate service to Silver Star's end user customer, even though Silver Star's end user may communicate verbally in response to requests for

---

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

information from the CenturyLink end user. In the same way that CenturyLink does not provide a separate service to Silver Star's end user customer, a broadband provider does not provide a separate service to an edge provider that is merely transmitting data in response to requests from end user customers.

This proposal to carve out “sender-side” traffic from a broadband Internet access service also presents a host of legal and practical problems, which its proponents largely ignore. For example, how can a broadband provider offer a “telecommunications service” to an edge provider when the identity of the edge provider is not clear in any particular circumstance and when the edge provider has no relationship with the end user's broadband provider? For example, because the Commission considers any “aspiring musician[] who upload[s] videos to sites such as YouTube” to be an edge provider,<sup>120</sup> assume a musician uploads his music video to YouTube that an end user accesses using his T-Mobile smartphone. In this circumstance, is the edge provider to whom T-Mobile is allegedly offering a “telecommunications service” the musician, YouTube, or both? In addition, how can it be said that T-Mobile is offering a “telecommunications service” to either the musician or YouTube, when T-Mobile is not making any promises to or proposing to enter into a contract with either of them?<sup>121</sup>

Furthermore, there are often multiple providers involved in handling any particular Internet traffic that an end user may request. So, for example, assume that the musician uses

---

<sup>120</sup> NPRM ¶ 170.

<sup>121</sup> *See, e.g.*, Black's Law Dictionary 1111 (7th ed. 1999) (defining an “offer” as “[a] promise to do or refrain from doing some specified thing in the future; a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract”); Restatement (Second) of Contracts § 24 (1981) (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it”).

Comcast broadband service to upload his video to YouTube, which is stored on a server maintained by Google, which transmits the video bits to Akamai, which in turn hands off the data to a Tier II Internet backbone provider, which in turn transmits the data to a Tier I Internet backbone provider before sending the traffic to T-Mobile for delivery to its end user's smartphone. Is every provider in this transmission chain offering a "telecommunications service" to the content provider? And, if not, on what legal or factual basis can one provider be considered to offer a "telecommunications service" to the musician or YouTube, while other providers are not.

Just as every consumer is or could be an edge provider, conceivably every entity involved in sending traffic to the requesting end user is or could be a "telecommunications carrier" under this expansive view of Title II. For example, does YouTube's Internet provider that delivers the musician's sender-side traffic to YouTube owe a Title II duty to the musician who is the edge provider in this case? Because "[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,"<sup>122</sup> the theory advanced by Mozilla and Messrs. Wu and Narechania would ensnare the entire Internet ecosystem into its telecommunications services web.

2. Broadband Providers Do Not Offer Telecommunications For A Fee To An Edge Provider When Their End Users Request Content From That Edge Provider.

Even assuming the service provided to edge providers could be separately parsed, a threshold requirement to finding a "telecommunication service" is that there must be an "offering

---

<sup>122</sup> *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, 9751 ¶ 16 (2001).

of telecommunications for a fee.”<sup>123</sup> For example, when the Commission classified the operator of a state-owned telecommunications network as a “telecommunications carrier,” no dispute existed that the operator was offering telecommunications for a fee.<sup>124</sup> The “offering of telecommunications for a fee” is the lynchpin of Title II regulation because a telecommunication’s carrier’s duty not to engage in unjust or unreasonable practices and to refrain from unjust and unreasonable discrimination is triggered only after a “customer” relationship is formed with those to whom the service is offered.<sup>125</sup>

When a broadband Internet access service provider receives an edge provider’s content that may be requested by its end user, the provider is not “offering” anything to the edge provider “for a fee.” The *Verizon* court theorized that an edge provider could be a broadband provider’s “customer,”<sup>126</sup> but there is no evidence that such “customer” relationships currently exist in this context.<sup>127</sup> In adopting the *Open Internet Order*, the Commission observed that the “record contained no evidence of U.S. broadband providers engaging in pay-for-priority arrangements, in which the broadband provider would agree with a third party to directly or indirectly prioritize

---

<sup>123</sup> 47 U.S.C. § 153(53); *Brand X*, 545 U.S. at 989.

<sup>124</sup> See, e.g., *U.S. Telecom Ass’n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002).

<sup>125</sup> *Z-Tel Communications, Inc.*, 331 F. Supp. 2d at 556 (“The bottom line is that the focus of a § 202 inquiry is on discrimination among customers.”); *Bundling of Cellular Customer Premises Equip. and Cellular Serv.*, 6 FCC Rcd 1732, ¶ 2 n.2 (“Section 202(a) of the Act prohibits carriers from discriminating unreasonably among customers in the ‘charges, practices, classifications, regulations, facilities, or services’ for ‘like’ communication service”).

<sup>126</sup> *Verizon v. FCC*, 740 F.3d 623, 653-55 (D.C. Cir. 2014).

<sup>127</sup> To be sure, a broadband provider may offer a host of services – such as high-capacity transport services – directly to edge providers to connect to the Internet. However, those services are not the subject of this discussion, which focuses on the purported “telecommunications service” that a broadband provider offers to an edge provider simply by virtue of the broadband provider’s customer accessing the edge provider’s content, service, or application.

some traffic over other traffic to reach the provider’s subscribers.”<sup>128</sup> Until this year, the *Open Internet Order* effectively foreclosed broadband providers from offering edge providers paid prioritization services.<sup>129</sup> While Verizon may have “expressed interest in pursuing commercial agreements with edge providers to govern the carriage of the edge providers’ traffic,”<sup>130</sup> there is no evidence that Verizon or any other broadband provider has begun offering this service for a fee.

Even if broadband providers were to offer this type of service to edge providers for a fee, it would not be “telecommunications.” “Telecommunications” is the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”<sup>131</sup> Some have argued that the “user,” for the purposes of sender-side traffic, is the edge provider. Thus, because a broadband provider offers “a discrete transmission service . . . between points that Netflix (for example) has specified,”<sup>132</sup> the transmission involves telecommunications.

However, the “user” in this scenario is always the end user customer, not the edge provider. An edge provider does not “specify” points of transmission because the initial request that determines the transmission points comes from the end user. For example, when a Netflix customer selects a show to watch on his or TV or mobile device, Netflix sends packets of data back to its customer to watch. Netflix does not specify the “points” of transmission because it only performs a subsidiary routing role. The end user specifies the points of transmission

---

<sup>128</sup> NPRM ¶ 36.

<sup>129</sup> *Open Internet Order* ¶ 76.

<sup>130</sup> NPRM ¶ 37.

<sup>131</sup> 47 U.S.C. § 153 (50).

<sup>132</sup> Wu & Narechania Ex Parte Letter, Attach. at 14–15 (citing 47 U.S.C. § 153 (50)),

whereas Netflix merely carries out the end user's instructions. Just as it would be odd to say that the mailman, as opposed to the person who mailed the letter, "sent" the letter or "specified" the points of pickup and delivery, so too is it odd to say that Netflix, or any other edge provider, "specifies" the points of transmission. Because the "user" referred to in the statute is the end user, broadband providers would not be offering "telecommunications" to edge providers.

The NPRM points to AT&T's Sponsored Data service as a potential offering of telecommunications.<sup>133</sup> "Sponsored Data is an AT&T service that enables companies to sponsor the data usage for specific content on behalf of eligible AT&T wireless customers. With AT&T Sponsored Data customers can browse, stream and enjoy content from [AT&T's] data sponsors without impacting their monthly data plan allowance."<sup>134</sup> Sponsored Data operates just like a toll free call from a 1-800 number. The sponsored content is available to all AT&T customers and is delivered at the same speed as non-sponsored content.

However, AT&T is not "offering" "telecommunications" through its Sponsored Data service. AT&T enables edge providers the ability to "offer" AT&T customers access to their content without the customers incurring data charges.<sup>135</sup> Even if AT&T could be described as the offeror in this circumstance, AT&T would only be offering edge providers a billing arrangement; it is not selling "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information

---

<sup>133</sup> NPRM ¶ 37.

<sup>134</sup> AT&T, Sponsored Data, *available at* [http://www.att.com/att/sponsoreddata/en/index.html#fbid=Z\\_ebMJUaTid](http://www.att.com/att/sponsoreddata/en/index.html#fbid=Z_ebMJUaTid) (last visited June 27, 2014).

<sup>135</sup> Marguerite Reardon, *AT&T says 'sponsored data' does not violate Net neutrality*, CNET (Jan. 9, 2014), *available at* <http://www.cnet.com/news/at-t-says-sponsored-data-does-not-violate-net-neutrality/>.

as sent and received.”<sup>136</sup> AT&T certainly cannot be described as offering “access or prioritized access to the broadband provider’s end users” because edge providers could still access AT&T customers , and non-sponsored content is delivered at the same speed as sponsored content.<sup>137</sup>

Without some evidentiary basis to find that the “sender side” communications discussed above, or any other type of service, would constitute the “offering of telecommunications for a fee,” the Commission could not lawfully classify these offerings as a “telecommunications service.”<sup>138</sup>

3. Any Theoretical Service That Broadband Providers May Offer To Edge Providers Would Not Be Offered On A Common Carriage Basis And Broadband Providers Could Not Be Compelled To Do So.

Even if the Commission could identify an offering of telecommunications for a fee to an edge provider when a broadband provider’s end user requests content from the edge provider, broadband providers would be unlikely to offer any such service “directly to the public, or to such classes of users as to be effectively available directly to the public.”<sup>139</sup> The phrase “directly to the public” incorporates the common law requirement that a common carrier offer service to

---

<sup>136</sup> 47 U.S.C. § 153(50).

<sup>137</sup> NPRM ¶ 44.

<sup>138</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 643-44 (D.C. Cir. 1976) (“*NARUC I*”) (“We therefore conclude that nothing in the record indicates any significant likelihood that SMRS will hold themselves out indifferently to serve the user public. While it is undisputed that they would be permitted so to hold themselves out if they desired, that is not sufficient basis for imposing the burdens that go with common carrier status. In so holding, we do not foreclose the possibility of future challenge to the Commission’s classification, should the actual operations of SMRS appear to bring them within the common carrier definition.”).

<sup>139</sup> 47 U.S.C. § 153(53).

the public on an indifferent basis.<sup>140</sup> By contrast, a private carrier will “make individualized decisions, in particular cases, whether and on what terms to deal.”<sup>141</sup>

There is no reason to believe that broadband providers would hold themselves out as willing to offer the same service to all edge providers on the same terms, even if a broadband provider decided to make such an offering available. Assuming a market for such edge provider services eventually develops, broadband providers presumably would offer different levels of service at varying prices based on different facts, given the significant variations in the number and types of edge providers. For example, a broadband provider would not offer a musician who may post videos on YouTube or a blogger who includes videos with his postings the same quality of service levels, service capacity, or network diversity that may be made available to Netflix. Without evidence that such a service would be held out to the public on an indiscriminate basis, the Commission could not lawfully classify service to edge providers as a “telecommunications service.”<sup>142</sup>

The Commission has suggested that it could “compel” service to be offered on a “common carrier basis” if the public interest requires it.<sup>143</sup> However, the courts have rejected

---

<sup>140</sup> *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999) (explaining that the requirement that a “telecommunications carrier” offer service ‘available directly to the public’ to be essentially a way of restating the definition of common carrier”); *U.S. Telecom Ass’n*, 295 F.3d at 1328 (explaining that “the term ‘telecommunications carrier’ includes only carriers that offer telecommunications on a ‘common carrier’ basis”); *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8521, ¶ 13 (1997) (“The legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services.”); House Conference Report No. 104-458, 115, 1996 U.S.C.C.A.N. 10, 126 (“The term ‘telecommunications service’ is defined as those services and facilities offered on a ‘common carrier’ basis.”).

<sup>141</sup> *NARUC I*, 525 F.2d at 641.

<sup>142</sup> *Id.* at 643-44.

<sup>143</sup> NPRM ¶ 150 & n.306.

“unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve.”<sup>144</sup> “A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”<sup>145</sup> Thus, to the extent a broadband provider does not offer service to edge providers on an indiscriminate basis, the Commission could not require that the broadband provider do so.

Even assuming the Commission could lawfully compel common carriage (which is not the case), the decision to impose common carrier status turns on whether the carrier “has sufficient market power.”<sup>146</sup> The Commission declined to find that broadband providers have substantial market power in the *Open Internet Order*,<sup>147</sup> and Judge Silberman doubted the Commission could make that finding.<sup>148</sup> Indeed, given the current state of the broadband marketplace today, the Commission could not find that broadband providers have the ability “to charge monopoly rents.”<sup>149</sup>

4. The Commission Could Not Ban Paid Prioritization Arrangements With Edge Providers Even If Any Service Offered By Broadband Providers Were Classified As A Title II “Telecommunications Service.”

To the extent the goal of the Title II exercise is to ban paid prioritization arrangements between broadband providers and edge providers, Title II would not accomplish this goal, even assuming any service that broadband providers may offer to edge providers can properly be

---

<sup>144</sup> *NARUC I*, 525 F.2d at 644.

<sup>145</sup> *Id.*

<sup>146</sup> *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21588-589, ¶ 9 (1998).

<sup>147</sup> *Open Internet Order* ¶ 32 & n. 87 (“Because broadband providers have the ability to act as gatekeepers even in the absence of market power with respect to end users, we need not conduct a market power analysis.”).

<sup>148</sup> *Verizon*, 740 F.3d at 664 (Silberman, J., dissenting).

<sup>149</sup> *AT&T Submarine Systems, Inc.* ¶ 9.

classified as a “telecommunications service.”<sup>150</sup> Section 202(a) has never been interpreted to prohibit carriers from engaging in all forms of discrimination (even assuming paid prioritization could be characterized as discrimination). As the D.C. Circuit explained in *Verizon*, “the Communications Act bars common carriers from engaging in ‘unjust or unreasonable discrimination,’ not all discrimination.”<sup>151</sup> “[B]oth the Commission and the courts have consistently interpreted that provision to allow carriers to charge different prices for different services.”<sup>152</sup>

---

<sup>150</sup> NPRM at 94 (Dissenting Statement of Commissioner Ajit Pai).

<sup>151</sup> *Verizon*, 740 F.3d at 657 (quoting 47 U.S.C. § 202); *Competitive Telecomms. Ass’n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) (“[S]o far as ‘unreasonable discrimination’ is concerned, an apple does not have to be priced the same as an orange.”); *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003).

<sup>152</sup> NPRM at 94 (Dissenting Statement of Commissioner Ajit Pai) (citing *Development of Operational Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, Second Report and Order, 15 FCC Rcd 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, “prima facie lawful” under section 202); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 14221 (1999) (granting dominant carriers pricing flexibility or special access services, allowing both higher charges for faster connections as well as individualized pricing and customers discounts); *GTE Telephone Operating Companies Tariff F.C.C. No. 1 et al.*, Transmittal Nos. 900, 102, 519, 621, 9 FCC Rcd 5758 (Common Carrier Bur. 1994) (approving tariffs for Government Emergency Telephone Service (GETS), a prioritized telephone service, and additional charges therefor); *see also, e.g., Interstate Commerce Commission v. Baltimore & O.R. Co.*, 145 U.S. 263, 283-84 (1892) (noting that common carriers are “only bound to give the same terms to all persons alike under the same conditions and circumstances,” and “any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge”).

For example, in *NARUC II*, the D.C. Circuit recognized that common carriers can engage in “certain types of priority treatment.”<sup>153</sup> As the court explained, “the Commission’s acceptance, or even requirement, of certain types of priority treatment . . . does not detract from the common carrier status of those subject to it.”<sup>154</sup> The Commission also had approved “preferential rate structures,” which the court found to be a form of “price discrimination” that was “fundamentally consistent with the essence of the common carrier concept.”<sup>155</sup>

Consistent with this precedent, there is nothing inherently “unjust or unreasonable” about prioritizing certain traffic over communications networks. Indeed, as discussed above, paid arrangements including prioritization arrangements could bring innovative new services and content to consumers at lower prices. Under Title II, as interpreted by the D.C. Circuit, broadband providers would be permitted to offer edge providers different tiers of service for access to their broadband customers. So long as the faster tier of service was made available to all similarly situated edge providers, these arrangements would not run afoul of Title II. For the Commission to declare all such arrangements to be “unjust or unreasonable” would run counter to a century of common carrier law, which has never viewed the offering of different tiers of service at different prices to be inherently unjust or unreasonable.

Furthermore, targeting arrangements with broadband providers under Title II ignores the broader nature of competition across the Internet ecosystem today. Providers at all different levels – broadband providers, operating system developers, app developers, device developers, online service providers, among others – all increasingly compete (and cooperate). Furthermore,

---

<sup>153</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) (“*NARUC II*”).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

many of these other players – from traditional search engines like Google to social media sites like Facebook – have at least as much ability to affect the consumer experience by prioritizing particular content. Under the circumstances, it would be inconsistent with Title II to find paid prioritization arrangements offered by broadband providers to be “unjust and unreasonable” when others within the Internet ecosystem have the same incentives and abilities to engage in similar conduct.

**V. THE COMMISSION HAS SUFFICIENT AUTHORITY TO PRESERVE THE OPEN INTERNET WITHOUT THE NEED FOR TITLE II REGULATION.**

The Commission need not go down the legally uncertain Title II path in order to adopt open Internet rules. Two U.S. Courts of Appeals have endorsed the Commission’s authority under Section 706,<sup>156</sup> and the D.C. Circuit, in particular, has provided the Commission with a “blueprint” for adopting lawful open Internet rules.<sup>157</sup> Consistent with this precedent, any open Internet rules the Commission decides to adopt should be predicated on Section 706 of the 1996 Act and Title III of the Communications Act rather than Title II.

---

<sup>156</sup> NPRM ¶¶ 142-43; *see also* Lawrence J. Spiwak, *What Are the Bounds of the FCC’s Authority Over Broadband Service Providers? A Review of the Recent Case Law*, Phoenix Center Policy Bulletin No. 35 (June 2014), *available at* <http://www.phoenix-center.org/PolicyBulletin/PCPB35Final.pdf> (concluding that “the Commission has ample authority over Broadband Service Providers going forward under the current legal regime and, as such, reclassification of broadband Internet access as a Title II common carrier telecommunications service is unwarranted”).

<sup>157</sup> NPRM ¶ 4.

**A. Two Courts Have Construed Section 706 To Provide The Commission With Authority To Adopt Open Internet Rules That Promote Broadband Deployment.**

Both the D.C. Circuit and the Tenth Circuit have held that Section 706 authorizes the Commission to adopt rules to promote broadband deployment.<sup>158</sup> In particular, Section 706(a) instructs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>159</sup> Congress has defined “advanced telecommunications capability” to include “broadband telecommunications capability.”<sup>160</sup>

In addition, Section 706(b) provides that the Commission “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market” if the Commission finds that “advanced telecommunications capability” is not “being deployed to all Americans in a reasonable and timely fashion.”<sup>161</sup> The Commission found in 2010 and 2012 that broadband Internet access services are not being deployed “in a reasonable and timely fashion.”<sup>162</sup>

---

<sup>158</sup> *Verizon*, 740 F.3d at 635 (holding that Section 706 “furnishes the Commission with the requisite affirmative authority to adopt the regulations”); *In re FCC 11-161*, No. 11-9900, 2014 WL 2142106, at \*20-21 (10th Cir. May 23, 2014).

<sup>159</sup> 47 U.S.C. § 1302(a).

<sup>160</sup> *Id.* § 1302(d)(1).

<sup>161</sup> *Id.* § 1302(b).

<sup>162</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 25 FCC Rcd 9556 (2010) (“Sixth Broadband Deployment Report”); Eighth Broadband Deployment Report, 27 F.C.C.R. 10342.

The *Verizon* court concluded that Sections 706(a) and 706(b) contain delegations of authority and are not mere policy statements.<sup>163</sup> As the court explained, Section 706(a) can reasonably “be read to vest the Commission with actual authority to utilize such ‘regulating methods’ to meet th[e] stated goal” of preserving the open Internet.<sup>164</sup> With respect to Section 706(b), the court held that this provision could be reasonably interpreted to authorize the Commission “to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’”<sup>165</sup> The Tenth Circuit reached a similar conclusion with respect to Section 706(b).<sup>166</sup> The Commission “triggered” its Section 706(b) authority in the Sixth Broadband Deployment Report<sup>167</sup> and renewed that authority in 2012. Thus, two courts have recognized that Section 706 provides the Commission with the authority to adopt rules that would advance broadband deployment.

The text of the rules proposed in the NPRM appear to fit within the scope of the Commission’s Section 706 authority, as interpreted by the D.C. and Tenth Circuits.<sup>168</sup> As viewed by the D.C. Circuit, first, the proposed rules “fall within the Commission’s subject matter jurisdiction” because broadband Internet access service is a form of communication by wire or

---

<sup>163</sup> *Verizon*, 740 F.3d at 637-38.

<sup>164</sup> *Id.* at 637-38; *see also id.* at 639 (“section 706(a)’s legislative history suggests that Congress may have, somewhat presciently, viewed that provision as an affirmative grant of authority to the Commission whose existence would become necessary if other contemplated grants of statutory authority were for some reason unavailable.”).

<sup>165</sup> *Id.* at 641.

<sup>166</sup> *In re FCC 11-161*, 2014 WL 2142106, at \*21 (concluding “that the FCC reasonably construed section 706(b) as an additional source of support for its broadband requirement”).

<sup>167</sup> *Verizon*, 740 F.3d at 640-42.

<sup>168</sup> This is not the case with regard to certain proposals in the NPRM. As the Commission itself recognizes, for example, any “flat ban on pay-for-priority service” would be inconsistent with its authority under section 706. NPRM ¶ 138.

radio.<sup>169</sup> Second, the proposed rules are “designed to achieve a particular purpose: to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”<sup>170</sup> The proposed rules, which mirror and build upon the rules in the *Open Internet Order*, “apply directly to broadband providers, the precise entities to which section 706 authority to encourage broadband deployment presumably extends, but also seek to promote the very goal that Congress explicitly sought to promote.”<sup>171</sup>

The D.C. Circuit has already upheld the Commission’s “virtuous cycle” rationale for preserving the open Internet. The court recognized that the Commission has authority to adopt rules that “protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband.”<sup>172</sup> Thus, by preventing broadband providers from blocking under certain circumstances or engaging in commercially unreasonable practices, the Commission presumably could find that the rules will “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,”<sup>173</sup> and “accelerate deployment of such capability,”<sup>174</sup> by removing “barriers to infrastructure investment” and promoting “competition.”<sup>175</sup>

---

<sup>169</sup> *Id.* at 640 (identifying this limitation on the Commission’s Section 706(a) authority); *see id.* at 641 (explaining that Section 706(b) is constrained “by the boundaries of the Commission’s subject matter jurisdiction”); *Comcast*, 600 F.3d at 646 (noting that Comcast conceded that its “Internet service qualifies as ‘interstate and foreign communication by wire’”).

<sup>170</sup> *Verizon*, 740 F.3d at 640; *see also id.* at 641 (explaining that Section 706(b) is constrained by “the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment”).

<sup>171</sup> *Id.* at 643; *see* NPRM ¶ 143.

<sup>172</sup> *Verizon*, 740 F.3d at 642.

<sup>173</sup> 47 U.S.C. § 1302(a).

In sum, as construed by the D.C. Circuit, Section 706 would provide the Commission with an adequate statutory basis to adopt the proposed rules. As a result, no need exists for the Commission to rely on Title II as “backstop authority.”<sup>176</sup>

**B. The Proposed Rules, On Their Face, Do Not Appear To Constitute Per Se Common Carriage Under D.C. Circuit Precedent.**

The text of the proposed rules do not appear to treat broadband providers as common carriers under the reasoning in *Cellco* and *Verizon*.<sup>177</sup> To be treated as a common carrier in violation of the Act,<sup>178</sup> broadband providers would be “forced to offer service indiscriminately and on general terms.”<sup>179</sup> In *Cellco*, the D.C. Circuit held that the data roaming rule did not treat mobile data providers as common carriers because “it left substantial room for individualized

---

(footnote cont’d.)

<sup>174</sup> *Id.* § 1302(b).

<sup>175</sup> *Id.* § 1302(a), (b).

<sup>176</sup> *Id.* ¶ 150.

<sup>177</sup> The same cannot be said about several proposals on which comment is sought in the NPRM, such as any requirement that broadband providers provide a minimum level of service for free to edge providers and a flat ban on pay-for-priority services. NPRM ¶¶ 96 & 100-104. These proposals amount to per se common carriage, which would violate Section 706 under the *Verizon* court’s reasoning.

<sup>178</sup> *Verizon*, 740 F.3d at 650 (“We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.”); 47 U.S.C. § 153(51); 47 U.S.C. § 332(c)(2).

<sup>179</sup> *Cellco*, 700 F.3d at 547; *see also Verizon*, 740 F.3d at 651 (identifying “the basic characteristic that distinguishes common carriers from ‘private’ carriers—i.e., entities that are not common carriers—as ‘[t]he common law requirement of holding oneself out to serve the public indiscriminately’” (quoting *NARUC I*, 525 F.2d at 642)); *id.* (explaining that “the primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently.” (internal quotation marks omitted) (quoting *NARUC II*, 533 F.2d at 608)).

bargaining and discrimination in terms”<sup>180</sup> under a “commercially reasonable” standard. By contrast, the *Verizon* court invalidated the *Open Internet Order*’s “no blocking” and “no unreasonable discrimination” rules because these rules compelled broadband providers to carry all edge provider traffic on an indifferent basis without any room for individualized negotiations.<sup>181</sup>

The proposed rules, by contrast – if adopted in a way that would leave room for broadband providers to negotiate individualized arrangements with edge providers – would comply with *Verizon*. For example, the *Verizon* court invalidated the *Open Internet Order*’s no blocking rule because the Commission had effectively imposed a mandated minimum level of service for free and refused to permit broadband providers to engage in individualized negotiations with edge providers.<sup>182</sup>

However, the Commission should expressly state, as it did in the *Data Roaming Order*, that broadband providers may negotiate commercial arrangements with edge providers on “individualized circumstances without having to hold themselves out to serve all comers

---

<sup>180</sup> *Cellco*, 700 F.3d at 548. The rule “expressly permit[ted] providers to adapt roaming agreements to ‘individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.’” *Id.*

<sup>181</sup> *Verizon*, 740 F.3d at 655-56 (“In requiring broadband providers to serve all edge providers without ‘unreasonable discrimination,’ this rule by its very terms compels those providers to hold themselves out “to serve the public indiscriminately.” (quoting *NARUC I*, 525 F.2d at 642)); *id.* at 658 (“In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.”).

<sup>182</sup> *Verizon*, 740 F.3d at 658 (“Instead, it makes no distinction at all between the anti-discrimination and anti-blocking rules, seeking to justify both types of rules with explanations that, as we have explained, are patently insufficient.”); NPRM ¶ 92.

indiscriminately on the same or standardized terms.”<sup>183</sup> And, the Commission should not impose a minimum level of service for free obligation or extend other rights to edge providers under the no blocking rule, as such requirements would impose common carriage under the rationale of *Verizon*. With these modifications, the proposed no blocking rule, on its face, would not relegate broadband providers to common carrier status.

Likewise, the former “no unreasonable discrimination” rule treated broadband providers as common carriers because it mirrored the Title II prohibition on “unjust or unreasonable” practices.<sup>184</sup> By contrast, the proposed rule prohibiting commercially unreasonable practices by fixed broadband providers adopts the “commercially reasonable” standard upheld in *Cellco* and maintains flexibility through several factors.<sup>185</sup> “[T]he ‘commercially reasonable’ standard . . . ensures providers more freedom from agency intervention than the ‘just and reasonable’ standard applicable to common carriers.”<sup>186</sup> So long as the final rule allows sufficient room for individualized bargaining between edge providers and broadband providers, a flexible ban on

---

<sup>183</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411, 5433, ¶ 45 (2011) (“*Data Roaming Order*”).

<sup>184</sup> *Id.* ¶ 114; *Verizon*, 740 F.3d at 656 (“Significantly for our purposes, the Commission never argues that the *Open Internet Order*’s no unreasonable discrimination standard somehow differs from the nondiscrimination standard applied to common carriers generally—the argument that salvaged the data roaming requirements in *Cellco*.”); *id.* at 657 (“Unlike the data roaming requirement at issue in *Cellco*, which set forth a ‘commercially reasonable’ standard the language of the *Open Internet Order*’s anti-discrimination rule mirrors, almost precisely, section 202’s language establishing the basic common carrier obligation not to ‘make any unjust or unreasonable discrimination.’” (citing *Cellco*, 700 F.3d at 537; 47 U.S.C. § 202)).

<sup>185</sup> NPRM ¶¶ 110-11, 115; *cf. Verizon*, 740 F.3d at 657 (“Moreover, unlike the data roaming rule in *Cellco*—which spelled out ‘sixteen different factors plus a catchall . . . that the Commission must take into account in evaluating whether a proffered roaming agreement is commercially reasonable,’ thus building into the standard ‘considerable flexibility,’—the *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains flexible.” (citing *Cellco*, 700 F.3d at 548)).

<sup>186</sup> *Cellco*, 700 F.3d at 548.

“commercially unreasonable practices” would not, on its face, treat broadband providers as common carriers per se.<sup>187</sup>

**C. The Commission Should Ensure That Its Rules Do Not Amount To Common Carriage In Application.**

The Commission should ensure that the proposed rules, which on their face purport to allow sufficient flexibility, do not become inflexible in practice. The D.C. Circuit explained in *Cellco* that the data roaming rule, which regulated such arrangements under the same “commercial reasonableness” standard, could end up relegating mobile data providers to common carrier status if the standard were applied too strictly in particular cases.<sup>188</sup> In the NPRM, the Commission prudently recognized that it will have to cautiously apply the proposed rules in specific cases so as not to run afoul of the common carrier bans.<sup>189</sup>

---

<sup>187</sup> NPRM ¶ 116; *see also Cellco*, 700 F.3d at 548 (“The Commission has thus built into the “commercially reasonable” standard considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market.”).

<sup>188</sup> *Id.* at 548-49 (“[E]ven if the rule sounds different from common carriage regulation, the more permissive language could, as applied, turn out to be no more than “smoke and mirrors.” . . . For instance, “commercially reasonable,” as applied by the Commission, may in practice turn out to be no different from ‘just and reasonable.’ . . . That said, should the Commission apply the data roaming rule so as to treat Verizon as a common carrier, Verizon is free to return to court with an “as applied” challenge. In implementing the rule and resolving disputes that arise in the negotiation of roaming agreements, the Commission would thus do well to ensure that the discretion carved out in the rule’s text remains carved out in fact.”); *see also Verizon*, 740 F.3d at 652 (explaining that the *Cellco* court “cautioned that were the Commission to apply the ‘commercially reasonable’ standard in a restrictive manner, essentially elevating it to the traditional common carrier ‘just and reasonable’ standard, the rule might impose obligations that amounted to common carriage per se, a claim that could be brought in an ‘as applied’ challenge” (citing 47 U.S.C. § 201(b))).

<sup>189</sup> NPRM ¶ 115 n. 240 (“The *Cellco* court turned aside a facial challenge to the data roaming rules, while reminding the Commission that it could consider ‘as applied’ challenges if the Commission were to apply its rules in a manner that, in fact, relegated network providers to common carrier status. We remain cognizant of the Court’s admonition in that circumstance, and in this one.” (citation omitted)).

To avoid that possibility, the Commission should modify the proposed rules in two respects. First, the Commission should affirmatively find that the “no commercially unreasonable practices” rule expressly permits arrangements between broadband providers and edge providers, including paid prioritization arrangements, on individual terms, to the extent commercial reasonable.<sup>190</sup> Adoption of an explicit or effective ban on such arrangements could not be squared with *Verizon*, which requires the Commission to allow broadband providers to engage in individualized negotiations with edge providers. An explicit or effective ban on all such commercial arrangements, including pay-for-priority services, would, as the Commission effectively did in the *Open Internet Order*,<sup>191</sup> compel broadband providers to hold themselves out as being willing to carry all Internet traffic to end users on an indifferent basis.<sup>192</sup> Indeed, the Commission candidly concedes “that section 706 could not be used” to ban paid prioritization (although, as noted above, Title II could not be used to accomplish this purpose either).<sup>193</sup> Adopting such an interpretation could not be sustained under *Southwestern Cable* and would violate the D.C. Circuit’s mandate in *Verizon*.

Second, the Commission should discard “good faith negotiation” as one of the factors to judge commercial reasonableness.<sup>194</sup> This factor could too easily be interpreted as compelling broadband providers to negotiate with edge providers; however, the essential component of

---

<sup>190</sup> *Id.* ¶¶ 89, 96, 138.

<sup>191</sup> *Open Internet Order* ¶ 76.

<sup>192</sup> *Verizon*, 740 F.3d at 657 (“If the Commission will likely bar broadband providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of \$0, we see no room at all for ‘individualized bargaining.’”).

<sup>193</sup> NPRM. ¶ 138.

<sup>194</sup> *Id.* ¶ 137.

private carriage is the ability of a carrier to refuse to negotiate altogether—to say no.<sup>195</sup> If the Commission adopts this factor, broadband providers will be compelled to negotiate carriage terms when they should be free to turn away edge providers with whom they do not wish to deal. And, if the Commission were to sanction a broadband provider for failing to negotiate in good faith, it would necessarily have to find that the provider failed to perform a duty that only a common carrier possesses. Sanctioning a broadband provider for this conduct could not be sustained in an as-applied challenge to the rule on appeal.

**D. The Commission Should Not Regulate The Internet Beyond Broadband Internet Access Services.**

The *Verizon* court upheld the Commission’s authority under Section 706 to regulate the mass market Internet access service that broadband providers offer to their end user customers over their last mile networks.<sup>196</sup> The court did not address the scope of the Commission’s authority to regulate “beyond ‘the limits of a broadband provider’s control over the transmission of data to or from its broadband customers’” because the open Internet rules “applied to a broadband provider’s use of its own network but did not apply the no-blocking or unreasonable discrimination rules to the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection.”<sup>197</sup>

---

<sup>195</sup> *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739-40 (5th Cir. 1960).

<sup>196</sup> *Id.* ¶ 55 (“The *Verizon* decision upheld the Commission’s regulate of broadband Internet access service pursuant to section 706 and did not disturb this aspect of the *Open Internet Order*.”).

<sup>197</sup> *Id.* ¶ 59 (quoting *Open Internet Order* ¶ 47, n.150); see also *Open Internet Order* ¶ 47 (“Nor does broadband Internet access service include virtual private network services, content delivery network services, multichannel video programming services, hosting or data storage services, or Internet backbone services (if those services are separate from broadband Internet access service). These services typically are not mass market services and/or do not provide the

The *Verizon* court did not endorse – expressly or implicitly – any attempt by the Commission to regulate the Internet backbone. Since the inception of the commercial Internet, both peering arrangements and transit arrangements have been privately negotiated and have never been subject to regulation or nondiscrimination obligations. Indeed, the FCC has summarized the state of the Internet backbone as follows: “[I]nterconnection between Internet backbone providers has never been subject to direct government regulation, and settlement-free peering and degradation-free transit arrangements have thrived.”<sup>198</sup> There is no reason for the Commission to revisit this determination or to test the boundaries of its legal authority by seeking to apply the proposed open Internet rules to the Internet backbone.

## VI. CONCLUSION

USTelecom’s member companies remain committed to an open Internet and support the competitive market structure and balance among the broadband, computing, content and applications sectors that have safeguarded an open and dynamic Internet for years. The nation’s remarkable progress under the current regulatory framework has resulted in unprecedented broadband deployment and adoption levels, coupled with increased broadband speeds and greater competition in the broadband marketplace. Those calling for last century regulation of broadband Internet access face a high bar in demonstrating the public interest benefits (and in overcoming the legal hurdles) in changing a regulatory paradigm that has been so successful for consumers and the United States economy. Because they cannot meet that burden, the

---

*(footnote cont’d.)*

capability to transmit data to and receive data from all or substantially all Internet endpoints.”); *id.* at n.150 (“We also note that our rules apply only as far as the limits of a broadband provider’s control over the transmission of data to or from its broadband customers.”).

<sup>198</sup> Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 133 (2005); Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶ 132 (2005).

Commission should reject proposals to impose burdensome Title II regulation on broadband services, and any open Internet rules that the Commission may adopt should be predicated on Section 706.

Respectfully submitted,

**UNITED STATES TELECOM  
ASSOCIATION**

By: /s/ Jonathan Banks

Jonathan Banks  
607 14th Street, NW  
Suite 400  
Washington, D.C. 20005  
(202) 326-7300

Dated: July 16, 2014