

**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
THE UNITED STATES TELECOM ASSOCIATION**

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I. SUMMARY AND INTRODUCTION

The United States Telecom Association (“USTelecom”) and numerous commenters have demonstrated that broadband Internet access services, content and application creators and the entire information and technology sector are flourishing under the current regulatory regime. Broadband has been deployed and adopted at an unparalleled speed, facilitated by more than one trillion dollars of investment from the private sector. Investment in broadband network infrastructure has created jobs, spurred innovation, and revolutionized the way Americans communicate, learn, work, and shop. Today, customers enjoy more options, faster speeds, and lower prices in selecting a broadband service provider. Consumers and businesses are using the Internet more than ever before, further highlighting the success of the current regime for the entire broad sector. And, the evidence is clear that customers can and do change providers, as underscored by the significant churn in the broadband marketplace and the substantial lengths to which broadband providers will go in an attempt to attract and retain customers.

Some commenters seek to distort the historical record, the evidence, and the law in an effort to divert the Commission from this successful path. Specifically, in urging the Commission to abandon its successful “light touch” regulatory approach to broadband Internet

access services in favor of Title II regulation, these commenters peddle a variety of half-truths and untruths, including that: (i) Title II was not enacted to constrain carriers with monopoly power; (ii) the Commission historically imposed Title II obligations on broadband; (iii) Title II is a “light touch,” deregulatory regime that has spurred and will continue to spur investment; and (iv) Congress always intended that broadband be regulated as a Title II service. USTelecom files these reply comments to set the record straight.

As USTelecom explains below, these commenters misstate the purpose and effect of common carrier regulation generally and Title II regulation specifically. The Commission itself has found that Title II was enacted for the purpose of constraining the monopoly power of telephone companies in the 1930s. Consistent with its historical purposes, the Commission has never imposed Title II common carrier regulation on a provider in the absence of that provider possessing market power. There is not a shred of evidence that broadband providers possess the ability to set rates or restrict entry, which is the essence of market power.¹

Notwithstanding the claims of some commenters to the contrary, the Commission has never regulated broadband Internet access services under Title II. Although incumbent telephone carriers were required under the *Computer Inquiry* regime to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II, this requirement was a far cry from regulating the broadband service offered to end users as a Title II telecommunications service. Furthermore, the vast

¹ *High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, ¶ 318 (2008). As explained below, even in the absence of market power, a telecommunications carrier may elect to be subject to common carrier regulation under Title II by offering telecommunications indiscriminately to the public. However, a broadband provider’s election of Title II regulation for its own business reasons is vastly different from the imposition of such regulation by the Commission – a difference some commenters conveniently overlook.

majority of broadband providers – including cable, mobile, fixed wireless, satellite, and non-incumbent providers – have never been subject to *Computer Inquiry*. Thus, advocates of Title II regulation are not endorsing a “return” to anything but rather are seeking an unprecedented expansion of broadband regulation by the Commission.

The evidence is overwhelming that Title II is an onerous brand of public utility regulation and imposing such regulation on the broadband market would have a negative effect on investment, deployment, and competition. The Commission has acknowledged the burdens of Title II, and the record is replete with evidence of its adverse impacts – the severity of which cannot be mitigated by forbearance. The claims by some commenters that Title II would actually encourage investment are simply not credible.

The notion that Congress intended for Title II to apply to broadband services is belied by the purpose and text of the Telecommunications Act of 1996 (“1996 Act”). Claims by some commenters to the contrary also are flatly contradicted by the contemporary statements of the drafters of the 1996 Act.

Commenters advocating for Title II regulation also mischaracterize the manner in which broadband Internet access services are offered. The Commission classified broadband Internet access services as information services because the transmission and data processing components of these services are functionally integrated and are not offered separately. The Supreme Court agreed. Title II advocates seek to re-plow this settled ground by arguing that the Commission should find that broadband providers offer a separable transmission service to the public. This argument fails now, just as it did before. Because the information service capabilities of broadband offerings are even more functionally integrated with the underlying transmission component, the Commission has no factual basis in the record to classify broadband as a

telecommunications service or to disavow its representations to the Supreme Court about the way in which this service is offered.

A few commenters support an approach by which broadband Internet access service would be split artificially into component parts, while conveniently glossing over the legal and factual impossibilities of this approach. Broadband services encompass any purported service to edge providers because the transmission of information from an edge provider to an end user is functionally integrated with the broadband Internet access service offered to end users – a view endorsed by the Commission in its line of orders classifying broadband Internet access services as information services. Furthermore, the proposal to split broadband services into two parts conflicts with longstanding Commission policy not to divide artificially a communication into separate components.

Attempts to shoehorn broadband service into the definition of a telecommunications service also are unconvincing because there is no evidence that broadband providers are charging edge providers a fee – which is a legal predicate for a telecommunications service. Indeed, if the Commission were to declare any service offered to edge providers as a telecommunications service, it would have the unintended effect of compelling broadband providers to start charging such fees.

In their efforts to persuade the Commission to embrace Title II regulation of broadband, some commenters misstate the law regarding the Commission’s Section 706 authority. The D.C. Circuit affirmed the Commission’s authority to adopt rules—including blocking and nondiscrimination rules—to preserve and advance the open Internet. Despite the heated rhetoric from some commenters, the proposed rules will not, on their face, treat broadband providers as common carriers, as long as the Commission leaves sufficient room for broadband providers and

edge providers to negotiate mutually beneficial commercial arrangements. To the extent any such arrangement proves to be commercially unreasonable, the Commission could step in to protect consumers under the D.C. Circuit’s interpretation of Section 706. No need exists for the Commission to pivot to Title II to address these issues.

The rhetoric reaches a fever pitch when commenters address the subject of “paid prioritization.” The record is devoid of any evidence of an agreement for prioritized access to end users, and thus the alleged harms associated with such agreements are purely theoretical. Acting prematurely to ban all such agreements would foreclose experimentation with two-sided arrangements that could bring exciting new products and services to the market and benefit consumers. Furthermore, advocates of Title II regulation of broadband ignore that Title II would not authorize the Commission to declare all prioritization arrangements to be per se unreasonable – an approach historically eschewed by the Commission in regulating the telecommunications market. The most prudent course is for the Commission to allow this nascent market to develop while preserving the ability to address any more limited types of conduct that may cause competitive or consumer harm.

II. THERE IS WIDESPREAD AGREEMENT THAT THE COMMISSION’S CURRENT APPROACH TO REGULATING BROADBAND IS WORKING AND THAT IMPOSITION OF TITLE II REGULATION WOULD BE BAD POLICY AS WELL AS LEGALLY UNSUSTAINABLE.

A. Commenters Widely Agree That Broadband Has Been A Success By Every Measure Under The Current Regulatory Framework.

Among the substantive comments filed in this proceeding, broadband providers,² equipment manufacturers,³ trade associations,⁴ and public interest groups⁵ almost uniformly

² Comments of Time Warner Cable Inc., GN Docket Nos. 14-28, 10-127, at 1-3 (filed July 15, 2014) (“Time Warner Comments”); Comments of Verizon and Verizon Wireless, GN Docket Nos. 10-127, 14-28, at 4-16 (filed July 15, 2014) (“Verizon Comments”); Comments of AT&T

agree that the Commission should maintain its current approach to regulating broadband Internet access services – an approach that has allowed broadband services to function and flourish largely outside of regulatory constraints.

Under the current regulatory framework, broadband and the information and technology sector has been a tremendous success story. Broadband in particular has developed with a speed and scope unparalleled by any prior network technology, producing jobs, economic growth, productivity gains, and vast societal benefits. By virtue of broadband providers having invested \$1.3 trillion dollars in building out their networks since 1996,⁶ an overwhelming majority of Americans today can choose among multiple broadband providers offering access to the Internet

(footnote cont'd.)

Services, Inc., GN Docket Nos. 14-28, 10-127, at 6-26 (filed July 15, 2014) (“AT&T Comments”); Comments of Comcast Corporation, GN Docket Nos. 14-28, 10-127, at 4-13 (filed July 15, 2014) (“Comcast Comments”).

³ Comments of Alcatel-Lucent, GN Docket Nos. 14-28, 10-127, at 5-7 (filed July 15, 2014) (“Alcatel-Lucent Comments”); Comments of ARRIS Group, Inc., GN Docket Nos. 14-28, 10-127 at 3-7 (filed July 15, 2014) (“ARRIS Comments”).

⁴ Comments of the United States Telecom Association, GN Docket Nos. 14-28, 10-127, at 4-10 (filed July 16, 2014) (“USTelecom Comments”); Comments of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127, at 6-16 (filed July 15, 2014) (“NCTA Comments”); Comments of TIA, GN Docket No. 14-28, at 4-8 (filed July 15, 2014) (“TIA Comments”); Comments of the U.S. Chamber of Commerce, GN Docket No. 14-28, at 5-8 (filed July 15, 2014) (“Chamber Comments”); Comments of CTIA—The Wireless Association, GN Docket Nos. 14-28, 10-127, at 5-14 (filed July 18, 2014) (“CTIA Comments”); Comments of GSM Association, GN Docket Nos. 14-28, 10-127, at 3-8 (filed July 15, 2014) (“GSMA Comments”).

⁵ Comments of The Free State Foundation, GN Docket No. 14-28, at 6-9 (filed July 15, 2014) (“Free State Comments”); Comments of Communications Workers of America and the NAACP, GN Docket No. 14-28, at 7-14 (filed July 15, 2014) (“CWA/NAACP Comments”).

⁶ Patrick Brogan, USTelecom Research Brief, “Latest Data Show Broadband Investment Surged in 2013” (Sept. 8, 2014), available at <http://www.ustelecom.org/news/research-briefs/latest-data-show-broadband-investment-surged-2013>.

at increasingly dizzying speeds with more and more integrated functionality.⁷ The depth and breadth of broadband deployment across competing platforms has spurred a dynamic of competitive investment and innovation among networks, applications, content, and devices, providing substantial benefits to consumers and the United States economy.⁸

Instrumental to the creation of this thriving Internet ecosystem was the decision by Congress and the Commission to adopt a light-touch regulatory approach to broadband services. This regulatory framework has been essential to fostering dynamic growth throughout an Internet ecosystem that is characterized by rapid changes in technology, shifting consumer preferences, and constantly evolving opportunities for businesses and consumers. In short, the current regulatory approach to broadband is working.

Notwithstanding the successful course that Congress and the Commission have chartered, some commenters recommend a fundamentally different tact, urging the Commission to regulate broadband for the first time under Title II. As numerous commenters agree, however, imposing Title II on the U.S. broadband market would be a radical shift in a longstanding policy that has proven successful across the broad information and technology sector. It would be an extremely risky step, likely to be a policy failure, and unlawful in any event. Furthermore, no need exists for the Commission to rely upon an antiquated regulatory regime with its origins in the 1800s as the legal framework for regulating a dynamic and constantly evolving broadband marketplace.

⁷ *Id.* (noting that “fixed broadband at 50 mbps download or greater was available to 83 percent of Americans, up from 46 percent in 2010, and 100 mbps download or greater was available to 63 percent of Americans, up from only 11 percent in 2010”).

⁸ Tom Wheeler, Chairman, FCC, The Facts and Future of Broadband Competition, Prepared Remarks at the 1776 Headquarters, Washington, D.C., at 3-4 (Sept. 4, 2014) (“Broadband Competition Remarks”), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf (noting that various broadband providers increased investment in response to competition).

B. Title II Regulation Is A Poor Fit For The Competitive Broadband Market.

USTelecom and many commenters have demonstrated that imposing Title II’s monopoly-era regime on broadband services would harm investment in broadband infrastructure and threaten the continued success of the Internet.⁹ Those commenters who advocate Title II regulation of broadband fail to comprehend the drastic implications of such a radical change in communications policy and distort the historical record, the evidence, and the law in the process.

1. Title II Common Carrier Regulation Was Intended For Carriers With Monopoly Power.

In their zeal to have the Commission impose Title II on broadband providers, some commenters grossly misstate the origin and purpose of common carrier regulation under Title II. For example, Public Knowledge argues that “[c]ommon carriage rules are not ‘monopoly’ rules,”¹⁰ while Free Press boldly proclaims that “[c]ommon carriage as embodied in Title II is most certainly not a framework for monopolies offering telephone service, but a framework for competition and consumer protection in two-way communications networks.”¹¹ Indeed, according to Free Press, “[c]ommon carriage has nothing to do with regulated utilities or monopolies,”¹² nor is Title II “a legal framework for communications monopolies.”¹³

⁹ See, e.g., USTelecom Comments at 15-22; GSMA Comments at 8-16.

¹⁰ Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, GN Docket Nos. 14-28, 10-127, 09-191, WC Docket No. 07-52, at 10 (filed July 15, 2014) (“Public Knowledge Comments”).

¹¹ Comments of Free Press, GN Docket Nos. 14-28, 10-127, 09-191, at 3 (filed July 17, 2014) (“Free Press Comments”).

¹² *Id.* at 2.

¹³ *Id.* at 3.

Such claims cannot be squared with the Commission’s view of common carrier regulation or well-established historical facts.¹⁴ In the *Competitive Carrier Proceeding*, for instance, the Commission undertook “a careful examination of the nature of its authority under Title II of the Communications Act of 1934.”¹⁵ The Commission concluded that Title II is a “regulatory scheme directed at the problems associated with monopoly control or market power,”¹⁶ noting that the statute “was primarily enacted to constrain the exercise of substantial market power possessed by firms providing communications services in 1934.”¹⁷ “Indeed, under

¹⁴ See AT&T Comments at 54 (“Title II is 80 years old and was designed to apply to monopoly-era telephone service, not to modern-day broadband Internet access service”); CTIA Comments at 47 (“Title II was implemented 80 years ago to address monopolistic conditions in the wireline voice telephony marketplace of the 1930s”); Comments of Charter Communications, GN Docket Nos. 14-28, 10-127, at 16 (filed July 18, 2014) (“Charter Comments”) (noting that Title II “was enacted to regulate the then-existing monopoly telephone companies”).

¹⁵ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Transfer*, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, ¶ 1 (1981) (“*Competitive Carrier FNPRM*”).

¹⁶ *Id.* ¶ 42; see also PETER WILLIAM HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW 1-20 (2014) (“Huber et al.”) (“Monopoly was, in any event, the clear premise of the 1934 Act.”); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 261 (2002) (“The history of common carrier regulation of telephone companies demonstrates a similar dual concern with controlling monopoly and, more generally, with declaring telephony to be a public enterprise.”); Free State Comments at 3-4, 20-21; Comments of Wireless Internet Service Providers Association, GN Docket No. 14-28, at 39 (filed July 16, 2014) (“WISPA Comments”); Verizon Comments at 47.

¹⁷ *Competitive Carrier FNPRM*, ¶ 6; see also *id.*, ¶ 8 (explaining that the basis “for the imposition of common carrier obligations is the possession of market power so clearly addressed by the 1934 enactment”); *id.*, ¶ 12 (“the mechanisms Congress adopted in Title II are designed to be employed to limit the conduct of dominant firms”); *id.*, ¶ 14 (concluding that “market power provided the principal justification for” telecommunications regulation); *id.*, ¶ 36 (explaining that Title II “was developed in recognition of the monopoly position held by the providers of what Congress deemed to be an essential public service”); *id.*, ¶ 42 (“Congress intended to create a regulatory system to constrain the abuses market power portends.”); *id.*, ¶ 56 (“The regulatory framework of Title II, and its attendant legislative history, reveals an almost unambiguous intent to regulate entities with market power.”); *id.*, ¶ 62 (“[A] duty to deal indifferently, legislatively imposed in 1934 for communications carriers, was imposed because of a recognition of a carrier’s monopoly control over essential services.”).

both the common law and our nation’s basic economic policies founded in the antitrust laws, no duty to deal exists in the absence of monopoly power.”¹⁸

The Commission also conducted a lengthy examination of the origins of common carriage at English common law.¹⁹ It concluded “that monopoly control over services regarded as essential to the public welfare formed the basis for imposing common carrier obligations upon businesses.”²⁰ According to the Commission, “the common law imposed the duty of common or public callings on a case-by-case basis upon *certain essential occupations which were effective monopolies.*”²¹

The Commission has recognized that imposing common carrier obligations on companies without market power “disserves the public interest” and “serve[s] directly to undermine” the Commission’s “statutory mandate.”²² Indeed, according to the Commission, imposing “a duty to deal indiscriminately” on companies without market power can “inhibit entry and disable

¹⁸ *Id.*, ¶ 37; see also *S. Pac. Commc’ns Co. v. Am. Tel. & Tel. Co.*, 556 F. Supp. 825, 886 (D.D.C. 1982), *aff’d*, 740 F.2d 980 (D.C. Cir. 1984) (concluding that “the statutory framework and legislative history of Title II of the Communications Act clearly show that the regulatory scheme was designed ‘primarily to constrain the market power of communications suppliers’ and to prevent ‘the problems associated with monopoly control or market power’”) (citing *Competitive Carrier FNPRM*, ¶ 33a, ¶ 41).

¹⁹ See *Common Carrier FNPRM* Appendix B, ¶ 2.

²⁰ *Id.*, ¶ 1; see *id.*, ¶¶ 5, 7, 9. Huber et al. at 1-13 (“The earliest common carriers were created when the Crown awarded an exclusive monopoly to a company operating such things as a ferryboat, a wharf, or for a time, a printing press.”); Speta, *A Common Carrier Approach to Internet Interconnection*, at 228 (“An examination of the common law and leading common carrier statutes demonstrates that common carrier duties were imposed to combat monopolies or to address other public interests.”).

²¹ *Common Carrier FNPRM* Appendix B, ¶ 7 (emphasis added).

²² *Id.*, ¶¶ 14, 68.

suppliers from tailoring their services to meet particular customer needs,” which can lead to “inefficiencies inevitably borne by consumers through the higher cost of goods and services.”²³

Consistent with this longstanding view and established history, the Commission repeatedly held that it cannot impose common carrier status on a provider unless that provider has “sufficient market power to warrant regulatory treatment as a common carrier.”²⁴ As the Commission has explained, where there are sufficient competitive alternatives, common carrier regulation is unnecessary because the provider lacks “market power and will not be able to charge monopoly rates”²⁵ Even Free Press recognizes, in a remarkable moment of candor, that Title II regulation “is centered on market power analysis.”²⁶

2. There Is No Evidence That Broadband Providers Have Market Power Or Act As Terminating Monopolies.

There is no evidence that broadband providers have market power that could justify the imposition of common carrier regulation. The Commission did not perform a market power analysis in the *Open Internet Order*,²⁷ nor did it purport to conduct such an analysis in the

²³ *Id.* ¶ 68.

²⁴ *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585 (1998) (“*AT&T Submarine Systems Order*”), *aff’d*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (“The Commission focused its inquiry on whether AT&T–SSI “has sufficient market power to warrant regulatory treatment as a common carrier.”); *see also* Time Warner Comments at 14; Verizon Comments at 65-68. Free Press notes that common carrier duties apply to commercial mobile radio service providers, “despite their non-monopoly status,” *see* Free Press Comments at 29, but that decision was made by Congress, not the Commission.

²⁵ *AT&T Corp.; MCI International, Inc.; SCBI-Pacific Networks, Inc.; Sprint Communications Company, L.P.; Teleglobe USA, Inc.*, Cable Landing License, 13 FCC Rcd 16232, ¶ 11 (1998).

²⁶ Free Press Comments at 142; *cf.* Free Press Comments at 28-29 (claiming that it “is an obvious and well-established truth” that “Title II and common carriage have absolutely no relation to a market’s level of competition”).

²⁷ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶ 32 n.87 (2010) (“*Open Internet Order*”) (“Because broadband providers have the ability to act as gatekeepers

NPRM. Indeed, the NPRM categorically rejects the notion of market power as a basis for regulation,²⁸ particularly when consumers have multiple options for broadband Internet access service.²⁹ The record fully supports the conclusion that the broadband market is competitive and that broadband providers do not have market power.³⁰ In the absence of market power, the Commission cannot simply “impose common carrier status upon any given [broadband provider] on the basis of the desired policy goal the Commission seeks to advance.”³¹

(footnote cont’d.)

even in the absence of market power with respect to end users, we need not conduct a market power analysis.”).

²⁸ See *Open Internet NPRM*, ¶ 49 (“Under the Commission’s reading, which the court upheld, our section 706 authority is not predicated on a finding of market power, specifically, that broadband providers need not be found to be ‘benefiting from the sort of market concentration that would enable them to impose substantial price increases on end users.’”).

²⁹ *Id.*, ¶ 48.

³⁰ Alcatel-Lucent Comments at 8-9 (“Furthermore, unlike the utility monopolies of the Nineteenth and early Twentieth centuries, broadband providers are competing to provide the latest advanced services and products, which renders unnecessary traditional common carriage protections. Likewise, with dynamic changes to broadband services, and with broadband platforms and network technologies rapidly evolving, the broadband market is ill-suited for regulation under Title II.”); NCTA Comments at 37 (“But the Commission did not and could not find that ISPs had market power when it adopted the 2010 Open Internet Order or when it defended that order before the D.C. Circuit, and plainly could not make such a finding in today’s increasingly competitive environment.”); Time Warner Comments at 14 (“The Commission has not suggested (much less demonstrated) that any broadband Internet access service provider has market power, let alone the ability to charge ‘monopoly rents.’”); Verizon Comments at 66 (“There is no monopoly and no government restriction on entry.”); Free State Comments at 10 (noting that “the Commission failed to cite any evidence of market power or consumer harm in its Notice. Nor did its Notice even present evidence of likely anticompetitive concerns.”).

³¹ *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

Some commenters argue that broadband providers act as terminating monopolists for edge providers seeking access to end users.³² But this argument fundamentally misapprehends the concept and misconstrues the context in which the Commission has used the term.³³

In the *CLEC Access Reform Order*, the Commission used the “terminating monopoly” concept to describe the power of competing local exchange carrier (“CLEC”) to “charge excessive rates for terminating access service” due to a “disjunction implicit in terminating access.”³⁴ CLECs are terminating monopolists in the access market, according to the Commission, because long distance carriers have no choice but to use the called party’s provider to terminate a telephone call and the tariffing regime mandated payment without individual contract negotiations. Thus, regardless of competition, “terminating access may remain a bottleneck controlled by whichever LEC provides terminating access to a particular customer.”³⁵ The Commission decided to regulate CLEC access rates because “the market for access services does not appear to be structured in a manner that allows competition to discipline rates.”³⁶

The competitive broadband market is fundamentally different. “[C]ompetitive forces are likely to deter any effort by a broadband provider to charge inefficiently high access charges for delivering broadband content to a consumer” because “most consumers have access to several

³² Public Knowledge Comments at 13-14; Comments of the Ad Hoc Telecommunications Users Committee, GN Docket 14-28, at 7-16 (filed July 18, 2014). (“Ad Hoc Comments”); see also *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014).

³³ Senior Judge Silberman has criticized the Commission’s use of the term “terminating monopoly” as lacking any basis in economic literature. See *Verizon*, 740 F.3d at 663 (Silberman, J., dissenting) (“These are terms, largely invented, the economic significance of which the Commission does not explain”).

³⁴ See *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶¶ 10 (2001) (“*CLEC Access Reform Order*”).

³⁵ *Id.*, ¶ 11.

³⁶ *Id.*, ¶ 32.

choices for broadband service.”³⁷ Even Public Knowledge concedes that “the competitive situation for high-speed broadband has improved since the Commission’s order in 2010.”³⁸ Because of competitive alternatives, “[i]f a broadband provider attempted to charge ‘inefficiently high’ prices to content suppliers to serve certain consumers,” these charges would be passed on to end users, who “could switch to another broadband provider.”³⁹

Furthermore, the Commission only stepped in to regulate CLEC access rates after compiling a record demonstrating a market failure evidenced by CLECs charging excessive rates for terminating access services.⁴⁰ In the broadband market, there is no evidence—or even a suggestion—that broadband providers are charging unjust or unreasonable rates (or charging anything in the case of edge providers), and no current tariffing mechanism exists that would mandate payment.⁴¹ Thus, even assuming broadband providers are terminating monopolists (which is a dubious assumption), there is no market failure that may otherwise warrant Commission action.⁴²

Although the Commission previously found that switching costs deter consumers from changing broadband providers – a sentiment recently expressed by Chairman Wheeler – the

³⁷ Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 35-36 (filed Jan. 14, 2010) (“Verizon 2010 Comments”), Attachment C, Declaration of Michael D. Topper, ¶ 62 (“Topper Declaration”).

³⁸ Public Knowledge Comments at 14; *see also* Free Press Comments at 43 (conceding that, “for the substantial majority of the country, broadband access is offered in a non-monopoly market”).

³⁹ Topper Declaration ¶ 150.

⁴⁰ *CLEC Access Reform Order* ¶¶ 24, 34.

⁴¹ *Open Internet NPRM* (Commissioner Michael O’Rielly, dissenting); USTelecom Comments at 19.

⁴² *See Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (“Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking”).

reality is otherwise.⁴³ As USTelecom discussed at length in its initial comments, actual market data as well as several consumer surveys confirm that customers can and do routinely switch broadband providers.⁴⁴ Although Public Knowledge cites a study finding that switching costs remain a problem,⁴⁵ that study was “focus[ed] primarily on Europe” and recognizes that “the presence of switching barriers is not in of itself evidence of a lack of competition.”⁴⁶

The fact that consumers may be subject to “early-termination fees, and equipment rental fees” does not prevent consumers from changing broadband providers.⁴⁷ Indeed, broadband providers frequently waive early termination fees⁴⁸ and activation fees,⁴⁹ while others offer to pay early termination fees to entice customers to switch providers.⁵⁰ With respect to equipment rental fees, broadband providers have been touting free broadband equipment to attract new customers.⁵¹ That some consumers have struggled “to get ISPs to allow them to drop service”⁵² is a perfect illustration of the competitiveness of the market and the lengths to which some providers will go to retain their customers.

⁴³ *Open Internet Order*, ¶ 34; Broadband Competition Remarks at 4.

⁴⁴ USTelecom Comments at 11-14.

⁴⁵ Public Knowledge Comments at 16-18 (citing Robert Kenny & Aileen Dennis, *Consumer Lock-in for Fixed Broadband*, Computers & Comm. Industry Ass’n Report, 4 (Sept. 5, 2013), <http://www.ccianet.org/wp-content/uploads/2013/10/Consumer-Lock-In-For-Fixed-Broadband.pdf> (“Kenny & Dennis”)).

⁴⁶ Kenny & Dennis at 7.

⁴⁷ Broadband Competition Remarks, at 4.

⁴⁸ See USTelecom Comments, Appendix A, Exhibit 6 – Time Warner Cable (“No Early Termination Fees”).

⁴⁹ See *id.*, Appendix A, Exhibit 7 - Verizon.

⁵⁰ See *id.*, Appendix A, Exhibit 2 – Charter Communications (“Stuck in a contract? We’ll pay your early termination fees up to \$500!”).

⁵¹ See *id.*, Appendix A, Exhibit 2 – Charter Communications (“Free Modem”); Exhibit 4 – DSL Extreme (“Free Equipment Lease & Free Self-Installation”).

⁵² Broadband Competition Remarks, at 4.

Public Knowledge blames switching costs on the bundling of triple-play services,⁵³ but the Commission and economists agree that bundles offer numerous consumer benefits.⁵⁴ According to the Commission, bundles are “highly attractive” to consumers, providing “not just advanced telecommunications capability, but also . . . simplicity and efficiency.”⁵⁵ In fact, the Commission repeatedly has cited a provider’s ability to offer new bundles as an important public interest benefit.⁵⁶ Accordingly, “[t]he fact that bundling occurs in competitive markets is evidence that the practice has efficiency explanations.”⁵⁷ Even Public Knowledge concedes that, when it comes to triple play bundles, consumers “are happy with those arrangements.”⁵⁸

⁵³ Public Knowledge Comments at 16-18.

⁵⁴ See, e.g., Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 72 (2007) (“Consumers realize benefits from bundling with reduced prices and reduced transaction costs”); Jeffrey Prince, *The Dynamic Effects of Triple Play Bundling in Telecommunications*, TWC Research Program on Digital Communications, at 7 (Winter 2012) (“[T]he most common reason to bundle is cost savings,” though bundling also creates value through a “simplif[ication] of record-keeping, payment scheduling, and utilization of customer service . . . even if there is no bundle price discount”), available at http://www.twcresearchprogram.com/pdf/TWC_PrinceReport.pdf.

⁵⁵ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 20 (2007).

⁵⁶ See, e.g., *Applications of GCI Communication Corp., ACS Wireless License Sub, Inc., ACS of Anchorage License Sub, Inc., and Unicom, Inc. for Consent to Assign Licenses to the Alaska Wireless Network, LLC*, Memorandum Opinion and Order and Declaratory Ruling, 28 FCC Rcd 10433, ¶¶ 67, 86 (2013); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698, ¶ 143 (2012).

⁵⁷ Stan J. Liebowitz and Stephen E. Margolis, *Bundles of Joy: The Ubiquity and Efficiency of Bundles in New Technology Markets*, Perspectives from FSF Scholars (Jan. 24, 2008), available at http://freestatefoundation.org/images/Bundles_of_Joy.pdf.

⁵⁸ Public Knowledge Comments at 17.

3. Commenters Supporting Title II Regulation Misconstrue The Historical Regulatory Regime Applicable to Broadband.

In support of their call for Title II regulation, some commenters assert that it would amount to a “return” to or “restor[ation]” of common carrier regulation of broadband, which they claim was the “DNA of the network revolution.”⁵⁹ Such assertions are demonstrably false.

First, with the exception of the basic transmission service underlying an incumbent telephone carrier’s enhanced services that was required under the *Computer Inquiry* regime to be provided pursuant to tariffs governed by Title II, no aspect of the broadband marketplace has ever been subject to Title II regulation. The Commission has never regulated cable modem service, mobile broadband, fixed wireless, satellite, or broadband services offered by non-incumbent telephone under Title II, and it is misleading for any commenter to suggest otherwise.

Second, even under the *Computer Inquiry* regime, the Commission did not regulate the broadband Internet access services provided by incumbent telephone companies to end users. In *Computer I*, the Commission first addressed “the nature and extent of regulatory jurisdiction and control” over “data processing” services.⁶⁰ There, the Commission held, with regard to data processing, that “there will be total regulatory forbearance with respect to the entire service whether offered by a common carrier or non-common carrier.”⁶¹ Nine years later, *Computer II* distinguished between “basic transmission service” and “enhanced services,” “subjecting only the former to mandatory Title II regulation.”⁶² The Commission “determined that enhanced

⁵⁹ See, e.g., Free Press Comments at 15, 22 & 53.

⁶⁰ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267, ¶ 2 (1971) (“*Computer I*”).

⁶¹ *Id.*, ¶ 31.

⁶² *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 211 (3d Cir. 2007).

services, which are offered ‘over common carrier transmission facilities,’ were themselves not to be regulated under Title II of the Act, no matter how extensive their communications components.”⁶³ Thus, imposing Title II regulation on broadband Internet access services would represent a dramatic departure from and be completely inconsistent with the *Computer Inquiry* regime’s hands-off approach to enhanced or information services.

Calls for a return to the *Computer Inquiry* regime also make little sense in light of technological advances in the broadband market. While *Computer II* imposed nondiscriminatory access requirements on incumbent telephone carriers, it did so only because “the telephone network was the primary, if not exclusive, means through which information service providers [could] gain access to their customers.”⁶⁴ As the Commission recognized when it eliminated those requirements, there are now “numerous technologies and network designs that form, or potentially could form, part of the broadband telecommunications infrastructure of the 21st century.”⁶⁵ In the nearly ten years since that decision, the broadband market has gone through even more technological changes, which renders the *Computer Inquiry* regime a policy for a bygone era, not a blueprint for the future.⁶⁶

⁶³ *Stevens Report*, ¶ 27.

⁶⁴ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967, 972 (2005).

⁶⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 33 (2005) (“*Wireline Broadband Order*”).

⁶⁶ While insisting that the *Computer Inquiry* regime was “directly responsible for enabling the growth of the Internet,” Free Press Comments at 35, Free Press overlooks the limited use being made of the tariffed transmission component of broadband Internet access services that incumbent LECs were required to make available on a tariffed basis when the Commission eliminated this requirement in 2005. See *Wireline Broadband Order* ¶ 63, n.181 (citing Letter from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33, Attach. at 8 (filed Apr. 25, 2005) (“noting that only one percent of the total broadband customers in BellSouth’s nine-state region obtain service from ISPs using BellSouth’s *Computer Inquiry*-required tariffed DSL transmission offering”).

4. Common Carriage Is A Particularly Onerous Method Of Regulating Public Utilities That Will Deter Broadband Investment.

Some commenters suggest that Title II is a “light touch” regulatory regime that does not impose major burdens on regulated entities. For example, Free Press claims that Title II is “not a burdensome regulatory framework in any respect” because it is a “highly deregulatory policy framework” that prefers “competition over regulation.”⁶⁷

Nothing could be further from the truth, as the Commission itself has acknowledged.⁶⁸ Title II is widely acknowledged to be an archaic, onerous form of regulation,⁶⁹ representing “the traditional approach to public utility regulation” in the United States.⁷⁰ “The essential elements of Title II regulation entail control on price, publication of terms and conditions of service, prohibitions on discrimination, control on investments and an obligation to serve all.”⁷¹ Furthermore, subjecting broadband to Title II regulation could expose broadband providers to the regulatory mercy of fifty state regulatory authorities – which would hardly be a “deregulatory”

⁶⁷ Free Press Comments at 3.

⁶⁸ See, e.g., *Decreased Regulation of Certain Basic Telecommunications Services*, Notice of Proposed Rulemaking, 2 FCC Rcd. 645, ¶ 11 (1987) (noting “the regulatory burdens imposed by our rules pursuant to Title II,” which the Commission sought to reduce or remove by means of “the ‘deregulation’ of basic services”); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 17 (1994) (granting forbearance to CMRS providers from various provisions of Title II that imposed “burdensome regulatory requirements that might impede their provision of service or place them at a competitive disadvantage in the mobile services marketplace”).

⁶⁹ See *Open Internet NPRM* (Commissioner Michael O’Rielly, dissenting); Free State Comments at 4; CTIA Comments at 47; NCTA Comments at 17-20; Chamber Comments at 1-8; Verizon Comments at 48-51; WISPA Comments at 39-40.

⁷⁰ *Competitive Carrier FNPRM*, ¶ 34.

⁷¹ *Id.*

approach.⁷² As former Chairman William Kennard observed in responses to calls for Title II regulation 15 years ago, “if we have the hope of facilitating a market-based solution here, we should do it, because the alternative is to go to the telephone world, a world that we are trying to deregulate and just pick up this whole morass of regulation and dump it wholesale on the cable pipe. That is not good for America.”⁷³

Public Knowledge’s proposal to impose Section 214 entry and exit regulation on broadband providers highlights the incongruity of Title II regulation.⁷⁴ As the Commission has explained, Section 214 harms firms operating in a competitive market because “certification procedures can actually deter entry of innovative and useful services, or can be used to delay or block the introduction of such innovations . . . [and] deter potential entrants from entering the marketplace.”⁷⁵ “Artificial barriers to entry erected by an indiscriminate application of Section 214 entry and exit authority translates into less varied communications services, the slower introduction of new services, and the greater security of the market positions of those firms to which our regulatory efforts should be targeted.”⁷⁶

Imposing Title II requirements on broadband would inhibit exactly what has allowed the broadband market to develop so effectively: the ability to innovate rapidly.⁷⁷ As Verizon aptly

⁷² *Stevens Report*, ¶ 48 (“The classification of information service providers as telecommunications carriers, moreover, could encourage states to impose common-carrier regulation on such providers.”).

⁷³ William E. Kennard, Chairman, FCC, Consumer Choice Through Competition, Remarks at the National Association of Telecommunications Officers and Advisors Annual Conference (Sept. 17, 1999), *available at* <http://transition.fcc.gov/Speeches/Kennard/spwek931.txt>.

⁷⁴ Public Knowledge Comments at 109-11.

⁷⁵ *Implementation of Sections 3(n) & 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, ¶ 812 (1994).

⁷⁶ *Competitive Carrier FNPRM*, ¶ 68.

⁷⁷ Verizon Comments at 50.

put it, “[a]pplying Title II to the American broadband industry would be like tying a cinder block to the ankle of an Olympic sprinter in the midst of a race and then wishing her luck.”⁷⁸

Forbearance is not the solution to the problems presented by Title II regulation.⁷⁹ In the *Stevens Report*, the Commission feared that classifying broadband as a telecommunications service “would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and procompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.”⁸⁰

The Commission expressed the same concern in the *Brand X* case. It explained that “the FCC’s forbearance authority is not in this context an effective means of removing regulatory uncertainty.”⁸¹ “Forbearance proceedings would be time-consuming and hotly contested and would assuredly lead to new rounds of litigation, and there is no way to predict in advance the ultimate outcome of such proceedings.”⁸²

⁷⁸ *Id.* at 48.

⁷⁹ AT&T Comments at 64-66; NCTA Comments at 26-27; Time Warner Comments at 9-23; Comments of Cox Communications, Inc., GN Docket Nos. 14-28 and 10-127, at 36 (filed July 18, 2014) (“Cox Comments; Comments of CenturyLink, GN Docket Nos. 14-28, 10-127, at 48-51 (filed July 17, 2014) (“Comments of CenturyLink”); Charter Comments at 17; WISPA Comments at 40; Comments of TechFreedom International Center for Law and Economics, GN Docket Nos. 14-28, 10-127, 09-191, WC Docket No. 07-52, at 32-47 (filed July 17, 2014) (“TechFreedom Comments”); Comcast Comments at 48-49; TIA Comments at 2; Verizon Comments at 47, 51; Alcatel-Lucent Comments at 14-15; ARRIS Comments at 11; *Open Internet NPRM* (Commissioner Michael O’Rielly, dissenting).

⁸⁰ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11830, ¶ 47 (1998) (“*Stevens Report*”).

⁸¹ Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 25, 2004 WL 1943678 (Aug. 27, 2004) (“*FCC Brand X Cert Petition*”) (internal citations omitted).

⁸² *Id.*

It is also unclear whether the Commission could craft a reasoned decision justifying Title II classification while at the same time forbearing from certain aspects of Title II.⁸³ To justify Title II the Commission would have to find that broadband providers have “substantial market power.”⁸⁴ By contrast, to justify forbearance under Section 10 of the Act, the Commission would have to find that enforcing certain provisions of Title II is not necessary to ensure just and reasonable rates or to protect consumers.⁸⁵ There is obvious tension between finding (i) that broadband providers have market power to justify Title II regulation but (ii) that certain Title II requirements are unnecessary to constrain such market power. It is not clear how the Commission could thread that needle.

Free Press also makes the remarkable assertion that imposing Title II would actually *encourage* investment in broadband networks by bringing regulatory certainty to the broadband market.⁸⁶ It also claims that the telecommunications industry has historically thrived during periods of Title II regulation.⁸⁷ Public Knowledge goes so far as to credit Title II for the very existence of the commercial Internet as well as mobile phones.⁸⁸

These arguments represent nothing more than wishful thinking. Indeed, the data upon which Free Press’ investment analysis is based – which show revenue and investment peaking in about 2000, dropping precipitously through the early 2000s, and increasingly steadily after 2004 – do not prove the efficacy of Title II regulation. As noted above, most competitors in the

⁸³ See Alcatel-Lucent Comments at 14-15.

⁸⁴ *Competitive Carrier FNPRM*, ¶ 6.

⁸⁵ 47 U.S.C. § 160(a).

⁸⁶ Free Press Comments at 46.

⁸⁷ *Id.* at 90-125; see also Comments of Vonage Holdings Corp., GN Docket Nos. 14-28, 10-127, at 13-15 (filed July 18, 2014) (“Vonage Comments”).

⁸⁸ Public Knowledge Comments at 9-10.

broadband marketplace, including cable and mobile, have never been subject to Title II regulation during this time period. The same is true for the Internet backbone.⁸⁹ In short, it is absurd to attempt to draw conclusions about the effect of Title II regulation on network investment by examining the investments of providers not subject to Title II regulation.

A better indicator of the impact of Title II regulation on broadband investment comes from real world events and from those who actually invest in the sector. The *Washington Post* reported that, on the day after Chairman Genachowski floated a proposal to regulate broadband under Title II, shares of cable and telecommunications stocks were trading 300 to 400 basis points lower than the overall market.⁹⁰ In Europe, where the model has been “to regulate broadband Internet access providers as public utilities,” “this approach has had a significant deleterious impact on broadband investment.”⁹¹ The Cambridge Strategic Management Group has found that increased the regulatory burden under Title II “impairs the commercial case for network investment.”⁹² Additional evidence that Title II would harm network investment permeates the record.⁹³

⁸⁹ See, e.g., *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 133 (2005) (“[I]nterconnection between Internet backbone providers has never been subject to direct government regulation, and settlement-free peering and degradation-free transit arrangements have thrived”).

⁹⁰ Verizon Comments at 15 (citing Cecilia Kang, *A look at how the FCC’s move can affect stocks*, WASHINGTON POST TECH BLOG (May 7, 2010, 11:07 AM), http://voices.washingtonpost.com/posttech/2010/05/a_look_at_how_the_fccs_move_ca.html).

⁹¹ AT&T Comments at 54.

⁹² TIA Comments at 18 (citing TIA Comments, GN Docket No. 10-127, WC Docket No. 07-52, at CSMG, *FCC Reclassification NOI: Economic Impact Assessment* (filed July 15, 2010)).

⁹³ See, e.g., Cox Comments at 35-36; Comments of Ericsson, GN Docket No. 14-28, at 1-6, 10-14 (filed July 17, 2014) (“Ericsson Comments”); Time Warner Comments at 9-23; NCTA Comments at 17-27; CTIA Comments at 46-47; AT&T Comments at 51-55; Verizon Comments

Industry analysts agree that regulating broadband under Title II would be a disaster. When the Commission considered applying Title II to broadband in 2010, Craig Moffett of Bernstein Research warned that markets would “abhor” the uncertainty that Title II would cause, predicting that this regulatory approach would have “a profoundly negatively impact on capital investment.”⁹⁴ Johnathan Chaplin of Credit Suisse echoed this view, stating that Title II regulation “could discourage investment and cost jobs.”⁹⁵ Stanford tech analyst Larry Downes concluded that reclassification “would be the worst example in history of a tail wagging the dog,” and perhaps “the worst idea in communications policy to emerge in the last 75 years.”⁹⁶

More recently, analyst Anna-Marie Kovacs explained that Title II regulation “would be disastrous.”⁹⁷ She explained that “the wireless and broadband industries are thriving because they are free to innovate The FCC’s rejection of Title II regulation for broadband in 2005 . .

(footnote cont’d.)

at 46-51; Comcast Comments at 43-50; TIA Comments at 15-19; Chamber Comments 1-8; Comments of Frontier Communications, GN Docket No. 14-28, at 2-4 (filed July 18, 2014); Comments of Nokia, GN Docket No. 14-28, at 3 (filed July 15, 2014); Comments of the Consumer Electronics Association, GN Docket Nos. 14-28, 10-127, at 12-14 (filed July 15, 2014) (“CEA Comments”); Comments of Qualcomm Incorporated, GN Docket No. 14-28, at 4-7 (filed July 15, 2014); Comments of Cisco Systems, Inc., GN Docket Nos. 14-28, 10-127, at 24 (filed July 17, 2014) (“Cisco Comments”); Comments of Association, GN Docket Nos. 14-28, 10-127 at 60-65 (filed July 17, 2014) (“Comments of American Cable Association”); Comments of Bright House Networks, GN Docket No. 14-28, at 21-23 (filed July 15, 2014) (“Comments of Bright House”); Comments of Mobile Future, GN Docket No. 14-28, at 14 (filed July 15, 2014); Comments of Free Market Advocates Opposed to Internet Regulation, GN Docket No. 14-28, at 4-6 (filed July 18, 2014); Comments of the National Minority Organizations, GN Docket Nos. 14-28, 10-127, at 8-11 (filed July 18, 2014) (“National Minority Organizations Comments”).

⁹⁴ Craig Moffett, *Quick Take-U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear*, Bernstein Research, May 5, 2010.

⁹⁵ Yu-Ting Wang & Howard Buskirk, *Reclassification Said to Pose Broad Risk to U.S. Economy*, Communications Daily, at 1 (June 14, 2010).

⁹⁶ Larry Downes, *What’s in a title? For broadband, it’s Oz vs. Kansas*, CNET News, Mar. 11, 2010, http://news.cnet.com/8301-1035_3-20000267-94.html.

⁹⁷ Anna-Maria Kovacs, *The Internet Is Not a Rotary Phone*, RE/CODE (May 12, 2014, 2:30 PM), <http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/>.

. encouraged incumbent phone companies to invest increasing amounts in broadband and IP.”⁹⁸ She then noted that the FCC’s light regulatory approach has worked: “[a]nnual broadband investment by phone companies has doubled since 2006 . . . [and] [t]he cable industry, which has never been subject to Title II, spent nearly \$14 billion on its networks in 2013.”⁹⁹

Although Free Press claims that Title II is the more “certain” regulatory approach, the opposite is true. Imposing Title II “would unleash a flood of litigation and regulatory disputes, further undermining stability in the marketplace and compounding the investment-chilling effects of Title II regulation.”¹⁰⁰ The entire Internet ecosystem “would have to assess whether any new application might fall within whatever forbearance the FCC might grant—and wonder whether future FCC decision-makers will agree with their predecessors on that point.”¹⁰¹ In short, Title II is not a recipe for certainty or success.

5. Congress Did Not Intend For Title II To Apply To Broadband Services.

Notwithstanding the harmful effects of Title II regulation, some commenters argue that Congress intended for the Commission to regulate broadband under Title II.¹⁰² This argument runs headlong into the plain language of the 1996 Act,¹⁰³ the purpose of which was to achieve a

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ AT&T Comments at 52.

¹⁰¹ TIA Comments at 19.

¹⁰² *See* Free Press Comments at 55-63.

¹⁰³ *See* Alcatel-Lucent Comments at 8 (“Because the Internet has “flourished, to the benefit of all Americans, with a minimum of government regulation,’ Congress declared in 1996 as a policy of the United States that the Internet — which includes broadband Internet access services — should remain “unfettered by Federal or State regulation.’ Application of Title II to broadband Internet access services would be antithetical to this Congressional mandate.”); Free State Comments at 20 (“Congress did not intend for the Commission to subject broadband ISPs to Title II regulations. Nor did Congress intend for the Commission to use its forbearance authority as a loophole to evade Congress’ intent to facilitate deregulatory approaches.”).

“pro-competitive, deregulatory communications policy.”¹⁰⁴ Indeed, Congress declared it the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered* by Federal or State regulation.”¹⁰⁵

Moreover, when Congress established two mutually exclusive categories of services – “information service” and “telecommunications service” – it declared that a telecommunications carrier “shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”¹⁰⁶ The Commission’s classification of broadband services as information services was meant to be “consistent with Congressional intent to maintain a regime in which information service providers are not subject to Title II regulations as common carriers”¹⁰⁷ and to allow Internet services to exist in “a minimal regulatory environment” to “promote innovative and efficient communication.”¹⁰⁸

When Congress wants the Commission to regulate a particular service under Title II, it knows how to say so. In Section 332(c)(1), for example, Congress explicitly directed the Commission to impose Title II regulation on commercial mobile services.¹⁰⁹ If Congress had

¹⁰⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁰⁵ 47 U.S.C. § 230(b)(2) (emphasis added).

¹⁰⁶ 47 U.S.C. § 153(51).

¹⁰⁷ *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 41 (2007) (“*Wireless Broadband Order*”); *see also id.*, ¶¶ 37-56.

¹⁰⁸ *Wireline Broadband Order*, ¶ 1.

¹⁰⁹ 47 U.S.C. § 332(c)(1)(A) (“A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter . . .”).

intended for the Commission to regulate broadband in the same manner, it could and would have said so expressly.¹¹⁰

And if there were any doubt about Congress's intent, the views of the sponsors of the 1996 Act are definitive that Congress did not intend for the Commission to impose Title II on Internet-based services.¹¹¹ Senators Wyden and Kerry wrote to the Commission that "nothing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."¹¹² They specifically urged the Commission to resist calls "to reclassify certain information service providers, specifically Internet Service Providers (ISPs), as telecommunications carriers."¹¹³ Likewise, Senator McCain stated that "[n]othing in the 1996 Act or the legislative history supports the view that Congress intended to subject information services providers to the current regulatory scheme applicable to common carriers which is, if anything, too intrusive and burdensome."¹¹⁴

There is no permit to Public Knowledge's assertion that Congress has since recognized that broadband should be recognized as a distinct service subject to Title II.¹¹⁵ Nothing in the

¹¹⁰ *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987) ("It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention."); *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) ("[W]here Congress knows how to say something but chooses not to, its silence is controlling.").

¹¹¹ Letter from Sens. John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, Ron Wyden, to Chairman William E. Kennard (Mar. 20, 1998).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See Stevens Report*, ¶ 37 (quoting U.S. Senator John McCain).

¹¹⁵ Public Knowledge Comments at 64.

Broadband Data Improvement Act of 2008¹¹⁶ or the American Recovery and Reinvestment Act of 2009¹¹⁷ even remotely suggests that Congress intended to overturn *sub silentio* the Commission’s classification of broadband services as information services. If Congress had intended to do so, it would have done so expressly because Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”¹¹⁸

C. **The Commission Lacks Any Factual Basis In The Record To Reverse Its Longstanding Policy That Broadband Internet Access Services Are Information Services.**

Even if the Commission were otherwise inclined to alter its longstanding classification of broadband as an information service, it could not lawfully do so. As USTelecom and many others explain, broadband Internet access services remain functionally integrated information services.¹¹⁹ Because the facts have not changed since the last time the Commission addressed this question, the Commission remains bound by its classification decisions and the representations it made to the Supreme Court about the nature in which broadband services are offered. Any attempt to reverse course would be legally unsustainable.

1. **Broadband Providers Continue To Offer Functionally Integrated Information Services To Their Customers.**

Some commenters seek to re-plow old ground by arguing that broadband Internet access services should be classified as telecommunications services.¹²⁰ They argue, yet again, that

¹¹⁶ Pub L. No. 110-385, 122 Stat. 4096 (2008).

¹¹⁷ Pub. L. No. 111-5, 123 Stat. 115 § 6001 (2009).

¹¹⁸ *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

¹¹⁹ USTelecom Comments at 24-31.

¹²⁰ Public Knowledge Comments at 60-79; Free Press Comments at 54-88; Comments of Consumer Federation of America, GN Docket No. 14-28, at 75-81 (filed July 15, 2014); Comments of Electronic Frontier Foundation, GN Docket 14-28, at 13 (filed July 15, 2014)

broadband providers are offering a distinct service involving the transmission of data over the Internet. These commenters provide no new evidence that would justify the Commission revisiting its previous decisions considering and rejecting this same argument.

The record is clear that the broadband transmission component remains intertwined with the offering of information services, and DNS remains a key component of broadband Internet access services.¹²¹ Over the past decade, broadband providers have integrated even more information services into their broadband offerings, such as email, parental controls, streaming music, security services, spam filters, pop-up blockers, instant messaging, reputation systems, and cloud backup and storage.¹²² Because Internet access services are even more functionally

(footnote cont'd.)

(“EFF Comments”); Comments of the People of Illinois and New York, GN Docket Nos. 14-28, 10-127, at 13-18 (filed July 15, 2014) (“Illinois and New York Comments”); Comments of Netflix, Inc., GN Docket Nos. 14-28, 10-127, at 22-25 (filed July 15, 2014) (“Netflix Comments”); Comments of Cogent Communications Group, GN Docket Nos. 14-28, 10-127, at 9-12 (filed July 15, 2014) (“Cogent Comments”); Vonage Comments at 44-45; Ad Hoc Comments at 2-7; Comments of Computer and Communications Industry Association, GN Docket No. 14-28, at 5-10 (filed July 15, 2014).

¹²¹ AT&T Comments at 48 (“One of the key data-processing components integrated with broadband transmission is DNS look-up. . . . Virtually all consumers today rely on their broadband ISPs to include DNS look-up functionality as an integral part of broadband Internet access service.”); Time Warner Comments at 11-12 (“Subscribers retrieve the information they seek because the ISP’s DNS server delivers information-processing capabilities rather than mere transmission.”); Comcast Comments at 58 (“Comcast customers, for example, overwhelmingly rely on Comcast’s DNS and DHCP functionality. In fact, these services are inextricably intertwined with nearly every use of the integrated transmission service that Comcast provides. Every request to transport data from an end user to an edge provider and back through a domain name—like ‘netflix.com,’ ‘gmail.com,’ or ‘facebook.com’—relies on DHCP to supply the end user’s originating IP address and DNS to translate the domain name that the end user enters or clicks on into the edge provider’s destination IP address.”); Verizon Comments at 60 (“As both the Commission and the Supreme Court have recognized, the transmission of data here *cannot* be separated from the processing that occurs with the DNS service because, without that processing, the provider would not even know where to transmit the information. Such processing occurs every time an end user clicks on a link or types in a domain name.”).

¹²² AT&T Comments at 48-49; Verizon Comments at 59-60; Comcast Comments at 57; NCTA Comments at 34-35; Time Warner Comments at 12; Cisco Comments at 25-26;

integrated today, there is no factual basis for the Commission to alter its classification of broadband Internet access services as information services. While the Commission may be entitled to change policies, it is not entitled to its own facts.

Public Knowledge claims that broadband providers primarily offer a telecommunications service because most consumers view Internet access service as simply a conduit for third-party content.¹²³ Even accepting this claim as true (a claim Public Knowledge concedes is not true for at least some consumers),¹²⁴ the Commission rejected this argument in the *Cable Modem Order*, concluding that the regulatory classification of broadband services does not turn on “whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.”¹²⁵

What some commenters perceive as a separate transmission component is actually inherent in every information service. The definition of information service includes the capability to store and retrieve “information via telecommunications.”¹²⁶ “Because information services are offered ‘via telecommunications,’ they necessarily require a transmission component

(footnote cont’d.)

CenturyLink Comments at 44-45; Charter Comments at 14-15; ACA Comments at 54-60; USTelecom Comments at 26-27.

¹²³ Public Knowledge Comments at 69-71, 74.

¹²⁴ *Id.* at 74 (recognizing that some consumers “do make heavy use of ISP-provided email or other ISP-provided information services”).

¹²⁵ *Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 38 (2002) (“*Cable Modem Order*”).

¹²⁶ 47 U.S.C. § 153(24).

in order for users to access information.”¹²⁷ “[A]n Internet access provider must enable the movement of information between customers’ own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, . . . it is appropriately classed as an ‘information service.’”¹²⁸

Public Knowledge argues that the Commission’s broadband classification decisions were wrong because DNS is not an information service since it purportedly only provides a “routing” capability.¹²⁹ However, both the Commission and the Supreme Court previously rejected this same argument. In the *Cable Modem Order*, the Commission explained that DNS “constitutes a general purpose information processing and retrieval capability that facilitates the use of the Internet in many ways.”¹³⁰ DNS is “commonly associated with Internet access service” and “encompasses the capability for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹³¹ The Commission disagreed that DNS and other applications associated with Internet access

¹²⁷ *Stevens Report*, ¶ 57; see also *id.*, ¶ 21 (explaining that Congress did not intend for information service providers to be “subject to regulation as common carriers merely because they provide their services ‘via telecommunications’”).

¹²⁸ *Id.*, ¶ 80.

¹²⁹ Public Knowledge Comments at 69-76 (citing 47 U.S.C. § 153(24), which exempts from the definition of information service the capability to store and process information “for the management, control, or operation of a telecommunications system or the management of a telecommunications service”)

¹³⁰ *Cable Modem Order*, ¶ 37.

¹³¹ *Id.*, ¶ 38.

“implement ‘the management, control, or operation of a telecommunications system or the management of a telecommunications service.’”¹³²

On appeal to the Supreme Court, the Commission defended its conclusion that DNS is an information service. As the Commission explained, “information-processing capabilities such as the DNS and caching are not used ‘for the management, control, or operation’ of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access. Their use accordingly does not fall within the statutory exclusion.”¹³³ Nothing has changed to alter that conclusion.

In *Brand X*, the Supreme Court found unpersuasive the argument that DNS is not an information service because it provides only routing capability. Although Justice Scalia in his dissent argued that “DNS, in particular, is scarcely more than routing information, which is expressly excluded from the definition of ‘information service,’”¹³⁴ the majority disagreed, concluding that “the definition of information service does not exclude ‘routing information.’” Instead, it excludes ‘any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.’”¹³⁵ Public Knowledge’s argument, like Justice Scalia’s argument, “begs the question because it assumes that Internet service is a ‘telecommunications system’ or ‘service’ that DNS manages.”¹³⁶

More fundamentally, DNS does not manage or control a telecommunications system or a telecommunications service. Under Commission precedent, Internet applications have no role in

¹³² *Id.*, ¶ 38 n. 150.

¹³³ Reply Brief for the Federal Petitioners at n.2, *Brand X*, 545 U.S. 967 (2006).

¹³⁴ *Brand X*, 54 U.S. at 1012-13 (Scalia, J., dissenting).

¹³⁵ *Id.*, at n.3.

¹³⁶ *Id.*

the management or control of a telecommunications system or service,¹³⁷ and the Commission has expressly and correctly found that DNS is an Internet application.¹³⁸ The Commission has not regulated Internet applications so they “remain insulated from unnecessary and harmful economic regulation at both the federal and state levels.”¹³⁹ If DNS were not an information service, “it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category.”¹⁴⁰

2. None Of The Precedents Cited By Public Knowledge Support Title II Regulation.

Public Knowledge’s attempts to spin the *Cable Modem Order* and the *GTE DSL Tariff Order* as supporting Title II classification are meritless.¹⁴¹ First, Public Knowledge’s reliance upon the *Cable Modem Order* is premised on its arguments that broadband providers offer a distinct transmission service and that DNS is not an information service.¹⁴² As explained above, neither argument is correct. The *Cable Modem Order* remains binding precedent that resolves the classification of broadband Internet access services.

Second, Public Knowledge mischaracterizes the *GTE DSL Tariff Order* as finding “that the provision of an IP-based service that offers to take data generated by a user, using customer

¹³⁷ *Petition for Declaratory Ruling That Pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶ 13 (2004) (finding that Pulver’s Free World Dialup offering “is not managing a telecommunications system or telecommunications service”) (“*Pulver Order*”).

¹³⁸ *Cable Modem Order*, ¶ 38.

¹³⁹ *Pulver Order*, ¶ 1.

¹⁴⁰ *Stevens Report*, ¶ 57; see also Verizon Comments at 55-56.

¹⁴¹ *GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (“*GTE DSL Tariff Order*”).

¹⁴² Public Knowledge Comments at 70-78.

premises equipment, to ‘the internet’ constitutes a ‘telecommunications service.’”¹⁴³ As a threshold matter, the ADSL service at issue in the *GTE DSL Tariff Order* was not an Internet access service; rather, GTE was offering DSL transmission on a common carrier basis to provide a connection to an ISP.¹⁴⁴ Moreover, the only question decided by the Commission in the *GTE DSL Tariff Order* was whether ADSL was jurisdictionally intra- or inter-state.¹⁴⁵ The Commission later rejected an argument, similar to Public Knowledge’s, that its *GTE DSL Tariff Order* resolved the broadband classification issue.¹⁴⁶ In fact, the *GTE DSL Tariff Order* cited the *Stevens Report*, adopted just six months earlier in 1998, for the proposition that “ISPs do not appear to offer ‘telecommunications service,’ and thus are not ‘telecommunications carriers.’”¹⁴⁷

¹⁴³ *Id.* at 66.

¹⁴⁴ *GTE DSL Tariff Order*, ¶ 1 (describing ADSL as an offering that “permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet”); *id.*, ¶ 8 (“interstate data special access service that provides a high speed access connection between an end user subscriber and an ISP”).

¹⁴⁵ *Id.*, ¶ 1 (concluding that ADSL “is an interstate service and is properly tariffed at the federal level”); *id.*, ¶ 2 (emphasizing “that we decide here only the issue designated in our investigation of GTE’s federal tariff for ADSL service”); *id.*, ¶ 16.

¹⁴⁶ *Wireline Broadband Order*, ¶ 106 (rejecting argument that “Commission precedent mandates that we classify the transmission underlying wireline broadband Internet access as a telecommunications service”); *id.* (“The previous orders upon which commenters rely assumed, correctly in each instance, that the offering of DSL transmission on a common carrier basis was a telecommunications service. These decisions, however, did not address the important threshold public interest issue we address in this Order -- whether this broadband transmission component must continue to be offered to competing providers of facilities-based wireline broadband Internet access service on a common carrier basis.”); *id.* n.133 (“Similarly, in its *GTE DSL Order*, the Commission found that GTE’s asynchronous DSL (ADSL) service offering was interstate and appropriately tariffed with the Commission. Again, its analysis concerned another issue -- the jurisdiction of GTE’s ADSL transmission for purposes of determining whether GTE should file an interstate, as opposed to intrastate, tariff.” (citation omitted)).

¹⁴⁷ *GTE DSL Tariff*, ¶ 20.

3. Broadband Providers Are Not Common Carriers Under *NARUC*.

Seeking to sidestep a definitional hurdle they cannot overcome, some commenters engage in regulatory jujitsu by trying to squeeze broadband into Title II through the backdoor. They argue that broadband providers are common carriers under *NARUC* because they hold themselves out to the public as willing to offer service “indifferently.”¹⁴⁸

A common carrier service and a telecommunications service are “essentially the same thing,”¹⁴⁹ and the terms information service and telecommunications service are mutually exclusive.¹⁵⁰ Because the Commission has found that broadband is a functionally integrated information service, it cannot also be a common carrier service under *NARUC*. Thus, the Commission would have to find that broadband Internet access service is no longer an information service to classify broadband providers as common carriers under *NARUC*. As explained above, there is no evidence in the record to support that conclusion.

Moreover, Public Knowledge’s argument is fundamentally flawed because it would sweep within Title II other services that have never been deemed common carrier services simply because such services are offered to the public “indifferently.” The offering of a service on an indifferent basis has never been sufficient – standing alone – to transform a provider into a common carrier under the Communications Act. Rather, the *NARUC* test describes the manner by which the service must be offered to the public; it does not describe the service itself. A carrier must be offering telecommunications services on a common carrier basis to be deemed a common carrier (or “telecommunications carrier”). That is why telephone companies,

¹⁴⁸ Comments of Public Knowledge et al. 65-66, 79; Comments of Free Press at 64-65, 83-88.

¹⁴⁹ *Virgin Islands Tel. Corp.*, 198 F.3d at 926 (quoting *AT&T Submarine Systems Order*, ¶ 6).

¹⁵⁰ *Stevens Report*, ¶ 13.

including CLECs, are common carriers under the Act – they offer telecommunications on an indifferent basis to the public. By contrast, edge providers are not common carriers under the Act, even though they may offer their services indifferently to the public, because they are not offering telecommunications services. In the same way, broadband providers are not common carriers under the Act because they are offering functionally integrated information services, not telecommunications services, to the public.¹⁵¹

D. Broadband Providers Do Not Offer A Separately Identifiable Telecommunications Service To Edge Providers.

As an alternative to classifying broadband Internet access services under Title II, some commenters urge the Commission to split this service into its component parts. In its initial comments, USTelecom explained that the Commission could not lawfully classify under Title II any service that broadband providers may offer to edge providers.¹⁵² The capability of edge providers to send traffic to end users is functionally integrated with the broadband Internet access service provided to end users.¹⁵³ Nor do broadband providers offer telecommunications to edge providers “for a fee” because there currently are no customer relationships between broadband providers and edge providers.¹⁵⁴ And, to the extent such relationships unfold in the future, no

¹⁵¹ Time Warner Comments at 13 (explaining that “broadband providers are not voluntarily offering a telecommunications service to end users today”).

¹⁵² USTelecom Comments at 31-41; Comcast Comments at 59-67; NCTA Comments at 43-45; Free State Comments at 21-23; CenturyLink Comments at 48; Charter Comments at 18-19; ACA Comments at 66-69.

¹⁵³ USTelecom Comments at 32; *see also* CenturyLink Comments at 48; ACA Comments at 67-68; Free State Comments at 21-23; Cisco Comments at 26-27; Cox Comments at 32-33; Charter Comments at 19-20.

¹⁵⁴ USTelecom Comments at 35-39.

reason exists to believe that broadband providers would offer service to edge providers on a common carrier basis.¹⁵⁵

The edge providers' transmission of content to end users is not a separate offering subject to Title II regulation because, as the Commission has previously determined, the delivery of information to end users is part and parcel of a broadband Internet access service.¹⁵⁶ In the *Stevens Report*, for example, the Commission described Internet-based offerings as those “in which a provider offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, *and* as an inseparable part of that service *transmits information supplied or requested by the user.*”¹⁵⁷ In the *Cable Modem Order*, the Commission described Internet access as including “the ability to *retrieve* information from the Internet,” which allows end users to “send *and view* content” at high speeds.¹⁵⁸ “Internet connectivity functions enable cable modem service subscribers to transmit data communications to *and from* the rest of the Internet.”¹⁵⁹ As the Supreme Court

¹⁵⁵ *Id.* at 39-40; *see also* Charter Comments at 20 (“And although there may be rare instances in which last-mile ISPs reach special direct interconnection agreements with particular edge providers, those are not agreements held out to the public, but individually negotiated commercial arrangements with substantial variation in their individual terms.”).

¹⁵⁶ *See* NCTA Comments at 39-40; Time Warner Comments at 20-22; Comcast Comments at 60-61; Verizon Comments at 62-63; Charter Comments at 19.

¹⁵⁷ *Stevens Report*, ¶ 56 (emphasis added); *see also id.*, ¶ 63 (describing “Internet-based offerings” as a service that enables “end users to obtain access to and send information”).

¹⁵⁸ *Cable Modem Order*, ¶ 10 (emphases added).

¹⁵⁹ *Id.*, ¶ 17 (emphasis added); *see also Wireline Broadband Order*, ¶ 39 (concluding that wireline broadband Internet access service “provides the user with the ability to *send and receive* information at very high speed, and to access the applications and services available through the Internet”) (emphasis added); *Id.*, ¶ 9 (“[W]here wireline broadband Internet access service enables an end user to retrieve files from the World Wide Web, the end user has the capability to interact with information stored on the service provider’s facilities”).

explained in *Brand X*, “cable companies provide such service via the high-speed wire that transmits signals to *and from* an end user’s computer.”¹⁶⁰

Even if this were an open question, the proposal to split the sending and receiving of information via the Internet into separate parts conflicts with longstanding Commission precedent.¹⁶¹ The Commission “consistently has rejected attempts to divide communications at any intermediate points.”¹⁶² It has long recognized that a communication proceeds along “a continuous path” that extends “from its inception to its completion.”¹⁶³

For example, in the *GTE DSL Tariff Order*, upon which Public Knowledge relies, parties urged the Commission to split Internet traffic delivered via ADSL into “two distinct components: an intrastate ‘telecommunications service,’ which ends at the ISP’s local service, and an interstate ‘information service,’ which begins where the telecommunications service ends.”¹⁶⁴ The Commission rejected this approach, applying its consistent policy of analyzing “the totality of the communication” as being a “continuous transmission.”¹⁶⁵ It also rejected the argument “that ‘telecommunications’ ends where ‘enhanced’ information service begins . . . because information services are offered via telecommunications” and “necessarily require a transmission component in order for users to access information.”¹⁶⁶

¹⁶⁰ *Brand X*, 545 U.S. at 988.

¹⁶¹ Huber et al. 11-32.

¹⁶² *GTE DSL Tariff Order*, ¶ 17.

¹⁶³ *Id.*, ¶¶ 17-18.

¹⁶⁴ *Id.*, ¶ 15.

¹⁶⁵ *Id.*, ¶ 20.

¹⁶⁶ *Id.*

This policy forecloses the proposal to “split broadband Internet access service into two components.”¹⁶⁷ An Internet communication involves the continuous transmission of information between the end user and the edge provider. As NCTA explains, “[n]early every online operation—from accessing a website to downloading a file to viewing a video to engaging in online gaming—entails numerous and often nearly simultaneous signals between the website and the end user.”¹⁶⁸ “For example, when streaming a video from an edge provider, there is a constant two-way communication between the edge provider and the user’s device that ensures that the packets with the information and content the edge provider is attempting to deliver are being delivered and assembled as the edge provider intended.”¹⁶⁹ Attempting to break up an Internet communication into its component parts would be unworkable and conflict with longstanding Commission policy.

In addition to these legal impediments, the record does not support the conclusion that broadband providers are offering a telecommunications service to edge providers. The definition of a telecommunications service requires the Commission to identify the “offering of telecommunications for a fee.”¹⁷⁰ As the Commission has held, “in order to be a telecommunications service, the service provider must assess a fee for its service.”¹⁷¹

It is undisputed that broadband providers are not charging edge providers a “fee” for access (whether prioritized or otherwise) to end users:

¹⁶⁷ Open Internet NPRM, ¶ 152.

¹⁶⁸ NCTA Comments at 42.

¹⁶⁹ Comcast Comments at 62-63.

¹⁷⁰ 47 U.S.C. § 153(53).

¹⁷¹ *Pulver Order*, ¶ 10.

- **AT&T:** “AT&T has no intention of creating fast lanes and slow lanes or of using prioritization arrangements for discriminatory or anti-competitive ends, as some net neutrality proponents fear.”¹⁷²
- **NCTA:** “Broadband providers simply do not have direct relationships with the edge providers whose content their subscribers are seeking; in other words, there is no ‘service’ being offered to edge providers that is distinguishable in any way from the ‘service’ being offered to end users.”¹⁷³
- **Comcast:** “As an initial matter, it is important to recognize that, for all the talk about ‘fast lanes’ and ‘slow lanes,’ broadband providers and edge providers have not entered into ‘paid prioritization’ arrangements throughout the many years when there has been no legal prohibition of such arrangements. . . . 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. . . . [B]roadband providers do not ‘offer’ anything ‘directly’ to edge providers. Broadband providers certainly do not offer edge providers any such service ‘for a fee,’ as the statutory definition of ‘telecommunications service’ requires.”¹⁷⁴
- **Verizon:** “To place this in context, neither Verizon nor any other broadband providers of which we are aware has introduced any form of paid prioritization arrangement to date, nor expressed a public interest in doing so. Verizon has no plans for such a service, and it is unclear – particularly given the widespread use of CDNs and other innovative technical means to ensure high-quality transmission of content and the ever-improving capabilities of broadband networks – that there would be much benefit to most Internet traffic from prioritization, particularly for the ‘big guys’ on the Internet.”¹⁷⁵
- **Charter:** “Broadband ISPs do not provide a service ‘for a fee directly to the public’ when they carry downstream traffic from edge providers to their end users. . . . ISPs typically lack any relationship at all with edge providers, much less a privity relationship in which services are provided ‘for a fee.’”¹⁷⁶

Mozilla dismisses the statutory “fee” requirement as a “legal formality,” claiming that the payment of a fee is not necessary because edge providers provide other valuable consideration to

¹⁷² AT&T Comments at 3; *see also id.* at 31.

¹⁷³ NCTA Comments at 42.

¹⁷⁴ Comcast Comments at 22, 64.

¹⁷⁵ Verizon Comments at 37.

¹⁷⁶ Charter Comments at 19-20.

broadband providers in the form of “Internet content desired by the (paying) local access service subscriber.”¹⁷⁷ The Commission rejected this claim in the *Pulver Order*, concluding that a service offered “free of charge” cannot be a telecommunications service.¹⁷⁸

If the Commission were to declare any offering to edge providers to be a telecommunications service, broadband providers would be required to charge edge providers a fee for access to end users¹⁷⁹—the very outcome net neutrality advocates seek to prohibit under Title II. As Stanford Law professor Barbara van Schewick correctly observes, “the definition of ‘telecommunications service’ requires that telecommunications is offered ‘for a fee.’”¹⁸⁰ Acting on this proposal would not “allow the FCC to actually ban access fees” because such fees would be required under the statute.¹⁸¹

III. CONCERNS ABOUT THE SCOPE OF THE COMMISSION’S AUTHORITY UNDER SECTION 706 ARE OVERBLOWN.

Various commenters seek to press the Commission into classifying broadband under Title II by mischaracterizing the scope of the Commission’s authority under Section 706 of the 1996 Act, as interpreted by the D.C. Circuit in *Verizon*. Based on this interpretation, the Commission’s Section 706 authority is sufficient to adopt its proposed rules in order to preserve the open Internet, notwithstanding arguments by commenters to the contrary.¹⁸²

¹⁷⁷ Comments of Mozilla, GN Docket No. 14-28, GN Docket 10-127 at 11-12 (filed July 15, 2014) (“Mozilla Comments”).

¹⁷⁸ *Pulver Order*, ¶ 10.

¹⁷⁹ Cox Comments at 33; Verizon Comments at 64.

¹⁸⁰ Notice of *Ex Parte* Meeting of Barbara van Schewick, GN Docket Nos. 09-191, 14-28, at 1 (filed Aug. 11, 2014).

¹⁸¹ *Id.*

¹⁸² USTelecom Comments at 44-51; Time Warner Comments at 7-9; CEA Comments at 9-12; CWA/NAACP Comments at 14-20; Cox Comments at 30-31; Comments of National Religious Broadcasters, GN Docket No. 14-28, at 5-6 (filed July 14, 2014); ACA Comments at

A. Commenters Misread *Verizon* As Foreclosing The Commission’s Ability To Regulate Blocking And Discrimination Under Section 706.

One common argument among Title II advocates is that Section 706 does not provide the Commission with authority to address discrimination or blocking.¹⁸³ As a threshold matter, the *Verizon* court squarely held otherwise, finding that Section 706 contains an independent grant of statutory authority “to utilize such ‘regulating methods’ to meet th[e] stated goal” of preserving the open Internet and “to take steps to accelerate broadband deployment if and when it determines that such deployment is not ‘reasonable and timely.’”¹⁸⁴ Arguments to the contrary are disingenuous.

Furthermore, the *Verizon* court suggested that the Commission could regulate blocking under Section 706.¹⁸⁵ The D.C. Circuit also recognized the Commission’s authority to regulate commercially unreasonable practices in *Cellco*, which presumably could include certain discriminatory practices.¹⁸⁶

(footnote cont’d.)

41-52; Comments of Information Technology and Innovation Foundation, GN Docket No. 14-28, at 6-7 (filed July 15, 2014) (“Comments of ITIF”); National Minority Organizations Comments at 4-11.

¹⁸³ Comments of the Writers Guild of America, GN Docket No. 14-28, at 28-31 (filed July 15, 2014); Comments of New Media Rights, GN Docket No. 14-28 at 20-23 (filed July 15, 2014); Cogent Comments at 12; Comments of Rural Broadband Policy Group et al., GN Docket Nos. 14-28, 10-127, at 5 (filed July 15, 2014); Free Press Comments at 125-149; Netflix Comments at 20-25; EFF Comments at 10-13; Public Knowledge Comments at 31-34; Comments of NASUCA, GN Docket Nos. 14-28, 10-127 at 13-15 (filed July 15, 2014); Vonage Comments at 33-36; Comments of Common Cause, GN Docket Nos. 14-28, 10-227, at 11-12 (filed July 15, 2014); Comments of Engine Advocacy, GN Docket Nos. 14-28, 10-127, at 13-15 (filed July 15, 2014).

¹⁸⁴ *Verizon*, 740 F.3d at 637-38, 641.

¹⁸⁵ *Id.* at 658; *see also* Comments of Comcast at 18-22; Comments of NCTA at 56-61.

¹⁸⁶ *Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

Notwithstanding claims to the contrary,¹⁸⁷ there is no reason to believe that the commercially reasonable standard—which the Commission adopted to regulate data roaming arrangements—would not be an effective tool to address practices that could harm the open Internet. “Under the Commission’s proposed approach, the Commission could address particular practices that harm competition or consumers . . . under the appropriate record without necessarily straying into impermissible common carriage or taking the radical step of ‘reclassification.’”¹⁸⁸ “CWA and the NAACP do not believe that the Commission’s proposal would create Internet ‘fast lanes’ and ‘slow lanes.’ Rather, properly constructed, a ‘commercially reasonable’ standard would allow edge providers to negotiate quality of service and content delivery network services with broadband providers, while promoting increased investment in broadband networks to benefit all Internet consumers.”¹⁸⁹

B. The Proposed Rules Are Not Per Se Common Carriage On Their Face.

Some commenters insist that the Commission’s proposed rules, if grounded in Section 706, would be unlawful because they treat broadband providers like common carriers.¹⁹⁰ For the most part, these commenters ignore *Cellco* altogether. In *Cellco*, the D.C. Circuit held that the

¹⁸⁷ See, e.g., Public Knowledge Comments at 34-46; Free Press Comments at 134-42; Comments of The Internet Association, GN Docket No. 14-28, at 16 (filed July 14, 2014) (“Comments of The Internet Association”); Netflix Comments at 6-9; Comments of Consumers Union, GN Docket No. 14-28, at 7-10 (filed July 15, 2014); Comments of New America Foundation and Benton Foundation, GN Docket Nos. 10-127, 14-28, at 19-21 (filed July 17, 2014).

¹⁸⁸ Verizon Comments at 36; see also TIA Comments at 24-26; Ericsson Comments at 14-15; Free State Comments at 5, 15-19; Cisco Comments at 6-10.

¹⁸⁹ CWA/NAACP Comments at 6.

¹⁹⁰ Public Knowledge Comments at 31-42; Free Press Comments at 125-34; Mozilla Comments at 5-9; Comments of Senator Al Franken, GN Docket No. 14-28, at 5-6 (filed July 15, 2014); Comments of i2Coalition, GN Docket Nos. 14-28, 10-127, 13-5, 09-51, WT Docket No. 13-135, WC Docket No. 07-52, at 1-8 (filed July 15, 2014).

Commission’s data roaming rule did not treat mobile data providers as common carriers because “it left substantial room for individualized bargaining and discrimination in terms” under a “commercially reasonable” standard.¹⁹¹

The proposed rules would be consistent with *Cellco* as long as the Commission allows sufficient room for broadband providers to negotiate arrangements with edge providers. The *Verizon* court invalidated the *Open Internet Order*’s no blocking rule because the Commission had effectively imposed a mandated minimum level of service for free and refused to permit broadband providers to engage in individualized negotiations with edge providers.¹⁹² So long as the Commission clarifies, as it did in the *Data Roaming Order*, that broadband providers may negotiate commercial arrangements with edge providers on “individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,”¹⁹³ the proposed rules would not be facially invalid.¹⁹⁴

¹⁹¹ *Cellco P’ship*, 700 F.3d at 548. The rule “expressly permit[ted] providers to adapt roaming agreements to ‘individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.’” *Id.*

¹⁹² *Verizon*, 740 F.3d at 655-56 (“In requiring broadband providers to serve all edge providers without ‘unreasonable discrimination,’ this rule by its very terms compels those providers to hold themselves out “to serve the public indiscriminately.” (quoting *National Ass’n of Regulatory Com’rs v. FCC*, 525 F.2d 630, 642 (“*NARUC I*”)); *id.* at 658 (“In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.”).

¹⁹³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411, ¶ 45 (2011) (“*Data Roaming Order*”).

¹⁹⁴ *Verizon Comments* at 36 (“Under the Commission’s proposed approach, the Commission could address particular practices that harm competition or consumers so long as it also allows sufficient flexibility for broadband providers to develop other differentiated arrangements. Indeed, the Commission can address practices that harm consumers or competition under the appropriate record without necessarily straying into impermissible common carriage or taking the radical step of ‘reclassification.’”).

In particular, the proposed no blocking rule does not compel broadband providers to “offer service indiscriminately and on general terms” because the Commission has proposed to allow “substantial room for individualized bargaining and discrimination in terms.”¹⁹⁵ Moreover, the Commission’s “‘commercially reasonable’ standard . . . ensures providers more freedom from agency intervention than the ‘just and reasonable’ standard applicable to common carriers.”¹⁹⁶ Like the data roaming rule, the Commission has “built into the ‘commercially reasonable’ standard considerable flexibility for providers to respond to the competitive forces at play in the” competitive broadband market.¹⁹⁷

Just because no blocking and nondiscrimination are akin to common carrier duties does not mean that the proposed rules unlawfully treat broadband providers as common carriers.¹⁹⁸ As the D.C. Circuit has explained, “there is an important distinction between the question whether a given regulatory regime is consistent with common carrier or private carrier status” and the “question whether that regime necessarily confers common carrier status.”¹⁹⁹ The proposed no blocking and nondiscrimination rules, although they resemble traditional common carrier duties, do not relegate broadband providers to common carrier status so long as they “leave[] substantial room for individualized bargaining and discrimination in terms.”²⁰⁰

¹⁹⁵ *Cellco P’ship*, 700 F.3d at 548.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 548.

¹⁹⁸ Public Knowledge Comments at 31; Free Press Comments at 125.

¹⁹⁹ *Cellco P’ship*, 700 F.3d at 547.

²⁰⁰ *Id.* at 548.

IV. THERE IS NO FACTUAL OR LEGAL BASIS TO BAN COMMERCIAL ARRANGEMENTS BETWEEN BROADBAND PROVIDERS AND EDGE PROVIDERS.

A. The Commission Should Allow This Nascent Two-Sided Market To Develop Because Consumers Could Benefit From Innovative New Services.

The Commission should not prematurely foreclose commercial arrangements between broadband providers and edge providers. This nascent market has not even begun to develop, as illustrated by the fact that there has not been a single instance of an edge provider paying a broadband provider for access or prioritized access to end users. Maintaining flexible rules for the future development of the Internet is essential because “no one has the ability to predict what will be the best network management practices and pricing and service models in the future.”²⁰¹ As the Chairman recently noted, “[e]specially in a fast-moving sector, it is important that companies be free to develop better networks and to attract the investment necessary to do so.”²⁰²

Acting prematurely could curtail the development of “new and better services.”²⁰³ As Verizon explains, “experimentation with individualized agreements offers the potential to initiate new ‘virtuous circles’ that can benefit consumers, edge providers, and broadband providers alike.”²⁰⁴ Such innovative arrangements – examples of which include tiered pricing, ad-supported services, 800-type “sponsored data” services, two-sided market arrangements and other sophisticated approaches to pricing – “could facilitate the entry of new edge providers and

²⁰¹ Verizon Comments, Exhibit 1, Declaration of Michael L. Katz, ¶ 36 (“Katz Declaration”).

²⁰² Broadband Competition Remarks at 5.

²⁰³ Topper Declaration, ¶ 130; *see also* USTelecom Comments at 19-22; Verizon Comments at 25-36; Ericsson Comments at 6-8, 14; Cisco Comments at 8-10; TIA Comments at 28; CenturyLink Comments at 1-7, 34; TechFreedom Comments at 16-41; Comments of Daniel Lyons, GN Docket No. 14-28, at 1-2 (filed July 18, 2014) (“Comments of Daniel Lyons”); ITIF Comments at 13-15; ARRIS Comments at 7-10.

²⁰⁴ Verizon Comments at 30.

promote efficient, pro-consumer behavior by incumbent edge providers.”²⁰⁵ The “flexibility to experiment with alternative arrangements not only can reduce costs to end users while allowing them to access the content they demand, but also benefit edge providers and spur continued investment in broadband infrastructure.”²⁰⁶

Prohibiting broadband providers and edge providers from experimenting with innovative business arrangements would repeat policy mistakes of the past. For years, the Commission prohibited experimentation through the attachment of devices to the telephone network. In *Hush-A-Phone Corp. v. United States*, the D.C. Circuit invalidated the Commission’s restrictive policy, holding that it was an “unwarranted interference with the telephone subscriber’s right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.”²⁰⁷ Later, in its *Carterfone* decision, the Commission held that consumers should be able to experiment by attaching any device to the telephone system “so long as the interconnection does not adversely affect the telephone company’s operations or the telephone systems’ utility for others.”²⁰⁸

These market-oriented decisions “opened the way for a complete line of competitive products” that led to enormous benefits for consumers.²⁰⁹ The same could be true for experimentation between edge providers and broadband providers, and the Commission should allow the market to decide whether certain arrangements succeed or fail. To the extent any

²⁰⁵ Katz Declaration, ¶ 36.

²⁰⁶ Verizon Comments at 31; *see also* Katz Declaration, ¶¶ 54-61.

²⁰⁷ *Hush-a-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956).

²⁰⁸ *Use of the Carterfone Device in Message Toll Telephone Service*, Decision, 13 F.C.C.2d. 420, 424 (1968).

²⁰⁹ Huber et al. at 1-33.

particular arrangements prove to be commercially unreasonable, the Commission could step in to protect consumers.²¹⁰

Despite the parade of horrors of “paid prioritization” identified by some commenters,²¹¹ fears that experimentation will create fast and slow lanes on the Internet are baseless. The Internet has historically functioned on a “best efforts” basis,²¹² and most Internet traffic is well-suited for this method of delivery. However, other types of traffic, such as voice and video, could benefit from prioritized treatment without affecting traffic delivered on a best efforts basis, which is getting faster every year as broadband providers pour billions of dollars into improving their networks.²¹³ Allowing edge providers and broadband providers to experiment with different types of arrangements could improve the broadband experience of customers while doing nothing to undermine the way the Internet historically has operated.

B. The Commission Could Not Lawfully Ban All Two-Sided Commercial Arrangements Under Title II.

Some commenters urge the Commission to classify broadband under Title II so it can ban commercial arrangements between broadband providers and edge providers.²¹⁴ These

²¹⁰ See Verizon Comments at 38.

²¹¹ Public Knowledge Comments at 34-46; Comments of reddit, Inc., GN Docket No. 14-28, at 7-8 (filed July 15, 2014); Consumers Union Comments at 6; Comments of Vimeo, LLC, GN Docket No. 14-28, at 4-15 (filed July 15, 2014); Illinois and New York Comments at 9-11.

²¹² *Open Internet NPRM*, ¶ 56 (“The Internet has traditionally relied on an end-to-end, open architecture, in which network operators use their ‘best effort’ to deliver packets to their intended destinations without quality-of-service guarantees.”).

²¹³ ARRIS Comments at 8-9.

²¹⁴ See, e.g., Public Knowledge Comments at 102; Free Press Comments at 47; Netflix Comments at 5, 17-19; Mozilla Comments at 20-22; Comments of National Public Radio, Inc., GN Docket No. 14-28, at 7-12 (filed July 15, 2014); Comments of AOL, Inc., GN Docket No. 14-28 (filed July 15, 2014); Comments of Higher Education and Libraries, GN Docket No. 14-28, at 12-13 (filed July 18, 2014); Comments of Independent Film and Television Alliance, GN

commenters misconstrue the Commission’s ability to regulate commercial relationships between broadband providers and edge providers under Title II.

First, classifying “broadband Internet access service” as a Title II telecommunications service would only address broadband providers’ relationships with their own end user customers.²¹⁵ As USTelecom has explained, broadband providers’ relationships with edge providers would remain outside the scope of the Commission’s Title II authority.

Second, even if the Commission were to regulate these relationships under Title II, commenters widely agree that the Commission could not ban all arrangements with edge providers under Title II by declaring all such arrangements to be per se unreasonable or discriminatory.²¹⁶ Title II of the Act expressly permits carriers to engage in reasonable discrimination among customers.²¹⁷ As the D.C. Circuit has explained, “the Commission’s acceptance, or even requirement, of certain types of priority treatment . . . does not detract from the common carrier status of those subject to it.”²¹⁸ The Commission could not declare all such

(footnote cont’d.)

Docket No. 14-28, at 7-8 (filed July 16, 2014); Comments of Microsoft Corporation, GN Docket No. 14-28, at 8-15 (filed July 18, 2014); Vonage Comments at 21-24.

²¹⁵ USTelecom Comments at 19.

²¹⁶ Verizon Comments at 51-53; Comcast Comments at 50-54; NCTA Comments at 27-30; Time Warner Comments at 9-23; ITTA Comments at 5-6; Cox Comments at 36; CenturyLink Comments at 51; TechFreedom Comments at 19-24; Bright House Comments at 27-29; Verizon Comments at 46 (“Yet Title II would not even address what reclassification supporters say are their concerns—in other words, this unlawful approach is just a Trojan horse to obtain regulation for regulation’s sake.”).

²¹⁷ *Verizon*, 740 F.3d at 657.

²¹⁸ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) (“*NARUC II*”).

relationships to be inherently unreasonable or discriminatory without running afoul of more than a century of common carrier law.²¹⁹

Public Knowledge’s argument that the *Carterfone* decision supports a flat ban on the entire range of commercial arrangements between edge providers, consumers, and broadband providers is without merit.²²⁰ In *Carterfone*, the Commission held that AT&T must allow the attachment of devices to the telephone network because “[t]here has been no adequate showing that nonharmful interconnection must be prohibited in order to permit the telephone company to carry out its system responsibilities.”²²¹ Similarly, there has been no concrete showing of across the board harm from commercial arrangements between broadband providers, consumers, and edge providers. Free Press’s concerns about a hypothetical impact on the open Internet from these arrangements are similar to the theoretical concerns about harm to the telephone system from the Hush-a-phone.²²² Consistent with basic principles of reasoned decision-making, the Commission could not ban all these possible arrangements without concrete evidence of harm.²²³

²¹⁹ Free Press argues that “a *per se* rule against paid prioritization as a form of unreasonable discrimination ... would be consistent with how the Commission has applied Sections 201 and 202.” Free Press Comments at 51-52. However, none of the cases cited by Free Press in support of this argument involved a *per se* rule under either Section 201 or Section 202. Indeed, only one case upon which Free Press relies even implicated Sections 201 or 202 – *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998) – but that case involved a request for forbearance in which the Commission found the statutory criteria under Section 10 had not been met.

²²⁰ Public Knowledge Comments at 103.

²²¹ *Carterfone*, 13 F.C.C.2d. at 424.

²²² *Hush-A-Phone*, 238 F.2d at 268 (Although the Commission found that using a Hush-A-Phone does not physically impair any of the facilities of the telephone companies, it nevertheless concluded that the device is ‘deleterious to the telephone system and injures the service rendered by it.’ There seems in that conclusion a suggestion that the use of a Hush-A-Phone affects more than the conversation of the user- that its influence pervades, in some fashion, the whole ‘telephone system.’ The Commission repeats this suggestion in its conclusion that use of a Hush-

V. CONCLUSION

USTelecom’s member companies remain committed to an open Internet and support the competitive market structure and balance among the broadband, computing, content and applications sectors that have safeguarded an open and dynamic Internet for years. In assessing the need for open Internet rules and in determining the regulatory paradigm under which any such rules should be adopted, the Commission should ignore the attempts to distort the historical record, the evidence, and the law by those who advocate for regulation of broadband under the antiquated Title II regime. The Commission should instead maintain its focus on the successes that have been achieved in the broadband marketplace under the current regulatory framework..

Respectfully submitted,

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(footnote cont’d.)

A-Phone involves ‘public detriment.’ It is because we see no findings to support these conclusions of systemic or public injury that we reverse the Commission’s decision.”).

²²³ See *Nat’l Fuel*, 468 F.3d at 843. See Comments of Verizon at 38 (“On an appropriate record demonstrating that certain paid prioritization practices have clear anti-competitive or anti-consumer effects, the Commission even could create a rebuttable presumption that those specific practices are unreasonable –without lapsing into common carriage.”); Katz Declaration, ¶ 51.