ERIC GARCETTI
MAYOR

By electronic filing

July 18, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Re: City of Los Angeles Comments
Protecting and Promoting the Open Internet

Dear Secretary Dortch:

Please find attached the comments of the City of Los Angeles, California, in response to the Commission's Notice of Proposed Rulemaking *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 14-61 (May 15, 2014).

The City files these opening comments pursuant to the Resolution (Council File No. 14-0137) that the Los Angeles City Council adopted on April 23, 2014.

Respectfully submitted,

ERIC GARCETTI
Mayor

Attachment

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

In the Matter of	)	GN Docket No. 14-28
Protecting and Promoting the Open Internet	)	

COMMENTS OF THE CITY OF LOS ANGELES, CALIFORNIA

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July 18, 2014

SUMMARY

The City of Los Angeles, California, files these comments to urge the Commission to adopt a legal framework that ensures that the Internet retains its most important feature—its openness. An open Internet empowers citizens and local businesses—and all innovators at the network's edges—to deliver content, services, applications, and other materials so that this content can succeed and flourish, both in the commercial marketplace and in the marketplace of ideas. Most importantly, the Internet gives this power to "edge providers" without requiring them to obtain the network operator's permission—either as a legal or practical matter. An open Internet is not a road with fast lanes for a few: it allows all services, applications, and ideas to compete on their merit.

Of particular importance to the City, the Internet increasingly serves as the primary distribution platform for the City's creative industries, including television and film writers, actors, videogame designers, musicians, producers, authors, and many other storytellers. The Internet's openness has served as a platform for small businesses and start-ups to thrive, allowed the City to provide services to constituents, and empowered citizens to express their views on important public issues. Allowing the Internet to become a platform that, effectively and practically speaking, requires creators and speakers to negotiate with Internet service providers for equal delivery of their content could undo many of these benefits in the City.

An open Internet will deteriorate severely without enforceable and effective Commission rules. To protect the Internet's openness, we urge the Commission to retain and update the rules in the 2010 *Open Internet Order*—transparency, no blocking, and no unreasonable discrimination—and to apply them fully to mobile Internet networks. There seems to be a

general consensus that preserving an open Internet is a critical goal, but little consensus as to the best way to achieve it. The Commission's notice suggests a few options:

- ***Use Section 706 to permit individualized carriage deals that do not sacrifice Internet openness.*** The Commission proposes to permit Internet service providers to enter into individualized deals with edge providers, but to police those arrangements to ensure that they protect the Internet's openness. The City urges the Commission to pursue this approach only if the Commission is certain that it can: (i) bar arrangements that would, over time and as a practical matter, fundamentally change the nature of open Internet; and (ii) address and resolve complaints promptly. There is a real risk that the best Commission policing could not prevent the creation of two different networks: one for those who pay for preferred delivery, and a second one—not as satisfying or usable—for everyone else.
- ***Reclassify Internet access service as a telecommunications service and require a provider to serve all without discrimination***. The City believes that the Commission would be well within its authority if it were to reclassify Internet access service as a telecommunications service, particularly given how consumers now perceive that service. After the reclassification, the Commission can require that an Internet service provider serve its customers and all edge providers indiscriminately, and (as comments previously submitted to the Commission suggest) it could also address particular Title II requirements that may be inappropriate for Internet access service. This approach would allow the Commission to preserve the Internet's openness.
- ***Reclassify the service a provider offers an edge provider—the delivery of content requested by an end user—as a telecommunications service***. The D.C. Circuit struck

down the Commission's rules in part because it assumed: (a) an Internet service provider offers some service to edge providers; (b) that service is an information service; and therefore (c) the provider cannot be required to carry traffic from edge providers as a common carrier. But the Commission has a strong basis to conclude that at least delivering content that a user has requested from an edge provider is a telecommunications service that may be regulated on a common-carrier basis. This approach is more modest, but may not be sufficient in all circumstances.

The Commission may wish to consider another alternative, perhaps in combination with one of the approaches above:

- ***Incentivize providers to adhere to the Commission's open-Internet rules by establishing that only providers who do so can take full advantage of Communications-Act benefits that apply to information services.*** For example, the Supreme Court has recognized the Commission's authority and expertise to set the rates for pole attachments under Section 224 if the service provided with the attachment is not "cable service" or "telecommunications service." The Commission has previously concluded that pole owners should not be able to charge an additional fee to a company that offered Internet access service—a decision that may make sense if the provider is subject to important public obligations. But the Commission should consider whether the quid pro quo for lower pole-attachment rates—or other benefits—should be adherence to the Commission's open-Internet rules.

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COMMENTS OF THE CITY OF LOS ANGELES, CALIFORNIA

The City of Los Angeles, California, files these comments in response to the Commission's Notice of Proposed Rulemaking[1] to urge the Commission to adopt a legal framework that ensures that the Internet retains its most important feature—its openness. An open Internet empowers citizens and local businesses—and all innovators at the network's edges—to deliver content, services, applications, and other materials in a manner that they can succeed and flourish, both in the commercial marketplace and in the marketplace of ideas. And, most importantly, the open Internet gives edge providers this capability without requiring them to obtain permission or to secure preferable placement from the network owner.

For the City, the Internet's openness has led to significant benefits. The City is home to a large and important creative industry that increasingly relies upon the Internet to distribute its creative output. An open Internet has served as a platform for these small businesses and start-ups to thrive, allowed the City to provide services to constituents, and empowered citizens to express their views on important public issues. The Commission's rules must preserve these

[1] *In re Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61 (May 15, 2014).

benefits, by keeping network owners from closing the Internet's open architecture by establishing a regime that—practically and effectively—requires creators to obtain the network owners' permission. We urge the Commission to retain and update the rules in the 2010 *Open Internet Order*—transparency, no blocking, and no unreasonable discrimination—and to anchor them in a legal framework that ensures that they remain enforceable and effective.

I. PRESERVING THE INTERNET'S OPENNESS IS VITAL IN THE CITY.

As the City looks to a future for its citizens and businesses rooted in harnessing the power of technology, it strongly agrees that preserving an open Internet is essential. The Internet is the "preeminent 21st century engine for innovation" and its economic and social benefits largely derive from the network's open architecture.[2] This architecture allows innovators at the network's edge to create and deliver content, applications, services, and devices without obtaining permission from the broadband provider.[3] It has led to substantial benefits in the City.

A. An Open Internet Empowers Citizens and Local Businesses.

The Internet's openness—and the value of that feature to end users—are best understood in contrast with cable television's closed model. Like the Internet, cable television delivers a significant amount of programming and information to end users. But it does so using a closed design that—with important exceptions—does not empower citizens and local businesses as the open Internet does today.

[2] NPRM at ¶ 1.

[3] *Id.*

That is in part because, under the cable-television model, with the critical exception of PEG and leased access programming,[4] the power over all content on the network is centralized: the operator acts as a gatekeeper. With the limited exceptions noted above, the operator tightly manages and controls the network's programming, and profits from this arrangement by delivering only its own programming and that of companies that enter into sophisticated commercial agreements with it. Meanwhile, at the network's ends, local citizens and businesses are largely powerless. No amount of tinkering with the remote control or cable box will allow them to share their ideas with the world.

The Internet is different—it empowers citizens and businesses at the network's edges. Because of its open architecture, the Internet places all the content-creating capacity not at the network's center, with the network owner, but at the network's ends, in the hands of all users. As a result, a citizen or local business with an innovative idea—be it a video program, service, blog post, or website—need not receive the cable operator's permission to deliver it. No special capacity needs to be reserved; traffic of the same type is treated equally. The innovator can share his idea with the world directly, without fees or negotiations. And the innovator's idea is not disadvantaged because a well-funded company with a competing idea has cut a deal for better carriage. A truly open Internet gives the content an opportunity to succeed on its own merit.

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[4] The exception is important—and will remain so. We note that even with a truly open Internet, PEG and leased-access programming will remain vital. Many groups rely on access to government programming over their basic cable service because they cannot afford or otherwise use the Internet. Because cable system are defined by their closed architectures, local and public advocates have fought vigorously to wrest away a limited amount of bandwidth for purposes that the operator does not control. However, under the cable-television model, this is the exception, not the rule, and it effectively limits the way in which programming can be placed on the network. It is also worth noting that PEG faces serious threats that illustrate the problems associated with a "slow lane"/"fast lane" approach. Many operators refuse to provide PEG channels in any format other than standard definition, and the channels are often not accessible in the same way as other content.

But the Internet's openness will deteriorate severely if the Commission does not craft enforceable rules.[5] Cable operators have an incentive to transition the Internet toward the cable-television model, where they can control and profit from all content that runs over the network.[6] And any Commission rules will not succeed if they preserve openness in name alone—or if they preserve only a form of unequal openness. To be sure, a road that blocks passage of anyone that does not pay the road owner's high fees is not open. But neither is a road that allows all to pass in a technical sense but that only allows smooth passage for a select few. Over time, that arrangement will inevitably lead to one result: those who pay for smooth passage would flourish; the rest would struggle. What is now one Internet would inevitably become two. On one network, well-funded companies' content and services would thrive, and that network would become the de facto "Internet." On the other, all other content would be relegated to a permanent second-tier status—not as satisfying or usable—if the network were to survive at all. As a practical matter, citizens and local businesses that need to compete would have only one option: to cut the same deal with the network operator. The co-founder of Kickstarter, describing his company's own start, recently put it best:

> One thing we didn't have to worry about: access to the Internet. We didn't have to negotiate a deal with a cable company or other Internet service provider (ISP). We didn't have to hire lawyers to appeal to the Federal Communications Commission when we were offered an unfair price. We didn't have to worry about whether our site's content would be slower than a competitor that had some kind of exclusive "fast lane" deal. Such roadblocks would have created enormous logistical and financial hurdles — ones so big they might have shut us down before we got started. But that's the world that start-ups will be born into if the FCC moves forward

[5] NPRM ¶¶ 42-53.

[6] *Id.*

> with its proposed rules allowing paid prioritization — a system where Internet carriers can charge for access to a "fast lane."[7]

Rules that allow some to cut preferable deals with the network operator may not preserve an open Internet at all.

B. An Open Internet Has Been Important in the City of Los Angeles.

The Commission now asks for comment about how the Internet's openness facilitates "innovation, economic growth, free expression, civic engagement, competition, and broadband investment and deployment."[8] In particular, it asks about the open Internet's role for public institutions.[9] The open Internet has played a critical role in the City.

Nearly 45 years ago, at the laboratory of UCLA professor Leonard Kleinrock, the first message to pass over the Internet originated in the City of Los Angeles. Since that time, the City and its residents have come to rely on the Internet's openness as a vital platform for the delivery of services and content. Today, the City's creative industries—television, film, music, videogames, publishing, advertising, product design, online/web, and others—all rely heavily upon the open Internet to distribute their creative content to the world. To quote from the Writers Guild of America West: "It is fundamental to free speech and essential to fostering a diverse and dynamic marketplace where writers can bypass conventional distribution methods and deliver

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[7] Y. Strickler, *FCC's 'Fast Lane' Internet Plan Threatens Free Exchange of Ideas*, July 4, 2014, *available at*: http://www.washingtonpost.com/opinions/kickstarter-ceo-fccs-fast-lane-internet-plan-threatens-free-exchange-of-ideas/2014/07/04/a52ffd2a-fcbc-11e3-932c-0a55b81f48ce_story.html.

[8] NPRM at ¶ 34.

[9] *Id.*

their product directly to the public. Writers are at the forefront of creating and distributing original content for the web."[10]

The open Internet has also benefitted the City's citizens and local businesses. The City is home to a large and important creative industry that increasingly relies upon the Internet to distribute its creative output.[11] The City's tech start-up community has grown at a "dizzying pace."[12] The website http://represent.la alone lists over 900 startups in this area. An open Internet has provided an essential platform for this community's innovative ideas to develop into successful businesses—and without the need for the innovator to negotiate a specialized deal with an Internet-service provider. Just as importantly, the open Internet has allowed citizens to voice their concerns on political and social issues, on a platform where they can share their views widely and without fear that well-funded messages will receive better placement.

The City itself relies heavily upon the Internet to deliver and provide important services and information to constituents. For example, the services and information delivered through the City's main web page and other City internet portals,[13] including but not limited to, the City's Department of Water and Power,[14] Los Angeles World Airport,[15] and the Port of Los Angeles[16]

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[10] Writers Guild of America, West, *available at*: http://www.wga.org/content/default.aspx?id=2897.

[11] *See, e.g.,* J. Graham, *Silicon Beach Emerges As a Tech Hotbed*, USA Today, July 16, 2012, available at: http://usatoday30.usatoday.com/tech/news/story/2012-07-15/silicon-beach/56241864/1

[12] *See, e.g.,* A. Nicolaou, *How Los Angeles is Kind of, Almost a Startup Town*, Fast Company, *available at*: http://www.fastcolabs.com/3026306/how-los-angeles-is-kind-of-almost-a-startup-town (Feb. 11, 2014).

[13] http://www.lacity.org/index.htm

[14] http://www.ladwp.com

[15] http://www.lawa.org/welcomeLAWA.html

are an essential component in the City's expanding ability to serve its residents in real-time volume and capacity. The City also streams its official City government station, LA Cityview 35, over the Internet.[17]

II. THE COMMISSION SHOULD ADOPT A LEGAL FRAMEWORK THAT ENSURES THAT THE INTERNET REMAINS OPEN.

The Commission begins its NPRM with a fundamental question: "What is the right public policy to ensure that the Internet remains open?"[18] The City submits that the Commission largely proposed the right rules in 2010; we offer only slight modifications. The Commission needs only to anchor its rules in a sustainable and defensible legal framework.

A. The Commission's Rules Should Require Transparency, Outlaw Blocking, and Forbid Unreasonable Discrimination—on Wireline and Wireless Networks.

The City urges the Commission to continue to defend the rules that it proposed in its 2010 order, but to apply them to both wireline and wireless networks. The 2010 order established three basic rules, which we modify here:

> **Transparency**. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;
>
> **No blocking**. Fixed and mobile broadband providers may not block lawful content, applications, services, or non-harmful devices~~; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services~~; and

[16] http://www.portofla.org/

[17] http://www.lacityview.org/

[18] NPRM ¶ 2.

> **No unreasonable discrimination**. Fixed and mobile broadband providers may not unreasonably discriminate in transmitting lawful network traffic.[19]

Extending the rules to mobile providers is particularly important. Users increasingly use mobile broadband as their exclusive connection to the Internet. Indeed, as the Commission notes, according to a Pew Research Internet Project, Blacks and Latinos were more than twice as likely as whites to rely on their smartphones as their exclusive source of Internet access.[20] At the same time, the wireless industry is beginning to take advantage of technologies like Wi-Fi and using fiber backhaul to overcome some of the limitations that led the Commission to distinguish wireless and wireline initially. It follows that mobile broadband should have all the protections of its fixed counterpart. The wireless industry should need to overcome a heavy burden for lesser rules to apply.

In response to the D.C. Circuit's decision, the Commission now proposes to replace its rule against unreasonable discrimination with a policy that would allow an Internet service provider to enter into individualized arrangements to deliver content while banning the Internet service provider from engaging in "commercially unreasonable" practices. This is risky. As it has been widely reported, a "commercially unreasonable" standard without a "nondiscrimination" rule could allow providers to create Internet "fast lanes" for some.[21] Those "fast lanes" could, over time, come to define "the Internet" as we know it. Schools and local governments (and other critical public institutions) are particularly vulnerable, as they rely

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[19] *In re Preserving the Open Internet Broadband Industry Practices*, Report and Order, GN Docket No. 09-191, WC Docket 07-52, FCC 10-201 (Dec. 23, 2010).

[20] NPRM at ¶ 106 n.228.

[21] *See, e.g.,* E. Wyatt, *F.C.C., in a Shift, Backs Fast Lanes for Web Traffic*, New York Times, April 23, 2014, *available at*: http://www.nytimes.com/2014/04/24/technology/fcc-new-net-neutrality-rules.html?_r=0.

increasingly on the Internet to deliver basic services—including those critical for public safety and welfare—but are not in a position to pay for fast lanes, or to pass costs on to the public to access these critical services. Further, these institutions often provide Internet services to vulnerable and "disconnected" populations across the "Digital Divide." In the City, for example, a large population is not able to access the Internet at broadband speeds at home, which increases their reliance upon libraries and public institutions. We urge the Commission to consider taking a different course.

B. The Commission Should Anchor the Rules in a Defensible and Effective Legal Framework.

To anchor its rules within the Commission's legal authority, the City sees four options. The first option, allowing Internet service providers to enter into individualized content-delivery deals with edge providers but using Section 706 of the Telecommunications of 1996 to regulate "commercially unreasonable" practices, is risky. The City urges the Commission to pursue this course only if it is confident that it can define "commercially unreasonable" to bar an Internet service provider from entering into arrangements—such as "fast lane" agreements—that would, over time and as a practical matter, fundamentally change the nature of open Internet. This would be difficult. It also assumes that the Commission will have the budget and resources to resolve complaints promptly, and without placing a significant burden on complainants (otherwise, the "fast lane" will belong to those who can either afford to pay for it, or those who can afford the cost associated with a Commission proceeding). A second option—classifying the entire relationship between an Internet service provider, its customer, and edge providers (those who would provide content, applications, and services to the customer) as a Title II telecommunication service—presents a much stronger foundation. Given recent technological developments and the Commission's authority to change policy positions over time, the

Commission would be well within its authority to reverse course and to conclude that Internet access service is now best viewed as a "telecommunications service" not an "information service." But the Commission may not need to go that far. Under a more modest third option, the Commission can continue to treat the service that an Internet service provider offers its customers as an unregulated information service but classify the service that the Internet service provider offers to edge providers—the transmission of their content, applications, or services across the network to end users—as a Title II, common-carrier service. The Commission can therefore require that Internet service providers treat this content indiscriminately, and it can prevent the Internet service provider from entering into "fast lane" arrangements for companies that pay for it. The problem with this approach is that it may not protect against discrimination on the network to which the edge provider itself subscribes. As a final option, the Commission can work to develop incentives for providers to comply with the Commission's open-Internet rules. For example, the Commission may be able to distinguish between networks that provide Internet access on a neutral basis and those that do not for purposes of pole-attachment rules under 47 U.S.C. § 224.

1. *Section 706: Permit Individualized Deals That Do Not Sacrifice Internet Openness.*

The Commission proposes to rely on Section 706 of the Telecommunications Act of 1996, and to permit Internet service providers to enter into deals with edge providers but only if the deals do not sacrifice the open Internet.[22] The Commission should pursue this option only with extreme caution.

[22] NPRM ¶¶ 142-147; 47 U.S.C. § 1302.

Section 706(a) allows the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[23] The D.C. Circuit affirmed that the Commission reasonably interpreted Section 706(a) as a grant of regulatory authority.[24]

The difficult question is how far the Commission's Section 706 authority can extend if the Commission continues to treat the relationship between an Internet service provider, its retail customer, and an edge provider as falling outside the common-carrier framework of Title II. The Commission may not utilize its Section 706 power "in a manner that contravenes any specific prohibition contained in the Communications Act."[25] But the D.C. Circuit recognized that, given the Commission's "information service" classification, treating an Internet service provider as a common carrier would do just that:

> We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers. Given the Commission's still-binding decision to classify broadband providers not as providers of "telecommunications services" but instead as providers of "information services," such treatment would run afoul of section 153(51): "A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services."[26]

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[23] 47 U.S.C. § 1302(a).

[24] *Verizon v. FCC*, 740 F.3d 623, 637 (D.C. Cir. 2014) (noting that the statute "can just as easily be read to vest the Commission with actual authority to utilize such 'regulating methods' to meet" the statute's stated goal).

[25] *Id.*

[26] *Id.* at 650 (internal citation omitted) (citing 47 U.S.C. § 153(51)).

The court explained that the core feature distinguishing a common carrier from a private carrier is that a common carrier holds itself out "to serve the public indiscriminately."[27] The court concluded that by requiring broadband providers to serve edge providers without "unreasonable discrimination," the Commission compelled the Internet service providers to act as common carriers vis-à-vis these providers.[28] The court particularly noted that the Commission would treat Internet service providers as common carriers if it barred them from selling the edge providers different forms of network access: "If the Commission will likely bar broadband providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0, we see no room at all for 'individualized bargaining.'"[29]

The Commission now proposes to avoid this legal problem by allowing Internet service providers to engage in individualized bargaining with edge providers. The Commission believes that it can *still* preserve an open internet by requiring that any terms that the Internet service provider negotiates are "commercially reasonable."[30] Perhaps the Commission is correct, but this approach creates significant risks and practical problems. As the Commission notes, the Internet has thrived precisely because edge providers do *not* require the permission of a network owner to deliver their content, services, and applications.[31] For example, the Commission cited the fact that Sir Tim Berners-Lee "needed neither permission nor approvals from network operators to

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[27] *Id.* at 651.

[28] *Id.* at 656.

[29] *Id.* at 657.

[30] NPRM at ¶ 116.

[31] NPRM at ¶ 1.

invent the World Wide Web using existing Internet layer and transport protocols."[32] Under the Commission's proposed framework, however, an edge provider *would* need the network owner's permission and approvals—at least if he wants his content to be delivered to end users in as desirable a manner as his well-funded competitors. As the Commission acknowledges, this framework also creates practical problems, because many edge providers may simply not be positioned to negotiate with Internet service providers nationwide:

> [C]onsider a start-up VoIP service, a politically oriented website with an audience of fewer than 100 visitors per day, a social networking application narrowly focused on a particular demographic, or peer-to-peer communications among individuals. Not all of those actors may seek to enter into a contract with a broadband provider; they may simply with to reach its subscribers.[33]

If the Commission were to endorse a model rooted in negotiation for carriage, it is unclear what would happen to many of the Internet's most important content creators. There is a tangible risk that this approach would effectively and practically create two "Internets": one for those who pay for preferred carriage, and the second for those who do not. It begins to look like a fundamentally different network than the open Internet of today.

To be sure, if the Commission is confident that it can use a factor-based approach to bar Internet service providers from setting terms that effectively create a two-tiered Internet—one for those who negotiate carriage deals, and another for those who do not—the City can support this approach. But this appears to be an extremely difficult task, with enormous risk of leading to important changes that cannot be undone later.

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[32] NPRM at ¶1, n.1.

[33] NPRM at ¶ 120.

2. *Apply Title II Broadly: Reclassify Internet access serve as a telecommunications service and require providers to serve all without discrimination.*

An approach much more likely to protect the open Internet is for the Commission to reclassify Internet access service as a "telecommunications service." Upon doing so, the Commission may treat Internet service providers that provide Internet access service as common carriers without risk that it conflicts with another provision of the Communications Act. The Commission has authority to make this reclassification, particularly given changes in how consumers now typically perceive their Internet service.

When the Supreme Court upheld the Commission's classification of cable-modem service as an "information service," the Court did not find that the Commission *must* adopt that classification, only that it *may* do so.[34] The Commission can now classify Internet access service differently, particular due to changes in how subscribers perceive it.[35] In 2002, the Commission found that because providers typically bundled data transmissions—telecommunications—with information services including "[e]-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS," a cable-modem typically perceives

[34] *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005) ("In the telecommunications context, it is at least reasonable to describe companies as not 'offering' to consumers each discrete input that is necessary to providing, and is always used in connection with, a finished service."); *id.* at 992 ("the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission, not by warring analogies.").

[35] *Id.* at 991 (noting that the question "turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance.").

that he purchased a single bundled product, an information service.[36] The Commission found that although cable-modem service technically provides a subscriber with capabilities "via telecommunications," the service that the company sells is not a "telecommunications service" because, from the consumer's perspective, the telecommunications is not "separable" from the data-process capabilities but is "integral" to them. The Commission noted that cable operators "often include in their cable modem service offering all of the services typically provided by Internet access providers, so that subscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications."

Now the Commission can reasonably conclude that Internet subscribers perceive the service "offered" to them as predominantly one of transmission.[37] Subscribers today do not use broadband service "always in connection" with the provider's own services.[38] To the contrary, they typically view the service not as a bundled whole but as providing them a transmission service that connects them to the content and applications of others. The Commission should therefore strongly consider classifying broadband Internet access service as a telecommunication service that can be regulated on a common-carrier basis.

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[36] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd. 4798, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, at ¶¶ 38-39 (Mar. 15, 2002).

[37] Letter from Tim Wu and Tejas Narechania, Columbia University, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Apr. 14, 2014) ("Wu and Marchania Ex Parte") ("That is, the 'offer,' which has always been capacious enough to *include* a telecommunications service, is increasingly seen as *predominantly* a telecommunications service.") (emphasis in original) (internal footnotes omitted).

[38] *Brand X*, 545 U.S. at 990.

3. *Apply Title II Narrowly: Classify only the service that an Internet service provider delivers to an edge provider as a telecommunications service.*

Because Internet service providers have opposed this second option, the Commission may be reluctant to go that far. If so, there is a more modest option. The Commission could potentially continue to treat a retail customer's request for content from an edge provider as an unregulated information service. At the same time, it can classify the response to that request—the transmission of the requested content, applications, or services across the network to the end user—as a Title II, common-carrier service. Under this framework, the Internet service provider would be required to act as a common carriers for requested content, and to deliver this content indiscriminately.[39]

The D.C. Circuit recognized that an Internet service provider "may be a common carrier with regard to some activities but not others."[40] As a result, an Internet service provider may be a common carrier for edge providers, but not for end users. In its 2002 order, the Commission found that classifying cable-modem service as an information service or telecommunication service "turns on the nature of the functions that the end user is offered."[41] The Commission looked only at the nature of the functions that the Internet service provider offers *to end-users*, not those it offers to edge providers. In its recent decision, however, the D.C. Circuit changed the focus. It considered the service that an Internet service provider offers edge providers: "Because broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers,' the obligations that the Commission imposes on broadband providers may

[39] NPRM ¶ 151-152; Wu and Marchania Ex Parte Letter.

[40] *Verizon*, 740 F.3d at 653.

[41] ¶ 38.

well constitute common carriage per se regardless of whether edge providers are broadband providers' principal customers."

To the extent that an Internet service provider offers *any* service to an edge provider, the offer is fundamentally different than the offer to subscribers. The offer certainly is not bundled with "[e]-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS"—the factors that led the Commission to conclude that the service offered to an end user was an "information service." Instead, the offer fits the classic definition of "telecommunications service."[42] The Commission should therefore at least classify the response to an end user's request for edge-provider content as a telecommunications service, and ensure that Internet service providers treat all this traffic equally.

However, it is not clear that this approach will prove sufficient. This approach would seem to protect an edge provider's content once it reaches the last network connecting to the subscriber, but it does not as obviously protect an edge provider's ability to communicate upstream on the network from which it buys Internet access service. Particularly with the industry's increasing concentration, this may mean that smaller and start-up edge providers are subject to significant discrimination. If the Commission were to take this approach, it must be careful to ensure that all edge providers benefit from an open Internet.

4. *Create incentives for networks that adhere to open-Internet rules.*

The Commission should also consider whether it can create incentives that encourage providers to adhere to the Commission's open-Internet rules. Most notably, it would appear to be

[42] *In re 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*, at 10 (May 5, 2014).

well within the Commission's authority to allow for a different pole-attachment rate under 47 U.S.C. § 224 for entities that agree to comply with the Commission's rules.

Section 224 is itself a type of openness-mandating statute. It forbids utility pole owners from denying access to their poles for any attachments by two classes of providers: "a cable television system" and a "provider of telecommunications service."[43] For these providers, the statute also specifically provides formulae for how the Commission must set attachments rates for two types of attachments: one for an attachment "by a cable television *solely to provide cable service*," and the second for attachments by "by telecommunications carriers *to provide telecommunications services*."[44] The Commission must prescribe rates that are "just and reasonable."[45]

Importantly, however, Section 224 is not limited to attachments by these entities that are used to provide these two services. Instead, because Section 224 applies to "any" attachment by a "cable television system" and a "provider of telecommunications service," if the provider uses the attachment to deliver *other* services, such as Internet access service, Section 224 authorizes the Commission to fashion a rate for the attachment, which might be the same as the rate for the cable service or telecommunications service, but could also be a different rate for a mixed-use service. As the Supreme Court put it, in those cases, it is for the Commission to "prescribe just and reasonable rates for them *without* necessary reliance upon a specific statutory formula devised by Congress."[46] The Court specifically explained that when a provider commingles

[43] 47 U.S.C. § 224(a)(4).

[44] 47 U.S.C. §§ 224(d)(3), (e)(1) (emphasis added).

[45] 47 U.S.C. §§224(b)(1), (d)(1), (e)(1).

[46] *NCTA v. Gulf Power Co.*, 534 U.S. 327, 336 (2002) (emphasis added).

telecommunications or cable service with Internet access service, Congress can be understood to have allowed the Commission to set rates that consider the Internet's evolution:

> Congress may well have chosen to define a "just and reasonable" rate for pure cable television service, yet declined to produce a prospective formula for commingled cable service. The latter might be expected to evolve in directions Congress knew it could not anticipate. As it was in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent. It might have been thought prudent to provide set formulas for telecommunications service and "solely cable service," and to leave unmodified the FCC's customary discretion in calculating a "just and reasonable" rate for commingled services.[47]

Using that authority, the Commission can exercise its discretion in this technical, complex, and dynamic area to offer Internet-access providers a powerful incentive to adhere to the Commission's open-Internet rules. The Commission can reasonably conclude that if a provider of Internet-access service opens its network to the content of others by complying with the open-Internet rules that the Commission establishes here, it is "just and reasonable" that the provider pay a lower rate to attach to third parties' poles under Section 224. On the other hand, if the provider would jeopardize the public interest by closing its network, it would be appropriate to set the rate at the higher end of the range of "just and reasonable" rates.

CONCLUSION

The Commission must fashion rules that preserve the Internet's open architecture. The rules must ensure that, as a practical matter, edge providers can continue to successfully disseminate content and services across the Internet—without first obtaining the network owner's permission. We urge the Commission to retain and update the rules in the 2010 *Open*

[47] *Id.* at 338-339 (internal references omitted).

Internet Order—transparency, no blocking, and no unreasonable discrimination—and to anchor the rules in a legal framework that ensures that they remain effective and enforceable.

Respectfully submitted,

/s/

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July 18, 2014

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