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

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
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COMMENTS OF
THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These comments are filed in response to the Commission's *Notice* proposing new rules to regulate the practices of broadband Internet service providers (ISPs).[1] The stated goal of the proceeding is to "find the best approach to protecting and promoting Internet openness."[2] At the outset, it must be emphasized that the "best approach" is not a heavy-handed regulatory approach. All things considered, the best approach almost certainly is a free market-oriented approach.

As the Commission acknowledges in its *Notice*, under the current regulatory regime, which for most of the past dozen years has not imposed legally enforceable rules on broadband providers, the Internet has grown into "the preeminent 21st century engine for innovation and the

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[*] These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Adjunct Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

[1] Notice of Proposed Rulemaking ("*Notice*"), In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28 (May 15, 2014), *available at* http://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm.

[2] *Id.* at ¶ 4.

economic and social benefits that follow."[3] Today, there is no evidence of marketplace failure or demonstrable consumer harm in the Internet ecosystem, including the Internet service provider market segment. Instead, there is competition among Internet service providers employing various technological platforms. And investment in network facilities is strong,[4] and innovative business models are thriving.[5] If new net neutrality mandates are adopted,[6] there is a substantial risk that this new regulatory action will disrupt, or at least inhibit, the innovation and investment that has characterized the Internet ecosystem for the past decade or so. This, in turn, and most significantly, will harm consumer welfare.

Aside from the risks to consumer welfare associated with ill-considered Internet regulatory policies, the proposals in the *Notice* are plagued by legal risks associated with deficiencies in the claimed authority on which the rules would be based. The Commission has

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[3] *Id.* at ¶ 1.

[4] Anna Maria Kovacs, "The Internet is Not a Rotary Phone," Recode.com, (May 12, 2014), *available at* http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/, ("The FCC's rejection of Title II regulation for broadband in 2005, and its move away from unbundling obligations and rate regulation for IP services, encouraged incumbent phone companies to invest increasing amounts in broadband and IP. Annual broadband investment by phone companies has more than doubled since 2006, culminating in roughly $18 billion in broadband investment in 2013 (out of a total of $26 billion). The cable industry, which has never been subject to Title II, spent nearly $14 billion on its networks in 2013."). "Four Years of Broadband Growth," Office of Science and Technology Policy & The National Economic Council (June 2013), *available at* http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf ("Annual investment in U.S. wireless networks grew more than 40% between 2009 and 2012, from $21 billion to $30 billion, and exceeds investment by the major oil and gas or auto companies; investment in European wireless networks remained flat during this time period, while wireless investment in Asia (including China) rose only 4%" and "High-speed wired and wireless networks place the United States at the center of a digital economy that is one of the brightest parts of our short-term recovery and long-term competitiveness."). Telecommunications companies are leaders in domestic capital investments. AT&T and Verizon ranked in the top five "U.S. Investment Heroes of 2013," together investing $34.5 billion last year. The telecommunications and cable sector was responsible for $50.5 billion of investment, comprising more than one-third of total capital investments in the U.S. economy last year. Diana G. Carew and Michael Mandel, "U.S. Investment Heroes of 2013: The Companies Betting on America's Future," Progressive Policy Institute (September 9, 2013), *available at* http://www.progressivepolicy.org/2013/09/u-s-investment-heroes-of-2013-the-companies-betting-on-americas-future/.

[5] *See, e.g.*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, MB Docket No. 12-203, at ¶ 354 (released July 22, 2013) ("Today the [video device] marketplace is more dynamic than it has ever been offering consumers an unprecedented and growing list of choices to access video content"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf.

[6] These comments are focused principally on the proposed "no-blocking" and "non-discrimination" prohibitions. We do not oppose a properly formulated transparency regulation that is not unduly burdensome and costly in relation to reasonable disclosure objectives. So, when these comments refer to net neutrality regulations, we have in mind the non-discrimination and no-blocking mandates.

already suffered two judicial losses in attempting to regulate Internet services. In those cases, the D.C. Circuit confirmed that the Commission exceeded its statutory authority by attempting to dictate the practices of broadband Internet service providers. Especially with respect to the Commission's alternative proposal to classify ISPs as common carriers under Title II of the Communications Act, it is unlikely, despite some claims to the contrary, that the Commission could effectuate such an about-face switcheroo without substantial risk of suffering yet another court defeat.[7]

Putting aside the substantial litigation risks – and the resulting lengthy uncertainty that will accompany any actual litigation – as a matter of policy the Commission should not adopt any new regulations. But assuming for the sake of argument that a Commission majority ultimately determines that it is going to adopt some form of new rules, the worst approach the Commission could take would be to classify broadband providers as common carriers under Title II. Title II, taken almost verbatim in essential respects from the Interstate Commerce Act of 1887, is designed to regulate service providers operating in a monopolistic marketplace environment. This was true with respect to the railroads regulated at the time of the passage of the Interstate Commerce Act, and it is true with regard to the telephone companies regulated when the Communications Act in 1934 was passed. At its core, Title II is intended to allow the Commission, rather than the service provider, to determine the rates, terms, and conditions of service. Title II regulation may have been appropriate at a time when Ma Bell possessed monopolistic power but this regulatory paradigm is particularly ill-suited to almost all of today's dynamic, competitive communications marketplace.

[7] This is not to say that, even under the D.C. Circuit's *Verizon v. FCC* decision, it will be at all easy for the agency, acting under the color of Section 706, to adopt net neutrality mandates that pass judicial muster. *See* 740 F. 3d 623 (D.C. Cir. 2014).

Only 5% of U.S. households in 2012 relied solely on Plain Old Telephone Service ("POTS") for their voice service, while 38% of households even then were wireless only.[8] And the number of consumer abandoning their landline phones continues to increase. As Anna Maria Kovacs stated in a recent study, "there are things regulators do well, but innovation is not one of them."[9] This is the reason why lightly regulated wireless and broadband services are thriving, while POTS service, still subject to public utility-like regulation, is declining rapidly.

To put it simply, Title II regulation, which is essentially public utility regulation like that applied to the electric company and the railroads before even they were deregulated, would put Internet providers in an overly rigid regulatory straight-jacket. When Commission Chairman Bill Kennard, a Democrat appointed by President Clinton, was beseeched to apply net neutrality-like "open access" regulations to cable operators, he rightly responded: "I don't want to dump the whole morass of Title II regulation on the cable pipe."[10]

At the Free State Foundation's seminar on June 25, 2014, Senator John Thune put the argument against Title II regulation very well when he declared:

> Another reason I oppose Title II reclassification is because regulating an industry as if it were a public utility monopoly is the surest way to guarantee the industry will become a monopoly. As I discussed earlier, the evidence in the marketplace makes it clear that our broadband market is dynamic and competitive-not at all like the early days of Ma Bell that Title II was intended for. Public utility regulation traditionally is intended to do two things -- protect the public from the harms of a monopoly, while simultaneously protecting that monopoly. Since the broadband market is demonstrably not a monopoly, regulating it as a public utility

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[8] Anna-Maria Kovacs, "Telecommunications Competition: The Infrastructure-investment Race," Internet Innovation Alliance (October 8, 2013), *available at* http://internetinnovation.org/images/misc_content/study-telecommunications-competition-09072013.pdf. The number of wireless-only households increased to 39.4% by June 2013. Stephen J. Blumberg and Julian V. Luke, "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January – June 2013," (December 20, 2013), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf.

[9] Kovacs, "The Internet is Not a Rotary Phone."

[10] "Consumer Choice Through Competition," Remarks by William E. Kennard, Chairman, FCC, at the National Association of Telecommunications Officers and Advisors, 19th Annual Conference, Atlanta, GA, September 17, 1999, at 5; *see also* Randolph May, "Communications Law and Policy in the Digital Age: The Next Five Years," *FSF Blog* (October 9, 2011), http://freestatefoundation.blogspot.com/search?q=bill+kennard.

> would only make the industry less competitive and less innovative. Or, in other words, make it more like a monopoly.[11]

Again, it is our view that not only should the Commission not classify ISPs as common carriers under Title II but that, absent convincing evidence of present market failure and consumer harm, there is no need for the Commission to adopt any new net neutrality mandates at this time. But if a majority of the Commission decides otherwise, it should do no more than adopt the "commercially reasonable" standard approach as proposed in the *Notice*.[12] If the Commission adopts this approach not to interfere with ISP practices that are "commercially reasonable," it must implement the standard in a way that, in reality, steers well clear of converting the ISPs into common carriers.

The D.C. Circuit's *Cellco Partnership v. FCC* (2012) decision upholding the *Data Roaming Order* (2011) provides a guidepost in this regard.[13] The key, not only to passing legal muster but, as importantly, to constituting sensible policy, is that the multi-factored commercial reasonableness standard must be implemented by the Commission in a sufficiently flexible way to allow ISPs to engage in individualized negotiations that are responsive to the differentiated demands of their customers in an evolving marketplace environment.

Moreover, in light of the technological dynamism and competitiveness of the marketplace, the Commission should adopt a presumption of commercial reasonableness running in favor of ISP practices.[14] A complainant should bear the burden of rebutting the presumption

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[11] Opening Keynote Address, Senator John Thune, Free State Foundation Seminar, June 25, 2014, *available at*: http://www.thune.senate.gov/public/index.cfm/press-releases?ID=5ac72da9-1954-48e7-b40a-a0dfaec54b4f.

[12] *Notice*, at ¶ 110 – 139.

[13] 700 F.3d 534, 548 (D.C. Cir. 2012)(upholding *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile-data services* ("*Data Roaming Order*"), WT Docket No. 05-265 (April 7, 2011)).

[14] *See* Randolph J. May, "FCC Should Not Presume It Can Regulate the Internet," *Washington Examiner*, June 18, 2014, available at: http://washingtonexaminer.com/fcc-should-not-presume-it-can-regulate-the-internet/article/2549911.

by clear and convincing evidence. Adopting of such a rebuttable presumption is necessary to prevent regulatory overreach in today's competitive environment.

In sum, absent convincing evidence market failure, the wisest course for the Commission is to defer to Congress to establish broadband policy. But if a Commission majority moves forward at all, as Senator Thune emphasized at the Free State Foundation's June 25 seminar, "policymakers must be careful to preserve the light-touch regime, first implemented by the Clinton Administration, that has been so successful in making us the digital envy of the world."[15]

II. Innovation and Competition Have Thrived Under the Light-Touch Approach to Broadband Services

Today's broadband Internet services market is the result-in-progress of successive waves of continuous and discontinuous innovation, backed by entrepreneurial investment. The last dozen years of this transformative market's history are marked by the emergence of new competitors, products, and services, and by convergence upon digital, IP-based technologies. This market directly generates tremendous value for consumers and supplies the infrastructure underlying the entire digital economy. Critically, the broadband Internet services market has grown into one of the most successful sectors in this digital economy – largely absent regulatory interference. But if adopted as proposed in the *Notice*, the Commission's new regulations risk undermining the critical processes of innovation and investment by injecting red tape-related restrictions and uncertainty into a market that has continuously advanced consumer welfare free from heavy-handed government oversight.

[15] Opening Keynote Address, Senator John Thune.

In today's broadband Internet services market, competition is fierce,[16] investment is strong,[17] and innovative technologies and business models are thriving.[18] According to data reported by NTIA,[19] as of June 30, 2012, ninety-eight percent of Americans have access to wired or wireless broadband at combined advertised download speeds of 3 Mbps or greater and upload speeds of 768 kbps or greater. Indeed, most consumers have a choice from among two fixed broadband ISPs and three or more mobile broadband ISPs. According to 2012 numbers contained in the Commission's last *Wireless Competition Report* (2013),[20] 91.6% of the U.S. population is served by three or more mobile wireless broadband providers and 82% are served by four or more providers. For consumers, technological innovation backed by investment and spurred by competition has resulted in faster speeds, more reliable services, wider capacity for data-rich services, including live online gaming and HD video streaming.

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[16] *See, e.g.*, Briand Fung, "This is What a Competitive Broadband Market Looks Like," *Washington Post* (February 11, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/02/11/this-is-what-a-competitive-broadband-market-looks-like/;

[17] Kovacs, "The Internet is Not a Rotary Phone" ("The FCC's rejection of Title II regulation for broadband in 2005, and its move away from unbundling obligations and rate regulation for IP services, encouraged incumbent phone companies to invest increasing amounts in broadband and IP. Annual broadband investment by phone companies has more than doubled since 2006, culminating in roughly $18 billion in broadband investment in 2013 (out of a total of $26 billion). The cable industry, which has never been subject to Title II, spent nearly $14 billion on its networks in 2013."). "Four Years of Broadband Growth," Office of Science and Technology Policy & The National Economic Council (June 2013), *available at* http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf ("Annual investment in U.S. wireless networks grew more than 40% between 2009 and 2012, from $21 billion to $30 billion, and exceeds investment by the major oil and gas or auto companies; investment in European wireless networks remained flat during this time period, while wireless investment in Asia (including China) rose only 4%" and "High-speed wired and wireless networks place the United States at the center of a digital economy that is one of the brightest parts of our short-term recovery and long-term competitiveness."). Telecommunications companies are leaders in domestic capital investments. AT&T and Verizon ranked in the top five "U.S. Investment Heroes of 2013," together investing $34.5 billion last year. The telecommunications and cable sector was responsible for $50.5 billion of investment, comprising more than one-third of total capital investments in the U.S. economy last year. Diana G. Carew and Michael Mandel, "U.S. Investment Heroes of 2013: The Companies Betting on America's Future," Progressive Policy Institute (September 9, 2013), *available at* http://www.progressivepolicy.org/2013/09/u-s-investment-heroes-of-2013-the-companies-betting-on-americas-future/.

[18] *See Fifteenth Report*, MB Docket No. 12-203, at ¶ 354 ("Today the [video device] marketplace is more dynamic than it has ever been offering consumers an unprecedented and growing list of choices to access video content").

[19] NTIA, *U.S. Broadband Availability: June 2010 – June 2012* (May 2013), *available at* http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf.

[20] Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Services, Including Commercial Mobile Services, *Sixteenth Report*, WT Docket No. 11-186 (released March 21, 2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-34A1.pdf.

The explosiveness of mobile broadband technologies and services exemplifies the vibrant and disruptive nature of the broadband Internet services market. The last two decades have seen wireless technology transition from analog to digital and undergo multi-generational network technology upgrades. More than 95% of Americans now have access to LTE, the fastest mobile broadband technology. This rapid rate of deployment owes to heavy capital investment. In 2013 alone, industry invested some $34 billion in infrastructure.[21] As a result, nearly two-thirds of U.S. consumers now connect to the Internet over mobile devices, up from zero in 2005.[22] Mobile broadband platforms have enabled the abrupt emergence of the thriving smartphone and tablet device market segments – along with the digital apps market segment that presents low barriers to entry and high value to consumers. Owing to investment in next-generation mobile networks, smartphones and tablets enable download speeds that average between 14 megabits per second and 19 Mbps, with peak speeds reaching as high as 57 Mbps.[23] Emergence of and convergence toward all-digital and all-IP services have drastically transformed consumer consumption of video content.

Broadband Internet services have furthered the ongoing, drastic reshaping of the competitive landscape for video services. For example, market analyses show that consumers are less inclined toward subscription video services as a standalone product, with demand shifting toward video services packaged with high-speed Internet access. While video subscriptions have dropped for the first time ever,[24] the same providers have gained broadband Internet subscribers. The largest cable and telephone providers in the US – representing about 93% of the market –

[21] Anna Maria Kovacs, "The Internet is Not a Rotary Phone."
[22] *See id*.
[23] *See id*.
[24] "Video Subscriptions Dropped for the First Time in 2013," Portada-online.com (March 19, 2014), http://www.portada-online.com/2014/03/19/according-to-snl-kagan-multichannel-video-subscription-count-dropped-by-251000-in-2013/#ixzz2wXFk8h00.

acquired over 2.7 million net additional high-speed Internet subscribers in 2012.[25]

Online video distributor (OVD) services have also emerged as potential close substitutes for MVPD services.[26] In their own right, OVDs services constitute an innovative product and source of value for broadband Internet subscribers. According to analyst estimates cited in the Commission's latest *Video Competition Report* (2013), at the end of 2011 there were 26.6 million households that accessed video content via an Internet-connected device, such as a game console, OVD set-top box, TV set, or Blu-ray player.[27] And the *Report* cited estimates that such households would grow to 41.6 million by years-end 2012.[28] The robust intermodal competition occurring in the markets for the delivery of video via broadband Internet services constitutes strong evidence that the marketplace is thriving, and has been, under a light-touch approach by the Commission.

III. The Commission Has Offered No Evidence of any Existing Problem to Justify its Proposed Regulations

A. Absent Demonstrable Evidence of Market Failure or Consumer Harm, The Commission Should Not Impose New Regulations on the Broadband Internet Services Market

Given the technological dynamism that characterizes the broadband Internet services market, any regulatory intrusion by the Commission should generally be predicated on the finding of demonstrated threat of an abuse of market power and a concomitant threat of consumer harm. The Commission should favor narrowly-tailored *ex post* remedial orders to

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[25] "2.7 Million Added Broadband From Top Cable and Telephone Companies in 2012: Press Release," LEICHTMAN RESEARCH GROUP (March 19, 2013), *available at* http://www.leichtmanresearch.com/press/031913release.html; *see also* 2.7 Million Added Broadband From Top Cable and Telephone Companies in 2012: Full Report," Leichtman Research Group (March 19, 2013), *available at* http://www.leichtmanresearch.com/press/031913release.pdf.
[26] *Fifteenth Report*, MB Docket 12-203, at ¶ 319 ("SNL Kagan reports that the availability of large libraries of archival content and the availability of new content, coupled with the availability of broadband and an increasing number of Internet-connected devices, has enabled OVD substitution.")
[27] *Id*. at ¶ 10.
[28] *Id.*

address practices that are alleged to be anticompetitive or abusive rather than undertaking broad *ex ante* proscriptions developed in generic rulemakings.

B. The Commission Has Failed to Provide Evidence of Market Failure or Consumer Harm

Tellingly, the Commission's *Notice* issued in 2010 cited only two instances of broadband ISP conduct deemed by the Commission to be at odds with the *Internet Policy Statement.*[29] And the evidentiary record that has accumulated since the Commission's 2010 rules were proposed is conspicuously devoid of evidence of market failure or consumer harm. Repeating the misguided approach of its 2010 rulemaking, the Commission failed to cite any evidence of market power or consumer harm in its *Notice*. Nor did its *Notice* even present evidence of *likely* anticompetitive concerns.

Instead, the *Notice*'s apparent position is that "the Commission need not engage in a market analysis to justify its rules."[30] The Commission thus proposes rules based only on hypothesized incentives for ISPs to discriminate among traffic and take advantage of edge providers and consumers.[31] But even this hypothesized claim is lacking on the merits.

In the lead-up to its *Open Internet Order* (2010), Free State Foundation Board of Academic Advisors member Glen O. Robinson explained that:

> The FCC's proposed [approach is not] about correcting monopoly power in any event. It is simply industrial policy disguised as consumer protection… The agency apparently believes that this protection is necessary in order to promote investment and innovation in content, though it concedes that this might also discourage investment and innovation in broadband service infrastructure. There is no substantial evidence that the former effect is more likely or more important

[29] Preserving the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 09-191, WT Docket No. 07-52, at ¶ 32 (released October 22, 2009), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.
[30] *Notice*, at ¶ 43.
[31] *Notice*, at ¶¶ 97 – 99.

than the latter. Unfortunately, evidence is not what fuels the Commission's engine on the net neutrality express.[32]

Regrettably, through its *Notice* the Commission is again disguising industry policy as consumer or edge provider protection.

C. The Commission Has Failed to Provide Evidence to Substantiate its Claims that Broadband ISPs Have Incentives to Restrict Internet Openness

Although the Commission's *Notice* asserts that "broadband providers have the incentive and ability to limit openness," the *Notice* fails to provide enough evidence to substantiate this statement.[33] By all appearances, the *Notice*'s assertion fails to even consider the existence or extent of *disincentives* that broadband ISPs have to restrict Internet openness, given competitive pressures from rivals or from loss of subscribers that would either diminish or outweigh any possible advantages such restrictiveness would bring.

Also, in its claiming that *Verizon v. FCC* (2014) supports its approach, the Commission overstates the D.C. Circuit's decision as to the conclusiveness of its assertions about broadband ISPs' incentives. The *Notice* states that the D.C. Circuit "concluded that … absent [open Internet] rules, broadband providers would have the incentive and ability to inhibit [broadband infrastructure] deployment."[34] However, the D.C. Circuit's decision only states the Court would not judicially second guess the Commission's assertions that ISPs "*could act*" or "*may be motivated to act*" in a discriminatory fashion.[35]

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[32] Glen O. Robinson, "The Middle Way to Internet Regulation," *Perspectives from FSF Scholars,* Vol. 5, No. 22 (September 13, 2010), at 4, *available at* http://freestatefoundation.org/images/The_Middle_Way_to_Internet_Regulation.pdf.
[33] *Notice*, at ¶¶ 6, 23, 39.
[34] *Notice*, at ¶ 23.
[35] 740 F. 3d at 645 (emphasis added).

IV. The Commission's Reliance on Section 706 to Support its Proposed Regulations is Misguided and Problematic

A. Regulation of Broadband Internet Services is Inconsistent with Section 706's Deregulatory Purposes

Based on a highly deferential standard of review, the D.C. Circuit found that the Commission's current understanding of Section 706(a) as a grant of authority represents a reasonable interpretation of the statute. As Free State Foundation scholars have previously explained, to read into the plainly deregulatory Section 706 a separate and positive grant of power to impose sweeping regulations on broadband network management practices is unsupportable according to the rules of statutory interpretation.[36] And from a commonsense perspective, such a reading of Section 706 is too counterintuitive to be correct. Without repeating that analysis in detail, the Free State Foundation reiterates that reliance on Section 706 as the basis for imposing regulations on broadband network management practices is contrary to that provision's deregulatory intent.

Indeed, Commissioner Michel O'Rielly has articulated, in persuasive fashion, the deregulatory context in which Section 706 was originally adopted.[37] As recounted by Commissioner O'Rielly, accepting a pro-regulatory re-interpretation of what Section 706 means making "some wild assumptions."[38]

> You would have to believe that a Republican Congress with a deregulatory mandate inserted very vague language into the statute to give complete authority over the Internet and broadband to the FCC, but then didn't tell a soul. It didn't show up in the writings, it didn't show up in the summaries. It didn't show up in

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[36] *See, e.g.*, Comments of the Free State Foundation, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion ("Section 706 Report"), GN Docket No. 11-121 (September 6, 2011) *available at* http://www.freestatefoundation.org/images/Section_706_Comments_090611_-_Final.pdf.

[37] The Free State Foundation's Sixth Annual Telecom Policy Conference, "A New FCC and a New Communications Act," Conversation with Commission Michael O'Rielly (March 18, 2018), *available at* http://www.freestatefoundation.org/images/March_18_2014_Agenda_030514.pdf; http://www.c-span.org/video/?318351-4/interview-michael-orielly.

[38] *Id*.

> any of the stories at the time.
>
> You would have to believe that the conference committee intended to codify Section 706 outside of the Communications Act, thereby separating it from the enforcement provisions of the Act, Title V, but somehow we still expected it to be enforced. [The Communications Act was not amended to include Section 706.]
>
> You would have to believe that the congressional committees that went on to do an extensive review of FCC authority afterwards, and even proposed legislation to rein it in, in terms of FCC reauthorization legislation, that they went through that effort, but at the same time they had provided a secret loophole to the Commission to regulate.
>
> You would have to believe that when Congress is having extensive debates over the ability to regulate, or the ability to give the Commission authority to regulate net neutrality, at the same time they had already given the Commission this authority.
>
> You would have to believe that when Congress did legislate in this space, and more particularly when they legislated on certain edge providers in certain narrow instances mostly related to public safety, you would have to believe that they went through that extensive process, and then it didn't matter, the fact that they had already given the Commission that complete authority under Section 706.

Commissioner O'Rielly concluded: "It's mindboggling to believe that all of those assumptions, and there are many more, are true. You would have to suspend your rational thought to get to that point."[39] Accordingly, the Commission should a novel interpretation of Section 706 necessarily based on so many implausible assumptions.

B. The D.C. Circuit's Decision Support for Section 706-Based Regulation has been Overstated and Does Not Make For Sound Policy

That interpretation is likewise far afield from what was widely understood to be the provision's original meaning – that the provision was not intended to constitute an independent grant of affirmative regulatory authority. This was also the Commission's own understanding of Section 706 until the after its first foray into net neutrality regulation met with defeat in *Comcast*

[39] *Id*.

Corp. v. FCC.[40]

Importantly, in *Verizon v. FCC* the D.C. Circuit did not purport to decisively define the boundaries of the Commission's Section 706 authority or adjudicate any particular exercises of such authority. Certainly ,the court did not require the agency to adopt any new regulations. Under all the circumstances – and especially the circumstance that there is no evidence of a present market failure or consumer harm resulting from Internet provider practices – there is no reason for the Commission to imposed new regulations on broadband ISPs.

In essence, the D.C. Circuit means little more than the Commission's pro-regulatory re-interpretation of Section 706 was not so arbitrary or capricious as to require its overruling under an abundantly deferential judicial standard. The D.C. Circuit's decision doesn't purport to fix Section 706's meaning. Its decision should not be regarded as the last word on the meaning of Section 706 or as a guide to sound policymaking. Respectfully, an expert agency not only can but should adopt policies that align with the competitive realities of the marketplace and that are based on demonstrable evidence rather than generalized and unsupported conjectures.

C. The Commission's Section 706 Rationale is Problematic According to Administrative Law Principles

Even if the Commission has authority to impose regulations on broadband network management practices under Section 706(a), it must still support its proposed means for achieving its goals with a well-reasoned explanation and prove the non-arbitrariness or reasonableness of the means chosen. Under *Burlington Truck Lines v. U.S.* (1962), a "reasoned explanation" requires that the agency provides a "rational connection between the facts found and the choices made."[41] And a reviewing court is called to intervene "not merely in case of procedural inadequacies … but more broadly if the court becomes aware that the agency has not

[40] *Comcast Corp. v. FCC*, 600 F.3d 642 (2010).
[41] *See* 371 U.S. 156, 165-8.

really taken a 'hard look' at the salient problems."[42]

The Commission's intrusive means of achieving its stated goals regarding broadband Internet services run afoul of administrative law principles. The *Notice*'s call for regulation based on speculative future harm arbitrarily expands the government's reach over the Internet. And the means the Commission proposes are not supported by reasons for regulatory interference. *Burlington Truck Lines* explained that where "particular deviations from an otherwise completely adequate service (which has economic need for the traffic) consist solely of illegal and discriminatory refusals to accept or deliver traffic … the powers of the Commission bear heavily on the propriety of relief."[43] Applied to the current broadband Internet services market, the Commission cannot implement relief – that is, regulations – based on a very few – or no – alleged deviations from otherwise successful broadband service and nondiscriminatory provider behavior without providing proof that the public interest was served by "fostering sound economic conditions" among service providers by intervening in the market.[44]

III. Adoption of a Commercially Reasonable Standard of Review of ISP Practices Premised on Deregulatory Presumptions Offers the Least Objectionable Approach

Given the constant technological innovation, intermodal competition, development of new business models, and general dynamism characterizing the broadband marketplace today, the Commission should not impose any new regulations on broadband ISPs. But among the approaches proposed in the *Notice*, the least objectionable would be adoption of a "commercially reasonable" standard of review for ISP practices.[45] A "commercially reasonable" standard can be implemented consistent with a circumscribed case-by-case adjudicatory process.

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[42] *Greater Boston TV Corp. v. FCC* 444 F. 2d 841 (D.C.Cir. 1970) (internal cites omitted).
[43] *Burlington Truck Lines*, 371 U.S. at 165-6.
[44] *Id*. at 157.
[45] *Notice*, at ¶¶ 110 – 139.

The Commission's goal of finding an approach that is "more focused and more flexible than the vacated 2010 non-discrimination rule" is commendable.[46] The *Notice*'s proposals to set a clear legal standard, establish clear factors for determining acceptable conduct, and encourage individualized negotiations is supported by the D.C. Circuit's *Cellco* decision.[47] If implemented properly, these rules may provide the flexibility necessary to allow the Commission to provide a regulatory backstop against discriminatory ISP practices, while also preventing the Commission from over-exerting its authority.

A. Competitive Market Conditions Call for Deregulatory Presumptions Regarding Broadband ISP Practices

In their present form however, the proposed rules presume ISP provider behavior to be unreasonable. *The Notice* thereby regards presumptions in the wrong way. For example, in the *Notice*'s discussion of how to consider certain competitive impacts, the Commission asks whether it should "adopt a rebuttable presumption that broadband provider conduct that forecloses rivals (of the provider or its affiliates) from competing in the marketplace is commercially unreasonable?"[48] By posing the question this way, the Commission presumes that almost certainly will restrict broadband Internet providers' business practices.

In addition to disregarding the implications of the market's competitive conditions in setting up its pro-regulatory presumption, the *Notice* compounds the problem of misdirection by failing to make the Commission's no-blocking rule – or a lack of blocking by a broadband ISP – a factor in its analysis.[49] It is difficult to readily perceive how a broadband ISP that does not exercise market power and does not block lawful content could still engage in conduct that should be presumed unreasonable from the outset.

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[46] *Notice*, at ¶ 116.
[47] 700 F.3d 534.
[48] *Id.* at ¶ 128.
[49] *See id.* at ¶ 117.

The Commission should revise its proposal to presume ISP provider behavior reasonable. It should begin by seriously considering the implications of the availability of choice in the broadband marketplace. Calibration of its presumptions according to the dynamic conditions in the marketplace implies that its presumptions should be deregulatory. The Commission should thereby presume broadband ISPs are behaving in ways that foster competition and benefit consumer welfare, but permit that presumption to be rebutted by actual evidence of anticompetitive conduct.

In other words, in light of the conceded technological dynamism and multiplatform competition that exists in the broadband marketplace, the proper approach for the Commission would be to presume that, absent clear and convincing evidence of market failure and consumer harm, the broadband ISPs' practices, including practices relating to the prioritization of services, are commercially reasonable. In other words, the rebuttable presumption – which is really an evidentiary presumption – should run in favor of marketplace freedom and against new regulatory restrictions.

The rules should require that an individual should initiate an adjudication to determine whether an ISP is engaging in commercially reasonable practices by filing a complaint alleging that particular ISP practices are unreasonable by providing evidence of consumer harm or evidence of market failure caused by the practice specified. In reviewing the complaint and conducting the adjudication, the Commission should adopt a presumption of commercial reasonableness in favor of ISPs, while imposing the evidentiary burden of rebutting the presumption of reasonableness on the complainant. Revising the rules in this way will help prevent abuse of the arbitration process and regulatory overreach.

The Commission has historically applied a presumption of reasonableness to wireless service providers under Section 201 and 202 of the Communications Act.[50] If the Commission adopts a similar standard for review of broadband service practices, it should apply the same deregulatory presumption in favor of those providers.

B. The Data Roaming Order Offers Precedent That The Commission Should Adhere to in Establishing Its "Commercially Reasonable" Standard

The Commission should establish a "commercially reasonable" standard that is based closely on the approach and factors the Commission adopted in its *Data Roaming Order*.[51] As the Commission explained in that *Order*, the factors used should "relate to public interest benefits and costs of [an] arrangement offered in a particular case, including the impact on investment, competition, and consumer welfare and whether a particular data roaming offering is commercially reasonable."[52] Particularly given the substantial investment, thriving competition, and choice available to consumers in the broadband marketplace, the Commission's application of a "commercially reasonable" standard should presume ISP behavior reasonable, and seriously consider the above factors when determining whether a complainant has presented enough evidence to rebut the presumption.

A. The Commission's "Commercially Reasonable" Analysis Should be Keyed to Market Power and Consumer Harm

The factors should also be keyed to whether or not they pose risks of market power or consumer harm, according to consumer welfare analysis. The Commission could adopt principles from jurisprudence that incorporate rigorous economic analysis based on consumer

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[50] *See* 47 U.S.C. § 201(b) (prohibiting unjust or unreasonable "charges, practices, [or] classifications); *id.* at § 202(a) (prohibiting "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services").
[51] WT Docket No. 05-265.
[52] *Id.* at 5452–53 ¶ 86.

welfare. A consumer welfare-based policy is premised on the idea that well-functioning markets are the best conduits for investment in innovations that enhance consumer welfare. A consumer welfare-based economic analysis would best ensure that the efficiency-enhancing economic processes of the market work to serve consumers. Circumscribing the Commission's regulatory intervention in this way would prevent agency overreaching that would result in stifled investment and innovation in the dynamic broadband Internet services market.

Based on the record established and an analysis of the relevant factors, the Commission would only prohibit broadband ISPs from engaging in "commercially unreasonable" practices determined to constitute an abuse of substantial, non-transitory market power and that cause demonstrable harm to consumers. Thus, the Commission would focus, *post hoc*, on specific allegations of consumer harm in the context of a particular marketplace situation.

IV. Title II Reclassification and Regulation is Unsupportable and Wholly Inappropriate for Today's Dynamic Broadband Market

The worst approach the Commission could take in this proceeding would be to reclassify broadband Internet services as Title II "telecommunications services" and thereby regulate broadband ISPs as common carriers.

It is misguided for the Commission to regard Title II as a magic bullet that would simultaneously provide regulatory policy with the flexibility needed to reflect marketplace realities and secure a role for the Commission in regulating broadband ISP practices. Even if the Commission could keep its promise not to impose the particularly onerous, inapt provisions of Title II to broadband Internet services, the dynamism and openness that characterizes the Internet are fundamentally at odds with a rigid regulatory scheme that would confine broadband services to centralized, inflexible government control.

Among all the regulatory approaches proposed in its *Notice*, Title II is the least appropriate given today's marketplace realities. Title II was designed for the monopoly telephone system, tasking regulators to determine rates and service specifications. In particular, Title II regulation is the regulatory construct devised to regulate the monopolistic power of the railroads in the late nineteenth century and it was essentially incorporated without material change in the Communications Act of 1934 to regulate Ma Bell at a time when everyone assumed that the provision of Plain Ol' Telephone Service would remain a monopoly forever. To put it simply, Title II regulation, which is essentially public utility regulation like that applied to the electric company, would put the Internet providers in an overly rigid regulatory straight-jacket. That is the reason why Chairman Bill Kennard, when he was asked to apply net neutrality-like regulations to cable operators, responded: "I don't want to dump the whole morass of Title II regulation on the cable pipe."[53]

Following Chairman Kennard's wise foresight, other Commission leaders have recognized that investment, innovation, and growth in the Internet economy have occurred because broadband has not been subjected to heavy-handed Title II regulation.

Chairman Kennard and subsequent Commission leaders recognized the "whole morass" of Title II regulation includes, in addition to the core rate regulation and nondiscrimination mandate, many other requirements that are ill-suited to today's vibrant Internet environment. These include requirements that the ISP seek approval for extending their networks or discounting service, valuation of property and cost allocation accounting requirements, and a very structure proceeding to determining the rates, terms, and conditions for interconnecting networks. These are all vestiges of a regime designed for a monopoly telephone system and

[53] Note 10, *infra*.

market that lacked competition – not today's dynamic, competitive, and rapidly changing broadband marketplace.

FSF Academic Board Advisor Professor Glen O. Robinson previously recognized the issues inherent in the Commission's proposal to impose Title II regulations while simultaneously promising the forbear from utilizing portions of that regime:

> The FCC has authority to forbear from enforcing provisions of Title II, but Congress gave the FCC that authority for the purpose of eliminating existing regulations that were no longer needed. The FCC's proposal invokes forbearance authority not as a means of removing old regulations but as a means of affirmatively engineering new ones. The Commission's approach resembles its use of ancillary jurisdiction in that it involves selective use of various Communications Act provisions to achieve some particular regulatory outcome that is not part of the statutory design.[54]

Congress did not intend for the Commission to subject broadband ISPs to Title II regulations. Nor did Congress intend for the Commission to use its forbearance authority as a loophole to evade Congress' intent to facilitate deregulatory approaches. Even if the Commission were to impose the full Title II regime on broadband providers, it would be difficult for the Commission to persuade a reviewing court that such a sharp departure from the Commission's related Title I classification decisions is not arbitrary and capricious.

It would also be seriously mistaken for the Commission to separately identify and classify broadband Internet services furnished to "edge providers" as opposed to end-user consumers.[55] As a general matter it may prove difficult to tell what distinguishes those categories. A media company offering video content online through its high-traffic website apparently fits within the definition of "edge provider." What about a blogger running a popular website featuring frequent high-definition video entries and generating profits through blog ads? Might the former not also be a large subscriber to broadband Internet service – and therefore an

[54] Robinson, "The Middle Way to Internet Regulation," at 2.
[55] *Notice*, at ¶ 151.

"end user"? And might the latter "end user" also be a small "edge provider"? While a major online retail outlet offering digital downloads and non-digital products via direct mail may suffice as an "edge provider," wouldn't the same be said for a broadband Internet subscriber who posts his or her own product storefront on a the online retailers site? Or consider a subscriber who runs a small, mom-and-pop retail store that it complements with a low-traffic website to sell its respective goods online.

In fact, the Commission's *Open Internet Order* (2010) acknowledged its regulatory definitions of "end user" and "edge provider" were "not mutually exclusive."[56] That scenario gives rise to the implication that "edge providers" are regarded as a special, privileged kind of end user without clear justification. It is uncertain how the Commission could treat parties in future proceedings given non-exclusive definitions of "edge providers" and "end users." But such a separate identification essentially involves the Commission inserting itself into the broadband market's value chain, deciding where pricing freedom exists and for whom. All of those considerations raise the possibility that future attempts by the Commission to demarcate "edge users" from mere "end users" could become fertile ground for special interest pleading and lobbying.

A separate classification scheme for "edge provider" analytical approach might well open the door to disputes similar to intercarrier compensation disputes raised at the Commission where significant benefits were accorded to parties depending upon whether they were designated as carriers or customers. Problems of this kind arose, for instance, when competitive local exchange carriers formed for the purpose of terminating and ending ISP-bound traffic, generating substantial revenues by collecting access charges from long-distance carriers. As FSF

[56] Preserving the Open Internet, *Report and Order* ("*Open Internet Order*") GN Docket No. 09-91, WC Docket No. 07-52 (released December 23, 2010), at ¶ 4, fn.2, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

Academic Board Advisor Professor Gerald Brock has written, "[i]n the late 1990s, companies attempted to transform themselves from customers into LEC," the reason being that "[i]f a dial-up ISP could create a CLEC 'front' so that the traffic coming to it was treated as incoming reciprocal compensation traffic, then the ILEC would make net payments to the ISP instead of the ISP paying the ILEC."[57]

In short, the Commission's intercarrier compensation regulatory scheme conferred significant benefits on carriers as opposed to regular customers. Today, however, the ambiguities posed by separate classification for broadband ISP service offerings to "edge providers" could create incentives for lawyers and lobbyists to pressure the Commission to decide one way or another in future enforcement proceedings.

VI. Conclusion

Today, the Internet economy is characterized by robust competition and constant innovation and development. Over-the-top services compete against stand-alone services, and service providers offer "triple-play" and "quad-play" packages. Multiple technologies and their associated business platforms directly challenge each other in the marketplace in a manner not fully contemplated at the time of the 1996 Act, and not acknowledged properly by the Commission in its consideration and proposal of new regulations.

As the Commission acknowledged in its response to Comcast's challenge in 2010, "[t]he Internet is … arguably the most important innovation in communications in a generation."[58] The Commission may have a role to play in the Internet ecosystem, but only as a regulatory backstop preventing demonstrable consumer harm or market failure, or helping achieve universal service,

[57] Gerald Brock, "Unifying the Intercarrier Compensation Regime," at 125, (published in Randolph J. May (ed.), NEW DIRECTIONS IN COMMUNICATIONS POLICY (2008)).
[58] *Notice*, at ¶ 1.

consumer protection, or public safety goals. But the Commission must not overstep its authority by interfering in the thriving broadband market, particularly given its limited authority under Section 706 and its failure to present evidence of the need for new regulations.

The Commission should not impose any new regulations on broadband providers, and should certainly not reclassify broadband service under Title II. If the Commission decides to adopt some of its proposed regulations, the least harmful of those proposed in the *Notice* are to set a "commercially reasonable" standard for reviewing challenged ISP behavior in arbitration, and to establish clear factors based on competition and marketplace realities to use in the determination process. Doing so, while presuming that ISP practices are commercially reasonable, may provide an approach flexible enough to protect and promote the open Internet.

In considering how to proceed in its approach to "America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment," the Commission should strive for regulatory humility identifying damages only as they occur and imposing appropriate remedies. Broadband has flourished because it has been largely free from regulation and subject to intermodal competition. Metrics including speed, usage, and prices demonstrate that the wireless and wired broadband markets are competitive

markets and in competition with each other. Any approach the Commission adopts should reflect these market dynamics in order to ensure the continued development of high speed Internet.

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July 15, 2014