

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

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

REPLY COMMENTS OF TIME WARNER CABLE INC.

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COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. (“TWC”) hereby submits its reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) and Public Notice in the above-captioned dockets.¹

INTRODUCTION AND SUMMARY

The comments submitted in response to the NPRM express strong support for measured action to “protect[] and promot[e] Internet openness.”² In particular, the record reflects a broad consensus on the need for effective, balanced, and restrained open Internet rules that address specific potential harms to competition and consumers while preserving a favorable climate for investment and innovation. The more than one million comments received by the Commission in response to the NPRM reveal both how well the longstanding light-touch regulatory model applicable to the Internet is working, and how intensely Americans want to preserve it; today’s Internet is truly indispensable, demonstrating how profoundly the investments and innovations of broadband providers, edge providers, and other participants in the Internet ecosystem have transformed the world. But the record also underscores that the Commission’s task is to *protect*

¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28 (rel. May 15, 2014) (“NPRM”); *see also Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service; Pleading Cycle Established*, Public Notice, GN Docket No. 10-127, DA 14-748 (rel. May 30, 2014).

² NPRM ¶ 4.

and *promote*—and not to radically disrupt— the regulatory and competitive equilibrium that has allowed the Internet to flourish.

The opening comments confirm that the Commission has ample authority under Section 706 of the Telecommunications Act of 1996 to safeguard the open Internet by ensuring transparency, preventing the blocking of access to online content and services, and prohibiting commercially unreasonable business arrangements between broadband providers and edge providers that relate to the provision of Internet access service. The record also shows that reclassifying any component of broadband Internet access under Title II would be both flawed as a legal matter *and* a counterproductive policy choice. The reclassification proposals advanced in the record would ignore the “factual particulars” of what broadband providers actually offer consumers, while severely chilling the investment and innovation that Congress and the Commission have sought to promote. And many parties confirm that the prospect of forbearance from the most onerous aspects of Title II would offer cold comfort as a feasible regulatory alternative, in part because the Commission cannot grant meaningful relief without making findings that would undercut the rationale for imposing open Internet rules in the first place, and in any event because the Commission would consign broadband providers to operate under a cloud of regulatory uncertainty.

Finally, the Commission should reject the attempts by some parties to leverage the Commission’s appropriate concern about protecting the open Internet into new rules that would upend the traffic-exchange marketplace. As the Commission has repeatedly recognized, the economic arrangements governing the interconnection of networks do not implicate the concerns relating to the delivery of traffic over last-mile networks. And, in any event, the commercial agreements that facilitate the exchange of traffic between and among network operators

(including, in some cases, large edge providers that operate their own content delivery networks) are the result of free-market negotiations within a well-established industry framework. That framework encourages efficiency in the routing of traffic and adheres to bedrock principles of cost causation. Any effort to shoehorn traffic-exchange issues into this proceeding would likely derail the emerging consensus in favor of effective open Internet rules and would threaten to undermine the economic and technological relationships that bind the Internet together.

DISCUSSION

I. SECTION 706, RATHER THAN ANY TITLE II RECLASSIFICATION THEORY, SHOULD PROVIDE THE BASIS FOR NEW OPEN INTERNET RULES

A. The Record Reflects Wide-Ranging Support for Adopting New Rules Pursuant to Section 706

A diverse array of commenters—including not only the vast majority of Internet service providers (“ISPs”) but leading equipment manufacturers, edge providers, content delivery networks (“CDNs”), and public interest and advocacy groups—support the blueprint established by the D.C. Circuit and reflected in the NPRM, which proposes to rely on Section 706 as the basis for new open Internet rules. After years of uncertainty, the record confirms that the Commission has a legally sustainable and broadly supported path to reinstate the protections embodied in the 2010 Open Internet Order.

In particular, the record confirms that the Commission can use Section 706 to supplement its existing transparency requirements by (i) reinstating its no-blocking rule, and (ii) adopting a new standard of commercial reasonableness that remains focused on ensuring that any two-sided market arrangements involving broadband providers and edge providers do not result in anticompetitive “fast lanes” and “slow lanes” within last-mile broadband networks.

First, there is no doubt that Section 706 authorizes the Commission to maintain strong transparency protections. Indeed, the facilitation of informed choice by consumers is perhaps the central core of protection for an open Internet,³ and a principal means by which Section 706’s vision of ubiquitous broadband deployment can be achieved.⁴ No one disputes the importance of transparency. At the same time, the Commission should acknowledge the degree to which broadband providers are already serving the public in this regard. The record reflects strongly that the existing transparency rule has been working as intended, and in fact, that its requirements are being exceeded.⁵ Many commenters also recognize that the expanded disclosure proposals set forth in the NPRM would impose greater burdens than benefits, raising costs for providers and but providing little to no improvement in consumers’ access to meaningful information.⁶

Second, the record also supports reinstatement of the no-blocking rule from the 2010 Open Internet Order. Notably, even parties that are otherwise unconvinced about the need for open Internet regulation have not opposed the reissuance of a no-blocking rule by the Commission.⁷ Yet a broad chorus of commenters agree that any new no-blocking rule should be

³ Consumer Electronics Association (“CEA”) Comments at 8.

⁴ *See generally*, Verizon Comments at 21; ADTRAN Comments at 41; American Cable Association Comments at 27; CenturyLink Comments at 25; Comcast Comments at 18.

⁵ *See, e.g.*, AT&T Comments at 80 (observing that broadband providers are “not only complying with their obligations under the transparency rule, but surpassing them”); *see also*, Verizon Comments at 20.

⁶ *See, e.g.*, Comcast Comments at 16-18; Competitive Carrier Ass’n (“CCA”) Comments at 7; Frontier Communications Comments at 4–5; Independent Telephone and Telecommunications Alliance (“ITTA”) Comments at 8; Telecommunications Industry Association (“TIA”) Comments at 22; TechFreedom & International Center for Law and Economics Comments at 12–13.

⁷ *See* TWC Open Internet Comments at 31-34; National Cable and Telecommunications Ass’n (“NCTA”) Comments at 47-55; TIA Comments at 23-24; Cox Comments at 22.

limited to preventing actual “blocking” of access to online content or services, as opposed to requiring a “minimum level of access” based on quantitative standards that would be frozen in time, complicated to administer, and out of step with the rapid technical evolution of broadband networks and applications.⁸ In the same vein, there is scant support in the record for a tying performance standards to a vague “reasonable person” formulation, highlighting that the concept of what constitutes “reasonable” access to online content is ever-evolving.⁹ Commenters broadly agree that, in lieu of any such prescriptive measures, the Commission should specify that broadband providers must continue to deliver traffic on a “best efforts” basis¹⁰—a standard that TWC agrees “would be flexible and could evolve over time as common consumer uses of the Internet change,” and would “avoid a prescriptive technical standard which will quickly become outdated.”¹¹ There is every reason to conclude that a “best efforts” standard will be “an effective benchmark for a no-blocking rule.”¹²

Finally, there is broad record support for the Commission to rely on Section 706 in adopting a rule focused on “ensuring that ISPs transmit packets over their last-mile networks in a nondiscriminatory fashion.”¹³ But just as the transparency and no-blocking rules should be

⁸ See CenturyLink Comments at 32; Cox Communications Comments at 23; Mozilla Comments at 16; Microsoft Comments at 16-17; Public Knowledge Comments at 46-48; Vimeo Comments at 8-9.

⁹ See Ericsson Comments at 15; *see also* AARP Comments at 33-34; Cox Comments at 25; NCTA Comments at 60; Public Knowledge Comments at 46-48.

¹⁰ *See, e.g.*, AT&T Comments at 72-79; Cox Comments at 23; *see also*, Verizon Comments, Katz Decl. ¶ 32 (“A carefully crafted rule that ensures that traffic will not be blocked or degraded over an end user’s best-effort Internet access service would provide assurances that end users could access the content and applications that they desire and that edge providers would continue to have a path to reach end users.”)

¹¹ Online Publishers Association Comments at 11-12.

¹² AT&T Comments at 79.

¹³ *Id.* at 94.

balanced and restrained, a new requirement of “commercial reasonableness” should be narrowly tailored to the goal of preventing unreasonably discriminatory or otherwise anticompetitive arrangements between broadband providers and edge providers. Specifically, the Commission should clarify that the rule would govern only direct commercial relationships between broadband providers and edge providers relating to the transmission of Internet traffic over broadband Internet access service,¹⁴ in contrast to an amorphous restriction on broadband providers’ “practices.”¹⁵

B. Reclassifying Internet Access Under Title II Would Be Unlawful and Would Needlessly Chill Investment and Innovation

1. A “Telecommunications Service” Classification Cannot Be Squared with the Realities of the Service Actually Offered to Consumers

As TWC explained in its opening comments, implementing a massive change in the regulatory scheme surrounding ISPs—simply to accomplish policy goals that can be readily fulfilled pursuant to Section 706—would not only be a needless and counterproductive exercise but would require the Commission to overcome significant legal obstacles.¹⁶ The Commission’s consistent and unequivocal findings regarding the functionally integrated information service that broadband providers offer their customers, combined with broadband providers’ extensive, investment-backed reliance on those findings, weigh heavily against any proposed reclassification.

Although many proponents of Title II ignore the facts and rely solely on misguided policy arguments, the Supreme Court made clear in *Brand X* that “[t]he entire question” in

¹⁴ Comcast Comments at 22-25.

¹⁵ *Id.*; see AT&T Comments at 93-94.

¹⁶ See, e.g., TWC Open Internet Comments at 11–12; see also Comments of Time Warner Cable Inc., GN Docket No. 10-127 (filed July 15, 2010).

classifying broadband Internet access service “turns not on the language of the Act, but on the *factual particulars* of how Internet technology works and how it is provided.”¹⁷ Accordingly, the Commission would have to develop a solid factual basis for determining that its many previous classification rulings were erroneous, or that the nature of broadband Internet access has somehow fundamentally changed in recent years, to support reclassification. But the record in this proceeding is, unsurprisingly, devoid of such factual support, because broadband Internet access remains an inextricably integrated package of transmission and information processing, storage, and retrieval.

A handful of commenters argue that the Commission misunderstood the law when it classified broadband Internet access service in the 2002 *Cable Modem Order*.¹⁸ This “misunderstanding” arose, according to Free Press, because the Commission based its determination on the ability of users to access *applications* from the ISP, rather than a broader “connectivity to the Internet.”¹⁹ But the Commission of course did no such thing; as it explained in the *Cable Modem Order*: “Cable modem service typically includes many and sometimes all of the functions made available through dial-up Internet access service, including ... the ability to *retrieve information from the Internet*, including access to the World Wide Web.”²⁰ The

¹⁷ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005) (emphasis added). *See also* Brief for Petitioners Federal Communications Commission and the United States of America at 23, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.* (Nos. 04-277 and 04-281) (stating that “the question whether a particular service constitutes a ‘telecommunications service’ under the Communications Act *must be* resolved by reference to the nature of the provider’s ‘offering . . . to the public,’ and thus the classification ‘turns on the nature of the functions that the end user is offered.’”) (quoting 47 U.S.C. § 153(46)) (emphasis added).

¹⁸ *See, e.g.*, Free Press Comments at 63-83; Public Knowledge Comments at 74.

¹⁹ *Id.* at 78 (internal citations omitted).

²⁰ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 *FCC Rcd* 4798 ¶ 10 (2002)

Commission further described broadband Internet access services as “establishing a physical connection between the cable system and the Internet” and providing services that process and translate information, such as “protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching.”²¹ Moreover, the Commission recognized in 2002 that, just as is the case today, consumers often relied on web-based email services, browsers, and other third-party applications; that was beside the point, as the dispositive consideration was that, “[w]hether the subscriber chooses to utilize functions offered by his cable modem service provider or obtain them from another source, these functions [were] included in the standard cable modem service offering.”²²

Accordingly, the classification of broadband Internet access service as an “information service” subject to Title I regulation was based on a comprehensive analysis of the factual particulars of the service actually offered to end users. And these factual particulars have not changed since the Commission’s repeated classification decisions or the Supreme Court’s validation of the information service classification in *Brand X*. In fact, the Commission’s justification for classifying broadband services as an information service—the integrated nature of the telecommunications and information-processing/retrieval components—has even more

(emphasis added) (“*Cable Modem Order*”); see also *id.* ¶ 17 (“Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet.”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853* ¶¶ 14, 39 (2005) (“*Wireline Broadband Order*”) (finding that “wireline broadband Internet access service” is “a single, integrated service” that “provides the user with the ability to *send and receive* information at very high speed, and to access the applications and services available through the Internet”).

²¹ *Cable Modem Order* ¶ 17–18.

²² *Id.* ¶ 25. See also *Wireline Broadband Order* ¶ 15 (“The information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service.”).

support today than it was when the FCC first addressed the regulatory classification issue. As AT&T observes, there are many examples of features, such as pop-up blockers, spam protection, parental controls, and other functions integrated into modern broadband services—all unavailable in 2002—that illustrate the connectivity of the network hive.²³ Similarly, Verizon describes how it now integrates additional features into its broadband offerings, including cloud-based services and CDNs that store media content to enable consumers to access that content at faster speeds.²⁴ TWC provides similarly advanced and highly valued tools, such as security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and file storage, and a customizable home page for each user—all of which involve “generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing” information.²⁵ In short, the technological evolution of broadband is a story of increasing functional integration, which makes the Commission’s past findings both accurate and likely insurmountable.

The partial reclassification proposals advanced by Mozilla and others likewise conflict with technical realities, and their preferred policy outcome (a ban on payments by edge providers for paid prioritization) is at odds with the statutory requirement that a telecommunications service be offered for a fee.²⁶ First, as TWC explained in its opening comments, broadband service, by definition, includes two-way communication: the ability to send and to retrieve

²³ AT&T Comments at 49.

²⁴ Verizon Comments at 59–60.

²⁵ Time Warner Cable High Speed Internet Plans and Packages, *available at* <http://www.timewarnercable.com/en/internet/internet-service-plans.html>; 47 U.S.C. § 153(24) (definition of “information service”).

²⁶ Mozilla Comments at 9-12; *see* Letter from Tejas Narechania and Tim Wu, Columbia University to Marlene Dortch, Secretary, FCC GN Docket No14-28 (filed April 14, 2014).

information from the Internet.²⁷ If this were not the case, broadband service would be a mere intranet for subscribers of the service, denying users the ability to connect with the broader Internet and withholding the “steady and accurate flow of information between the cable system” and the Internet.²⁸ Second, even if the Commission were able to overcome the legal and factual barriers and create a contrived partial reclassification scheme, it could not simultaneously advance the proponents’ goal of precluding the imposition of fees on edge providers. Not only does the law not allow for the prohibition of such fees with respect to telecommunications services, but that is a required definitional element.²⁹ Even some Title II proponents recognize that partial reclassification along the lines proposed by Mozilla would be unlawful.³⁰

2. *Reclassification Is Equally Misplaced from a Policy Standpoint*

The record also confirms that pursuing any reclassification approach would be destabilizing and would thus be a recipe for deterring (rather than encouraging) investment and innovation. Free Press’s suggestion that applying Title II is actually “deregulatory” is absurd, and its claims that heavy-handed common-carrier regulation *promotes* investment is demonstrably false.³¹ Indeed, the parties that have made the most significant investments in broadband Internet access—the ISPs—uniformly recognize that Title II would deter continued investments in broadband infrastructure.³² Similarly, equipment providers such as Cisco note

²⁷ See TWC Open Internet Comments at 21.

²⁸ *Cable Modem Order* ¶¶ 14, 17.

²⁹ See 47 U.S.C. § 153(53) (defining a telecommunications service as the transmission of information of the user’s choosing “for a fee”).

³⁰ See, e.g., Letter of Professor Barbara van Schewick (Aug. 8, 2014); AARP at 42-46; Center for Democracy and Technology Comments at 21-22.

³¹ Free Press Comments at 36-46, 55-63.

³² See, generally, AT&T Comments at 39; Comcast Comments at 43; NCTA Comments at 38; United States Telecom Association Comments at 24–28.

that reclassification would “clearly disrupt the reliance interests of network providers, who have invested billions in building networks based on the expectation that broadband Internet access service is subject to light-handed regulation as an information service.”³³ Uncertainty has a powerful chilling effect on investment, and the prospect of subjecting broadband services to extensive new regulatory mandates would jeopardize the broadband deployment and adoption goals at the heart of Commission policy.³⁴

Forbearance would be far from sufficient to prevent these harmful effects of Title II regulation.³⁵ Indeed, forbearance would depend on findings that contradict the very arguments advanced in support of imposing open Internet rules, and the Commission’s forbearance standards cast considerable doubt on whether the requisite showings could be made on a sufficiently granular basis. As TWC explained in its opening comments, to justify forbearance from applying its regulations, the Commission must demonstrate that applying the regulation (1) is not necessary to ensure just and nondiscriminatory rates, (2) is not necessary to protect consumers, and (3) is inconsistent with the public interest.³⁶ Meeting this standard would require showing that the broadband marketplace is highly competitive, which would likely run counter to the factual determinations animating the imposition of common carrier obligations on broadband providers in the first place. And this challenge would be complicated by the fact that many

³³ Cisco Comments at 27; *see also* Akamai Comments at 10.

³⁴ *See, e.g.*, Hal Singer, *The Net Neutrality Debate Reduced To A Cocktail Napkin*, FORBES, (June 25, 2014, 9:29 PM), <http://www.forbes.com/sites/halsinger/2014/06/25/the-net-neutrality-debate-reduced-to-a-cocktail-napkin/> (arguing that “a heavy-handed Title II approach could risk substantial core investment without generating any offsetting incremental investment at the edge”).

³⁵ *See* CEA Comments at 12 (“Title II regulation, even with forbearance from application of certain legacy rules, would hamstring the flexibility that is key to broadband innovation.”).

³⁶ TWC Open Internet Comments at 19 *citing* 47 U.S.C. § 160(a).

proponents of Title II unabashedly seek to impose virtually the full panoply of common carrier requirements on broadband services, including unprecedented wholesale unbundling requirements in addition to price and service quality regulation.³⁷ In this context, a “light touch” framework under Title II is not readily achievable.

C. To the Extent “Paid Prioritization” Ever Becomes an Issue, Section 706 Provides Ample Authority to Address It

While the concept of “paid prioritization” has generated significant controversy and concern by public interest groups and the media, Title II reclassification is not remotely necessary as a response. As a threshold matter, the record makes clear that no broadband provider has actually established “fast lanes” and “slow lanes” on its network, and no provider has expressed any interest in doing so.³⁸ TWC and other cable broadband providers have made clear that they intend to give subscribers unfettered access to whatever lawful content and services are available online.³⁹ AT&T likewise asserts that it has “no intention of creating fast lanes and slow lanes or otherwise using prioritization for discriminatory or anticompetitive ends,” while Verizon more broadly explains that “neither Verizon nor any other broadband providers of which we are aware has introduced any form of paid prioritization arrangement to

³⁷ See, e.g., Public Knowledge Comments at 88-95; CompTel Comments at 21-23; New Media Rights Comments at 25; Mozilla Comments at 13; NARUC Comments at 14-16; Rural Broadband Policy Group Comments at 8-9.

³⁸ See, e.g., Sandvine Comments at 3 (stating that “to the best of our knowledge, none of the innovative service plans that Sandvine has helped implement across our customer base have involved payments between operators and edge providers for traffic priority – so-called Pay for Priority.”).

³⁹ See Comcast Comments at 22 (“For its part, Comcast has not entered into a single ‘paid prioritization’ arrangement, has no plans to do so in the future, and does not even know what such an arrangement would entail as a practical matter.”); NCTA Comments at 62-63 (noting lack of interest among ISPs in paid prioritization).

date, nor expressed a public interest in doing so.”⁴⁰ These are far from empty proclamations—they reflect the evolving structure of the Internet. Verizon describes in detail how the growing use of CDNs and other new and innovative techniques for managing and directing traffic, along with the enhanced capability and capacity of broadband networks, makes it unlikely that “there would be much benefit to most Internet traffic from prioritization, particularly for the ‘big guys’ on the Internet.”⁴¹

In any event, Section 706 enables the Commission to prohibit anticompetitive paid-prioritization arrangements between broadband providers and edge providers. Despite the lack of an existing problem to solve, several parties have proposed strong presumptions and other mechanisms that would enable the Commission to invoke Section 706 to prevent any harms associated with hypothesized fast lane arrangements. For example, Comcast and Verizon note that the Commission could adopt a rebuttable presumption against paid prioritization arrangements with discriminatory or otherwise anticompetitive attributes.⁴² Similarly, the National Minority Organizations suggest a rebuttable presumption against paid prioritization arrangements that degrade other content, so long as this presumption would nevertheless allow for prioritization that has significant potential benefits for consumers (*e.g.*, telemedicine).⁴³ The Communications Workers of America and NAACP likewise call for a rebuttable presumption against providers’ favoring their own content or that of their affiliates.⁴⁴

⁴⁰ AT&T Comments at 31; Verizon Comments at 37.

⁴¹ Verizon Comments at 37.

⁴² Comcast Comments at 24; Verizon Comments at 38.

⁴³ National Minority Organizations at 11.

⁴⁴ CWA & NAACP Comments at 19.

AT&T suggests a different approach, albeit with the same aims: It proposes that the Commission use Section 706 to “prohibit providers from engaging in paid prioritization of traffic over mass-market fixed broadband Internet access service where such prioritization is not authorized by end users.”⁴⁵ This proposal would allow *consumers* to manage their allotted bandwidth by opting in to faster service for particularly sensitive or important traffic, but would prevent system-wide fast-lanes and slow-lanes. Alternatively, AT&T argues that the Commission could provide broadband Internet access providers with a choice between either a voluntary commitment to refrain from paid prioritization or submission to more onerous regulatory obligations designed to ameliorate the perceived harms associated with such prioritization.⁴⁶

TWC believes that these proposals warrant careful consideration, and the limitations they entail would not result in the imposition of common carrier duties as long as the Commission allows for “other types of differentiated arrangements.”⁴⁷ The Commission should strive to craft a regulatory approach that precludes the development of anticompetitive and harmful fast lanes and slow lanes within last-mile networks while encouraging continued innovation, consumer choice, and competition.

Finally, it bears emphasis that Title II would not support a ban on all “discriminatory” two-sided market arrangements any more than Section 706 would. As TWC stated in its opening comments, Title II specifically *permits* service providers to treat customers differently where offering distinct levels of service, or as long as “discrimination” in the provision of equivalent

⁴⁵ AT&T Comments at 31–32.

⁴⁶ *Id.* at 37.

⁴⁷ Verizon Comments at 36–37.

services is not “unreasonable.”⁴⁸ The Commission has undertaken exhaustive examinations of what treatment is “reasonable,” finding that contract terms may be different so long as those differences are based on a “neutral, rational basis.”⁴⁹ Again, neither TWC nor any other ISP has expressed an interest in creating fast lanes within its broadband Internet access service. However, were such a service to be imagined, it would, in all likelihood, be structured as a reasonable offering based on cognizable distinctions between parties or the services they seek. At minimum, Title II would require the Commission to undertake a case-by-case review of such arrangements, in contrast to the categorical ban that most proponents of Title II favor.

In this regard, Public Knowledge provides no support for its position that paid prioritization can be classified as unjust and unreasonable on a blanket basis.⁵⁰ It provides no evidence of any harms suffered when two parties receive different services. To the contrary, as NCTA observes, reasonable fees for prioritization cannot be generally prohibited under Title II’s “unreasonable discrimination” standard.⁵¹ Moreover, allowing some level of individualized contractual arrangements and reasonable “discrimination” could help ISPs to provide a higher quality of service to all end users.⁵² Indeed, in part because of the perceived benefits to consumers, the Commission has repeatedly upheld a variety of differentiated terms and conditions, multiple service levels, and ranges in price, volume, duration, service and installation

⁴⁸ See TWC Open Internet Comments at 14 *citing* 47 U.S.C. § 202(a).

⁴⁹ See TWC Open Internet Comments at 14 *citing* *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984); *see also* Mobile Future at 12–14; Wireless Internet Service Providers Association at 40.

⁵⁰ Public Knowledge Comments at 102–103.

⁵¹ NCTA Comments at 27–29.

⁵² See Telecom Italia Comments at 3–4.

prioritization as not inconsistent with Title II.⁵³ Thus, even apart from the many legal and policy impediments to reclassification, it does not authorize the type of bright-line prohibitions that Title II proponents imagine.

II. THE COMMISSION SHOULD ADDRESS TRAFFIC-EXCHANGE ARRANGEMENTS THROUGH A SEPARATE PROCEEDING (IF AT ALL), AS THE NPRM PROPOSES.

The marketplace for the exchange of Internet traffic through peering and transit arrangements is robustly competitive and such agreements are the product of mutually beneficial negotiations. The Commission appropriately excluded these agreements from its proposed rule, noting in the NPRM that it intends to “maintain [the] approach” of the *2010 Open Internet Order*, which excluded “existing arrangements for network interconnection, including existing paid peering arrangements.”⁵⁴ TWC supported this conclusion in its opening comments, explaining that the marketplace for peering is healthy, with a diverse array of parties, vigorous negotiations, and complex contractual partnerships.⁵⁵ This complexity and competition is best illustrated, as TWC described, by the variety of options edge providers have in how to route traffic to the networks of broadband Internet access providers.⁵⁶ With countless partners from which to choose, content providers are not faced with a gatekeeper limiting their use of peering, transit, and CDN arrangements. Chairman Wheeler has rightly highlighted that the unique business arrangements that move traffic across the Internet distinguish traffic-exchange from the

⁵³ Verizon Comments at 52–53.

⁵⁴ NPRM ¶ 59.

⁵⁵ TWC Open Internet Comments at 30.

⁵⁶ See, e.g., Sandvine, *Choices: Video Providers, CDNs, Peers, ISPs...and You*, <http://www.internetphenomena.com/2014/05/choices-video-providers-cdns-peers-isps-and-you/>.

open Internet concerns that gave rise to the NPRM and should be addressed, if at all, in a separate proceeding.⁵⁷

Despite the distinct market dynamics and issues presented by traffic-exchange arrangements, some commenters nonetheless attempt to import backbone and interconnection issues into this proceeding. Netflix asserts, for example, that the Commission’s work of protecting consumers would not be “complete” unless any new rules “address the points of interconnection to terminating ISPs’ networks.”⁵⁸ But interconnection has no bearing on the “openness” of the Internet. Interconnection agreements determine where traffic is exchanged and who pays, but do not impact end users’ unfettered ability to access to any Internet content, service or application of their choice via their broadband Internet access service. Because the openness of the Internet is in no way determined by these commercial arrangements, the Commission should flatly reject efforts to conflate interconnection and open Internet issues.

While the merits of proposals to regulate traffic-exchange arrangements should be addressed elsewhere, the relatively few calls to supplant the market-based regime with Commission-dictated terms is seriously misguided. In today’s robustly competitive backbone marketplace, edge providers have many cost-effective ways to route content to ISPs and end users. The economics that drive networks rely on shared incentives; network operators (including ISPs and backbone providers) build networks with continually improving performance capabilities, while edge providers develop new compression and encoding technologies that use less capacity. This time-tested model results in a right-sized network and shared costs, ensuring that consumers receive the greatest value.

⁵⁷ See, e.g., Bryce Baschuk, *Wheeler: Peering Not a Net Neutrality Issue But FCC Spokesman Says It Will Be Watched*, Bloomberg BNA, Apr. 2, 2014, <http://www.bna.com/wheeler-peering-not-n17179889335/>.

⁵⁸ Netflix Comments at 11.

Netflix’s suggestion that the various transit pathways and third-party CDN connections into ISPs’ networks are all at capacity, necessitating coerced payments for peering,⁵⁹ is disingenuous and demonstrably false. TWC (like other ISPs) has substantial interconnection capacity available through a multiplicity of transit routes, and edge providers (rather than ISPs) control which routes their traffic will traverse. In fact, it is well documented—indeed, literally part of a peering “playbook”—that edge providers and transit providers often trump up claims of congestion to exert leverage in the interest of extracting more favorable economic terms.⁶⁰ The Commission should not be swayed by such gamesmanship. Any attempt to ban or restrict settlement payments (especially a rule that would prohibit payments flowing to ISPs, while continuing to subject ISPs to payment obligations where an unequal exchange of value results in such payments today) would prove enormously disruptive and dangerous. Indeed, if paid peering were, as Netflix alleges, a broken marketplace, then that would only underscore the need to examine peering issues comprehensively and holistically in a separate proceeding, and to apply any resultant rules to all participants in the traffic-exchange marketplace, not just to broadband providers. In contrast, any one-sided regulation would diminish or even eliminate edge providers’ incentives to rely on compression technologies and related tools, and would shift significant costs to purchasers of broadband Internet access services while subsidizing entertainment services that only a subset of broadband subscribers choose to purchase. Such

⁵⁹ See Netflix Comments at 13-15.

⁶⁰ See Dr. Peering International, *The Peering Playbook*, <http://drpeering.net/> (describing traffic-manipulation and bluffing tactics employed by edge providers and transit providers, including attempts to increase the costs of ISPs that resist settlement-free peering and efforts to create the appearance of performance problems that can only be solved by peering); see also MIT Information Policy Project, *Measuring Internet Congestion: A Preliminary Report*, at 2 (2014) (debunking the myth that a “widespread congestion problem [exists] among the U.S. providers”), available at <https://ipp.mit.edu/sites/default/files/documents/Congestion-handout-final.pdf>.

regulatory intervention would epitomize the risks of picking winners and losers in the marketplace, as it would elevate the interests of a small number of companies over those of broadband subscribers generally. Therefore, from a substantive as well as procedural perspective, the Commission should reject proposals to convert this open Internet proceeding into one focused on interconnection arrangements.

CONCLUSION

TWC joins the multitude of commenters from across America who support the Commission's goal of ensuring that the Internet remains the "preeminent 21st century engine for innovation" by protecting openness and preserving the ecosystem that has allowed the Internet to thrive.⁶¹ The Commission can best achieve that goal in this proceeding by relying on its Section 706 authority and crafting narrowly tailored rules that address discrete potential harms while avoiding the destabilizing and destructive impacts of Title II reclassification.

Respectfully submitted,

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⁶¹ NPRM ¶ 1.