**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C.**

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| 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 |

# REPLY COMMENTS OF BRIGHT HOUSE NETWORKS


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## EXECUTIVE SUMMARY

The FCC has repeatedly assured investors that "broadband services should exist in a minimal regulatory environment that promotes investment" and has maintained a light touch to provide "the regulatory certainty needed to help spur growth and deployment." BHN and other investors have relied on the FCC's decision not to classify broadband access service as Title II, and the resulting extraordinary risk capital investments have funded rapid expansion and continuous improvements in speed, quality, adoption, and facilities-based choices in broadband access.

According to Free Press's revisionist history, the cable industry invested the most when it was under heaviest regulation. In actual history, under '92 Act rules modeled on legacy carrier principles, the programming marketplace and network rebuilds slowed to a near halt, and cable penetration and viewership stalled. Fourteen Orders on Reconsideration on price regulation alone tried unsuccessfully to regulate the market back to health. Cable investment was unleashed and soared once the overregulation of the '92 Act was sunset in 1998 and continued as the FCC successfully defended its light touch approach in the Supreme Court. BHN continues to invest in and improve broadband access through upgrades in headend equipment, cable modem termination systems (CMTS) and software, in recovery and allocation of bandwidth, in node splits, in caching and security, and in customer premises equipment like DOCSIS 3.0 modems and integrated access devices that make better use of network resources. Similar light touch policies have fueled the growth and development of cable, DBS, wireless, voice, and spectrum.

The high hopes and general promises from Title II advocates that reclassification can bring stability and certainty are belied by their specific comments about what to do next. Their specific proposals invite highly-litigated, case-by-case forbearance fights that the FCC anticipated and told the Supreme Court were "not in this context an effective means of removing

regulatory uncertainty." They propose regulatory creep into price regulation, starting with restrictions on usage-based billing that could otherwise fairly apportion greater costs to the highest users, as is the case for electricity, water, and most goods and services. They even propose government mandates on how different services may share private networks—proposals that the FCC has previously and rightly rejected. These are approaches that have been repeatedly demonstrated not to attract the essential investments that are needed to sustain and expand broadband.

Nor is there any factual basis for reclassifying broadband Internet access as a Title II service. When the FCC studied the technology in 2002, customers used broadband Internet service as an information service for searching the web, for using FTP to transport files, and for manipulating information using the Internet via telecommunications. The same is true today as information is "requested" and "received." Any "telecommunications" that is part of Internet access is always used in connection with the manipulation of information. If this were not true, there would be no "virtuous circle" on which the FCC has repeatedly based its authority; the traffic BHN delivers today from caches would slow; and denial of service attacks, botnets, spam and phishing would skyrocket.

Proposals for more expansive network monitoring and measurement, more elaborate transparency notices, and tailored communications directed to different parties on the edge all suffer from three fundamental deficiencies. First, because the user experience is not defined exclusively by the ISPs, additional detail from ISPs alone will not provide helpful information, will increase customer confusion, and will leave ISPs with the blame for matters ISPs cannot control. Second, none of the costs for installing probes, for integration, for analytics or for multiple layers of reporting have been considered, let alone balanced against supposed benefits.

Third, with the wealth of information already available from ISPs today, from online tools, from the FCC, and from third-party reports, and considering how edge providers, CDNs, cloud computing and software-as-a-service have flourished under existing arrangements, the proposals for more probes and more disclosures are excessive and unnecessary.

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**REPLY COMMENTS OF BRIGHT HOUSE NETWORKS**

Bright House Networks, LLC (BHN) hereby submits its Reply Comments in response to the Notice of Proposed Rulemaking issued by the Commission in the above-captioned proceeding.[1]

## I. INVESTMENT IN BROADBAND INTERNET SERVICES HAS BEEN FUELED BY "LIGHT TOUCH" OPEN INTERNET RULES

### A. The FCC Explicitly Adopted "Light Touch" Rules to Provide the Regulatory Certainty Needed for Internet Investment

The U.S. enjoys an extraordinary broadband market of dramatic investment, rapid expansion, continuous improvements in speed and quality, rising adoption, and increasing facilities-based choices, funded almost entirely by investor risk capital. This was no accident: from the inception of cable broadband, the FCC declared that "broadband services should exist in a minimal regulatory environment that promotes investment," and avoided trying to micromanage the field.[2] It backstopped its approach with guiding principles of openness, but it never imposed common carrier regulation on cable modem service. It then applied the same

[1] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014). The Reply date was extended to September 15 by Public Notice, DA 14-1199 (August 15, 2014).

[2] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶¶ 4-5 (2002) ("*Cable Modem Declaratory Ruling*").

"light touch" model to the many competing models for Internet access for the explicit purpose of inviting more investment in facilities-based competition in broadband Internet access. The FCC applied a "lighter regulatory touch" to DSL, a "minimal regulatory environment" to broadband over power line, and the same treatment to wireless Internet access, in order to provide "the regulatory certainty needed to help spur growth and deployment."[3] The National Broadband Plan reflected back on this history, celebrated how the broadband revolution had been fueled by private investment, and offered recommendations for how to invite more investment while keeping government in its "limited" role.[4]

### B. History Confirms that a Light Touch and Regulatory Stability Attracted Investment

Free Press offers a different view of history than the one BHN has experienced. According to Free Press, the cable industry invested the most when it was under heaviest regulation.[5] Under "light touch" regulation, it claims, cable is not currently investing.[6]

In actual history, the '92 Cable Act imposed a host of regulatory measures on cable, including price controls modeled on common carrier regulation. But the result was not as desired. Rules modeled on legacy carrier principles provided so little return for adding new programming and new channels that the programming marketplace and network rebuilds slowed to a near halt, and cable penetration and viewership stalled—at considerable consumer loss.[7]

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[3] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 3 (2005); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information* Service, Memorandum Opinion and Order, 21 FCC Rcd 13281 ¶ 2 (2006); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 27 (2007).

[4] *Connecting America: The National Broadband Plan* at XI, 5 (2010).

[5] Comments of Free Press at 98, 104.

[6] Comments of Free Press at 105-10.

[7] THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS (1997); Thomas W. Hazlett, *Economic and Political Consequences of the 1996*

Although the FCC tried to bring the market back with more liberal "going forward" rules, investment continued to lag. Inordinate resources were directed instead into myriad regulatory proceedings and appeals. Fourteen Orders on Reconsideration on price regulation alone tried unsuccessfully to regulate the market back to health. Eventually the '96 Act took a more market-oriented approach.

In actual history, cable investment was unleashed and soared once the overregulation of the '92 Act was sunset in 1998. In actual history, the FCC never classified cable modem service a common carrier, and went to the Supreme Court to successfully defend that regime.[8] In actual history, operators like BHN have invested continuously in broadband service under this light touch regime, as BHN documented in its Comments.[9]

Free Press' spin is that cable investments have nothing to do with Internet access because much of cable's outside plant is already built.[10] It seems unaware of how much of the broadband experience is fueled by investment in upgrades in headend equipment, cable modem termination systems (CMTS) and software, in recovery and allocation of bandwidth, in node splits, in caching and security, and in customer premises equipment like DOCSIS 3.0 modems and integrated access devices that make better use of network resources. Building new pole lines is not the only way one invests in broadband access. BHN and industry investments today are continuing to upgrade the Internet experience, and are being made under the light touch regulation for broadband access.

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*Telecommunications Act*, 23 REGULATION 36 (Fall 2000) *available at* http://object.cato.org/sites/cato.org/files/serials/files/regulation/2000/10/hazlett.pdf.

[8] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[9] *See* BHN Comments at 1-3, 23-24.

[10] *See* Comments of Free Press at 108-11.

The FCC's decision to keep Internet access free from legacy regulation has been instrumental in creating a stable climate that invites investment. As BHN catalogued in its Comments, similar policies have fueled the growth and development of cable, DBS, wireless, voice, and spectrum.[11] As the FCC applied the same model to broadband, it repeatedly offered assurances to the investment community of its commitment to the "light touch" model. BHN has relied on the FCC's decision not to classify cable modem service as Title II, as it explicitly intended for us to do.

## II. TITLE II RECLASSIFICATION WILL UNDERMINE INVESTMENT

Today we hear high hopes from Title II advocates that reclassification can bring stability and certainty, but their specific comments about what to do next provide a better glimpse of where that path leads.

Consider the promise of forbearance, which is offered up in the abstract as the stabilizing safety valve of Title II. Public Knowledge's specific comments ask the FCC not to forbear much at all[12]—portending the kind of highly-litigated, case-by-case forbearance fights that the FCC anticipated and told the Supreme Court were "not in this context an effective means of removing regulatory uncertainty."[13] The proposals to reclassify broadband Internet access as Title II would recreate the same unfortunate experience that cost so much in time, investment and consumer benefit in the video market under the '92 Act.

Likewise, while Title II advocates in the abstract disclaim any intention to regulate prices, their specific comments seek to expand the scope of the rule to restrict usage-based

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[11] *See* BHN Comments at 23-25.

[12] Comments of Public Knowledge at 80-96.

[13] Petition for a Writ of Certiorari of U.S. Dept. of Justice and FCC at 28, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (No. 04-277).

billing.[14] This regulatory creep into price regulation reveals another example of the uncertainty and litigation that reclassification can unleash. Critics of usage-based billing claim that congestion is artificial. Some see usage-based billing as an attempt to monetize scarcity in the local network.[15] Others claim that ISPs have created "congestion by design."[16] The facts are to the contrary. As BHN demonstrated in its Comments, BHN invests to stay ahead of congestion,[17] but investment resources are not infinite and BHN is not aware of any network that offers infinite capacity for infinite traffic at every moment in time.

Although BHN has not adopted usage-based billing, the Commission should preserve the opportunity for service providers to price services proportionally to use. Such approaches can reduce prices for low usage (as Time Warner Cable has done) and fairly apportion greater costs to the highest users, as is the case for electricity, water, and most goods and services. If problems arise, they can be addressed in the context of a specific case.

A key lesson from the '92 Act is that rate regulation is the surest way to deflect investment. The same lesson is evident from satellite. Satellite did not flourish when it was regulated as a common carrier offering in which high-risk investments in launches were supposed to be funded by at-cost transponder leases. When the Commission allowed satellite to be offered on a non-common carrier basis, the DBS industry emerged and became a formidable competitor to cable. Title II proponents are inviting the FCC to return to a legacy framework that invites price controls[18] and even government mandates on how services may share private

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[14] *See, e.g.*, Comments of Public Knowledge; Comments of Free Press; Comments of Netflix; Comments of Cogent; Comments of the Center for Democracy & Technology (CDT).

[15] *See, e.g.*, Comments of Free Press at 111-12; Comments of Public Knowledge at 48-49.

[16] *See, e.g.*, Comments of Netflix at 6, 11-15; Comments of Cogent at 8-9, 19-22.

[17] *See* BHN Comments at 2-3, 11.

[18] If the proposed rule against any "commercially unreasonable practices" is inviting such calls for price regulation, then it is far too broad. It will invite the Commission into adjudicating complaints about investments, bandwidth

networks[19] – approaches that have been repeatedly demonstrated not to attract the essential investments that are needed to sustain and expand broadband.

## III. THERE IS NO FACTUAL BASIS FOR RECLASSIFYING INTERNET ACCESS INFORMATION SERVICES AS TITLE II SERVICES

Nor is there any factual basis to sustain Title II reclassification. When the FCC studied the technology in 2002, customers used broadband Internet service as an information service for searching the web, for using FTP to transport files, and for manipulating information using the Internet via telecommunications. Caching and security were an integral part of service, and access to DNS and email were part of the package. The same is true today. Any "telecommunications" that is part of Internet access is always used in connection with the manipulation of information using the Internet.[20] If this were not true, there would be no "virtuous circle" on which the FCC has repeatedly based its authority. DNS and email are still included, and although BHN does not block subscribers from using a different DNS or Gmail, its service continues to include these capabilities and features, "regardless of whether subscribers use all of the functions provided as part of the service."[21] Caching and security are still an integral part of service. If they were not, the traffic BHN delivers today from caches (more than

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allocation, or any conduct by an ISP. The proposed rule should be narrowed to its intended scope. It is sufficient for the FCC to retain the right to investigate as needed for any "evasion," which is already provided in current rules.

[19] For example, CDT argues that specialized services must use separate capacity not commingled with Internet traffic. *See* Comments of CDT at 18, 23-24. The FCC rightly rejected this position when CDT advanced it in 2010. *Preserving the Open Internet; Broadband Internet Practices*, Report and Order, 25 FCC Rcd 17905 ¶¶ 112-14 (2010). Despite CDT's refrain of concerns that specialized services will unfairly consume bandwidth and capacity at the expense of Internet access, specialized services have not constrained or limited broadband internet access service, and there have been none of the ill effects the Commission was watching for when it began monitoring specialized services in 2010. *See* BHN Comments at 17-19.

[20] Public Knowledge is mistaken in citing BHN's win against Verizon for the proposition that Internet access is just telecom with some "adjunct to basic" accoutrements. Comments of Public Knowledge at 71. The case it cites did not reclassify broadband Internet or voice over IP. Instead, it found Verizon liable for using number porting requests to launch subscriber retention activities, in contravention of Section 222. *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008).

[21] *Cable Modem Declaratory Ruling* at ¶ 38.

half of our traffic) would slow, and denial of service attacks, botnets, spam and phishing would skyrocket. Just as the FCC and Supreme Court previously concluded, broadband internet service is factually an information service.

Some comments seek to end run this reality by hypothesizing a severable "edge-facing" carrier service that has never been classified.[22] The reality is that the service evaluated by the FCC in 2002 and presented to the Supreme Court was (and remains) a two-way service.[23] Access to DNS, caching and security, and the manipulating of information described above are in play both ways as information is "requested" and "received," and even more so in today's world of more cached content, more immersive interactive multiplayer gaming, and highly interactive adjustable bit rate streams defining the "over the top" video experience. There is no severable service for the Commission to reclassify.

The major players from the edge recognize the fundamentally destabilizing effect that reclassification would bring, and are not pressing for reclassification.[24] They agree that Section 706 remains the right foundation for continued certainty and investment—and the one that will permit the Commission to apply the same standards to wireless, as BHN and many others have advanced in Comments.[25]

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[22] *See, e.g.*, Comments of Mozilla at 9-12; Letter from Tejas N. Narechania and Tim Wu, Columbia Law School to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed Apr. 14, 2014) at Attachment pp. 13-15.

[23] *Cable Modem Declaratory Ruling; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[24] *See, e.g.*, Comments of Information Technology Industry Council at 3; Comments of Internet Association at 2.

[25] *See* BHN Comments at 4-5.

## IV. THE PROPOSED EXPANSION OF TRANSPARENCY NOTICES AND NETWORK MONITORING ARE UNNECESSARY AND WILL CREATE CUSTOMER CONFUSION

Several comments propose far more expansive network monitoring and measurement, more elaborate transparency notices, and tailored communications directed to different parties on the edge.[26] But there are three fundamental deficiencies in all of these proposals.

First, none of the proponents for placing more probes into ISP plant confront the fact that the user experience is not defined exclusively by the ISPs, but by a combination of user devices, the home WiFi system, user-selected video quality settings, the adaptive bit rate algorithms of the edge provider, and the capacity and geography of the source CDN server. Requiring additional detail from ISPs alone will not provide helpful information, will increase customer confusion, and will leave ISPs with the blame for matters ISPs cannot control.[27]

Second, none of the costs for installing probes, for integration, for analytics or for multiple layers of reporting have been considered, let alone balanced against supposed benefits.[28]

Third, ISPs already disclose the key features of service under our control. For interested consumers, online tools provide ready measurement of speed, jitter, data consumption and traffic flow on an individualized basis. In addition, hundreds of whiteboxes are reporting data on speed, latency, packet loss, and more, which the FCC compiles into its *Measuring Broadband America* Reports. Academics have been able to study Internet congestion in great detail from existing information. Edge providers, CDNs, cloud computing and software-as-a-service have flourished under existing arrangements, without the need for creating disclosures tailored to the varied and potentially unique needs of the hundreds of such providers who have no reciprocal obligation.

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[26] *See, e.g.*, Comments of Public Knowledge; Comments of Netflix; Comments of Cogent; Comments of CDT.

[27] *See* BHN Comments at 11-12.

[28] *See* BHN Comments at 14-17.

Considering the wealth of information already available, the proposals for more probes and more disclosures are excessive and unnecessary.[29]

## CONCLUSION

BHN has been able to invest in and continue to upgrade broadband services under repeated FCC assurances of a "light touch" regulatory regime, and consumers have been the beneficiaries. Title II reclassification and overregulation will undermine the very investment on which broadband and broadband consumers depend. The Commission should retain its light touch.

Respectfully submitted,

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[29] *See* BHN Comments at 8-12, 16-17.