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 COX COMMUNICATIONS, INC.

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September 15, 2014

SUMMARY

The opening comments reveal a broad consensus around many of the central issues in this proceeding. Whereas the 2010 rulemaking was marked by a wide gulf between parties supporting and opposing regulation, reflecting stark disagreements about the Commission's authority to regulate broadband services and the policy merits of doing so, that is no longer the case. Indeed, in the wake of the D.C. Circuit's decision in *Verizon v. FCC* and in light of the roadmap established by that case, almost all broadband providers and other participants in the Internet ecosystem now agree that the Commission has authority under Section 706 of the Telecommunications Act of 1996 to adopt Open Internet protections that: (i) require transparency; (ii) prohibit blocking; and (iii) ensure the commercial reasonableness of any business arrangements between broadband providers and edge providers that address the delivery of traffic over last-mile networks. The record therefore provides a strong basis to implement Open Internet policies that protect consumers while preserving much-needed flexibility for Internet service providers ("ISPs").

The comments persuasively demonstrate that the Commission should rely on Section 706 in adopting any new rules, rather than pursuing a legally suspect and counterproductive effort to reclassify any component of broadband Internet access under Title II. As for the substance of the rules, the record confirms Cox's position that existing disclosure requirements are sufficient to ensure transparency, whereas most of the enhanced disclosure obligations on which the NPRM seeks comment are unnecessary and would be unduly burdensome. Moreover, most commenters agree that the Commission could provide meaningful protection to consumers through a "no-blocking" rule along the lines discussed in Cox's opening comments, without need for more restrictive regulations that micromanage broadband service quality. And to the extent the Commission seeks to prohibit "paid prioritization"—despite the wholly speculative nature of any need to screen such arrangements and broadband providers' unequivocal statements disclaiming any interest in pursuing them—it should do so using a rebuttable presumption or similar mechanism that prohibits wholesale arrangements with "commercially unreasonable" attributes without disrupting ISPs' relationships with their retail subscribers.

The record demonstrates that, in developing new Open Internet rules, the Commission should harmonize its treatment of fixed and mobile broadband providers and should protect consumers from anticompetitive or other harmful conduct by edge providers to the same extent that the rules regulate ISPs. By contrast, the relatively small group of parties who seek to shoehorn traffic-exchange arrangements into this proceeding ignore the important differences between traffic exchange and Open Internet issues. Such advocates also overlook the significant harms that would result from replacing the well-functioning market-based standards governing traffic exchange with prescriptive regulation. The Commission therefore should adhere to its tentative conclusion that it should examine traffic-exchange arrangements (if at all) outside the scope of this rulemaking.

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Cox Communications, Inc. ("Cox") hereby replies to the opening comments in this proceeding, which were submitted in response to the Notice of Proposed Rulemaking ("NPRM") adopted by the Commission on May 15, 2014.[1]

INTRODUCTION

Although some advocates at the fringes of this debate have portrayed the Commission's Open Internet proposals as cause for alarm—either because they would exert too much or too little oversight over the broadband marketplace—the record actually reveals a broad consensus around many of the central issues in this proceeding. Notably, the 2010 rulemaking was marked by a wide gulf between parties supporting and opposing regulation, reflecting stark disagreements about the Commission's authority to regulate broadband services and the policy merits of doing so. But in the wake of the D.C. Circuit's decision in *Verizon v. FCC* and in light of the roadmap established by that case, almost all broadband providers and other participants in the Internet ecosystem now agree that the Commission has authority under Section 706 of the Telecommunications Act of 1996 to adopt Open Internet protections that: (i) require transparency; (ii) prohibit blocking; and (iii) ensure the commercial reasonableness of any

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

business arrangements between broadband providers and edge providers that address the delivery of traffic over last-mile networks. The record therefore provides a strong basis for the Commission to implement Open Internet policies that protect consumers while preserving much-needed flexibility for Internet service providers ("ISPs").

More specifically, the opening comments reflect stakeholders' broad agreement that:

- the Commission should rely on Section 706 in adopting any new rules, rather than pursuing a legally suspect and counterproductive effort to reclassify any component of broadband Internet access under Title II;
- existing disclosure requirements are sufficient to promote transparency, whereas most of the enhanced disclosure obligations on which the NPRM seeks comment are unnecessary and would be unduly burdensome;
- the Commission could provide meaningful protection to consumers through a "no-blocking" rule along the lines discussed in Cox's opening comments, without need for more restrictive regulations that micromanage broadband service quality;
- to the extent the Commission seeks to prohibit "paid prioritization" arrangements that could create "fast lanes" and "slow lanes" on the Internet—despite the wholly speculative nature of such arrangements and broadband providers' statements disclaiming any interest in pursuing them—it should do so using a rebuttable presumption or similar mechanism that prohibits "commercially unreasonable" arrangements without disrupting ISPs' relationships with their retail subscribers;
- in developing new Open Internet rules, the Commission should harmonize its treatment of fixed and mobile broadband providers and should protect consumers from anticompetitive or other harmful conduct by edge providers to the same extent that the rules regulate ISPs; and
- arrangements governing the exchange of Internet traffic—such as peering, transit, and CDN arrangements—present very different issues than the delivery of Internet traffic over last-mile broadband networks and should not be shoehorned into this proceeding.

In short, there is strong legal and policy support in the record for an appropriately balanced regulatory regime under Section 706. While Cox remains skeptical of the need for prescriptive Open Internet rules beyond the existing transparency requirements, as the marketplace has effectively safeguarded Open Internet principles in the absence of any

mandates, Cox would not oppose the adoption of measured rules that avoid the harms associated with heavy-handed regulation. By contrast, the record confirms that it would be a profound mistake to pursue Title II reclassification, as doing so would only undermine the important interest in developing a stable and sustainable regulatory framework while frustrating the overarching objective of promoting continued broadband investment and innovation.

Notwithstanding Cox's willingness to comply with consensus-driven Open Internet rules, Cox opposes the calls of the relative handful of parties that urge the Commission to regulate Internet traffic-exchange arrangements. Such arrangements present very different issues than the delivery of Internet traffic over last-mile broadband networks, and are being examined independently by the Commission.

DISCUSSION

I. THE RECORD REFLECTS WIDESPREAD SUPPORT FOR RELYING ON SECTION 706 AS THE BASIS FOR ANY NEW OPEN INTERNET RULES

In its opening comments, Cox urged the Commission to adopt any new Open Internet rules in a manner consistent with the blueprint suggested by the D.C. Circuit in *Verizon v. FCC*,[2] by relying on the authority conferred by Section 706 of the Telecommunications Act of 1996.[3] Cox explained that, as construed by the court, Section 706 provides ample leeway to achieve the goals embodied in the NPRM and that, by contrast, pursuing reclassification of any component of broadband Internet access under Title II of the Communications Act[4] would be legally suspect and profoundly unwise from a policy standpoint.[5]

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2 *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)

3 47 U.S.C. § 1302.

4 *See id.* §§ 201 *et seq.*

5 *See* Comments of Cox Communications, Inc., GN Docket No. 14-28 at 30-31 (Jul. 18, 2014) ("Cox Comments").

The record reflects widespread support for this position. Indeed, a remarkably diverse array of commenters—including ISPs, leading equipment manufacturers, CDNs, edge providers, public interest/advocacy organizations, and others—agree that the Commission should adopt the NPRM's proposal to rely on Section 706 as the basis for any new Open Internet rules. For example, ISP commenters overwhelmingly agree that Section 706, as construed by the D.C. Circuit in *Verizon*, authorizes the primary proposals set forth in the NPRM.[6] Equipment manufacturers such as Alcatel-Lucent likewise urge the Commission to follow the "roadmap" set forth by the court in that decision.[7] The Communications Workers of America ("CWA") and the National Association for the Advancement of Colored People ("NAACP") conclude that "Section 706 provides a sound legal grounding for its Open Internet rules, rules that will continue the successful track record of the 2010 rules in protecting Internet freedom and encouraging investment by in network and edge providers."[8] Other examples abound.[9]

While these and other parties agree that Section 706 provides ample authority to ensure transparency and to prevent blocking or commercially unreasonable arrangements between

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6 *See, e.g.*, Comments of AT&T Services, Inc., GN Docket No. 14-28, at 38-39 (Jul. 15, 2014) ("AT&T Comments"); Comments of the United States Telecom Association, GN Docket No. 14-28, at 45-48 (Jul. 16, 2014) ("USTelecom Comments"); Comments of Comcast Corporation, GN Docket No. 14-28, at 13-14 (Jul. 15, 2014) ("Comcast Comments"); Comments of Time Warner Cable Inc., GN Docket No. 14-28, at 7-8 (Jul. 15, 2014) ("Time Warner Cable Comments").

7 *See* Comments of Alcatel-Lucent, GN Docket No. 14-28, at 13 (Jul. 15, 2014) ("Alcatel-Lucent Comments"); *see also* Comments of the Telecommunications Industry Association, GN Docket No. 14-28, at 20-21 (Jul. 15, 2014) ("TIA Comments").

8 *See* Comments of the Communications Workers of America and the National Association for the Advancement of Colored People, GN Docket No. 14-28, at 15 (Jul. 15, 2014) ("CWA/NAACP Comments").

9 *See, e.g.*, Comments of the Information Technology and Innovation Foundation, GN Docket No. 14-28, at 6-7 (Jul. 15, 2014) ("ITIF Comments"); Comments of the National Minority Organizations, GN Docket No. 14-28, at 4-5 ant 11-12 (Jul. 18, 2014) ("NMO Comments").

broadband providers and edge providers, they also identify serious harms that would result from reclassification of any component of broadband Internet access under Title II. It is perhaps not surprising that ISPs oppose the strictures of Title II regulation,[10] but they are far from alone in recognizing the threats to investment, innovation, and consumer welfare that would flow from reclassification. For example, Akamai acknowledges that "[t]here is surely some truth" in assertions that "the imposition of overly proscriptive regulations would adversely affect investment in broadband infrastructure," and notes that "any slowing of investment in underlying networks will make it more difficult for providers . . . to deploy innovative services and handle the vastly increasing volume of Internet traffic."[11] Equipment manufacturers express similar concerns; for instance, the Consumer Electronics Association ("CEA") observes that "Title II regulation, even with forbearance from application of certain legacy rules, would hamstring the flexibility that is key to broadband innovation."[12] And the Telecommunications Industry Association recognizes that "[r]ecreating a common carrier regime for broadband ISP service now, years after the Commission set a different regulatory course, would thwart the operation of the 'virtuous cycle' of investment, competition, and innovation that the agency has celebrated and throw the industry into disarray."[13]

Even some parties that are leading voices in supporting the adoption of Open Internet rules agree that the Commission should do so pursuant to Section 706. Notably, the Internet

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10 *See supra* n.6.

11 *See* Comments of Akamai Technologies, Inc., GN Docket No. 14-28, at 10 (Jul. 15, 2014).

12 *See* Comments of the Consumer Electronics Association, GN Docket No. 14-28, at 12 (Jul. 15, 2014) ("CEA Comments"); *see also* Comments of Ericsson, GN Docket No. 14-28, at at 10, 13 (Jul. 17, 2014); Alcatel-Lucent Comments at 2, 7-10; Comments of Arris Group, Inc., GN Docket No. 14-28, at 10-14 (Jul. 15, 2014).

13 *See* TIA Comments at 16.

Association—which counts Google, Amazon, and Facebook among its members—urges the Commission to adopt "simple, light-touch rules" that "avoid disrupting the delicate balance that stakeholders have already established," and in doing so it refrains from arguing that Title II is needed as a source of authority.[14] Moreover, several commenters that would favor reclassification for policy reasons acknowledge that Sections 706(a) and (b) "provide sufficient authority for the Commission to adopt the type of rules discussed in the NPRM . . . ."[15] In short, there simply is no sound reason to pursue reclassification under Title II—particularly given the harms discussed above. To the contrary, the record confirms that arguments advanced by proponents of Title II reclassification are flawed and misguided from both a legal and policy perspective.

First, the record demonstrates that reclassification cannot be justified based on any change in the "factual particulars" of broadband Internet access service. Some parties have argued those particulars have indeed changed,[16] but as the United States Telecom Association notes, "the facts would not support any such finding."[17] Whereas Free Press and other parties assert that consumers today seldom rely on their broadband Internet access provider's email service or web browser, the Commission recognized in the *Cable Modem Order* that consumers have *always* been "free to download and use instead, for example, a web browser from Netscape,

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14 *See* Comments of the Internet Association, GN Docket No. 14-28, at 16 (Jul. 14, 2014) ("Internet Association Comments").

15 *See* Comments of Cogent Communications Group, Inc., GN Docket No. 14-28, at 12 (Jul. 15, 2014); *see also* Comments of AOL Inc., GN Docket No. 14-28, at 7-8 (Jul. 15, 2014) (arguing that Section 706 provides the Commission with broad authority to prevent practices that would undermine the "virtuous circle").

16 *See, e.g.*, Comments of Free Press, GN Docket No. 14-28, at 70-71 (Jul. 17, 2014) (asserting that "the Commission's rationale about homepages, email services, newsgroups and DNS services are all currently incorrect when applied to today's broadband access services") ("Free Press Comments").

17 *See* USTelecom Comments at 24.

content from Fox News, and e-mail in the form of Microsoft's 'Hotmail.'"[18] That fact is of no moment because, regardless of "[w]hether the subscriber chooses to utilize functions offered by his cable modem service provider or obtain them from another source, these functions currently are all included in the standard cable modem service offering."[19] The Commission later reaffirmed "[t]he information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (*e.g.*, e-mail or web-hosting)," because it is the nature of the service *offered* to end users that determines its classification under the Act.[20]

Proponents of reclassification also ignore the more fundamental reality that broadband providers not only transmit Internet content to and from subscribers but process and retrieve information as inextricable components of the service. As the Commission has recognized since its initial classification ruling, it is not simply the optional features like e-mail and web hosting that make broadband Internet access an information service; rather, that classification results from tightly integrated functions including "protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching."[21] Moreover, more recently introduced features including pop-up blockers, spam protection, and parental controls—as well as the functionalities necessary to "transform an IPv4

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18 *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 25 (2002) ("*Cable Modem Order*").

19 *Id.*

20 *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 15 (2005).

21 *Cable Modem Order* ¶¶ 17-18.

address into an IPv6 address, and vice versa"[22]—further confirm that Internet access service is "far more than a pure 'connectivity' service."[23] Because the record confirms that the technical nature of broadband Internet access services has not changed, reclassification would be legally suspect.[24]

Second, the record likewise undercuts arguments for alternative Title II approaches—such as the Mozilla/Wu theory that only the transmission of Internet content from remote servers to end users should be deemed a telecommunications service.[25] For example, Charter Communications notes that ISPs do not offer such remote transmission as a stand-alone service that can be classified in isolation, and that such classification would be contrary to the text of Title II in any event because "[b]roadband ISPs do not provide a service 'for a fee directly to the public' when they carry downstream traffic from edge providers to their users.[26] Even some proponents of Title II realize that such approaches cannot be squared with the relevant facts or the statute. For example, Professor Barbara van Schewick—who has argued for stringent Open Internet rules—echoes the observations made by Charter and further notes that if such transmission were provided on a fee-for-service basis it would be arbitrary and capricious to use

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22 Comments of Verizon and Verizon Wireless, GN Docket No. 14-28, at 61 (Jul. 15, 2014) ("Verizon Comments").

23 *See* AT&T Comments at 49.

24 *See, e.g.*, CEA Comments at 12 n.31 ("The Commission cannot depart from its long-held conclusion that broadband Internet access is an information service, given that the underlying facts of Internet technology have not changed.").

25 *See* Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-91, 14-28, WC Docket No. 07-52, at 9 (filed May 5, 2014).

26 *See* Comments of Charter Communications, Inc., GN Docket No. 14-28, at 19-20 (Jul. 18, 2014).

the existence of such fees to support the Commission's authority to adopt a Title II approach only to turn around and ban those fees.[27]

Third, the record belies any assertion that a Title II approach would be "deregulatory" in nature or would somehow *promote* innovation and investment.[28] As Cox noted in its opening comments, the Commission itself has long recognized that common-carrier regulations restrict the ability of providers to respond rapidly to market forces by providing pricing and service options that are tailored to consumers' needs.[29] Indeed, as Internet pioneer Jeff Pulver recently observed, advocates calling for Title II regulation dangerously ignore the obstacles that framework poses to investment and innovation; indeed, in his view, "Title II makes innovation illegal."[30] Moreover, while "[p]reemptive action against the mere perception of risk is always problematic . . . the pace of change makes it impossible in the case of IP networks."[31] Many commenters agree that a Title II approach would undermine the certainty and stability necessary to drive continued investment in broadband networks and innovation, and thus would frustrate

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27 *See* Ex Parte Letter of Professor Barbara van Schewick, GN Docket No. 14-28 (Aug. 6, 2014). Professor van Schewick also recognizes that adopting a contingent or "springing" reclassification approach that would treat Title II as a backstop that would take effect only if an order relying on Section 706 were vacated by a court would be fatally flawed because the Commission could not simultaneously maintain that that broadband Internet access service is both a "telecommunications service" and an "information service," and in any event could not establish now how broadband Internet access services should be classified at some later date.

28 *See* Free Press Comments at 98-112.

29 *See* Cox Comments at 35; *see also* Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 25-26 (Aug. 27, 2004).

30 *See* Jeff Pulver, *Fear and Loathing as Telecom Policy*, HUFFINGTON POST (Aug. 6, 2014), *available at* http://www.huffingtonpost.com/jeff-pulver/fear-and-loathing-as-tele_b_5654881.html?utm_hp_ref=tw.

31 *Id.*

the vital national interests in extending broadband availability to unserved areas of the country.[32] This risk is vividly illustrated by economic analyses presented by the National Cable & Telecommunications Association ("NCTA"), which show that common-carrier regulation has chilled broadband investment in Europe (and thwarted the emergence of vigorous competition), in contrast to the extraordinary levels of broadband investment that accompanied the light-touch regulatory framework that has been applicable in the United States.[33]

Fourth, while parties favoring reclassification assert that forbearance would mitigate many of these concerns,[34] the record undercuts such assertions. As AT&T notes, forbearance is "by no means the panacea that reclassification proponents make it out to be."[35] Among other problems: (i) the forbearance standard could be satisfied only through extensive further proceedings and granular data analysis—all of which would further undermine the certainty and stability critical to the continuing evolution of the Internet;[36] (ii) the requisite findings to satisfy

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32 *See, e.g.*, Alcatel-Lucent Comments at 13; AT&T Comments at 39-40 and 51-61; Comments of CenturyLink, GN Docket No. 14-28, at 36 (Jul. 17, 2014) ("CenturyLink Comments"); Comments of Cisco Systems, Inc., GN Docket No. 14-28, at 23-24 (Jul. 17, 2014) ("Cisco Comments"); CEA Comments at 12-14; Comments of Frontier Communications, GN Docket No. 14-28, at 2-4 (Jul. 18, 2014) ("Frontier Comments"); Comments of Mobile Future, GN Docket No. 14-28, at 12-15 (Jul. 15, 2014); NMO Comments at 8-11.

33 *See* Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28, at 9 (Jul. 15, 2014) ("NCTA Comments").

34 *See, e.g.*, Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, GN Docket No. 14-28, at 80-83 (Jul. 15, 2014) ("Public Knowledge Comments"); Comments of COMPTEL, GN Docket No. 14-28, at 21-24 (Jul. 15, 2014) ("COMPTEL Comments"); Vonage Comments at 46.

35 *See* AT&T Comments at 39.

36 *See* Petition for a Writ of Certiorari by U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-281, at 25-26 (Aug. 27, 2004) (explaining that forbearance authority "is not in this context an effective means of removing regulatory uncertainty," as "[f]orbearance proceedings would be time-consuming and hotly contested and would

the forbearance standard in Section 10 of the Communications Act likely would conflict with whatever policy findings are made in support of new Open Internet rules; and (iii) whatever Title II provisions would remain after partial forbearance—and proponents of Title II argue for an extensive array of surviving provisions, including not only the core common carrier duties of Sections 201 and 202 but many other measures, such as unprecedented wholesale unbundling requirements[37]—would entail substantial burdens that would chill investment and innovation and curtail competition in spite of any pruning of other obligations.

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For all these reasons, the Commission should rely on Section 706 rather than Title II as the basis for any Open Internet rules that it adopts in this proceeding.

II. THE RECORD REVEALS A BROAD CONSENSUS REGARDING THE APPROPRIATE PARAMETERS OF TRANSPARENCY, NO-BLOCKING, AND "COMMERCIAL REASONABLENESS" REQUIREMENTS

Cox's opening comments explain that, although Cox is not convinced of the need for prescriptive Open Internet mandates, Cox does not oppose transparency, no-blocking, or "commercial reasonableness" requirements that achieve the Commission's Open Internet policy objectives without imposing excessive burdens that undercut investment and innovation.[38] The record contains strong support for such a measured approach and demonstrates that heavy-handed regulation is unnecessary and would be counterproductive.

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assuredly lead to new rounds of litigation, and there is no way to predict in advance the ultimate outcome of such proceedings").

37 *See, e.g.,* Public Knowledge Comments at 88-95; CompTel Comments at 21-23; Comments of New Media Rights, GN Docket No. 14-28, at 25 (Jul. 15, 2014); Comments of Mozilla, GN Docket No. 14-28, at 13 (Jul. 15, 2014); Comments of the National Association of Regulatory Utility Commissioners, GN Docket No. 14-28, at 14-16 (Jul. 18, 2014).

38 *See* Cox Comments at 1.

A. The Opening Comments Demonstrate That Existing Transparency Requirements Are Sufficient and Proposals for "Enhancements" Would Create More Harms than Benefits

As Cox noted in its opening comments, transparency should continue to play a central role in any Open Internet regulatory regime, as transparency requirements are "the most effective and least intrusive regulatory measures at the Commission's disposal" for promoting Open Internet principles and ensure that consumers can make informed decisions about available broadband Internet access services.[39] At the same time, Cox argued that existing transparency requirements are more than sufficient to protect consumers and need not be augmented through the imposition of additional obligations on ISPs, particularly given the many problems associated with the NPRM's "enhanced disclosure" proposals. The record reflects strong support for this sentiment.

For example, CEA notes that additional transparency requirements are "unnecessary and could excessively burden broadband providers, impeding innovation and discouraging investment."[40] Qualcomm similarly observes that proposed requirements are solutions in search of a problem, in that "there is no evidence that the existing rule is insufficient or has caused any customer harm."[41] To the contrary, the data suggest that proposed requirements themselves would cause more harm than good; as economist Michael Katz explains, "it is unlikely that the economic benefit of providing potentially esoteric network information to end users would outweigh the economic costs to both providers and end users."[42]

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39 NPRM ¶ 66.

40 *See* CEA Comments at 7 n.14.

41 *See* Comments of QUALCOMM Incorporated, GN Docket No. 14-28, at 11 (Jul. 15, 2014).

42 *See* Michael L. Katz, *Protecting and Promoting Consumer Benefits Derived from the Internet*, at ¶ 22, *attached to* Verizon Comments.

In short, commenters generally agree that most of the enhanced transparency proposals would entail substantial burdens that would far outweigh any benefits. Accordingly, the Commission should not adopt additional disclosure or reporting requirements at this time.

B. The Record Also Confirms That Reinstatement of the 2010 "No-Blocking" Rule Would Be More than Sufficient to Protect Consumers

Cox has no intention of blocking access to any lawful websites or services; as it explained in its opening comments, Cox has invested billions of dollars to ensure that its subscribers have access to the online content and services they desire, and thus has every incentive to encourage customers to make full use of the network.[43] Other ISPs have made similar investments and have similar incentives. Because ISPs are subject to market discipline, blocking access to lawful content and services would be counterproductive. Consequently, regulation likely is unnecessary to prevent blocking of such access.

Nevertheless, Cox continues to recognize that the Commission may deem it necessary to impose a formal "no-blocking" requirement as a regulatory backstop. To the extent that the Commission makes such a determination, the record shows that the Commission could provide meaningful protection to consumers through a "no-blocking" rule similar to that adopted in 2010 (consistent with Cox's opening comments). For example, AT&T notes that the Commission could "adopt the text of the [2010] no-blocking rule . . . with a clarification that it does not preclude broadband providers from negotiating individualized . . . arrangements" with edge providers that comport with Commission rules governing paid prioritization.[44] CWA and the NAACP, among many other parties, also urge the Commission to reinstate the 2010 no-blocking

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43 *See* Cox Comments at 24.

44 *See* AT&T Comments at 72-73.

rule to protect an open Internet and foster the "virtuous circle" of investment and innovation by broadband and edge providers.[45]

At the same time, commenting parties recognize that the Commission should not micromanage broadband service quality by imposing minimum performance requirements in the guise of a "no-blocking" rule. For example, Cisco Systems notes that establishing minimum standards in this fashion "would be an extraordinarily complicated and difficult task," and one that the Commission need not undertake as market forces already compel the provision of quality service to consumers.[46] Mozilla (despite favoring extensive regulation) agrees that any attempt to require a "minimum quality of service" for all traffic is "destined for failure."[47] The record thus supports ISPs' position that they should be required only to offer service on a "best efforts" basis.[48]

As there is broad agreement that existing rules are working and that new performance requirements are unnecessary and would be unworkable, the Commission should refrain from adopting any such requirements.

C. The Commission Can Address Concerns Regarding "Paid Prioritization" Without Imposing Needless Restrictions on ISPs' Relationships with their Retail Subscribers

In its opening comments, Cox questioned whether the Commission has a genuine need to screen any two-sided market arrangements involving ISPs for "commercial reasonableness," given that ISPs are constrained by competitive forces and have strong incentives to ensure that broadband content is delivered to consumers in the manner they demand. Cox alternatively

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45 *See* CWA/NAACP Comments at 18-19.

46 *See* Cisco Comments at 17.

47 *See* Mozilla Comments at 16.

48 *See, e.g.*, NCTA Comments at 56-61; Comcast Comments at 3.

urged the Commission to ensure that any rule it does adopt in this regard allows ISPs to maintain an appropriate degree of business flexibility. More specifically, Cox argued that any such rule should: (i) focus on whether a given practice is anticompetitive; and (ii) be limited to actual or proposed relationships between broadband access providers and edge providers regarding the delivery of broadband Internet access traffic over last-mile networks.[49]

The record supports that approach and reinforces the NPRM's tentative conclusion that the Commission can address any concerns regarding "paid prioritization" by relying on its authority under Section 706 and targeting ISPs' relationships with edge providers—while steering clear of ISPs' relationships with their retail subscribers. For example, Cisco Systems endorses a "commercial reasonableness" requirement that "is implemented in a manner that affords providers the flexibility they need to function in the dynamic broadband Internet marketplace."[50] Comcast also supports this approach, noting that a "commercial reasonableness" requirement focused on "direct commercial relationships between broadband providers and edge providers" would "closely mirror the rule suggested in *Verizon*."[51] Many other comments are in accord.[52]

The record also establishes that if the Commission were to address anticompetitive "paid prioritization" arrangements more specifically, it could do so effectively using targeted rules that would be legally defensible and practically workable. For example, Comcast notes that the Commission could use its authority under Section 706 to adopt "a rebuttable presumption that

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49 *See* Cox Comments at 26-28.

50 *See* Cisco Comments at 6.

51 *See* Comcast Comments at 23-24.

52 *See, e.g.*, NCTA Comments at 61-66; Verizon Comments at 29-33.

'paid prioritization' arrangements are commercially unreasonable"[53]—an approach that also has received significant support from public interest groups.[54] Such a presumption would allow ISPs to "show[] that the arrangement is commercially reasonable and fair to consumers and edge providers."[55] AT&T offers two alternative approaches: (i) banning all paid prioritization arrangements that are not authorized by end users;[56] and (ii) allowing ISPs to forego the right to engage in paid prioritization arrangements in exchange for freedom from increased regulation.[57] Each of these proposals merits careful consideration.

As Cisco Systems notes, to survive legal scrutiny, any "commercial reasonableness" requirement "must 'differ materially from the kind of requirements that necessarily amount to common carriage.'"[58] An approach that bans or imposes a rebuttable presumption against certain arrangements with specific attributes that render them likely to be anticompetitive—while leaving some room for individualized dealings that are procompetitive and benefit consumers—would comply with the *Verizon* decision.[59] Moreover, by using its Section 706 authority to prevent harmful arrangements between broadband providers and edge providers that address the delivery of Internet traffic over last-mile networks, while refraining from imposing new restrictions on broadband providers' relationships with their retail subscribers, the Commission

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53 *See* Comcast Comments at 24; *see also* Verizon Comments at 38 (noting that "the Commission even could create a rebuttable presumption that those specific practices are unreasonable—without lapsing into common carriage").

54 *See* NMO Comments at 11; CWA/NAACP Comments at 19.

55 *See* Comcast Comments at 24.

56 *See* AT&T Comments at 31-37.

57 *See id.* at 37-39.

58 *See* Cisco Comments at 7 (quoting *Cellco P'ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012)).

59 *Verizon*, 740 F.3d at 657.

could remain faithful to the blueprint established by the *Verizon* court. The record accordingly makes clear that, contrary to the contentions of some commenters, there is no need to pursue a destabilizing and likely unlawful Title II approach in order to adopt strong rules limiting paid prioritization.

III. ANY OPEN INTERNET RULES SHOULD APPLY EVENHANDEDLY TO FIXED AND MOBILE BROADBAND PROVIDERS AS WELL AS TO EDGE PROVIDERS

The record supports the proposition that, if the Commission adopts new restrictions on blocking and other rules to ensure the reasonableness of commercial arrangements between ISPs and edge providers, it should ensure that those rules apply to *mobile* broadband providers to the same extent as *fixed* providers. As Cox noted in its opening comments, mobile networks have evolved to the point that they now compete head-to-head with fixed networks and have secured a central place in consumers' lives.[60] As Chairman Wheeler noted at the 2014 CTIA Show last week, mobile networks now support "must-have service used for just about everything" such that "[o]ne of the constant themes on the record [in this proceeding] is how consumers increasingly rely on mobile broadband as an important pathway to access the Internet."[61] Recent surveys confirm that many Americans rely on their mobile device as their primary means for accessing the Internet.[62] Consequently, to the extent that consumers are at any risk of harm from blocking

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60 *See* Cox Comments at 9-11.

61 *See Prepared Remarks of FCC Chairman Tom Wheeler*, 2014 CTIA Show, Las Vegas, NV, at 2, 4 (Sep. 9, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0909/DOC-329271A1.pdf.

62 *See* Drew Desilver, *For Most Wireless-Only Households, Look South and West*, PEWRESEARCHCENTER (Dec. 23, 2013) (describing particular reliance of rural Americans on broadband wireless devices), *available at* http://www.pewresearch.org/fact-tank/2013/12/23/for-most-wireless-only-households-look-south-and-west/; *see also id.* ("The wireless-only lifestyle is especially predominant among the poor and the young."); Bank of America, *Trends in Consumer Mobility Report* (June 30, 2014), at 1 (describing

or discrimination, failing to extend Open Internet requirements to mobile providers would fail to ameliorate such concerns and would result in significant competitive distortions.[63] Cox observed that these results would be particularly unacceptable given that mobile providers have given rise to the very concerns prompting the Commission to initiate this proceeding.[64]

Other parties—including both service providers and public interest organizations—agree that any cogent regulatory framework must treat wireline and wireless providers comparably. For example, Public Knowledge, the Benton Foundation, and Access Sonoma Broadband agree that rapid advances by mobile wireless networks in recent years eliminate any conceivable justification for differential treatment of fixed and mobile providers under the rules.[65] They further observe that mobile networks provide the only broadband access for many low-income households; thus, unless Open Internet requirements apply to mobile networks, such mobile-only households will not benefit from the new Open Internet rules.[66] Similarly, the Center for Democracy & Technology ("CDT") advocates treating fixed and mobile providers under a common set of rules.[67] A diverse array of ISPs, edge providers, and public interest organizations agree.[68]

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mobile devices as "the cornerstone for communication" and describing extraordinary importance of such devices to consumers).

63 *See* Cox Comments at 8-10.

64 *See* Cox Comments at 8 n.9; NPRM ¶ 41 (citing recent conduct of AT&T Mobility and Verizon Wireless as the key justification for reinstating Open Internet rules).

65 *See* Public Knowledge Comments at 25-26.

66 *Id.* at 28-29

67 *See* Comments of the Center for Democracy and Technology, GN Docket No. 14-28, at 28 (Jul. 17, 2014) ("CDT Comments").

68 *See, e.g.*, CenturyLink Comments at 24; NCTA Comments at 69-75; Frontier Comments at 8-10; ITIF Comments at 20-21; Internet Association Comments at 20-21; Comments of Microsoft Corporation, GN Docket No. 14-28, at 19-27 (Jul. 18, 2014).

Mobile wireless interests, unsurprisingly, suggest that they should be exempt from any new Open Internet rules.[69] But there simply is no basis for such an exemption, as: (i) the same Open Internet concerns arise in the mobile context (to the extent they are valid at all), and mobile customers are no less deserving of protection; and (ii) mobile providers compete with fixed providers, such that differing regulatory requirements would result in marketplace distortions. The Commission has an important opportunity in this proceeding to adopt sustainable, forward-looking Open Internet rules, and, especially in light of the rapid growth of and consumer demand for mobile broadband services, excluding those services from the Commission's new framework should be a non-starter.

Similarly, edge providers should be subject to the same limitations on blocking and discrimination as ISPs. As Cox noted in its opening comments, several large edge providers have a demonstrated history of withholding content from consumers, and such behavior directly implicates Section 706 and the Open Internet interests that it authorizes the Commission to advance.[70] Other parties agree. For example, NCTA emphasizes that the Commission cannot accomplish its regulatory objectives if it focuses solely on ISP conduct, and observes that Google's practices have a far more significant impact on consumers' access to other services than those of ISPs.[71] Verizon likewise urges the Commission to ensure that any Open Internet rules are applied to ISPs and edge providers in an even-handed fashion.[72]

In contrast, parties advocating that any Open Internet rules apply exclusively to ISPs provide no valid justification for excluding over-the-top content providers and other edge

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69 *See, e.g.*, Comments of CTIA—The Wireless Association, GN Docket No. 14-28, at 10-11 (Jul 18, 2014); CEA Comments at 10; Verizon Comments at 43-44.

70 *See* Cox Comments at 11-13.

71 *See* NCTA Comments at 76-78.

72 *See* Verizon Comments at 19-20.

providers. For example, while CDT claims that such application would "undercut the very choice and innovation that an open Internet is intended to facilitate,"[73] it fails to explain: (i) how enabling edge providers to selectively block access to content they make freely available to the public is somehow necessary to choice and innovation or (ii) why such concerns about choice and innovation should be given less weight when it comes to a decision to regulate ISPs. And while some parties suggest that the Commission may lack authority to impose Open Internet requirements on edge providers,[74] the *Verizon* court's analysis indicates that the Commission's authority to regulate ISPs under Section 706 is *broader* and *more direct* than its authority to regulate ISPs under that section.[75] In short, there is no basis to exempt edge providers from the scope of any Open Internet rules. Rather, the Commission should adopt a consistent approach to ISPs and edge providers, recognizing that if blocking and discrimination present concerns that justify regulatory intervention, those concerns are no less pressing when the source of the harm is an edge provider.[76]

IV. THE COMMISSION SHOULD RESIST THE EFFORTS OF SOME PARTIES TO EXPAND THE SCOPE OF THIS PROCEEDING TO ENCOMPASS INTERNET TRAFFIC-EXCHANGE ARRANGEMENTS

Finally, consistent with Cox's opening comments, other commenters agree that traffic-exchange arrangements concern only "the efficient allocation of costs for the transmission of

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73 *See* CDT Comments at 26.

74 *See, e.g.*, Comments of the Online Publishers Association, GN Docket No. 14-28, at 5 (Jul. 15, 2014).

75 *See* Cox Comments at 12.

76 *See* Everett Ehrlich, *Internet Policy Shouldn't Pit Service Providers Against Content Providers*, WASHINGTON POST (Aug. 17, 2014) (arguing that concerns about broadband providers' acting anticompetitively vis-à-vis edge providers are misplaced, as "the leading edge providers have achieved true market power and, in many cases, monopoly or near-monopoly status"), *available at* http://www.washingtonpost.com/opinions/internet-policy-shouldnt-pit-service-providers-against-content-providers/2014/08/17/e78b68d0-2336-11e4-958c-268a320a60ce_story.html.

traffic across the Internet backbone," and thus "have no bearing on and are entirely distinct from any issues that are the subject of the Commission's open Internet rules."[77] In addition, commenters note that the traffic-exchange marketplace is competitive and is subject to market discipline.[78] Consequently, that marketplace has never been the focus of the Commission's Open Internet initiatives and should not be the focus of such initiatives now.[79]

Netflix asserts that "any open Internet protection[s]" for end users would not be "complete" unless the rules "address the points of interconnection to terminating ISPs' networks."[80] But Netflix ignores that the business arrangements that govern Internet traffic-exchange do not address or impact the end-user's ability to access specific content or the priority with which such content is delivered. Netflix also ignores the competitive nature of traffic-exchange markets, which ensures that no ISP can abuse its position to the detriment of other participants in the Internet ecosystem. Critically, ISPs interconnect with a variety of transit and content delivery network ("CDN") providers, ensuring that edge providers have multiple cost-effective routes to choose from to reach each ISP's customers.[81] Consequently, there is no basis for addressing Internet traffic-exchange arrangements in this proceeding or otherwise subjecting such arrangements to invasive regulation.

Even apart from the inappropriateness of efforts to shoehorn traffic exchange into this proceeding, subjecting such arrangements to a roving and undefined "reasonableness" or "anti-

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77 *See* Comcast Comments at 33.

78 *See, e.g.,* Verizon Comments at 70-76.

79 *See* NCTA Comments at 78-82; *see also, e.g.,* Comcast Comments at 32-39; Time Warner Cable Comments at 30.

80 *See* Comments of Netflix, Inc., GN Docket No. 14-28, at 11 (Jul. 15, 2014) ("Netflix Comments").

81 *See* NCTA Comments at 76-78; USTelecom Comments at 53-54; Verizon Comments at 70-75; Comcast Comments at 36-38.

discrimination" requirement, as suggested by certain parties,[82] would disrupt the existing Internet ecosystem and result in significant harm to consumers. Among other things, any such approach would undermine incentives for transit providers and edge providers to compress traffic and otherwise promote network efficiencies. As a result, network congestion almost certainly would increase and, at the same time, consumers likely would face higher costs. These factors, in turn, would undermine the Commission's interest in increasing broadband adoption, especially in price-sensitive segments of the unserved population.

CONCLUSION

For the reasons set forth herein and in Cox's opening comments, the Commission should ensure that any Open Internet rules adopted in this proceeding are technologically neutral, balanced, and restrained.

Respectfully submitted,

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September 15, 2014

[82] *See* Comments of Level 3 Communications, LLC, GN Docket No. 14-28, at 14 (Jul. 15, 2014); Netflix Comments at 18.