

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

In the Matter of

Protecting and Promoting the Open Internet

GN Docket No. 14-28

In the Matter of

Framework for Broadband Internet Service

GN Docket No. 10-127

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES
ON NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION AND SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”), whose members include 38 state offices representing utility and telecommunications services consumers and several other consumer organizations, provides reply comments to the Federal Communications Commission (“FCC” or “Commission”) on “a fundamental question: What is the right public policy to ensure that the Internet remains open?”¹ As NASUCA’s initial comments stated, “[T]his question ... is crucial for consumers, industry, and the national

¹ Notice of Proposed Rulemaking (“NPRM”), FCC 14-61 (rel. May 15, 2014), ¶ 2.

economy and ecology.”²

Broadband Internet access service (“broadband”) as it is being furnished by Internet service providers (“ISPs”), and as it is being used by consumers and other end users, is a telecommunications service. The primary – and for most end users and other stakeholders – the sole function of broadband is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”³ Broadband is a Title II telecommunications service, consistent with its treatment before 2002. Under Title II, backstopped by 47 U.S.C. § 706, the fundamental non-blocking and anti-discrimination principles that underlie common carrier status will provide a strong foundation for an open Internet, and enable the Commission to effectively address the threats to the open Internet posed by network owners and others. As discussed below, on its own § 706 cannot assure that these essential principles will be achieved. To the extent that broadband competition makes existing Title II regulations not necessary to protect the public interest, the Commission can use its forbearance authority under 47 U.S.C. § 160 where appropriate. In response to the network owners’ comments, in Part VIII NASUCA also presents a “unified theory” for protecting the Internet.

The ends that NASUCA seeks here are consistent with Chairman Wheeler’s recent policy statement.⁴ The Chairman’s focus on competitive forces to protect consumers, however, seems

² NASUCA Comments at 1. As with NASUCA’s initial comments, these reply comments are also part of the record-refreshing in GN 10-127.

³ 47 U.S.C. §153(50). With the exception of limited “information services” that are offered by ISPs but are rarely used by their end-user customers, the transport of data in Internet Protocol (“IP”) and other supported transmission protocols between end users and host websites and other content providers without modification, without any net change in the code or protocol of the transmitted data streams, and without acting on any stored information by the ISP other than for purposes of routing and other ministerial activities, is a telecommunications service.

⁴ http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

to disregard the fact that even where competitive options exist, consumers need protection from network owners' business plans. So there should be a Fifth Principle to the "Agenda for Broadband Competition"⁵: Consumers are entitled to high-quality affordable telecom and information services at just and reasonable rates.

The overwhelming majority of the comments submitted to the Commission in this docket support the compelling need for Title II treatment of broadband. On the other hand, virtually all of the comments opposing Title II came from the handful of dominant carrier broadband ISPs⁶ who see Title II as a threat to their unfettered exercise of monopoly power to engage in a variety of discriminatory practices, including the extraction of payment from content providers for the ability to communicate with the access providers' end user "eyeball" customers.

NASUCA has not gone searching for the many parts of the numerous initial comments that support NASUCA's positions. And NASUCA has not addressed the various views on the specifics of anti-discrimination, anti-blocking, and transparency rules.

These reply comments instead principally focus on rebutting the comments that suggest that the Commission should either take no action, and leave network owners and others free to provide priority access to some while others get inferior service, or should adopt rules that allow paid priority and fast and slow lanes, and other forms of blocking and discrimination.⁷ These proposals would obstruct the reasonable consumer protection regulation – expressly contemplated under Title II -- that is necessary to preserve the open Internet and the enduring

⁵ Id.

⁶ Given the current ecology (see Part IV.C.), "ISP" here should be read as broadband Internet service provider.

⁷ NPRM at page 85, Proposed Rule §§ 8.3(c) (pay-for-priority arrangements must be disclosed) and 8.5, 8.11(a) ("individualized, differentiated arrangements" allowed if lawful content or service is not degraded "before a minimum level of service").

values that underlie this country's telecommunications policies and the Telecommunications Act of 1996.

II. THE FLOOD OF PUBLIC COMMENT SUPPORTING THE OPEN INTERNET DEMONSTRATES WIDESPREAD PUBLIC CONCERN AND SUPPORT FOR OPEN INTERNET REQUIREMENTS.

The 2013 oral argument at the D.C. Circuit in *Verizon v. FCC* focused on the conflict between content providers and network infrastructure owners.⁸ Unfortunately, at no point in the three-hour oral argument were the rights and interests of 300 million American Internet users explicitly addressed.

Now more than a million Americans have come forward to comment in and around this proceeding about the vital role that the Internet, and the broadband networks on which the Internet runs, play in their lives.⁹ Although, as an expert agency, the Commission's decision-making cannot be just polling of public views, the overwhelming majority – 99 per cent¹⁰ □ of the public comments reviewed recommend retaining and strengthening the Open Internet rules.¹¹ This is no mere “minority of political activists.”¹²

⁸ The recording of the oral argument is accessible at [http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/DCD90B260B5A7E7D85257BE1005C8AFE/\\$file/11-1355.mp3](http://www.cadc.uscourts.gov/recordings/recordings2014.nsf/DCD90B260B5A7E7D85257BE1005C8AFE/$file/11-1355.mp3).

⁹ See <http://e-pluribusunum.com/2014/09/11/internet-slowdown-day-sends-over-111000-new-comments-on-net-neutrality-to-fcc/>.

¹⁰ See <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/02/sunlight-99-percent-of-net-neutrality-comments-wanted-stronger-fcc-rules/>.

¹¹ See also <http://www.npr.org/blogs/alltechconsidered/2014/08/12/339710293/a-fascinating-look-inside-those-1-1-million-open-internet-comments>). Academic musings about the value of such comments (<http://www.npr.org/blogs/alltechconsidered/2014/07/21/332678802/one-million-net-neutrality-comments-filed-but-will-they-matter>) largely miss the point of the comments here: Network users are seeking controls on network owners.

¹² “Free Market Advocates Opposed to Internet Regulation” (“FMOIR”) Comments at 1; see also Adtran Comments at ii.

Indeed, it would not be a stretch to argue that the opening comments in this proceeding reveal a stark contrast between the more-than-a-million Americans, and those who speak for them, who support strengthening the Open Internet rules, and the handful of owners of the physical infrastructure on which the Internet runs and those affiliated with them. Public officials, including, e.g., United States Senators Edward Markey, Al Franken, Bernie Sanders, Charles Schumer, Ron Wyden, Richard Blumenthal, Jeff Merkley, Elizabeth Warren, Sheldon Whitehouse, Ben Cardin, Kirsten Gillibrand and Corey Booker; Minority Leader Representative Nancy Pelosi; the state Attorneys General of Illinois, New York, Vermont and Washington; the National Association of Regulatory Utility Commissioners and the Pennsylvania Public Utilities Commission; the City of Los Angeles; large membership organizations such as AARP,¹³ the ACLU, the Electronic Frontier Foundation, Free Press, Greenlining Institute, Public Knowledge; and well-informed academics including the American Association of State Colleges and Universities, Professors Barbara van Schewick and Tim Wu (with Tejas N. Narechania),¹⁴ support the application of Title II common carriage no-blocking and anti-discrimination rules to the telecommunications substrate of the Internet utilized by broadband providers. Even established industry companies like AOL, Cogent, Mozilla and Netflix support a Title II approach, as do the venture capitalists who provide financial support for edge providers and have a vested interest in adoption of rules that promote Internet innovation.¹⁵ Individuals and companies that *use* the Internet support the no-blocking and non-discrimination requirements

¹³ AARP reports 37 million members. Comments of AARP at 1.
<http://apps.fcc.gov/ecfs/document/view?id=7521705861>

¹⁴ Professor Wu filed his comments and ex parte as a private citizen and academic.
<http://apps.fcc.gov/ecfs/document/view?id=7521331210> and
<http://apps.fcc.gov/ecfs/document/view?id=7521098085>

¹⁵ See GN I4-28, Union Square Ventures ex parte (May 9, 2014) attaching May 8, 2014 letter at 2 (emphasis added).

inherent in Title II classification.

This leaves some of those that own and control the physical network – Verizon, AT&T, Comcast, Cox, etc. – and their business partners (Ericsson and the like) to argue that the FCC should either stay out of this fight, or should proceed under the relatively amorphous contours of § 706 alone, rather than the combined authority of Title II and § 706.¹⁶ Some other network owners are not opposed to Open Internet rules.¹⁷

In light of the extensive and wide-ranging interests supporting Title II treatment of broadband Internet access, arguments that the success of the Internet negates the need for regulation¹⁸ should be rejected. The **current** market dominance of network owners –two of the largest of which are seeking to merge¹⁹ □ with their economic and business incentives both to block competitors and to impose discriminatory charges on content providers, continues to threaten the future of an open Internet, and demonstrates the continued need for regulation.

III. THE COMMISSION SHOULD REJECT THE VIEWS OF THOSE CLAIMING THAT ANTI-DISCRIMINATION AND ANTI-BLOCKING RULES ARE NOT NEEDED.

Verizon recently announced that it will slow down service to customers who are on older unlimited data plans; the FCC Chairman is concerned.²⁰ Apparently, T-Mobile wants to get in

¹⁶ NASUCA does not mean to suggest that no academics or political figures have sided with the network owners. See, e.g., June 10, 2014 *ex parte* notice of Professor Christopher Yoo concerning his meeting with Commissioners Pai and O’Rielly. See also Comments of the Free State Foundation, *et alia*, as discussed below.

¹⁷ See, e.g., Comcast Comments at 13-26; TWC Comments at 3-4.

¹⁸ See, e.g., USTelecom Comments at 1; National Cable & Telecommunications Association (“NCTA”) Comments at 2.

¹⁹ *Applications of Comcast Corporation and Time Warner Cable, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57.

²⁰ See <http://www.dispatch.com/content/stories/business/2014/07/31/verizon-data-limit-questioned.html>.

the game,²¹ and the debate continues.²² Rightly so. It seems as though, in other contexts, such throttling might be seen as commercially reasonable.²³ **But not for the Nation’s vital communications networks.**

The FCC has the authority to determine what is just, and what is reasonable, and what is discriminatory, in the broadband context. The FCC needs to adopt rules so that carriers and consumers as well as content providers know that actions such as (1) slowing down the speed at which consumers access the content of their choice;²⁴ (2) discriminating among consumers or content providers by providing faster or slower access for reasons other than network management; and (3) blocking access to content, all violate the broadband providers’ obligations under federal telecommunications law and violate the fundamental principles that underlie federal law and policy. The D.C. Circuit decision in *Verizon v. FCC*, discussed below, make clear that such rules can only exist within a Title II framework.

NASUCA urges the Commission not to be swayed by the small number of very large incumbent carrier ISPs²⁵ who claim to support an open Internet,²⁶ but oppose “further regulation

²¹ See <http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/13/report-t-mobile-wants-to-throttle-some-of-its-unlimited-data-users-too/>.

²² <http://online.wsj.com/articles/fcc-chairman-wheeler-still-concerned-about-verizons-data-throttling-1407519063>.

²³ See Verizon Comments at 3.

²⁴ T-Mobile reportedly slowed access when customers on unlimited plans accessed “continuous’ Web cam videos or engage[d] in peer-to-peer filesharing.” See <http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/13/report-t-mobile-wants-to-throttle-some-of-its-unlimited-data-users-too/>

²⁵ In March 26, 2010 Reply Comments in WC Docket No. 09-191 at 7-8, NASUCA noted that there was a distinction between mom-and-pop ISPs, often non-facilities based companies that focus primarily if not exclusively on Internet access, and the large (mostly incumbent) facilities-based carriers and cable companies whose Internet access services use and are adjunct to their primary transport and telecommunications capabilities. In an August 7, 2014 seminar at the California Public Utilities Commission, Netflix counsel Christopher Libertelli reported that Netflix’ connection problems with last-mile transport providers were limited to the six largest ISPs. Netflix’ presentation, and the archived webcast of the following Q and A, are accessible at: http://www.cpuc.ca.gov/PUC/hottopics/7other/081027_thoughtseries.htm.

²⁶ E.g., Verizon Comments at 1; CTIA – The Wireless Association® (“CTIA”) Comments at 4; Time Warner Cable

of broadband providers' behavior....²⁷ Regulation is needed not just because of "a few isolated and dated incidents of alleged problems,"²⁸ but to assure that the public, the content providers and the Internet access providers follow the same rules that prohibit discrimination and blocking. Apparently, Verizon does not view its throttle-down as a problem. Verizon is wrong.

The need for rules to maintain an open Internet is well-established. As NASUCA pointed out in its March, 2014 Comments in this proceeding, the D.C. Circuit rejected the network owners' repeated assertions that no systemic problem exists. The D.C. Circuit cited with approval Commission findings that there is a real and imminent threat to an open Internet:

- "[B]roadband providers' potential disruption of edge-provider traffic [is] itself the sort of 'barrier' that has 'the potential to stifle overall investment in Internet infrastructure'";²⁹
- Broadband Internet access providers "have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue generating telephone and/or pay-telephone services";³⁰
- Broadband Internet access providers have "the technological ability to distinguish between and discriminate against certain types of Internet traffic";³¹

("TWC") Comments at 1.

²⁷ Verizon Comments at 2; see also CenturyLink Comments at ii ("Broadband providers have every incentive to design, maintain and manage their networks in a way that meets or exceeds end-user expectations of openness.").

²⁸ Verizon Comments at 1; see also CTIA Comments at 1.

²⁹ *Verizon v FCC*, 740 F.3d at 642.

³⁰ *Id.* at 645 ("As the Commission noted, Voice-Over-Internet Protocol (VoIP) services such as Vonage increasingly serve as substitutes for traditional telephone services, and broadband providers like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own 'core video subscription service.'" ... Broadband providers also have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users"), citing *Open Internet Order* at ¶¶ 22-24. In the face of the D.C. Circuit's findings, Cox Communications simply denies this. Cox Comments at i.

³¹ *Id.* at 646.

- “[B]roadband providers’ position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers...the provider functions as a ‘terminating monopolist’ ... [and has] this ability to act as a ‘gatekeeper’”;³²
- “[E]nd users are unlikely to react [to a carrier’s discrimination] in this fashion [immediately switching to a competing broadband provider]” as “end users may not know” that their broadband provider is imposing access costs on edge providers, and “even if they do have this information [consumers] may find it costly to switch”;³³ and
- Prior incidents support the Commission’s conclusion “that the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not ... ‘merely theoretical.’”³⁴

Dominant network owners’ arguments to the contrary are inconsistent with Commission findings, Court findings, and the empirical record.

The record shows that “[d]ue to a voluntary commitment, Comcast is currently the only broadband provider that is legally bound by the no-blocking and nondiscrimination rules adopted in” the Open Internet Order.³⁵ Comcast does not seem to be suffering from the Title II regulations many other network owners bemoan. Indeed, as part of its \$62 billion proposed takeover of Time Warner, Comcast has committed to extend those regulations to Time Warner, along with continuing to invest in its networks,³⁶ which investment other owners say could not happen if anti-discrimination and anti-blocking rules are adopted. Customer demand, driven by the abundance of compelling Internet content, should be sufficient to drive investment for other

³² Id.

³³ Id.

³⁴ Id. at 648.

³⁵ Comcast Comments at 1.

³⁶ See MB Docket No. 14-57, Joint Comments of New Jersey Division of Rate Counsel and NASUCA (August 25, 2014).

carriers as well.³⁷ Customers pay for Internet access, and pay more for faster speeds. As in most industries, the providers should be expected to invest in their service so that they can continue to both provide better (e.g. faster) service, and to provide service to more consumers.

III. THE COMMISSION SHOULD RECLASSIFY BROADBAND TO MEET THE PUBLIC'S NEEDS.

FMAOIR begin their comments by claiming that “[f]or 10 years officials at the Federal Communications Commission have told Americans that the Internet will ‘break’ unless the agency steps in to keep it ‘free and open.’”³⁸ Ten years ago was 2004 – when the FCC was defending its *Cable Modem Broadband* decision in court. Nonetheless, a despite the 2002 re-classification, in 2005 the Commission affirmed its commitment to the openness and neutrality of Internet access by adopting the Open Internet Policy Statement.³⁹ The Commission’s 2005 Policy Statement assured that broadband Internet access providers would not discriminate or block consumers’ access to the content of their choice, and made clear the Commission’s intention to “preserve and promote the open and interconnected nature of the public Internet.”⁴⁰

The FCC’s policy of protecting consumers’ expectation that they can reach the content of their choice over the Internet without interference from their broadband provider is long-standing, notwithstanding the legal challenges brought by Comcast and Verizon.⁴¹ Although

³⁷ See GN 14-28, *Union Square Ventures ex parte* (May 9, 2014), attaching May 8, 2014 letter at 2.

³⁸ FMAOIR Comments at 1; see also ACA Comments at 1.

³⁹ *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14986 (2005).

⁴⁰ *Id.* at 14988, ¶4.

⁴¹ *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010); *Verizon v. FCC*, *supra*.

FMAOIR cautions the Commission to seek guidance from Congress,⁴² FMAOIR disregards the fact that protecting an open Internet is a continuation of the FCC's policy since at least 2005,⁴³ before 2002, and dating back even before 1996, as the D.C. Circuit pointed out.⁴⁴ And although courts have questioned the legal foundation for specific rules, the policy premise that neither consumers nor content providers should suffer discrimination, blocking or degraded service has never been abandoned by the Commission. Protecting an open Internet is not a change in policy, and does not require Congressional action.

As discussed in more detail below, the regulatory action to return Internet access to Title II, so that the no-blocking and no-discrimination rules have a solid legal foundation, is entirely within the Commission's discretion and entirely consistent with the definition of telecommunications under the Telecommunications Act of 1996.⁴⁵ When it affirmed the FCC's classification of cable modem broadband from a telecommunications service to an information service in the *Brand X* case, the Supreme Court made it very clear that "the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change."⁴⁶ Reclassification from an information service back to a telecommunications service represents a "reasoned interpretation to change course" in light of the actual function of facilities-based Internet access providers, consumer expectations, the dangers of discrimination

⁴² FMAOIR Comments at 2.

⁴³ *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14986 (2005).

⁴⁴ *Verizon v. FCC*, 740 F.3d at 630 (noting Title II treatment for Internet access prior to 1996 Act).

⁴⁵ The Telecommunications Act of 1996 defines the term "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(50). Broadband Internet access fits squarely within this definition.

⁴⁶ *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981-982 ('*Brand X*').

and paid preference, and a better understanding of how Internet use has developed.

IV. THE ARGUMENTS AGAINST TITLE II SHOULD BE REJECTED.

Not to give the opponents of reclassification too much room, but Verizon's summary against it is eloquent, albeit ultimately empty:

“[R]eclassification” of broadband Internet access service as a Title II common carriage telecommunications service would be a radical departure that would not achieve its proponents’ stated goals and would only endanger the entire Internet ecosystem. The arcane regulatory framework embodied in Title II was crafted for 19th Century railroad monopolies and the early 20th Century one-wire telephone world. The price and service regulation inherent in Title II have no place in today’s fast-paced and competitive Internet marketplace, and the threats posed by this approach would not likely be confined to broadband providers but would spread inevitably to other Internet sectors. Moreover, such an approach would be unlawful and, at a minimum, would result in years of counterproductive uncertainty for the entire industry. In contrast, a balanced framework will ensure that broadband providers act reasonably and would protect against backsliding or bad acts that threaten consumers or competition, while preserving flexibility for all providers to experiment with new approaches that could offer new choices and benefit consumers and small Internet players alike.⁴⁷

Verizon, AT&T, Comcast and various other commenters thus argue that returning to the Commission’s prior treatment of Internet access as a telecommunications service – defined, as noted, as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”⁴⁸ □ is somehow unlawful and will invite years of litigation. AT&T even complains about how, and how frequently, the NPRM mentions Title II.⁴⁹ While these large ISPs would prefer to avoid the common carrier no-blocking and no-discrimination obligations that are inherent in

⁴⁷ Verizon Comments at 4; see also AT&T Comments, Part III.

⁴⁸ 47 U.S.C. §153(50).

⁴⁹ AT&T Comments at 50-51; see also NCTA Comments at 2.

transmitting content specified by the user, neither the case law,⁵⁰ the statute,⁵¹ nor the function of broadband justifies treating this service as anything other than common carrier telecommunications.

Reclassification is not a “radical departure,”⁵² but a return to the principles under which the Internet became what it is today. As the D.C. Circuit pointed out, the FCC’s 2002 *Cable Modem Broadband Order* was the radical departure from the well-settled consensus that the Nation’s communication network (1) is a vital national resource subject to common carriage; (2) would not be dominated by the business interests that owned and controlled it; and (3) on which there was a well-defined separation of conduit and content. The Court noted that:

When Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission’s long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which the end users accessed the Internet. *See, e.g., Second Computer Inquiry*, 77 FCC2d at 473-74, PP 228-29. Indeed, one might have thought, as the Commission originally concluded, ... *Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously.*⁵³

Under these common carrier rules, network owners are not allowed to dictate access, or otherwise discriminate among users. This was no “arcane framework,” but a guarantee of protections that defend the enduring values of this Nation.⁵⁴

⁵⁰ *Verizon v. FCC*, 740 F.2d at 650-651; *Brand X*, 545 U.S. at 982; see also *id.*, Dissent of Scalia, J..

⁵¹ See the definitions in the Telecommunications Act of 1996, 47 U.S.C. §153(50)(telecommunications); §153(53)(defining a telecommunications service); §153(24) (defining an information service as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”).

⁵² Or “an about-face switcheroo....” Free State Foundation Comments at 3. Or “a disastrous policy reversal....” NCTA Comments at 3. Or a “blunderbuss instead of a scalpel...” Adtran Comments at i.

⁵³ *Verizon v FCC*, 740 F.3d at 638-639 (emphasis added).

⁵⁴ See FCC 14-5, ¶ 22.

A. Verizon and Time Warner

What strains credulity here is that Verizon once again fails to acknowledge that it **knowingly and willingly had its networks classified as Title II long ago.**⁵⁵ And then never bothered to mention that fact in any forum, not even now.⁵⁶ Verizon expressly identified its investment in fiber optic cable to support its FiOS service as a Title II, “telecommunications” service in connection with its cable franchise, so that construction would be subject to New Jersey’s telecommunications, not cable, authority.⁵⁷ Clearly, when common carrier classification benefits the Company it is willing to claim that status. The Commission should be skeptical of a Company that engages in such regulatory arbitrage.

Similarly, TWC states that it “and similarly situated broadband providers are not voluntarily offering a telecommunications service to end users today.” This conclusion does not stand up to the fact that TWC offers broadband service, which is transmission of content specified by the user without modification, to the public for a price, and which *is a telecommunications service no matter how and how often TWC and its access provider cohorts mischaracterize it as an “information service.”*⁵⁸ Further, at least in New York and California, TWC *is* voluntarily offering “telecommunications services,” even though circuit-switched, to end

⁵⁵ See N.J.S.A. 48:5A-20(a) and N.J.S.A. 48:5A-3(d) (under state-wide franchise statute, plant used to provide video service is telecommunications plant), see also http://www.huffingtonpost.com/bruce-kushnick/title-shopping-exposed-ve_b_5586478.html.

⁵⁶ See http://www.huffingtonpost.com/bruce-kushnick/title-shopping-exposed-ve_b_5586478.html.

⁵⁷ *Id.* Verizon is quoted as stating, “[A]ny construction [of its fiber-to-the-premises plant] being performed in the public rights of way is being undertaken pursuant to Verizon NJ authority as a telecommunication service provider.”

⁵⁸ See Time-Warner’s Internet service offerings at <http://www.timewarnercable.com/en/residential.html> (last visited September 5, 2014)

users as an “eligible telephone carrier” taking universal service funds.⁵⁹ The Commission cannot ignore these contradictions by network owners.

B. A Reasonable Reading of the Act

Free State Foundation asserts that “Title II, taken almost verbatim in essential respects from the Interstate Commerce Act of 1887, is designed to regulate service providers operating in a monopolistic marketplace environment.”⁶⁰ As almost everyone else realizes, Title II – as significantly modified and updated by the 1996 Telecom Act – was designed to transition the networks – legacy and updated – to competition, **while retaining the enduring values that are key to the 1934 Act**. While the largest broadband providers oppose Title II treatment, smaller and rural network owners have submitted comments that broadband is properly treated as a Title II service, with the associated common carrier obligations and protections.⁶¹

A reasonable reading of both the Telecommunications Act of 1996, particularly the definitions found in Section 153, along with the extensive discussion of *Chevron* deference in *Brand X*,⁶² demonstrate that the Commission has the legal authority to reclassify broadband Internet access service from an “information” service under Section 153(24) to a

⁵⁹ See Order Designating Competitive Local Exchange Carriers as Eligible Telecommunications Carriers, Service Areas, and Granting Waivers, NYPS&C Case No. 940-C-00095 (Dec. 24, 1997); *Application of Time Warner Cable Information Services (California), LLC for Designation as an Eligible Telecommunications Carrier*, CPUC A. 13-10-019, Decision Granting Request for Eligible Telecommunications Carrier Status (Decision 14-03-038), March 26, 2014, at 4.

⁶⁰ Free State Foundation Comments at 3.

⁶¹ NTCA Comments at 8-12 and WTA – Advocates for Rural Broadband Comments at 3-5.

⁶² *Brand X*, 545 U.S. at 982.

“telecommunications” service under Section 153(50), subject to common carrier regulation, pursuant to Section 153(51).⁶³

As discussed above, the very definition of “telecommunications” under the Telecommunications Act of 1996 reflects modern consumers’ expectation of Internet access as “*transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.*”⁶⁴ Today, Internet access providers like local cable companies and telephone companies offer transmission of information over the Internet directly to the public, for a fee.⁶⁵ The Commission is well within its statutory discretion to reclassify broadband to reflect these realities.

C. Consumers’ Early Expectations of Broadband

Compared with the quantity, variety and nature of content that is available on the Internet today, the Internet of 2002 was still looking for the “killer applications” that would accelerate the migration of customers to broadband access. To stimulate demand for their Internet access services, dial-up and the few broadband ISPs offered a variety of proprietary content and layered applications that were offered exclusively to their Internet access subscribers. Dial-up ISPs used such proprietary content and layered applications to differentiate their service from those of rival providers and to stimulate usage of their services, much as the 19th century railroads offered land for the construction of factories as a means of creating demand for their freight services, and built hotels and other tourist facilities along their rights-of-way as a means to stimulate passenger traffic. And just as the railroads and the demands for their services developed to the point where

⁶³ 47 U.S.C. §§153(50), (51) and (53).

⁶⁴ 47 U.S.C. §153(50) (emphasis added).

⁶⁵ *Id.* at §153(53) (defining a telecommunications service).

these ancillary activities were no longer necessary, similarly, broadband Internet access providers no longer need to stimulate demand by bundling content with access. The plethora of content, applications and services that are now available from service providers not affiliated with providers of broadband Internet access demonstrates that “information services” have become an inconsequential component of the ISPs’ service offering, and further highlights the difference between broadband access providers and the information consumers can obtain through that access.

The distinction between transmission and information is highlighted by the fact that today the “information services” still being bundled with broadband access go virtually unused. Back in 2002, precisely because broadband providers bundled access to the Internet with the information that the providers themselves supplied, □ web portals, search engines, and e-mail □ the Commission classified “bundled” broadband access as an information service.⁶⁶

Consumers’ use of the Internet in 2002, when the Commission first classified the Internet as an “information” service, was very different from today. In 2002, consumers were still in the process of moving from dial-up Internet access to high speed, broadband access. In 2003, 35% of households accessed the Internet by dial-up modem, while only 19% used broadband access, up from 4% in 2000.⁶⁷ At that time, the Commission noted that “all information-service providers,” i.e., both those that used dial-up connections and those that used broadband connections, used telecommunications to provide consumers with Internet service. **Broadband** providers, however, combined access to the Internet and transmission of consumers’ requests to

⁶⁶ *Brand X*, 545 U.S. at 987-988.

⁶⁷ See FCC, *OBI Technical Paper No. 4: Broadband Performance*, 21 (2010). Available at: [http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-\(obi\)-technical-paper-broadband-performance.pdf](http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-broadband-performance.pdf).

send and receive information, with information they supplied, web sites, search engines, and email.

The Commission thus classified “bundled” broadband access as an information service because it chose not to separate these services from the telecommunications aspect of the service.⁶⁸ As the FCC saw it in 2002, broadband providers combined the two functions provided in the early days of the public Internet by (1) the telephone companies that provided access and (2) independent ISPs that purchased access to the Internet from telephone companies (dial-up service) and then routinely bundled limited content – e-mail, stock quotes, weather, sports scores, search engines – with access to the Internet.

D. The State of the Internet Ecology Today

Now, in 2014, the distinction between broadband access to the Internet and the information and services available as a result of that access is clear. Today consumers can still choose to use the carrier’s e-mail, web portal, search engine, or other functions, but very few consumers actually do. Many access provider web portals are also available to non-subscriber users at no charge.⁶⁹ AOL, in fact, has all but dropped out of the Internet access business, but still offers its web portal aol.com to anyone without a subscription fee or charge. The distinction between the transmission of consumers’ requests for information and the actual information has become much more clear-cut than it was in 2002.

⁶⁸ *Brand X*, 545 U.S. at 987-988.

⁶⁹ A web portal is a type of web site used to connect the user to various information services, e.g., sports scores, stock quotes, and news. For example, Comcast.net (the web portal) provides news and other links to sports, travel, celebrity news and other information. Consumers who do not subscribe to Comcast’s broadband access service can access Comcast.net. By contrast, comcast.com is the business web site of Comcast Corporation, and is used, among other things, for business transactions with Comcast, such as bill payment and available services.

A variety of statistics regarding end-user access to individual websites is available online, much of it free. Sandvine's *Global Internet Phenomena Report*⁷⁰ estimates that for the first half of 2014, web browser traffic (using Internet Explorer, Chrome, Firefox, or Safari) accounted for only 13.06% of all North American fixed (i.e., non-mobile) access Internet use.⁷¹ Thus, non-web Internet traffic, including communications, storage, tunneling, file-sharing, and real-time entertainment,⁷² represents a much larger 87% of total fixed access Internet use. For example, it has been estimated that Netflix alone accounts for some 30% of all residential Internet use.⁷³ Netflix and other entertainment providers are often⁷⁴ not associated with a broadband access provider and not accessed through the access provider's portal.

Web browser traffic (i.e. the 13.06% identified in the Sandvine report) represents web pages accessed via web browsers such as Internet Explorer, Chrome, Firefox, or Safari. They do not include many other major categories of Internet use, such as streaming video (e.g., Netflix, Hulu, Amazon Prime), or streaming audio, such as Pandora, Spotify and Grooveshark, as well as any of the 50,000 or so Internet Radio streaming services. Further, the 13% web browser traffic does not include e-mail traffic, mobile app traffic including music downloads from iTunes or similar services, the ever-expanding array of cloud-based services, VoIP telephone use, video chat use, or any "Internet of Things" types of transmissions.

⁷⁰ Sandvine, *Global Internet Phenomena Report 1H 2014*, available online at <https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/1h-2014-global-internet-phenomena-report.pdf> (last accessed on September 8, 2014).

⁷¹ *Id.* at 5 (Table 1).

⁷² *Id.*

⁷³ See *id.* showing Netflix at 31.09% of aggregate traffic.

⁷⁴ Of course the Comcast-NBC Universal merger combined an information provider and an access provider, and links to NBC Universal content can be found on Comcast's web portal. See Comcast.net.

Trafficestimate.com focuses on the 13% of Internet traffic generated by consumer use of various web browsers. It provides data on the number of individual webpage visits to specific websites over a 30-day period. During the period covered by these data, access provider web portals represented only about 0.3% of all web pages visited,⁷⁵ an amount all but lost in the noise. When this 0.3% of traffic is considered in light of Internet traffic reported by Sandvine, it is clear that more than 99.9%⁷⁶ of all web pages visited were *not* associated with a broadband Internet access provider's web portal or "information services.

With the exception of e-mail, none of the network owners have any consequential presence in any category of traffic or use. And even access provider e-mail, which is typically bundled with broadband Internet access, is dwindling in importance as end users migrate away from those e-mail domains to services such as Gmail, Yahoo mail, AOL mail and Apple's iCloud or to any number of other e-mail services specifically to avoid being locked into to an access provider e-mail address should they decide or need to change their broadband ISP.

In the case of commercial (i.e., non-residential) Internet use, access provider "information services" are for all practical purposes nonexistent. Businesses (except perhaps for the very smallest) do not use provider e-mail services. They do not use provider web portals. They do use Virtual Private Network ("VPN") "tunnels" for intercommunication between remote sites and principal network servers, Session Initiation Protocol ("SIP") for virtual PBX telephone

⁷⁵ A listing of the 250 most visited web pages as a percentage of total traffic taken from Trafficestimate.com for the period July 14, 2014 to August 14, 2014 is attached to these Reply Comments.

⁷⁶ Only 0.3% of the browser related traffic is associated with content provider web portals. This is only 0.3% of the 13% of overall web traffic represented by browser related traffic, demonstrating that broadband access provider's information services are an insignificant portion of Internet traffic.

systems, and any number of other specialized applications whose use of the public Internet is solely for purposes of telecommunications transport.

Thus somewhere in the range of 99.9% of all broadband Internet access used by consumers does not rely upon an information service provided by the broadband Internet access provider. Broadband access is pure telecommunications transport between the user and the content provider more than 99.9% of the time, and it fully conforms to the statutory definition of “telecommunications service.” Not only *should* the Commission reclassify broadband Internet access as a Title II telecommunications service, the current nature of Internet access use justifies no other choice.

What seemed important in 2002 (all the add-ons that were bundled with broadband access) were in retrospect only applications riding the network. It was always about transport.⁷⁷ This historical development of broadband transport and Internet access only serves to underscore how separable the transport element has become in the intervening twelve years since the *Cable Modem Broadband Decision*.⁷⁸ The pizza can be separated from the delivery.⁷⁹

⁷⁷ See <https://www.publicknowledge.org/news-blog/blogs/100th-anniversary-kingsbury-commitment>.

⁷⁸ In 2003, 35% of households accessed the Internet by dial-up modem, while only 19% used broadband access, up from 4% in 2000. At that time, the Commission noted that “all information-service providers,” i.e. those that used dial-up connections and those that used broadband connections, thereby used telecommunications to provide consumers with Internet service. Broadband providers, however, combined access to the Internet and transmission of consumers’ requests to send and receive information with information they supplied, web sites, search engines, and email.

⁷⁹ Justice Antonin Scalia, in a famous and oft-quoted dissent from the majority opinion in *Brand X*, dismissed the FCC’s interpretation of the 1996 Act in the *Cable Modem Broadband Order* as follows:

If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common “usage” ... would prevent them from answering: “No, we do not offer delivery – but if you order a pizza from us, we’ll bake it for you and then bring it to your house.” The logical response to this would be something on the order of, “so, you *do* offer delivery.” But our pizza-man may continue to deny the obvious and explain, paraphrasing the FCC and the Court: “No, even though we bring the pizza to your house, we are not actually ‘offering’ you delivery because the delivery that we provide to our end users is ‘part and parcel’ of our pizzeria-pizza-at-home service and is ‘integral’ to its other capabilities.”

E. Back to Common Carriage

The concept of “common carriage” and “common carrier” status has its roots in common law, and has been applied precisely where risks associated with giving the service provider the right to grant priority or preference to some and to discriminate against others with respect to an activity “vested with the public interest” are present. Most ISPs operate under monopoly or at most duopoly market conditions, and they *always* operate as terminating monopolists with respect to their own end-user “eyeball” customers. Content providers seeking to communicate with end-user customers must go through the end-user’s ISP, giving providers the ability and the financial incentive to obtain monopoly rents both from their own end-user customers and from content providers. Common carrier treatment and common carrier regulation was and is intended to address precisely these kinds of market failures.

Broadband Internet access providers are all monopolies with respect to terminating traffic. The power of ISPs to control access to consumers, and the clear distinction between access to the Internet – *i.e.*, the unimpeded ability to send and receive information and the role of independent information sources or providers and their phenomenal growth, emphasize the need to apply the correct regulatory structure to broadband Internet access providers.

Once Internet access is correctly classified as a telecommunications service, the Open Internet rules will be fully consistent with the essential obligations at the heart of common carrier status, *i.e.*, that service be provided with no unjust or unreasonable discrimination in charges or practices and no undue or unreasonable preferences or advantage, or prejudice or disadvantage to any particular person or class of persons, per 47 U.S.C. §202(a). As discussed below, the

Brand X, dissent, p. 4.

Commission's forbearance authority will provide flexibility to adapt statute-based consumer protections to the needs of the Internet ecology. Fundamentally, there is no more net uncertainty in such a regime than there had been pre-*Verizon v. FCC*.

Services that transmit information of the user's choosing, without change in the form or content of the information as sent and received, between or among points specified by the user, are "telecommunications" under the Act. This definition matches the function of broadband Internet access service and should lead the Commission finally to reverse the 2002 decision that incorrectly conflated the information provided by ISPs with the transmission service that underlies that information.⁸⁰ The conflation, if ever needed, is not needed now.

Apparently, broadband Internet access providers find the proposed rules' commercial reasonableness standard and the prospect of Title II reclassification both unmanageable. Cox asserts that "[i]mposing 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."⁸¹ The D.C. Circuit vacated the rules because the Commission could not impose common carrier regulations on non-Title II services. Once the Commission reclassifies broadband as a Title II service, these necessary regulations will not be subject to vacation on appeal.

F. Legal Issues on Reclassification

Of course Verizon (and AT&T, and others) claim that reclassification would be

⁸⁰ See *Brand X*, 545 U.S. at 997. In rejecting the notion that access becomes an information service because information is provided along with access, Justice Scalia wrote: a leashed puppy is still a puppy, even though it is not offered on a "stand-alone" basis. *Id.* at 1008 (Scalia, J., dissenting).

⁸¹ Cox Comments at ii.

unlawful.⁸² Neither Verizon’s nor AT&T’s comments provides compelling arguments that refute NASUCA’s prior arguments.⁸³ AT&T argues that reclassification would be contrary to the “plain language of the Communications Act...”⁸⁴ AT&T ignores both the various definitions contained in Section 153 of the Telecommunications Act of 1996 and that in *Brand X*, the Supreme Court ultimately and explicitly gave deference to the FCC’s **interpretation** of the Act.⁸⁵ Interpretation would not have been necessary – or be allowed □ if the “plain language” of the Act plainly and directly said that broadband is an information service or a telecommunications service.⁸⁶ As publicly stated, the FCC actually had to invent the term “broadband Internet access service,” because it wasn’t in the statute.

G. Uncertainty

And Verizon says reclassification would land us in uncertainty, which could be compared to the uncertainty that has benefited network owners – and their suppliers⁸⁷ □ over the last nine years since the decision in *Brand X*. Clear, strong rules would bring certainty. The alternative to clear, strong rules is discriminatory and preferential pricing contrary to the public interest.

The risks associated with giving the access provider the right to grant priority or preference to some and to discriminate against other sources of information are evident. As discussed in Part IV.C. above, consumers use independent information sources at a rate significantly higher than they use those of the access provider, providing an incentive to the

⁸² Verizon Comments at 4; see also CenturyLink Comments at iv-v; USTelecom Comments at 2.

⁸³ See NASUCA initial comments at 6-8.

⁸⁴ AT&T Comments at 3.

⁸⁶ *Brand X*, 545 U.S. at 974.

⁸⁷ See Alcatel ex parte (July 23, 2014).

access provider to interfere with consumers' choice of information. The distinctions between access to the Internet, the unimpeded ability to send and receive information, and the role of independent information sources or providers have in fact become clearer since 2002.

H. The "Regulatory Morass"

Then there are the continuing claims of regulatory "morass" that would result from reclassification. USTelecom's comments do not cite a single rule that would cause such a morass.⁸⁸

Contrary to USTelecom's assertion, it is the absence of a Title II classification that leaves the Commission, consumers, content providers and broadband providers subject to new and difficult-to-apply standards of "commercial reasonableness" that will need extensive litigation to elaborate and apply. While common carrier obligations do not permit *unreasonable* discrimination or preference, the law is well-developed and flexible enough to allow the Commission and parties to rely on established principles of "reasonableness" in the context of discrimination and preferences.⁸⁹

⁸⁸ See NCTA Comments at 4. On a National Regulatory Research Institute webinar on July 23, 2014, USTelecom's Jonathan Banks mentioned equal access and some accounting rules, as such burdens. Unfortunately, if equal access is defined as an interexchange carriers' equal access to local exchange carriers' ("LECs") customers, and the attendant burden on LECs, it is simply not relevant today, given the proliferation of all-distance plans (wireless and wireline). But if it means edge providers' equal access to end users, that is and will continue to be a burden that ISPs should have to meet.

⁸⁹ See, e.g., 47 U.S.C. §201(b) (communications "may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications."); 47 U.S.C. §202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services." (Emphasis added)). In applying these sections, the Commission determines if the services at issue are (1) "like" services, (2) offered at different prices, and (3) whether the difference is reasonable. *Competitive Telecommunications Associations v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993); *Ad Hoc Telecommunications Users Comm v. FCC*, 680 F.2d 790 (D.C. Cir. 1982).

Cox Communications is concerned that the proposed rules use vague and untested concepts in an attempt to maintain open Internet rules, in order for the FCC to avoid an express Title II classification and the established non-discrimination and no-blocking obligations associated with it.⁹⁰ USTelecom's suggestion that a Title II reclassification would result in a "morass" is without merit. If the Commission reclassifies broadband as a Title II service, as urged here, it will not be necessary to construct new legal "roving" standards or standards "more expansive and intrusive" than a simple Title II non-discrimination and no-blocking standard.

I. Impact on Investment

A recurring theme of the network owners is that reclassification will kill investment and innovation.⁹¹ The Commission should remember that AT&T existed as a regulated Title II common carrier throughout the 20th century, and by all appearances had no trouble attracting capital or producing innovations in its Bell Labs. The innovation was there, even if AT&T made the **business decision** to suppress certain technologies, such as DSL,⁹² just as AT&T and Verizon are now making business decisions to curtail their deployment of broadband.

Several carriers have cited a study by Professor Christopher Yoo asserting that there is less investment where there is "public utility" treatment of the service.⁹³ Professor Yoo studied broadband deployment in Europe, and found that there was more investment in areas where there are overbuilt telephone and cable facilities than in areas where service was only available

⁹⁰ See Cox Comments at ii.

⁹¹ Comcast Comments at 4; Verizon at Comments at 50; AT&T Comments at 50-55; CTIA Comments at 2; Free State Foundation Comments at 2; TWC Comments at 4.

⁹² See TIM WU, THE MASTER SWITCH, at 107; see also http://www.huffingtonpost.com/art-brodsky/the-master-switch-by-tim_b_776247.html; TWC Comments at 1-2.

⁹³ <https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment>.

through use of the incumbent's wireline.⁹⁴ Professor Yoo's regression analysis shows only that facilities-based competition – where it exists – requires more investment than opening the incumbent's network. His analysis does not show that facilities-based competition will or will not grow to match unbundled-network-element (“UNE”)-like competition. The more than one hundred venture capitalists who supported Title II show the opposite of Yoo's study.⁹⁵

The Commission needs more information before it can rely on the carriers' assertions here: **Whose investment would be stifled by Title II classification?** Current reports are that between 2002 and 2012, “as a percentage of the money they pull in, ISPs have generally spent less on infrastructure over time from a high of 37 percent of revenue in some cases to a low of around 12 percent more recently.”⁹⁶

Verizon warns about a repeat of the supposed 2010 impact of former FCC Chairman Genachowski's proposed “Third Way” on carriers' stocks.⁹⁷ These Verizon-cited impacts were temporary impacts on big network owners, based on computer programs in investment houses, supposedly in response to **the mere possibility of regulation**. Yet Verizon reports no continuing stock rebound when it seemed certain that the Third Way was not going to be travelled after 2010. The “threat” of Title II for broadband has been continuing for years, and is now clearly at the forefront. The performance of Verizon's stock does not show much impact from the Commission's current suggestions.⁹⁸

⁹⁴ Id. at 9.

⁹⁵ See GN 14-28, Union Square Ventures ex parte (May 9, 2014) attaching May 8, 2014 letter at 2 (emphasis added).

⁹⁶ <http://www.washingtonpost.com/blogs/the-switch/wp/2014/07/24/isps-are-spending-less-on-their-networks-as-they-make-more-money-off-them/>.

⁹⁷ Verizon Comments at 22-23; but see Free Press ex parte (July 17, 2014).

⁹⁸ See <http://www.thestreet.com/quote/VZ/details/advanced-charts.html>.

USTelecom asserts that “it is difficult to address the relevant questions empirically,” despite the fact that its statement is titled “Regulatory Impact on Investment: Getting the Facts Right.”⁹⁹ USTelecom focused on Free Press’s position, based on empirical studies, that there is no harm to investment from reclassification. Yet USTelecom’s critique ultimately resorts to “theory, or just common sense.”¹⁰⁰ As Free Press’s information shows, however, it is all too often true that some or other economic theory, e.g., as to the economic impact of reclassification, may not work in practice – or at least cannot be shown to be valid. On USTelecom’s second point, as the sage opined, “Common sense seems very uncommon now-a-days...”¹⁰¹ Ultimately, it should be clear that consumer demand and competition, not regulatory treatment, are the primary drivers of an access provider’s decision to invest in infrastructure. It should also be clear that the interests of large network owners that want to retain their market power often work contrary to the interests of a broader cross section of the Internet ecology.

USTelecom also asserts that, at most, the “marginal” customer will be harmed when carriers do not invest.¹⁰² Preventing such harm is the purpose of the Connect America Fund: To fund broadband where there may be no business case for investment, where the “business case” is reasonable and proper.

⁹⁹ <http://www.ustelecom.org/blog/regulatory-impact-investment-getting-facts-right> (emphasis added).

¹⁰⁰ *Id.*

¹⁰¹ Quintus Horatius Horace, in “Thoughts for Meaningful Life” p. 96.

¹⁰² <http://www.ustelecom.org/blog/regulatory-impact-investment-getting-facts-right>.

J. Final Arguments

The network owners seek a “light touch” from regulation.¹⁰³ Of course. But “lightness” is not the proper standard for ensuring that the enduring values are protected.¹⁰⁴ There is a zone of reasonableness between the so-light-as-to-be-nonexistent touch sought by AT&T, Verizon and others, and the “heavy-handed” application of every form of regulation ever used under Title II. Do AT&T, and Verizon and TWC,¹⁰⁵ really expect the Commission to impose those regulations?

The Commission recently issued a not-so-light “FCC Enforcement Advisory,” advising “broadband Internet access providers” that they are – and have been since 2011 – subject to the Transparency Rule, 47 C.F.R. § 8.3.¹⁰⁶ Why – under the “light-touch” theory – has such a notice that rules will be enforced not adversely affected the markets? Indeed, Verizon itself supports the Transparency Rule.¹⁰⁷

On the other hand, AT&T asserts that reclassification using the Commission’s mutual exclusivity principle “would necessarily apply, as well, to broad swaths of the Internet ecosystem—including content-delivery networks (‘CDNs’) and many edge providers....”¹⁰⁸ First, the Supreme Court hardly enshrined the principle of “mutual exclusivity.”¹⁰⁹ Second, and more importantly, Title II **should** apply to a broader swathe of the ecology than it currently does.

¹⁰³ Verizon Comments at 2; CenturyLink Comments at ii. See also Free State Foundation Comments at 1.

¹⁰⁴ FCC 15-5, ¶ 22.

¹⁰⁵ See Part IV.A., above.

¹⁰⁶ DA 14-1039, Enforcement Advisory No. 2014-03 (rel. July 23, 2014); see also Chairman Wheeler’s concurrent statement.

¹⁰⁷ Verizon Comments at 2-3.

¹⁰⁸ AT&T Comments at 4-5, 55-61; see also CenturyLink Comments at iii; USTelecom Comments at 3.

¹⁰⁹ *Brand X*, 545 U.S. at 991.

How broad is for the Commission to determine when considering when services meet the statutory definition. The courts will likely give deference (again) to such a determination.

CenturyLink argues that the proposed rules would violate the First and Fifth Amendments to the Constitution.¹¹⁰ In earlier comments, NASUCA thoroughly refuted the idea that the Open Internet Rules represent a limitation on providers' freedom of speech, or a taking of their property.¹¹¹ The network owners' "detrimental reliance" argument¹¹² is equally wrong.

V. FORBEARANCE IS A WORKABLE SOLUTION TO TITLE II "PROBLEMS."

In earlier years, the FCC often found that forbearance under § 160 was appropriate. Some of those findings were challenged¹¹³; some were overturned because the Commission had inconsistently addressed the market power issue.¹¹⁴

The role of forbearance associated with Open Internet rules will be developed as needed. Nonetheless, the proper classification of broadband Internet access as a telecommunications service is critical, because the no unreasonable discrimination and no blocking requirements that are so vital to an open Internet are also the "quintessential common carrier standard."¹¹⁵ The extent to which other common carrier obligations are applicable to broadband Internet access has not yet been addressed. And it need not be addressed in detail before reclassification, just as not all the details of Title I classification were addressed before the *Cable Modem Broadband Order*.

¹¹⁰ CenturyLink Comments at 58-71.

¹¹¹ See NASUCA Comments, GN Docket No. 10-127 (submitted August 12, 2010) at 17-21.

¹¹² See NCTA Comments at 2; TWC Comments at 4.

¹¹³ See *NASUCA v. FCC*, D.C. Cir. Case No. 08-1226.

¹¹⁴ See *United States Telecomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

¹¹⁵ *Verizon v. FCC*, 740 F.3d at 657.

(Indeed, some of those details have led, perhaps inexorably, to the current need to correct that 2002 error.)

In the event the Commission has to decide whether a particular obligation applies, on a forbearance petition or otherwise, the Commission will make its decision based on the facts and arguments before it then.¹¹⁶ For example, the Commission must take into account factors such as lack of market power or control over bottleneck broadband access facilities when determining whether forbearance is in the public interest.

Speculations about weaknesses of the forbearance process in the wake of reclassification are just that: speculations. AT&T argues at length that forbearance would be inadequate, awkward, and uncertain.¹¹⁷ But for AT&T itself, the process has been almost entirely successful.

AT&T further contends that

any such [forbearance] determination would have to be reconciled with the threshold findings that the Commission would need to make to conclude that Title II regulation is necessary in the first place. This tension makes the approach of “reclassification plus forbearance” a much more legally risky endeavor than its proponents have acknowledged.¹¹⁸

This argument overlooks the statutory underpinnings of FCC forbearance. Congress allowed the FCC to determine that Title II regulation **prescribed by Congress** is not necessary. So forbearing from a **Commission**-ordered classification (resulting from finding broadband to be a telecommunications service) would be much less legally risky.

¹¹⁶ The Phoenix Center argues that forbearance will not allow the Commission to exempt edge providers from access charges. See <http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf>. Yet the Commission has just been upheld in setting a zero access charge for sending traffic to terminating monopolists. *In re FCC 11-161*, 753 F.3d 1015 (May 2014).

¹¹⁷ AT&T Comments at 64-68.

¹¹⁸ *Id.* at 66; see also Comcast Comments at 4.

VI. THE COMMISSION SHOULD NOT ASSERT AUTHORITY PRIMARILY UNDER § 706.

AT&T's opening argument is that, under § 706, "as the NPRM correctly recognizes, the Commission has legal authority to adopt new no-blocking and nondiscrimination rules that are precisely tailored to prohibit any practices that could pose a threat to the 'virtuous circle' of investment and innovation that has enabled the Internet to thrive."¹¹⁹ So AT&T should not be heard again to argue against § 706. AT&T now even supports § 706 rules designed to protect against paid prioritization.¹²⁰

CenturyLink erroneously says that the rules cannot be adopted even under § 706.¹²¹ Yet as other commenters pointed out, § 706 and general Title II authority are not alternative, but additive.¹²² Thus, as NASUCA has argued, the Commission should first reclassify broadband Internet access as a telecommunications service, subjecting it to common carrier obligations under Title II.¹²³ This gives the cleanest, most certain, authority to provide consumer protections for broadband. The Commission can also use § 706 as a backstop to enhance its Title II authority and to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."¹²⁴

¹¹⁹ AT&T Comments at I. See also American Cable Association Comments at 44-53; Comcast Comments at 2; TWC Comments at 4; Cox Comments at iii; USTelecom Comments at 3 and Larry Spiwak's piece at <http://www.bna.com/understanding-net-neutrality-n17179892771/>. Spiwak's "basic legal primer" refers to the "cacophony" of those supporting the "draconian change" of reclassification, and is as much wrong as rhetorically fervored.

¹²⁰ AT&T Comments at I. By contrast, FMAOIR opposes any use for § 706.

¹²¹ CenturyLink Comments at v.

¹²² See, e.g., American Cable Association Comments at 41.

¹²³ 47 U.S.C. §153(50) and (51) and §§201 *et seq.*

¹²⁴ The extent of the Commission's, and state commissions', § 706 authority is well-explicated in the recent Office of Ratepayer Advocates CPUC presentation. See http://www.tellusventure.com/downloads/comcast/comcast_cpuc_application_ora_comments_23jul2014.pdf; 47

VII. THE NEED FOR “FLEXIBILITY”

Verizon cites the need for flexibility.¹²⁵ Reclassification and forbearance provide adequate flexibility.

Title II classification in itself provides significant flexibility both in the application of the terms “unjust or unreasonable discrimination” and “undue or unreasonable preference or advantage”¹²⁶ and in the application of forbearance, per § 160. Common carrier status includes the obligation to deliver the traffic of all users “indifferently,”¹²⁷ but it does not deprive ISPs of the ability to efficiently manage their network operations to accommodate the different costs, functions, and burdens imposed by various situations. A properly structured common carrier approach to broadband services can assure that contracts between content providers and broadband Internet access providers are evaluated in an open and neutral process, while preserving the fundamental principles of nondiscrimination and openness.

Thus a change in the classification of Internet access service from an “information service” to a “telecommunications service” will protect the Open Internet, provide a solid legal foundation for effective Open Internet rules, provide flexibility within a well-established legal framework, and allow reasonable network management practices. At the same time, the law authorizes well-founded petitions for forbearance, which the Commission is obligated to act on promptly.¹²⁸

U.S.C. §1302(a).

¹²⁵ See Verizon Comments at 3; see also *id.* at 69-77; CTIA Comments at 2.

¹²⁶ 47 U.S.C. § 202(a).

¹²⁷ *Verizon*, 740 F.3d at 651.

¹²⁸ 47 U.S.C. §160(c) (forbearance granted unless the Commission acts within one year, with a 90 day extension possible).

But Verizon says that such “flexibility” should include a lack of Open Internet rules for wireless broadband.¹²⁹ Such a one-sided tilting of the playing field should not be countenanced.¹³⁰ Verizon is simply attempting to carve out its own market niches.¹³¹ Likewise, the rules should apply to the entire ecology, as explained in the next section here.¹³² None of the modalities for which Verizon and others seek exemption are “nascent”; the modalities (inter- or intramodal) do not need protection, other than from market power, although all their customers still do.¹³³

VIII. THE COMMISSION SHOULD ADOPT A FULLY THEORIZED¹³⁴ MODEL FOR OPEN INTERNET RULES.

In multiple comments in 2010 and 2014, NASUCA advanced an underlying concept of an open Internet that relies on a clear distinction between conduit and content, between telecommunications transport and information content or services, and between the physical layer and all that rides on it.¹³⁵ NASUCA has argued that the Commission’s attempts to preserve

¹²⁹ Verizon Comments at 4; see also Akamai Comments at 2.

¹³⁰ See CenturyLink Comments at iii; Cox Comments at i; TWC Comments at 5-6; NCTA Comments at 4.

¹³¹ AT&T does its own niche-carving, as in its apparent non-objection to a ban on paid prioritization.

¹³² See ACA Comments at iv-v.

¹³³ Thanks go to Larry Spiwak of the Phoenix Center for bringing “nascence” back into the dialog. See <http://www.phoenix-center.org/PolicyBulletin/PCPB35Final.pdf>.

¹³⁴ In the related discourse on constitutional speech theories, commenters bemoan an “incompletely theorized” theory. See Stuart Minor Benjamin, *Transmitting, Editing and Communicating: Determining What “the Freedom of Speech” Encompasses*, 60 DUKE L.J. 1673, 1677-78 (2011) (“The Court has invoked the marketplace of ideas more than any other conception of the First Amendment, but different cases have emphasized different conceptions, and in many cases the Court has refrained from choosing among them. This is not surprising: each possible conception of the First Amendment can be subjected to legitimate criticism, and reaching agreement at that level of specificity is difficult for any group, Justices or otherwise. The Supreme Court’s First Amendment jurisprudence is thus one of the many areas characterized by incompletely theorized agreements.”).

¹³⁵ See, e.g., NASUCA January 14, 2010 Comments in 09-191, at 6 ff; NASUCA May 30, 2014 *ex parte* comments/letter in 14-28.

an open Internet are correctly directed to the physical layer, the transport facilities that make the Internet possible.¹³⁶

Yet these networks are now used to provide all communication services, including voice service. Regulations pertaining to prices, consumer protections, privacy (including customer proprietary network information (“CPNI”)), however, must apply to more than the transport facilities and must apply to the services that ride on top of the network. Regulatory oversight is appropriate for more than just the physical layer because universal service high cost support is now targeted to broadband networks.¹³⁷

On the network side, however, from its inception, at or before t this Commission’s 2002 *Cable Modem Broadband Order*, the net neutrality debate focused primarily on the last mile, the ISP’s connection to its subscribers, and whether the ISP would be allowed to discriminate between content in that last mile, as Comcast was found to have done.¹³⁸ That is the “A” side of the Open Internet.

With the most recent Comcast/Netflix dispute, however, as well as with Verizon’s and other large ISPs’ claims in this proceeding and elsewhere, the definition of the problem has broadened to include the “B” side of the equation: **content providers’ connections to the ISPs.** Verizon, as an appellant in the D.C. Circuit and as a commenter here, along with others, has argued that it should be allowed to charge content providers, as well as subscribers, to connect to

¹³⁶ See NASUCA Reply Comments in 10-127.

¹³⁷ *In re FCC 11-161*, 753 F.3d 1015 (May 2014).

¹³⁸ Comcast interfered with a customer’s beloved barbershop quartets. *See, e.g.*, Varrone, “The Comcast Case and the Fight for Net Neutrality,” May 2011 LOS ANGELES LAWYER at 9, available at <http://www.lacba.org/files/la/vol34no3/2809.pdf>.

its network.¹³⁹ This raises the prospect of a two-sided market, where the network owner sits between subscribers and content owners and decides (for a fee) what content will reach the network owner's subscribers and at what speed. NASUCA has warned about the dangers of a two-sided broadband market.¹⁴⁰

Netflix's comments state,

Discrimination and unfair access charges at interconnection points are not theoretical. Their effects on consumers have been picked-up in the popular press. As the Commission is aware, Netflix and its members have been impacted by interconnection congestion, particularly on Comcast's and Verizon's networks."¹⁴¹

Some commenters, NASUCA included, have reacted strongly against the notion that an ISP could pick winners and losers among edge providers on the basis of what amounts to payola – giving preference to some information without the knowledge or consent of the consumer who seeking an unbiased transmission of information.¹⁴² The recent petition by Mozilla,¹⁴³ the well-reasoned analysis by Tim Wu and Tejas Narechania,¹⁴⁴ and the Comcast/Netflix dispute, have now squarely put the “B” side on the agenda.

Mozilla argues that the Commission should avoid messy “A” side debates by focusing on the pathway from the ISPs' back door, so to speak, to the ultimate content providers.¹⁴⁵ Wu and

¹³⁹ In the September 9, 2013 oral argument before the DC Circuit (see footnote 8), Verizon counsel argued that the FCC's 2010 rules unlawfully prohibited a two-sided market; see also Verizon's July 15, 2014 Comments at 34 (“the Commission should declare two-sided pricing to be presumptively reasonable”).

¹⁴⁰ NASUCA Comments (March 21, 2014) at 8-9, 43-49.

¹⁴¹ Netflix Comments at 12.

¹⁴² NASUCA Comments at 15-17; Comments of Lisa Madigan, Attorney General of Illinois and Eric Schneiderman, Attorney General of New York at 6; ACLU Comments at 5; Comments of AARP at 24-25 (pay-for-priority and minimum speed requirements will interfere with consumers' receiving information at the speeds they pay for).

¹⁴³ 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 (filed May 5, 2014) (“Mozilla Petition”).

¹⁴⁴ Wu and Narechania April 14, 2014 *ex parte* letter in this proceeding, and attached draft analysis, “Sender-Side Transmission Rules for the Internet.”

¹⁴⁵ But see Open Technology Institute *ex parte* (August 25, 2014).

Narechania also frame their approach as a way to avoid the Catch-22 the Commission created for itself by its *Cable Modem Broadband Order*:

[T]he FCC can split the facilities-based services offered by [a] broadband carrier into two discrete transactions: first, a *call* by broadband subscribers to request data from a third-party content provider; and second, a content provider's *response* to the subscriber. Imposing this constructed two-stage call-and-response frame on the structure of internet traffic – a frame that is derived from the D.C. Circuit's recent decision in *Verizon* – allows the Commission to separately consider the appropriate regulatory treatment for each.

This creates an obvious opportunity for the Commission to classify – in the first instance – one of these relationships as subject to some form of regulation under Title II. In particular, the Commission should consider the appropriate regulatory treatment of traffic that is sent by content providers in response to requests from retail end users. Classifying such “sender-side” traffic as a telecommunications service is, perhaps surprisingly consistent with the [2002] *Cable Modem [Broadband] Order*.¹⁴⁶

The Wu/Narechania approach has two primary virtues: (1) it makes clear that Netflix and other content providers only send content out onto the network at the request of a broadband subscriber who is paying the ISP a substantial monthly charge for broadband connectivity; and (2) it describes part of that traffic – the “response” or B side traffic – as what it is: telecommunications.

But in attempting to square their proposal with the 2002 *Cable Broadband Modem Order*, Mozilla, Wu and Narechania avoid the “A” side of the market, the carrier-subscriber relationship, in order to avoid the reclassification problem. This approach appears to accept this Commission's 2002 classification mistake as fixed for all time, a result for which the network owners and the carriers also argue.¹⁴⁷ NASUCA has repeatedly pointed out that the FCC decision “was wrong when decided, and the error has become more obvious with each passing

¹⁴⁶ Wu and Narechania at 13 [footnote omitted, emphasis in original].

¹⁴⁷ See, e.g., AT&T Comments at 42.

year. With that 2002 error, the Commission effectively made most of the regulatory framework of the 1996 Telecommunications Act inapplicable to broadband.”¹⁴⁸ This mistake, made on the “A” side, and with uncertain application to the “B” side, needs in any event to be corrected.

A new focus on the “B” or content side of the ISP’s termination monopoly is consistent with the protection of consumers from interference when they use a content provider not favored by the ISP. It has the added virtue of allowing the Commission to think about net neutrality as an interconnection problem, as NASUCA has urged it to do.¹⁴⁹ Applying the Title II interconnection regime (47 USC §§ 251-252) to ISP-content provider interconnection would enable the Commission to use the hard-won wisdom it has accumulated from dealing with the abuses of terminating monopolists under that statutory scheme.¹⁵⁰

Netflix says in its July 15, 2014 Comments:

[T]he Commission should implement clear rules that ... terminating ISPs cannot charge data sources for interconnection and must provide adequate no-fee interconnection wholesalers and Internet services so consumers experience the broadband speeds for which they have paid. ... [T]he Commission should take

¹⁴⁸ NASUCA March 21, 2014 Comments in this proceeding, at 3, *passim*; see also NASUCA July 15, 2010 Comments in FCC’s now-dormant reclassification docket, WC 10-127, at 3, *passim*, analyzing the Court’s deference analysis in *Brand X* (“The majority found that either changed circumstances, or a mere ‘change in administration,’ could justify reversal of the policy”).

¹⁴⁹ NASUCA March 21, 2014 Comments, at 43 *ff.*

¹⁵⁰ In a May 9, 2014 *ex parte*, AT&T argued the *ad horrendum* consequences of a thorough-going reclassification:

For example, if broadband Internet access service is a telecommunications service, then broadband Internet access providers could be entitled to receive transport and termination fees under section 251(b)(5). The Commission could not avoid this occurrence by establishing a bill-and-keep regime because, unlike voice traffic, Internet traffic is asymmetric. And because Internet traffic would now be subject to reciprocal compensation, virtually every settlement free peering arrangement would have to be replaced by newly negotiated arrangements implementing the reciprocal compensation provisions of the Communications Act. Moreover, in those instances in which reciprocal compensation does not apply, ISPs would be entitled to file tariffs for the collection of charges for terminating Internet traffic to their customers.

(At 5.) What AT&T is describing here, however, is precisely the sort of regulatory arbitrage that the recently-upheld *Transformation Order* was designed to address. *In re FCC 11-161*, 753 F.3d 1015 (May 2014).

the same approach that it did in its recent *Intercarrier Compensation Order* dealing with interconnection for telecommunications services: that is, bill and keep. As the Commission explained, bill and keep has 'significant policy advantages,' because it 'ensures that consumers pay only for services that they choose and receive, eliminating the existing opaque implicit subsidy system under which consumers pay to support other carriers' network costs.¹⁵¹

NASUCA recognizes Netflix' self-interest in making this proposal, but it appears one way to prevent the network owners from choosing winners and losers, and ultimately determining the content that is available to Americans. The methodologies adopted in the *Transformation Order* and recently approved by the 10th Circuit,¹⁵² make the economics of bill-and-keep less problematic.

The Title II interconnection regime provides a framework to understand the B side issues. And this means reclassification of all transport.

NASUCA recommends that Title II be adopted for all transport, A and B side, so that the non-discrimination and no-blocking obligations inherent in the provision of telecommunications services are applied to consumers and information providers alike, and that the Commission specifically address and reverse its 2002 mistake.

IX. EMPHASIZING THE NEED FOR RULES

For small carriers, NTCA states,

Although the Commission's inquiry appears focused on the potential actions of retail broadband Internet access service providers, there are multiple participants in the ecosystem that makes up the Internet (the "Service and Network Ecosystem") who have both the incentive and the ability to either fulfill or frustrate consumer expectations with respect to an "Open Internet."¹⁵³

¹⁵¹ Netflix July 15, 2014 Comments, at 17.

¹⁵² *Re: FCC 11-161*.

¹⁵³ NTCA – The Rural Broadband Association ("NTCA") Comments at 1.

Those that have the incentive and the ability to frustrate consumer expectations should be prohibited from such action. Each of the incidents of discrimination or blocking to date has likely been predicted beforehand, as a hypothetical.¹⁵⁴ Another likely hypothetical would be if a carrier offered to pay a network owner the owner's immediate costs for carrying an increased level of streaming traffic, but the owner refused. This would be a clear example of market power, and not in the public interest. And it could happen, if it hasn't already.

X. CONCLUSION

For network owners, NCTA states,

As is always the case whenever the Commission considers new rules for the Internet, the Commission has been bombarded with apocalyptic predictions that the vibrancy of the Internet will somehow be destroyed unless the Commission subjects providers of broadband Internet access service to more heavy-handed regulation.¹⁵⁵

The more reasonable perspective is that the Commission has been bombarded with apocalyptic predictions *from network owners* that the Internet will somehow be destroyed if the Commission properly classifies broadband Internet access service, and applies well-established non-discrimination and no-blocking rules applicable to common carriers to ISPs.

¹⁵⁴ See CenturyLink Comments at ii. The possible extent of network owners' misbehavior cannot be minimized. See Hinton Telephone Company, File No: EB-SED-14-00016210, Notice of Apparent Liability for Forfeiture, DA 14-1070 (rel. August 4, 2014).

¹⁵⁵ NCTA Comments at 5.

Clearly, the Commission has another Herculean task before it. NASUCA urges the Commission to clean the Augean stables¹⁵⁶ by allowing the river of the public interest to flow open and free through the Internet, without blocking or discrimination. The Commission should disregard the obstructions set up by network owners wanting to retain their market dominance. NASUCA urges the FCC to adopt the framework for protecting consumers set forth – in response to the network owners' and their cohorts' comments □ in these reply comments.

Respectfully submitted.

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¹⁵⁶ <http://www.perseus.tufts.edu/Herakles/stables.html>.

WEB PAGE VISITS: SUMMARY STATISTICS

July 14th - August 14th, 2014 or most recent 30-day period for which data is available.

Source: www.trafficestimate.com [9/9/2014]

TOTAL WEB PAGES VISITED -- TOP 250 NON-ISP WEBSITES	30,652,595,941
TOTAL WEB PAGES VISITED -- ISP WEB PORTALS	92,935,100
TOTAL WEB PAGES VISITED	30,745,531,041

ISP WEB PORTAL VISITS AS PERCENT OF TOTAL	0.3023%
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WEB PAGE VISITS

July 14th - August 14th, 2014 or most recent 30-day period for which data is available.
 Source: www.trafficestimate.com [9/9/2014]

Rank	Website	Estimated Monthly Visits	Broadband Access Provider Web Portal
1	google.com	4,840,295,000	
2	facebook.com	2,668,419,000	
3	youtube.com	1,883,529,000	
4	yahoo.com	1,471,079,000	
5	baidu.com	1,214,450,000	
6	wikipedia.org	1,038,375,000	
7	qq.com	909,577,000	
8	twitter.com	732,947,000	
9	amazon.com	669,517,000	
10	live.com	616,880,000	
11	linkedin.com	572,449,000	
12	blogspot.com	456,525,000	
13	wordpress.com	341,161,000	
14	ebay.com	340,082,000	
15	bing.com	327,339,000	
16	pinterest.com	288,348,000	
17	ask.com	268,232,000	
18	instagram.com	260,533,000	
19	msn.com	228,217,000	
20	tumblr.com	221,463,333	
21	microsoft.com	207,996,000	
22	paypal.com	195,129,000	
23	imdb.com	177,156,000	
24	apple.com	173,981,000	
25	imgur.com	171,944,333	
26	craigslist.org	165,151,000	
27	stackoverflow.com	160,585,800	
28	t.co	157,237,000	
29	xhamster.com	153,985,333	
30	cnn.com	152,433,333	
31	reddit.com	147,874,000	
32	go.com	145,225,000	
33	bbc.co.uk	141,605,000	
34	blogger.com	140,622,333	
35	aliexpress.com	130,639,000	
36	wordpress.org	128,987,000	
37	googleusercontent.com	120,948,000	
38	kickass.io	119,949,000	
39	adobe.com	118,574,000	
40	huffingtonpost.com	117,860,000	
41	godaddy.com	117,232,000	
42	alibaba.com	117,232,000	
43	thepiratebay.se	105,420,000	
44	espa.go.com	101,382,000	
45	dailymotion.com	101,382,000	
46	akamaihd.net	100,425,000	
47	about.com	98,566,000	
48	netflix.com	97,665,000	
49	dailymail.co.uk	96,538,000	
50	vimeo.com	94,812,333	
51	theforest.net	93,412,000	
52	redtube.com	90,287,000	
53	flickr.com	86,684,000	
54	cnet.com	84,667,000	
55	dropbox.com	84,017,000	
56	amazonaws.com	84,017,000	
57	aol.com	82,131,000	
58	youporn.com	79,753,000	
59	conduit.com	78,066,000	
60	buzzfeed.com	76,983,000	
61	outbrain.com	74,911,900	
62	fiverr.com	74,884,333	
63	secureserver.net	74,340,750	
64	yelp.com	73,920,000	
65	nytimes.com	73,920,000	
66	weather.com	71,109,000	
67	wikia.com	70,231,750	
68	theguardian.com	70,223,000	
69	hootsuite.com	69,360,000	
70	mozilla.org	68,938,000	

WEB PAGE VISITS

July 14th - August 14th, 2014 or most recent 30-day period for which data is available.
 Source: www.trafficestimate.com [9/9/2014]

Rank	Website	Estimated Monthly Visits	Broadband Access Provider Web Portal
71	bbc.com	68,827,333	
72	gmail.com	68,520,000	
73	wikihow.com	67,301,000	
74	directrev.com	65,745,000	
75	etsy.com	64,997,000	
76	w3schools.com	64,695,000	
77	mailchimp.com	63,553,000	
78	forbes.com	63,051,000	
79	deviantart.com	62,837,000	
80	foxnews.com	61,513,000	
81	stumbleupon.com	61,513,000	
82	bankofamerica.com	60,229,000	
83	businessinsider.com	59,609,000	
84	avg.com	59,304,000	
85	files.wordpress.com	58,704,000	
86	answers.com	58,042,666	
87	indeed.com	57,829,000	
88	wikimedia.org	57,829,000	
89	stackexchange.com	57,543,000	
90	github.com	56,430,000	
91	chase.com	55,626,000	
92	archive.org	55,626,000	
93	aweber.com	54,339,000	
94	hostgator.com	54,339,000	
95	zillow.com	53,597,000	
96	reference.com	53,597,000	
97	loading-delivery1.com	53,597,000	
98	walmart.com	52,551,000	
99	addthis.com	52,273,400	
100	salesforce.com	51,948,000	
101	soundcloud.com	51,948,000	
102	skype.com	49,983,000	
103	tripadvisor.com	49,568,000	
104	wix.com	48,959,000	
105	statcounter.com	48,571,750	
106	bleacherreport.com	47,103,500	
107	wsj.com	46,676,000	
108	mashable.com	46,676,000	
109	telegraph.co.uk	46,318,000	
110	wellsfargo.com	45,966,000	
111	pandora.com	45,619,000	
112	twitch.tv	45,278,000	
113	moz.com	44,777,000	
114	weebly.com	44,612,000	
115	photobucket.com	43,809,000	
116	warriorforum.com	43,112,500	
117	ups.com	41,437,000	
118	ikea.com	40,752,000	
119	goodreads.com	39,704,000	
120	comcast.net	39,572,600	Comcast Corporation
121	infusionsoft.com	38,593,000	
122	media.tumblr.com	38,121,000	
123	zedo.com	38,005,000	
124	disqus.com	37,889,000	
125	usps.com	37,775,000	
126	meetup.com	37,102,000	
127	usatoday.com	36,884,000	
128	zendesk.com	36,455,000	
129	washingtonpost.com	35,832,000	
130	fedex.com	35,822,666	
131	bitly.com	35,769,666	
132	ign.com	35,659,200	
133	microsoftonline.com	35,509,000	
134	bluhost.com	35,232,000	
135	zeobit.com	35,134,000	
136	reuters.com	35,134,000	
137	constantcontact.com	35,036,000	
138	chow.com	34,372,000	
139	tmz.com	33,553,600	
140	hulu.com	33,378,000	

WEB PAGE VISITS

July 14th - August 14th, 2014 or most recent 30-day period for which data is available.
 Source: www.trafficestimate.com [9/9/2014]

Rank	Website	Estimated Monthly Visits	Broadband Access Provider Web Portal
141	nlb.gov	32,694,000	
142	time.com	32,627,600	
143	wcbmd.com	32,528,000	
144	nbcnews.com	32,217,333	
145	bestbuy.com	31,337,000	
146	lifelacker.com	31,261,000	
147	mlb.com	30,946,750	
148	4dsply.com	30,666,000	
149	homedepot.com	30,166,000	
150	bloomberg.com	29,957,000	
151	americanexpress.com	29,683,000	
152	groupon.com	29,615,000	
153	gfycat.com	29,548,000	
154	force.com	29,414,000	
155	getresponse.com	28,828,000	
156	target.com	28,576,000	
157	cj.com	28,452,000	
158	list-manage.com	28,390,000	
159	techcrunch.com	28,146,000	
160	intuit.com	28,086,000	
161	capitalone.com	28,026,000	
162	gizmodo.com	27,906,000	
163	pof.com	27,186,000	
164	accuweather.com	27,046,000	
165	surveymonkey.com	26,935,000	
166	nydailynews.com	26,398,000	
167	retailmenot.com	25,933,000	
168	abnews.go.com	25,782,000	
169	taboola.com	25,486,000	
170	trulia.com	25,389,000	
171	att.com	24,685,000	
172	latines.com	24,038,000	
173	pch.com	23,726,000	
174	expedia.com	23,684,000	
175	sharcasale.com	23,560,000	
176	houzz.com	23,117,000	
177	newegg.com	22,616,000	
178	leadpages.net	22,541,000	
179	match.com	22,466,000	
180	takeo.net	22,392,000	
181	upworthy.com	22,030,000	
182	citibank.com	21,680,000	
183	backpage.com	21,262,666	
184	eonline.com	21,133,666	
185	swagbucks.com	20,884,750	
186	cbsports.com	20,825,000	
187	hotels.com	20,825,000	
188	verizonwireless.com	20,793,000	
189	theblaze.com	20,638,000	
190	marketwatch.com	20,576,000	
191	yellowpages.com	20,244,000	
192	citrixonline.com	19,982,000	
193	priceline.com	19,698,000	
194	slate.com	19,698,000	
195	rottentomatoes.com	19,642,000	
196	glassdoor.com	19,532,000	
197	nordstrom.com	19,505,000	
198	liveleak.com	19,505,000	
199	ca.gov	19,398,333	
200	kayak.com	19,289,000	
201	cbslocal.com	19,209,000	
202	examiner.com	19,156,000	
203	gotomeeting.com	19,052,000	
204	gawker.com	19,026,000	
205	macys.com	18,821,000	
206	npr.org	18,745,000	
207	cnbc.com	18,729,000	
208	eventbrite.com	18,599,000	
209	southwest.com	18,522,000	
210	realtor.com	18,498,000	

WEB PAGE VISITS

July 14th - August 14th, 2014 or most recent 30-day period for which data is available.

Source: www.trafficestimate.com [9/9/2014]

Rank	Website	Estimated Monthly Visits	Broadband Access Provider Web Portal
211	lowes.com	18,401,000	
212	allrecipes.com	18,377,000	
213	slickdeals.net	18,196,666	
214	monster.com	18,149,666	
215	coupons.com	18,070,000	
216	m-w.com	18,065,600	
217	wunderground.com	17,752,000	
218	squarespace.com	17,663,000	
219	optmd.com	17,641,000	
220	ancestry.com	17,597,000	
221	sears.com	17,403,000	
222	sfgate.com	17,276,000	
223	overstock.com	17,171,000	
224	foxsports.com	17,068,000	
225	mapquest.com	16,747,000	
226	people.com	16,699,333	
227	zappos.com	16,592,000	
228	worldstarhiphop.com	15,984,000	
229	usmagazine.com	15,921,400	
230	verizon.com	15,702,000	
231	gap.com	15,207,000	
232	whitepages.com	14,655,000	
233	comcast.com	14,381,000	
234	foodnetwork.com	14,186,000	
235	ticketmaster.com	14,118,000	
236	disney.go.com	14,010,000	
237	nypost.com	13,997,000	
238	delta.com	13,944,000	
239	zulily.com	13,813,000	
240	united.com	13,621,000	
241	staples.com	13,596,000	
242	careerbuilder.com	13,534,000	
243	fidelity.com	13,484,000	
244	kohls.com	13,387,000	
245	nbcsports.com	13,383,666	
246	nfl.com	12,943,000	
247	cbsnews.com	12,926,600	
248	usbank.com	12,832,000	
249	emgn.com	12,788,000	
250	costco.com	12,284,000	
	cox.net	9,099,200	Cox Communications Inc.
	verizon.net	8,030,900	Verizon Communications Inc.
	bhn.rr.com	6,907,900	Bright House Networks LLC
	att.net	6,799,800	AT&T Inc.
	optimum.net	6,173,100	Cablevision Systems Corporation
	charter.net	5,955,000	Charter Communications Inc.
	centurylink.net	2,873,500	CenturyLink Inc.
	twcc.com	2,248,700	Time Warner Cable Inc.
	windstream.net	1,929,400	Windstream Communications
	suddenlink.net	1,209,100	Suddenlink Communications
	wowway.net	539,800	Wide Open West
	mediacomtoday.com	500,000	Mediacom Communications Corporation
	armstrongmywire.com	356,800	Armstrong Group of Companies
	atlanticbb.net	295,300	Atlantic Broadband Inc.
	midco.net	190,900	Midcontinent Communications
	wavebroadband.com	133,300	Wave Broadband
	metrocast.net	110,000	MetroCast Communications
	mybrctv.com	9,800	Blue Ridge Communications
	midco.net	190,900	Midcontinent Communications
	wavebroadband.com	133,300	Wave Broadband
	metrocast.net	110,000	MetroCast Communications
	mybrctv.com	9,800	Blue Ridge Communications