

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF CENTURYLINK

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INTRODUCTION AND SUMMARY

On January 14, 2014, the DC Circuit Court of Appeals issued an opinion that upheld the disclosure rules adopted in the Commission's *2010 Open Internet Order* but found that the no blocking and non-discrimination rules adopted in that same order exceeded the Commission's limited legal authority in this area.¹ Since that time, proponents of monopoly-era heavy-handed regulation for broadband Internet access services (BIA or broadband Internet access) have campaigned relentlessly for a reinstatement of the old rules or possibly even more onerous rules. If needed, they say, the Commission should attempt to justify such regulation by trying to reverse a series of decade-old Commission decisions holding that BIA services are non-regulated information services. Parties in this camp repeatedly shout catch phrases like "exclusive fast lanes" and "harm to the Internet" that have no grounding in the reality of the current Internet marketplace.

That market reality presents a very different picture. It shows that there has been dramatic growth in large bandwidth-consuming content and applications (primarily video) in recent years and that significant investment is needed to meet the needs of this increased consumption. Providers of broadband Internet access (broadband providers) continue to invest massive amounts of capital to build-out capacity to meet the challenge. But, certain large content and application providers (edge providers), whose traffic is uniquely driving this bandwidth demand and who have always paid for ingress and egress to broadband networks, increasingly seek to avoid having to pay for their share of broadband network costs. Unless broadband providers have adequate ability to charge edge providers, those costs will be imposed

¹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)(*Verizon* or *Verizon* decision).

on consumers who do not contribute to this Internet usage but will end up funding it. And, adequate investment will not occur to build-out the networks needed to support the service quality that consumers have historically enjoyed and continue to expect.

The best policy balance in this context is a light regulatory touch. This is the approach that will maximize innovation and broadband investment while also maximizing service performance for consumers. This approach, rather than heavy-handed regulation, is the one that will maintain the historic virtuous cycle that has made the Internet an unprecedented vehicle of innovation, growth, expression, and civic engagement. Continuing on that historic path – not slogans or needless debates about Title II versus Title I – is what consumers care about and is what the Commission should care most about.

A more cautious approach also properly accounts for the very real risk that any action the Commission might take could damage the Internet virtuous cycle through either intended or unintended consequences. Even the threat of heavy-handed Open Internet rules hampers broadband investment/deployment.

In light of all of the above, there is good reason to question the policy wisdom of imposing *any* new regulation to broadband Internet access services at this time in the name of preserving an open Internet. Contrary to the claims of some parties cited in the *NPRM*, there is no evidence whatsoever that new rules are needed. The valuable contribution of broadband providers in the Internet virtuous cycle precedes the Commission's prior Open Internet rules and will continue regardless of whether the Commission adopts additional rules. Broadband providers have every incentive to design, maintain and manage their networks in a way that meets or exceeds end-user expectations of openness. Moreover, the Commission's existing Open Internet disclosure obligations already require detailed disclosures regarding every material

aspect of BIA offerings and related broadband network management practices. And, a diverse cross-section of the Internet community scrutinizes these practices constantly -- assisted by countless investigatory tools. This ensures that any broadband provider action that could potentially harm Internet openness will come to public light immediately.

Additionally, any regulatory framework applied solely to BIA services, is certain to be ineffective since, by definition, it ignores the critical role that edge providers play in determining broadband Internet access customer experience. This is demonstrated by the increasing varieties of gamesmanship deployed by certain large edge providers to contrive the appearance of a problem with broadband provider network practices.

In the event the Commission chooses, despite this evidence, to adopt new regulations, the approach initially proposed by the Chairman following the *Verizon* decision (as reported by the press) and those parts of the *NPRM* consistent with that approach strike the better policy balance.² Following this path, the Commission would:

- **Re-adopt its prior definitions regarding the scope of any Open Internet rules and re-adopt its prior exclusions for such things as Internet traffic exchange, specialized services, and reasonable network management practices.**
- **Modify its past approach slightly by applying any newly adopted rules equally to mobile and fixed providers – thereby assuring a level playing field.**
- **Utilize disclosure requirements as the primary regulatory tool in this area.**

² Following the issuance of the *Verizon* decision in January 2014, it was reported that the Chairman planned to propose limited and flexible new rules. See, e.g., *FCC Chairman Tom Wheeler Pledges Open Internet in Face of Criticism*, Time, (April 30, 2014), available at <http://time.com/#82409/wheeler-net-neutrality/> (reporting that the Chairman planned to propose new rules that would restore the FCC's ability to prohibit broadband providers from blocking or degrading Internet services for users while also allowing them to strike agreements on individual terms with edge providers as long as they acted in a "commercially reasonable manner subject to review on a case-by-case basis.") And, the more moderate proposals discussed in the *NPRM* are consistent with this approach. But, the *NPRM* also seeks comment regarding a variety of other approaches proposed by other parties, thus raising the prospect of overly prescriptive rules not consistent with the Chairman's vision or the needs of the marketplace.

However, as discussed more fully below, existing rules already go a long way toward ensuring adequate transparency for consumers as well as edge providers and the Internet community at-large. At most, minor enhancements are required. More onerous new disclosure requirements discussed in the *NPRM* -- such as requiring multiple disclosures targeted to different audiences, standardized disclosures and overly detailed performance and congestion related disclosures -- would impose high costs that greatly outweigh any resulting benefit.

- **Exercise caution in adopting a no blocking rule.**

As discussed more fully below, the primary problem with the Commission's 2010 no blocking rule was the manner in which it purported to create broadband provider obligations vis-à-vis edge providers. The *NPRM*'s new no blocking rule, as proposed, will create the same problem. But, this problem can be mitigated if the Commission simply clarifies that any no blocking obligation is owed solely to the broadband provider's end users and if it eliminates any type of "minimum level of service" requirement.

- **Exercise caution in adopting a nondiscrimination rule.**

Consistent with the Chairman's stated intent, any nondiscrimination standard adopted should be adequately flexible and, at a minimum, should unambiguously permit non-exclusive agreements between broadband providers and edge providers on individual terms. The Commission should not adopt an unreasonable nondiscrimination standard, which carries the risk of being applied in an overly prescriptive manner. If a flexible, factor-based "commercially reasonable" nondiscrimination standard is to be adopted, the Commission should avoid including vague or overly complex defining factors such as "impact on competition" or "unfair methods of competition" that will only lead to litigation and uncertainty.

- **Rely on the Commission's established ability to conduct *ex post* review of any concerning broadband provider practices -- as an alternative to more onerous *ex ante* rules.**

A light regulatory approach is also more likely to be sustained as within the Commission's legal authority in this area. To begin with, any attempt to find legal authority for the proposed regulations by reclassifying BIA service or any purportedly discreet component of Internet "transmission" as a Title II telecommunications service would be reversible error. A Title II reclassification legal framework, even if the Commission accompanies it with forbearance from some Title II requirements, would be unlawful. Title II reclassification would

also not give the Commission the authority to promulgate the more onerous regulatory rules that certain parties seek and would create results the Commission clearly wants to avoid. By way of example, under Title II, the Commission would still lack authority to impose a minimum level of service requirement, extend rights to edge providers under a no blocking rule, or ban paid prioritization. Reclassification would also mean that a host of arcane Title II legacy telecommunications regulations would apply for the first time to BIA services, and that the telecommunications provider and telecommunications service labels would apply to edge providers and content delivery network (CDN) providers and their services.

As discussed more fully below, there is also significant doubt as to whether the Commission possesses legal authority to adopt the proposed rules, and particularly the more onerous versions, under Section 706 or any other proposed statutory source of Commission legal authority. To the extent the Commission does have such authority, the proposed regulations, particularly the more onerous aspects, exceed that authority as they would constitute common carrier regulation prohibited by Section 153(51).

Adoption of the proposed rules, particularly the more onerous versions, would also violate the First and Fifth Amendments.

Given these clear limitations on the Commission's legal authority in this area, both an overly aggressive Title I regulatory framework and a Title II reclassification framework will, at the very least, result in extensive litigation and years of uncertainty. Because of this, the Commission should, particularly before enacting more aggressive regulations, consider utilizing alternatives to new rules – for example, referral to appropriate technical advisory groups.

TABLE OF CONTENTS

PAGE

I. THE FACTUAL RECORD EVIDENCES DRAMATIC GROWTH AND STRONG NETWORK INVESTMENT, BUT ALSO THE CRITICAL NEED FOR A TWO-SIDED MARKET DRIVEN BY COMMERCIAL RELATIONSHIPS – NOT NEW REGULATORY RULES. 1

A. There Has Been Dramatic Growth in Large-Bandwidth Consuming Applications -- Driven By The Usage Of A Small Percentage of Customers. 1

B. Significant Capital Investment Is Required To Meet The Capacity Demands of This Consumption. 3

C. Broadband Providers Already Invest To Their Utmost, But A Two-Sided Market Is Critical..... 4

D. Additional Rules Are Not Needed For The Protection and Promotion of An Open Internet and Even The Prospect of Regulation Harms Investment..... 7

E. Competition Is Thriving And Broadband Providers Lack The Economic Incentive To Limit Internet Openness..... 8

 1. Competition in the broadband market is thriving and ever-increasing..... 8

 2. Competition ensures that broadband providers have every incentive to meet end-user expectations of openness..... 13

F. Extensive Information Regarding Provider Network Management Practices Is Already Available And The Record Shows That Factors Beyond the Control of Broadband Providers Drive Customer Experience..... 14

G. The *NPRM* Ignores the Critical Role That Edge Providers Play In Determining Customer Experience. 16

 1. Edge providers have never fully covered their share of network costs. 16

 2. Edge providers have considerable control over customer experience. 17

II. A LIGHT REGULATORY TOUCH STRIKES THE RIGHT POLICY BALANCE IN THIS CONTEXT..... 20

A. The Commission Should Adopt Its Tentative Conclusions Regarding the Scope of any Open Internet Rules. 20

 1. The Commission’s existing definition for “broadband Internet access services” should be maintained. 21

 2. The Commission should retain existing express exclusions..... 21

 3. The Commission should maintain the reasonable network management exception. 23

B. Any Open Internet Rules Should Apply Equally To Mobile and Fixed Providers..... 23

C. The Current Disclosure Requirement Is Adequate and The More Onerous Rules Proposed Will, With a Few Exceptions, Impose Unnecessary Costs. 25

1.	Proposed changes to consumer-oriented disclosure requirements would impose excessive costs that outweigh any potential benefit.	25
2.	Only minor enhancements are needed to disclosures for the “common interest.”	27
3.	Proposed new disclosure compliance measures would also impose undue cost.	31
D.	The Commission Should Exercise Caution In Adopting A No Blocking Rule.	31
1.	Any “no blocking” rule should focus on a broadband provider’s obligations to its end users.	32
2.	The Commission should not adopt a “minimum level of service” requirement.	32
E.	The Commission Should Exercise Caution In Adopting A Nondiscrimination Rule....	33
1.	The Commission should not re-adopt an unreasonable discrimination standard.	33
2.	Any nondiscrimination standard should, at a minimum, expressly permit non-exclusive agreements on individual terms.	34
3.	If a factor-based nondiscrimination standard is to be adopted, the Commission should avoid vague and overly complex defining factors.	34
F.	Reliance On <i>Ex Post</i> Review Is Preferable To Onerous <i>Ex Ante</i> Rules and The Commission Can Rely On Existing Processes.....	35
III.	A LIGHT TOUCH REGULATORY APPROACH ALSO HAS THE MORE PROMISING LEGAL BASIS.	36
A.	Reclassification of Broadband Internet Access Service As a Title II Telecommunications Service Would Be Unlawful.....	37
1.	Title II unambiguously does not apply to broadband Internet access.....	37
2.	The Commission could not sustain a reversal of its prior classification rulings since nothing has changed in connection with the key underlying findings.....	40
3.	The Commission could not sustain a reversal of its prior classification rulings given the serious reliance interest of broadband providers.	45
B.	Classification of Other Purportedly Discreet “Transmission” Components As Title II Telecommunications Services Would Also Be Unlawful.	48
C.	A Title II Forbearance Model Cannot Be Sustained.	48
D.	Title II Reclassification Would Also Not Create the Desired Results.	51
E.	The Commission Lacks Adequate Authority Under Section 706 To Adopt the Proposed New Regulations -- Particularly the More Onerous Aspects.....	52
1.	Section 706 contains no grant of Commission authority.	52
2.	The proposed rules, or some of them, exceed the scope of any purported Commission authority under Section 706.....	55
3.	The proposed rules also constitute common carrier regulation and are prohibited by Section 153(51).....	56
F.	The Proposed Rules, Particularly the More Onerous Aspects, Would Also Violate the First and Fifth Amendments.	58

1. Any new disclosure requirements must satisfy applicable First Amendment requirements.....	58
2. The proposed rules, particularly the more burdensome no blocking and nondiscrimination rules, would violate the First Amendment.....	61
3. The proposed no blocking and nondiscrimination rules would also violate the Fifth Amendment.....	64
G. Light Touch Regulation Has The More Promising Legal Basis and Will Minimize Uncertainty.....	71
H. Because of Concerns About Its Legal Authority, the Commission Should Consider Referring Issues To Technical Advisory Groups.....	72
IV. CONCLUSION.	73

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COMMENTS OF CENTURYLINK

CenturyLink submits these comments in the above-referenced matter in response to the Commission’s *Open Internet* Notice of Proposed Rulemaking (*NPRM*).¹ These comments also respond to the Wireline Competition Bureau’s recent Public Notice seeking to refresh the record in the Commission’s 2010 *Framework for Broadband Internet Service* proceeding.²

I. THE FACTUAL RECORD EVIDENCES DRAMATIC GROWTH AND STRONG NETWORK INVESTMENT, BUT ALSO THE CRITICAL NEED FOR A TWO-SIDED MARKET DRIVEN BY COMMERCIAL RELATIONSHIPS – NOT NEW REGULATORY RULES.

A. There Has Been Dramatic Growth in Large-Bandwidth Consuming Applications -- Driven By The Usage Of A Small Percentage of Customers.

There has been dramatic growth in the usage of large-bandwidth consuming content and applications (particularly video) in recent years and the pace of growth has continued to increase every year. Cisco reports that global IP traffic “has increased more than fivefold in the past 5 years, and will increase threefold over the next 5 years” and, overall, “IP traffic will grow at a

¹ *In the Matter of Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28 (Rel. May 15, 2014) (*NPRM*), 2014 FCC Lexis 1689.

² *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, Public Notice, DA 14-748 (Rel. May 30, 2014); Notice of Inquiry, 25 FCC Rcd 7866 (2010) (*NOI*).

compound annual growth rate (CAGR) of 21 percent from 2013 to 2018.”³ Cisco also reports that global Internet traffic in 2018 will be equivalent to 64 times the volume of the entire global Internet in 2005.⁴ Other sources document similar trends. Another report reveals that international Internet bandwidth (i.e. capacity for carrying traffic between nations) has grown from 0.9 tbps to 54.9 tbps since 2002, a compounded annual growth rate of 58%, and that international Internet bandwidth more than quintupled from mid-2007 to mid-2011 (from 8.7 terabits per second (tbps) to 54.9 tbps).⁵

Each year, video represents a greater and greater portion of this growing traffic volume. According to Cisco: “[g]lobally, IP video traffic will be 79 percent of all consumer Internet traffic in 2018, up from 66 percent in 2013.”⁶ It also reports that “Internet video to TV doubled in 2013” and will “increas[e] fourfold by 2018,” and that “consumer VoD traffic will double by 2018.”⁷ The NPRM acknowledges these trends.⁸

At the same time, the record also demonstrates that this dramatic traffic growth is being driven by a small percentage of customers. A report from the Pew Research Internet Project found that “the percent of online adults who watch or download videos has grown over the past four years, from 69% of adult internet users in 2009 to 78%” in 2013.⁹ This means that 22% of

³ *Cisco Visual Networking Index: Forecast and Methodology, 2013–2018*, Cisco (2014) pp. 1-2.

⁴ *Id.*

⁵ Ana-Maria Kovacs, *Internet Peering and Transit*, (April 4, 2012), available at <http://www.techpolicyinstitute.org/files/amkinternetpeeringandtransit.pdf>, p. 5 (citing TeleGeography data).

⁶ Cisco report, *supra*, n. 3, pp. 1-2.

⁷ *Id.*

⁸ *NPRM* ¶ 32.

⁹ See the Pew Research Center, *Online Video 2013*, (rel. October 10, 2013), available at: http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_Online%20Video%202013.pdf.

all online users never use high bandwidth consuming video applications. The Pew report also concludes that “video-sharing sites like YouTube have been the main driving force in the increasing percentage of online adults who post, watch and download videos. Since 2006, the percent of online adults who use video-sharing sites has grown from 33% to . . . 72%.” This means that 28% of adult online users never access video sharing sites like YouTube. Further, a recent Sandvine report concludes that a small percentage of online customers are driving a majority of the online usage. Sandvine reports that “in North America, the top 1% of subscribers who make up the heaviest use of the network’s upstream resources account for 47% of total upstream traffic. The comparable downstream users account for 12% of downstream bytes” and that “the network’s lightest 50% of users account for only 7% of total monthly traffic.”¹⁰

B. Significant Capital Investment Is Required To Meet The Capacity Demands of This Consumption.

It is self-evident that massive capital investment is required to meet the capacity demands of this growing consumption. While, as described below, broadband provider investment levels have been massive and are expected to continue at consistent levels, additional capital is needed to meet the rapid traffic growth expected. By way of example, a recent AT Kearney report describes in great detail the anticipated deficiencies in capital investment based on similar trends in Europe.¹¹ And, a 2011 MIT study discusses possible ways to quantify these costs and, among other things, concludes that “[the] costs are not so great as to destroy the viability of the service,

¹⁰ See Sandvine Intelligent Broadband Networks *Global Internet Phenomena Report 1H 2014*, p.6, available at <https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/1h-2014-global-internet-phenomena-report.pdf>.

¹¹ See, e.g., AT Kearney, *A Viable Future Model for the Internet*, pp. 17-21 and Figure 10.

but they are large enough that we can expect access networks to take explicit steps to recover” them.¹²

C. Broadband Providers Already Invest To Their Utmost, But A Two-Sided Market Is Critical.

Broadband providers have been investing to their utmost to meet the network capacity challenges created by this traffic growth, but the evidence is clear that a two-sided market is critical.

Broadband providers have been devoting, and continue to devote, massive amounts of capital toward the build-out of their broadband networks. AT&T, Verizon, and CenturyLink, alone, report annual capital investment (of which the vast majority is for broadband network build-out) over the last three years in the approximate average amounts of \$20 billion, \$16 billion, and \$3 billion, respectively.¹³ On the cable side, Comcast, Time Warner and Charter report annual broadband network investment of approximate average amounts of \$5 billion, \$3 billion, and \$2 billion, respectively, over this same time period.¹⁴ The *NPRM* itself documents

¹² David Clark, William Lehr, Steven Bauer, *Interconnection in the Internet: the policy challenge*, Massachusetts Institute of Technology, pp. 9-10, (August 9, 2011).

¹³ See http://www.att.com/Investor/ATT_Annual/2013/downloads/ar2013_annual_report.pdf; http://www.progressivepolicy.org/wp-content/uploads/2013/09/2013.09-Carew-Mandel_US-Investment-Heroes-of-2013.pdf, p. 5; http://progressivepolicy.org/wp-content/uploads/2012/07/07.2012-Mandel_Carew_Investment-Heroes_Whos-Betting-on-Americas-Future.pdf, p. 3; http://www.verizon.com/investor/app_resources/interactiveannual/2013/downloads.html, p. C9; http://www.progressivepolicy.org/wp-content/uploads/2013/09/2013.09-Carew-Mandel_US-Investment-Heroes-of-2013.pdf, p. 5; http://progressivepolicy.org/wp-content/uploads/2012/07/07.2012-Mandel_Carew_Investment-Heroes_Whos-Betting-on-Americas-Future.pdf, p. 3; <http://centurylink.uberflip.com/i/294303>, p. 6.

¹⁴ <http://www.cmcsa.com/annuals.cfm>, p. 68; http://www.progressivepolicy.org/wp-content/uploads/2013/09/2013.09-Carew-Mandel_US-Investment-Heroes-of-2013.pdf, p. 5; http://progressivepolicy.org/wp-content/uploads/2012/07/07.2012-Mandel_Carew_Investment-Heroes_Whos-Betting-on-Americas-Future.pdf, p. 3; http://ir.timewarnercable.com/files/doc_financials/Annual%20Reports/twc%20ar%202013.pdf, p. 49; [4](http://www.progressivepolicy.org/wp-content/uploads/2013/09/2013.09-Carew-</p></div><div data-bbox=)

these investment levels, citing a June 2013 White House report that nearly \$250 billion in private capital has been invested in U.S. wired and wireless broadband networks since 2009¹⁵ and a USTelecom report that annual broadband capital expenditures overall have risen steadily, from \$64 billion in 2009 to \$68 billion in 2012.¹⁶ Moreover, a University of Pennsylvania report shows that per capita network investment in the United States is more than twice that of Europe.¹⁷

However, even while broadband providers continue to invest at these high levels, it is clear that a two-sided market is needed to meet the ever-growing demand for bandwidth. A two-sided market maximizes investment in broadband networks.¹⁸ Conversely, without a two-sided market, broadband investment will suffer.¹⁹ In all events, the economic benefits of allowing two-

[Mandel US-Investment-Heroes-of-2013.pdf](#), p. 5; http://progressivepolicy.org/wp-content/uploads/2012/07/07.2012-Mandel_Carew_Investment-Heroes_Whos-Betting-on-Americas-Future.pdf, p. 3; <http://cox.mediaroom.com/index.php?s=43&item=753>.

¹⁵ *NPRM* ¶ 30 (citing White House Office of Science and Technology Policy & The National Economic Council, *Four Years of Broadband Growth* (June 2013) (*Four Years of Broadband Growth*), available at http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf).

¹⁶ *Id.* (citing USTelecom, *Historical Broadband Provider Capex*, available at <http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex> (last visited May 8, 2014)) and Patrick Brogan, *Updated Capital Spending Data Showing Rising Broadband Investment in Nation's Information Infrastructure 1*, USTelecom (Nov. 4, 2013), available at <http://www.ustelecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf> (*Updated Capital Spending Data Report*)).

¹⁷ Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?*, University of Pennsylvania Law School (June 2014).

¹⁸ *See, e.g.*, J. Gregory Sidak, *Assessing the Network Neutrality Debate in the United States*, p. 16, available at http://www.iscr.org.nz/f571,16443/Sidak_New_Zealand_Net_Neutrality_paper.pdf (“Additionally, allowing content providers to pay for service will help contribute to covering the sunk costs borne by service providers, thus increasing incentives to innovate and invest....”).

¹⁹ *See, e.g.*, Robert Litan and Hal J Singer, *Net Neutrality is Bad Broadband Regulation*, p. 3, available at http://haljsinger.files.wordpress.com/2011/10/litan_singer_ev.pdf (“Because end users are more sensitive to price increases than are content providers, the incremental revenues

sided markets greatly outweigh any potential harms.²⁰ A two-sided market approach ensures that the costs of content and applications causing greater bandwidth consumption are ultimately passed on to the subscribers who use those services, ensures that adequate pricing signals are communicated to edge providers and, overall, produces the optimal economic outcome.²¹

raised on end users under a net neutrality regime cannot compensate ISPs for the forgone revenues on content providers; that means that the profitability of the broadband network will decline under a price-regulated net neutrality regime. Lower profitability means lower returns, which in turn means less investment.”).

²⁰ See, e.g., J. Gregory Sidak, *A Consumer Welfare Approach to Network Neutrality Regulation of the Internet*, p. 474, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928582 (“The probability that a network operator could successfully foreclose a provider of content or applications through differential pricing of priority delivery of data packets is remote, as any single network operator serves a small share of nationwide broadband households. For this reason, regulators should err in favor of allowing network operators to contract with content providers for priority delivery and to compete in the upstream market for advertiser-supported content and applications. The potential benefits from this injection of competitive entry vastly exceed the potential harm to the incumbent providers of content and applications. In the unlikely event that a network operator engaged in anticompetitive behavior, it could be easily detected by the provider and consumers of the affected content or application, and it could then be swiftly enjoined by an antitrust court or a regulatory agency. It bears repeating that the stakeholders whose interests should weigh most heavily in the deliberations of policy makers are consumers, not any particular constituency of competitors.”).

²¹ Christopher Yoo, *Network Neutrality and the Economics of Congestion*, p. 1, available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1780&context=faculty_scholarship (concluding that “when transaction costs render metering network-usage uneconomical, imposing restrictions on bandwidth-intensive activities may well enhance economic welfare by preventing high-volume users from imposing uncompensated costs on low-volume users. Usage of bandwidth-intensive services can thus serve as a useful proxy for congestion externalities...”). See also Sidak, *supra*, n. 18 at p. 16 (“Both sides of the market exhibit positive demand for broadband use, and both sides should therefore pay a positive price. The same principle applies to specific network features, such as priority delivery. If the quality of an application such as video conferencing would improve from priority delivery, both the user (who enjoys a superior broadband experience) and the application provider (who, as a result of the improved consumer experience, benefits from increased demand for its product) are willing to pay for this service. If, as a consequence of network neutrality regulation, only end-users are permitted to pay for priority delivery, then end-users will purchase only a limited quantity of prioritized packets. If the content provider is allowed to pay, then a higher quantity of prioritized packets will be purchased, which results in a larger consumer benefit... There is no economic reason why end users should cover all the costs of the network when both parties benefit from its use. By charging content providers for prioritized delivery, a broadband service provider could recover

D. Additional Rules Are Not Needed For The Protection and Promotion of An Open Internet and Even The Prospect of Regulation Harms Investment.

There is also no evidence that new rules, particularly heavy-handed rules such as an outright ban on paid prioritization, are needed to protect and promote an open Internet. The function of the Internet as a vehicle of innovation and growth, expression, and civic engagement, and the valuable contributions of broadband providers in the “virtuous cycle,” precede the Open Internet rules and will continue regardless of whether the FCC adopts new/additional rules. The Commission’s 2010 Open Internet rules were only in effect for roughly two years. Preceding and following the effective dates of those rules, there was/is no evidence of the types of behavior proponents of heavy-handed regulation fear – such as exclusive affiliated deals for paid prioritization.

Conversely, there is strong evidence that Open Internet regulation, and particularly the threat of Title II reclassification and more onerous Open Internet rules, will hamper broadband competition and investment/deployment. The Progress & Freedom Foundation reports that the ramifications of the crusade for Net Neutrality regulation and Title II reclassification will likely be “delayed or foregone investment, discouraged innovation at both the core and edge of networks, and the increasing politicization and bureaucratization of high-technology policy.”²² Similarly, the Brattle Group reports that “network neutrality regulations would be counterproductive to reaching the FCC’s goals of increased broadband connectivity and the

sunk costs, reduce prices to consumers, and subsidize access to more price-sensitive customers, thereby increasing overall broadband penetration....”).

²² Adam Thierer and Mike Wendy, *The Constructive Alternative to Net Neutrality Regulation and Title II Reclassification Wars*, The Progress & Freedom Foundation (May 2010)(noting that “capital markets and investors are rightly tightfisted when the threat—even the whiff—of government-created scarcity through regulation rears its ugly head.”).

associated economic benefits that connectivity would bring.”²³ More recently, market analysts warn that “[t]hose who fantasize that Title II could successfully be extended to broadband ignore the wishes of two key constituencies — consumers and investors... [c]onsumers aren’t buying regulator-designed services, and investors won’t fund what consumers don’t buy.”²⁴

E. Competition Is Thriving And Broadband Providers Lack The Economic Incentive To Limit Internet Openness.

1. Competition in the broadband market is thriving and ever-increasing.

In the mass market BIA services market, regulated wireline telephone companies like CenturyLink compete vigorously with cable providers, wireless companies and other types of providers.²⁵

One need look no further than the Commission’s latest report on Internet access deployment to see that competition in this market is thriving and ever-increasing. The Commission’s latest report, released in June 2014, demonstrates that 82% of US households are located in census tracts where 3 or more providers report that they provide services with speeds of at least 3 mbps downstream and over 200 kbps upstream.²⁶ The report also indicates 78% of

²³ Dr. Coleman Bazelon, *The Employment and Economic Impacts of Network Neutrality Regulation: An Empirical Analysis*, The Brattle Group, Inc. (April 23, 2010)(also noting that “experience with analogous regulatory episodes suggests that price and/or access regulation imposed on privately owned infrastructure can be expected to impede investment and sector development.”).

²⁴ Anna-Maria Kovacs, *The Internet is Not a Rotary Phone*, (May 12, 2014)(also noting that “Total telecommunications infrastructure investment in the U.S. in 2013 was about \$73 billion, and roughly 90 percent of it was spent on those segments that undergird the Internet ecosystem — and are exempt from Title II.”).

²⁵ See, *NPRM* ¶ 47 (seeking comment on the state of competition in BIA services).

²⁶ *Internet Access Services: Status as of June 30, 2013*, Industry Analysis and Technology Division, Wireline Competition Bureau, (rel. June 2014). While the Commission cautions in the report against construing its results as proof of competition (*see, e.g.*, pp. 9, 10), the results are undeniable.

US households are located in census tracts where 3 or more providers report that they provide services with speeds of at least 3 mbps downstream and at least 768 kbps upstream.²⁷ When mobile services are added to the equation, those numbers jump to 99% in both categories.²⁸

Additionally, the investment detailed above is resulting in providers deploying higher and higher broadband speeds and vigorous competition among providers on price and other terms. The Commission also reports that the number of BIA connections over 200 kbps in at least one direction grew year over year from 2012 to 2013 by 13% to 276 million.²⁹ In June 2013, there were 70 million fixed and 93 million mobile connections with download speeds at or above 3 megabits per second and upload speeds at or above 768 kbps -- as compared to 57 million fixed and 43 million mobile connections in June 2012.³⁰ The number of connections with downstream speeds of at least 10 mbps increased by 118% between June 2012 and June 2013, to 103 million connections.³¹

²⁷ *Id.*

²⁸ *Id.* It is also clear that wireless broadband services are adequate substitutes for wireline broadband services for purposes of determining levels of competition. As has occurred in the voice market, more and more broadband customers “cut the cord” each year. Moreover, wireless broadband does not need to be a perfect substitute for wireline broadband service in order for it to serve as a competitive constraint on wireline services from both a pricing and quality of service perspective. As long as there are enough customers willing to consider “cutting the cord” (often called customers “at the margin”), this constrains the pricing and service quality of wireline broadband providers. The bottom line is that, if a wireline broadband provider were to raise prices to a supracompetitive level or provide unacceptable service quality, it would be subject to losing customers to both wireline and wireless rivals.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

At the same time, broadband prices have generally been declining in terms of the price per megabit.³²

And, broadband providers are otherwise competing vigorously, differentiating their services based on attributes such as data speed and price. Virtually all providers offer bundles of services at a discount, and offer promotional rates to attract customers.³³ These providers also engage in comparative advertising, seeking to attract customers based on these attributes.³⁴ This is all characteristic of a competitive market.

³² See, e.g., *The Whole Picture: Where America's Broadband Networks Really Stand*, The Information Technology & Innovation Foundation, (February 2013), available at: <http://www2.itif.org/2013-whole-picture-america-broadband-networks.pdf> (“When we examine prices over time, we see a steady decline in the costs per Mbps per network mile. The cable modem packages that sold for \$45 ten years ago offered 1Mbps, but today’s \$45 package offers 20 or 30 Mbps. It also suggests that the subsidies employed in nations with extremely high speed fiber edge networks serve more to reduce monthly fees paid by the highest intensity users than to reduce entry barriers to the poor and other non-subscribers.”).

³³ See *MyRatePlan Compare High Speed Internet Providers*, available at http://www.myrateplan.com/bundles/compare_high_speed_internet (“An ever-increasing number of technologies (cable, DSL, satellite, Wi-Fi, cellular 3G, 4G) are available to deliver high speed Internet access. This is making the market more competitive, leading to a nice combination of lower prices and ever increasing download speeds... On this page, we display high speed Internet promotions from phone (DSL) and cable companies. The phone companies tend to offer multiple DSL plans, with higher prices associated with more download speed. If your Internet needs aren’t as intensive (e.g. checking e-mail and web browsing as opposed to gaming), you may find that a lower-end DSL offering can save you quite a bit of money, while still delivering a satisfying high speed experience.”). See also AT&T U-Verse Offers & Packages: <http://www.att.com/u-verse/shop/#fbid=tQ-8E9iNRc6>; Comcast Cable TV and Internet packages: <http://www.comcast.com/cable-internet-packages.html>; Time Warner Cable Deals and Internet Packages: <http://www.timewarnercable.com/en/packages/cable-internet-packages.html>; Verizon FIOS bundle options: <http://www.verizon.com/home/bundles/fios/>; CenturyLink® Bundled Services: <http://www.centurylink.com/home/bundles/>; Frontier Communications Bundles: <http://west.frontier.com/bundles>; Windstream High Speed Internet Bundles: http://www.windstream.com/Getting_a_Deal_on_High_Speed_Internet_Bundles/.

³⁴ See Jeffrey A. Eisenach, *Broadband Competition in the Internet Ecosystem*, American Enterprise Institute (October 2012) available at <http://www.aei.org/papers/economics/broadband-competition-in-the-internet-ecosystem/> (“Competition in the broadband industry is shaped by the same forces as in the rest of the Internet ecosystem, like the markets for computers, content, applications, software, and so

It is clear that no broadband provider is currently capable of exercising undue “market power.” Market power is typically defined as the ability of a firm to profitably raise prices above competitive levels for more than a transitory period of time.³⁵ In the competitive environment described above, broadband providers are not able to sustain broadband price increases above competitive levels. If they did so, customers would simply choose another option. While a broadband provider may be able to engage in a *short term* increase in price (for a comparable service), such increases would not be sustainable in the long term, as exhibited by the declining price per megabit over time. Even if you believe the broadband provider market to be a duopoly, there is no evidence that broadband providers are earning supra-normal rates of return.³⁶

Several other observations about market power are important. First, broadband prices and service quality levels are also constrained, and market power limited, because broadband providers generally operate with high price-cost margins due to scale and scope economies. In these situations, “price increases that produce even small reductions in demand can generate large losses in contribution to joint and common costs because the firm’s revenues decline much more than the costs it can avoid.”³⁷ Thus, high price-cost margins -- typically required of high-technology firms -- can serve to discipline the provider’s pricing behavior.

forth... because broadband markets are dynamic, the primary focal points of competition are innovation and product differentiation.”).

³⁵ *Id.* ¶ 50. See also *Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission (1992) [Inclusive of April 8, 1997 Revisions], Section 0.1. (A firm possesses market power when it has “the ability profitably to maintain prices above competitive levels for a significant period of time.”).

³⁶ Thomas W. Hazlett and Dennis L. Weisman, *Market Power In U.S. Broadband Services*, George Mason University Law and Economics Research Paper Series, 09-69 (November 2009).

³⁷ See Reply Comments of Qwest Corporation, WC Docket No. 09-135, filed Oct. 21, 2009 at Exhibit 1: Declaration of Timothy J. Tardiff and Dennis L. Weisman in Support of the Reply Comments of Qwest Communications: Principles of Competition and Regulation

Second, as alluded to earlier, market power is further constrained in the broadband market because competition occurs “at the margin” which means that a little competition goes a long way:

The phrase that “competition occurs at the margin” means that it is the marginal customers, those willing to substitute alternative services in the face of a price increase, that serve to impose pricing discipline on the market provider.³⁸ This observation has special significance for wireline providers because it implies that a relatively small percentage of customers (the “marginal customers”) willing to discontinue service or switch to alternative service providers in the face of a price increase is sufficient to provide the requisite competitive discipline.³⁹

Thus, for example, broadband wireless competition helps to constrain wireline broadband prices and service quality because there are customers “at the margin” who would substitute wireless broadband service for wireline service if the wireline provider priced services too high or engaged in activities that reduced service performance.

Third, the market power of individual broadband providers is limited by the nature of service bundling. Many broadband customers purchase broadband service as a component of a service bundle, *i.e.*, they purchase it along with voice service, video service and/or wireless service at a “bundle discount.” If a broadband provider sets prices too high, service quality too low, or engages in any other activity that displeases customers, the broadband provider would lose not only a broadband customer, but a customer who purchases other services. For example, if a CenturyLink customer purchases a bundle of broadband, voice, video and wireless, and they become dissatisfied with CenturyLink broadband service, they may switch to a bundle provided

for the Design of Telecommunications Policy, dated Oct. 21, 2009 at 33 ¶ 61. (Tardiff and Weisman Declaration).

³⁸ See, *e.g.*, Jerry A. Hausman, *Regulated Costs and Prices in Telecommunications*, in Gary Madden (ed.), *International Handbook of Telecommunications Economics, Volume 2: Emerging Telecommunications Networks* (2003) at 226.

³⁹ See Tardiff and Weisman Declaration, at 34 ¶ 62.

by another provider such as Comcast. In that case, CenturyLink would lose not only a broadband bundle customer, but a voice, video and wireless customer as well.⁴⁰ The potential loss of these revenues constrains broadband prices and any decline in service quality.

Nor is there evidence that switching costs are a significant factor when it comes to BIA customers changing from one provider of BIA to another.⁴¹ Clearly, each provider seeks to offer a “sticky” service to stave off defections and reduce churn. Thus, providers offer bundles, promotions, “price for life” guarantees, discounts for a longer term contract, etc. And, providers would obviously like to retain existing customers and attract new ones. However, no customer is “locked in” to a broadband provider.

2. Competition ensures that broadband providers have every incentive to meet end-user expectations of openness.

This high level of competition ensures that broadband providers have every incentive to design and maintain broadband networks that meet or exceed end-user expectations of openness. It is, thus, not surprising that there have been few complaints about lack of openness and no evidence of the types of broadband provider practices the proponents of heavy-handed regulation describe (for example, exclusive preferences for a broadband provider’s competitive services). In this environment, broadband providers have every incentive to design, maintain and manage their networks in a way that meets end-user expectations for openness. If they do not, customers will not hesitate to switch to a competitor.⁴² Nor is there evidence of the type of practices

⁴⁰ CenturyLink offers Verizon Wireless as a component of its bundled service offerings.

⁴¹ See *NPRM* ¶ 46 (seeking comment on end users’ ability to switch providers if a particular broadband service does not meet their needs).

⁴² See, e.g., J. Gregory Sidak, *Assessing the Network Neutrality Debate in the United States*, p. 17 available at http://www.iscr.org.nz/f571,16443/Sidak_New_Zealand_Net_Neutrality_paper.pdf

described in the *NPRM* where broadband providers tailor their network practices to areas of less competition or target discreet groups of end users such as minorities – and broadband providers lack any incentive to do so.

F. Extensive Information Regarding Provider Network Management Practices Is Already Available And The Record Shows That Factors Beyond the Control of Broadband Providers Drive Customer Experience.

There is already extensive information available to the public at large regarding broadband networks and the practices deployed by broadband providers in connection with BIA service. The Commission’s existing Open Internet disclosure obligations already require disclosures regarding virtually every material aspect of a provider’s offerings and underlying network management practices.⁴³ Additionally, a diverse cross-section of the Internet

(“Consumers value choice, and, if a provider were to block competing content on its network, it would risk losing customers to providers that offered greater choice.”).

⁴³See, e.g., AT&T Broadband Information: <http://www.att.com/gen/public-affairs?pid=20879>; AT&T Broadband Usage FAQ’s: <http://www.att.com/esupport/article.jsp?sid=KB409045#fbid=nZBOu1O4tml>; Cox Internet Service Disclosure: <http://ww2.cox.com/aboutus/policies/internet-service-disclosure.cox> and Speed and Usage Information for High Speed Internet Service by Location: <http://ww2.cox.com/aboutus/policies/speedsusage.cox>; Comcast Network Management Information Center: <http://networkmanagement.comcast.net/>; Comcast Frequently Asked Questions about Network Management: <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Network-Management> or FCC Disclosure: <http://www.comcast.com/Corporate/Customers/Policies/Policies.html>; Comcast Blog: <http://blog.comcast.com/2012/05/comcast-to-replace-usage-cap-with-improved-data-usage-management-approaches.html>; The Facts about Xfinity TV and Xbox 360: Comcast is Not Prioritizing at: <http://blog.comcast.com/2012/05/the-facts-about-xfinity-tv-and-xbox-360-comcast-is-not-prioritizing.html>; See Launching an Optional Usage-Based Broadband Pricing Plan in Southern Texas at: <http://www.twcableuntangled.com/2012/02/launching-an-optional-usage-based-pricing-plan-in-southern-texas-2/>; Time Warner Description of Network Management Practices, Performance, and Commercial Term at: http://help.twcable.com/html/description_of_network_management_practices.html; Verizon Terms and Conditions Network Management Guide at: <http://www.verizon.com/about/terms/networkmanagementguide/>; Verizon Broadband Performance: HSI *available at*:

community constantly scrutinizes these practices. They are assisted in doing so by countless publicly available investigatory tools, including speed tests and the like.⁴⁴ This oversight ensures that any broadband provider action that could potentially harm Internet openness will come to public light immediately.

These disclosures demonstrate, among other things, that all broadband providers devote significant resources to managing their networks with an eye toward preventing congestion.

And, there is also increasing evidence that other factors, not network management practices, increasingly drive BIA customer experience. There is no evidence that any broadband providers throttle or shape on a content/application basis. At the same time, network providers seeking to manage their networks face an array of factors completely beyond their control that have the potential to impact customer experience. A “Congestion Management Report” issued by the Broadband Internet Technical Advisory Group (BITAG), details the fact that network performance is often driven by unpredictable events such as edge provider routing changes, emergencies and natural disasters, temporary network accidents or failures, malicious attacks or

http://www.verizon.com/about/terms/BroadbandPerformance_HSI.htm; 2013 Verizon Broadband Performance Disclosure Page at: <http://www.verizon.com/about/terms/broadbandperformance/>; Windstream Broadband Network Statement is available at <http://www.windstream.com/uploadedFiles/Content/Footer/broadbandnetworkstatement.pdf>; CenturyLink Network Management disclosure webpage *available at*: <http://www.centurylink.com/Pages/AboutUs/Legal/InternetServiceManagement/>.

⁴⁴ DSL Reports *available at*: <http://www.dslreports.com/speedtest?more=1> (providing a directory of speed tests from around the world of “varying types and quality” and describing over 100 of those speed tests for various locations within the United States.).

random congestion events (for example, when a large number of users sharing a network “simultaneously have high demand for a very short period of time”).⁴⁵

G. The *NPRM* Ignores the Critical Role That Edge Providers Play In Determining Customer Experience.

The *NPRM* also ignores a gaping hole, both in its effort to gather data regarding the factors that impact on BIA customer experience and its attempt to propose rules that enhance and maintain customer experience with BIA services. It wholly ignores the critical role that edge providers play in determining customer experience.

1. Edge providers have never fully covered their share of network costs.

The *NPRM* fails to recognize that edge providers have always shared in the costs of providing Internet access yet have never fully covered their share of the costs of broadband networks. There are a broad variety of paths by which a given edge provider’s traffic can reach the public Internet. But, regardless of the path, it does so via a commercial relationship. And, the compensation paid through these arrangements is typically flat and not correlated with usage.⁴⁶ It is typically based solely on the bandwidth capacity acquired for the edge provider’s initial connection to a network, which forms a very small part of the overall cost structure of operating a broadband network.⁴⁷

⁴⁵ See, *Real-time Network Management of Internet Congestion Technical Working Group Report*, Broadband Internet Technical Advisory Group (pp. 6-8) available at http://www.bitag.org/documents/BITAG_-_Congestion_Management_Report.pdf.

⁴⁶ AT Kearney, *A Viable Future Model for the Internet*, pp. 7, 13 (describing the “fundamental structural problem . . . in terms of who pays for necessary infrastructure required to sustain the Internet because pricing on both sides of the market is disconnected from network usage.”).

⁴⁷ *Id.*

2. Edge providers have considerable control over customer experience.

The *NPRM* also fails to recognize other ways in which edge providers determine BIA customer experience and ignores the fact that “fast lanes” already exist on the Internet for certain edge providers. Large edge providers such as Google, Netflix, Ebay, Facebook, and Amazon all have considerable economic resources and, as a result, are able to leverage multiple paths for exchanging traffic.⁴⁸ These include building or leasing their own physical networks and utilizing CDNs and thereby storing content close to the broadband provider and end users and bypassing backbone transit providers completely.⁴⁹ Indeed, some large edge providers (e.g. Google) effectively own their own large scale content distribution networks. Additionally, edge providers frequently deploy multi-homing, a practice by which they buy Internet transit from one or more providers through which they simultaneously exchange traffic.⁵⁰ Edge providers using these types of arrangements are constantly managing the distribution of their traffic to meet their individually determined goals for cost and performance.⁵¹ Large edge providers are also able to

⁴⁸ See *The Net Has Never Been ‘Neutral*, National Journal (May 13, 2014) available at: <http://www.nationaljournal.com/tech/the-net-has-never-been-neutral-20140513> (“Many of the largest companies like Google, Apple, Amazon, and Microsoft build their own data centers to ensure a smooth service for their users, investing billions of dollars to give their websites an edge over the competition.”); Declaration of Nicolas Pujet, SVP of Corporate Strategy for Level 3 (submitted to the FCC in July 2011 in the Level 3 – Global Crossing merger docket, IB Docket No. 11-78)(explaining that, while content providers and ISPs were in large part dependent on purchasing IP transit from Tier 1 backbone providers in the early days, “[t]oday’s ISPs and content providers have much more choice....”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Stanley M. Besen and Mark A. Israel, *The Evolution of Internet Interconnection from Hierarchy to ‘Mesh’: Implications for Government Regulation*, (July 11, 2012) (“Any CDN or other IP network normally has a choice of several alternative paths into an ISP’s network, and it is capable of rerouting traffic among these paths in real time. For example, CDNs can – and we understand that Akamai, Limelight, and others do -- deliver traffic for an ISP’s end users by purchasing transit services from one or more of that ISP’s peering partners, which in turn exchange traffic with the ISP on *settlement-free terms*....In some cases, a CDN can even send

utilize a variety of other technologies and practices more broadly (e.g. Adaptive Bit Rate Streaming, caching, and device server optimization) that allow them to accomplish enhanced performance for their content and applications.

Even where these edge provider “fast lanes” may not exist, broadband Internet access customer experience is often determined by edge provider decisions about how to route traffic. As described above, broadband providers generally do not throttle or shape traffic on a content/application basis. But, edge providers frequently vary their traffic delivery techniques for different content, different devices, different broadband providers, and the like.⁵² For example, Netflix chooses to route traffic differently to end users depending upon whether they are using a Blu-ray player, a tablet, a PC, Apple TV, or a PS3, etc.⁵³ And, a large content provider like Apple can have a tremendous impact on network performance by something as simple as a software upgrade release.⁵⁴

traffic over the ISP’s own paid transit connections, in which case the ISP pays for the traffic...[L]arge content providers...generally [multihomed and divide] their traffic among multiple CDNs or other IP networks. A CDN, in turn, may divide traffic that is bound for a particular access ISP among many different transit providers and shift among them in real time in response to congestion delays and other factors. Each of the CDN’s transit providers may itself be either a settlement-free peer of the ISP, in which case the ISP receives no compensation for receiving the traffic, or a transit provider to that ISP, in which case the ISP generally *pays* the transit provider for the greater traffic volume.”

⁵² See *Choices: Video Providers, CDNs, Peers, ISPs... and You; Sandvine Global Internet Phenomena Report, 1H 2014*.

⁵³ *Id.*, p. 19.

⁵⁴ See *Sandvine Global Internet Phenomena Report 2H13*, p. 31 available at: <https://www.sandvine.com/trends/global-internet-phenomena/> (“Apple has the ability to cause a tremendous impact on networks because of the size of these updates and the number of people that have their products. For example, in a home with an iMac (desktop), a MacBook Pro (laptop), and two iPhones, over 20 GBs of updates were released in a single day.” During an Apple update, one fixed network showed traffic levels “almost a 10x increase over typical Apple update levels”).

Further demonstrating their control over customer experience, edge providers also engage in a variety of gamesmanship in order to contrive the appearance of a problem with broadband provider network management practices warranting regulatory intervention. It has been well publicized that edge providers such as Netflix, via their peering partners, contrive the appearance of network congestion by refusing to move to industry-standard paid peering or other available arrangements when traffic becomes out of balance over settlement-free peering arrangements.⁵⁵ More recently, Netflix deployed loading pages advising the customers of a variety of broadband providers that congestion was occurring on the broadband provider's networks when it was, in

⁵⁵ See, e.g., *Comcast vs Netflix: Is this really about Net Neutrality*, available at: <http://www.cnet.com/news/comcast-vs-netflix-is-this-really-about-net-neutrality/> (“Netflix is attaching a fire hose to the Comcast network, which is only equipped to handle connections the size of garden hoses. The gushing fire hose of content can't possibly be funneled into the few garden hose ports that are available. So packets are dropped and the service is degraded. Netflix could fix this problem in one of two ways. It could pay for a fire hose connection instead of taking the garden hose connection that it can get through a standard peering relationship with Comcast. The large connection would accommodate the Netflix traffic. The other option is to distribute its traffic more evenly among other CDNs that are delivering traffic to Comcast. In this case, the video traffic could get onto the Comcast network via the many garden hoses already connected to the Comcast network. Of course, in either instance this would cost Netflix more money. The company would either have to pay Comcast for more capacity or the company would have to pay CDNs more money to deliver its traffic. In either instance, the additional costs that Netflix would incur under either of these scenarios are not new. The company has always had to pay for the transit and delivery of its content.”); *Rereading the Tea Leaves in the Netflix-Comcast Deal* available at: <http://www.cnet.com/news/rereading-the-tea-leaves-in-the-netflix-comcast-deal/> (“Netflix, in fact, has been flexing its new competitive muscle for some time. In January 2013, the company began pushing its Open Connect Content Delivery Network [and] ... in 2013 the company tried to speed up adoption in the US by announcing that only ISPs who met the technical and business requirements Netflix was offering would be allowed access to new SuperHD and 3D programming. That restriction led some, including GigaOm's Paul Sweeting, to accuse Netflix of performing a kind of "Net neutrality jujitsu." Instead of an ISP blocking content, now it was a content provider doing the blocking, holding its own customers hostage in a gambit to get better terms than other CDNs for connections and co-location of its equipment at the ISPs' key distribution points.”); *Comcast Comments on Level 3* available at <http://corporate.comcast.com/comcast-voices/comcast-comments-on-level-3> (“To quantify this, what Level 3 wants is to pressure Comcast into accepting more than a twofold increase in the amount of traffic Level 3 delivers onto Comcast's network -- for free. In other words, Level 3 wants to compete with other CDNs, but pass all the costs of that business onto Comcast and Comcast's customers, instead of Level 3 and its customers.”).

fact, caused by Netflix's failure to make adequate arrangements for the exchange of its high-bandwidth video traffic.⁵⁶

II. A LIGHT REGULATORY TOUCH STRIKES THE RIGHT POLICY BALANCE IN THIS CONTEXT.

In light of the factual record discussed above, there is good reason to question the policy wisdom of imposing *any* new regulation on BIA services at this time in the name of preserving an open Internet. But, if the Commission chooses, despite this evidence, to adopt new regulations, the Commission should apply a light regulatory touch that focuses on disclosure requirements and avoids at least the more onerous no blocking and nondiscrimination requirements discussed in the *NPRM*.

A. The Commission Should Adopt Its Tentative Conclusions Regarding the Scope of any Open Internet Rules.

To begin with, the Commission should adopt the *NPRM*'s tentative conclusion that it retains its existing rules defining the types of services to which any Open Internet rules would apply and establishing a number of express exclusions from the rules.⁵⁷

⁵⁶ *Netflix Points at Verizon for Delays in Streaming*, New York Times, (June 4, 2014) available at http://www.nytimes.com/2014/06/05/business/media/netflix-points-at-verizon-for-delays-in-streaming.html?_r=0; *Verizon to Netflix: Stop Blaming us for Bad Video*, The Wall Street Journal, (June 5, 2014) available at <http://online.wsj.com/article/AP0de1e7365e5f4bcdac8af427b6141121.html?KEYWORDS=netflix> (“Verizon Communications Inc., the country's fourth-largest home Internet service provider, sent a letter to Netflix Inc. on Thursday, telling it to stop blaming Verizon for bad video quality or face a lawsuit. Verizon is reacting to messages appearing on the screens of some Netflix subscribers, blaming Internet service providers for poor video quality....’ The impression that Netflix is falsely giving our customers is that the Verizon network is generally 'crowded' and troublesome,” Verizon general counsel Randal Milch said in the letter. ‘Responsibility for its customers' experience falls squarely on Netflix itself The cost/quality trade-off is one Netflix has chosen.’”).

⁵⁷ *NPRM* ¶¶ 54-61.

1. The Commission’s existing definition for “broadband Internet access services” should be maintained.

Because its rules expressly state that its Open Internet rules apply to “broadband Internet access service,” the primary rule determining the types of services subject to those rules is the Commission’s Rule 8.11(a) definition of that term.⁵⁸ The Commission should, as the *NPRM* proposes, maintain its existing definition for “broadband Internet access service.” This approach has proved workable thus far and has been effective in focusing the impact of the rules on the services that provide public Internet access to mass market customers and broadband provider relationships with those customers.

2. The Commission should retain existing express exclusions.

The *NPRM* also rightly concludes that the Commission should retain the existing express exclusions from its Open Internet rules for a variety of different services that are not mass market BIA services.⁵⁹ Each of these excluded categories of services falls outside the definition of “broadband Internet access service” and therefore properly falls outside the scope of any Open Internet rules the Commission may adopt.

As noted in the *NPRM*, multichannel video programming, enterprise services, virtual private network services, hosting and data services and other edge provider services used for the “provision of content on the Internet” are not mass market BIA services and do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.⁶⁰

The *NPRM*, citing a discussion in *Verizon* regarding the relationship between broadband providers and edge providers, also asks whether the Commission should now establish a new

⁵⁸ 47 C.F.R. § 8.11(a).

⁵⁹ *NPRM* ¶¶ 57-60.

⁶⁰ *NPRM* ¶¶ 57-58.

rule identifying a separate service subject to the rules.⁶¹ It should not. The court, in *Verizon*, only addressed the relationship between broadband providers and edge providers because Verizon argued that the Commission’s 2010 *Open Internet Order* could be read as effectively imposing an obligation on broadband providers to provide carriage for free to edge providers.⁶² The court properly ruled that such a requirement would constitute impermissible common carriage regulation. But, this should not now lead the Commission to extend its Open Internet rules to these services. These services properly fall outside the definition of “broadband Internet access service” and are among the types of services that fall within the Commission’s various established exclusions discussed above and below. The *NPRM* correctly proposes to maintain these exclusions.

Internet traffic exchange arrangements also properly fall outside the scope of “broadband Internet access.” The Commission should reject proposals by certain parties that the rules now be expanded to cover such services.⁶³ Competition has proven adequate, thus far, to address problems that have arisen in this context – with the exception of instances of edge provider gamesmanship discussed above.

Similarly, specialized services such as IPTV and facilities-based VoIP rightly fall outside the scope of the Commission’s Open Internet rules. These services should continue to be excluded from the rules. Since there is no evidence of problems in implementing this exclusion, the Commission should also reject suggestions that specialized services be addressed within the scope of a “commercially reasonable” rule.⁶⁴ As the *NPRM* recognizes, these services benefit

⁶¹ *NPRM* ¶ 55.

⁶² *Verizon Decision*, 740 F.3d at 658, & *see also* at 654.

⁶³ *NPRM* ¶ 59.

⁶⁴ *NPRM* ¶ 60.

consumers and spur investment and there is no evidence that providers have used them to bypass the Commission's rules.⁶⁵

3. The Commission should maintain the reasonable network management exception.

The *NPRM* also correctly concludes that the Commission should retain the existing reasonable network management practices exception to its Open Internet rules and continue to develop the scope of that exception on a case-by-case basis.⁶⁶ This exception is critical to ensuring that broadband providers have the flexibility to manage their networks in a way that maintains network security and integrity, addresses harmful traffic, and mitigates against the effects of congestion.⁶⁷ There is also no evidence of a problem with implementing this exception following the Commission's *2010 Open Internet Order*. And, the Commission's existing Open Internet disclosure requirements provide transparency as to the scope of broadband provider network management practices -- ensuring that providers do not misuse the exception to circumvent intended open Internet protections.⁶⁸

B. Any Open Internet Rules Should Apply Equally To Mobile and Fixed Providers.

The *NPRM* tentatively concludes that the Commission should retain the approach of the *2010 Open Internet Order* when it comes to mobile services -- that is, it should apply a more limited no blocking rule to mobile broadband Internet access services and exempt mobile services from any nondiscrimination rule entirely.⁶⁹ Should the Commission choose to re-adopt

⁶⁵ *Id.*

⁶⁶ *NPRM* ¶ 61.

⁶⁷ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17952 ¶ 82 (2010) (*2010 Open Internet Order*).

⁶⁸ *NPRM* ¶ 61.

⁶⁹ *Id.* at ¶ 62.

no blocking and nondiscrimination rules in this proceeding, there is no basis for extending such new rules to fixed broadband providers while exempting (partially or entirely) broadband providers who happen to utilize a wireless platform. It would be arbitrary and capricious to regulate one platform differently from another.

There are no differences between mobile wireless broadband platforms and wireline platforms that would justify differences in how any Internet openness principles are applied. The potential concerns identified in the *2010 Open Internet NPRM* with respect to wireless networks apply equally to wireline networks. By way of example, both wireless and wireline networks are shared networks that are dynamic in nature.⁷⁰ Similarly, while wireless networks may require steps to address radio interference or propagation effects such as signaling loss with increasing distance,⁷¹ wireline networks face similar dynamic challenges. For example, large bandwidth-gobbling applications regularly interfere with normal network engineering assumptions in unpredictable ways on both types of platforms. Signaling loss with distance is common to both mobile technologies and wireline technologies such as DSL. Similarly, capacity issues impact wireless and wireline networks alike. While wireless providers have finite spectrum, wireline providers face capacity limitations that are only solved by costly network build-out. Nor does the mobility of wireless broadband end users distinguish wireline networks for purposes of these proposed obligations. Wireline networks must also deal with bandwidth demand swings due to certain applications (*e.g.*, P2P), certain content (*e.g.*, video), and user dynamics (*e.g.*, sudden usage increases due to a major snowstorm).

⁷⁰ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13119 ¶ 159 (2010) (*2010 NPRM*).

⁷¹ *Id.*

C. The Current Disclosure Requirement Is Adequate and The More Onerous Rules Proposed Will, With a Few Exceptions, Impose Unnecessary Costs.

The Commission should also reject the *NPRM*'s tentative conclusion to adopt more onerous Open Internet disclosure obligations.⁷² As detailed above, the Commission's existing disclosure requirement strikes the right balance by providing detailed guiding principles while, at the same time, permitting broadband providers flexibility in designing their disclosures. At most, minor enhancements are required.

1. Proposed changes to consumer-oriented disclosure requirements would impose excessive costs that outweigh any potential benefit.

Changes proposed in the *NPRM* as to the required method or content for end user disclosures would impose excessive costs that greatly outweigh any potential benefit. Accordingly, the Commission should reject the proposals that broadband providers now be required to maintain separate disclosures tailored to consumers and other constituencies and that mandate more specific and detailed disclosures for the benefit of end users regarding network management practices, performance characteristics and commercial terms.⁷³

In short, there is already more than adequate transparency when it comes to performance measurements for broadband networks. A quick perusal of existing provider Open Internet disclosures reveals that providers already make available in one place both simple, understandable disclosures tailored to the needs of consumers and more technical information that may useful to other parties such as edge providers and the Commission.⁷⁴ CenturyLink and other providers supplement these disclosures with a variety of FAQ documents and other

⁷² *NPRM* ¶ 67.

⁷³ *NPRM* ¶ 68.

⁷⁴ *See* n. 43, *supra*.

detailed supporting information.⁷⁵ Providers also already incur considerable costs providing input to the Commission's "Measuring Broadband America" (MBA) program. And, the MBA

⁷⁵ The following list is not comprehensive, but provides examples. **CenturyLink:** Excessive Use Policy Questions and Answers, <http://internethelp.centurylink.com/internethelp/pdf/EUP.pdf>; List of Approved MODEMS, <https://www.centurylink.com/static/PDF/AboutUs/Legal/Open%20Internet%20Modem%20List.pdf>; Acceptable Use Policy, <https://www.centurylink.com/Pages/AboutUs/Legal/AcceptableUse/>; Port 25 Filtering, <http://internethelp.centurylink.com/internethelp/email-troubleshooting-port25.html>; CenturyLink Consumer Internet Protection Program, <https://www.centurylink.com/home/support/internetprotection/>; Online Security, <https://www.centurylink.com/Pages/AboutUs/Legal/onlineSecurity.jsp>; Speed Tests, <http://denver.speedtest.centurylink.net/> and <http://spdtst-dlls.tx.centurylink.net/>; Privacy Policy, <https://www.centurylink.com/Pages/AboutUs/Legal/PrivacyPolicy/>. **AT&T:** Broadband Usage FAQ's, <http://www.att.com/esupport/article.jsp?sid=KB409045#fbid=nZBOu1O4tml>; AT&T Acceptable Use Policy, <http://www.corp.att.com/aup/>; AT&T Terms of Service, <http://www.att.com/gen/public-affairs?pid=20879#terms-service>; AT&T Consumer Wired Data Plans, <http://www.att.com/esupport/internet/usage.jsp#fbid=tQ-8E9iNRc6>; AT&T Consumer Wireless Data Plans, http://www.att.com/att/planner/index.html#fbid=wFhCS_52_Oj; AT&T Wi-Fi, <http://www.att.com/gen/general?pid=9182>; U-Verse High Speed Internet Terms of Service, <http://www.att.net/csbellsouth/s/s.dll?spage=cg/legal/att.htm&leg=tos>; AT&T Speed Tiers, <http://www.att.net/speedtiers>; Privacy Policy, <http://www.att.com/gen/privacy-policy?pid=2506>. **Verizon:** Verizon Terms Webpage, <http://www.verizon.com/about/terms/>; Verizon Internet Security Suite, <http://www.verizon.com/home/utilities/security-backup>; Verizon Parental Controls, <http://responsibility.verizon.com/online-safety>; Port 25, <http://www.verizon.com/Support/Residential/Internet/fiosinternet/email/setup+and+use/question/124274.htm#>. **Comcast:** Comcast Network Management Information Center: <http://networkmanagement.comcast.net/>; Frequently Asked Questions about Network Management, <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Network-Management>; Comcast Blog, <http://blog.comcast.com/2012/05/comcast-to-replace-usage-cap-with-improved-data-usage-management-approaches.html>; See The Facts about Xfinity TV and Xbox 360: Comcast is Not Prioritizing, <http://blog.comcast.com/2012/05/the-facts-about-xfinity-tv-and-xbox-360-comcast-is-not-prioritizing.html>; Launching an Optional Usage-Based Broadband Pricing Plan in Southern Texas, <http://www.twcableuntangled.com/2012/02/launching-an-optional-usage-based-pricing-plan-in-southern-texas-2/>; Comcast XFINITY Customer Privacy Notice, <http://www.comcast.com/Corporate/Customers/Policies/CustomerPrivacy.html>; Customer Agreement for Residential Services, <http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html>; Speed Test page, <http://speedtest.comcast.net/>; Network Management Information Center, <http://networkmanagement.comcast.net/>. **Cox:** Measuring Broadband America, <http://www.fcc.gov/measuring-broadband-america/charts>; Subscriber Agreement, <http://www.cox.com/aboutus/arizona/policies.cox#sub>; Acceptable Use Policy,

program produces comprehensive data results comparing performance across types of services in a standardized manner. Consumers also have access to an array of speed tests and other diagnostic tools. The industry also has access to voluminous data produced by such efforts as the Internet Health Report.⁷⁶

Nor is there evidence the current requirements are inadequate. The Commission reports in the *NPRM* that it has received “hundreds” of complaints of various types since 2010.⁷⁷ But, that is not a concerning volume of complaints given the technical complexities associated with BIA services and the massive scale of BIA service deployment in the United States.

CenturyLink notes that it publicizes a process for receiving any questions and concerns with its disclosures or its network management practices⁷⁸ and has received no inquiries on these subjects through that process.

In short, the current Open Internet disclosure requirements are working and additional requirements are not needed at this time.

2. Only minor enhancements are needed to disclosures for the “common interest.”

The *NPRM* proposes a variety of other potential “enhancements” to its Open Internet disclosure rules in the name of better serving the “common interest” (i.e. edge providers, the

<http://www.cox.com/aboutus/arizona/policies.cox#acu>; Residential Internet pricing, speeds, and data plans, <http://www.cox.com/aboutus/arizona/policies/speedsusage.cox>; Speed and Usage Information for High Speed Internet Service by Location, <http://ww2.cox.com/aboutus/policies/speedsusage.cox>.

⁷⁶ See <http://internetpulse.net/>.

⁷⁷ *NPRM* ¶ 69.

⁷⁸ CenturyLink’s Network Management disclosure webpage *available at*: <http://www.centurylink.com/Pages/AboutUs/Legal/InternetServiceManagement/> (“customers may direct questions or concerns regarding CenturyLink’s High-Speed Internet service to Regulatory.Compliance@CenturyLink.com.”).

Commission, the Internet community at large).⁷⁹ However, at most, only minor disclosure rule “enhancements” are needed to address the concerns discussed in the *NPRM*. Most of the proposed new disclosure requirements in this area are also unnecessary.

For example, Paragraph 78 of the *NPRM* tentatively concludes that providers should be required to “disclose in a timely manner to consumers, edge providers, and the public (and, of course, the Commission) when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or “best effort” service as distinct from any priority service.”⁸⁰ The Commission’s *2010 Open Internet Order* already made clear that provider disclosures were expected to provide information regarding network practices and provided specific guidance as to the types of information it expected to see in connection with congestion management practices, application-specific behavior, device–attachment rules and security practices.⁸¹ The Commission provided this guidance in the context of its stated desire to allow flexibility in the implementation of the disclosure requirements while providing guidance regarding what it considered to be effective disclosure models.⁸² Consistent with this approach, the Commission can and should clarify that, to the extent providers are now entitled to provide priority services, the Commission would also expect to see basic information about those practices and distinctions between any priority services and “best efforts” services. But, the Commission should also continue to permit providers flexibility as to how they disclose that information and, in all events, should not require transaction-level details about such arrangements. Such a requirement would require

⁷⁹ *NPRM* ¶¶ 75-83.

⁸⁰ *NPRM* ¶ 78.

⁸¹ *2010 Open Internet Order*, 25 FCC Rcd at 17938-39 ¶ 56.

⁸² *Id.*

disclosure of proprietary and competitively-sensitive information and would actually reduce competition. In the meantime, other subjects discussed in Paragraph 78 (e.g. network management practices, generally, or such practices as blocking and throttling), are already adequately covered by the existing requirements.

Similarly, the potential costs of proposed additional mandates regarding performance measurement and congestion would greatly exceed any potential benefit.⁸³ For example, the *NPRM* asks whether performance measurement capability should be included in end-user modems⁸⁴ and proposes that providers now be required to provide “meaningful information regarding the source, location, timing, speed, packet loss, and duration of network congestion.”⁸⁵ The *NPRM* also seeks comment regarding a proposal by Cogent that would mandate voluminous and detailed disclosures regarding capacity and usage for virtually every piece of equipment in a broadband provider’s network – including details regarding network equipment falling well outside the scope of the Commission’s Open Internet rules (e.g. peering connection facilities).⁸⁶ It is self-evident that the costs of complying with these types of onerous and ongoing detailed reporting requirements would be staggering and would divert broadband provider resources away from the important work of building and maintaining robust networks. Providers do not currently deploy their resources with an eye toward capturing and publishing detailed congestion related data on an ongoing basis for disclosure to the public. They are focused on identifying and preventing congestion wherever it occurs. Thus, costly new support systems and processes would have to be installed to comply with these proposals.

⁸³*NPRM* ¶¶ 80-83.

⁸⁴*NPRM* ¶ 80.

⁸⁵*NPRM* ¶ 83.

⁸⁶*Id.*

And, there is no evidence that new disclosures along these lines would provide any practical value in meeting the purported goal for the changes -- enhancing a customer's understanding regarding the source of performance issues with their BIA services.⁸⁷ As described in detail above, the performance of a customer's broadband network is only one factor that potentially impacts customer experience. And, as detailed above, there is extensive information already available regarding the performance of broadband networks, including the voluminous information made available via the MBA program.⁸⁸ Moreover, the proposed new disclosure requirements wholly ignore the other factors that frequently impact on customer experience – particularly, the broad variety of ways in which edge providers determine customer experience for the traffic supporting their products.⁸⁹ Consider the circumstance of a hypothetical end user experiencing performance issues in connection with certain video content: Even if the broadband provider at issue had put in place a capability that enabled that consumer (or other interested parties) to determine the existence and location of congestion during the relevant time period on the provider's network, that information would provide little meaningful insight as to the source of the customer's performance issues. To do that, one would also need to know details regarding how the video content provider had chosen to deliver traffic to the provider at issue and the video provider's traffic management practices.

Mandated disclosure of details regarding network performance and congestion also threaten network security. For example, Denial of Service (DOS) attacks intentionally prey on potential network weaknesses. Efforts by network providers to battle such practices will be

⁸⁷ *NPRM* ¶ 82.

⁸⁸ *See* pp. 14-16, *supra*.

⁸⁹ *See* pp. 17-20, *supra*.

greatly undermined if providers are now required to provide detailed disclosures regarding the congestion levels on different components of their networks at a given point in time.

3. Proposed new disclosure compliance measures would also impose undue cost.

Proposed new compliance and enforcement measures associated with the Open Internet disclosure rules are also not needed and would impose undue cost.⁹⁰ For example, the *NPRM* proposes that providers now be required to submit reports to the Commission regarding their pay-for-priority arrangements.⁹¹ As noted above, to the extent providers are now entitled to provide priority services, they should be required to provide basic information about the deployment of those practices. But, more detailed disclosures, such as disclosure of transaction-specific terms, should not be required. Similarly, proposed requirements that providers also report to the Commission “descriptions of current practices” or “changes to traffic management policies” are unnecessary as they are redundant of existing disclosure requirements.⁹²

D. The Commission Should Exercise Caution In Adopting A No Blocking Rule.

The Commission should also proceed with caution when it comes to adopting a no blocking rule.⁹³ In all events, it should not adopt the *NPRM*'s proposed approach without making changes and/or providing certain clarifications necessary to mitigate potential harmful impacts.

⁹⁰ *NPRM* ¶¶ 87-88.

⁹¹ *Id.* at ¶ 88.

⁹² *Id.* at ¶¶ 87-88.

⁹³ *NPRM* ¶¶ 94-104.

1. Any “no blocking” rule should focus on a broadband provider’s obligations to its end users.

To begin with, the Commission should clarify that any no blocking obligation is owed solely to the broadband provider’s end users and that the no blocking rule creates no obligations as between broadband providers and edge providers. As discussed above, combining a no blocking rule together with any obligation to edge providers was one of the primary problems with the Commission’s 2010 no blocking rule.⁹⁴ The *NPRM*’s new no blocking rule, as proposed, will create the same problem. In addition to creating significant legal infirmities as discussed below,⁹⁵ this approach is also bad policy. Broadband provider obligations vis-à-vis edge providers or other third parties who are not end users should be governed by commercial contracts and industry standards – not regulatory rules. As discussed above, the *NPRM* correctly proposes to exclude from the scope of any Open Internet rules hosting and peering arrangements and the variety of other arrangements by which edge provider traffic may reach the public Internet. The Commission should not bring those arrangements “in the back door” by purporting to give edge providers rights under a no blocking rule.

2. The Commission should not adopt a “minimum level of service” requirement.

The Commission should also not adopt a “minimum level of service” requirement, as proposed in the *NPRM*. Whether it is established using a best efforts, minimum quantitative performance or “reasonable person” standard, a minimum level of service component would only lead to disputes and uncertainty about the meaning of the requirement. And, a minimum service level requirement is not needed. From a policy perspective, re-adoption of the no blocking text adopted in the *2010 Open Internet Order*, together with a change to the

⁹⁴ *See supra*, pp. 21-22.

⁹⁵ *See infra*, pp. 56-57.

nondiscrimination rule making clear – among other things – that broadband providers are free to reach agreements with edge providers on individual terms, would provide more than adequate protection. It would also satisfy the Commission’s intended goals – “safeguarding consumers’ ability to access and effectively use the lawful content, applications, services, and devices of their choice.”⁹⁶

E. The Commission Should Exercise Caution In Adopting A Nondiscrimination Rule.

If the Commission chooses to adopt a new nondiscrimination rule, it should exercise caution in order to avoid creating a standard that is either overly prescriptive or overly complex. If crafted to ensure adequate flexibility to broadband providers, and if accompanied with an express clarification making unambiguously clear that broadband providers are permitted to reach non-exclusive agreements with edge providers on individual terms, a “commercially reasonable” standard could accomplish these policy goals. This approach would also be most consistent with the Chairman’s stated intentions for new Open Internet rules. On the other hand, the Commission should not adopt an unreasonable discrimination standard, which carries the risk of being applied in an overly prescriptive manner. And, if a flexible, factor-based “commercially reasonable” nondiscrimination standard is to be adopted, the Commission should also avoid including vague or overly complex defining factors such as “impact on competition” or “unfair methods of competition” that will only lead to litigation and uncertainty.

1. The Commission should not re-adopt an unreasonable discrimination standard.

While the *NPRM* proposes a “commercially reasonable” nondiscrimination standard, it also seeks comment as to whether it should, in the alternative, adopt an “unreasonable

⁹⁶ *NPRM* ¶ 94.

discrimination” rule.⁹⁷ In addition to the potential unlawfulness of such a standard, as discussed more fully below, an unreasonable nondiscrimination standard is the wrong approach from a policy perspective. Because of its origins in the legacy of Title II common carrier services, an unreasonable discrimination standard has the potential to be too rigid for the services at issue. A “commercially reasonable” standard, by comparison, should ensure that broadband providers are able to make individual determinations in their dealings in the manner sought.

2. Any nondiscrimination standard should, at a minimum, expressly permit non-exclusive agreements on individual terms.

For these same reasons, it is essential that any non-discrimination standard unambiguously provide broadband providers considerable discretion in determining with whom they deal and on what terms. At a minimum, the Commission should make unambiguously clear that, under any nondiscrimination standard that may be adopted, non-exclusive agreements on individual terms between broadband providers and edge providers are permitted. This could be accomplished as the *NPRM* suggests by establishing an explicit safe harbor for such conduct in the context of a commercially reasonable nondiscrimination standard.⁹⁸ Conversely, the Commission should not adopt a per se ban on pay-for-priority practices.⁹⁹

3. If a factor-based nondiscrimination standard is to be adopted, the Commission should avoid vague and overly complex defining factors.

If a flexible, factor-based “commercially reasonable” nondiscrimination standard is to be adopted, the Commission should also avoid establishing overly complex and vague guiding factors. For example, the “totality of the circumstances,” “impact on competition,” “unfair

⁹⁷ *Id.*, ¶ 121.

⁹⁸ *Id.*, ¶ 141.

⁹⁹ *Id.*, ¶ 138.

methods of competition,” and “impact on speech and civic engagement,” factors discussed in the *NPRM* will create new, vague and undefined terms of art whose meaning will only be fleshed out, if they are ever fleshed out, through years of disputes and litigation.¹⁰⁰ Similarly, the Commission should avoid adopting factors like “technical feasibility” that echo legacy Title II terms of art and thereby invite intrusive oversight to transactions reminiscent of legacy telecommunication regulation.¹⁰¹

F. Reliance On *Ex Post* Review Is Preferable To Onerous *Ex Ante* Rules and The Commission Can Rely On Existing Processes.

As noted above, the approach most consistent with the Chairman’s proposed path here is to rely, as an alternative to more onerous *ex ante* rules, on the Commission’s established ability to conduct *ex post* review of any concerning broadband provider practices. At its heart, the *NPRM* appears to be proposing the adoption of a “commercially reasonable” nondiscrimination standard premised on balancing between two potentially competing goals. The proposed approach would “permit broadband providers to serve customers and carry traffic on an individually negotiated basis, “without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,” so long as such conduct is commercially reasonable.”¹⁰² But, it would also “prohibit as commercially unreasonable those broadband providers’ practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects.”¹⁰³ To create balance between these two goals, the *NPRM* proposes to establish a variety of factors to give additional guidance as to the kind of conduct

¹⁰⁰ *Id.*, ¶¶ 123-128, 131.

¹⁰¹ *Id.*, ¶ 132.

¹⁰² *Id.*, at ¶ 116.

¹⁰³ *Id.*

that is likely to violate the “commercially reasonable” standard enforceable legal standard.¹⁰⁴ But the “commercially reasonable” nondiscrimination framework proposed in the *NPRM* ultimately relies heavily on the backstop of a rigorous *ex post* process for reviewing and evaluating challenges to given practices on a case-by-case basis.¹⁰⁵ A strong reliance on such a backstop, as opposed to overly prescriptive rules, is the better policy approach. And, the *NPRM* correctly concludes that, to accomplish this backstop, the Commission can rely upon “the same three means by which the Commission focused on potential open Internet violations after the adoption of the *Open Internet Order*, namely self-initiated investigation, informal complaints, and formal complaints ... to enforce any new open Internet rules.”¹⁰⁶ The Commission should avoid other proposed practices like non-binding staff opinions and enforcement advisories that have the potential to create confusion.

III. A LIGHT TOUCH REGULATORY APPROACH ALSO HAS THE MORE PROMISING LEGAL BASIS.

A light regulatory approach is not only more consistent with the Chairman’s proposed approach, but is also more likely to be sustained as within the Commission’s legal authority in this area. Conversely, either a Title II reclassification approach or an overly aggressive regulatory approach based on the Commission’s existing Title I authority is likely to exceed the Commission’s legal authority and, at the very least, lead to years of litigation and uncertainty. In all events, the Commission must proceed with full appreciation for the clear limitations on its authority in this area. Because of this, it should, particularly before enacting more aggressive regulatory tools, consider utilizing alternatives to new rules.

¹⁰⁴ *Id.*, ¶¶ 122-135.

¹⁰⁵ *Id.*, ¶¶ 111, 136.

¹⁰⁶ *Id.*, ¶ 172.

A. Reclassification of Broadband Internet Access Service As a Title II Telecommunications Service Would Be Unlawful.

Proponents of heavy-handed Open Internet regulations have called for the Commission to try and reverse a series of orders issued over a decade ago in which the Commission determined that broadband Internet access services are unregulated information services. And, the Commission discussed this subject in the *NOI*.¹⁰⁷ But, Title II reclassification would be unlawful and, even if that were not the case, it does not provide the legal elixir that is sought.

1. Title II unambiguously does not apply to broadband Internet access.

First, Title II unambiguously does not apply to either the Internet or to BIA services or to any telecommunications that may underlie such services.

A cursory review of a host of the provisions contained in Title II reveals that they were expressly designed for voice service and simply have no meaning in the context of broadband Internet service. These include, for example, the following:

- **Section 223.**¹⁰⁸ This provision governs the placement of obscene or harassing telephone calls. Its prohibitions have no meaning as applied to BIA service itself.
- **Section 226.**¹⁰⁹ This provision governs telephone operator services, which, again, are not relevant in the context of BIA services.
- **Section 227.**¹¹⁰ This provision limits the use of automated dialing systems and facsimile advertising, and likewise has no application with regard to BIA service.
- **Section 228.**¹¹¹ This provision regulates the offering of pay-per-call services, and is irrelevant as applied to broadband.

¹⁰⁷ See *NOI*, at Heading II.B.2.

¹⁰⁸ 47 U.S.C. § 223.

¹⁰⁹ 47 U.S.C. § 226.

¹¹⁰ 47 U.S.C. § 227.

¹¹¹ 47 U.S.C. § 228.

- **Section 251.**¹¹² Specific subsections of this provision require local exchange carriers to offer (among other things) local number portability and dialing parity, and to negotiate reciprocal compensation arrangements for the exchange of local telephone traffic -- none of which has application in the context of broadband.
- **Section 258.**¹¹³ This provision prohibits unauthorized changes in a subscriber's pre-selected telephone service provider. It, too, has no application with regard to the broadband context, where a change in provider generally requires the installation of new facilities and/or customer premises equipment (precluding surreptitious replacement of the provider) and where the selected broadband provider would need to assent to any such change (in contrast to the long-distance context that gave rise to the slamming prohibition, in which an IXC could unlawfully direct the customer's LEC to change the customer's pre-selected IXC without that original IXC's knowledge or consent).
- **Sections 271 and 272.**¹¹⁴ These provisions impose a host of requirements on Bell Operating Companies (BOCs) as preconditions to the provision of interLATA service – an irrelevant concept in the context of BIA.

Even those Title II requirements that could, in the event of reclassification, theoretically be considered for application to broadband Internet service clearly have no application outside of a monopolistic environment. For example:

- **Sections 203-205.**¹¹⁵ These provisions require telecommunications carriers to tariff their services. As the Commission has long recognized, their application is inappropriate in markets not dominated by a single provider. To that end, the Commission has mostly forborne from imposing tariffing requirements on long-distance carriers, CMRS providers, and competitive local exchange carriers.¹¹⁶

¹¹² 47 U.S.C. § 251.

¹¹³ 47 U.S.C. § 258.

¹¹⁴ 47 U.S.C. §§ 271, 272.

¹¹⁵ 47 U.S.C. §§ 203-205.

¹¹⁶ See *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 245(g) of the Communications Act of 1934*, as amended, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (subsequent history omitted); *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (subsequent history omitted); *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (subsequent history omitted); see also 47 C.F.R. § 20.15.

There is absolutely no basis for imposing such requirements on providers of broadband Internet access, given the high proportion of customers with access to multiple fixed and mobile broadband providers.

- **Section 214.**¹¹⁷ This section imposes (among other things) limitations on a provider’s ability to enter or exit markets without regulatory approval. The Commission has long recognized that entry regulation is not appropriate in the contemporary communications market,¹¹⁸ and that it is particularly inappropriate in the context of advanced services.¹¹⁹ Nor are “exit” limitations appropriate: In a market characterized by multiple providers and the high revenue opportunities available for the provision of voice, data, video, alarm-monitoring, and other services using the broadband connection, there is little reason to fear that a provider will exit a market such that customers are left with no broadband options. Nor is there any reason to believe that customers in such a market will be inadequately served by the same broadly applicable contractual remedies and consumer protection mandates that guard customers’ interests in other non-monopoly markets.
- **Section 220.**¹²⁰ This provision and related rules prescribe accounting practices for use by common carriers. Whether or not such requirements were appropriate for purported legacy monopoly providers operating under rate-of-return and/or price-cap pricing requirements, they certainly are not properly applied to a broadband market in which prices are constrained by competition (which is only growing) and consistently falling.
- **Sections 251 and 252.**¹²¹ Specific provisions of this section mandate interconnection on specific rates and terms, unbundling of network facilities, resale of services at regulated rates, and collocation of competitors’ facilities. These aggressive requirements were designed to facilitate competitive entry in the

¹¹⁷ 47 U.S.C. § 214.

¹¹⁸ *In the Matter of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, CC Docket No. 97-11, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364 (1999).

¹¹⁹ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22415 ¶ 20 (2004) (“Regardless of the definitional classification of DigitalVoice under the Communications Act, the *Minnesota Vonage Order* directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as DigitalVoice.”).

¹²⁰ 47 U.S.C. § 220.

¹²¹ 47 U.S.C. §§ 251, 252.

local service market, where competitors had historically faced economic and legal barriers to entry. However, it might be argued that such requirements impose substantial costs on providers and can deter investment by all market participants. As such, they are not appropriate for the broadband market, in which numerous entities compete over a large variety of platforms, and in which providers have successfully employed a variety of commercial agreements to ensure interconnection. Likewise, there is no reason to impose Section 252's obligations, which address the means by which carriers must negotiate and/or arbitrate interconnection agreements implementing certain Section 251 obligations.

2. The Commission could not sustain a reversal of its prior classification rulings since nothing has changed in connection with the key underlying findings.

A reversal of the Commission's prior classification orders with respect to BIA could also not be sustained legally since nothing has changed to warrant different findings on whether a discreet, severable transmission component exists.

The *NPRM* asks a series of questions regarding the current facts in the broadband marketplace in an attempt to determine whether the facts have changed on the question of whether there is a severable transmission component in broadband Internet access being offered as a telecommunications service to the public.¹²² Answering that question requires a straightforward application of the following principles:

- The Act defines a “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used.”¹²³
- “[T]elecommunications” is defined as “the transmission . . . of information of the user's choosing, without change in the form or content of the information as sent and received.”¹²⁴
- An “information service” is defined as the “offering of a capability for generating,

¹²² *NPRM* ¶ 150.

¹²³ 47 U.S.C. § 153(53).

¹²⁴ *Id.* at (50).

acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . .”¹²⁵

- The Commission has found that the categories of telecommunications service and information service are mutually exclusive.¹²⁶
- As recognized by both the Commission in its various classification orders and by the Supreme Court in *Brand X*, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what the consumer perceives to be the integrated finished product.”¹²⁷

¹²⁵ *Id.* at (24).

¹²⁶ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4823 ¶¶ 39-40 (2002) (*Cable Modem Order*); *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11516-26 ¶¶ 33-48, 11530 ¶ 59 (1998) (*Report to Congress*); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24029 ¶¶ 35-37 (1998); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385, 394-95 ¶ 21 (1999); *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105, 7120 ¶ 27 (1999); *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 96-61; CC Docket No. 98-183, Report and Order, 16 FCC Rcd 7418, 7447 ¶¶ 49-50 (2001).

¹²⁷ See *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) (*Brand X*); see also, *Amendment of Section 64.702 of the Comm’n’s Rules & Regulations, Second Computer Inquiry*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *aff’d sub nom. Computer & Comm’n’s Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm’n’s Rules & Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Phase I, Report and Order, 104 F.C.C. 2d 958 (1986) (*Computer III Phase I Order*) (subsequent history omitted); *Cable Modem Order*, 17 FCC Rcd 4798; *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007); and see also *NOI*, 25 FCC Rcd at 7870-75 ¶¶ 12-21.

- Similarly, the term “offer” in the definition of “telecommunications service” means a stand-alone offering of telecommunications that transparently transmits information chosen by the user, which, from the user’s perspective, is different in kind from the provision of data processing capabilities integrated with transmission capability that is the hallmark of an “information service.”¹²⁸

Applying these principles, it is clear that, for CenturyLink’s BIA service offerings as well as those of other providers, the consumer perceives the finished product to be an integrated broadband Internet access product and not a separate transmission service. As the Supreme Court found in *Brand X*, the service that CenturyLink and other providers offer to members of the public “is Internet access, not a transparent ability (from the end user’s perspective) to transmit information.”¹²⁹ Moreover, to the point of the question in the *NPRM*, nothing has changed that would warrant a different finding by the Commission on these issues.

Indeed, if anything, broadband Internet access services are even more clearly characterized today as the provision of information processing (as opposed to transmission) than they were at the time of the Commission’s prior reclassification orders. As the Supreme Court found in the *Brand X* decision, CenturyLink’s broadband Internet access can only be characterized as an integrated service that “provides consumers with a comprehensive capability for manipulating information using the Internet.” Every aspect of this service entails information processing. Whether a consumer is using the service to browse web pages, to download or upload files, or for any other function, the consumer is generating, acquiring, storing,

¹²⁸ See 1998 Report to Congress, 13 FCC Rcd at 11507-08 ¶ 13, 11516-526 ¶¶ 33-48. See also, *Brand X*, 545 U.S. at 990 (“One might well say that a car dealership “offers” cars, but does not “offer” the integrated major inputs that make purchasing the car valuable, such as the engine or the chassis. It would, in fact, be odd to describe a car dealership as “offering” consumers the car’s components in addition to the car itself.”).

¹²⁹ *Brand X*, 545 U.S. at 999-1000 (finding that “subscribers can reach third-party Web sites via “the World Wide Web, and browse their contents, [only] because their service provider offers the ‘capability for ... acquiring, [storing] ... retrieving [and] utilizing ... information.’”).

transforming, processing, retrieving, utilizing, or making available information via telecommunications. And, broadband Internet access is, at its essence, a service that provides such capability to the consumer.

Relatedly, the technical functionality underlying this service inherently entails a broad variety of integrated information processing just as it did at the time of the Commission's prior orders. This includes, to name just a few aspects: that domain name system (DNS) functionality (the functionality by which a uniform resource locator (URL) entered into the address bar is converted into an IP address by a DNS service); the information processing necessary to establish a physical layer between a modem and the broadband network in the first place; radius server information processing (providing the authentication and other essential radius functionality that permits an end user to interact with broader Internet access architecture); routing capabilities and security mechanisms to ensure IP packets are delivered to the appropriate recipients; and web browsing functionality by which a customer connects with the IP address provided by the DNS service. CenturyLink's systems and engineers are also constantly monitoring Internet traffic flows to protect broadband customers from DOS attacks and CenturyLink has a dedicated security team and its Consumer Internet Protection Program in place to alert customers of possible malware, worms, and viruses that may be on their computers through its Walled Garden infrastructure.¹³⁰ CenturyLink's broadband Internet access service

¹³⁰ The Commission's Network Reliability and Interoperability Council (NRIC) website catalogues more than 200 cybersecurity best practices for network operators to implement within their networks. See NRIC Best Practices website, *available at*: <https://www.fcc.gov/nors/outage/bestpractice/BestPractice.cfm>. Among other things, these best practices address: surveillance of the network (Detailed Information for the Best Practice: 7-7-0401, available at <https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-7-0401>), protection against denial of service attacks (Detailed Information for the Best Practice: 7-6-8047, available at <https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-6-8047>).

also inherently entails information processing in the form of spam and malware protection, network monitoring and other management techniques to provide a safe, high performance Internet experience for customers. Some customers may choose to obtain some limited portion of this functionality from a third party. For example, some customers choose to use third-party web browsers. But, again, all of the CenturyLink technical functionality is still provided with the service and is fully integrated with the Internet access service offering. And, much of this functionality is, in fact, exclusively provided by CenturyLink's.

Further, many of the same features that come with broadband Internet access are still available to consumers. All of CenturyLink's residential broadband Internet access plans include some or all of the following: email accounts and email storage; Wi-Fi access; Norton Antivirus protection; spam filtering; online backup protection; security, and other support services such as CPE and wireless networking support, and the ability to set up a personalized home page that automatically retrieves games, weather, news and other information selected by the customer.¹³¹ CenturyLink's business plans include similar email functionality, security, as well as web site design and hosting, Domain Name Registration, data backup; wireless networking, and a variety of other business tools.¹³² All of these features similarly involve "generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing" information. Again, for some of these features, a customer may choose to utilize a third party. For example, CenturyLink residential

6-8047), and protection of the domain name system from poisoning (Detailed Information for the Best Practice: 7-6- 8048, available at <https://www.fcc.gov/nors/outage/bestpractice/DetailedBestPractice.cfm?number=7-6-8048>).

¹³¹ See CenturyLink's residential offer and ordering web site: <https://www.centurylink.com/home/internet/>; and <http://www.centurylink.com/help/index.php?assetid=120>; and <http://www.centurylink.com/home/support/internetprotection/>.

¹³² See CenturyLink's business offer and ordering web site: <https://www.centurylink.com/small-business/products/business-internet/>.

customers can choose to use Gmail instead of the CenturyLink' email feature. But, the CenturyLink email feature is still provided with the service. And, customers still must rely on the network provider for the technical functionality described above.

Moreover, CenturyLink and other broadband providers compete based on these service functionalities and features, just as they compete based on speed and price. Providers use these aspects of broadband Internet service to differentiate their services from those of competitors.¹³³

3. The Commission could not sustain a reversal of its prior classification rulings given the serious reliance interest of broadband providers.

In light of the above, any reversal of the Commission's past rulings regarding the classification of broadband Internet access under Title I would be legally untenable. The Commission, in its *Cable Modem Order* and its subsequent decisions addressing the regulatory status of other broadband technologies, ruled that broadband Internet access is an information service with an inseparable telecommunications component.¹³⁴ It follows, said the Commission,

¹³³ See, e.g., Comcast: <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?lid=2LearnHSI&pos=Nav>; Cox: <http://www.cox.com/residential/internet.cox>; Charter: <http://www.charter.com/Visitors/Products.aspx?MenuItem=20>; Mediacom: <https://mediacomcable.com/site/internet.html>;

Cable One: <https://www.cableone.net/residential/internet>;

CenturyLink: <http://www.centurylink.com/home/internet/>; AT&T: <http://www.att.com/shop/internet.html#fbid=2tZUASHvFBZ>; Verizon: <http://www.verizon.com/home/highspeedinternet/>.

¹³⁴ *Cable Modem Order, rev'd, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd, NCTA v. Brand X*, 545 U.S. 967 (2005); *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for*

that broadband Internet access is not a telecommunications service within the Commission's Title II jurisdiction.¹³⁵ The factual underpinnings of these rulings have not changed. Indeed, this conclusion is even more accurate today.

Moreover, the industry, particularly broadband providers who have invested billions of dollars in network infrastructure since the Commission's rulings, has relied heavily on these rulings in making significant financial outlays.¹³⁶ In this context, the Commission cannot simply cast aside its prior rulings.

Applicable legal precedent establishes the burden that applies where a reversal by the Commission would require it to make factual findings that contradict its earlier rulings and where its policy has engendered serious reliance interests such as those at stake here.¹³⁷

Specifically, the Supreme Court has held:

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

Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *aff'd sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and cons. cases), 507 F.3d 207 (2007); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Order*).

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

¹³⁶ *See pp. 4-5, supra*.

¹³⁷ *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1810-1811 (2009).

reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. (emphasis added)¹³⁸

This legal standard cannot be met here. The transmission component of broadband Internet access is, if anything, more integrated into the finished service than at the time of the Commission's prior broadband decisions.

Nor could the Commission reverse its prior classification orders based on some observation about the current state of competition for broadband. To begin with, as demonstrated above, competition has thrived and there has been robust growth in the broadband market since the Commission classified broadband Internet access as a Title I information service.¹³⁹ But, even if that were not the case, it would be reversible error to premise a reclassification decision upon any determination regarding the current state of competition. The classification analysis is not, and never has been, properly guided by concerns of competition policy. The relevant statutory definitions speak to the functionalities provided, not the state of the market for those functionalities.¹⁴⁰ Likewise, the Commission's decisions addressing service classification have examined the functionality of the services provided, and the degree to which any information-service aspects were integrated with, or merely incidental to, the underlying transmission -- not to the state of the market for the offering at issue.¹⁴¹

¹³⁸ *Id.* at 1811.

¹³⁹ *See* pp. 8-13, *supra*.

¹⁴⁰ *See* 47 U.S.C. § 153(24) (defining "information service"), 153(50), (53) (together providing definition of "telecommunications service").

¹⁴¹ *See, e.g., Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731 (2008); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-30, Declaratory Ruling, 22 FCC Rcd 5901 (2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006);

B. Classification of Other Purportedly Discreet “Transmission” Components As Title II Telecommunications Services Would Also Be Unlawful.

It follows from this discussion that a classification of various other purportedly discreet pieces of “transmission” that underlie BIA service as Title II telecommunications services would also be unlawful. The *NPRM* cites two similar proposals, the recent petition by Mozilla as well as a proposal by various academics at Columbia University, that ask that the Commission now classify another portion of the integrated information service functionality that is BIA as a discreet Title II telecommunications service.¹⁴² Both proposals ask the Commission to find that the part of BIA that might be seen as a content provider response to a customer’s query is a discreet telecommunications service.¹⁴³ But, consistent with the discussion above, these aspects of BIA service are also fully integrated with the broadband Internet access service offering from the customer’s perspective. Thus, any attempt to now classify those components of BIA service as a telecommunications service would also be reversible error.

C. A Title II Forbearance Model Cannot Be Sustained.

A Title II forbearance model for establishing Commission authority to issue Open Internet regulations also cannot be sustained. The *NPRM* asks whether the Commission should

AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket No. 03-133, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005); *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002). The Supreme Court followed the same approach in *Brand X*.

¹⁴² *NPRM* ¶ 152 (describing Mozilla petition proposing a telecommunications service status for “remote delivery service” and Columbia University proposal seeking the same for “sender side” aspect of BIA service).

¹⁴³ *Id.*

contemplate an approach by which it would apply some but not all Title II requirements to the transmission “component” – for example, Sections 201, 202, and 208.¹⁴⁴ And, the Commission also discussed a Title II forbearance model in the *NOI*.¹⁴⁵ It would be both unlawful and unwarranted to do so, given the competitive state of broadband and the nearly complete absence of any claims of harm under the current regime. As described above, the vast majority of Americans have access to three or more fixed broadband providers and three or more mobile broadband providers. Given these conditions, one would expect to find the forces of competition protecting consumer interests, as providers work to capture and retain customers by responding to customer needs. And, in fact, this is precisely what has happened.

The *NPRM* and *NOI* essentially ask commenting parties to identify those provisions of Title II that the Commission should forbear from or, alternatively, decline to forbear from -- should it reclassify some portion of BIA as a telecommunications service. However, under Section 10’s forbearance standard, the Commission would have to forbear from the application of all provisions in Title II. Given the above, the Commission could not plausibly argue that Section 10’s forbearance standard permits the application of any of the common-carrier requirements, designed a century ago for the provision by monopoly providers of communications and transportation offerings, to broadband networks of today. Section 10 asks the Commission to consider whether “enforcement of [the] regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations ... are just and reasonable and are not unjustly or unreasonably discriminatory;” whether such enforcement “is not necessary for the protection of consumers;” and whether forbearance “is consistent with the

¹⁴⁴ *NPRM* ¶ 154.

¹⁴⁵ *NOI*, at Heading II.B.3.

public interest.”¹⁴⁶ Here, where customers are being well-served by a multi-platform market offering, consistently improved quality of service and consistently declining prices, and where providers continue to invest massive amounts of capital in an effort to build better, faster, and more efficient networks, there can be no argument that the application of provisions that currently *do not apply* is somehow “necessary” to insuring reasonable rates, terms, or prices, to protecting consumers, or to promoting the public interest.

This conclusion is only bolstered by Section 10’s legislative history and its consistent interpretation by the Commission and the courts, all of which confirm that this provision is designed to *remove* existing requirements -- *i.e.*, to deregulate -- where (as here) the market is capable of ensuring that providers respond to consumer needs. When the Senate Committee on Commerce, Science, and Transportation passed the 1995 version of what later became the 1996 Act -- a version whose forbearance provision largely mirrored the provision ultimately enacted -- the Report emphasized that the section would “permit the FCC to reduce the regulatory burdens on the telephone company when competition develops or when the FCC determines that relaxed regulation is in the public interest.”¹⁴⁷ Likewise, that Committee’s Chairman commented on the Senate floor that forbearance “will allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest.”¹⁴⁸ The D.C. Circuit has called Section 10 “[c]ritical to Congress’s deregulation

¹⁴⁶ 47 U.S.C. § 160(a).

¹⁴⁷ 104 S. Rpt. 23, Telecommunications Competition and Deregulation Act of 1995.

¹⁴⁸ 141 Cong. Rec. S7886 (daily ed. June 7, 1995) (remarks of Sen. Pressler).

strategy.”¹⁴⁹ The Commission has similarly called Section 10 “[a]n integral part of the ‘pro-competitive, de-regulatory national policy framework’ established in the 1996 Act.”¹⁵⁰

Given the competitive state of the market, the absence of significant harm resulting from the current framework, and Section 10’s deregulatory purpose, the Commission simply cannot sustain a refusal to forbear from application of Sections 201, 202, 208, or any other Title II provision.

D. Title II Reclassification Would Also Not Create the Desired Results.

Title II reclassification would also not give the Commission the authority to promulgate the proposed rules, particularly the more onerous aspects, and would otherwise create results the Commission does not want. Should the Commission reclassify, it would, as a matter of law, need to categorize broadband providers as nondominant providers. But, regardless of whether broadband providers are deemed dominant or nondominant, the Commission could not sustain the more onerous new regulations proposed in the *NPRM* – for a example, extending rights to edge providers under a no blocking rule, creating a minimum level of service requirement or prohibiting price discrimination or paid prioritization via a nondiscrimination rule. For example, reclassification would also mean that Title II’s reciprocal compensation and Sections 201 and 202 requirements apply and thus that broadband providers must be paid and have some ability to discriminate on price and other terms. Reclassification would also mean that

¹⁴⁹ *AT&T Inc. v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006).

¹⁵⁰ *See, e.g., In the Matters of Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19487 ¶ 15 (2007) (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)).

telecommunications provider and telecommunications service labels would apply to edge providers, CDN providers, and others and their services.

E. The Commission Lacks Adequate Authority Under Section 706 To Adopt the Proposed New Regulations -- Particularly the More Onerous Aspects.

The FCC also lacks adequate authority under Section 706 or the other cited statutory provisions to adopt the proposed regulations, and this is particularly so for the more onerous aspects of the no blocking and nondiscrimination rules discussed above.

1. Section 706 contains no grant of Commission authority.

The *NPRM* contends that Section 706(a) and 706 (b) contain “independent and overlapping grants of authority that give the Commission the flexibility to encourage deployment of broadband Internet access service through a variety of regulatory methods, including removal of barriers to infrastructure investment and promoting competition in the telecommunications market, and, in the case of section 706(b), giving the Commission the authority to act swiftly when it makes a negative finding of adequate deployment.”¹⁵¹ CenturyLink respectfully disagrees with these assertions and with the conclusions of the DC Circuit in *Verizon* that Section 706 contains any independent grant of authority that can support adoption of affirmative regulatory obligations such as no blocking and nondiscrimination rules to begin with.

A cursory review of the statutory language in Section 706 confirms this. Section 706(a) states:

(a) In general. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance,

¹⁵¹ *NPRM* ¶ 143.

measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.¹⁵²

And, Section 706(b) states:

The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.¹⁵³

Sections 706(a) and 706(b) clearly do not confer independent authority to regulate. As was the case with the Commission's *2010 Open Internet Order*, it is impossible to tell whether the *NPRM* contemplates the Commission purporting to exercise direct or ancillary jurisdiction. The Commission's purported legal theories fail even if it relies on ancillary, as opposed to direct, legal authority. *Midwest Video II* and other decisions in the line of cases beginning with the Supreme Court's 1968 decision in *United States v. Southwestern Cable Co.* make clear that the Commission does not have jurisdiction and authority to impose the proposed rules under its ancillary authority.¹⁵⁴ But, regardless, the conclusion that section 706 does not confer the necessary authority holds.

Section 706(a) contains no grant of independent regulatory authority of any kind. It directs the FCC to take action "by utilizing . . . price cap regulation, regulatory forbearance,

¹⁵² 47 U.S.C. § 1302(a).

¹⁵³ 47 U.S.C. § 1302(b).

¹⁵⁴ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Those cases establish that ancillary Title I authority exists where: "(1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citing *Southwestern Cable*, 392 U.S. at 177-78). Consistent with the discussion in the text, the new rules proposed in the *NPRM* are not reasonably ancillary to the Commission's effective performance of any of its statutorily mandated responsibilities.

measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹⁵⁵ In other words, it directs the Commission to utilize its existing authority found in other statutory grants of authority to pursue certain policies. Indeed, based on this text, the Commission, in 1998 concluded that “section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods,” but rather “directs the Commission to use the authority granted in other provisions.”¹⁵⁶ The Commission, in the *2010 Open Internet Order* sought to disavow this reading. But, its prior interpretation is correct.

And, Section 706(b) does not grant the FCC independent authority to impose regulatory mandates like those discussed in the *NPRM*. That provision authorizes the FCC to act only “by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”¹⁵⁷ It is impossible to construe this language as giving the Commission authority to involuntarily impose regulatory obligations like the no blocking and non-discrimination rules discussed in the *NPRM*. Even the authority it does confer applies only in geographic areas where deployment has been deemed inadequate, not nationwide.

Contrary to the suggestions of the *NPRM*, the proposed interpretation of Section 706 authority also does not bolster the policies of Section 230(b).¹⁵⁸ Rather, Section 230(b) and the 1996 Act’s other provisions¹⁵⁹ only further disprove any claim that Congress intended to vest the

¹⁵⁵ 47 U.S.C. § 1302(a).

¹⁵⁶ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044 (1998) (*Advanced Services Order*).

¹⁵⁷ 47 U.S.C. § 1302(b).

¹⁵⁸ *NPRM* ¶ 146.

¹⁵⁹ *See, e.g.*, The Act’s preamble, Pub. L. No. 104-104, Preamble (stating that its purpose was “[t]o promote competition and reduce regulation in order to secure lower prices and higher

Commission with authority to regulate the Internet or broadband Internet access. Section 230(b) (“Protection for private blocking and screening of offensive material”) states:

- (b) Policy. It is the policy of the United States –
- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
 - (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
 - (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
 - (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and
 - (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.¹⁶⁰

The only reasonable reading of this language is that it mandates that the Commission ensure that the Internet remain “unfettered by Federal or State regulation.” Thus, a reading of Section 706 as granting the Commission authority to regulate broadband Internet access cannot be considered consistent with Section 230(b) either.

2. The proposed rules, or some of them, exceed the scope of any purported Commission authority under Section 706.

Even assuming Section 706 provides a grant of Commission authority to begin with, it provides only a very narrow grant and the proposed rules exceed that authority.

At most, Section 706 permits the Commission to take actions that have the effect of promoting broadband deployment. Section 706(a) only authorizes the FCC to “encourage the

quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”).

¹⁶⁰ 47 U.S.C. § 230(b).

deployment” of broadband services “by utilizing ... regulating methods that remove barriers to infrastructure investment.”¹⁶¹ Section 706(b) directs the FCC, upon finding that broadband is not “being deployed to all Americans in a reasonable and timely fashion,” to “take immediate action to accelerate deployment of such capability” in areas lacking deployment.¹⁶²

As demonstrated above, the record shows that the new rules proposed in the *NPRM*, and particularly the more onerous versions of those rules discussed herein, would not promote deployment and in fact would deter investment and thereby actually deter deployment. Such regulation also cannot be reconciled with the clear expression in both Section 706(a) and Section 706(b) of a pro-competition, de-regulatory policy guidance. And, as discussed above, these conclusions are only bolstered by Section 230(b) and other provisions in the 1996 Act.

3. The proposed rules also constitute common carrier regulation and are prohibited by Section 153(51).

Even if one or more of the proposed statutory bases for authority exist, the Commission lacks adequate authority to adopt the proposed regulations, and particularly the more onerous aspects, as they would constitute common carrier regulation prohibited by Section 153(51).¹⁶³ As the *NPRM* acknowledges, even if the Commission finds adequate authority to regulate here under Section 706 or some other statutory provision, Section 153(51) precludes the Commission from regulating under that authority in a way that regulates broadband providers as common carriers.¹⁶⁴ For example, the DC Circuit, in *Verizon*, has already found that the adoption of a no blocking rule that effectively requires that broadband providers provide a minimum level of

¹⁶¹ 47 U.S.C. § 1302(a).

¹⁶² 47 U.S.C. § 1302(b).

¹⁶³ 47 U.S.C. § 153(51).

¹⁶⁴ *NPRM* ¶ 147.

service for free to edge providers would constitute impermissible common carrier regulation.¹⁶⁵ The no blocking rule proposed in the *NPRM* still imposes a minimum level of service for free and purports to extend the benefit of that requirement to edge providers. As such, it constitutes permissible common carrier regulation. Similarly, the court, in *Verizon*, correctly found that application of an unreasonable discrimination standard would constitute impermissible common carrier regulation.¹⁶⁶ Moreover, the court's discussion of the nondiscrimination standard adopted in the Commission's *2010 Open Internet Order* makes clear that any nondiscrimination standard that did not unambiguously permit pay-for-priority or similar arrangements between broadband providers, or otherwise was so prescriptive as to excessively limit the ability of broadband providers to determine who they would deal with and the terms of those dealings, would constitute impermissible common carrier regulation.¹⁶⁷ Depending upon what form is ultimately adopted, the *NPRM*'s proposed non-discrimination standard would rise to that level.

The discussion above highlights some of the concerning aspects of the rules. For example, a minimum level of service requirement, extension of no blocking rights to edge providers, an outright ban on paid prioritization, or an otherwise overly prescriptive no blocking or nondiscrimination rule (i.e. one that in concept or in application failed to unambiguously provide broadband providers considerable discretion in determining with whom they dealt and on what terms) would constitute impermissible common carrier regulation.

¹⁶⁵ *Verizon v. FCC*, 740 F.3d at 658.

¹⁶⁶ *Verizon v. FCC*, 740 F.3d at 655-56.

¹⁶⁷ *Verizon v. FCC*, 740 F.3d at 655-57.

F. The Proposed Rules, Particularly the More Onerous Aspects, Would Also Violate the First and Fifth Amendments.

1. Any new disclosure requirements must satisfy applicable First Amendment requirements.

CenturyLink addresses the best policy approach with respect to the Commission’s proposed new disclosure rules, above. But, in the end, any disclosure rule must satisfy applicable First Amendment requirements. And, notably, a detailed and rigid new disclosure mandate (for example, a standardized BIA disclosure requirement), in addition to being less desirable as a policy matter, would also violate the First Amendment.

The Supreme Court has made clear that disclosure requirements trigger First Amendment scrutiny every bit as much as prohibitions on speech. The Court has opined that “[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”¹⁶⁸ The Court has rejected any distinction between “compelled statements of opinion” and “compelled statements of ‘fact’”: “either form of compulsion burdens protected speech.”¹⁶⁹

Accordingly, any information mandate considered by the Commission would need to pass First Amendment review. On the basis of the current record, it does not appear that a more detailed consumer disclosure mandate such as those proposed in the *NPRM* would survive such scrutiny.¹⁷⁰ As noted above, there are only a very small number of anecdotal examples where

¹⁶⁸ *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis in original).

¹⁶⁹ *Id.* at 797-98.

¹⁷⁰ *See, e.g., NPRM* ¶¶ 66-83.

broadband access providers have taken actions that the Commission has found objectionable.¹⁷¹ Quite simply, there is no factual predicate for a sweeping new information disclosure mandate because there is no evidence of a systematic or enduring problem.

The Supreme Court has never upheld the constitutionality of a governmentally-imposed disclosure requirement in the absence of evidence that the regulation was reasonably necessary to address a potential problem. In *Riley v. National Fed'n of the Blind of N.C., Inc.*,¹⁷² for example, the Supreme Court invalidated a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually given to the charities for whom the fundraisers worked, even though certain donors might have an abstract interest in learning such information.

Similarly, in *Ibanez v. Florida*, the Court invalidated the punishment of a Certified Financial Planner (CFP) under a state rule requiring CFPs to disclose in their advertisements that CFP status was conferred by an unofficial private organization. The Court explained that the State's "concern about the possibility of deception in hypothetical cases is not sufficient" and demanded actual evidence of harm.¹⁷³ The Supreme Court has continued to apply First Amendment scrutiny to disclosure requirements.¹⁷⁴

¹⁷¹ See *supra*, pp. 7-8.

¹⁷² See *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. at 797-98.

¹⁷³ *Ibanez v. Fla. Dept. of Bus. and Professional Regulation*, 512 U.S. 136, 145 n.10 ("Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled" in the absence of the disclosure.). "Given the state of this record -- the failure of the Board to point to any harm that is potentially real, not purely hypothetical -- we are satisfied that the Board's action is unjustified." *Id.* at 146.

¹⁷⁴ See *John Doe No. 1 v. Reed*, 561 U.S. 186, 195-96 (2010) (affirming that disclosure requirements trigger First Amendment scrutiny); *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 250 (2010) (explaining that "[u]njustified or unduly burdensome disclosure

In *Int'l Dairy Foods Ass'n v. Amestoy*,¹⁷⁵ the Second Circuit invalidated a Vermont statute requiring dairy manufacturers who used a synthetic growth hormone to disclose that fact in the label of their milk. The court of appeals held that the State's asserted justifications for the statute -- "strong consumer interest and the public's 'right to know'" -- were "insufficient to justify compromising protected constitutional rights."¹⁷⁶ The court added:

We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernible impact on a final product.¹⁷⁷

The court noted further that, if the government were not required to adduce a factual predicate for a mandatory disclosure rule, there would be no limit on its authority to impose such mandates:

Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered. Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern, the manufacturers cannot be compelled to disclose it.¹⁷⁸

Mandated information-disclosure requirements are, therefore, unconstitutional in the absence of a documented governmental justification. "The First Amendment does not permit a

requirements offend the First Amendment by chilling protected speech," although upholding the particular disclosure rules at issue, based on review of the record showing that they were "intended to combat the problem of inherently misleading commercial advertisements").

¹⁷⁵ *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

¹⁷⁶ *Id.* at 73.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 74.

remedy broader than that which is necessary to prevent deception, or correct the effects of past deception.”¹⁷⁹

On the basis of the current record, the First Amendment standard cannot be met for a detailed and rigid disclosure rules such as those proposed in the *NPRM*.

2. The proposed rules, particularly the more burdensome no blocking and nondiscrimination rules, would violate the First Amendment.

Regardless of the supporting legal theory, the no blocking and nondiscrimination rules proposed in the *NPRM* would also displace access service providers’ editorial control over their networks and would therefore violate the First Amendment rights of free speech and free press. This is particularly true of the more aggressive proposed regulations along the lines of the objectionable aspects of the no blocking rule and nondiscrimination rule detailed above.

The First Amendment protects the process of editorial control and selection of information, as well as the transmission of content of one’s own creation. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995), for example, the Supreme Court made clear that the process of choosing among messages was itself an act of expression:

Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. The selection of contingents to make a parade is entitled to similar protection.¹⁸⁰

¹⁷⁹ *National Committee on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977).

¹⁸⁰ 515 U.S. at 570 (citations omitted).

Similarly, in *Turner I*, 512 U.S. 622 (1994) and *Turner II*, 520 U.S. 180 (1997), the Supreme Court held that the First Amendment protects the right of cable operators to decide what channels to carry, whether or not the programming involved is produced by the cable operator or an affiliate: “Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’”¹⁸¹ The Court held that mandatory carriage rules interfered with a provider’s editorial control and therefore abridged “speech” within the meaning of the First Amendment.¹⁸² A bare majority of the Supreme Court upheld this must-carry regime even though all agreed that it substantially infringed the First Amendment rights of both cable operators and cable programmers: “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”¹⁸³ The must-carry regime invaded the cable companies’ constitutionally guaranteed autonomy to choose “what to say and what to leave unsaid.”¹⁸⁴

¹⁸¹ *Turner I*, 512 U.S. at 636 (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

¹⁸² *Turner I*, 512 U.S. at 636-37.

¹⁸³ *Turner I*, 512 U.S. at 641.

¹⁸⁴ *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 11 (1986) (plurality opinion). In the wake of *Turner Broadcasting*, lower courts have continued to apply the same principle. In *Time Warner Ent’t Co. v. FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001), for example, the court of appeals held that the Commission’s 30% subscriber cap on cable operators did not satisfy intermediate scrutiny under the First Amendment because it limited the ability of cable companies to speak with their customers. In *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009), the D.C. Circuit vacated the subscriber cap limit without the opportunity for further proceedings because of the substantial First Amendment principles involved. *See also Cablevisions Sys. Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (“As to the cable operators, the exclusivity ban dampens their incentives to invest in new or existing programming networks. They might not take the risk and spend the money if they cannot fully reap the fruits of their investment. Similarly, competitors of cable operators

These vital First Amendment principles apply to the Internet as well. The Supreme Court has made clear that Internet speech enjoys full First Amendment protection.¹⁸⁵

Whether based on a Title II reclassification rationale or any other legal authority theory, the rules as proposed in the *NPRM* – and particularly the more onerous aspects of the no blocking and non discrimination rules discussed above -- would strip the ability of broadband Internet access service providers to exercise editorial control over their networks by transforming them into common carriers. Although CenturyLink and other providers have heretofore chosen to disseminate speech on an open and equal basis, their voluntary choice to do so cannot be replaced by a government mandate that effectively eliminates their right to exercise editorial control. Imposing obligations such as a minimum level of service for free to edge providers or explicitly or in practice banning broadband providers from reaching deals with edge providers on individual terms would be like a rule requiring a cable operator to carry all broadcast stations, but see *Turner I and II*, or a parade organizer to admit all applicants on a lottery basis, but see *Hurley*, or a newspaper to carry replies to its editorials, but see, *Miami Herald Publishing Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974); *Ampersand Pub., LLC v. N.L.R.B.*, 702 F.3d 51, 56 (D.C. Cir. 2012) (affirming right of editorial control).

Reclassification would therefore trigger First Amendment scrutiny because it would eliminate broadband providers' editorial control over their networks. A regulation need not

may feel less need to invest in new programming networks because they can piggyback on the cable-affiliated networks. As a result, there may be fewer new video programming networks than there otherwise would be. As this Court has explained, the resulting reduction in speech (compared to what otherwise would occur) implicates First Amendment interests.”).

¹⁸⁵ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868-69 (1997) (“Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry”).

explicitly silence speech in order to violate the First Amendment.¹⁸⁶ At a minimum, the intermediate scrutiny standard applied in *Turner Broadcasting* requires the Government to demonstrate that a content-neutral regulation “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”¹⁸⁷ As is demonstrated throughout these comments, it is clear that the requirements of intermediate scrutiny could not be satisfied here. These heavy-handed regulatory requirements would not advance important governmental interests -- in fact, they would discourage broadband deployment, reduce innovation, and harm consumers. Moreover, they are not necessary in light of other regulatory alternatives available to the Commission. Just as the Commission has recognized the importance of technological change in the original cable must-carry rules, with the approval of the D.C. Circuit, *see Agape Church, Inc. v. FCC & United States*, 738 F.3d 397 (D.C. Cir. 2013), it should do the same here.

Accordingly, these proposals would violate the First Amendment. At a minimum, the Commission should construe its authority to avoid raising such questions.¹⁸⁸

3. The proposed no blocking and nondiscrimination rules would also violate the Fifth Amendment.

The proposed rules, particularly the more onerous aspects of the no blocking and non discrimination rules discussed in the *NPRM*, would also appropriate private property and therefore also constitute a taking within the meaning of the Fifth Amendment. Such rules would

¹⁸⁶ *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (“Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.”).

¹⁸⁷ *Turner II* at 189.

¹⁸⁸ *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).

effectively grant third-party content providers the use of a portion of an access provider's network and thereby represent an occupation of that property. It would cede to a third party what would amount to an easement to intrude its content onto the access provider's transmission equipment, computers, and cables. The government-compelled occupation and use of access provider property would strip the provider of its right to exclude others -- perhaps the most fundamental element of the bundle of rights known as "property."

In the related context of the cable must-carry rules, the courts in *Turner Broadcasting*¹⁸⁹ noted the potential Fifth Amendment question even though the issue of a taking was not before them.¹⁹⁰ Judge Williams raised the Fifth Amendment issue in the three-judge district court:

Because of my conclusions on the First Amendment challenge to the must-carry provisions, I do not reach the contention . . . that those provisions also represent an unconstitutional taking of cablecasters' property in violation of the Fifth Amendment. I do not, however, regard that claim as frivolous. The creation of an entitlement in some parties to use the facilities of another, *gratis*, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television. The NAB responds that *Loretto* is limited to "physical" occupations of "real property". But the insertion of local stations' programs into a cable operator's line-up presumably is not a metaphysical act, and presumably takes place on real property.¹⁹¹

¹⁸⁹ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

¹⁹⁰ *See Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 56 (D.D.C. 1993) (Sporkin, J., concurring) ("No challenge has been made under the taking provision of the Fifth Amendment or any other legal provision.").

¹⁹¹ *Id.* at 67 n.10 (Williams, J., dissenting) (internal citation omitted).

Similarly, in *Turner I*, four Justices noted “possible Takings Clause issues” from a hypothetical government mandate to transform cable systems into common carriers.¹⁹² These concerns are equally relevant here.

The touchstone is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where the Court applied the Takings Clause to a state law compelling apartment building owners to permit cable operators to place a small cable box and about 30 feet of one-half inch cable on their apartment buildings.¹⁹³ Explaining that the “power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights,”¹⁹⁴ the Court held that even such a “minor” occupation of an owner’s property authorized by government “constitutes a ‘taking’ of property for which just compensation is due.”¹⁹⁵ This *per se* rule is warranted because “constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.”¹⁹⁶ “An owner is entitled to the absolute and undisturbed possession of every part of his premises. . . .”¹⁹⁷ Therefore, “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”¹⁹⁸

The Supreme Court specifically held that a government-authorized invasion by a private party is treated no differently than a trespass by the government itself. “A permanent physical

¹⁹² 512 U.S. at 684 (O’Connor, J., concurring in part and dissenting in part, joined by Scalia, Thomas, and Ginsburg, JJ.).

¹⁹³ *Id.* at 422.

¹⁹⁴ *Id.* at 435.

¹⁹⁵ *Id.* at 421.

¹⁹⁶ *Id.* at 436.

¹⁹⁷ *Id.* at 436 n.13 (brackets, quotation marks and citation omitted).

¹⁹⁸ *Id.* at 426.

occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.”¹⁹⁹ Indeed, “an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property.”²⁰⁰ To force an owner to permit a third party to use and control part of his property “literally adds insult to injury.”²⁰¹ Following *Loretto*, the D.C. Circuit in *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), invalidated the FCC’s physical co-location rules, which granted competitive telephone providers “the right to exclusive use of a portion of the [local exchange carrier’s] central offices.” The FCC’s rules “directly implicate[d] the Just Compensation Clause of the Fifth Amendment, under which a ‘permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.’”²⁰² The court had no occasion to consider the FCC’s virtual co-location rules because it deemed them a mere exception to the physical co-location requirement; it therefore vacated the virtual co-location rules as a matter of severability and did not consider their constitutionality.²⁰³

Similarly, in *TCI of North Dakota v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993), the Eighth Circuit indicated that granting cable companies broad access to telephone company easements would give rise to “serious questions” under “the Takings Clause of the federal constitution.”²⁰⁴ By the same token, a no blocking rule or a nondiscrimination rule mandating that a broadband access service provider accept the intrusion of all network traffic onto the

¹⁹⁹ *Loretto*, 458 U.S. at 432 n.9.

²⁰⁰ *Id.* at 436 (original emphasis).

²⁰¹ *Id.* at 436.

²⁰² *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426).

²⁰³ *Id.* at 1447.

²⁰⁴ *TCI of North Dakota* at 815.

provider's property -- its transmission equipment, computers, and cables -- is not a mere *regulation* of the provider's property. A "regulatory taking . . . does not give the government [or its agent] any right to use the property, nor does it dispossess the owner or affect her right to exclude others."²⁰⁵ In contrast, a no blocking rule extending rights to edge providers, minimum level of service requirement, and an overly prescriptive nondiscrimination requirement all lead to a physical invasion of a cable operator's transmission facilities and a "practical ouster of [its] possession."²⁰⁶ It compels "an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."²⁰⁷ The *Loretto* Court stated that a *per se* taking occurs when the government authorizes a third party to "'regularly' use, or 'permanently' occupy, . . . a thing which theretofore was understood to be under private ownership."²⁰⁸ A nondiscrimination rule would have these harmful impacts. Indeed, given the level of competition demonstrated above, these prohibitions may serve to preclude a reasonable opportunity to recover their costs. Hence, the restrictions themselves constitute a taking, particularly in light of empirical evidence that supra-normal returns are not being earned.

The taking cannot be avoided by describing the invasion as "electronic" rather than "physical."²⁰⁹ Just as the law recognizes many forms of property (such as real, personal,

²⁰⁵ *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 n.19 (2002).

²⁰⁶ *Loretto*, 458 U.S. at 428 (citation and quotation marks omitted).

²⁰⁷ *Id.* at 431 (citation and quotation marks omitted).

²⁰⁸ *Id.* at 427 n.5 (citation and quotation marks omitted).

²⁰⁹ *See Arkansas Game and Fish Com'n v. United States*, 133 S. Ct. 511, 518 (2012) (holding that government-induced flooding could constitute a "taking" because "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking," "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests," and that "most takings claims turn on situation-specific factual inquiries.").

intellectual), so the forms of physical encroachment are equally varied. In fact, an invasion need not even physically touch the property in order to “occupy” it: the placement of telephone lines suspended above another’s real estate or building or right-of-way constitutes a compensable physical invasion, “even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land.”²¹⁰

In the case of a communications network, an electronic invasion or occupation is every bit as real as a physical one. Otherwise, the government could appropriate the entire network by, for example, commanding it to carry only content supplied by the government or designated third party, and then claim that no “taking” of private property had occurred. The Fifth Amendment may not be circumvented through such subterfuge.²¹¹ Even the famous “seizure” of the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630-31 (1952), did not involve physical invasion as such of the mills by government agents. Rather, the presidents of the various mills were deputized as “operations managers” and directed to carry on their activities in accordance with regulations and directions of the Secretary of Commerce.²¹² “A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of” the Fifth Amendment.²¹³

Thus, the no blocking and non discrimination rules, particularly the more onerous aspects discussed here, qualify as a *per se* taking whether the invasion is described as “physical” or

²¹⁰ *Loretto*, 458 U.S. at 430; *see also id.* at 422 (intruding cable company wires were suspended above rooftop of plaintiff’s building); *id.* at 429-30 (“construct[ing] and operat[ing] telegraph lines over a railroad’s right of way” would “be a compensable taking”).

²¹¹ *E.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 12 (1949) (government must pay just compensation “where public-utility property has been taken over for continued operation by a governmental authority”).

²¹² 343 U.S. at 583.

²¹³ *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2595 (2013).

“electronic.” Further, these rules would violate the Fifth Amendment even if they were analyzed not under *Loretto* but as a regulatory taking. In *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), for example, the Supreme Court held that a nondiscrimination rule requiring open access to a privately developed marina constituted a compensable taking. Although the Supreme Court has “been unable to develop any ‘set formula’” for such regulatory takings, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), it has “identified several factors -- such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action -- that have particular significance.”²¹⁴

Starting with the character of the government action, here -- as in *Kaiser Aetna* -- the challenged action is the government’s imposition on the property owner of a servitude or easement allowing others to use the property and preventing the owner from exercising the right to exclude. In *Kaiser Aetna*, the government tried to impose a navigational servitude that would have allowed the public free access to private property.²¹⁵ There, the public -- like a third-party content provider here -- was “an interloper with a government license.” *Florida Power*, 480 U.S. 245, 253 (1987). The Supreme Court found a taking:

[W]e hold that the “right to exclude,” so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.²¹⁶

²¹⁴ *Kaiser Aetna*, 444 U.S. at 175.

²¹⁵ 444 U.S. at 169, 178.

²¹⁶ *Kaiser Aetna*, 444 U.S. at 179-80 (internal citations and footnotes omitted); see also *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (state could not, without paying compensation,

The economic impact of the government-licensed invasion imposed by these rules would be far greater than that of the navigational servitude at issue in *Kaiser Aetna*. There, the public would have enjoyed “free access” to the marina “while [the property owners’] agreement with their customers call[ed] for an annual \$72 regular fee.”²¹⁷ Under these rules, content providers throughout the country would enjoy free use of a broadband access service provider’s facilities and free access to the provider’s customers -- property rights worth considerably more.

Finally, there are the access service provider’s reasonable, investment-backed expectations. Broadband access service providers have invested billions of dollars to upgrade their systems to handle increased capacity and to offer a host of innovative services, all to the end of offering their customers a better product. For the government to take advantage of the access service providers’ own market-driven improvements to their property to impose these onerous rules in order to subsidize and encourage “a budding entrepreneur in a dorm room”²¹⁸ would upset reasonable, investment-backed expectations and violate basic norms of fairness.²¹⁹

G. Light Touch Regulation Has The More Promising Legal Basis and Will Minimize Uncertainty.

The above discussion makes abundantly clear that the Commission’s authority in this area is generally very limited. It also demonstrates that an overly aggressive regulatory

require beachfront property owners to grant an easement allowing members of the public to pass across their property). The same result would obtain in this case.

²¹⁷ 444 U.S. at 180.

²¹⁸ *NPRM*, 24 FCC Rcd at 13065-66 ¶ 4.

²¹⁹ Investments have been made on the basis of a belief that the Internet was free from the very sort of regulation that the government proposes here. Gregory J. Sidak and Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract*, Cambridge University Press: Cambridge MA, 1997, pp. 12, 224-226 and 275-276. (“The utility placed the assets in service in expectation of the earnings that would be received. The expected returns of the firm constitute *investment-backed expectations*”, p. 276).

framework (e.g. a no blocking rule extending rights to edge providers, a minimum level of service and nondiscrimination obligation banning paid prioritization or otherwise failing to make unambiguously clear upfront that broadband providers have the ability to make deals on individual terms) will, at the very least, result in extensive litigation and years of uncertainty. This is true regardless of whether the Commission seeks to justify such a framework under a Title I legal authority theory or a Title II reclassification framework. In this context, light touch regulation – i.e. one that imposes no additional obligations or at least avoids the more onerous aspects of the *NPRM* proposals, has the more promising legal basis and will minimize uncertainty.

H. Because of Concerns About Its Legal Authority, the Commission Should Consider Referring Issues To Technical Advisory Groups.

Because of these concerns about the Commission’s legal authority in this area, it should also consider utilizing alternatives to new rules – particularly before enacting more aggressive regulatory tools that have questionable value as a policy matter and are likely legally challengeable. For example, the Commission should, as the *NPRM* suggests, consider seeking first to address issues via referrals to appropriate technical advisory groups. The *NPRM* seeks comment “on whether and how the Commission should incorporate the expertise of technical advisory groups into a new open Internet framework in a manner that could serve the goals of providing guidance, flexibility and access.”²²⁰ The *NPRM* asks how such groups might best be used and which groups would be most effective. Given the concerns detailed above, the Commission should consider referral or encouragement to such groups as an alternative to enacting more aggressive regulatory tools in this area. And, the Broadband Internet Technical

²²⁰ *NPRM* ¶ 176.

Advisory Group (BITAG), one of the groups mentioned in the *NPRM*, would be ideal for such work.

IV. CONCLUSION.

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

Respectfully submitted,

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