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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet;	)	GN Docket 14-28
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	)	
Framework for Broadband Internet Service	)	GN Docket 10-227
	)	
	)	

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I. Introduction

By statute, the mission of the Federal Communications Commission (FCC) is to advance the public interest. Strong public interest policies ensure that the awesome potential of communications reaches all Americans. Indeed, the Commission has both the ability and legally resilient authority to promote the public interest, convenience and necessity. These principles are timeless, even as communications evolve.

Broadband users in America need strong Open Internet guarantees. Common Cause has long supported the Open Internet (or "network neutrality") principles as a necessary condition for open and accountable government; meaningful public discourse; and an informed electorate. "The Internet was born on openness, thrived on openness and will achieve its full potential only through continued openness."[1] Increased broadband adoption and the pervasiveness of Internet applications to daily life make such guarantees all the more necessary. Access to affordable, usable broadband is essential in the 21st century. Online services are a backbone to industry, government, our everyday lives, and our democracy. Any policy regime short of full openness – embodied by enforceable and legally defensible no-blocking and anti-discrimination rules – threatens that openness.

II. Open Internet Protections Are Essential

In the years since the Commission examined the classification of broadband Internet service, notably the 2002 Declaratory Ruling and 2010 Open Internet Order, broadband Internet has become a more important and pervasive aspect of American lives. While 2.6 million

[1] In the Matter of Preserving the Open Internet Broadband Indus. Practices, 25 F.C.C. Rcd. 17905, 18044 (2010) (Concurring Statement of Commissioner Michael J. Copps) [hereinafter 2010 Order].

subscribers added broadband from the few major cable and telephone companies in 2013[2], nearly 1.2 million Americans have already added broadband in just the first quarter of 2014.[3] Forty-nine percent of the country now has a television connected to the Internet, more than double the amount in 2010.[4] Increased broadband adoption and new service offerings demonstrate that Open Internet protections foster the "virtuous circle" of innovation, generating both consumption and new discourse, driving additional investment and yet more creative applications.

However, as the industry has consolidated, Internet Service Providers (ISPs) have ever more incentive to discriminate against content they may disfavor for competitive or ideological reasons. Limited competition in last-mile connectivity means end-users are largely captive to ISP gatekeeping behaviors. As Commissioner Michael J. Copps stated in 2005, the Commission "need[s] a watchful eye to ensure that network providers do not become Internet gatekeepers, with the ability to dictate who can use the Internet and for what purpose."[5] Fully 70% of Americans have two or fewer options for broadband connectivity, with nearly one third limited to a single choice.[6] Concentrated market power has largely removed the incentive for capital investment for bandwidth upgrades. In sum, there is too little competition to prevent a race to the bottom.

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[2] LEICHTMAN RESEARCH GROUP, INC., *Actionable Research on the Broadband, Media & Entertainment Industries,* [1Q 2014] Res. Notes (2014), *available at* http://www.leichtmanresearch.com/research/notes03_2014.pdf.

[3] Press Release, Leichtman Research Group, Nearly 1.2 Million Add Broadband in the First Quarter of 2014 (May 20, 2014), http://www.leichtmanresearch.com/press/052014release.html.

[4] Press Release, Leichtman Research Group, 49% of U.S. Households have a TV Connected to the Internet (June 6, 2014), http://www.leichtmanresearch.com/press/060614release.html.

[5] *See* In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Serv. Obligations of Broadband Providers Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs.; 1998 Biennial Regulatory Review -- Review of Computer III & Ona Safeguards & Requirements Conditional Petition of the Verizon Tel. Companies for Forbearance Under 47 U.S.C. §4f 160(c) with Regard to, 20 F.C.C. Rcd. 14853, 14980 (2005)

[6] Jim Barthold, Franken rails against Comcast-TWC merger, says media companies fear retaliation, FIERCE CABLE (April 14, 2014), http://www.fiercecable.com/story/franken-rails-against-comcast-twc-merger-says-media-companies-fear-retaliat/2014-04-14. *See also* Zach Epstein, *Almost one-third of U.S. households have no choice for broadband Internet service*, BOY GENIUS REPORT (Mar 14, 2014 at 8:45 AM), http://bgr.com/2014/03/14/home-internet-service-competition-lacking/ (Analyzing the December 2013 FCC Internet Access Report).

But communications policy should empower consumers, not gatekeepers. Any proposal to allow blocking, discrimination, or paid-prioritization would strengthen incumbent ISPs that possess both the technical ability and financial incentives to act as toll collectors, judges and juries of Internet content and access.

III. The Open Internet Promotes an Informed and Engaged Electorate

The Internet is the 21st century public square, and must be guaranteed as an open forum for civic engagement. Beyond business innovation, the Internet is a laboratory for social innovation and political discourse. A fully-functioning democracy relies not only on citizens heading to the polls on Election Day, but also on continuing citizen engagement, debate, and discourse. News sites, social media tools, and organizing applications have facilitated voter education and activism. The historic presidential elections of 2008 and 2012 evinced new trends of online engagement, promulgating a more vibrant national discourse. Our Constitutional guarantee of free speech in the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[7] All citizens have the right and thus should have the ability to access information.[8] Democracy is best served when voters are able to seek and find information, thus enabling them to "actively speak" on Election Day.[9]

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[7] Associated Press v. U.S., 326 U.S. 1, 20 (1945); *see also* U.S. v. Midwest Video Corp., 406 U.S. 649, 668 n. 27 (1972).

[8] *See generally* 5 U.S.C.A. § 552 (West); *see also* FCC'S FREEDOM OF INFORMATION ACT PAGE, http://www.fcc.gov/foia (last visited July 10, 2014).

[9] In the Matter of Protecting & Promoting the Open Internet, GN14-28, 2014 WL 2001752 (F.C.C. May 15, 2014) [hereinafter NPRM].

A. The Open Internet Provides Access to a New Marketplace of Ideas

With the decline of newspaper reading and local TV news viewing,[10] voters are finding a new forum online, where citizens discuss the issues and advocates organize their constituents. Candidates for election are increasingly using the Internet to reach out, inform, and spread their campaign messages, and voters are utilizing diverse forums to communicate their messages to public officials.[11] This new media consumption cries out for a renewal of the Commission's strongly held tradition, established more than forty years ago in *Red Lion*, always to regulate in the public interest.[12] Here the public interest is clear. Certainly one such important public interest goal is to promote and protect a plurality of citizen voices in this electronic town square. With a few keystrokes, engaged citizens can express their political voices by generating website content, writing on a blog, or simply posting on a social networking site. As of 2012, 66% of Americans who use some form of social networking sites have utilized their capabilities to engage in civic or political activities.[13] This large percentage of social network users indeed accounts for 39% of American adults as a whole.[14] A quarter of subscribers to social networks aver that they have

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[10] *See* Pew Research Center, Daily Number: Number of Americans Who Read Print Newspapers Continues Decline (Oct. 11, 2012), http://www.pewresearch.org/daily-number/number-of-americans-who-read-print-newspapers-continues-decline/; *see also* PEW RESEARCH CENTER, STATE OF THE NEWS MEDIA, NEWSPAPERS: BY THE NUMBERS (2013), *available at* http://stateofthemedia.org/2013/newspapers-stabilizing-but-still-threatened/newspapers-by-the-numbers/; PEW RESEARCH CENTER, STATE OF THE NEWS MEDIA, LOCAL TV: AUDIENCE DECLINES AS REVENUE BOUNCES BACK (2013), *available at* http://stateofthemedia.org/2013/local-tv-audience-declines-as-revenue-bounces-back/; Pew Research Center, Fact Tank: Local TV Audiences Bounce Back (Jan. 28, 2014), http://www.pewresearch.org/fact-tank/2014/01/28/local-tv-audiences-bounce-back/ (Evidencing how a minor uptick in viewership is still overshadowed by greater overall decline over time).

[11] Pew Research Center's Journalism Project Staff, *How Presidential Candidates Use the Web and Social Media*, PEW RESEARCH JOURNALISM PROJECT (Aug. 15, 2012), http://www.journalism.org/2012/08/15/how-presidential-candidates-use-web-and-social-media/ ("In 2012, in short, voters [played] an increasingly large role in helping to communicate campaign messages, while the role of the traditional news media as an authority or validator has only lessened").

[12] *See generally* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367 (1969).

[13] Aaron Smith, *Civic Engagement in the Digital Age*, PEW RESEARCH INTERNET PROJECT (April 25, 2013), http://www.pewInternet.org/2013/04/25/civic-engagement-in-the-digital-age/.

[14] Id.

become increasingly active regarding a political issue after discussing or reading the posts of fellow users about the subject.[15] And not only are citizens becoming more active; some are both evolving and even changing their political views after engaging in the competitive marketplace of ideas and information.[16]

Voters use the Internet not only to discuss and share their views, but to seek out information and the latest news regarding our government and its many players. Both high profile reporters and newer voices are increasingly finding homes in digital media news sources.[17] With traditional outlets ever more constrained, these online reporters are both filling in gaps in local and diverse niche topics, and are "cultivating new forms of storytelling" via video, crowdsourcing, and new visualizations, styles, and means to connect with viewers.[18] More than one third of all US adults watch videos of the news online, and in adults aged 18-49 that percentage reaches nearly half.[19] During the most recent presidential campaign in 2012, 66% of registered voters who use the Internet watched election related videos online.[20] Web videos and live streams allow citizens access to inform themselves in new and dynamic ways, whether from a home desktop computer, a laptop in a coffee shop, or on their smartphones while in line at the bank. Anything from a live stream of The State of the Union address to videos of local town council meetings are accessible online.

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[15] Id.

[16] Lee Rainie and Aaron Smith, *Politics on Social Networking Sites*, PEW RESEARCH INTERNET PROJECT (Sept. 24, 2012), http://www.pewinternet.org/2012/09/04/politics-on-social-networking-sites/ ("16% of SNS users say they have changed their views about a political issue after discussing or reading posts about it on SNS").

[17] Mark Jurkowitz, *The Growth in Digital Reporting*, PEW RESEARCH JOURNALISM PROJECT (March 26, 2014), http://www.pewinternet.org/2012/09/04/politics-on-social-networking-sites/http://www.journalism.org/2014/03/26/the-growth-in-digital-reporting/.

[18] Id.

[19] Kenneth Olmstead et al., *New Video on the Web*, PEW RESEARCH JOURNALISM PROJECT (March 26, 2014), http://www.journalism.org/2014/03/26/news-video-on-the-web/ ("Nine in ten 18-to-29-year-olds watch online videos, and almost half, 48%, watch online news videos. That is equal to the 49% of 30-to-49-year-olds who watch online news video and outpaces the 27% of 50-to-64-year-olds and 11% of those 65 and older who do the same").

[20] Aaron Smith and Maeve Duggan, *Online Political Videos and Campaign 2012*, PEW RESEARCH INTERNET PROJECT (Nov. 2, 2012), http://www.pewInternet.org/2012/11/02/online-political-videos-and-campaign-2012/.

B. The Open Internet Facilitates Citizen-Government Interaction

As the Commission evaluates the impact of its policies on online citizen engagement, it should bear in mind that the federal government is increasingly utilizing the Internet to make services more available to the public. Since the enactment of the E-Government Act of 2002 and the creation of the Office of E-Government & Information Technology, the federal government has sought "To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government."[21] As vital public service information moves online, Open Internet guarantees are all the more important to ensure that those services are available and responsive to public need.

Deprioritization could also undermine the Commission's own ability to receive comment from the public online. Since its inception three years ago, 14 million users have signed 21 million petitions at the White House's citizen engagement site "We The People."[22] More than 105,000 of those signatures were used to call for Title II reclassification.[23] Additionally, Common Cause along with its allies collected more than a million signatures on an online petition calling for reclassification.[24] In total, more than three million citizens have raised their voices in support of the Open Internet.[25]

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[21] E–GOVERNMENT ACT OF 2002, PL 107–347, December 17, 2002, 116 Stat 2899

[22] Ezra Mechaber, *Making We The People More User-Friendly Than Ever*, THE WHITE HOUSE BLOG (June 25, 2014, 2:57 PM), http://www.whitehouse.gov/blog/2014/06/25/making-we-people-more-user-friendly-ever.

[23] *Restore Net Neutrality By Directing the FCC to Classify Internet Providers as "Common Carriers"*, WE THE PEOPLE, https://petitions.whitehouse.gov/petition/restore-net-neutrality-directing-Commission-classify-Internet-providers-common-carriers/5CWS1M4P (last visited July 10, 2014).

[24] Adrianne Jeffries, *Net neutrality petition gets a million signatures*, THE VERGE (Jan. 30, 2014), http://mobile.theverge.com/2014/1/30/5362166/net-neutrality-petition-gets-a-million-signatures-free-press.

[25] David Dayen, *Section Somehow, Activists Have Put Protecting Net Neutrality Back on the Agenda*, NEW REPUBLIC (May 15, 20140) http://www.newrepublic.com/article/117777/net-neutrality-comeback-why-fcc-might-save-it-yet.

Online voter registration is a new and growing frontier for government/public participation and interaction. Supplementing traditional paper registration, as of this June 20 US states offer online voter registration, and three more offer some form of limited online voter registration.[26] Paid prioritization could negatively impact this positive development. The technological advances that have fostered enhanced public engagement have also produced significantly increased voted registration.[27] Confining online voter registration sites to a slow lane would surely discourage uptake and usage of the service. Alternatively, state agencies may have to pay tolls to keep their online voter registration sites responsive, an access charge that would ultimately be borne by taxpayers.

A neutral Internet is necessary to ensure more than just e-government – it is essential to our increasingly-digital lives. Any service or content in a slow lane will always be disadvantaged relative to priority content. Web latency drives away traffic. This loss of traffic translates into real, material harm to edge providers because "people will visit a Web site less often if it is slower than a close competitor by more than 250 milliseconds."[28] An underfunded campaign may never reach and persuade its potential audience if those with more money grab (and keep) the voter's attention instead. Whether access charges are placed on the edge provider or the end user, they harm the user experience. The Commission has voiced concern that "innovation that

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[26] *Online Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 30, 2014), http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx.

[27] Erica Evans, *Surprising New Online Voter Registration Statistics*, FAIR ELECTIONS LEGAL NETWORK (Mar. 29, 2013), http://www.fairelectionsnetwork.com/blog/surprising-new-online-voter-registration-statistics ("In Arizona, there has been a 9.5% increase in voting since they began online registration in 2004. In 2012, the state of California registered 679,000 new voters online in the two months leading up to the November election. Oregon saw nearly 30,000 online registrations in the two days leading up to its registration deadline that same year, and hundreds of thousands in total since they began their system in 2010.").

[28] Steve Lohr, *For Impatient Web Users, an Eye Blink Is Just Too Long to Wait*, N.Y. Times, Mar. 1, 21012, at A1, *available at* http://www.nytimes.com/2012/03/01/technology/impatient-web-users-flee-slow-loading-sites.html?pagewanted=all&_r=1&; *see also How loading Time Affects Your Bottom Line,* KISSMETRICS, http://blog.kissmetrics.com/loading-time/?wide=1 (last visited July 11, 2014).

does not occur due to lack of Internet openness may be hard to detect."[29] Similarly, democratic vibrancy and public engagement which may be lost are not easy to quantify. That does not make them less important, since communications media exist as the conduit for free speech, not the speaker itself, [30] public policy should always prioritize the rights of the end user, the voter, the citizen.

IV. Paid Prioritization for Broadband Should be Barred Altogether

Allowance of paid prioritization on "commercially reasonable" terms would foreclose the Open Internet. This concept must not be pursued further. Such a policy regime would represent the abrogation of the Commission's prior public interest commitments and its stated priorities.[31] Prioritization creates fast lanes for deep-pocketed incumbents, leaving behind those alternative, independent, niche, and nascent voices with fewer resources to support them. Furthermore, "commercially reasonable" and "minimal level of service" are unworkable standards which invite years more of litigations, and an uncertain playing field. True Internet Openness should not be abandoned simply to avoid reclassification.

A. The Commercially Reasonable Standard

[29] NPRM para. 26.
[30] Open Internet Order 25 FCC Rcd at 17982, para.141.
[31] FCC Adopts Policy Statement, 2005 WL 1866079 (F.C.C. Aug. 5, 2005); *see also* Julius Genachowski, Chairman, Fed. Com. Comm'n, Preserving a Free and Open Internet:
A Platform for Innovation, Opportunity, and Prosperity (Sept. 21, 2009) (transcript available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-293568A1.doc).

"Commercial reasonableness" is not only too problematic to create a workable standard the Commission could enforce or that courts could uphold, but it favors the broadband providers over the end users. The standard is subjective, and in its very essence is discriminatory. In 2010, regarding the "no unreasonable discrimination" standard, the Commission attempted to "put particular emphasis on keeping control in the hands of users and preserving an application-blind network--a key part of making the Internet the innovative platform it is today."[32] The commercial reasonableness standard places control in the hands of the larger ISPs with the money to better argue what is reasonable. Reasonable network management, when applied agnostically to applications, can adapt to changes in technology and internet culture,[33] and puts control back in the hands of end users – determined by their own use and subscription. Commercially reasonable discrimination is flatly and flagrantly contrary to neutral Internet. The Commission would disserve the public interest by allowing such discrimination simply to avoid requiring broadband providers "to hold themselves out to serve all comers indiscriminately on the same or standardized terms."[34] This proposal only supplants one easily solvable problem with a slippery slope of paid prioritization and end user abuses.

The court has warned that "commercially reasonable" lends itself to "as applied" challenges because it remains too much in the gray area of permissiveness.[35] Even where it has been conditionally sanctioned by the Commission and the court regarding data-roaming, this measure is proving both unsatisfactory and commercially frustrating.[36] When challenged legally,

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[32] 2010 Order at 18046-47 (Concurring Statement of Commissioner Michael J. Copps).
[33] *See* Genachowski *supra* note 32 ("How do you design a network that is "future proof" -- that can support the applications that today's inventors have not yet dreamed of? The solution was to devise a network of networks that would not be biased in favor of any particular application. The Internet's creators didn't want the network architecture -- or any single entity -- to pick winners and losers.")
[34] NPRM para. 116 (Quoting Cellco P'ship v. F.C.C., 700 F.3d 534, 548 (D.C. Cir. 2012)).
[35] Verizon v. F.C.C., 740 F.3d 623, 652 (D.C. Cir. 2014) (citing Cellco, 700 F.3d at 548–49).
[36] *See* Wireless Telecommunications Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by T-Mobile Usa, Inc. Regarding Data Roaming Obligations, WT05-265, 2014 WL 2599360 (F.C.C. June 10, 2014).

even in the best case, the process would always favor incumbents with legal resources over start-ups. What is commercially reasonable for a major broadband provider may be unreasonable for a smaller burgeoning content provider; a lack of resources for access tolls easily translates into a lack of resources in the court room. The standard is fundamentally discriminatory, permitting "unjust and unreasonable" paid prioritization, and is teeming with ambiguities ripe for exploitation.[37] Therefore it is a policy regime which is diametrically opposed to the values of neutrality.

B. Minimum Levels of Service

The Commission's proposed minimum level of service standard is similarly impossible to quantify, and too easily abused. Whatever minimum level is set, the relative fast lane would advantage edge providers with the resources to pay for priority. Content in slower lanes would suffer decreased traffic,[38] or be forced to use lower-bandwidth technologies, such as fewer videos or lower quality content to compete with page load speeds. Any "best effort" measurement of service levels would fall only to the ISP to prove what is "traditional" or normal in their course of dealings, or their "technical capacity," not how the ISP *should* be performing in the best interest of the end user. As dissenting Judge Silberman pointed out in *Verizon v. FCC*, "by exceeding the minimum level of service… the broadband providers would have wide latitude to engage in individualized bargaining, which might take this rule outside of common

[37] John Eggerton, *Mayors Strongly Back Network Neutrality*, MULTICHANNEL NEWS (June 24, 2014 10:30 AM), http://www.multichannel.com/news/policy/mayors-strongly-back-network-neutrality/375346, (2014 Resolution of the National Conference of Mayors *available at* http://usmayors.org/82ndAnnualMeeting/media/resolutions-final.pdf).
[38] NPRM at para. 102.

carriage per se."[39] But as such a standard is too easily abused, attempted avoidance of per se common carriage through minimum levels and individualized bargaining would inevitably lead to "de facto" common carriage challenges, impermissible under Title I, according to current Court interpretation.

C. New Methods of Evaluation

Furthermore, both a factored approach and a case-by-case method of evaluating individualized negotiations leave too much room for uncertainty, certain to create trepidation among newer edge providers. While there is value to flexible standards, new entrants and new voices rely on stable ground rules with which to grow their businesses and online communities of civic engagement. The proposal for preclearance via an ombudsman is costly not only in money but in time, an unaffordable luxury to many new entrants.

If a factored approach is chosen, despite its uncertain legal resilience, the impact of broadband provider practices on free exercise of speech and civic engagement would undeniably need to be accounted for. But the so-called flexibility of a case-by-case basis discourages entrepreneurship, lowers the number of possible cases even to be heard, and thus interrupts the "virtuous circle" the Commission wisely wishes to encourage. Clear prophylactic rules serve far more effectively to promote new voices and to avoid unnecessary litigation.

V. Section 706 of the Telecommunications Act Fails as a Basis of Legal Authority

[39]Verizon *supra* note 36, at 667-68.

Section 706 of the 1996 Telecommunications Act has repeatedly proven an inadequate legal basis for guaranteed Open Internet protections. True authority to preserve the Open Internet cannot survive legal scrutiny when it is grounded in a precedent of maybes. The court in *Verizon v. FCC* repeatedly pointed to where regulation *might* be acceptable under Title I, but such inadequacy should raise red flags, rather than vain hopes. While §706 positively grants the regulatory authority to accelerate broadband deployment, this grant is limited in scope. A neutral platform for free speech and civic engagement remains continually and unnecessarily vulnerable under §706. There is no room for "fast lanes" in a truly open Internet, and the proposed §706 approach would explicitly create a de facto two-tiered Internet. For the baseline "minimum level of service" to continue to be effectively useful under any proposed standard of evaluation, it must be rooted beyond the constraints of Title I.

The court has repeatedly vacated Open Internet rules under §706 authority. First in *Comcast v. FCC*, then in *Verizon v. FCC,* the United States Court of Appeals for the District of Columbia Circuit pointed to the Commission's lack of authority to regulate the Internet under §706 other than to promote broadband deployment.[40] This is not because the court did not see value in these goals. Indeed the court has pointed to ways in which an Open Internet has proven a valuable and worthwhile objective.[41] The court has not contended that Title I "presents the quickest and most resilient path forward,"[42] but indeed has pointed to the opposite. What may be

[40] *See* Verizon *supra* note 36; *see also* Comcast Corp. v. F.C.C., 600 F.3d 642 (D.C. Cir. 2010).
[41] Verizon *supra* note 36 at 644 ("The Commission's finding that Internet openness fosters the edge-provider innovation that drives this "virtuous cycle" was likewise reasonable and grounded in substantial evidence.").
[42] *Fact Sheet: Protecting and Promoting the Open Internet*, FEDERAL COMMUNICATIONS COMMISSION (May 15, 2014), http://www.fcc.gov/document/fact-sheet-protecting-and-promoting-open-internet

quick is not necessarily strong, and Title I is in no way the more resilient path. It falls to the Commission to reevaluate and reverse its previous findings in the 2002 Declaratory Ruling.[43]

The Commission has both the ability to change the classification of broadband, and the respect of the court to do so. The court in *Brand X*, applying the *Chevron* standard, affirmed and deferred to the Commission's judgment in evaluating the communications landscape and distinguishing broadband as the Commission deemed best. The technological landscape has changed, and the Commission is free to revisit and alter its statutory interpretations.[44] Indeed, it has a clear obligation to bring its analysis and its classifications into the 21st century.

VI. Broadband Internet is a Telecommunications Service and Should be Reclassified Under Title II

The Commission has repeatedly voiced its commitment to a strong Open Internet. Now it must base this commitment on the strongest authority possible. That means reclassification under Title II of the Communications Act. While the rules regarding transparency remain in effect,[45] more robust rules are required to better serve the public. The worthy and necessary goals of no-blocking and non-discrimination currently lack any force and legal defense.

The solution to what has been a vexing problem for years is therefore incredibly simple. The only clear model for legal certainty, regulatory authority, and the flexibility to reflect modern civic engagement is reclassification of broadband Internet under Title II, with available forbearance prudently applied. Title II opponents have unwisely referred to this model as

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[43] https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf (classifying broadband as an information service)

[44] FCC v. Fox Television Stations, 556 U.S. 502 (2009) (agencies bear no higher burden of proof when changing their interpretations of statutes than in their initial interpretations).

[45] Verizon *supra* at note 36 at 659 (Rejecting Verizon's challenges to disclosure requirements).

outmoded and obsolete. On the contrary, the principles that buttress Title II are in truth timeless and well-suited to our modern communications needs.

A. Title II Will Stand Up to Legal Scrutiny

Title II presents clear and certain legal bases for net neutrality protections.[46] Section 202 of the Communications Act clearly states that common carriers may not "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services." [47] Classified under this authority, the Commission would have unambiguous authority to regulate against discrimination and blocking. Transparency requirements would further bolster the Commission's ability to protect consumers from "unjust and unreasonable practices," once anti-discrimination and no-blocking rules are solidly grounded in the Title II. Additionally, new enforcement and dispute resolution processes would be unnecessary under application of Section 208.[48] This process is already in effect for other Title II services. It provides a process which would be more accessible and innovation-friendly to new entrants.

The 1996 Telecommunications Act was written with the intent to grant the Commission authority to protect the Internet and the courts have recognized this grant. "It is true that 'Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with

[46] Comcast *supra* at note 41 at 645 ("Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. §§ 151 et seq., Congress has given the Commission express and expansive authority to regulate common carrier services.").
[47] 47 U.S.C.A. § 202 (West).
[48] 47 U.S.C.A. § 208 (West).

rapidly evolving communications technologies.'"[49] The legislative intent of the Communications Act was to grant the Commission means to "preserve competition and safeguard consumers."[50]

Sen. Ed Markey, a primary author of the 1996 Act, has stated that the Commission's proposed rules "could begin the dismantling of the Open Internet as we know it unless the Commission reclassifies broadband as a telecommunications service under Title II. Internet access today is like traditional phone service decades ago – we can't live or work without it."[51]

B. Forbearance Allows for Light Touch Regulation

A balance between legal fortitude and minimal regulation can, and should, be achieved by applying the available forbearance under Title II. Reclassification of broadband as a common carrier does not imply extra regulation. The tradition of light touch regulation may continue, and it can readily adapt itself to evolving broadband technologies and services. Title II is simply the means to an end, and the only effective means at that. This adaptability allows for a minimal regulatory presence which reflects modern technology while maintaining the values forbidding unjust or unreasonable practices, discrimination, or acts outside of the public interest.

Common carrier classification is appropriate for broadband Internet. Common carriage's reasonable scope may be interpreted and defined by the Commission, and due deference can be

[49] Comcast *supra* at note 41 at 661 (Quoting the FCC's brief).
[50] Press Release, Ed Markey United States Senator for Massachusetts, Markey Decries Court Ruling on Open Internet Rule (Jan 14, 2014), http://www.markey.senate.gov/news/press-releases/-markey-decries-court-ruling-on-open-internet-rule ("As one of the primary authors of the Telecom Act of 1996, I know the Communications Act gives the FCC clear authority to oversee the operation of broadband networks, and has the power to intervene in its effort to preserve competition and safeguard consumers.").
[51] Press Release, Ed Markey United States Senator for Massachusetts, Markey Statement on FCC Open Meeting (May 15, 2014), http://www.markey.senate.gov/news/press-releases/markey-statement-on-fcc-open-meeting.

expected from the courts.[52] The Internet is now considered as indispensable to everyday life as other utilities, and the Commission is not a stranger to this idea.[53] The established and workable framework for Title II regulation is a durable, adaptable model to encourage the Open Internet. The Commission's attempts to regulate broadband access by other means have failed. This failure needs to be addressed through Title II classification.

VII. Conclusion

For the FCC to successfully promote the public interest, it must reclassify broadband services under Title II of the Communications Act. The American people expect open and nondiscriminatory Internet access in this world of fast paced change. Their demand for an Open Internet has inspired hundreds of thousands of comments on the proceeding docket. It is time to bring broadband access oversight home to Title II.

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[52] Cellco, 700 F.3d at 544 ("the Commission's interpretation and application of the term 'common carrier' warrants Chevron deference").

[53] *See* Genachowski *supra* note 32 ("Today, we can't imagine what our lives would be like without the Internet – any more than we can imagine life without running water or the lightbulb.").