

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

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

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

The Internet is a remarkable success story, fueled by broadband providers' investments of hundreds of billions of dollars of private capital over the last two decades. Indeed, Cox has invested more than \$15 billion in its network over the past 10 years and, most recently, announced plans to begin rolling out 1 Gigabit per second residential Internet speeds in certain markets and to double the speeds of the company's most popular broadband tiers for the majority of its customers this year. In addition, Cox has been a leader in promoting broadband adoption, particularly through its active support of Connect2Compete.

Such sustained investment and voluntary broadband adoption initiatives, together with broadband providers' ongoing adherence to existing Open Internet principles, underscore the reality that today's marketplace is delivering the consumer benefits the Commission intends to foster without any need to resort to heavy-handed regulatory mandates. Accordingly, Cox respectfully submits that, contrary to the core hypothesis that animates many of the proposals set forth in the NPRM—namely, that broadband Internet access providers have a supposed interest in blocking access to online content or services or engaging in unreasonable discrimination—Cox and other network operators have a powerful incentive in today's competitive broadband marketplace to ensure that their customers can access whatever online content and services they desire while enjoying the best possible experience.

Indeed, it would be self-defeating for broadband providers to engage in conduct that frustrates consumers and deters them from purchasing and making full use of broadband Internet access services. Especially as providers like Cox are actively responding to consumer demand by upgrading to super-fast connections, devaluing the consumer experience through blocking or discrimination would be anathema. Cox therefore believes that the best way to continue promoting the "virtuous cycle of innovation" enabled by broadband networks is to enforce the existing transparency requirements and to let the competitive marketplace operate without undue interference.

Cox nevertheless recognizes that the Commission has launched this proceeding with the intention of establishing a regulatory backstop to prevent anticompetitive or other harmful conduct that potentially could threaten the consensus values that have developed in the Internet ecosystem. Notwithstanding its preference for relying primarily on customer demands to ensure consumer-friendly practices, Cox does not oppose certain aspects of Commission oversight that are competitively neutral, balanced, and sufficiently restrained so as to ensure that broadband Internet investment is not jeopardized and consumers are not ill-served.

As an initial matter, the scope of any new rules should be carefully tailored to the openness principles at stake. Such rules should apply equally to fixed and mobile broadband services, as they increasingly compete head-to-head, and differential obligations would distort the marketplace and undermine efforts to promote the relevant policy objectives. The Commission therefore should adopt a single set of rules that apply to all facilities-based broadband providers (and, in all events, should harmonize the treatment of licensed mobile broadband services and unlicensed Wi-Fi services).

In addition, to the extent that the Commission is concerned about safeguarding consumers' access to online content and services, the resulting rules should apply to any entity that poses a potential threat of blocking or unreasonable discrimination, whether an access provider or edge provider. At the same time, the rules should remain limited to ensuring mass-market consumers' unfettered access to the Internet, and should not extend to enterprise services, specialized services, or Internet peering/interconnection arrangements. None of those categories sufficiently implicates the openness concerns driving the rulemaking proposals set forth in the NPRM or warrants expanded regulation, especially in light of the harmful unintended consequences that likely would flow from such an expansion.

As for the substance of the proposed rules, Cox agrees with the Commission that transparency should be the centerpiece of any regime designed to preserve and promote the Open Internet. Unfortunately, however, many of the proposals to expand the existing disclosure obligations are misguided. Whereas the existing transparency rules ensure appropriate disclosures that benefit consumers and edge providers alike, several proposals to create new disclosure obligations would result in considerably greater burdens than benefits and more confusion than clarity. In particular, the Commission should view with great skepticism the proposals to require broadband providers to craft varying disclosure statements for many different audiences, as well as those that would require detailed reporting of congestion events that are typically short-lived and often beyond a broadband provider's control. Such requirements would be burdensome and confusing to consumers, thus undermining rather than advancing the Commission's objectives.

While Cox is not convinced that there is any need for new rules that prohibit broadband providers from blocking access to content or services—given existing marketplace incentives and leading broadband providers' unequivocal commitments to refrain from any such conduct—Cox would not oppose reinstatement of a no-blocking rule, provided it is competitively and technologically neutral and avoids micromanaging baseline service attributes.

By the same token, while Cox does not believe it is necessary to screen any emerging two-sided market arrangements for "commercial reasonableness" to safeguard the Open Internet, any rules that designate certain practices as anticompetitive or otherwise unreasonable should maintain some degree of business flexibility. Consistent with the D.C. Circuit's guidance and the *2010 Open Internet Order's* anti-discrimination rule, any commercial reasonableness standard should focus on whether such practices are anticompetitive, should be limited to actual or proposed relationships between broadband access providers and edge providers regarding the delivery of broadband Internet access traffic over last-mile networks, and should not be morphed into yet another body of retail regulation or regulation of other services outside the sphere of broadband Internet access (such as specialized services or Internet traffic-exchange arrangements). Imposing a roving standard of reasonableness on all broadband provider practices would be even more expansive and intrusive than the nondiscrimination rule vacated by the D.C. Circuit. The Commission therefore should focus on ensuring that two-sided market arrangements are reasonable and flexible, rather than policing every aspect of a broadband provider's relationship with its retail subscribers.

The Commission's enforcement procedures should reflect the competitive and rapidly changing nature of the Internet ecosystem. In relying on traditional complaint-driven and

agency-initiated enforcement mechanisms, the Commission's rules also should maximize certainty and ensure options for streamlined dispute resolution.

In developing new rules, the Commission should follow the blueprint suggested by the D.C. Circuit in *Verizon* by relying on the authority conferred by Section 706 of the Telecommunications Act of 1996. As construed by the court, Section 706 provides ample leeway to achieve the goals embodied in the NPRM. By contrast, pursuing reclassification of any component of broadband Internet access under Title II of the Communications Act would be legally suspect. A reclassification decision would ignore the “factual particulars” that the Supreme Court has said must guide statutory classification, and would trample on investment-backed reliance interests. The Commission cannot remedy these flaws by seeking to sever a so-called “remote delivery service” from broadband Internet access or adopting a reclassification decision only on a contingent basis, or by introducing a complex web of case-by-case forbearance from utility regulation. And, in all events, even if reclassification were legally defensible, it would be profoundly unwise from a policy standpoint. There is perhaps nothing that would do more to undercut the investment incentives required to fulfill the national policy interests in promoting broadband deployment and adoption.

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COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. (“Cox”) respectfully submits these comments in response to the Notice of Proposed Rulemaking adopted on May 15, 2014 in GN Docket No. 14-28.¹ With a measured regulatory approach and forward-looking policies that have facilitated the growth of a dynamic and competitive broadband marketplace, the Commission has overseen the development of the Internet into a vital engine for economic, educational, and cultural growth. Consistent with that successful approach, the Commission should ensure that any rules adopted in this proceeding promote Open Internet principles without imposing excessive burdens that undercut investment and innovation.

INTRODUCTION

As a leading provider of robust broadband Internet access services (as well as video and voice services), Cox can attest to the massive investments of private capital made by network providers that have fueled the growth of the Internet. Indeed, Cox has invested more than \$15

¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61 (May 15, 2014) (“NPRM”). These comments also respond to the Public Notice subsequently issued by the Commission in GN Docket No. 10-127, which seeks comment with respect to a subset of the issues addressed in the NPRM. *See Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service*, DA 14-748 (May 30, 2014).

billion in its network over the past 10 years and, most recently, announced plans to begin rolling out 1 Gigabit per second residential Internet speeds in certain markets and to double the speed of the company's most popular broadband tiers for the majority of its customers this year.² In addition, Cox has committed substantial resources to expanding broadband adoption throughout its footprint; indeed, Cox was one of the first service providers in the nation to implement broadband adoption programs. In particular, Cox first launched a broadband adoption program in its Santa Barbara, California cable system in 2002, and that program subsequently became the blueprint for the national Connect2Compete ("C2C") initiative in which many major cable companies voluntarily participate today. Through C2C, Cox offers broadband service at a low monthly rate of \$9.95 to qualifying low-income households with school-aged children participating in the free or reduced lunch programs.

Such sustained investment and voluntary broadband adoption initiatives, together with broadband providers' ongoing adherence to existing Open Internet principles, underscore the reality that today's marketplace is delivering the consumer benefits the Commission intends to foster without any need to resort to heavy-handed regulatory mandates. Accordingly, Cox respectfully submits that, contrary to the core hypothesis that animates many of the proposals set forth in the NPRM—namely, that broadband Internet access providers have a supposed interest in blocking access to online content or services or engaging in unreasonable discrimination—Cox and other network operators have a powerful incentive in today's competitive broadband marketplace to ensure that their customers can access whatever online content and services they desire while enjoying the best possible experience.

² Press Release, Cox Communications, *Cox Communications Kicks Off Plan to Offer Residential Gigabit Speeds* (May 22, 2014), available at <http://cox.mediaroom.com/index.php?s=43&item=753>.

Indeed, it would be self-defeating for broadband providers to engage in conduct that frustrates consumers and deters them from purchasing and making full use of broadband Internet access services. Especially as providers like Cox are actively responding to consumer demand by upgrading to super-fast connections, devaluing the consumer experience through blocking or discrimination would be anathema. Cox therefore believes that the best way to continue promoting the “virtuous cycle of innovation”³ enabled by broadband networks is to enforce the existing transparency requirements and to let the competitive marketplace operate without undue interference.

Cox nevertheless recognizes that the Commission has launched this proceeding with the intention of establishing a regulatory backstop to prevent anticompetitive or other harmful conduct that potentially could threaten the consensus values that have developed in the Internet ecosystem. Notwithstanding its preference for relying primarily on customer demands to ensure consumer-friendly practices, Cox does not oppose certain aspects of Commission oversight that are competitively neutral, balanced, and sufficiently restrained so as to ensure that broadband Internet investment is not jeopardized and consumers are not ill-served.

As an initial matter, the scope of any new rules should be carefully tailored to the openness principles at stake. Such rules should apply equally to fixed and mobile broadband services, as they increasingly compete head-to-head, and differential obligations would distort the marketplace and undermine efforts to promote the relevant policy objectives. The Commission therefore should adopt a single set of rules that apply to all facilities-based broadband providers (and, in all events, should harmonize the treatment of licensed mobile broadband services and unlicensed Wi-Fi services).

³ *Verizon v. FCC*, 740 F.3d 623, 644 (D.C. Cir. 2014).

In addition, to the extent that the Commission is concerned about safeguarding consumers' access to online content and services, the resulting rules should apply to any entity that poses a potential threat of blocking or unreasonable discrimination, whether an access provider or edge provider. At the same time, the rules should remain limited to ensuring mass-market consumers' unfettered access to the Internet, and should not extend to enterprise services, specialized services, or Internet peering/interconnection arrangements. None of those categories sufficiently implicates the openness concerns driving the rulemaking proposals set forth in the NPRM or warrants expanded regulation, especially in light of the harmful unintended consequences that likely would flow from such an expansion.

As for the substance of the proposed rules, Cox agrees with the Commission that transparency should be the centerpiece of any regime designed to preserve and promote the Open Internet. Unfortunately, however, many of the proposals to expand the existing disclosure obligations are misguided. Whereas the existing transparency rules ensure appropriate disclosures that benefit consumers and edge providers alike, several proposals to create new disclosure obligations would result in considerably greater burdens than benefits and more confusion than clarity. In particular, the Commission should view with great skepticism the proposals to require broadband providers to craft varying disclosure statements for many different audiences, as well as those that would require detailed reporting of congestion events that are typically short-lived and often beyond a broadband provider's control. Such requirements would be burdensome and confusing to consumers, thus undermining rather than advancing the Commission's objectives.

While Cox is not convinced that there is any need for new rules that prohibit broadband providers from blocking access to content or services—given existing marketplace incentives

and leading broadband providers’ unequivocal commitments to refrain from any such conduct—Cox would not oppose reinstatement of a no-blocking rule, provided it is competitively and technologically neutral and avoids micromanaging baseline service attributes.

By the same token, while Cox does not believe it is necessary to screen any emerging two-sided market arrangements for “commercial reasonableness” to safeguard the Open Internet, any rules that designate certain practices as anticompetitive or otherwise unreasonable in this space and time should maintain some degree of business flexibility for the future and establish safe harbors to promote predictability. Consistent with the D.C. Circuit’s guidance and the *2010 Open Internet Order*’s anti-discrimination rule, any commercial reasonableness standard should focus on whether such practices are anticompetitive, should be limited to actual or proposed relationships between broadband access providers and edge providers regarding the delivery of broadband Internet access traffic over last-mile networks, and should not be morphed into yet another body of retail regulation or regulation of other services outside the sphere of broadband Internet access (such as specialized services or Internet traffic-exchange arrangements). Just as the *Verizon* court held that the Commission may not impose a common-carrier “nondiscrimination” duty on information service providers, so too is the Commission barred from subjecting broadband providers to a general “just and reasonable” standard. Indeed, imposing a roving standard of reasonableness on all broadband provider practices would be even more expansive and intrusive than the nondiscrimination rule vacated by the D.C. Circuit. The Commission therefore should focus on ensuring that two-sided market arrangements are reasonable, rather than policing every aspect of a broadband provider’s relationship with its retail subscribers.

The Commission’s enforcement procedures should reflect the competitive and rapidly changing nature of the Internet ecosystem. In relying on traditional complaint-driven and agency-initiated enforcement mechanisms, the Commission’s rules also should maximize certainty and ensure options for streamlined dispute resolution.

In developing new rules, the Commission should follow the blueprint suggested by the D.C. Circuit in *Verizon* by relying on the authority conferred by Section 706 of the Telecommunications Act of 1996.⁴ As construed by the court, Section 706 provides ample leeway to achieve the goals embodied in the NPRM. By contrast, pursuing reclassification of any component of broadband Internet access under Title II of the Communications Act would be legally suspect and profoundly unwise from a policy standpoint.⁵

The Supreme Court has made clear that the classification of broadband access depends on the “factual particulars” of the service provided to end users,⁶ and that service remains (as it has been from its inception) an integrated package of transmission and information processing—*i.e.*, an information service. Moreover, whereas the information service classification consistently reaffirmed by the Commission has successfully fostered hundreds of billions of dollars of investment over the last decade-plus, introducing the threat of public utility regulation undoubtedly would curtail such investment and undercut the Commission’s broadband deployment and adoption goals.⁷ In any event, it is far from clear that Title II would authorize restrictions on discrimination beyond those the Commission can promulgate pursuant to Section

⁴ 47 U.S.C. § 1302.

⁵ *See id.* §§ 201 *et seq.*

⁶ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

⁷ *See, e.g.*, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 3 (2010) (noting the critical role played by private investment in facilitating improvements in broadband availability and access, as well as the need for significant additional investments).

706, as Title II prohibits only *unreasonable* discrimination and thus would not support categorical prohibitions of particular conduct any more than Section 706 would. Reliance on Title II instead would serve only to subject ISPs to a panoply of costly and burdensome common-carrier obligations, which would undermine the Commission’s efforts to ensure the availability of affordable broadband service to all Americans. In short, the Commission should halt any further consideration of pursuing reclassification under Title II.

DISCUSSION

I. THE COMMISSION SHOULD TAILOR THE SCOPE OF ANY NEW RULES TO THE OPENNESS PRINCIPLES AT STAKE

The NPRM suggests that Open Internet rules are necessary because broadband providers “have short-term incentives to limit openness,” which generate harms to mass-market consumers and other participants in the Internet ecosystem.⁸ As noted above, Cox submits that any such incentives are easily outweighed in today’s marketplace by broadband providers’ interest in *promoting* openness—which consumers demand of their broadband service providers. But if the Commission disagrees and determines that incentives to engage in blocking or unreasonable discrimination do exist, it follows that the effectiveness of any Open Internet rules should be measured by the extent to which they mitigate such incentives wherever they may arise—thus avoiding the harms identified by the Commission. Rules that narrowly focus on only one potential source of threats to openness would fail to achieve the Commission’s objectives.

Unfortunately, the NPRM focuses almost exclusively on fixed broadband Internet access service providers, thus undermining the legitimacy and efficacy of the proposed rules. In doing so, the NPRM would unjustifiably exempt mobile broadband providers from core aspects of the Open Internet rules, even though the NPRM relies on such entities’ conduct as the primary

⁸ NPRM ¶ 26.

justification for adopting any new rules at all.⁹ Moreover, addressing the Commission’s openness concerns in a coherent manner would require not only that any Open Internet rules apply to all mass-market broadband Internet access services—regardless of technology used—but also that such rules address the harms of blocking and discrimination whether caused by a broadband access provider or an edge provider.

At the same time, all regulations impose burdens on regulated entities while potentially undermining the ability of those entities to provide efficient and effective services in response to consumer needs and market drivers.¹⁰ Consequently, the rules also should be carefully tailored to avoid placing unnecessary limits on services or arrangements that do *not* implicate the Commission’s interest in ensuring that mass-market consumers can access Internet content and services without being blocked or having their access degraded. Accordingly, the Commission should continue to exclude business broadband services, specialized services, and Internet traffic-exchange arrangements from the scope of this proceeding, as those contexts fail to present comparable concerns.

A. Any Open Internet Rules Should Be Technologically Neutral

The NPRM tentatively concludes that any Open Internet rules adopted by the Commission in this proceeding should apply to the provision of “broadband Internet access service” as that term is defined in the Commission’s rules—*i.e.*, “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or

⁹ See *id.* ¶ 41 (citing recent conduct of AT&T Mobility and Verizon Wireless as the key justification for reinstating Open Internet rules).

¹⁰ See generally Paul L. Joskow and Nancy L. Rose, *The Effects of Economic Regulation*, HANDBOOK OF INDUSTRIAL ORGANIZATION 1450-1506 (1989).

substantially all Internet endpoints”¹¹ While this definition suggests that any rules would apply regardless of the specific technology upon which a service provider relies, the NPRM makes clear the Commission’s tentative intent to subject providers of fixed broadband Internet access services to far more restrictive requirements than providers of mobile broadband Internet access services.¹² There is no principled basis for drawing such a distinction; rather, it would undermine both the legitimacy and efficacy of new rules by perpetuating the arbitrary differences in the treatment of fixed and mobile platforms under the 2010 Open Internet rules.

The Commission has long recognized that minimizing competitive and technological bias tends to “facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier.”¹³ For this reason, the Commission has determined that “[r]egulatory policies must promote technological neutrality . . . to ensure that broadband service providers have sufficient incentive to develop and offer such products and services.”¹⁴ Any Open Internet rules adopted in this proceeding should reflect this longstanding tenet of policymaking.

Cox respectfully submits that there never was any valid reason to subject fixed and mobile broadband services to materially different rules. Both fixed and mobile platforms are constrained in their overall capacity, and thus share the need to engage in “reasonable network management” to ensure that their networks can support a quality consumer broadband experience. And while wireless broadband services were mostly viewed as a complement to

¹¹ NPRM ¶ 54; 47 C.F.R. § 8.11(a).

¹² NPRM ¶ 62.

¹³ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, at ¶ 48 (1997).

¹⁴ *Federal Communications Commission Strategic Plan for Fiscal Years 2009 to 2014*, DOC-283196 (June 25, 2008).

fixed services in 2009-10, the dramatic increases in speeds and network capacity enabled by 4G deployments over the last few years have made head-to-head competition between fixed and mobile broadband services a far more prevalent phenomenon.¹⁵ The NPRM acknowledges the “significant changes since 2010 in the mobile marketplace,” including “how mobile providers manage their networks, the increased use of Wi-Fi, and the increased use of mobile devices and applications,”¹⁶ further undercutting any argument for differential treatment of fixed and mobile providers. Moreover, wireless providers’ recent announcements of plans to undertake further network upgrades that will enable speeds of 200 Mbps or greater have made the supposed justifications for disparate rules even more untenable.¹⁷

Even more fundamentally, if the Commission concludes that consumers are at risk of being harmed by blocking or discrimination that interferes with their ability to access Internet content and services, they would be no less harmed when such blocking or discrimination occurs on a mobile platform.¹⁸ To the extent that mobile providers still rely on assertions regarding the technological limitations of their networks, such limitations should be taken into account in the

¹⁵ Randall Stephenson, Chairman & CEO, AT&T, Inc., Morgan Stanley Technology, Media & Telecom Conference, Transcript (Mar. 6, 2014) (explaining that increased competition from wireline broadband providers places a “heightened sense of urgency” on AT&T to complete its LTE deployment plans); *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Wireless Services*, Sixteenth Report, 28 FCC Rcd 3700, at ¶ 371 (2013) (providing examples of how mobile broadband increasingly is being used as a replacement for, and/or in competition with, wireline broadband).

¹⁶ NPRM ¶ 62.

¹⁷ *See, e.g.,* Phil Goldstein, *Softbank’s Son vows broadband speeds of 200 Mbps, more competition in U.S. market*, FIERCEWIRELESS (Mar. 11, 2014), at <http://www.fiercewireless.com/story/softbanks-son-vows-broadband-speeds-200-mbps-more-competition-us-market/2014-03-11>.

¹⁸ To the contrary, as noted above, the Commission has focused primarily on questionable practices by mobile broadband providers in justifying the need for new Open Internet rules. *See* NPRM ¶ 41.

process of evaluating the reasonableness of a given policy or practice—an inherently contextual determination that can and should take network attributes into account—rather than in determining whether certain Open Internet rules should apply in the first instance.

The Commission therefore should adopt a single set of rules that apply to all facilities-based broadband providers. But in all events, the Commission should harmonize the treatment of licensed mobile broadband services and unlicensed Wi-Fi services. The *2010 Open Internet Order* introduced significant uncertainty as to whether Wi-Fi-based Internet access services were governed by the rules for fixed wireline services or the rules for mobile wireless services.¹⁹ The Commission should now ensure that licensed and unlicensed wireless services are subject to the same rules, regardless of whether the fixed/mobile disparities are eliminated. Not only will licensed mobile broadband services and unlicensed Wi-Fi services increasingly serve as competitive substitutes going forward, but the notion that different rules might apply to a single stream of communications as it hops back and forth between licensed and Wi-Fi networks is simply unworkable.

B. Any Open Internet Rules Should Apply to Edge Providers as well as Broadband Internet Access Providers

The NPRM’s failure to address incentives that edge providers may have to restrict Internet openness presents similar problems. Because the proposed rules stem from the Commission’s interest in prohibiting blocking of access to online content or services and unreasonable discrimination in the delivery of such services, the Commission cannot credibly exempt blocking or discrimination by edge providers. Rather, any exclusion of edge providers

¹⁹ See *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, at ¶ 49 (2010) (explaining that the no-blocking and nondiscrimination rules for fixed broadband services “encompasses fixed wireless broadband services (including services using unlicensed spectrum)”) (“*2010 Open Internet Order*”).

would be inconsistent not only with the policy rationale underlying the Commission's efforts to adopt Open Internet rules, but with the only judicially approved jurisdictional basis for adopting such rules.

As noted above, the *Verizon* court found that the Commission could impose Open Internet rules under Section 706 of the Telecommunications Act. In doing so, the court credited the Commission's assertion that the restrictions on broadband Internet access providers "protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband."²⁰ If broadband provider misconduct warrants regulatory intervention because it could dampen end-user demand for online services and thereby undercut broadband investment incentives, then edge provider conduct that blocks or impedes access to online services would have an even *more direct* impact on broadband investment under the core justification advanced by the Commission. As a result, it would be arbitrary and capricious to target broadband provider conduct that implicates the asserted interests only indirectly (*i.e.*, the "triple-cushion shot" described by Verizon and the court), while exempting edge provider conduct implicating those interests directly (*i.e.*, via a "single" or "double-cushion shot").

Moreover, while the concerns about broadband provider blocking or discrimination are overwhelmingly hypothetical, blocking by edge providers is a very real and harmful phenomenon. For example, earlier this year Viacom blocked one ISP's subscribers from accessing Viacom's otherwise freely available online content to gain leverage in a carriage dispute that had nothing to do with the ISP's broadband service or the broadband customers that

²⁰ *Verizon*, 740 F.3d at 642.

were adversely impacted as a result.²¹ CBS acted in similar fashion last year during a highly publicized dispute with Time Warner Cable.²² As these troubling incidents illustrate, it is edge providers—and not ISPs—that have a track record of blocking consumers from accessing online content of their own choosing.

From the Commission’s perspective, it should not make any difference whether the entity engaging in blocking or other discrimination is a broadband provider or an edge provider that hosts its content online. As long as the edge provider in question engages in transmission by wire or radio—as many, if not most, do today—the Commission’s authority under Section 706 authorizes the extension of a no-blocking rule to such entities. Therefore, to the extent the Commission seeks to restrict entities from engaging in blocking or discrimination with respect to online content and services, it should adopt competitively neutral rules that apply to network operators and edge providers alike.

C. Any Open Internet Rules Should Be Narrowly Tailored To Protect the “Mass-Market” Consumer without Imposing Undue Limitations on Unrelated Services

The NPRM appropriately proposes to limit the scope of any new rules to protecting “mass-market” consumers’ access to online content and services. By contrast, services and arrangements distinct from mass-market broadband Internet access and content should remain outside the scope of the Open Internet rules, as they do not sufficiently implicate the policy concerns at issue. More specifically, the Commission should not extend any Open Internet rules

²¹ See Mike Farrell, *Viacom Blocks Online Access to CableOne Subs*, MULTICHANNEL NEWS (Apr. 30, 2014), at <http://www.multichannel.com/news/news-articles/viacom-blocks-online-access-cableone-subs/374283>.

²² See Letter from Matthew A. Brill, Counsel to Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 1 (filed Aug. 2, 2013) (explaining that CBS is blocking TWC’s *broadband Internet access* subscribers from accessing programming on CBS.com as a result of the retransmission consent dispute between the parties).

to business services, specialized services, or Internet traffic-exchange arrangements such as peering or CDN agreements.

a. *Business Services*

The NPRM tentatively concludes that any Open Internet rules adopted in this proceeding should not apply to enterprise customers.²³ Cox supports this approach, which would reflect the Commission’s longstanding recognition of the fundamental differences between residential and business customers.

As the Commission has acknowledged, many of the consumer-protection concerns that arise in the residential context simply do not arise in the business context, warranting different regulatory treatment. For example, business customers “tend to be sophisticated and knowledgeable” and often benefit from the assistance of consultants.²⁴ Moreover, business customers frequently enter into long-term contracts for customized service packages that are individually negotiated after the issuance of a request for proposals.²⁵ Consequently, business customers are better able to protect their interests through the workings of the competitive marketplace. As a result, it simply is not necessary to extend any Open Internet rules to business customers.²⁶

b. *Specialized Services*

The NPRM tentatively concludes that any new Open Internet rules should preserve the ability of broadband providers to offer “specialized services” through their other business lines

²³ NPRM ¶ 58.

²⁴ See, e.g., *AT&T and BellSouth Corp.*, Memorandum Opinion and Order, 22 FCC Rcd 5662, at ¶ 85 (2007).

²⁵ *Id.*

²⁶ Indeed, to promote administrative simplicity, Cox encourages the Commission to exempt *all* business broadband services from the Open Internet rules, and not just so-called “enterprise” services.

without restriction.²⁷ Cox supports this approach, which promises to advance the objectives of the Commission’s Open Internet policies while ensuring that any rules adopted in this proceeding do not undermine the ability of broadband providers to develop specialized services that “benefit end users and spur investment.”²⁸ As the Commission has made clear, the definition of broadband Internet access does not encompass services—like the voice and video services offered by Cox—that “do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.”²⁹ Those offerings already are subject to well-developed regulatory regimes (for example, Title II or the interconnected VoIP rules in the case of voice, and Title VI in the case of MVPD services).

By their nature, specialized services are independent offerings that are distinct from “broadband Internet access.” Subjecting specialized services to regulation would discourage the deployment of the broadband infrastructure necessary to support such services. As the Commission and the Open Internet Advisory Committee (“OIAC”) have recognized, the ability of broadband providers to offer specialized services over their last-mile networks “drive[s] additional private investment in broadband networks and provide[s] end users valued services, supplementing the benefits of the open Internet.”³⁰ Consequently, applying Open Internet rules

²⁷ NPRM ¶ 60.

²⁸ *Id.*

²⁹ *2010 Open Internet Order* ¶ 47.

³⁰ *Id.* ¶ 112; *OIAC Annual Report, Specialized Services: Summary of Findings and Conclusions*, at 2 (Aug. 20, 2013) (explaining that “[t]he business case to justify the investment in the expansion of fiber optics and improved DSL and cable technology which led to higher broadband speeds was fundamentally predicated upon the assumption that the operator would offer multiple services” and that “high speed internet access service has benefited from the deployment of specialized video services like IPTV, because the investment in the higher bandwidth infrastructure needed for video services brought higher capacity to more households”).

to specialized services also would undermine efforts to extend broadband Internet access services to consumers.

c. *Internet Traffic-Exchange Arrangements*

Cox supports the NPRM's tentative conclusion that any Open Internet rules should not apply to "the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection."³¹ As an initial matter, as Chairman Wheeler has recognized,³² Internet traffic-exchange arrangements of the type described in the NPRM present a distinct and significantly more complex set of issues than the delivery of Internet content and services over a single network operator's last-mile facilities. These issues therefore should not be addressed in the context of this rulemaking. If the Commission does seek to explore potential regulation of Internet traffic-exchange arrangements at all, it should do so in a separate proceeding that would avoid conflating

³¹ NPRM ¶ 59. As Cox has explained in other proceedings, the exchange of *voice* traffic in connection with local and long-distance telecommunications services and interconnected VoIP offerings presents very different policy issues (based on the historical dominance of incumbent local exchange carriers and the different architecture of voice networks) and different legal issues (as the exchange of voice traffic by telecommunications carriers, unlike the exchange of broadband Internet access traffic by ISPs, is subject to Title II of the Act). See Reply Comments of Cox Communications, Inc. on Sections XVII.L-R, *Connect America Fund*, WC Docket No. 10-90 (Mar. 30, 2012). For those reasons, Cox continues to support the Commission's enforcement of Title II obligations relating to the interconnection of voice networks and the exchange of voice traffic no matter the underlying technology.

³² See NPRM, Statement of Chairman Tom Wheeler, at 2 (observing that Internet traffic exchange "is a different matter that is better addressed separately" from the Open Internet proceeding); Richard Greenfield, BTIG Research, *Forget Net Neutrality, Peering and Interconnection Set To Be the Internet Issue of 2014* (Feb. 11, 2014), available at <http://www.btigresearch.com/2014/02/11/forget-net-neutrality-peering-and-interconnection-set-to-be-the-internet-issue-of-2014/> (quoting Chairman Wheeler's remarks at the State of the Net Conference on January 28, 2014 that Internet traffic exchange "is not the same issue" as net neutrality).

proposed rules addressing the delivery of Internet traffic *within* last-mile networks with potential concerns about the economic arrangements governing the exchange of traffic *between* separate networks.

More broadly, the Commission should view calls to regulate Internet traffic-exchange arrangements with skepticism. Broadband data interconnection arrangements have arisen in a largely deregulated environment, in large part because the Internet is a relatively young “network of networks,” the effectiveness of which has always been predicated upon the interconnection of disparate facilities—unburdened by a legacy of monopoly local providers. Given this positive history of peering and fair dealing between networks, there has been no need to closely regulate interconnection of Internet services.³³

In short, there is a vibrant marketplace for backbone, Internet transit, and CDN services, giving all edge providers a multiplicity of routes (including many settlement-free routes) into broadband providers’ networks. Redundant network architecture gives edge providers substantial control over the arrangements through which their Internet traffic flows to and from Cox’s and other Internet service providers’ networks.³⁴ Indeed, the Commission has recognized that “settlement-free peering and degradation-free transit arrangements have thrived” even though “interconnection between Internet backbone providers has never been subject to direct

³³ In contrast, in the wireline voice context ILECs have long had a history of refusing to offer competing network providers interconnection on fair and reasonable terms and conditions.

³⁴ See, e.g., Margit A. Vanberg, *Competition and Cooperation in Internet Backbone Services*, TELECOMMUNICATIONS MARKETS: DRIVERS AND IMPEDIMENTS, at 57 (2009) (finding “strong support” for the proposition that “competitive forces in the transit market are working” and can effectively hinder Tier-1 ISPs from discriminating against other parties).

government regulation”³⁵ Accordingly, while Cox appreciates the Commission’s interest in obtaining greater information about the Internet traffic-exchange marketplace,³⁶ the record will confirm the wisdom of the Commission’s longstanding hands-off approach to backbone, Internet transit, and CDN services and Internet traffic-exchange arrangements.

II. THE COMMISSION SHOULD NOT ADOPT ADDITIONAL DISCLOSURE OR REPORTING REQUIREMENTS THAT IMPOSE UNWARRANTED BURDENS ON NETWORK OPERATORS

Cox agrees with the Commission that transparency should continue to play a central role in any Open Internet regulatory regime, and Cox accordingly supports continued application of the existing disclosure requirements. As the Commission has recognized, transparency requirements are “the most effective and least intrusive regulatory measures at the Commission’s disposal” for promoting Open Internet principles.³⁷ Indeed, the Commission’s existing transparency requirements more than ensure that consumers can make informed decisions about available broadband Internet access services, and they likewise give edge providers and regulators insight into each provider’s performance attributes, policies, and network management practices. Cox is open to refinements of the existing disclosure rules, but only to the extent they would meaningfully benefit retail consumers without imposing disproportionate burdens on

³⁵ *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd 18290, at ¶ 132 (2005); *see also* Michael Kende, Director of Internet Policy Analysis, *The Digital Handshake: Connecting Internet Backbones*, Office of Plans and Policy Working Paper No. 32, at 26 (Sept. 2000), *available at* http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf (recognizing that “[a]ny regulation of the Internet backbone market would represent a significant shift in the unregulated status quo under which the Internet industry has grown at unprecedented rates,” with the potential for significant disruption of efficient commercial arrangements). These observations remain valid today.

³⁶ *See* Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion (Jun. 13, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327634A1.pdf.

³⁷ NPRM ¶ 66.

ISPs. For example, it might be reasonable to adopt a “standardized label for Internet service,”³⁸ as such a label would make broadband providers’ disclosures even more accessible and understandable.

In contrast, most of the expanded disclosure proposals included in the NPRM would impose burdensome obligations that are highly unlikely to prove useful to consumers and would only degrade the overall effectiveness of the transparency rule. Cox therefore urges the Commission not to adopt mandates that would require tailored disclosures to many different audiences, more granular reporting of information that would not be useful to consumers, or the reporting of congestion events, whatever the source.

A. Varying Disclosure Requirements Aimed at Many Different Audiences Would Be Excessively Burdensome and Impractical

Cox opposes any proposal that would require broadband providers to make different types of disclosures to different parties. Notably, the Commission declined to adopt such variable disclosure requirements in the *2010 Open Internet Order*,³⁹ and nothing has changed to warrant a reversal of that decision. Indeed, there is no evidence to suggest that ISPs’ existing disclosures are insufficient to meet the needs of edge providers and, as a result, no basis on which to support the NPRM’s tentative conclusion that changes to the existing transparency rule are warranted.⁴⁰ Moreover, the adoption of enhanced disclosure obligations with respect to edge providers would be excessively burdensome and impractical. It simply is not realistic or appropriate to expect the Commission and broadband providers to anticipate and respond to the

³⁸ *Id.* ¶ 72.

³⁹ *2010 Open Internet Order* ¶ 58.

⁴⁰ See NPRM ¶ 67 (seeking “general comment on how well the Commission’s existing transparency rule is working” but nevertheless tentatively concluding that the Commission “should enhance the transparency rule”).

informational requirements of every existing and future edge provider. Nor would it be fair to hold broadband providers accountable for satisfying the perceived needs of all such edge providers. Rather, given the rapidly evolving nature of the Internet ecosystem, it continues to make sense to “allow flexibility in implementation of the transparency rule” by allowing broadband providers to satisfy the transparency rule through a single disclosure.⁴¹

B. The Commission Should Not Expand the Scope of Disclosures Required Under the Transparency Rule

Cox also is concerned about proposals that would greatly expand the scope of disclosures required under the transparency rule. For example, the NPRM proposes to require broadband providers to disclose detailed measurements of “packet loss, packet corruption, latency, and jitter” in their network management disclosures.⁴² Such information would only confuse the vast majority of consumers, obfuscating rather than clarifying matters and thus undermining the Commission’s goal of making the disclosures “accessible and understandable to end users.”⁴³ At the same time, such detailed measurements would be difficult to take and present in a uniform and accurate manner, and in any event would greatly increase the costs of compliance with the rule without any material benefit to end users.

Similarly, the proposal to require network operators to “disclose meaningful information regarding the source, location, timing, speed, packet loss, and duration of network congestion” raises significant concerns.⁴⁴ As the NPRM acknowledges, network congestion can occur at various points along the networks used to deliver content or services to an end user, including portions of a network that are not part of the “last mile” (and thus beyond the scope of the Open

⁴¹ 2010 *Open Internet Order* ¶ 56.

⁴² NPRM ¶ 73.

⁴³ *Id.* ¶ 72.

⁴⁴ *Id.* ¶ 83.

Internet rules) and/or third-party networks.⁴⁵ Indeed, so-called network “congestion” often is a function of the manner in which a content provider delivers traffic to ISPs, and, as a result, is beyond the control of the broadband provider.⁴⁶ It would be particularly burdensome—and potentially impossible—for a network operator to accurately identify and report incidences of congestion that stem from a third party’s network, particularly given that network congestion often is ephemeral.

Cox also opposes the NPRM’s unusual proposal to adopt a separate reporting obligation that would require broadband providers to *describe* their current disclosure practices (in addition to making the disclosures themselves).⁴⁷ Such a requirement would inject obvious, unnecessary redundancies into the transparency rule that would only impose greater burdens on broadband providers without offering any benefit.

Furthermore, Cox continues to believe that more detailed disclosure requirements should be avoided because they risk exposing commercially sensitive and proprietary information. As Cox explained in the prior Open Internet proceeding, requiring disclosure of detailed network management practices would place the security of its broadband network at risk to hackers and others⁴⁸—particularly where such practices relate to edge provider activity. Recognizing these significant risks, the Commission took appropriate steps to ensure that the transparency rule

⁴⁵ See *id.* ¶ 82 (noting evidence that “sources of congestion that impact end users may originate beyond the broadband provider’s network or in the exchange of traffic between that network and others”).

⁴⁶ See, e.g., Dan Rayburn, *Netflix & Level 3 Only Telling Half The Story, Won’t Detail What Changes They Want To Net Neutrality*, STREAMINGMEDIA.COM (Mar. 21, 2014) at <http://blog.streamingmedia.com/2014/03/netflix-level-3-telling-half-story-wont-detail-changes-want-net-neutrality.html>.

⁴⁷ NPRM ¶ 87.

⁴⁸ See Comments of Cox Communications, Inc., GN Docket No. 09-191, at 11 (Jan. 14, 2010).

would “not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices.”⁴⁹ In particular, the Commission adopted a flexible rule and outlined a non-exhaustive list of information that potentially should be included in a provider’s online disclosure. Although that rule is working as intended, the NPRM indicates a new willingness to require broadband providers to provide highly detailed, sensitive information regarding the operation of their networks, disclosure of which would threaten the integrity and security of the nation’s communications infrastructure. Broadband providers should not be required to disclose such information to any third party.

III. ANY NO-BLOCKING RULE SHOULD FOCUS ON PREVENTING ACTUAL “BLOCKING” RATHER THAN IMPOSING SERVICE QUALITY MANDATES ON BROADBAND INTERNET ACCESS SERVICES

Cox has no intention of blocking access to any lawful websites or services and submits that regulation likely is unnecessary to prevent blocking of such access. Indeed, Cox, like other broadband providers, has invested billions of dollars to ensure that its subscribers have access to the online content and services they desire, and it has every incentive to encourage customers to make full use of the network. Nevertheless, should the Commission determine that a no-blocking rule is necessary to preserve the Open Internet, Cox would not oppose the proposal to reinstate the rule adopted by the Commission in 2010,⁵⁰ as long as the Commission extends such a prohibition to both fixed and mobile broadband providers and to edge providers, as discussed above.⁵¹

⁴⁹ 2010 *Open Internet Order* ¶ 55.

⁵⁰ NPRM ¶ 94 (proposing to adopt the text of the 2010 no-blocking rule).

⁵¹ See Section I, *supra*.

However, Cox opposes any attempt to interpret the no-blocking rule as imposing minimum quantitative performance standards on broadband providers. As an initial matter, it is simply not plausible to construe a *prohibition* against blocking as an *affirmative* duty to provide service at levels determined by the government. Moreover, there is no sound policy justification for supplanting broadband providers' discretionary, market-based judgments about the speeds and other performance capabilities associated with their baseline Internet access offerings. As exemplified by Cox's recent announcement of 1-Gigabit speeds and other providers' similar initiatives, the marketplace is driving network operators to make investments in ever-increasing broadband capabilities absent any regulatory fiat. Moreover, history has shown that broadband providers' "best efforts" services are meeting consumers' needs and are constantly improving. Accordingly, broadband performance capabilities should continue to be determined by individual network operators based on the technical capabilities of their networks and the competitive market forces that have driven the "virtuous cycle" to date.⁵²

Conversely, the adoption of any "minimum quantitative performance" standard would be ill-advised. There is no practical way for the Commission to supplant broadband providers' judgment with regulatory mandates regarding the appropriate performance attributes to deliver to consumers. Given the many network architectures in place (whether based on fiber, coaxial cable, copper, or spectrum, and of varying configurations), it would be virtually impossible to set appropriate baseline metrics at the national level, and if the Commission sought to establish varying requirements to account for different technological platforms and other relevant issues,

⁵² Because the unique architectural characteristics of a broadband provider's network necessarily impact the level of service it can provide to subscribers, any such "best efforts" standard should be based on the technical attributes and capacity constraints of an individual provider's *network*, not the "typical" level of service for that *type of traffic*." NPRM ¶ 102 (emphasis added).

the undertaking would become impossibly complex and inherently subjective. Moreover, especially in light of the rapidly changing nature of the Internet and the services it makes available, any centrally imposed performance standard inevitably would be obsolete in short order, and any automatic adjustments that might seek to avoid such obsolescence would risk being arbitrary. The Commission thus could end up stifling investment and innovation rather than promoting those core objectives.

In addition, as a legal matter, a rule requiring broadband providers to offer a specific level of service to consumers or edge providers—such as a minimum speed or other quantitative performance metric—would risk being deemed an impermissible common carriage mandate. In particular, any no-blocking rule that would require a broadband ISP to provide particular levels of service specified by the government would seem to amount to the type of service-quality mandate regulators traditionally imposed on dominant telephone companies pursuant to Section 201(b) and applicable state laws. In fact, micromanaging the performance attributes of broadband providers’ baseline service offerings would amount to the sort of heavy-handed regulation that the Commission has been determined to *avoid*—including when it was considering pursuing reclassification of broadband Internet access services under Title II.⁵³ Relatedly, any rule that requires a broadband provider to deliver edge providers’ content at or

⁵³ See, e.g., *Framework for Broadband Internet Service*, Notice of Inquiry, GN Docket No. 10-127, FCC 10-114, Separate Statement of Chairman Julius Genachowski (rel. June 17, 2010) (describing the Third Way approach as “reject[ing] ... the extreme of applying extensive legacy phone regulation to broadband”); Chairman Julius Genachowski, Federal Communications Commission, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010) (detailing regulation that the Commission should not undertake, including, among others, “constraining reasonable network management practices of broadband providers[] or stifling new business models or managed services that are pro-consumer and foster innovation and competition”); Austin Schlick, General Counsel, Federal Communications Commission, *A Third-Way Legal Framework For Addressing the Comcast Dilemma*, at 7-8 (May 6, 2010).

above a certain minimum speed would conflate concerns about potential discrimination with the more straightforward concept of “blocking.”

By the same token, seeking to tailor performance standards to the expectations of a “reasonable person” would involve comparable guesswork and uncertainty.⁵⁴ The NPRM does not state how such a “reasonable person” would be defined other than to suggest that broadband providers would be required to meet “the reasonable expectations of the typical end user,” including “the ability to access streaming video from any provider, place and receive telephone calls using the VoIP service of the end user’s choosing, and access any lawful web content.”⁵⁵ But broadband providers would have no assurance under such an amorphously broad standard that any level of investment in their networks would be sufficient to satisfy the minimum access requirement. Indeed, the “reasonable person” standard could be interpreted to subject a broadband provider to liability even in cases where the end user’s lack of “access” results from an issue on another network or is otherwise beyond the broadband provider’s control. It also is not clear that the Commission could sufficiently clarify the “reasonable person” standard to avoid such issues. To the extent the Commission sought to more concretely define “the reasonable expectations of a typical end user,”⁵⁶ the “reasonable person” standard would present the same infirmities as the “minimum quantitative performance” standard—namely, that the rule quickly would become outdated and require constant updating by the Commission. Accordingly, Cox urges the Commission to ensure that, to the extent it adopts any no-blocking rule, the rule is designed to address true “blocking” concerns rather than to impose rigid service-quality standards in an already competitive marketplace.

⁵⁴ See NPRM ¶ 104.

⁵⁵ *Id.*

⁵⁶ *Id.*

IV. ANY COMMERCIAL REASONABLENESS REQUIREMENT ALSO SHOULD REFLECT RESTRAINT AND PROVIDE CERTAINTY

As noted above, there is no realistic prospect that a broadband provider in today's marketplace would or could force an edge provider to pay a "toll" for delivering content to end users, at any level of priority. Accordingly, Cox doubts the need for a complex regulatory regime aimed at ensuring the reasonableness of business arrangements between edge providers and broadband ISPs. Nevertheless, any rules the Commission may choose to adopt to ensure "commercial reasonableness" should permit a sufficient degree of flexibility, which the *Verizon* court made clear is necessary to comply with the Communications Act.⁵⁷

In particular, the Commission should proceed with caution in making predictive judgments regarding the future state of the Internet marketplace.⁵⁸ Rather, the Commission's rules should make clear that broadband providers are free to experiment with new business arrangements and make other business judgments that, based on their considerable experience, will best position them to meet their customers' needs in the evolving Internet ecosystem. Indeed, as the Commission recognized in the 2009 Open Internet NPRM, in the dynamic broadband marketplace, "broadband Internet access service providers must be able to manage their networks and experiment with new technologies and business models in ways that benefit consumers."⁵⁹

Thus, although Cox does not necessarily oppose a rule that would identify certain "industry practices" relating to the delivery of broadband Internet access traffic across a

⁵⁷ See *Verizon*, 740 F.3d at 657 (explaining that, "unlike the data roaming rule in *Cellco*—which spelled out 'sixteen different factors plus a catchall . . . '—the *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains flexible").

⁵⁸ See NPRM ¶ 124.

⁵⁹ *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, at ¶ 103 (2009).

provider’s network as presumptively commercially reasonable or unreasonable,⁶⁰ the Commission should be careful not to discourage new and innovative business practices that would pose no threat to the Open Internet. For example, Cox agrees with AT&T that any arm’s length prioritization agreement with a non-affiliated entity (however unlikely such arrangements may be) should be considered presumptively reasonable.⁶¹ In addition, the Commission should consider other safe harbors and presumptions that provide as much certainty as possible to broadband providers and edge providers, while taking into account the important role played by market forces in ensuring the reasonableness of new business models.

Lastly, to remain consistent with the *2010 Open Internet Order* and the guidance provided by the D.C. Circuit, the Commission should limit any “commercial reasonableness” screen to actual or proposed agreements between broadband access providers and edge providers specifically involving the *delivery* of broadband Internet access traffic. Troublingly, the NPRM appears to suggest a roving standard of reasonableness that would apply to *all* broadband provider practices, including retail service attributes.⁶² The *Verizon* court suggested the possibility of a “commercial reasonableness” standard based on its review of the Commission’s data roaming rule in *Cellco*,⁶³ which governs direct commercial relationships between roaming carriers and host carriers.⁶⁴ Limiting such a standard to oversight of wholesale commercial

⁶⁰ See NPRM ¶ 134.

⁶¹ See *id.* ¶ 141.

⁶² See NPRM, Appendix A, Proposed Rule § 8.7 (prohibiting broadband providers from engaging in all “commercially unreasonable practices.”).

⁶³ See *Verizon*, 740 F.3d at 657.

⁶⁴ See 47 C.F.R. § 20.12(e)(1) (“A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions”); *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

relationships not only is necessary to remain faithful to the court’s guidance,⁶⁵ but also would be consistent with the anti-discrimination rule adopted in the *2010 Open Internet Order*, which focused on preventing broadband providers from *unreasonably discriminating against particular edge providers*, rather than policing all potentially unreasonable *practices* by broadband providers.⁶⁶

Notably, the Commission took pains to emphasize in 2010 that broadband providers would retain discretion to determine retail pricing and service attributes, absent government micromanagement.⁶⁷ Especially given the Commission’s stated objectives of reinstating the protections embodied in the *2010 Open Internet Order* and following the blueprint offered by the D.C. Circuit, there is no basis for such a radical expansion of oversight of broadband provider “practices.” To the contrary, as noted above, the general imposition of a “just and reasonable” standard that applies as broadly as Section 201(b) of the Act—unlike a more targeted review of two-sided market arrangements based on specifically enumerated factors, as in the data roaming context—would risk violating the Act in the same manner that the former nondiscrimination rule was found to constitute an impermissible common carrier mandate. Therefore, notwithstanding the proposed rule language addressing all broadband provider “practices,” any commercial reasonableness standard should be limited to actual or proposed commercial relationships relating to the delivery of broadband Internet access.

⁶⁵ See *Verizon*, 740 F.3d at 649 (holding that Section 706 authorizes the Commission to “regulat[e] how broadband providers treat edge providers”).

⁶⁶ See *2010 Open Internet Order* ¶¶ 75-76.

⁶⁷ See *id.* ¶ 77 (“The rule we adopt provides broadband providers’ sufficient flexibility to develop service offerings and pricing plans, and to effectively and reasonably manage their networks.”); *id.* ¶ 79 (explaining that broadband providers were free to decide “what connection speed(s) to offer, and at what price”).

V. THE COMMISSION SHOULD ADOPT STREAMLINED ENFORCEMENT AND DISPUTE RESOLUTION MECHANISMS

Although Cox does not oppose the use of traditional informal and formal complaint and notice of apparent liability processes to enforce the Commission's Open Internet rules,⁶⁸ such mechanisms have proven to be expensive and time consuming for all parties involved, even in instances where strict time limits are placed on the pendency of such adjudicatory proceedings. Lengthy enforcement proceedings thus could have a chilling effect on a network operator that is accused of wrongdoing—even if the allegations are without merit—while the operator awaits Commission resolution of the dispute. Moreover, the chilling effect could spread to the broader marketplace to the extent that, as a result of a complaint or investigation into the practices of one broadband provider, others refrain from engaging in similar business practices (however innovative and potentially beneficial) for fear of becoming the target of a complaint or investigation.

Cox therefore supports the NPRM's proposal to adopt additional dispute resolution mechanisms, such as expedited, non-binding staff review informed by input from the Broadband Internet Technical Advisory Group ("BITAG") and/or resolution by technical advisory groups like OIAC and BITAG. Cox also supports the adoption of safe harbors for network management practices that conform to industry standards or best practices developed by such bodies. Indeed, Cox believes that such alternative mechanisms are critical to ensuring that the Commission's enforcement procedures do not threaten the "virtuous cycle" that the Open Internet rules are intended to protect.

⁶⁸ See NPRM ¶ 172.

VI. THE COMMISSION SHOULD GROUND ITS NEW RULES IN SECTION 706 AND SHOULD NOT PURSUE ANY TITLE II RECLASSIFICATION THEORIES

A. The Commission Should Follow the Blueprint Provided by the D.C. Circuit and Rely on Section 706 as Authority for any New Rules

The NPRM appropriately proposes to adopt Open Internet rules under Section 706 of the Telecommunications Act, consistent with the approach upheld by the D.C. Circuit in *Verizon v. FCC*.⁶⁹ The court unequivocally held that Section 706 “grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers,” subject to the limitations imposed by other provisions of the Communications Act.⁷⁰ In addition, the court upheld the transparency rules adopted in the *2010 Open Internet Order*, thus establishing a strong foundation for preserving the Open Internet;⁷¹ it explained how the Commission could reinstate its no-blocking rule;⁷² and it suggested a basis for ensuring “commercially reasonable” arrangements between broadband providers and edge providers.⁷³

Thus, the *Verizon* decision provides a clear blueprint establishing how the Commission may use its authority under Section 706 to adopt Open Internet rules that would be consistent with the requirements of the Communications Act and the Administrative Procedure Act—and thus survive judicial scrutiny. There is no sound reason to depart from this blueprint, particularly following court reversals of the Commission’s prior attempts to establish and enforce Open Internet principles; indeed, the only alternative identified in the NPRM—reclassifying a component of broadband Internet access services under Title II—would ignore the factual record

⁶⁹ *Id.* ¶ 142.

⁷⁰ *Verizon*, 740 F.3d at 649. As discussed above, the court’s analysis also indicates that Section 706 would authorize the Commission to regulate edge providers themselves.

⁷¹ *Id.* at 659.

⁷² *See id.* at 658-59.

⁷³ *See id.* at 657.

describing the nature of such services and trample on investment-backed reliance interests, and thus invite forceful legal challenges. And even if a reclassification theory could be sustained, it would undermine, rather than advance, critical policies that have allowed the Internet to flourish to date.

B. Seeking to Reclassify any Component of Broadband Internet Access Under Title II Would Be Unlawful and Counterproductive

As a threshold matter, there simply is no factual or legal basis for reclassifying broadband Internet access services as some have proposed. The Supreme Court has made clear that “[t]he entire question” in classifying broadband Internet access service “turns . . . on the *factual particulars* of how Internet technology works and how it is provided.”⁷⁴ The Commission has examined such particulars on multiple occasions, with special focus on “the nature of the functions that the end user is offered” by the service.⁷⁵ Time after time, the Commission has reached the same conclusion—broadband Internet access service is an information service incorporating information-processing capabilities that are inextricably integrated with a transmission component, such that consumers are not offered a separate “telecommunications service.”⁷⁶ There is no valid basis for revisiting this determination now, as neither the “factual particulars” nor functional nature of broadband Internet access service have changed.

⁷⁴ *Brand X*, 545 U.S. at 991 (emphasis added).

⁷⁵ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, at ¶ 38 (2002) (“*Cable Modem Order*”).

⁷⁶ *See, e.g., id.* ¶ 41; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, at ¶ 5 (2005) (reclassifying wireline broadband services as an information service “in light of the competitive and technical characteristics of the broadband Internet access market *today* [in August 2005]”) (“*Wireline Broadband Order*”); *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

The integrated data-processing functionality of broadband Internet access service likewise would preclude the Commission from splitting that service into separate components so that some of the resulting pieces could be subjected to Title II regulation. Thus, for example, there is no basis for treating the portion of the service in which a broadband provider transmits information in response to a subscriber’s request as a distinct telecommunications service, as some have suggested.⁷⁷ Such a distinction would make no sense; a subscriber’s *request* for Internet data and the broadband provider’s *response* to that request are functionally integrated components of a single service provided to a given subscriber, and either component in and of itself has little value. And even assuming, *arguendo*, that the Commission could draw an artificial line between the “request” and “response” components of broadband service, the integrated nature of the functionality of the two “services” provided remains the same. Contrary to the assertion that a so-called “remote delivery service” falls “outside the category of services previously designated by the Commission,”⁷⁸ the Commission made clear in the *Cable Modem*

Opinion and Order, 21 FCC Rcd 13281, at ¶ 1 (2006) (finding that “the transmission component underlying BPL-enabled Internet access service is ‘telecommunications,’ and that the offering of this telecommunications transmission component as part of a functionally integrated, finished BPL-enabled Internet access service offering is not a ‘telecommunications service’”); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, at ¶¶ 11-17 & nn.45-54 (2007) (evaluating the classification of “Current Wireless Broadband Internet Access Services and Technologies” on the basis of the technical characteristics of wireless broadband service as of early 2007 and determining that wireless broadband services, similar to other broadband services, should be classified as an information service).

⁷⁷ NPRM ¶ 152 (describing the proposal of Professors Tim Wu and Tejas Narechania).

⁷⁸ Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-91, 14-28, WC Docket No. 07-52, at 9 (filed May 5, 2014); *see also* Letter from Tejas Narechania and Tim Wu, Columbia University to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28, at 13 (filed Apr. 14, 2014) (asserting that “[c]lassifying such ‘sender-

Order and in its later classification decisions that broadband Internet access is a “single, integrated service” that enables users “to transmit data communications *to and from* the rest of the Internet.”⁷⁹ Any tortured attempt to treat these components of broadband Internet access service as “stand-alone” services would contravene this precedent and undermine the legitimacy of whatever Open Internet rules the Commission chooses to adopt in this proceeding; indeed, such a results-driven approach to classification would represent the height of arbitrariness.⁸⁰

Furthermore, the claim that broadband providers are supplying edge providers with a “telecommunications service” is at odds with the *Verizon* decision. The *Verizon* court invalidated the no-blocking and anti-discrimination rules adopted in the 2010 *Open Internet Order* after finding that they constituted impermissible common-carrier mandates.⁸¹ There would have been no basis for that ruling if the court had been able to determine that broadband Internet access services—or any portion thereof—were, in fact, “telecommunications services” subject to common-carrier regulation under Title II.

In any event, to the extent that reclassification proponents seek to prohibit payments from edge providers to broadband ISPs for access/transmission to end users, reclassifying the relevant transmission functionality in either direction as a telecommunications service would actually *require* such payments, as the relevant definition specifies that the transmission of information

side’ traffic as a telecommunications service is, perhaps surprisingly, consistent with the *Cable Modem Order*”).

⁷⁹ *Cable Modem Order* ¶¶ 17, 38 (emphasis added); *see also Wireline Broadband Order* ¶ 39 (“[E]ach platform provides the user with the ability *to send and receive* information at very high speed, and to access the applications and services available through the Internet.” (emphasis added)).

⁸⁰ *Cf. Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1975) (rejecting the argument that the Commission has “unfettered discretion . . . to confer or not confer common carriers status on a given entity, depending on the regulatory goals it seeks to achieve”).

⁸¹ *See Verizon*, 740 F.3d at 653.

be “for a fee.”⁸² Thus, it is far from clear what attempting to sever a so-called remote delivery service from broadband Internet access would even accomplish.⁸³

Nor is there any merit to proposals to pursue Title II reclassification solely on a contingent basis, to take effect only in the event a court were to vacate the rules adopted pursuant to Section 706.⁸⁴ Because a decision to reclassify broadband Internet access would have to be grounded in detailed factual findings regarding the functional characteristics of the service,⁸⁵ such a decision cannot be justified as an “alternative” theory, as it could not coexist alongside rules premised on an information-service classification that rests on diametrically opposed factual findings.

Even assuming, *arguendo*, that reclassifying broadband Internet access services under Title II were legally permissible, principles of sound public policy still would counsel against taking that radical step. As the Commission consistently has observed—and as Congress and industry have agreed—classifying broadband Internet access services as information services has promoted the public interest by *avoiding* the investment-inhibiting and innovation-curtailing

⁸² 47 U.S.C. § 153(53) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

⁸³ In fact, the most likely outcome would be to call into question the regulatory status of various other transmission components utilized by non-carrier participants in the Internet ecosystem (such as transit providers, CDNs, and edge providers), as it is far from clear why one component would be deemed a common-carrier “telecommunications service” but similar transmission components should not be. *See, e.g.*, Letter of Robert W. Quinn, Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 5 (May 9, 2014) (describing how Title II reclassification along the lines suggested by Professors Narechania and Wu could subject many players in the Internet ecosystem to common carrier regulation).

⁸⁴ *See* NPRM ¶ 150.

⁸⁵ *Brand X*, 545 U.S. at 991.

effects that flow from the imposition of Title II requirements.⁸⁶ As the Commission itself has argued, reclassifying broadband Internet access services would achieve the opposite result by subjecting providers to restrictive common-carrier obligations, including “a new federal duty to furnish ‘communication service upon reasonable request therefor’; to charge ‘just and reasonable’ rates; to refrain from engaging in ‘unjust or unreasonable discrimination’; to comply with FCC requirements for filing and abiding by written tariffs; and to interconnect with other carriers.”⁸⁷ Broadband providers also would be required to contribute to universal service and other funding mechanisms, which would frustrate their ability to offer affordable broadband service to consumers.⁸⁸ These effects would result in a substantial drag on investment. Indeed, a recent study comparing the Commission’s light-touch regime over the last decade to the heavy-handed, public utility model applicable to broadband providers in Europe found significant disparities in the resulting investments—with the United States leading Europe in fiber and LTE investment, deployment, performance, and price.⁸⁹

The uncertainty that would flow from abandoning the judicially sanctioned blueprint relying on Section 706 in favor of untested and risky reclassification theories, and the years of

⁸⁶ See, e.g., *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, at ¶ 46 (1998); Ex Parte Letter of NCTA, CTIA, USTA, TIA, ITTA, Verizon, AT&T, and Time Warner Cable, GN Docket No. 09-191, at 3 (filed Apr. 29, 1010) (noting negative reactions of financial analysts and other commentators to proposed reclassification).

⁸⁷ Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 25 (Aug. 27, 2004) (internal citations omitted) (“DOJ/FCC *Brand X* Petition”).

⁸⁸ *Id.* at 26.

⁸⁹ See Christopher S. Yoo, *U.S. v. European Broadband Deployment: What Do the Data Say?*, at 1 (June 2014); see also Martin H. Thelle & Bruno Basalisco, Copenhagen Economics, *Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models*, at 3-4 (June 2013) (finding that disparities in broadband regulation have contributed to 50% more investment per capita in the United States than in Europe).

litigation and regulatory uncertainty that would ensue, would only compound the public interest harms associated with such an approach. In contrast, continuing to treat broadband Internet access services as information services would be consistent with the Commission’s broader objective of ensuring ubiquitous broadband access.

Moreover, the Commission cannot avoid these policy harms through selective application of the Commission’s forbearance authority. As the Commission itself pointed out in its joint petition with DOJ for certiorari in *Brand X*, “the FCC’s forbearance authority is not in this context an effective means of removing regulatory uncertainty.”⁹⁰ In this context, it is far from clear how the Commission could simultaneously support reclassification and make the findings necessary to relieve broadband providers from broad swaths of Title II. Cox strongly agrees that forbearance would be risky and would lead to prolonged bouts of litigation that would harm both consumers and providers by extending and exacerbating uncertainty.

At the same time, the purported benefits of reclassification are illusory. The impetus for the latest reclassification proposals seems to be a desire to ban all “paid prioritization” arrangements, but it is far from clear that Title II would support a categorical ban on such arrangements any more than Section 706 would. Title II prohibits only “unreasonable” discrimination,⁹¹ and Commission precedent makes clear that telecommunications carriers are free to distinguish among customers for a host of legitimate reasons.⁹² Accordingly, whatever the Commission’s ultimate judgment about the potential benefits and harms associated with paid

⁹⁰ DOJ/FCC *Brand X* Petition at 28.

⁹¹ 47 U.S.C. §§ 201, 202.

⁹² See, e.g., *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (upholding carriers’ ability to offer differential discounts to retail customers); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (upholding carriers’ ability to enter into individualized contracts); *Ameritech Operating Cos. Revisions to Tariff FCC No. 2*, Order, DA 94-1121 (CCB 1994) (upholding reasonableness of rate differentials based on cost considerations).

prioritization and similar arrangements, any such practices would have to be reviewed on a case-by-case basis pursuant to general standards promulgated by the Commission—regardless of whether the Commission seeks to rely on Section 706 or Title II.

For all these reasons, the Commission need not and should not subject the dynamic Internet marketplace to the profound uncertainty and harm that would result from upending the longstanding classification of broadband Internet access as an integrated information service.

CONCLUSION

For the foregoing reasons, the Commission should ensure that any Open Internet rules adopted in this proceeding are technologically neutral, balanced, and restrained.

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