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Protecting and Promoting the Open Internet	GN Docket No. 14-28

COMMENTS OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

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SUMMARY

The Commission's commitment to preserving an open Internet has not wavered, and its path toward that goal is now clear: adopt rules under Title II that ensure that the end users of mass market, broadband Internet access can obtain, from any source, whatever lawful content they choose, and can likewise upload and transmit content to any Internet destination of their choice.

Two very thorough appellate decisions have made it clear that section 706 and Title I are unsteady ground on which the Commission can base the forthcoming rules. Internet transmission paths are simply interconnected network facilities that carry bit streams of information – they supply "telecommunications" and should be treated as such. The authority to regulate, minimally, information services and to encourage the deployment of broadband facilities is not sufficient authority to prevent a Broadband Internet Access Provider (BIAP) from "restricting its customers from the Internet and preventing edge providers from reaching consumers[.]"[1]

No-Blocking and No-Discrimination Rules must be adopted to preserve an open Internet. BIAPs should not be permitted to block or even to treat disfavorably, the platforms, applications, or online offerings that end users choose to access. BIAPs should not be permitted to give priority treatment to their own platforms, applications, or online offerings. As Chairman Wheeler stated, "The prospect of a gatekeeper choosing winners and losers on the Internet is

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[1] NPRM ¶ 5. "This is a real threat, not merely a hypothetical concern." *Id.*

unacceptable."[2] If the Commission wishes to preserve "ONE Internet" that is "fast, robust and open,"[3] these prohibitions must be adopted in clear, unmistakable rules.

Those rules should be enforced through well-established means of investigation and adjudication that result in binding Commission decisions having precedential effect. CCIA does not support adoption of new, untested procedures, such as "Non-Binding Staff Opinions", that may be informative but could not serve as authority in the event of a dispute. CCIA also is concerned that a "case-by-case" approach will only create greater uncertainty, complicate adjudications, and likewise be of no legal effect for subsequent disputes.

The existing Transparency Rule is a helpful tool for educating consumers about the broadband Internet access service to which they subscribe. Even with the positive enhancements envisioned in the NPRM, however, the Transparency Rule can do little to prevent the abuses an open Internet rule is designed to address.

Finally, Open Internet protections should apply broadly to BIAPs. Allowances for capacity and engineering challenges in mobile wireless service, while significant, should not result in a blanket exemption from open Internet safeguards, and certainly not for vertically integrated dominant carriers that are also premium content distributors via their wireline networks. So-called "Specialized Services", which nobody could define in 2010 and which still escape identification, should not obtain an exemption at this time. Anticompetitive discrimination can occur at network interconnection points as well. The integrity of the Internet can be lost at any point in the network, blocking and improper discrimination can be accomplished by any server in a transmission path, and thus the proposed "Internet traffic exchange" exemption should be rejected.

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2 GN Docket No. 14-48, Statement of Chairman Wheeler Re: Protecting and Promoting the Open Internet (May 15, 2014) *available at* http://www.fcc.gov/article/doc-327104a2.

3 *Id.*

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The Computer & Communications Industry Association ("CCIA"), by and through counsel, files these Comments in response to the Notice of Proposed Rulemaking released May 15, 2014, in this docket.[4] After two unsuccessful attempts to protect the open Internet against the harms to the public of which Broadband Internet Access Providers ("BIAPs") have been proven capable, the Commission should invoke its authority under Title II of the Communications Act to classify the transmission component of broadband Internet access service as telecommunications and adopt clear, meaningful rules to protect consumers, innovation, and the integrity of the Internet.[5]

I. THE COMMISSION'S INSTINCTS ARE CORRECT: AMERICA NEEDS CLEAR, MEANINGFUL OPEN INTERNET RULES

Four years ago, the record in the Commission's previous Open Internet proceeding contained a great deal of evidence that the broadband Internet access market had too few choices of providers.[6] End users have even fewer choices now.[7]

Four years ago, the Commission had proof that BIAPs had the ability and incentive to interfere with and manipulate end users' Internet traffic.[8] We have even more proof now,[9] as the D.C. Circuit fully credited.[10]

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4 GN Docket No. 14-28, *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) ("NPRM").

5 CCIA expressly incorporates its Comments (January 13, 2010) and Reply Comments (March 5, 2010) filed in the previous, related proceeding captioned GN Docket No. 09-191, *Preserving the Open Internet*.

6 *E.g.*, GN Docket No. 09-191, Reply Comments of CCIA at 3-4 (Mar. 5, 2010) ("CCIA 2010 Reply Comments").

7 *E.g.*, WT Docket No. 13-193, *Applications of Cricket License Co., LLC and AT&T Inc. for Consent to Transfer of Control of Authorizations*, Memorandum Opinion and Order, DA 14-349 (rel. Mar. 13, 2014) (transferring AWS-1, PCS, and microwave licenses along with section 214 authorizations to AT&T).

The Commission asks parties to "update the record" regarding the "incentives and the economic ability" of network operators to "limit Internet openness."[11] That is easily done by referencing the ongoing troubles that Netflix has experienced which, it appears, spurred Chairman Wheeler to commence an investigation into the private agreements that Netflix felt forced to sign with Comcast and Verizon.[12] And even with those private agreements, Netflix believes its content continues to be slowed by Verizon.[13]

It is undeniable that the owners of Internet access facilities have full control over those facilities. It is the reality of network engineering that servers manage the flow of Internet traffic in exactly the way that their owners prescribe.[14] As such, BIAPs inarguably have the

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8 GN Docket No. 09-191, *Preserving the Open Internet*, Notice of Proposed Rulemaking, FCC 09-93, 24 FCC Rcd. 13064, 13084 ¶ 50 (rel. Oct. 22, 2009) ("*2009 NPRM*").

9 NPRM ¶ 40.

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> Moreover, as the Commission found, broadband providers have the technical and economic ability to impose such restrictions. Verizon does not seriously contend otherwise. In fact, there appears little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic.

Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014) ("*Verizon 2014*").

11 NPRM ¶ 44.

12 "Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion" (June 13, 2014), *available at* http://www.fcc.gov/document/chairman-statement-broadband-consumers-and-internet-congestion ("Wheeler Statement").

13 Victor Luckerson, "Everything You Need to Know About the Netflix-Verizon Smackdown," TIME (June 6, 2014), *available at* http://time.com/#2838570/verizon-netflix-feud-streaming-speeds/.

14 Cisco, for example, has authored several documents to assist its customers with "Quality of Service" issues, describing the several tools, such as "Queue Management" and "Traffic Shaping", that Cisco servers are programmed to use. Cisco created its own DocWiki to host those documents. *See* http://docwiki.cisco.com/ wiki/Main_Page.

operational ability to "limit Internet openness."[15]

They have the "economic ability"[16] as well. The wireline-cable duopoly reigns over the nation, and to the extent that wireless mobile broadband uptake has increased since 2010,[17] the competitive pressure introduced by that new market entrant is mitigated by the fact that two dominant wireline broadband providers – Verizon and AT&T – also dominate the wireless mobile broadband oligopoly.[18] According to the recent FCC Internet Access Report, for households in 38% of U.S. census tracts, consumers have only two choices for "fixed location" broadband of 6 Mbps or higher.[19] The Report does not provide such information separately for mobile broadband; rather, the FCC combined the figures for both Fixed and Mobile connections to find that households in 92% of census tracts have Internet access at speeds of 6 Mbps or higher.[20] It is nonetheless evident that, as a result of the increasing vertical integration of communications companies, consumers have very few choices of BIAP.

This severe limitation in choice of provider is what gives BIAPs the "economic

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15 NPRM ¶ 44.

16 *Id.*

17 *See Internet Access Services: Status as of June 30, 2013*, Figure 1, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. June 25, 2014) ("*2014 Internet Access Services Report*"), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.doc. This Report identifies specific technologies capable of broadband Internet access but does not identify carriers. The FCC notes that the Report "does not purport to measure competition" and that Form 477 has been modified to "enable a more precise analysis in future." *Id.* at 9.

18 CCIA does not take the position that wireless broadband service is a substitute for either wireline- or cable-based broadband service. Rather, the fact that the dominant wireless carriers are owned by dominant wireline carriers weakens the competition pressure that the wireline-cable duopoly would experience from unaffiliated wireline competitors.

19 *2014 Internet Access Services Report*, Figure 5(a).

20 *Id.*, Figure 5(b).

ability" to "limit Internet openness."[21] With so few competitors, BIAPs have little to fear when they inhibit or manipulate end users' Internet access service. But it is also important to note that, even were the BIAP market subject to meaningful competition, each BIAP nonetheless holds a monopoly on the end user's point of Internet access, much like the "terminating access monopoly" that the Commission has recognized when addressing switched access charges. For the duration of the service subscription – which in the cable and mobile industries are for a defined term with early termination penalties – the BIAP fully controls the end user's Internet access. Structural separation between local network facilities and finished telecommunications service would ameliorate the anticompetitive effect of this monopoly.[22] Absent use of that intrusive remedy, classification of BIAP transmissions to end users as "telecommunications" is required to protect the public interest.

As to their "incentive" to "limit Internet openness," BIAPs have acquired that characteristic by virtue of their expansion into premium video distribution, including the acquisition of content providers. This additional form of vertical integration – communications networks combined with platforms, data, and applications – simply makes it an economically rational decision for BIAPs to promote and prioritize their own content over the content of unaffiliated third parties. Any provider with the means to extract maximum revenue from its

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21 NPRM ¶ 44.

22 *See* Organisation for Economic Cooperation and Development, *Report on Experiences with Structural Separation* § 5.13 (2011) ("The [Equivalence of Inputs] standard requires that BT must consume exactly the same access and wholesale products and on the same terms as its competitors. … [C]ommunications providers have continued to make significant investment in delivering LLU-based services, while BT has been investing in its next generation core network.").

facilities will do so. The Commission's mandate, however, is to ensure the just, reasonable and nondiscriminatory conduct of communications service providers.[23]

The record here will show that BIAPs demonstrably have both the means and the incentive, as well as the intent, to manipulate Internet traffic in a manner that favors their own integrated and bundled services but is contrary to the needs and requests of end users. The Commission has expressed doubt that BIAPs should have the right to do so. Clear, meaningful, and enforceable Open Internet rules are required to prevent BIAPs from doing so.

II. TITLE II PROVIDES THE APPROPRIATE AUTHORITY FOR THE OPEN INTERNET RULES THAT THE COMMISSION KNOWS ARE REQUIRED

The Commission's best source of legal authority to accomplish its goals in this proceeding is the Title II telecommunications framework.[24] CCIA has maintained throughout the Open Internet discussion that Internet access service – which refers to the bare transmission component of Internet service – fully meets the definition of "telecommunications service" in section 153 of the Act.[25] Having been overturned twice by the D.C. Circuit for failing to articulate a sound statutory basis for its previous attempts to protect the integrity of Internet access,[26] the Commission now should expressly reclassify broadband Internet access service under as "telecommunications" for the forthcoming Open Internet rules.

A. The Transmission Component of Broadband Internet Access Is Title II Telecommunications

The Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without

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23 47 U.S.C. § 202(a).

24 *See* NPRM ¶¶ 148-55.

25 CCIA 2010 Reply Comments at 10-13.

26 *See generally Verizon 2014*; *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

change in the form or content of the information."[27] Thus, telecommunications is the process by which information (voice or data) is simply carried from one end user to another.[28] Title II requires that the data sent by one end user to another is not unfairly delayed, distorted, or blocked by the companies that own the transmission facilities over which the data travels. It ensures that all carriers treat the data flowing over their network in a consistent, even-handed, and competitively neutral manner.

In the forthcoming rules, the Commission merely will ask that BIAPs behave in a reasonable and nondiscriminatory manner. Title II is the correct basis for that request; it authorizes the Commission to require that two-way telecommunications paths to and from the Internet are properly provisioned. These Internet transmission paths are functionally no different from the end user's perspective than the loops that carry plain old telephone traffic. They also are functionally no different, from the online entrepreneur's perspective, from the common carrier networks upon which Yahoo!, Google, Amazon, and eBay were launched. It is time for the Commission finally to embrace the essential telecommunications nature of Internet bit stream paths and, as former Commissioner Michael Copps recently stated, reverse the fiction that broadband Internet access service is not telecommunications at all.[29]

CCIA urges the Commission to sharply reject the worn-out rhetoric that protecting end users' transmission paths to the Internet constitutes "regulating the Internet." That facile

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[27] 47 U.S.C. § 153(50); *see also* 47 U.S.C. § 153(53) (defining "telecommunication service" as "the offering of telecommunications for a fee directly to the public").

[28] The content of bit streams is outside the realm of the Title II framework.

[29] Testimony of Hon. Michael J. Copps, Senate Judiciary Ctte. Field Hearing, "Preserving an Open Internet: Rules to Promote Competition and Protect Main Street Consumers," at 4 (July 1, 2014), *available at* http://www.judiciary.senate.gov/imo/media/doc/07-01-14CoppsTestimony.pdf ("Title II classification is the prerequisite of an open Internet. It is the essential first step.").

hyperbole should have no credibility any longer. The "Internet", broadly speaking, is composed of interconnected networks and bit streams. It is comprised of bare transmission facilities, sophisticated servers, software, and applications. ***The forthcoming rules will deal with the transmission facilities.*** They cannot reasonably be characterized as regulations for the entire set of hardware, software, applications, and computers that together create our "Internet".

The time also has come for the Commission to recognize the blatant inconsistency that mars the arguments of those who still oppose legal safeguards for an Open Internet: if they want little or no oversight for Internet access connections or network interconnection and refuse to be deemed common carriers, then they must relinquish all the government-bestowed benefits that presently are afforded to common carriers. BIAPs must, then, also cease invoking exemptions from statutes such as the Digital Millennium Copyright Act,[30] the Communications Decency Act,[31]

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> A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections … .

17 U.S.C. § 512(a). This "transitory communications" exemption applies, however, only where "the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider." *Id.* § 512(a)(2). If BIAPs now assert that they do more than merely transmit – that they also must select what is transmitted – then BIAPs no longer are eligible for this DMCA exemption.

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> No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

and the Telephone Consumer Privacy Act that punishes unwanted faxes and text messages.[32] And no more Universal Service Fund money for broadband facilities, made possible by section 254 of the Act.

Broadband Internet access is now deemed an essential element of American commerce, civic engagement, and education. As the Commission knows, broadband also plays a vital role in the provision of health care.[33] It is as fundamental to our society as the telephone. So much so that Congress set aside $750 Million for broadband deployment grants in the 2008 Troubled Asset Relief Program. So much so that in 2011 the FCC expanded Universal Service to cover the deployment and maintenance of broadband Internet access facilities.[34]

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47 U.S.C. § 230(c)(2); *see also id.* § 230(f)(2) (defining "interactive computer services") . BIAPs successfully have invoked the "interactive computer services" exemption to avoid liability under the CDA. *Doe v. GTE Corp.*, 347 F.3d 655, 657-58 (7th Cir. 2003). Section 230(c) survived the partial *vacatur* of *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

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> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States ... to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party ... .

47 U.S.C. § 227(b)(1)(B).

33 *E.g.*, GN Docket No. 09-137, Sixth Broadband Deployment Report, FCC 10-129 n.121 (rel. July 20, 2010) ("As Congress found in 2008 when it amended section 706, broadband 'has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans.'")

34 WC Docket Nos. 10-90, *et al.*, *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 ¶¶ 3-8 (rel. Nov. 18, 2011), *aff'd Direct Communc'ns Cedar Valley, LLC v. FCC*, Case No. 11-9900 (10th Cir. May 23, 2014). This Order does include "public service" obligations for carriers that accept Universal Service funds for broadband deployment, but those obligations lie more in ensuring that the resultant service meets the FCC's definition of "broadband" in terms of speed (4 Mbps downstream, 1 Mbps upstream) and satisfies the longstanding "reasonably comparable service" requirement that applies to USF funding for plain telephone service. *Id.* ¶¶ 90-100. If those rules were sufficient to prevent the blocking and discriminatory treatment of end users' chosen Internet content, the Chairman would not have opened this proceeding.

With broadband being thus treated as a public good warranting government-supplied and supplemental government-supervised funding, it should be treated as critical infrastructure.[35] Now that the United States has invested so deeply in ensuring the broadest possible reach for high-speed Internet connectivity, the manner in which that connectivity is supplied must be subject to meaningful rules. Stated differently, common-carriage funding support for broadband must come with common-carriage obligations.

The "telecommunications" classification does not mean, however, that the entirety of Title II must be imposed, ceaselessly, on broadband Internet access. Section 10 forbearance is now a well-used tool for ensuring that telecommunications companies are not subject to regulatory requirements that have no reasonable application to their service.[36] Section 10 also ensures that the regulations that do reasonably apply to a particular service are not kept in place past the time of their necessity or efficacy.[37] In this way, Title II is quite an elegant solution for preserving an open Internet and many issues – including enforcement (*see* Section V. below) – are readily resolved.

For all these reasons, the Commission should invoke, in this third attempt to secure legal safeguards for an open Internet, its Title II authority over the transmission component of broadband Internet access service.

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[35] President Obama refers to the "systems and assets" comprising the nation's interconnected data network as "critical infrastructure." Executive Order No. 13636, *Improving Critical Infrastructure Cybersecurity*, 78 Fed. Reg. 11739 (Feb. 19, 2013); *see also* President's Council of Advisors on Science and Technology, Report to the President: Immediate Opportunities for Strengthening the Nation's Cybersecurity at 5, 7 (Nov. 2013), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_cybersecurity_nov-2013.pdf.

[36] NPRM ¶¶ 153, 155.

[37] Reliance on Title II and section 10 forbearance thus resolves the question of whether the FCC must adopt a date certain for the forthcoming rules to "sunset". It can simply invite forbearance petitions if a particular BIAP believes that a particular aspect of the rules is no longer required.

B. Section 706 Is Ill-Suited as the Foundation for Preserving an Open Internet and Requires a Complex Predicate Analysis of the State of Deployment

The purpose of section 706, 47 U.S.C. § 1302, is to "encourage" deployment of broadband telecommunications capacity.[38] We shall not belabor the point that the D.C. Circuit has twice rejected the FCC's arguments that this largely hortatory instruction authorizes oversight over the manner in which BIAPs operate their broadband transmission facilities.[39] Section 706 is about

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

47 U.S.C. § 1302(a). "Encourage" in section 706 means that

> ... the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

Id. § 1302(b).

39 *Verizon 2014*, 740 F.3d at 649-51 ("Given the Commission's still-binding decision to classify broadband providers not as providers of 'telecommunications services' but instead as providers of 'information services,'" the Court of Appeals held that "[w]e think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."); *Comcast*, 600 F.3d at 659 ("Because the Commission has never questioned, let alone overruled, that understanding of section 706, and because agencies "may not ... depart from a prior policy *sub silentio*," the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority." (internal citation omitted)). The Commission asserts in the NPRM that the D.C. Circuit "upheld the Commission's regulation of broadband Internet access service pursuant to section 706 and did not disturb this aspect of the *Open Internet Order*." NPRM ¶ 55. CCIA is unsure what section 706 "regulation" the D.C. Circuit "upheld" in *Verizon 2014*, but it is evident that the No-Blocking and No-Discrimination Rules did not survive the Court's 706 analysis.

fostering infrastructure investment, and the Commission has never been able successfully to translate that benign mandate into the ability to demand the nondiscriminatory operation of facilities once they are deployed.

The Commission nonetheless suggests that section 706 is the appropriate source of authority for the rules it seeks to adopt.[40] But even in doing so, the Commission feels compelled to ask how it should address the *Verizon* decision that its "no-blocking and anti-discrimination rules impermissibly regulated broadband providers as common carriers" which section 706 cannot support.[41] That question then forces the Commission to ponder how it can adopt a No-Blocking Rule, which plainly would regulate the transmission paths of broadband Internet access, but "avoid *per se* common carriage" regulation.[42] The Commission asks the virtually impossible: tell us how to impose the common-carrier regulations that we know to be necessary without using the term "common carriage." CCIA believes that a more straightforward, less contrived approach is far preferable.

Moreover, the Commission reveals the inefficacy of section 706 for open Internet purposes when it seeks comment on "how we should treat the existence of and the findings in the Commission's Broadband Progress Reports for the purposes of this proceeding."[43] Section 706(b) requires a finding of insufficient deployment as a necessary predicate for "tak[ing] immediate action to accelerate deployment."[44] That predicate requires a fact-intensive review of the nation's

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40 "We propose that the Commission exercise its authority under section 706 … ." NPRM ¶ 142.

41 *Id.* ¶ 147.

42 *Id.* ¶ 99.

43 *Id.* ¶ 144.

44 47 U.S.C. § 1302(b).

broadband facilities, with the attendant analysis of "the disparity between metropolitan areas and rural development."[45] It would take years for the FCC to satisfy the "inquiry" requirement of section 706(b), and only upon completion of that task, with a finding of insufficient deployment, could the FCC begin to devise its "immediate action to accelerate deployment."

Continued reliance on section 706 would all but guarantee an overload on Commission resources, with tremendous delay, and a prolonged regulatory vacuum in which BIAPs can act to disadvantage end users without penalty. And, as the *Verizon 2014* and *Comcast* decisions taught us, a section 706-based rule is not likely to survive appeal. CCIA thus urges the Commission invoke the more direct and plainly applicable authority of Title II as clearly the better alternative.

C. Title I Is a Weaker Basis of FCC Authority That Has Proven Unable to Support the Crucial Open Internet Rules That the Market Requires

Title I of the Communications Act applies to the information services that ride on telecommunications networks. As such, it is, and is meant to be, a less powerful grant of authority than what Congress provided the Commission for overseeing common carrier connectivity that is an essential, general purpose, publicly available service.

In addition, the D.C. Circuit took painstaking lengths to explain why the No-Blocking and No-Discrimination Rules cannot be seen as anything but common carrier regulations. Prohibiting a BIAP from impeding an end user's Internet access stems directly from the section 201 mandate that common carriers "furnish … communication service upon reasonable request therefor."[46] As the D.C. Circuit summarized, "given the [2010] *Open Internet Order*'s anti-blocking and anti-Discrimination requirements, *if* Amazon were now to make a request for service,

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45 NRPM ¶ 144.

46 47 U.S.C. § 201(a).

Comcast *must* comply."[47] That section 201 obligation simply cannot find a reasonable analog in Title I. As the saying goes, with Title I, the Commission "can't get there from here."

III. BLOCKING AND DISCRIMINATION MUST BE PROHIBITED, WITH THE TRANSPARENCY RULE AS A COMPLEMENTARY TOOL FOR PROTECTING CONSUMERS

The Commission should adopt a No-Blocking Rule and a No-Discrimination Rule as the twin cornerstones of its new Open Internet framework. BIAPs must be prohibited from impeding, in any way and to any degree, the free transmission of Internet platforms, services, and applications that are retrieved or uploaded by their end users. The Transparency Rule, which CCIA agrees should be enhanced in the ways suggested in the NPRM, is helpful but cannot be a replacement or a proxy for rules that aim directly at the manner in which Internet access and interconnection is provisioned. Talking about high-quality service will not ensure high-quality service; the Commission must also actively monitor the adequacy of mass market Internet access connections that BIAPs actually provide.

A. Blocking Internet Content Should Be Deemed a Presumptive Violation of Section 201 Absent a Court Order

The Commission has posed the No-Blocking Rule in a manner that links the concept of blocking with the concept of "individualized bargaining".[48] The Commission then asks whether private agreements between BIAPs and edge providers should be permitted under the forthcoming rules.[49] CCIA is unable to conceive how, under the conditions of the broadband Internet market, the No-Blocking Rule can have any effect if eroded by the inevitable deluge of private deals.

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47 *Verizon 2014*, 740 F.3d at 653 (emphasis in original).

48 NPRM ¶ 93.

49 *Id.* ¶ 96.

As an initial matter, a No-Blocking Rule is an absolutely necessary component of open Internet protections. Even the most vociferous opponent of this proceeding would not advocate that service providers can simply block an Internet transmission of data. And as demonstrated in Section I. above, the Commission's concerns that BIAPs have both the means and the incentive to impede Internet transmissions have been borne out in record evidence and were fully credited by the *Verizon* court.[50] The Commission's tentative conclusion that it must adopt a replacement No-Blocking rule therefore is correct.

An additional fundamental principle that the Commission should expressly adopt is that traffic prioritization is presumptively unlawful. Prioritization is quite different from tiered pricing: it ensures that certain bit streams are handled faster and with less latency than other bit streams. It means that the BIAP decides, either for financial consideration or to favor its own platforms, applications, and content, which bit stream "wins". Such conduct is textbook discrimination; it is not the indifferent carriage of "information of the end user's choosing."[51] BIAPs must not have the unilateral discretion to prioritize content – or, most importantly, sell the prioritization of content – in an open Internet.

The No-Blocking issue really revolves around the question whether the Commission should tolerate side-deals between BIAPs and online platforms that purportedly are

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50 Furthermore, the Commission established that the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not, as the Commission put it, "merely theoretical." In support of its conclusion that broadband providers could and would act to limit Internet openness, the Commission pointed to four prior instances in which they had done just that.

Verizon 2014, 740 F.3d at 648 (internal citation omitted).

51 47 U.S.C. § 153(50).

required to enhance transmission capacity specifically to handle those platforms' content. Further complicating the discussion is the fact that some side-deals truly are mutually voluntary and advantageous for the BIAP, content provider, and consumers. Deals that are forced upon or extorted from content providers, or are provisioned under discriminatory terms and conditions, by contrast, threaten the viability of the Internet and must not be tolerated. The Commission thus should rule that private agreements secured by threat or diminished service or that carry discriminatory prices and conditions are unlawful.

Internet access facilities are scarce. So scarce, in fact, that as noted above in Section II.A the Universal Service Fund now supports the deployment of broadband equipment and facilities. Despite the considerable investment that BIAPs have made in the panoply of services and technologies that support broadband Internet access, scarcity is why BIAPs believe they deserve the unfettered right to manage their networks, ***and*** the data traffic that transits them, as they see fit.

Internet transmission paths are shared infrastructure that operates to some degree as a Zero-Sum Game: if one party's content wins by virtue of favorable treatment, then other parties' content loses, relatively, as a result of diminished service. That diminished service may well be unintentional, and carry no malicious purpose, but it will be the unavoidable result if BIAPs are permitted to favor certain platforms, or certain sources of content, over others.

For this reason, CCIA opposes the Commission's inclination to allow BIAPs broad discretion to create private arrangements with edge providers via "individualized bargaining".[52] CCIA cannot envision how an open Internet can be preserved when BIAPs are "gatekeepers"[53] that

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52 NPRM ¶ 93; *see also id.* ¶ 95.

53 *See* Wheeler Statement at 1.

hold their own paying subscribers for ransom in order to extract an additional revenue stream from content providers.

As stated above, the "priority agreements" that the Commission is inclined to allow[54] will quickly devolve into legalized extortion of content providers. Despite the fact that their end users already pay quite handsomely for broadband service, BIAPs will demand "priority agreements" from content providers as a fully additive revenue stream. The demand will be made on pain of slow commercial death.

The Commission proposes to permit priority interconnection agreements so long as they are "commercially reasonable". The sticking point in that analysis is that the inquiry necessarily focuses on the wrong parties. In a free economy, all contracts are "commercially reasonable" to the parties that sign them; their signatures represent a belief that the terms of the arrangement are at the least acceptable, if not a valuable benefit. But the Internet was launched and has thrived primarily on the basis of settlement-free traffic exchange between carriers. If BIAPs now can demand so-called "paid peering" at will, the delicate ecosystem of the Internet will experience a seismic shift that will not be reversed easily.

Moreover, how can a "commercially reasonable" standard afford any protection to ***end users***, particularly consumers and nonprofit organizations? How does a concept like "commercial" apply to an individual end user? The analysis misses the point of this proceeding entirely. The concept of priority agreements is infused with a concern only for large companies; it is inimical to the Commission's stated Open Internet goals.

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54 NPRM ¶¶ 89, 90.

As regards the supposedly "arm's-length" side agreements between BIAPs and edge providers that AT&T promises,[55] the term "commercially reasonable" concept may have some meaningful application. Extortion and arbitrary discrimination are not "reasonable" in any setting. When a BIAP begins impeding or throttling edge provider content, as Netflix believes was done to its video streaming,[56] in order to force the edge provider to "negotiate" a private agreement, one can hardly characterize the situation as "bargaining"[57] between two like parties. Further, when the terms of that private agreement are not in any way subject to oversight, and the BIAP – whom we have established is a telecommunications common carrier – is permitted to extract whatever rents it wants for the supposedly necessary facilities upgrade needed to carry the edge provider's content, that arrangement is not "reasonable".[58] For these reasons, CCIA is reluctant to agree that a blithe acceptance of "individualized, differentiated arrangements"[59] is a prudent course when the Commission's stated aim is to prevent blocking and throttling.

The Commission endeavors to temper the presence of individualized agreements with the notion that it will simultaneously create a baseline for all Internet access service: the

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55 NPRM ¶ 141 (quoting AT&T Comments at 3).

56 *E.g.*, Haley Sweetland Edwards, "Verizon, Netflix Spar in Epic Battle Over Who Should Pay for What," TIME (June 12, 2014), *available at* http://time.com/#2866004/verizon-netflix/ ("In February, Netflix CEO Reed Hastings agreed to pay Comcast an undisclosed fee to ensure that its videos streamed quickly. (He later told investors that he was "forced" into making the deal).)"; *see also supra* n.13.

57 NPRM ¶¶ 93, 162.

58 Kickstarter, for example, is concerned that the malleable concept of "commercially reasonable" will do little to protect start-ups and small companies. "Using our small legal team or hiring outside counsel to prove that an offered deal was "commercially unreasonable," as proposed in your rules, would take far too long and cost far too much to be a feasible option. " GN Docket No. 14-28, Comments of Kickstarter, Inc. at 3 (July 10, 2014).

59 NPRM ¶ 89.

"minimum level of access" standard.[60] This notion fails *ab initio*, because, due to the continual challenge of scarcity, once the Commission opens the door to private agreements, there is no discernible limit to the level of unavoidable service degradation that other data streams will suffer. How can the Commission credibly decide what number of private agreements can be tolerated? What is the aggregate bandwidth limit that the Commission could successfully impose on these agreements? The Commission's obligation to be even-handed in regulating similarly situated parties will prevent it from ever concluding that a particular priority agreement is simply one too many.

In addition, CCIA cautions against any attempt by the Commission to set a defined standard – which necessarily, in the context of broadband telecommunications, means a quantified standard – for "minimum level of access". The startlingly fast development of broadband technology has demonstrated that once the Commission lands on a number, that number will already be wrong. It will not be high enough or reflective of the state of broadband offerings that consumers can obtain. Even worse, quantifying a standard could have the effect of chilling investment and innovation, in that it will excuse BIAPs from ever doing more and will dissuade competitors from attempting more.

As such, the "minimum level of access" concept is not a viable counterpoint to the obvious danger that priority agreements introduce. It would in fact trigger a "race to the bottom". It would not provide the regulatory balance that the Commission hopes to achieve.[61]

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60 NPRM ¶¶ 97-101.

61 The Commission hopes in this proceeding to "to strike the right balance between minimizing the regulatory burden on providers and ensuring that the public interest is served." *Id.* ¶ 153.

For all these reasons, the Commission should adopt a No-Blocking Rule that prohibits private agreements that are obtained via unreasonable dealing or on unreasonable terms.

B. BIAP Discrimination in Favor of Particular Content or Sources Should Be Prohibited

BIAPs must not be permitted to discriminate against any platforms, applications, or source just as they should not be permitted to give favorable treatment to any platforms, applications, or source.

The Commission has tentatively concluded that the forthcoming No-Discrimination Rule also permits "individualized practices" so long as those practices do not "threaten to harm Internet openness."[62] In other words, the No-Discrimination rule would have the same broad carve-out for priority agreements as the No-Blocking rule. For all the reasons described in the previous section, such a rule would be fatally inconsistent and would simply collapse upon itself.

Allowing BIAPs to convey priority to particular content means that all other content delivery is relatively degraded. Moreover, allowing priority agreements ***is itself discrimination***, and not of the type that the Communications Act will tolerate. To decide which data of Mrs. Smith's choosing will come faster and more intact is to dictate Mrs. Smith's choice in the first instance. But other end users who happen to seek online content only from providers that signed priority deals will not lose their freedom of choice in this way. A No-Discrimination rule that countenances priority agreements would thus ***discriminate against Mrs. Smith*** who, as a customer paying the required subscription fee, is situated exactly the same as any other BIAP subscriber. The Commission could never permit that result for any other communications service.

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62 NPRM ¶ 111.

Now the question arises, how can the FCC adopt a No-Discrimination Rule without actually relying on or employing common-carriage policies? The Commission appears poised to model the No-Discrimination Rule on the 2010 *Data Roaming Order* as a means of avoiding the application of telecommunications authority to BIAPs.[63] That decision would be unwise. The *Data Roaming Order* does not govern the quality or openness of network access connections. It was designed instead to guard against anticompetitive terms, conditions or pricing of the data roaming services that, as all parties acknowledge, smaller wireless carriers must buy from dominant carriers in order to provide nationwide service to their customers. Even in that altogether different context, smaller carriers have found the "commercially reasonable" standard woefully insufficient to constrain anticompetitive demands by the dominant carriers.[64]

The *Data Roaming Order* therefore can provide no authority and no template for a proposed No-Discrimination Rule that would require BIAPs to deliver and carry the Internet platforms and applications of end users' choosing without impediment or with less care. Here again, the Commission's motivation to avoid a political battle over Title II authority – one that it has every reason to end right now – leads it to grasp at alternatives to common-carrier regulation which, creative as they may be, will not work. The *Data Roaming* precedent will not absolve the Commission if it refuses for a third time to use the appropriate statutory authority as the basis for adopting the No-Discrimination rule.

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63 NPRM ¶ 115 (contained within Section IV.E. Codifying an Enforceable Rule to Protect the Open Internet That Is Not Common Carriage *Per Se*).

64 T-Mobile has been forced to seek the Commission's "guidance" in resolving "certain ambiguities in the 'commercially reasonable' standard for data roaming" that, in its experience, wireless carriers are "exploiting" in order to prevent competitors from obtaining data roaming on workable terms. WT Docket No. 05-265, Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., at 2 (May 27, 2014).

C. Transparency Is Useful But Does Little To Dissuade Internet Broadband Providers From Engaging In Unreasonable Conduct

The Commission has proposed several ways in which the affirmed Transparency rule can be enhanced as to the required level of detail and manner of delivery that BIAPs must employ.[65] The Commission's Transparency rule is of course a beneficial additive tool for assisting consumers in understanding the level of service to which they are entitled. The rule also will serve as one standard for reviewing whether a BIAP has impaired an end user's Internet access.

Unfortunately, however, the Transparency Rule could incentivize BIAPs to release service quality information that deliberately undersells the speeds and effective throughput that a consumer can expect, thus enabling the BIAPs to perform down to those disclosed levels. The lack of competition in the broadband Internet market, *see* Section I. above, would insulate the BIAPs from losing customers as a result of such dour disclosures. And obligating BIAPs to maintain whatever weak service commitments they disclose would be of little use in protecting consumers or ensuring a robust Internet.

For these reasons, CCIA finds the Transparency Rule a useful but in itself an insufficient means of preserving an open Internet. Clear No-Blocking and No-Discrimination Rules having broad application, few exemptions, and vigorous enforcement, *see* Sections III.A and III.B above, are absolutely necessary as the primary regulatory tools for this purpose.

CCIA does support the Commission's proposed enhancements to the Transparency Rule that the NPRM lays out. The rule should require that each distinct service and service package have tailored disclosures informing the end user of exactly the service quality to be

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[65] NPRM ¶¶ 67-74.