

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**REPLY COMMENTS OF CENTURYLINK**

Timothy M. Boucher  
1099 New York Avenue, N.W.  
Suite 250  
Washington, DC 20001  
303-992-5751  
Timothy.Boucher@CenturyLink.com

Attorney for

CENTURYLINK

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CenturyLink submits these reply comments in the above-referenced matters in response to the Commission’s *Open Internet* Notice of Proposed Rulemaking (*NPRM*)<sup>1</sup> and the Wireline Competition Bureau’s recent Public Notice seeking to refresh the record in the Commission’s 2010 *Framework for Broadband Internet Service* proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY.**

The initial comments demonstrate that there is one central, overarching issue in these proceedings—whether all broadband Internet access (BIA) users should have to help pay for the vast usage of a small percentage of customers. It cannot be seriously denied that there is a dramatic transformation occurring in the way that last mile broadband networks are being utilized due to the avalanche of data consumption being driven by the usage (primarily video usage) of a minority of end users. This transformation is a good thing, to be sure, for all participants in the Internet ecosystem. But, the key central policy question presented by this

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<sup>1</sup> *In the Matter of Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28 (Rel. May 15, 2014), 2014 FCC Lexis 1689 (*NPRM*).

<sup>2</sup> *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, Public Notice, DA 14-748 (Rel. May 30, 2014); Notice of Inquiry, 25 FCC Rcd 7866 (2010) (*NOI*).

phenomenon is whether the Commission will create a regulatory environment that will benefit consumers and edge providers by allowing broadband providers to continuously evolve their network management practices to meet rapidly changing consumption demands. If they are going to have adequate flexibility to manage their networks, broadband providers must, among other things have the ability to make individualized offerings that more efficiently target the costs of this growing consumption. And, in order to do so efficiently, they cannot be limited to making differentiated offerings to end users only. Broadband providers must have access to both sides of the two-sided market that is driving this consumption and, at least in some instances, have the ability to extend differentiated offerings to edge providers.

Proponents of heavy-handed regulation in this area insist that broadband providers should not have *any* such flexibility. In other words, broadband providers should, in their view, be precluded from offering different services to address the usage of a grandmother who uses her broadband service exclusively for web-surfing and email and the usage of a teenager who binge watches every episode of a new season of “House of Cards” in high definition starting the moment it is released. According to them, not only must all forms of differentiated broadband provider offerings to edge providers be barred, but the Commission should eliminate the flexibility broadband providers possessed under the Commission’s 2010 *Open Internet* rules to extend differentiated offerings to end users -- by banning long-standing practices such as data caps and usage-based differentiated offerings to end users. None of these parties deny the transformation that is driving the need for these practices. They simply ignore it altogether and continue a campaign that distorts the underlying issues with slogans like “exclusive fast lanes” and “slow lanes” and contrived hysteria about the potential for blocking or degrading of Internet traffic – despite the absence from the record of any evidence of such practices. These parties

also wholly ignore the obvious irony that, if their proposals are adopted, the Commission would only be ensuring that all consumers will bear the costs of the high usage of a few – a decidedly anti-consumer outcome.

The Commission should reject these entreaties and, instead, impose a light touch regulatory approach that will ensure that broadband providers have adequate flexibility in their BIA services and thereby ensure that the historic Internet virtuous cycle extends into this new era.

CenturyLink also discusses applicable legal requirements briefly below. Among other things, CenturyLink discusses legal defects with some of the specific no blocking and non-discrimination proposals advocated by certain parties for last mile networks that support BIA, as well as the proposals by some parties that the Commission adopt rules in this proceeding that regulate new areas such as peering and other IP traffic exchange and interconnection.

## **II. THE INITIAL COMMENTS FURTHER CONFIRM THE DRAMATIC TRANSFORMATION THAT IS OCCURRING IN BROADBAND INTERNET ACCESS USAGE.**

There is universal recognition in the initial comments, by the parties who address the issue, that there is a dramatic transformation occurring in the manner in which broadband Internet access services are utilizing last mile broadband networks. CenturyLink demonstrated this, together with the investment needed to address this consumption, in its initial comments.<sup>3</sup>

The initial comments of a variety of other carriers further evidence this phenomenon.<sup>4</sup> For

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<sup>3</sup> CenturyLink Comments, pp. 1-7.

<sup>4</sup> See, e.g., AT&T, Inc. (AT&T) Comments, pp. 10-11; Charter Communications, Inc. (Charter) Comments, pp. 11-12; Comments of Cisco Systems, Inc. (Cisco), pp. 3-5; National Cable & Telecommunications Association (NCTA) Comments, pp. 6-16; ;The Telecommunications Industry Association (TIA), Comments, pp. 6-11; Comments of Qualcomm Incorporated (Qualcomm), pp. 5-6.

example, AT&T describes the dramatic increase in usage of online video, music and photo applications – including an increase in online video services revenues of 175 percent (from \$1.86 billion to \$5.12 billion) during the time period 2010 to 2013.<sup>5</sup> Charter confirms the *NPRM*'s finding that there has been “tremendous growth in the online voice and video markets.”<sup>6</sup> Cisco reports that:

Cisco's own research finds that “[g]lobal IP traffic has increased more than fivefold in the past 5 years” and that it “will increase threefold over the next 5 years.” In North America alone, Cisco expects traffic to grow from 16,607 petabytes of data in 2013 to 40,545 petabytes of data in 2018. Cisco expects this growth to be driven by multiple factors including online gaming, video over IP, voice over IP, and peer-to-peer (“P2P”) file-exchange services and the growth of the Internet of Things. (citations omitted)<sup>7</sup>

Cisco also confirms the unique role of online video usage in this growth trend:

The sum of all forms of IP video, which includes Internet video, IP VoD, video files exchanged through file sharing, video-streamed gaming, and videoconferencing, will continue to be in the range of 80 to 90 percent of total IP traffic. Globally, IP video traffic will account for 79 percent of traffic by 2018 . . .<sup>8</sup>

Similarly, TIA describes the way in which “America's increasing appetite for video and online gaming, in particular, is transforming the way traffic moves across the Internet.”<sup>9</sup> The United States Telecom Association (US Telecom) also details how customers are making significantly greater use of the Internet, including the fact that the U.S. generated three hundred sixty times more IP traffic in 2012 than it generated in the year 2000, eight thousand times more than 1996, and twelve and a half million times more than 1990.<sup>10</sup>

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<sup>5</sup> AT&T, pp. 10-11.

<sup>6</sup> Charter, p. 4; *NPRM* at ¶ 32.

<sup>7</sup> Cisco, pp. 4-5.

<sup>8</sup> Cisco, p. 5.

<sup>9</sup> TIA, p. 7.

<sup>10</sup> US Telecom Comments, p. 6.

At the same time, there is no evidence in the record controverting CenturyLink’s demonstration in its initial comments that this dramatic traffic growth is being driven by a small percentage of customers.<sup>11</sup>

The initial comments also further document the control that edge providers, particularly a small group of dominant edge providers, have over customer experience with BIA services.<sup>12</sup> By way of example, Charter discusses the disproportionate share of traffic growth being driven by a handful of giant edge providers such as Google, Apple, Amazon, and Facebook.<sup>13</sup> NCTA details the significant impact that a small number of Internet “hyper-giants” have on BIA customer experience—including Netflix and Google (YouTube) in online video.<sup>14</sup> Bright House Networks, LLC (Bright House) describes the rise in blocking activities by edge providers in recent years.<sup>15</sup>

**III. PROPONENTS OF HEAVY-HANDED REGULATION WHOLLY IGNORE THIS TRANSFORMATION AND, INSTEAD, SEEK TO TURN-BACK-THE-CLOCK AND ELIMINATE EVEN EXISTING FLEXIBILITY.**

These trends in BIA usage of last mile networks are wholly ignored by the various proponents of heavy-handed regulation in this proceeding – an amazing oversight in the context of a proceeding where the central purpose is to gather data about the current challenges facing broadband networks and, based on that data, devise the appropriate policy/regulatory framework

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<sup>11</sup> See, e.g., CenturyLink, pp. 2-3.

<sup>12</sup> CenturyLink, pp. 16-20.

<sup>13</sup> Charter, p. 11.

<sup>14</sup> NCTA, pp. 14-16.

<sup>15</sup> Bright House Comments, pp. 5-8.

to assure a continuation of the Internet virtuous cycle.<sup>16</sup> In other words, without any serious discussion of the real network management issues facing broadband providers today, these parties ask the Commission to reverse the de-regulatory trajectory it has taken with respect to broadband and BIA over the last ten-plus years, and impose (under either Title I or Title II) the equivalent of common carrier obligations in this area. Their proposals would prevent broadband providers from having the flexibility they need to address the current challenges facing broadband networks. Most of these parties advocate for a complete ban, either expressly or effectively, on differentiated broadband provider offerings to edge providers.<sup>17</sup> Moreover, some would even have the Commission eliminate existing flexibility in broadband provider offerings to end users. For example, a large portion of Public Knowledge, et al.’s comments are focused on arguments that data caps and other forms of usage-based billing practices should also be banned.<sup>18</sup> This is something that was expressly permitted even by the Commission’s 2010 Open Internet rules.<sup>19</sup>

#### **IV. A LIGHT TOUCH REGULATORY APPROACH WILL ENSURE THAT THE INTERNET VIRTUOUS CYCLE CONTINUES.**

The concerns discussed above compel a decision in this proceeding that will result in a light regulatory touch. As CenturyLink detailed in its initial comments, there is good reason to

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<sup>16</sup> See generally, for example, Electronic Frontier Foundation (EFF) Comments; Free Press Comments; National Association of State Utility Consumer Advocates (NASUCA) Comments; Public Knowledge, Benton Foundation, Access Sonoma Broadband (Public Knowledge, et al.) Comments; Level 3 Communications, LLC (Level 3) Comments; Cogent Communications Group, Inc. (Cogent) Comments; Netflix, Inc. (Netflix) Comments.

<sup>17</sup> See, e.g., Free Press, p. 127 (calling for a “prohibition on discrimination”); NASUCA, p. 17 (calling for rules that prevent discrimination); Public Knowledge, et al., p. 1 (calling for prohibition on usage-based and other differentiation).

<sup>18</sup> Public Knowledge, et al., pp. 1, 48-60.

<sup>19</sup> *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17952 ¶ 72 (2010) (*2010 Open Internet Order*).

question the policy wisdom of imposing any new regulation to broadband Internet access services at this time in the name of preserving an open Internet. But, if the Commission chooses, despite this evidence, to adopt new regulations, it should ensure that, whatever it does, it does not prevent broadband providers from having the flexibility they need to manage their networks in a way that maximizes service performance for consumers and efficiently targets costs of Internet consumption to the users/causers of that consumption. This approach will ensure that the historic virtuous cycle, which has made the Internet an unprecedented vehicle of innovation, growth, expression, and civic engagement, continues in the face of today's transformed model of usage of last mile networks.

**V. LEGALLY, ANY NO BLOCKING OR NON-DISCRIMINATION RULES *MUST* PROVIDE ADEQUATE FLEXIBILITY TO BROADBAND PROVIDERS TO OPERATE NETWORKS EFFICIENTLY.**

The discussion above and in the initial comments of CenturyLink and a variety of other parties clearly demonstrate that the best policy result is one where broadband providers have the flexibility to operate their networks in an efficient manner. But, this is not just the ideal policy result, it is the one that the law compels as well. CenturyLink's initial comments already detailed the limited scope of any potential Commission legal authority in this area – whether it seeks to enact regulation under Title I/Section 706 or pursuant to any version of a Title II reclassification approach.<sup>20</sup> Other parties also express their views as to potential limitations on the Commission's legal authority.<sup>21</sup> A brief additional discussion is warranted for some of the

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<sup>20</sup> CenturyLink, pp. 36-73.

<sup>21</sup> See, e.g., Comments of Verizon and Verizon Wireless (Verizon), pp. 31-33, 46-69; AT&T, pp. 39-50; Charter, pp. 13-21; Comcast Corporation (Comcast), pp. 54-59; Comments of Cox Communications, Inc., pp. 31-37; US Telecom, pp. 31-44, 51-53.

specific proposals for no blocking rules and non-discrimination rules discussed in the comments of certain parties.

As CenturyLink and numerous other parties demonstrate in their initial comments, even assuming *arguendo* that Section 706 provides a grant of Commission authority to begin with,<sup>22</sup> it provides only a very narrow grant.<sup>23</sup> And, any grant is circumscribed by the independent requirement in the Communications Act of 1934, as amended (the Act) that providers of information services such as broadband providers not be subjected to common carrier regulation. The proposed rules, and certainly the more onerous types of rules proposed, would cross both of these boundaries. This is certainly true, by way of example, for an unreasonable discrimination standard, a minimum level of service requirement, extension of no blocking or nondiscrimination rights to edge providers, an outright ban on paid prioritization or paid-for differentiated service offerings, or any other type of no blocking, nondiscrimination or other rule that mandates service for free or otherwise prevents broadband providers from having adequate flexibility to determine with whom they deal and on what terms. At most, Section 706 permits the Commission to take actions that have the effect of promoting broadband deployment and removing barriers to investment. But, the record shows that the new rules proposed in the *NPRM*, and particularly the more onerous versions of those rules discussed herein and in CenturyLink's initial comments and the comments of other parties, would not promote deployment and remove barriers to infrastructure investment. In fact, they would deter investment and thereby actually deter deployment. No regulation that prevents broadband providers from having the flexibility to enter

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<sup>22</sup> CenturyLink's initial comments already discussed questions about the existence of any Section 706 legal authority to begin with. CenturyLink, pp. 52-55. CenturyLink will not restate those arguments here.

<sup>23</sup> See CenturyLink, pp. 55-57.

into individualized offerings to end users or edge providers can be fairly characterized as promoting broadband deployment or removing barriers to infrastructure investment. Such regulation also cannot be reconciled with the clear expression in both Section 706(a) and Section 706(b) of a pro-competition, de-regulatory policy guidance. And, it also contravenes the prohibition in Section 153(51) of the Act on imposing common carrier regulation on information services.<sup>24</sup>

Other potential regulatory obligations discussed in the initial comments would also clearly fall into this prohibited territory. For example, Comcast proposes that the Commission might lawfully adopt a rebuttable presumption against paid prioritization.<sup>25</sup> It cannot. This is precisely how the Commission's 2010 nondiscrimination rule was framed and the D.C. Circuit, in *Verizon*, has already found that such a rule constitutes impermissible common carrier regulation.<sup>26</sup> It would also exceed any conceivable Section 706 authority for the reasons discussed above. While Comcast proposes to cabin such a requirement with a clarification that it would not be a complete ban on paid prioritization (or paid differentiation), the risk is too high that such a regulation would, in the end, be the equivalent of the 2010 rule that the D.C. Circuit rejected. Public Knowledge, et al.'s apparent proposal that the Commission adopt a prohibition on data caps or other usage-based offerings to end users<sup>27</sup> would also cross the boundaries of any available Section 706 authority *and* rise to the level of impermissible common carrier regulation. This would effectively mandate the classic common carrier principle – now on the end user side – that a provider hold itself out indiscriminately to all comers on standardized terms. Similarly,

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<sup>24</sup> See 47 U.S.C. §§ 153(51) and (53).

<sup>25</sup> Comcast, pp. 24-25.

<sup>26</sup> *Verizon v. FCC*, 740 F.3d 623, 655-657 (D.C. Cir. 2014).

<sup>27</sup> Public Knowledge, et al., pp. 48-60.

no support can be found in any Section 706 authority for a flat bar on differentiated offerings to affiliates or regarding affiliated content and applications – as proposed by Vonage Holdings Corp. (Vonage).<sup>28</sup> Contrary to Vonage’s contentions, such a regulation would also excessively restrict broadband provider flexibility and thereby rise to the level of impermissible common carriage regulation and exceed even any conceivable Section 706 authority.

**VI. THE COMMISSION SHOULD ALSO REJECT, AS UNLAWFUL, EFFORTS TO EXTEND COMMISSION REGULATION INTO NEW AREAS SUCH AS PEERING, TRAFFIC EXCHANGE, AND INTERCONNECTION.**

The proposals of some parties that the Commission extend, in this proceeding, no blocking or non-discrimination rules, interconnection obligations, or other regulation beyond the context addressed in the *NPRM* – the last mile networks that support BIA services – would also be unlawful. There is no legal basis on which the Commission could assert jurisdiction over peering or other Internet traffic exchange or interconnection in this matter. Indeed, the *NPRM* does not even recognize, or seek comment on, the legal issues surrounding traffic exchange or interconnection (backbone or otherwise) issues. For these reasons, even if there were valid policy arguments for regulating beyond the last mile – and there are not – such regulation would be beyond the scope of the instant proceeding.

As an initial matter, the Commission has not provided sufficient notice concerning any theory establishing its jurisdiction over Internet traffic exchange or interconnection. The Administrative Procedure Act (APA) states that the “[g]eneral notice of [a] proposed rule making” published by the agency must include “reference to the legal authority under which [a]

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<sup>28</sup> Comments of Vonage, p. 49.

rule is proposed.”<sup>29</sup> This reference, moreover, must be presented “in a concrete and focused form so as to make criticism ... possible.”<sup>30</sup> The instant *NPRM*, however, does not address at all the Commission’s authority in connection with Internet traffic exchange or interconnection, and provides parties with no notice of the legal theory under which the Commission would proceed if it were to adopt rules in this area.<sup>31</sup> Moreover, commenters could not cure the lack of sufficient notice by commenting on issues not raised in the *NPRM*: as the D.C. Circuit has explained, parties cannot be presumed to have reviewed one another’s comments,<sup>32</sup> and the APA’s notice requirement does not contemplate “an elaborate treasure hunt.”<sup>33</sup>

In any event, the Commission lacks legal authority to regulate Internet traffic exchange and interconnection. To begin with, even assuming *arguendo* that peering, transiting and other traffic exchange/interconnection arrangements involve transmission, they have always been negotiated on a commercial, one-off basis, with parties offering case-specific rates and terms and retaining the right not to provide service to any given customer. Thus, these arrangements are not common carrier services or “telecommunications services,”<sup>34</sup> and are not subject to the Commission’s Title II authority.<sup>35</sup> Moreover, even assuming *arguendo* that the Commission enjoys separate authority under Section 706, that authority does not empower the agency to

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<sup>29</sup> 5 U.S.C. § 553(b)(2). See also *Koretov v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (quoting same).

<sup>30</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

<sup>31</sup> *NPRM* at ¶ 59.

<sup>32</sup> See *AFL-CIO v. Donovan*, 757 F.2d 330, 339-340 (D.C. Cir. 1985).

<sup>33</sup> *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549-50 (D.C. Cir. 1983).

<sup>34</sup> 47 U.S.C. § 153(53).

<sup>35</sup> See *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (holding that the “the undertaking to carry for all people indifferently” is “the primary sine qua non of common carrier status”) (internal quotations omitted).

regulate Internet traffic exchange or interconnection. A regime that mandated traffic exchange or interconnection either for free or on regulated rates and terms, would also impose *de facto* common carrier requirements under Section 706 – precisely the result that the D.C. Circuit found impermissible in *Verizon*.<sup>36</sup> Further, there is no plausible claim that expansive rules governing Internet traffic exchange or interconnection are needed to “encourage the deployment [of broadband] on a reasonable and timely basis” or “to accelerate deployment of such capability,” as required in order for Section 706 jurisdiction to support adoption of such rules.<sup>37</sup> To the contrary, the commercially negotiated agreements that have governed these activities since the dawn of the Internet have produced massive investment and deployment – and nothing in the record suggests otherwise.

Therefore, the Commission lacks any legal basis for regulating Internet traffic exchange (e.g. peering) or interconnection in this proceeding.

## **VII. CONCLUSION.**

For the reasons stated above, the Commission should take the action described herein.

Respectfully submitted,

**CENTURYLINK**

By: /s/ Timothy M. Boucher  
Timothy M. Boucher  
1099 New York Avenue, N.W.  
Suite 250  
Washington, DC 20001  
303-992-5751  
Timothy.Boucher@CenturyLink.com

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Its Attorney

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<sup>36</sup> *Verizon v. FCC*, 740 F.3d at 650-55.

<sup>37</sup> 47 U.S.C. § 1302(a), (b).