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

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

REPLY COMMENTS

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Executive Summary

The American Cable Association ("ACA") submits these reply comments in response to comments filed in the above-captioned proceedings. ACA and its member companies have been and remain fully committed to protecting and promoting an open Internet and remain firm in their stance that the Commission can create a balanced and effective legal framework to achieve this goal under its Section 706 authority.

Scope of Open Internet Rules. In its Comments, ACA called upon the Commission to adopt even-handed open Internet rules that protect the consumer Internet experience against likely threats from the various actors who play a role in the multi-sided Internet market. ACA made the case that the Commission will fail in its quest to adopt rules that protect and promote the open Internet if it subjects broadband Internet service providers ("ISPs") to no blocking and commercial reasonableness rules while leaving Internet actors, like Internet content, applications and services ("edge") providers, free to block or discriminate in ways equally or more harmful to the openness. Nearly every broadband ISP, large and small, has, like ACA, called upon the Commission to recognize that not only ISPs can threaten the Internet's openness but that Internet edge providers also can threaten the open Internet and, more importantly, have blocked consumer access to content, and that an appropriate set of rules need to be adopted that accounts for this.

An even-handed approach is the right policy and the Commission should not be deterred by claims it ought not regulate in an even-handed manner, that it lacks jurisdiction, or that extending open Internet regulations to Internet edge providers would raise constitutional concerns. None of the objections to applying the open Internet rules to edge providers interposed in the record have merit. The Commission has subject matter jurisdiction over all information service providers, including edge providers, and has previously demonstrated how it could impose open Internet rules on broadband ISPs, a class of information service providers,

without running afoul of First Amendment protections. The same would be true for open Internet rules applied to Internet edge providers, another class of information service providers.

Regulatory Approach. In its Comments, ACA also suggested how the Commission could adopt a balanced set of rules pursuant to its authority under Section 706 to accelerate broadband deployment by removing barriers to entry and competition in telecommunications markets along the lines suggested by the D.C. Circuit Court of Appeals in *Verizon v. FCC*. Because the Commission can effectively protect and preserve Internet openness in this manner, ACA cautioned the Commission to eschew taking the extreme step of reclassifying broadband Internet access service as a Title II common carrier offering and potentially subjecting it to full panoply of Title II obligations that attach to common carrier services by operation of law. Discretionary forbearance by the Commission from some of these provisions alone cannot adequately lessen or undo the damage to the ability of broadband ISPs to attract capital and invest in and expand their networks that such an action would engender. The record strongly supports ACA's assessment that Title II reclassification would be a radical and destructive step, and one that is best avoided when more moderate means are available to the Commission for achieving its goals under Section 706.

At the extremes, there is sharp disagreement in the record over the appropriate legal framework for open Internet rules. Conversely, there is broad agreement on the need to protect Internet openness, leaving the Commission free to focus on crafting the best policy framework for achieving this goal. While the record contains no one "perfect" solution, it nonetheless contains several moderate and thoughtful suggestions for how the Commission can more precisely target through use of its Section 706 authority to address "paid prioritization," the specific behavior on the part of broadband ISPs that is of most concern to commenters and the public at large. ACA recommends that these proposals be more thoroughly investigated and

considered as refinements or alternatives to the rules proposed in the NPRM should the Commission decide to move forward and adopt a new set of open Internet rules.

Transparency. Finally, the record confirms the lack of a need for the various enhancements to the transparency rule outlined in the Open Internet Notice or any other commenter's proposed transparency rule enhancements. The existing transparency rules have been successful in fulfilling the Commission's goals of helping it to detect conduct that could impact Internet openness, effectively informing consumers so they can make informed choices about their broadband Internet subscriptions, and enabling edge providers to develop innovative new applications and services. Due to the success of the current transparency rules, there is no justification to adopt the transparency rules "enhancements" contemplated by the Commission or proposed by other parties since such enhancements would impose substantial financial and logistical burdens on broadband ISPs. While a relatively small number of Internet, technology and transport providers ask for certain enhancements to the rules, all of which would be highly burdensome, none has made the case that such enhancements, if needed at all, should apply to smaller broadband ISPs. This lends further support to ACA's call for an exemption for smaller providers from any expansion of the transparency rule. Moreover, if the Commission decides to require additional transparency disclosures related to network congestion, the record shows that such requirements should apply to all entities on the Internet transmission path that could be responsible for such congestion.

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REPLY COMMENTS

I. INTRODUCTION

The American Cable Association ("ACA") submits these reply comments in response to comments filed in the above-captioned rulemakings.[1] In these reply comments ACA will address three matters: (i) the need for the Commission to adopt balanced Open Internet rules that apply to all Internet actors capable of threatening the Internet, which must include Internet edge providers; (ii) the need to explore middle-ground approaches to developing a no blocking and "commercial reasonableness" or similar rule under Section 706 similar to several of those outlined in the record that will permit the Commission to adopt new Open Internet rules that

[1] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28 (FCC 14-61) (rel. May 15, 2014) ("Notice" or "NPRM"); *See* Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks, Public Notice, DA 14-748, GN Docket No. 10-127 (rel. May 30, 2014) (requesting commenters to refresh the record and establishing a pleading cycle to run concurrent with the Open Internet rulemaking).

achieve its goals without imposing undue burdens on broadband ISPs ; and (iii) the lack of need for the Commission to adopt enhanced transparency rules.

II. THE COMMISSION CAN ACHIEVE ITS OPEN INTERNET GOALS WITHOUT UNTOWARD DISRUPTION UNDER SECTION 706

The record reveals uniform support for an "open Internet." While the record provides no single ideal solution that would appease the vocal advocates of the debate's fridges, it does contain several constructive suggestions seeking a middle ground that balances the concerns of some that rules derived from the Commission's Section 706 authority would be too weak, and those of others that rules promulgated under Title II would be unlawful, unnecessarily burdensome, and likely to create unintended and adverse consequences. ACA recommends the Commission focus its attention on these constructive middle-ground suggestions as a means to close the gap between the views of parties who share the common goal of promoting and protecting an "open Internet."

A. There Is Uniform Support for Protecting and Promoting an "Open Internet" Leaving the Commission Free to Focus on Crafting the Best Policy Framework to Achieve This Goal.

There is no disagreement in the record that the open Internet is an important public interest that the Commission may seek to further under the Communications Act. Public interest groups, a substantial number of the public at large, broadband ISPs, edge providers, state and local government officials all support some form of legal framework that the Commission can implement to preserve and protect the "virtuous circle" of Internet innovation at the edge, that leads to consumer demand for Internet services and broadband Internet access, which in turn stimulate service improvements, broadband network investment and deployment by broadband ISPs.[2]

[2] *See* e.g. *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the Open Technology Institute at the New America Foundation and Benton Foundation, at iii (filed July 17, 2014) ("OTI/Benton Comments") ("Strong open Internet protections are needed to ensure that the Internet can

One key feature of the open Internet of concern to public interest advocates and smaller edge providers is preservation of its "permission-less" quality – that through the use of common Internet protocols, a start-up innovator or average citizen can launch a new service or publish his or her views to the online community without first seeking permission from the last-mile access ISPs.[3] There appears to be broad agreement that a "no blocking" rule is critical to the preservation of this feature, and it is noteworthy that all the major broadband ISPs have pledged not to block Internet traffic on their networks.[4] A key concern is that broadband ISPs not be

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continue to serve as a platform for innovation, economic growth, and unfettered communication among all users. Preserving net neutrality contributes to the economic well-being of the United States and the continued growth of the American technology industry."); Comments of the Internet Association, at 1 (filed July 14, 2014) ("Internet Association Comments") ("Preserving the Internet's neutrality ensures that it remains an engine for economic growth, innovation, and democratic values. The Internet is a multi-stakeholder, layered platform built on an open and neutral architecture. These characteristics fuel its success and spin the "virtuous circle."); Comments of The City of Los Angeles, California, at 1 (filed July 18, 2014) ("City of LA Comments") ("An open Internet empowers citizens and local businesses—and all innovators at the network's edges—to deliver content, services, applications, and other materials so that this content can succeed and flourish, both in the commercial marketplace and in the marketplace of ideas."); Comments of AT&T, at 11 (filed July 15, 2014) ("AT&T Comments") ("Importantly, the Internet has remained open—and the 'virtuous circle' of investment and innovation throughout the Internet ecosystem has flourished—without the overly intrusive, top-down rules that many net neutrality advocates claim are essential."); Comments of Cox, at 1 (filed July 18, 2014) ("Cox Comments") ("With a measured regulatory approach and forward-looking policies that have facilitated the growth of a dynamic and competitive broadband marketplace, the Commission has overseen the development of the Internet into a vital engine for economic, educational and cultural growth. Consistent with this successful approach, the Commission should ensure that any rules adopted in this proceeding promote Open Internet principles without imposing excessive burdens that undercut investment and innovation.").

[3] *See* e.g. *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Free Press at 3, 134-35 (filed July 17, 2014) ("Free Press Comments") ("Innovation on the Internet should be possible without the permission of a broadband provider."); Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband at 54 (filed July 15, 2014) ("Public Knowledge et al Comments") ("[T]he need to ask permission from an individual ISP would be a burden for any edge service and would become stifling if it became widespread…Such bureaucratic overhead is anathema to an open internet"); Internet Association Comments at 6 ("Edge providers create tremendous value in the Internet. And that value is rooted in the fact that they can innovate without permission from governments or the companies that provide access to the Internet.").

[4] *See*, e.g., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the American Cable Association at iii, 1 (filed July 17, 2014) ("ACA Comments") ("ACA and its member companies have been and remain fully committed to protecting and promoting and open Internet and welcome this opportunity to comment on the right public policy to ensure that the Internet remains open."); Comments of NCTA at 57 (filed July 17, 2014) ("NCTA Comments") ("NCTA and its members and other leading broadband providers have consistently pledged that they will not block subscribers' access to lawful Internet content and services, both before the Commission adopted the no-blocking rules in the Open Internet Order and after those rules were vacated by the Verizon Court."); *see also*

permitted to pick Internet winners and losers through their handling of Internet traffic on their networks, particularly by entering in "paid prioritization" deals that have the effect of degrading the performance of non-paying traffic terminating on their networks.[5]

ACA members, along with all broadband ISPs commenting in the record, share the desire to preserve the open Internet and are committed to doing so. They have pledged to, and have been, following the Commission's 2005 Open Internet Policy Statement and complying with the 2010 transparency rule,[6] and have not been the subject of any complaints brought to the Commission by either Internet edge providers or their own subscribers. They have also stated their support for the approach taken by the Commission in 2010 to codify these principles into enforceable rules that protected Internet openness.

At the same time, broadband ISPs have been continually upgrading their broadband services and networks to bring ever-increasing bandwidth speeds and choices to consumers,

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Comments of Comcast at 1 (filed July 15, 2014) ("Comcast Comments") (stating its support for the *2010 Open Internet Order.)*; AT&T Inc., Press Release, "AT&T Statement on Net Neutrality," (Feb. 19, 2014) ("AT&T has built its broadband business, both wired and wireless, on the principle of Internet openness. That is what our customers rightly expect, and it is what our company will continue to deliver. That is also why we endorsed the FCC's original rule on net neutrality, and is why we pledged to adhere to openness principles even after the recent court decision."), *available at* http://publicpolicy.att.com/att-open-internet-policy-statement.

[5] *See, e.g.*, Free Press Comments at 136 ("degrading everyone else's service is the only way to create a priority service on a packet-switched network – and the only way to make it worthwhile for people to buy it."); Public Knowledge et al Comments at 23 ("[E]ven with no-blocking protections, such small providers will face significant new barriers to entry and growth, since they will suffer degraded performance in relation to larger companies that garner the interest of (and can afford to partner with) ISPs for network-level quality-of-service guarantees.").

[6] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) ("Internet Policy Statement"); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) ("2010 Order"), aff'd in part, vacated and remanded in part sub nom. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) ("Verizon").

expending substantial amounts of capital in the process.[7] The 2010 Open Internet rules struck the right balance by achieving the Commission's goals of preserving the open Internet while at the same time giving broadband ISPs the needed flexibility in their provision of service, the management of their networks and the development of new service offerings. This strongly suggests that this "light touch" regulatory approach has paid enormous dividends for the American public.[8] With the exception of Free Press,[9] the fact that broadband ISPs have invested enormous sums of money in deploying broadband facilities and services over the last 15 years is generally not disputed, even by advocates for "strong" net neutrality rules and including those advocating using a Title II common carrier framework.

ACA maintains that, given the lack of widespread problems with ISP handling of Internet traffic, the Commission's 2005 Internet Policy Statement, together with its 2010 transparency rule, provide adequate means for the Commission to continue protecting the open Internet. It

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[7] *See* NCTA Comments at 7-8 (Broadband providers in the U.S. have invested an astounding $1.2 trillion in private capital since 1996 to develop and deploy advanced broadband networks. Over the past two decades, the broadband industry has invested an average of $70 billion a year in our nation's wired and wireless broadband networks. And this investment is only accelerating; in fact, since 2012, broadband providers in the United States have laid more high-speed fiber cables than in any similar period since 2000.") (footnotes omitted). *See also* John Solit, Platform: NCTA's Blog, "ISPs Top U.S. Investment Heroes Ranking," (Sept. 12, 2014) (Broadband ISPs are "investing more capital into infrastructure improvements than any other industry in America….[In 2013] ISPs took top billing with a total $46 billion [investment]."), *available at* https://www.ncta.com/platform/industry-news/isps-top-u-s-investment-heroes-ranking/.

[8] *See*, e.g. *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of USTelecom at 5-6 (filed July 16, 2014) ("USTelecom Comments") (during the time period from 2003 until 2012, broadband provider investment under the Title I regime includes more than $650 billion in network infrastructure, in 2013 investment by cable and telecommunications companies represented 33 percent of the $149.8 billion total investment in the U.S. economy and "this investment has propelled a 'virtuous cycle' of complementary investments in information and communications technology."); Comments of Communications Workers of America and the National Association for the Advancement of Colored People at 7-14 (filed July 15, 2014) ("CWA/NAACP Comments") (discussing enormous capital investment in broadband networks and job creation by broadband ISPs under light touch regulatory regime); AT&T Comments at 1 ("[R]emarkable growth in investment and innovation continued even after the Commission adopted net neutrality rules in 2010, in part because those rules successfully balanced concerns about Internet openness with the need to maintain incentives for Internet service providers to continue investing in advanced networks.").

[9] *See* Free Press Comments at 98-112 (taking issue with view that broadband infrastructure investment has been encouraged by FCC's utilization of a Title I approach for broadband Internet access service).

bears repeating these rules were layered on top of the existing authority of other agencies over the Internet marketplace. In particular, the Department of Justice and the Federal Trade Commission are already well positioned to police and take action against anti-consumer and anticompetitive behavior by Internet actors as they are with respect to other sectors of our economy. However, given the high level of public concern over the lack of any sector-specific rules now governing ISP behavior, ACA understands the Commission's desire to put in place a set of legally enforceable rules aimed at preventing broadband ISPs from engaging in anticompetitive or anti-consumer practices with respect to their treatment of Internet traffic.[10]

It is evident that there is a great deal of public fear about what broadband ISPs might do in the absence of open Internet rules, despite the small number of confirmed instances of such behavior since the inception of broadband Internet service in the mid-1990s, and these fears must be taken seriously by policymakers. While the record to date provides no single, clear "perfect" answer it does highlight both the problem the public perceives in having no rule and, on the other extreme, adopting rules that require the reclassification broadband Internet access service and subjecting it to Title II common carrier regulation.

B. The Record Demonstrates that Reclassifying Broadband Internet Access Service as a Title II Service is Unnecessary to Achieve the Goals of an Open Internet and Would be Highly Disruptive to Broadband ISP Operations.

There may be no single perfect answer to the challenge the Commission faces in attempting to craft rules that get at covert discrimination in the handling of Internet traffic on broadband ISPs' networks while avoiding the imposition of "per se" common carriage on

[10] As Lincoln said, "In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed." Abraham Lincoln, First Debate with Steven Douglas, delivered at Ottawa, Illinois, Aug. 21, 1858, during the campaign for the election of the Legislature of Illinois, which should choose a successor to Douglas in the United States Senate, *available at* http://www.bartleby.com/268/9/23.html.

broadband ISPs, but the Commission should steer clear of proposals that fail to recognize and take into account the varied viewpoints on this matter.

1. Title II reclassification for broadband Internet access service is unnecessary to achieve the goals of an Open Internet and would create unintended harmful consequences.

Reclassification of broadband Internet access service under Title II is foremost among the proposals that "strong" rules proponents seek, in complete disregard for the practical impact of such a radical reformation of the regulatory framework governing broadband ISP operations and the consequent public interest harms this would engender. Not only is this highly disruptive step uncalled for, it demonstrably fails to get at the behavior all net neutrality advocates fear the most: "paid prioritization" services that turn the Internet into a series of fast and slow lanes. Furthermore it would subject broadband ISPs to an onerous set of regulations for the first time that will chill private investment in networks that have been responsible for delivering increasing speeds to broadband consumers year over year.[11]

Fear of what broadband ISPs might do in the absence of a no blocking or non-discrimination rule alone cannot provide a basis for the radical reformation of a regulatory framework that has been successful in bringing the widespread availability of broadband services, at ever increasing speeds, to most Americans in a relatively short period of time.[12]

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[11] *See*, e.g., Robert Litan and Hal Singer, The Progressive Policy Institute, "The Best Path Forward on Net Neutrality," at 2 (Sept. 2014), *available at* http://www.progressivepolicy.org/issues/economy/best-path-forward-net-neutrality/. The authors note that the debate over how to respond to Verizon remand "has taken on the character of a religious dispute, with the FCC caught in the cross-fire. They recommend that the "key to a possible resolution, however, may be the eventual realization by the Commission that Title II regulation of Internet access would (1) reduce ISP investment at the 'core' of the Internet by more than it would stimulat[e] at the 'edge' by content providers, resulting in a net loss in investment, and (2) could one day boomerang on certain major tech companies or be expanded to regulate other ISP offerings." The authors propose an alternate path forward on net neutrality that focuses on investment and preserves the Commission's flexibility under Section 706 by utilizing case-by-case adjudication of Internet discrimination should it actually occur in the marketplace.

[12] Although the NPRM evidences a concern about "paid prioritization" over last mile connections in several places, it cites no examples of such arrangements. *See*, *e.g.*, NPRM, ¶¶ 96, 121; USTelecom

Moreover, discrimination cannot be categorically and conclusively eliminated under any regulatory framework available to the Commission. Nor should it be.[13]

The degree of certainty and stability net neutrality advocates seek under Title II is unsupported by the 80-year history of Commission actions to implement its mandates and of service providers' in following them, which is marked by significant and protracted legal battles at each turn. There are risks attendant upon any regulatory scheme. Supporters of Title II treatment vastly overstate the amount of certainty that would be provided under that regime while vastly understating its costs.

ACA detailed the numerous burdensome and adverse consequences of reclassification in ACA's initial comments.[14] Nearly every broadband ISP commenting in the record echoes ACA's concerns about the unnecessary burdens and costs of Title II regulation.[15] Along with

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Comments at 19 (lack of examples of paid prioritization "is not surprising given that many broadband providers have disclaimed any interest in offering such a service").

[13] *See*, e.g., Greg Piper, Communications Daily, "Internet Architect Suggests 'Futures Market' to Avoid Policy Disputes," (Feb. 5, 2009) (reporting on statements by David Clark, MIT, that the Internet was a neutral, discrimination-free zone at its inception, "'The network is not neutral and never has been,' Clark said, dismissing as 'happy little bunny rabbit dreams' the assumptions of net neutrality supporters that there was once a 'Garden of Eden' for the Internet. NSFnet, an early part of the Internet backbone, gave priority to interactive traffic, he said: 'You've got to discriminate between good blocking and bad blocking.'"); David Clark, Written Statement of Dr. David D. Clark, MIT Computer Science and AI Lab, FCC Public Hearing on Network Management (Feb. 25, 2007) ("The Internet is not neutral, and has not been neutral for a long time. There is lots of discrimination that goes on inside the network; some good, some bad. The vision cannot be a return to a simple world with no discrimination, but to find a line that delineates acceptable and unacceptable."), *available at* http://transition.fcc.gov/broadband_network_management/022508/clark.pdf. *See* also Mark M. Bykowsky and William W. Sharkey, "Welfare Effects of Paid Prioritization Services: A Matching Model with Non-Uniform Quality of Service," FCC Office of Strategic Planning and Policy Analysis (July 14, 2014) (analysis demonstrating "that in the majority of the examined economic environments, the [broadband ISP's] resources are more efficiently allocated when it is allowed to charge a uniform (non-discriminatory) price for priority on both the subscriber and [content, applications and services] sides of the market), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468202.

[14] ACA Comments at 62-65; *see* also *Framework for Broadband Internet Service*, MB Docket No. 10-127, Comments of the American Cable Association at 8-13 (filed 15, 2010) ("ACA Third Way Comments"); *Framework for Broadband Internet Service*, MB Docket No. 10-127, Reply Comments of the American Cable Association at 5-24 (filed Aug.12, 2010) ("ACA Third Way Reply Comments").

[15] *See*, e.g., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of WISPA at 38-42 (filed July 16, 2014) ("WISPA Comments"); NCTA Comments at 16-30; Cox Comments at 30-37; AT&T Comments at 39-55; Verizon Comments at 46-69; USTelecom Comments at 15-44. *But, see*

ACA members, other broadband ISPs overwhelmingly oppose Title II reclassification not because they oppose an open Internet, but because they understand the deleterious impact reclassification would have on their businesses, their subscribers, and their ability to attract the level of investment necessary to continuously improve and expand their broadband networks. In a word, as NCTA put it, Title II would be a "disaster."[16] Recently, in a speech about the benefits of broadband competition, Chairman Wheeler acknowledged that the benefits of regulation must be weighed against the costs, when he stated that "[t]here is no doubt that regulation, even where necessary, imposes costs. Especially in a fast-moving sector, it is important that companies be free to develop better networks and attract the investment necessary to do so."[17] This is undoubtedly true and should guide Commission actions in this sphere.

While Free Press, for example, characterizes Title II as a "deregulatory" or "light touch regulatory" regime, this is simply not the case.[18] The reality of whether common carrier regulation is a "light touch" regime, however, is best demonstrated by actions rather than words. In this regard, the actions of those Internet actors seeking to avoid it, such as Google Fiber and Uber, speak volumes. Google Fiber declined to add voice telephony to its bundle of service offerings because it would face too much regulation and additional tax burdens across the fifty

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NTCA Comments at 8-14 (advocating that all transport and transmission capacity offered on underlying broadband networks be regulated pursuant to Title II, regardless of any information services offered in conjunction or the type of capacity offered).

[16] John Eggerton, Multichannel News, "NCTA: Title II Would be a Disaster," (Sept. 2, 2014), *available at* http://www.multichannel.com/news/policy/ncta-title-ii-would-be-disaster/383488; NCTA, Title II: Net Disaster, Not Net Neutrality, NCTA.com, *available at* https://www.ncta.com/titleII.

[17] Prepared Remarks of FCC Chairman Tom Wheeler, "The Facts and Future of Broadband Competition," 1776 Headquarters, Washington, D.C., at 5 (Sept. 4, 2014).

[18] Free Press Comments at 3, 39-47 (claiming that by virtue of the Commission's policy of relieving non-dominant common carriers of some requirements and following the amendments added by the Telecommunications Act of 1996, many of whose provisions apply solely to specific classes of common carriers – incumbent local exchange carriers, Regional Bell Operating Companies – as opposed to all common carriers generally, Title II common carriage "is a highly deregulatory policy framework").

states.[19] Uber opposes being classified as a transportation common carrier by the Public Service Commission of Maryland, seeking instead to be classified as an "information service" provider exempt from common carrier regulation under the Communications Act.[20]

These actions are perfectly understandable – classification as a common carrier brings at least two levels of immediate regulatory obligations – federal and state – and carries with it tax consequences at the federal and state levels – with the potential of different telecommunications service tax obligations in each individual state. Numerous regulatory obligations attach immediately by virtue of the regulatory status itself, with only the hope that regulatory forbearance, if and where available, will be granted at some future date, to soften the impact. Broadband ISPs, rather than hiring network engineers and working on plans to upgrade

[19] VoIP-Catalog.com, "Google Fiber Cancels Plans for VoIP Landline Service," (Dec. 11, 2012) ("Google is a household name, and according to Seeking Alpha, it is the largest Internet provider with a market cap of $250 billion. What with Google's popularity and overflowing wallet, it seems somewhat surprising that it didn't throw VoIP options in with its other features. However, Google Vice President of Access Services Milo Medin recently said that Google considered providing VoIP, but nixed it due to the "special rules that apply" when a company wants to provide phone service. Indeed, there is quite a bit of red tape surrounding telecommunication services….Additionally, working with the billing systems to allow for phone services created other limitations for Google. Every state has different taxes on telecom service, which can rack up the price tag on phone service, especially for some of the bigger companies."), *available at* http://www.voip-catalog.com/news_item4190.html.

[20] *See* Case No. 9325, In the Matter of an Investigation to Consider the Nature and Extent of Regulation Over the Operations of Uber Technologies, Inc. and other Similar Companies, Proposed Order of Public Utility Law Judge, Maryland Public Service Commission, (Apr. 24, 2014) (rejecting Uber's claim that it was simply an online technology company and finding Uber to be a transportation common carrier because it is "engaged in the public transportation of persons for hire."), *available at* http://webapp.psc.state.md.us/Intranet/home.cfm. Uber is appealing the decision on the grounds that it is an "information service" provider and that the PSC is therefore preempted by the federal Communications Act from regulating Uber as a common carrier. Id., Uber Memorandum on Appeal of Uber Technologies, Inc. at 1, 41-47 (arguing that Uber is a "Uber is a technology company that offers a smartphone application ("Uber App") for requesting transportation service from Commission-licensed third-party passenger-for-hire ("PFH") carriers;" "the Uber App and corresponding Driver App are information services in that at their core the applications offers the 'capability for generating, acquiring, storing, transforming, processing retrieving, utilizing or making available information via telecommunications.' Users and drivers utilize the Uber App and Driver App as an information service which permits them to generate, retrieve and utilize information and not as common carrier transportation service;" "Uber is not, as the Chief Judge would have it, a traditional transportation company that simply uses the Internet in its business operations. Uber's 'products' are information services as defined in the Telecom Act;" imposing MPSC regulation on Uber would conflict with federal policies prohibiting Federal or State regulation of information service providers) (Jun. 6, 2014).

or expand their networks, will instead be hiring lawyers to help them through the maze of new compliance and reporting obligations applicable to common carriers. It simply defies reason to suggest that Title II is a "deregulatory" path that will accelerate broadband network deployment when just the opposite is the case.

Application of Title II regulation would be particularly burdensome for smaller broadband ISPs. It would be especially unfair to subject them to extensive and costly common carrier regulation given the fact that they are demonstrably not the source of any alleged open Internet problems. To the extent legitimate concerns about broadband ISP handling of Internet traffic as it connects to and traverses their networks have been raised, all are directed at the very largest ISPs, and none at smaller and medium-sized providers.[21] This fact is attested to by Netflix, one of the most vocal proponents of "strong" net neutrality rules:

> Although every terminating access network is a terminating access monopoly, in Netflix's experience to date, *four terminating access networks have the requisite market power to leverage their terminating monopoly to foreclose edge providers or raise their costs to access the*

[21] *See*, *e.g.*, Consumers Union Comments at 9 ("With enormous subscriber bases and control over the pipes, the largest incumbents continue to exercise tremendous leverage over smaller competitors and have the power to dictate how consumers can receive the content and what prices they must pay. Because of their roles as gatekeepers to millions of customers, the largest ISPs recognize that smaller content providers depend on their for the viability of their business."); Netflix Comments at 11-16 (discussing issues with terminating traffic on Comcast networks); Reed Hastings, Wired.com, "How to Save the Net: Don't Give In to Big ISPs," (Aug. 19, 2014) ("This year we reluctantly agreed to pay AT&T, Comcast, and Verizon for access to our mutual subscribers, who were seeing a rapid decline in their Netflix viewing experience because of congestion at the connection point where we transfer content to the ISP."), *available at* http://www.wired.com/2014/08/save-the-net-reed-hastings/. *See also* Daniel Frankel, FierceCable, "Netflix to FCC: We only have trouble with big, consolidated ISPs in the U.S.," (Aug. 27, 2014) ("The essentials of the streaming service's argument break down this way: Globally, Netflix send its video traffic over the networks of 99 percent of Internet service providers without having to pay an interconnection fee. The only ISPs it does have to pay are large conglomerates in the U.S. – AT&T, Verizon, Comcast, and Time Warner Cable. Merging the latter two will only exacerbate the excessive market power they use to undermine net neutrality."), *available at* http://www.fiercecable.com/story/netflix-fcc-we-only-have-trouble-big-consolidated-isps-us/2014-08-27. *See also* Susan Crawford, Bloomberg View, "How Amazon Plans to Storm Cable's Castle," (Sept. 2, 2014) ("What is crucial is that the destiny of Twitch, Neflix, Inc., and any other future high-capacity streaming service – think telemedicine, education and civic engagement – is utterly dependent on the goodwill of just four companies: Comcast Corp., Time Warner Cable Inc., Verizon Communications, Inc. and AT&T Inc."), *available at* http://www.bloombergview.com/articles/2014-09-02/how-amazon-plans-to-storm-cable-s-castle.

ISP's last mile networks.[22]

Whether one agrees or not with Netflix's terminating access monopoly argument, the fact that it singles out only four broadband ISPs as having the ability to foreclose edge providers or raise their costs in a manner that threatens Internet openness is striking, and is echoed by Level 3, who calls for regulation only of "the largest eyeball ISPs, those serving several million customers each."[23]

Practically speaking, one of the biggest detriments for the public is that if the Commission takes a Title II approach there will undoubtedly be ISP challenges, as the record suggests. The outcome of such a case will be uncertain, and as the case works its way through the courts over the following three to five years, there will be continued uncertainty concerning

[22] *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, GN Docket No. 14-57, Petition to Deny of Netflix at 44 (filed Aug. 26, 2014) ("Netflix Petition to Deny") (emphasis added).

[23] *See*, e.g., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Level 3 at 7-11 (filed July 15, 2014) (describing how "some big mass-market ISPs are attempting to exploit their control over access to their customers to extract interconnection tolls from providers like Level 3—at levels that frequently equal or even exceed the entire price Level 3 charges its customers for transit to reach those ISPs' networks as well as the rest of the Internet"); Ex Parte of Level 3 at 2-4 (filed Sept. 8, 2014) ("Level 3 Ex Parte"); (seeking interconnection regulation for only the largest "eyeball ISPs," defined as "those serving several million customers each" as having congested their ports in an attempt to extract tolls). Netflix and Level 3's position that only the largest ISPs have the ability to threaten to effectively block or degrade edge provider access to ISP customers is echoed by others in this dockets as well as in the comments of both Cogent and Roku in the Comcast-TWC docket. *See*, *e,g.*, *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, GN Docket No. 14-57, Petition to Deny of Netflix at 52 (filed Aug. 26, 2014). *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, GN Docket No. 14-57, Comments of Cogent Communications Group, Inc. at 27 (filed Aug. 26, 2014) ("Cogent Comments in GN Docket No. 14-57") (Cogent alleges that when it began carrying Netflix's traffic, Comcast began refusing to upgrade connections with Cogent. Cogent states that "smaller residential broadband networks continued to upgrade both peering and transit ports and Cogent has had no congestion problems with those networks."); Comments of Roku, Inc. at 11 (filed Aug. 26, 2014) ("Roku Comments in GN Docket No. 14-57") (distinguishing the behavior of Comcast not permitting its customers to use third-party applications to that of the far smaller Time Warner Cable who developed its own Roku app that enables their cable customers to access virtually the entire Time Warner cable service offering).

the rules. If protecting the Open Internet is the goal, then finding a path forward that is legally sound and less likely to be challenged and overturned seems the preferred approach.

Even with forbearance, the implementation of which might take years if not decades to conclude, Title II regulation would be extremely detrimental to the industry because it would impose far more burdens than are necessary to achieve the goal of an open Internet. Title II reclassification, even if available to the Commission, therefore cannot be considered a moderate approach.[24] Moreover, it is unclear how much forbearance the Commission would be prepared to provide. The NPRM did not provide any information about what parts of Title II, if any, would be subject to forbearance should the Commission decide to reclassify broadband Internet access service. The only information publicly available about what the post-reclassification regulatory landscape would look like is contained in the four-year old "Third Way" Notice of Inquiry, which itself suggested forbearance from anywhere between six to seventeen provisions might be appropriate.[25]

Even among proponents of Title II reclassification, there seems to be little consensus on how much common carrier regulation is necessary or appropriate. Nonetheless, even with some forbearance, Title II regulation would be too burdensome. For example, Sidecar Technologies suggests that all that would be necessary would be retention of three provisions of Title II: Sections 201, 202 and 208.[26] While Free Press and Sidecar Technologies, for

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[24] *See* ACA Comments at 53-58 (discussing the lack of a factual and legal basis for reclassification); *see also* ICLE-Tech Freedom Legal Comments at 48-51 (discussing why the Commission lacks authority to force common carrier status).

[25] *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 (2010) ("Third Way NOI").

[26] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Reply Comments of Sidecar Technologies at 6 (filed Aug. 12, 2014) ("Sidecar Reply Comments") ("the FCC should not assert outdated, unneeded authorities found in Title II and should immediately forbear from much of Title II of the Act. Specifically, we encourage the FCC not to forbear from sections 201, 202, and 208, to ensure that the Commission has the solid authority to stop a "two-tiered Internet" with slow lanes and ISPs have the power to pick winners and losers in our economy,").

example, advise that the Commission could protect Internet openness by retaining no more than three "core" Title II provisions and forbearing from the remainder,[27] Public Knowledge/Benton/Access Sonoma argue that in addition to sections 201, 202 and 208, the Commission should not presumptively forbear from *over 20 other provisions* of Title II governing issues such as interconnection and termination of service; the authority to compel production of information; the filing of carrier contracts and tariffs; protection of consumer proprietary network information; and various remedial provisions.[28] As Public Knowledge/Benton/Access Sonoma concede, there are provisions of Title II that impose obligations directly on the Commission, rather than carriers, that it is unlikely the Commission could forbear from.[29] It would take the Commission and the courts years, if not decades, to work through the wisdom and legality of this approach.

For all of these reasons, reclassification of broadband Internet access service as a Title II common carrier service is a road best not taken.

2. None of the approaches identified in the NPRM involving Title II are viable.

Notwithstanding the fact that all of the alternative suggestions concerning use of Title II would be burdensome, no approach under Title II has been shown to enable the Commission to achieve its open Internet policy goals any more than proposals that do not require a Title II classification.

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[27] Free Press Comments at 43-46 (discussing the need to retain sections 201, 202 and 208, consistent with Congress' treatment of commercial mobile radio services, while potentially forbearing from other provisions in the same manner the FCC relieved non-dominant common carriers of certain obligations, such as tariff filings).

[28] Public Knowledge et al Comments at 88-91.

[29] *See*, *e.g.*, Public Knowledge et al Comments at 95 ("Commenters strongly believe that the Commission cannot relieve itself of its obligation to report on what barriers prevent minority communities or small businesses from enjoying any and all economic and social benefits from access to broadband," pursuant to Section 257, for example).

Many commenters point out, as did ACA, that Title II prohibits only unjust and unreasonable discrimination in the provision of services to similarly situated entities while permitting differentiated classes of service offerings to entities having varying needs and requirements.[30] A flat ban on paid priority services under Title II, even assuming the record supported such a prohibition, would be unlikely to pass muster in court, even if the Commission were to accept the suggestion of many proponents that it has the authority to deem certain practices per se unjust and unreasonable.[31]

The Narenchania/Wu and Mozilla partial-Title II treatment proposals cited in the NPRM garnered almost no support in the record, even from the most ardent supporters of use of the Commission's Title II authority.[32] Free Press, for example, does not even discuss them. According to noted net neutrality scholar, Professor Barbara van Schewick, the Mozilla proposal is unlikely to offer meaningful protection against paid prioritization because it would give the Commission authority to ensure that rates charged edge providers were just and reasonable, but not clearly permit it to ban such fees, nor would it offer protection to edge providers who do not pay a fee.[33]

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[30] NCTA Comments at 27-28 (explaining that Title II bars only "*unjust and unreasonable discrimination*" and "*undue or unreasonable* preference[s]," while "Service providers thus remain free to offer customers different levels of service at different rates—as may be the case in a hypothetical paid prioritization arrangement—and may even charge different prices for similar services where there is a 'neutral, rational basis underlying [the] apparently disparate charges.'"); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Verizon and Verizon Wireless at 51 (filed July 15, 2014) ("Verizon Comments") (describing how reclassification under Title II would not ban two-sided arrangements).

[31] *See*, e.g., Public Knowledge et al Comments at 102-104.

[32] NPRM, ¶ 152. *See*, *e.g.*, Comcast Comments at 62-65 and NCTA Comments at 39-43 (describing impracticalities and other factual and legal problems with the proposals such as requiring the imposition of fees for terminating traffic); CDT Comments at 21 (discussing alternative to Narenchania/Wu proposal that does not hinge on the direction of the traffic); Public Knowledge et al supporting Mozilla proposal only if FCC declines to reclassify; Cogent Comments at 10 (critiquing it as "directionally correct" but inadequate).

[33] Letter to Marlene Dortch from Barbara van Schewick, Notice of Ex Parte Meeting, GN Docket No. 09-191; GN Docket No. 14-28, at 1 (Aug. 11, 2014) ("Aug. 11 van Schewick Ex Parte Letter").

The proposal from Representative Waxman that the Commission use "Title II-as-backstop" has been criticized from both sides of the debate for its inherent contradictions: a service cannot be simultaneously an information service and a telecommunications service as the categories are mutually exclusive and any attempt to maintain this posture would meet with certain defeat in court.[34] The two reasons why using Title II as a backstop might be deemed "arbitrary and capricious" are summarized succinctly by Professor van Schewick:

> *First,* as the Commission has noted repeatedly, the definitions of telecommunications service and information service are mutually exclusive. The backstop theory, however, would require the FCC to argue in the same order that broadband Internet access service is an information service and to engage in a conditional classification, which requires arguing that it is a telecommunications service. However, Internet access service is either a telecommunications service or an information service; it cannot meet both definitions at the same time. *Second*, as the Supreme Court has pointed out in Brand X, the classification depends on the factual particulars of how the service is offered to end users. This suggests that a service must meet the definition of [a telecommunications service] at the time of classification. When the FCC adopts the order based on Section 706, it does not know what the Internet service will look like in the future when the court strikes down the network neutrality rules based on Section 706, triggering a reclassification. A classification decision at that time in the future needs to be based on the facts at the time, not on the facts today.[35]

It is evident that these proposals have garnered little or no record support for good and sufficient reasons and should therefore be dropped from consideration by the Commission.

C. The Record Contains Several Proposals Under Section 706 Designed to Protect Internet Openness Without Imposing Undue and Unjustified Burdens on Broadband Internet Service Providers that Deserve Further Exploration.

In contrast to the impractical or unworkable proposals concerning reclassification under Title II, the record contains several thoughtful ideas for an approach under Section 706 that can

[34] *See*, *e.g.*, Report to Congress, Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, ¶¶ 73-81 (1998) ("Stevens Report") (discussing the mutually exclusive categories of "telecommunications services" and "information services); AT&T Comments at 41-44.

[35] Aug. 11 van Schewick Ex Parte Letter at 1-2.

achieve the bulk of the Commission's policy goals as well as the goals of those who support Title II reclassification without also unduly burdening service providers. At least three sets of comments, those of AT&T, AOL and CDT, are worth further consideration as the Commission continues to search for the best path forward. As discussed below, both AT&T and AOL focus on the core concern net neutrality advocates with "paid prioritization" and provide alternative formulations for rules. CDT offers both an attractive comprehensive policy framework and several specific implementation proposals.

AT&T observes that most of the concern about the rules proposed in the NPRM relates to the potential for broadband ISPs to engage in "paid prioritization" and therefore suggests targeting that practice rather than broadly regulating any form of discrimination. AT&T outlines a two-part approach under the Commission's Section 706 authority described by the court in *Verizon*.[36] The first option it offers is a prohibition on paid prioritization not authorized by end users as a per se commercially unreasonable practice under the theory it threatens the open Internet. Paid prioritization not authorized by end users would be deemed *per se* commercially unreasonable. In contrast, end user-directed prioritization would be deemed commercially reasonable, and broadband ISPs could enter into arrangements providing such services on an individual basis. Broadband ISPs selecting this option would be subject to the existing transparency rule, the 2010 no blocking rule, and a commercially reasonable nondiscrimination standard.[37] As AT&T explains, there would be no reason to subject them to any of the additional safeguards discussed in the NPRM, particularly specifying a "minimum level of service" because those seem aimed at addressing concerns relating to paid prioritization,

[36] AT&T Comments at 30-38.

[37] *Id.* at 31-32.

particularly that it could result in the degradation of the non-prioritized traffic of those unwilling or unable to pay.[38]

The second option AT&T outlines is to give broadband ISPs the choice of (i) making a voluntary commitment to refrain from paid prioritization or (ii) subjecting themselves to more substantial regulation designed to mitigate the perceived harms of such prioritization. Broadband ISPs selecting this option would be subject to ex post review of any paid prioritization arrangements they undertake, as well as additional regulations to address the concerns that have been expressed regarding possible impacts of paid prioritization on Internet openness. They could be subject to enhanced regime of transparency with additional disclosures required for paid prioritization arrangements and their impact on other traffic. They could also be subject to enhanced no blocking and nondiscrimination rules to address the purported risk that paid prioritization could result in degradation of non-prioritized traffic, such as those proposed in the NPRM.[39]

In ACA's view, AT&T's bifurcated approach has the merits of focusing intently on the key concern of net neutrality advocates – paid prioritization not directed by the end user. It appears to offer both adequate protections to edge providers and end users, while giving broadband ISPs the needed flexibility to manage their networks and create innovative service offerings. This is an approach certainly worth further study and discussion.

AOL too focuses on the core fear of net neutrality proponents – that paid prioritization would inevitably lead to Internet fast lanes and dirt roads. AOL suggests that the Commission can prohibit "pay-to-play" under Section 706 to prevent broadband ISPs from commoditizing congestion and therefore undermining the goal of accelerating broadband deployment by

[38] *Id.* at 72-79.

[39] *Id.* at 37-39.

firming up its proposal.[40] AOL observes, as has Fiber to the Home Council, that in an uncongested network, prioritization is a solution in need of a problem.[41] But, according to AOL, the problem with *authorizing* prioritization of network traffic is that it provides broadband ISPs with the wrong incentive: "to commoditize congestion, rather than network performance." To monetize congestion, broadband ISPs would have to forgo network upgrades, so "paid prioritization" would not lead to faster lanes, but to "purchasing a place in the queue" – that is, uninterrupted service relative only to its ability to pay more than other edge providers for a place high up in the queue." That would make the services of those lower down, who don't pay, unusable by consumers, particularly at peak periods.[42]

To address this perceived problem, AOL offers enhancements to the NPRM's proposed rules that would permit individual negotiations for priority delivery services with several set restrictions. Broadband ISPs would be prohibited from entering into pay for priority arrangements when the ISP is (i) affiliated with an upstream edge provider; has market power; and also charges end users (i.e., no double-charging). Otherwise, such arrangements may be entered into subject only to Commission prior approval.[43]

As with the AT&T proposal, AOL's proposal is certainly worth discussing because it focuses on refinements to the no blocking and commercial reasonableness proposals contained in the NPRM that incorporate key limiting concepts like vertical integration/affiliation, market power, and consumer protection.

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[40] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of AOL at 5-6 (filed July 15, 2014) ("AOL Comments"). AOL further suggests that the Commission can retain Title II authority "as a backstop" that will be triggered in certain circumstances if the primary rule proves insufficient. Id. at 8. According to AOL, combatting pay-for-play is so critical that the FCC needs full arsenal at its command. "Title II can serve as a backdrop that is triggered (along with a set of appropriately firm Title II rules if Section 706 proves insufficient." *Id.*

[41] *Id.* at 6; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Fiber to the Home Council at 2 (filed July 16, 2014) ("FTTH Council Comments").

[42] AOL Comments at 6.

[43] *Id.* at 5-8.

CDT offers the most comprehensive discussion of alternatives to the rules proposed in the NPRM. Although CDT's preferred approach is reclassification because it believes Title II offers a stable base of legal authority, CDT recognizes that there are two principal disadvantages to use of Title II and that neither is a "trivial" matter: (i) it would engender a major legal battle that would take years to resolve and entail "some legal risk"; and (ii) it would saddle broadband ISPs with excessive and outdated regulation, unless paired with substantial forbearance.[44] ACA fully agrees with both of these observations.

CDT begins with a useful policy framework for analyzing what net neutrality rules should accomplish.[45] Next, CDT offers some reasonable suggestions for improving the functioning of the Commission's proposals under a Section 706 framework, recommending a "multi-pronged approach."[46] CDT's policy framework is as follows:

1. An anti-blocking rule (prohibition against blocking access to lawful online content, applications, and services; subscription to broadband ISPs should give "free reign" to end user to engage in the full range of other Internet users/endpoints).
2. A general expectation of nondiscrimination for Internet service (broadband ISPs should not be able to play favorites in the online marketplace, distorting competition among edge providers – core principle is evenhanded treatment, not absolute prohibition on discrimination: broadband ISPs will not discriminate against lawful content based on its content, source, destination, ownership, application or service).
3. Allowance for reasonable network management (rules should not be rigid; where possible, practices to be content- and application- agnostic and should comply with the common technical standards on which the Internet is based).
4. Flexibility for different/additional data delivery models that don't "squeeze out" ordinary Internet access (broadband ISPs should have flexibility to experiment with different services reflecting different business models or tech architectures so long as these create additions to "ordinary Internet access rather than displacing it").
5. Clarity regarding scope (FCC to "expressly disclaim any application to the various online or "over-the-top" content, applications, and services that the Internet enables).[47]

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[44] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the Center for Democracy and Technology at 8-17 (filed July 17, 2014) ("CDT Comments").

[45] *Id.* at 6-8.

[46] *Id.* at 17.

[47] *Id.* at 17-25.

ACA notes that the first four policy goals articulated by CDT are largely reflective of the FCC's 2005 Policy Statement and 2010 Open Internet rules. ACA has repeatedly affirmed its support, and its member's support, for these bedrock open Internet policies that balance the needs of both edge and access providers. As discussed at length in the following section, ACA respectfully but strongly disagrees with CDT's call for the Commission to disclaim its jurisdiction over edge providers, leaving them free to threaten Internet openness while placing broadband ISPs under regulatory constraints. Nonetheless, many of the specific changes to the NPRM's proposals to govern ISP behavior identified by CDT are certainly worth further investigation and consideration by the Commission because (i) they offer a moderate path for answering the concerns the Internet edge and broader Internet community have voiced about the NPRM; (ii) are more precisely targeted to the alleged dangers of "paid prioritization;" (iii) allow for end-user choice of priority delivery services; and (iv) preserving the ability of broadband ISPs to innovate in the provision of their services and flexibility manage their service offerings.

CDT recommends strengthening rules proposed in NPRM by: (i) prohibiting prioritization deals that have the effect of degrading the absolute performance of other traffic; (ii) replacing the "commercial reasonableness" standard with "edge facing" services rules; and (iii) linking the concepts of individualized negotiations and specialized services without reclassifying edge facing services under Title II.[48] The benefit of this approach, according to CDT, is in leaving broadband ISPs with the ability to: (i) engage in reasonable network management; (ii) enter into beneficial forms of enhanced delivery services, such as caching and off-loading certain traffic to dedicated capacity (specialized services) because these are not likely to degrade likely performance of other Internet-based services; and (iii) prevent scenarios where individually

[48] *Id.* at 17-22. CDT suggests that a prohibition on prioritization deals that have a side effect of degrading the absolute performance of other traffic could take the form of either a rule or a strong presumption.

negotiated prioritization deals make congestion worse for content providers who haven't negotiated similar deals – a key purpose of open Internet rules.[49]

In addition, CDT proposes replacing the somewhat controversial "commercially reasonable" standard with a standard that requires practices "consistent with Internet openness" or to prohibit practices that would tend to "undermine Internet openness."[50] CDT argues that the data roaming "commercially reasonable" standard not a good fit for open Internet policy aims because the protections are intended to apply in most cases where there is no direct agreement by key parties, whereas the Internet features many communications/entities that are not commercial.[51]

Next, CDT recommends that the Commission explicitly recognize, as had the D.C. Circuit in *Verizon*, that broadband ISPs provide a service to edge providers – that is the ability to reach the broadband ISP's subscribers, limited to carriage across the broadband ISP's network.[52] In conjunction with this proposal, CDT suggests that the concepts of individualized negotiations and specialized services be linked without reclassifying the edge-facing service under Title II. CDT notes that the 2010 rules let broadband ISPs offer specialized services that were distinct from Internet access that, although provided over the same facilities, left some potential for edge and access providers to negotiate special delivery arrangements. While recognizing that the original formulation was not designed for this end, CDT recommends that

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[49] *Id.* at 18.

[50] *Id.* at 18-19.

[51] *Id.* at 18.

[52] *Id.* at 21. This "edge-facing service" would be defined as "a service by wire or radio that provides the capability to transmit and receive data across the provider's own network to and from subscribers of the provider's broadband Internet access service, including any capabilities that are incidental to and enable the operation of the communications service." *Id.* at 21. CDT explains that unlike the Wu/Narenchania sender-side traffic concept, this does not depend on the direction of the traffic, but it does imply that the same exchange of bits can simultaneously constitute the provision of distinct services to two distinct parties (as in a two-sided market). *Id.* at 21-22.

the "specialized services" rule can provide the substantial room needed for individualized bargaining between edge and broadband ISPs to avoid the imposition of per se common carrier status.[53]

Finally, CDT offers some generalized advice on how to make a Section 706-based policy framework acceptable to its critics. CDT acknowledges that an approach based on Section 706 "carries some legal questions" and requires walking a "legal fine line," both as adopted and as applied, lest the application of the rule come too close to a common carriage obligation.[54] CDT notes that the "potential for such disputes seems real, because there is a fundamental tension in trying to limit discrimination by entities that (given current regulatory classifications) cannot be made subject to a true non-discrimination rule."[55] To this end, among other things, CDT counsels that the Commission acknowledge that rules based on Section 706 do not provide a complete answer to policy concerns at issue avoid signaling approval of controversial practices not covered by the rules and leave open the possibility of further steps in the future.[56]

CDT, like AT&T and AOL, has presented a thoughtful and moderate approach to the problem of addressing the concern with paid prioritization in a manner that nonetheless leaves broadband ISPs with the flexibility to enter into arrangements with edge providers that benefit

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[53] *Id.* at 23-24.

[54] *Id.* at 17.

[55] *Id.*

[56] *Id.* at 24. Specifically, CDT recommends that the Commission should: (i) acknowledge constraints of Section 706 to avoid leaving impression it is not concerned about the full set of practices not covered by its rules, particularly concerning discrimination; avoid signaling approval of controversial practices not covered by the rules; explicitly state that Title II classification remains a serious consideration and at a minimum, leave open the Title II (Third Way) docket, and indicate an intention to further explore regulatory classification in another proceeding; commit to closely monitor marketplace developments with a particular focus on any signs that specialized services are in any way retarding the growth or constricting the capacity available for broadband Internet access service, as it did in 2010; reiterate a concern if broadband Internet capacity fails to keep pace; and emphasize that any limits in the scope of its rules should not be read as implicit approval of any practices that might undermine Internet openness, and that the FCC intends to actively monitor and address practices that may arise. *Id.* at 24-25.

the parties as well as end users under the Section 706 framework suggested by the *Verizon* court. ACA agrees with CDT's assessment that use of Section 706 to target blocking and harmful discrimination may come with some risks. Nonetheless, as CDT readily concedes, the potential for disputes and litigation to occur under Title II is equally real.[57] Given the lack of evidence of a widespread and serious problem, however, ACA believes those risks are worth taking if the alternative is Title II reclassification, a path of excessively heavy burdens and high costs for broadband ISPs that is equally if not more fraught with legal uncertainties. At the very least, the Commission should do a comprehensive risk/benefit analysis on the claims of those who argue Section 706 cannot provide a stable legal basis and is inadequate to protect Internet users and edge providers against discrimination before adopting any of the rules proposed in the NPRM.

III. ACA'S CALL FOR EVEN-HANDED OPEN INTERNET RULES THAT REACH ALL INTERNET ACTORS CAPABLE OF INTERFERING WITH INTERNET OPENNESS AND BROADBAND DEPLOYMENT IS BROADLY SUPPORTED IN THE RECORD

A. The Complexities of the Internet Ecosystem Call for an Even-handed Policy Framework that Encompasses Threats to Internet Openness from Any Sector.

ACA, in its Comments, asked the Commission to take a holistic approach to adopting open Internet rules and expand their scope to include all Internet actors capable of interfering with Internet openness and broadband deployment, consistent with its explicit recognition in the NPRM that other Internet actors can similarly interfere with open consumer access to Internet content, applications, services and devices.[58] In doing so, ACA observed, the Commission will be returning to the more comprehensive approach to Internet openness that it took in its 2005

[57] *Id.* at 8 (reclassification would "surely engender a major legal battle in the short term" and the inevitable legal fight would take several years and would entail some legal risk").

[58] ACA Comments at iv, 15; NPRM, ¶ 52 n.118.

Internet Policy Statement to ensure "that providers of telecommunications for Internet access or Internet Protocol (IP enabled) services are operated in a neutral manner."[59]

ACA reasoned that to the extent the Commission determines open Internet rules are required, the exclusion of Internet edge providers from them, will undermine the rules' goals and effectiveness, and in turn, cause distortions in the multi-sided Internet marketplace.[60] For this reason, Internet edge providers should be subject to a "no blocking" rule and a commercial reasonableness or a similar rule, if they are imposed on broadband ISPs. Moreover, the current transparency rule should be applied to Internet edge providers. This will ensure consumers are not mislead regarding the reasons they are unable to access otherwise freely available, lawful content on the Internet when it is due to the actions of edge, rather than access, providers.[61]

The Commission and the *Verizon* court have accepted that actions by broadband ISPs to block or degrade consumer access to Internet content, applications and services would break the "virtuous circle" of Internet innovation, consumer demand, investment and deployment in broadband infrastructure that the Commission is charged to protect under Section 706.[62] ACA pointed out that edge providers were equally capable of engaging in blocking or degradation of access to their content, services and applications. If these edge actors were to engage in such practices, it follows that they too would break the circle by limiting the value of the Internet for end users, and that too would suppress demand for broadband access services, in which case

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[59] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) ("Internet Policy Statement").

[60] ACA Comments at iv, 25-26

[61] *Id.* at 20-22 (describing Viacom action blocking access to its free online content to subscribers of select broadband ISPs and advising subscribers the blockage was caused by the actions of their ISP).

[62] *Id.* at 10-14.

broadband ISPs would be less likely to invest in deploying broadband infrastructure and improving their service offerings. More specifically, ACA maintained there is a class of edge providers that offer sufficiently important content to end users of the Internet, such as popular search engines, social networks, online retailers, and online video providers, that can severely threaten the overall value of broadband access services and the Internet by limiting access to their content in a commercially unreasonable manner.[63]

Relying on the analysis of Dr. William Lehr, MIT, ACA detailed how, the exclusion of Internet edge providers from the scope of any open Internet rules will undermine the rules' goals and effectiveness, and in turn, cause distortions in the Internet and related markets.[64] Dr. Lehr warned that, "singling out a solitary class of agents for asymmetric regulations is bad policy" because it "risks misidentifying the locus of a threat to Internet openness and mis-targeting the agent responsible. In both cases, the proposed regulations could accentuate the very harm they are intended to address."[65]

ACA demonstrated, moreover, that these concerns are not merely hypothetical, and that not only do many edge providers have the incentive and ability to engage in discriminatory blocking and degradation of access, but that this behavior has been exhibited in the marketplace by several powerful Internet content providers to the detriment of broadband ISPs and their subscribers.[66] The ability of broadband ISPs to attract and retain subscribers depends on their ability to offer customers a valuable broadband service, and that means being able to enable customers to access and use the popular content and applications that have become well-recognized parts of the Internet experience. This will not be possible if access to popular

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[63] *Id.* at 15-17.

[64] *Id.* at 11-19; William Lehr, MIT, *The Mistake of One-Sided Open Internet Policy*, Section 5, Addressing Edge Provider Threats is Important to Protect Internet Openness, at 19-26 ("Lehr Paper").

[65] ACA Comments; Lehr Paper at 18.

[66] ACA Comments at 17-22.

content, applications, and services is not available to the customer due to blocking by broadband ISPs or anyone else.

Making matters worse, in a multi-sided market like the Internet, "asymmetric regulatory rules that constrain the business behavior of a single class of platform providers (i.e., fixed broadband ISPs that are also MVPDs) would distort market incentives and accentuate content-providers' abilities and incentives to threaten actors more constrained in their behaviors due to regulation, particularly ISPs subject to Open Internet rules."[67] The outcome of this distortion of regulatory-mandated negotiations between MVPDs and programmers, as ACA explained, will by further weakening the hand of MVPDs while enhancing the bargaining position of programmers, result in higher prices for programming content, which in turn will depress demand for and investment in Internet and broadband infrastructure and services by ISPs.[68]

To address this problem, the Commission must take a holistic approach to protecting Internet openness and extend any rules adopted in this proceeding to all categories of Internet actors capable of inhibiting that openness, including applying transparency requirements to Internet edge providers. Taking a holistic approach is fully consistent with the breadth of this rulemaking, which, as discussed in Section II, goes beyond the narrow concern of "network neutrality" embracing the more comprehensive concept of protecting and promoting the "open Internet" against threats that have continued to emerge since 2010.[69] Because threats to the

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[67] Lehr Paper, at 23.

[68] ACA Comments at 25; Lehr Paper at 25.

[69] In their comments, Public Knowledge/Common Cause makes the astute observation that in 2010 the Commission made the critical decision to define its rulemaking "in terms of an open internet, as opposed to a potentially more narrow concern such as network neutrality." *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Public Knowledge and Common Cause at 5 (filed July 17, 2014) ("Public Knowledge/Common Cause Comments"). Continuing they recommend that, "[i]n addition to reaffirming its enforceable commitment to an open Internet, the current proceeding provides the Commission with an opportunity to fully engage with threats to an open Internet that have emerged since 2010. As such, the Commission should not limit itself to merely grounding its previous open internet rules in a more robust theory of statutory authority it should strive to craft rules that protect the open internet from threats that have continued to emerge throughout the process." Id. at 5. Netflix too calls upon the

open Internet continue to emerge that may not have been apparent earlier and that the Commission should avoid locking itself into an overly rigid approach by focusing solely on ISP behavior. Any open Internet rules adopted in this proceeding must apply not only to ISPs, but must also reach other Internet actors equally capable of interfering with Internet openness and, in turn, broadband investment and deployment.

ACA reiterates its view that taking no further action today to regulate the practices of broadband ISPs is far preferable than "committing prematurely to a poorly-designed policy framework that fails to adequately address either today's or tomorrow's foreseeable threats to Internet openness," thereby embracing regulatory inconsistency and engendering regulatory uncertainty for years to come.[70]

B. The Record Supports ACA's View that Gatekeepers Can Appear at Various Points in the Internet Ecosystem and Adversely Affect the Consumer Internet Experience and that the Commission Must Recognize these Facts and Broaden the Scope of its Rulemaking Accordingly.

The record shows that many agree with ACA that Internet actors other than the ISPs exist that can threaten the openness of the Internet, and adopting one-sided rules that apply to ISPs in what is a multi-sided Internet marketplace would fail to protect consumers against such threats. Moreover, nearly every ISP, large and small, agrees that large edge providers are one of these other Internet actors that have the incentive and ability to engage in blocking and discrimination, and such practices would break the "virtuous cycle" that the Open Internet rules are intended to keep intact. These same ISPs have also noted, as did ACA, that large edge providers have acted on their incentives, and that there are at least as many examples of

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Commission to expand the reach of its open Internet rules to include peering and interconnection. *See* Netflix Comments at 10-16. Although ACA does not agree with these commenters that data caps, peering and interconnection are "the two most obvious examples of these types of threats," ACA agrees wholeheartedly with the principle they express that protection of the open Internet is a concept broad enough to reach actions that threaten openness in the Internet ecosystem beyond those of broadband ISPs handling of Internet traffic on their networks.

[70] ACA Comments at 26; Lehr Paper at 26.

blocking and discrimination by edge providers as there are by ISPs. Among those who highlight this issue, there is a near universal call for evenhanded regulatory treatment.[71]

Recognition of the fact that gatekeepers may appear all along the Internet value chain is growing, [72] regardless of where one stands on the correct policy response. For example, market-oriented groups, like ICLE & Tech Freedom, while generally opposing Commission regulation of Internet providers, recognize that ISPs are not the only players capable of non-neutral behavior and that there are gateway players at higher levels of the Internet than the ISP layer and Internet content providers can be non-neutral.[73] eBay too observes that although the 2010 Open Internet rules did not apply beyond an ISP's relationship with its individual broadband user, "there are other potential chokepoints through with access to a neutral, interconnected Internet can be restricted," and calls upon the Commission to "expand the

[71] *See*, e.g., Cox Comments at 4 ("to the extent that the Commission is concerned about safeguarding consumers' access to online content and services, the resulting rules should apply to any entity that poses a potential threat of blocking or unreasonable discrimination, whether an access provider or edge provider"); NCTA Comments at 76; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Time Warner Cable at 23-27 (filed July 15, 2014) ("TWC Comments"); Verizon Comments at 19-21 (Commission must recognize that large incumbent edge providers have undeniable power to affect the consumer Internet experience); *see* also Bright House Network Comments at 5-8; NTCA Comments at 1, 2-4, 7, 14-16 (Commission should address problems throughout the Internet ecosphere that threaten to undermine consumer expectations, including those of large edge providers); WISPA Comments at 22-26 (Commission should not impose no blocking and no commercially unreasonable practices on small broadband providers without taking broader view and examining the practices of edge providers as well).

[72] Recently a Washington Post reporter, explained that hugely popular Internet platforms like "Vimeo, Etsy, and reddit," who have become "have become the digital infrastructure of the Internet age," would not actually be slowing down the operation of their websites on "Internet Slowdown" day, because "[s]lowing down their services is likely to anger their audiences (not to mention, in some cases, their shareholders). In other words, they've become – Too Big to Slow? – but that also gives them enormous power. They have the ability to draw millions of eyeballs to the spinning loading icon that they will feature on their sites." Nancy Scola, Washington Post Blog, "How Wednesday's 'Internet Slowdown' is supposed to work," (Sept. 9, 2014), *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/09/how-wednesdays-internet-slowdown-is-supposed-to-work/. The enormous power of these edge providers can just as easily be turned against select broadband ISPs, particularly smaller providers, who lack the wherewithal to fight back, to the detriment of the ISPs' subscribers.

[73] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of ICLE & Tech Freedom Policy at 9, 22-24 (filed July 17, 2014) ("ICLE/Tech Freedom Comments").

purview of the Open Internet Rules to cover any potential choke points that could be used to limit the growth of Internet-enabled small businesses."[74]

Several commenters note, as did ACA, that there are large edge providers that offer important content to end users of the Internet, such as popular search engines, social networks, online retailers, and online video providers, and if these edges providers limit access to their content in a commercially unreasonable manner, it can severely threaten the overall value of broadband access services and the Internet.[75] Charter correctly observes that the largest edge providers, such as Google, Apple, Amazon, and Facebook, are responsible for a huge portion of Internet traffic, and often control substantially larger shares of their respective markets (e.g., for search, long- and short-form Internet video, online commerce, etc.) than most ISPs control in the market for retail broadband access."[76] Verizon too points out how large Internet incumbents such as Google, Netflix, and Amazon have undeniable power to affect the consumer experience online and Internet openness, and the reach of these companies often dwarfs that of particular ISPs.[77]

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[74] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of eBay at 5 (filed May 15, 2014) ("eBay Comments").

[75] *See*, e.g., NCTA Comments at 76 ("It is well documented that a relatively concentrated group of large edge providers—such as Google, Netflix, Microsoft, Apple, Amazon, and Facebook—have enormous and growing power over consumers' ability to access the content of their choice on the Internet. As of 2013, "50% of traffic c[ame] from 35 sites/services."); NTCA Comments at 1 ("there are multiple participants in the ecosystem that makes up the Internet (the "Service and Network Ecosystem") who have both the incentive and ability to either fulfill or frustrate consumer expectations with respect to an "Open Internet").

[76] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Charter Communications, Inc. at 11-12 (filed July 18, 2014) ("Charter Comments").

[77] Verizon Comments at 19-20 ("Netflix boasts of its power in the Internet ecosystem: Its website states that '[t]he more successful Netflix becomes, the more important we are to the ISPs' subscribers,' and that '[i]t is natural for ISPs to worry that we may try to charge them in the future like linear TV networks charge MVPDs.' Indeed, even aside from the popularity of Netflix with millions of Internet users, the volume of Netflix's traffic – more than one-third of all U.S. Internet traffic during peak times, according to one recent study – gives Netflix significant power to affect how the Internet operates and the consumers' Internet experience. Amazon exercises similar control over large swaths of the consumer Internet experience, given the central role of its site in online commerce, the popularity of its consumer devices such as the Kindle, and its cloud-based services. Amazon has even begun to limit customers' ability to purchase content from publishers that do not agree to its ebook pricing mechanism.").

Commenters also agree with ACA that these Internet edge providers have the incentive and ability to act as gatekeepers or choke points, and these concerns are not merely hypothetical. It's commonly observed in the record that there are as many instances of edge provider blocking and discrimination as there are allege instances of ISP blocking and degradation.[78] Charter notes, the largest edge providers "unquestionably have the ability and incentive to engage in forms of blocking and discrimination to protect their own, or their affiliates,' commercial interests, such as through prioritizing search results and other forms of information filtering, or by blocking access to their content by the customers of ISPs as a means of obtaining leverage in commercial negotiations."[79] TWC reports "how entities other than broadband Internet access service providers—some of which are much larger (boasting much higher market capitalizations, far larger customer bases, and, very often, a global presence)—actually engage in practices that limit consumers' access to online content and services and can inflict real harms," citing its well-publicized retransmission consent dispute with CBS, during which CBS blocked TWC's broadband subscribers from accessing programming on CBS.com as a blatant means of obtaining leverage in retransmission consent negotiations."[80] Other commenters, like ACA, also pointed out that Disney blocked Cablevision's broadband subscribers, and Viacom is currently blocking many smaller cable operators who also offer Internet service.[81]

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[78] *See*, e.g., NCTA Comments at 77 ("in contrast to the largely theoretical threats to Internet openness from broadband providers, [Internet] hyper-giants [like Google] have demonstrated the ability and a willingness to harm other companies and their customers by, for example, manipulating search results"); Cox Comments at 12-13 (discussing the "very real and harmful phenomenon" of blocking of access to ISP customers by edge providers like Viacom to gain leverage in programming carriage negotiations with the ISP/MVPD).

[79] Charter Comments at 12.

[80] TWC Comments at 25.

[81] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Bright House Networks at 6 (filed July 16, 2014) ("Bright House Comments"); Cox Comments at 12.

The record shows the large edge providers to have the greatest ability to block or degrade against smaller ISPs and their customers. WISPA describes how small broadband providers "face the very real threat that edge providers will adopt anti-competitive practices that would degrade or even deny content to them."[82] Further, WISPA states that "[i]n contrast to larger broadband providers, small businesses lack market power and, in some cases, the bandwidth to negotiate for monetary payments from edge providers and content delivery networks."[83] Indeed, while proponents of open Internet rules have highlighted examples of large broadband ISPs engaging in practices that might threaten the openness of the Internet, the experience of the smaller ISPs who comprise ACA's membership has been the reverse: blocked and degraded access for their customers at the hands of large Internet edge providers.[84]

Also, like ACA, NCTA, recommends that any Commission rules regarding Internet openness "must address the holistic nature of the Internet and the fact that ISPs are not entirely in control of the consumer Internet experience. While the NPRM tentatively concludes that any rules should not apply to 'edge provider activities, such as the provision of content on the Internet,' it would not accomplish the Commission's objectives to focus solely on conduct by broadband ISPs."[85] TWC criticizes the NPRM for focusing "singularly on the prospect that broadband Internet access providers will act as 'gatekeepers' to the Internet by granting or denying access to content, services, and applications as they see fit" and failing "to acknowledge that the real—and growing—threat to Internet openness continues to be posed by

[82] WISPA Comments at 22.

[83] *Id.* at 22-23.

[84] ACA Comments at 20-22; NTCA Comments at 3; WISPA Comments at 23.

[85] NCTA Comments at 76.

entities other than broadband Internet access providers."[86] Similarly, Cox points out that because the Commission's proposed rules derive from the agency's interest in "prohibiting blocking of access to online content or services and unreasonable discrimination in the delivery of such services, the Commission cannot credibly exempt blocking or discrimination by edge providers."[87] Cox is correct. Addressing the Commission's openness concerns in a reasoned and coherent manner would require, at the least, that such rules address the harms of blocking and discrimination whether caused by a broadband access provider or an edge provider.[88]

C. The Logic of the Commission's Policy Approach Compels Even-handed Treatment of all Internet Actors Capable of Interfering with the "Virtuous Circle" Engendered by Internet Openness.

In its comments, ACA observed that the Commission and the *Verizon* court have accepted that actions by broadband ISPs to block or degrade consumer access to Internet content, applications and services would break the "virtuous circle."[89] If Internet edge providers engage in similar actions of blocking or service degradations, it follows that they too would break the circle by limiting the value of the Internet for end users, and that too would suppress demand for broadband access services, in which case broadband ISPs would be less likely to

[86] TWC Comments at 23.

[87] Cox Comments at 11.

[88] *See* Bright House Comments at 5, 7-8 ("if the online publisher offers its content free to the web, then it should not be permitted to impose discriminatory blackouts on Internet customers. If the Commission intends to adopt principles of no blocking and of nondiscrimination, then it should apply the same principles to online publishers."); Verizon Comments at 19 ("To the extent the Commission does adopt new rules governing the broadband marketplace; moreover, it should ensure that those rules apply in an even-handed way that promotes innovation across the ecosystem."). *But*, *see* Charter Comments at 12-13 (acknowledging the unquestionable incentive and ability such edge providers have to engage in forms of blocking and discrimination to protect their own or their affiliates' commercial interests, such as through prioritizing search results and other forms of information filtering, or by blocking access to their content by customers of ISPs as a means of obtaining leverage in commercial negotiations, but counseling the Commission to rely on market forces for both edge and access providers rather than creating "regulatory requirements up and down the Internet ecosystem").

[89] ACA Comments at 7-8, 41.

invest in deploying broadband infrastructure and improving their service offerings.[90] The logic of the Commission's policy approach compels it to apply any open Internet rules to all actors capable of interfering with the "virtuous circle" of Internet innovation and investment engendered by Internet openness. ACA's position is well supported in the record.

NCTA and NTCA, like ACA, see little difference in terms of harm "to the 'virtuous circle' of innovation and broadband deployment as the hypothesized conduct by broadband providers that justify the proposed rules" between certain Internet "hyper-giants" who "have demonstrated the ability and a willingness to harm other companies and their customers by, for example, manipulating search results and conduct by broadband providers that is cited to justify the proposed rules."[91] As NTCA puts it:

> The Open Internet NPRM states that "threats to the open Internet, such as limitations on users to access the content of their choice or speak their views freely, are therefore within the authority of the Commission to curb." When viewed through this lens, it is difficult to see a difference between a retail broadband ISP's 'incentive and ability to limit openness' and a Content/Edge Provider's withholding of access to certain services, applications or content. In fact, Content/Edge Provider blocking of otherwise freely available content upon an unduly discretionary whim is nothing less than a limitation on users' access to the content of their choice, and as such, has as much adverse impact on consumer demand for broadband service as the theoretical behavior that triggered this proceeding. Consumers displeased with the prospect that the online content of their choice may not be available due to a dispute between a retail ISP and a Content/Edge Provider may see less need to keep, or utilize, their broadband subscription. The resulting depression in "end user demand, which then threatens broadband deployment," is

[90] *See*, *e.g.*, Cox Comments at 12 ("[T]he Verizon court found that the Commission could impose Open Internet rules under Section 706 of the Telecommunications Act. In doing so, the court credited the Commission's assertion that the restrictions on broadband Internet access providers 'protect and promote edge-provider investment and development, which in turn drives end-user demand for more and better broadband technologies, which in turn stimulates competition among broadband providers to further invest in broadband.' If broadband provider misconduct warrants regulatory intervention because it could dampen end-user demand for online services and thereby undercut broadband investment incentives, then edge provider conduct that blocks or impedes access to online services would have an even more direct impact on broadband investment under the core justification advanced by the Commission.).

[91] NCTA Comments at 77-78.

at the very heart of this proceeding.[92]

ACA agrees. The Commission's open Internet rules will fall far short of the mark if they continue to apply solely to broadband ISPs. This is particularly true as reports of edge providers acting non-neutrally continue to mount with respect to such Internet giants as Google, Amazon and Facebook.[93] Previously, as both ACA and TWC have noted, the Commission recognized that the principles of Internet openness apply equally to other participants in the Internet ecosystem."[94] Given the interconnectedness of relationships among Internet content,

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[92] NTCA Comments at 15-16. *See* also Fred Campbell, CBIT, "Net Neutrality: How Sponsored Data Plans Would Promote Competition on the 'Edge,'" (Aug. 25, 2014) ("I've previously explained how the theory of 'gatekeeper control' underlying the FCC's 2010 approach to net neutrality is applicable to *any* Internet intermediary that is capable of blocking, degrading, or favoring particular Internet services, applications, or content – a category of 'non-ISP gatekeepers' that includes the mobile operating systems offered by Apple and Google.").

[93] Ben Fritz and Greg Bensinger, The Wall Street Journal, "Disney-Amazon Dispute Concerns More Than Pricing," (Aug. 11, 2014) (reporting that while the Walt Disney Co. and Amazon are at loggerheads over price, product promotion and placement on the Amazon website, Amazon has impeded consumers' ability to preorder certain Disney discs), *available at* http://online.wsj.com/articles/disney-amazon-dispute-concerns-more-than-pricing-1407798288; David Streitfeld, The New York Times, "Plot Thickens as 900 Writers Battle Amazon," (Aug. 7, 2014) (quoting from letter from authors published by Hachette whose books Amazon discourage readers from purchasing as a way of pressuring the publisher into giving Amazon a better deal on e-books, "'We feel strongly that no bookseller should block the sale of books or otherwise prevent or discourage customers from ordering or receiving the books they want'"), *available at* http://www.nytimes.com/2014/08/08/business/media/plot-thickens-as-900-writers-battle-amazon.html?_r=0; Rolf Winkle, The Wall Street Journal, "As Google Builds Out Own Content, Some Advertisers Feel Pushed Aside," (Aug. 18, 2014) (changes in its search offering "risk Google's standing as a neutral arbiter of Internet content and the most widely used search engine" by "providing as much information as possible to keep users in Google's virtual universe" instead of links directing them to other sites, including those paying for Google advertising), *available at* http://online.wsj.com/articles/googles-richer-content-worries-some-advertisers-1408391392; Jane L. Levere, The New York Times, "A Campaign to Pique the Interest of Those Who Revel in a Deal," (Aug. 11, 2014) ("Earlier this year, industry observers raised questions about RetailMeNot's long-term prospects after Google revised its search engine algorithm in a way that could have a negative effect on the company's business model."); Zeynep Tufeki, Medium, "What Happens to #Ferguson Affects Ferguson: Net Neutrality, Algorithmic Filtering and Ferguson," (Aug. 14, 2014) (discussing how switching from "neutral" Twitter feeds about Ferguson to "non-neutral" Facebook algorithmically filtered posts can dramatically a user's access to information posted to social media sites), *available at* https://medium.com/message/ferguson-is-also-a-net-neutrality-issue-6d2f3db51eb0.

[94] *See* ACA Comments at 9; TWC Comments at 25 n.71, *citing* Internet Policy Statement ¶ 4 (recognizing that the principles at stake were relevant not only for broadband Internet access providers, but also for "application and service providers, and content providers"); *Broadband Industry Practices*, Notice of Inquiry, 22 FCC Rcd 7894, ¶ 8 (seeking "a fuller understanding of broadband market participants today, including network platform providers, broadband Internet access service providers, other broadband

applications, services and access providers, this was undoubtedly the right policy approach, and the Commission should take action to protect the Open Internet from more than just ISPs. If the Commission moves ahead with adopting new open Internet constraints on broadband ISPs, then given the record before it, the Commission cannot turn a blind eye to edge provider blocking and discrimination that threaten Internet openness.

D. Failure to Apply Open Internet Rules to all Internet Actors Would Be An Arbitrary and Capricious Exercise of the Commission's Regulatory Authority that Would Undermine the Commission's Policy Objectives.

In addition to recognizing that asymmetrical application of open Internet rules to only broadband ISPs would be bad policy, it would also be an arbitrary and capricious application of the Commission's authority since the record soundly shows that ISPs are not the only Internet actors capable of undermining the goals of the proposed open Internet rules. In its comments, ACA argued that not only would failure to apply open Internet rules on all Internet actors that have the ability to block or degrade fail to achieve the primary open Internet goals of the Commission, but asymmetric regulation that constrain the business behavior of a single class of platform providers (i.e., fixed broadband ISPs that are also MVPDs) would distort market incentives. For the largest edge providers, it would accentuate their ability to threaten ISPs because the open Internet constraints on the ISPs prevent them from threatening market actions in a way that would neutralize the edge provider's threats.[95] In this way, asymmetrical rules that are intended to promote an open Internet in some cases can empower those not subject to them and make matters worse in the marketplace.

ACA's warnings about the harm of asymmetric regulation in a multi-sided market are echoed in the record, and elsewhere. Time Warner Cable argues strongly that a "regime that

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transmission providers, Internet service providers, Internet backbone providers, content and application service providers, and others.").

[95] ACA Comments at 22-25.

applies only to broadband Internet access providers would not only be ineffective but also potentially unlawful, as such under-inclusiveness would threaten the rationality and thus legal viability of the rules. Particularly given the absence of any cogent explanation for the selectivity proposed by the NPRM, failing to address comparable practices by others in the Internet ecosystem would be arbitrary and capricious under the Administrative Procedure Act and would risk violating the Constitution."[96] Cox too asserts that "it would be arbitrary and capricious to target broadband provider conduct that implicates the asserted interests only indirectly (i.e., the "triple-cushion shot" described by Verizon and the court), while exempting edge provider conduct implicating those interests directly (i.e., via a "single" or "double-cushion shot")."[97]

Other commentators too have criticized the Commission's single-minded focus on ISPs and noted that one-sided net neutrality rules will lead to an Internet market that is less free rather than more so by leaving Internet edge providers free to engage in the same "gatekeeper control" behavior that the Commission finds antithetical to Internet openness on the part of broadband ISPs.[98] ACA agrees that maintaining regulatory distinctions between access and

[96] TWC Comments at 26.

[97] Cox Comments at 11-12.

[98] Howard Buskirk, Communications Daily, "FCC Wrong to Focus Net Neutrality on Just ISPs, Campbell Says," Aug. 26, 2014 ("Net neutrality rules and the emphasis on ISPs will lead to an Internet market that is less free rather than more so, former FCC Wireless Bureau Chief Fred Campbell argued in a new blog post."); Fred Campbell, CBIT, "Net Neutrality: How Sponsored Data Plans Would Promote Competition on the 'Edge,'" (Aug. 25, 2014) ("The FCC has nevertheless focused its net neutrality efforts entirely on ISPs. The result of the FCC's myopic regulatory strategy: Google has engaged in precisely the type of behavior that net neutrality was intended to prevent in order to cement its control over the Android operating system and mobile search. . . . Net neutrality advocates love to paint ISPs as the 800 pound gorilla when it comes to gatekeeper or 'bottleneck' control in the Internet ecosystem. For whatever reason, these advocates refuse to acknowledge that the companies who control mobile operating systems and devices have just as much or more bottleneck power than ISPs. Unlike ISPs, whose geographic scope is relatively limited, mobile operating systems have gatekeeper control — not to mention economies of scope and scale — on a global basis. . . . If the FCC wishes to preserve competition in the mobile Internet segment, its best bet is to maintain a light regulatory touch that maximizes opportunities for market negotiation. If the FCC won't do that, then it should apply whatever net neutrality rules it adopts to *all* mobile Internet gatekeepers, ISP and non-ISP alike. Reinstating the FCC's ISP-only approach to Internet regulation is by far the *worst* option for regulating the mobile Internet. We already know where that market distorting road leads: To new monopolies in the middle."), *available at*

edge providers when both are equally capable of denying some consumers, based on the identity of their ISP, access to content made freely available on the Internet to all other users would almost certainly be found arbitrary and capricious by the courts.[99]

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In view of the record, the Commission cannot plausibly continue to declare simply that blocking and discrimination by Internet actors other than ISPs are "beyond the scope of this proceeding." At the very least, the Commission must formally recognize that blocking and commercially unreasonable behavior on the part of Internet edge providers is a threat to the Open Internet for the same reasons it finds such behavior if engaged in by ISPs to be a threat. It is obvious that the ability of broadband ISPs to attract and retain subscribers depends on their ability to offer customers a valuable broadband service, and that means being able to enable customers to access and use the popular content and applications that have become well-recognized parts of the Internet experience.[100] This will not be possible if access to popular content, applications, and services is not available to the customer due to blocking by broadband ISPs or anyone else. Such fragmentation of the consumer Internet experience would threaten the Internet's openness by dividing it into a series of fiefdoms ruled by powerful edge providers, in much the same way that net neutrality advocates fear broadband ISPs will do

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http://cbit.org/blog/2014/08/net-neutrality-how-sponsored-data-plans-would-promote-competition-on-the-edge/.

[99] *See*, e.g., *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (holding that an agency acts arbitrarily and capriciously when it "applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record").

[100] ACA Comments at 15 (a broadband Internet subscriber's lack of access to certain edge providers would "severely threaten the overall value of broadband access and services); NTCA Comments at 3 ("Because consumers find value in broadband through access to services, applications, and content offered by Content/Edge providers, while Content/Edge providers need the networks and services provided by retail ISPs for their services, applications, and content to be of use to consumers…each party thus has the ability to enhance or undermine the successful operation of the other and its ability to serve consumers."

if unconstrained by additional open Internet constraints. Should the Commission adopt new open Internet rules on ISPs as part of this proceeding, the Commission must broaden the scope of its rules to apply equally to all forms of Internet blocking and degradation that interfere with the virtuous circle of innovation, consumer demand, investment and broadband deployment that it is charged to protect, or else it severely risks reversal in the courts. The prolonged uncertainty such a situation would create would do no one – not edge providers, nor access providers nor consumers – any good.

IV. THE COMMISSION SHOULD NOT BE DETERRED BY CLAIMS THAT IT OUGHT NOT ADOPT EVEN-HANDED RULES, LACKS JURISDICTION, OR THAT REGULATING INTERNET EDGE PROVIDERS WOULD RAISE CONSTITUTIONAL CONCERNS ANY MORE THAN DOES REGULATING ACCESS PROVIDERS

ACA and others have demonstrated why the Commission must expand the scope of its open Internet rules to encompass all Internet actors with the incentive and ability to threaten Internet openness, and thereby impede the operation of the virtuous circle of innovation and investment that has made the Internet what it is today. Enabling and fostering Internet "innovation without permission" is a policy goal that should apply to the Internet's edge and "core" or access networks alike once it is understood that threats to Internet openness can come from endpoints and access networks alike.[101]

CDT argues that the Commission should not bring Internet edge providers under its open Internet framework.[102] Raising both policy and legal arguments, CDT urges the Commission to "expressly disclaim regulatory authority over the content, applications and services that run over the Internet.[103] ACA respectfully disagrees. Failure to apply its open

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[101] *See* 2010 Open Internet Order, 25 FCC Rcd at 18044, Concurring Statement of Commissioner Michael J. Copps ("It is my fervent desire that, "with this Order, we start to write the next chapter in the great Internet success story – one of continued openness, innovation without needing permission from anyone….").

[102] CDT Comments at 25-27 ("The Commission should cabin its policy focus to the provision of physical transmission functions, and expressly disclaim authority over Internet content and applications.").

[103] *Id.* at 28.

Internet rules in an evenhanded way would leave Internet edge providers free to engage in precisely the same anti-consumer blocking and degradation of services that the Commission plans to prohibit if engaged in by broadband ISPs, to the detriment of consumer welfare. This would be a very poor policy outcome. Nor do CDT's legal justifications warrant exempting Internet edge providers who may similarly interfere with the consumer Internet experience and threaten Internet openness with discriminatory blocking or degradation of access to freely available online content, applications and services.

A. The Commission Should Pay Little Heed to CDT's Policy Arguments Against Broadening the Scope of its Open Internet Rules to Include Certain Edge Providers.

CDT first asks that the Commission "expressly disclaim regulatory authority over the content, applications and services that run over the Internet," regardless of whether it imposes rules pursuant to its Title II or Section 706 authority).[104] ACA believes that implicit in this call to "disclaim regulatory authority" is a recognition that the Commission does, indeed, have regulatory authority over Internet edge providers. Nonetheless, CDT argues that "any effort to extend open-Internet protections to over-the-top services or computer software or hardware would invite dangerous overbreadth and quickly raise a host o[f] problems."[105]

To be clear, ACA is not advocating open access to all Internet content, applications and services. ACA's primary concern with blocking and degradation in this proceeding goes solely to the actions of powerful Internet content providers who have the incentive and ability to

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[104] *Id.* at 26. ACA notes that some broadband providers, such as AT&T and Verizon, have argued that any interpretation of the Communications Act that permits reclassification of broadband Internet access services would compel reclassification of many other services as well, including non-facilities-based ISPs, content delivery networks, Internet backbone providers, broadband-enabled devices, Internet search engines and online advertising companies, online video services and cloud computing services. AT&T Comments at 15-16; 55-60; Verizon Comments at 55-56 ("because all Internet services involve some form of transmission, an approach severing an information service's transmission component from its processing capabilities would also implicate a wide range of information service providers;" reclassification is a "dangerous approach that could sweep in a broad range of Internet services.").

[105] CDT Comments at 26.

discriminatorily or arbitrarily block or degrade access to content of end users served by select ISPs, particularly for content they otherwise choose to make freely available online.[106] As ACA stated in its comments, and again above in Section III certain "edge providers offer content, applications and services that are sufficiently important to end users of the Internet that limited access would severely threaten the overall value of broadband access and services."[107] At a minimum, the Commission can impose reciprocal Open Internet rules on edge providers affiliated with video programming vendors with respect to their video content made freely available online that is the same or a derivative of content they make available to MVPDs for distribution to their customers.

CDT next advocates that the Commission regulate only "providers of transmission links that connect subscribers to the Internet" to prevent "carriers providing connections to the Internet" from limiting choices or playing favorites."[108] CDT's premise for restricting the scope of the Commission's open Internet rules is its view that the "purpose of the proceeding is to preserve the Internet as a transmission medium that is equally open and available to an essentially unlimited array of content, applications, and services. Central to that goal is the

[106] Content owners may freely decide to put their intellectual property behind pay walls and charge subscription fees. ACA is certain that the Commission will be able to identify this discrete class of actors in its rules with sufficient specificity to guard against regulatory overbreadth. In an analogous situation, in its program access rules, the Commission was able to identify entities that own or control regional sports networks as a class of actors within the programming industry deserving of special constraints. *See* also, e.g., Bright House Comments at 7-8 ("If the Commission intends to adopt principles of no blocking and of non-discrimination, then it should apply the same principles to online publishers. Keeping the Internet open should mean that while content providers may adopt non-discriminatory pay-walls, they may not blackout, surcharge or otherwise discriminate against a targeted ISP or its customers. If the content is available to some ISPs and their customers, it must be available to all.").

[107] ACA Comments at 15; Lehr Paper at 19 ("certain "edge providers offer content, applications and services that are sufficiently important to end users of the Internet that limited access would severely threaten the overall value of broadband access and services"). *See* also, e.g., NCTA Comments at 76 ("It is well documented that a relatively concentrated group of large edge providers – such as Google, Netflix, Microsoft, Apple, Amazon and Facebook – have enormous and growing power over consumers' ability to access the content of their choice on the Internet.")

[108] CDT Comments at 26.

simple premise that carriers providing connections to the Internet should not limit choices or play favorites. Open-Internet protections, therefore, should apply specifically and exclusively to providers of Internet access service."[109]

Here, CDT has conveniently re-formulated the goals of the proceeding to suit its own policy ends: regulation of access providers and no regulation of edge providers. But, as ACA has demonstrated, the aims of the Commission as stated in the NPRM and presented to and accepted by the DC Circuit were a good deal broader: to codify rules that would protect the "virtuous circle" of innovation at the edge, increased consumer demand for broadband Internet services leading to more investment and deployment of broadband infrastructure, which in turn would engender more innovation at the edge, and so on.[110] Any number of actors in the Internet ecosystem can disrupt this circular pattern, as the record shows. Accordingly, if the Commission is to achieve its goals, it must look at threats to Internet openness more holistically.

CDT also claims that any effort to extend the rules to "over-the-top" services or computer software or hardware would invite dangerous overbreadth and quickly raise a host of problems.[111] CDT explains this concern as follows: "Open Internet rules aim to permit innovation and choice at the Internet's endpoints. This produces a smorgasbord of services and applications, many of which are not themselves open, neutral or nondiscriminatory; rather, they reflect the particular preferences or idiosyncratic tastes of their creators or users. Extending openness requirements to over-the-top services and applications would undercut the very choice and innovation that an open Internet is intended to facilitate."[112]

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[109] *Id.* at 26.

[110] 2010 Open Internet Order; Brief for Appellee/Respondents, USCA Case #11-1355 (filed Jan. 16, 2013), Verizon ("FCC Brief"). Public Knowledge/Common Cause too have acknowledged that the goals of this rulemaking transcend a narrow definition of network neutrality and more comprehensively aim to preserve and protect "the open Internet." Public Knowledge/Common Cause Comments at 5.

[111] CDT Comments at 26.

[112] *Id.*

First, CDT's "overbreadth" assertion is itself manifestly overbroad. If the Commission is capable of crafting open Internet rules that are appropriately tailored to address harmful broadband ISP behavior without unduly burdening or prohibiting the ISP's ability to innovate, there is no reason it cannot do so with respect to those Internet edge providers that are sufficiently important to broadband Internet access subscribers that their loss would lessen the value of their subscription and potentially depress demand for broadband. Second, CDT offers no rationale for why non-neutral, closed or discriminatory Internet services and applications are an unalloyed "good" while similar behavior on the part of ISPs is an absolute evil.

ACA has focused its concern in this proceeding on a particular type of blocking and nondiscriminatory treatment by edge providers that is harmful to the openness of the Internet because it breaks the virtuous cycle and depresses deployment and innovation. Notwithstanding other forms of preferences or idiosyncratic tastes of edge providers in how they make their content available, the targeted blocking and discriminatory treatment of select ISPs' customers by large Internet content providers identified by ACA should not be permitted.

CDT does acknowledge that some over-the-top services "may come to present legitimate questions about market power or anticompetitive conduct" but notes competition and consumer protection laws may apply where that happens.[113] Yet, this is equally true for broadband ISP behavior. If *ex ante* competition law enforcement would be sufficient to police edge provider behavior that threatens Internet openness, it should be equally sufficient to police ISP behavior. To the extent, however, the Commission determines that general antitrust and consumer protection rules are not adequate for this purpose, it would be compelled to apply the same analysis to edge provider violations of open Internet norms and adopt appropriate safeguards.

[113] *Id.*

ACA maintains that, to the extent the Commission can identify certain behavior by an edge provider that it concludes is harmful to the openness of the Internet it is better for the Commission to adopt a rule preventing such behavior, then to rely on a case-by-case approach through competition and consumer protection laws. If the Commission concludes that certain behavior when pursued through competition and consumer protection laws will consistently lead to enforcement against the actor, then adopting a per se rule against the behavior is the most efficient means of curbing the behavior. A Commission-adopted rule avoids the expenditure of excessive resources of either the courts or the government and parties; a process that is particularly burdensome for smaller ISPs. Commission action in this case would better protect consumers because they would have the protection they need in the near term rather than waiting potentially years for disputes to run their course fully through the agencies and/or courts.

CDT argues additionally that open-Internet policy cannot provide "an all-purpose safeguard across the entire Internet ecosystem; to be effective it needs to be tailored to the specific risk for which it was designed."[114] ACA agrees that the Commission's open Internet policy cannot provide an "all-purpose safeguard" across the entirety of the Internet. But that is no reason to fail to apply a targeted safeguard to those Internet content providers who have demonstrated their incentive and ability to block or degrade consumer access to content that they otherwise make freely available online solely on the basis of the identity of the consumer's ISP. This is particularly true in cases where the Commission recognizes harm to the public interest, and is able to adopt an efficient and effective administrative remedy for addressing it. The Commission acts well within its discretion by addressing problems that fall within its subject matter and regulatory authority incrementally, rather than all at once.[115]

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[114] *Id.*

[115] As the Supreme Court has recognized, Congress has delegated to the Commission the authority to "execute and enforce" the Communications Act, and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. *See AT&T Corp. v. Iowa Utilities*

B. CDT's Claims that the Commission Lacks Legal Authority or Would Run Afoul of the First Amendment if it Subjected Edge Providers to its Open Internet Rules Are Unavailing.

CDT next raises a series of legal impediments to Commission action. Despite its initial call for the Commission to "disclaim" jurisdiction to regulate Internet edge providers, which suggests there is jurisdiction to disclaim, CDT argues that the Commission lacks authority "over activities that are not closely connected to the actual transmission of communications" such as the non-transmission-related functions of consumers electronics." CDT argues further that any data processing performed at an Internet endpoint before or after the transmission of a communication (e.g., actions of websites, search engines, social networks, cloud computing services) would be outside the scope of FCC authority.[116] CDT relies on the decision of the D. C. Circuit in *American Library Ass'n v. FCC*, 365 F.3d 353 (DC Cir. 2005) to support its argument that the Commission lacks authority to regulate non-transmission-related functions.[117]

The court's decision in *American Library Ass'n*, however, poses no bar to Commission regulation of Internet edge providers. First, this ancillary jurisdiction case involving the FCC's attempt to impose a "broadcast flag" requirement on apparatus used to play broadcast programming after its receipt can just as easily be read to support jurisdiction over Internet edge providers because the activity ACA is concerned with, blocking of information retrieval over the Internet, are actions of entities engaged in interstate communication (transmission) by radio or

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Bd., 525 U.S. 366, 377-378 (1999). Commission action under this authority often includes targeted relief. *See*, *e.g.*, *Nat'l Cable & Telec'ns Ass'n v. Brand X*, 545 U.S. 967 (2005). *See also Revision of the Commission's Program Carriage Rules*, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Rcd 11494 (2011) (taking initial step of revising program carriage complaint procedures while seeking comment on more widespread rule changes); *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) (prohibiting joint retransmission consent negotiations by top four stations that are not commonly owned, while not addressing other proposals included in 2011 NPRM and seeking further comment on eliminating the network non-duplication and syndicated exclusivity rules).

[116] CDT Comments at 26-27.

[117] *Id.* at 27; *American Library Ass'n v. FCC*, 365 F.3d 353 (DC Cir. 2005) ("American Library Association").

wire. In *American Library Ass'n*, the D.C. Circuit found the Commission lacked *subject matter jurisdiction* to impose a requirement that digital television receivers and other devices capable of receiving digital television broadcast signals include a technology allowing them to recognize the "broadcast flag" – a digital code embedded in the digital television broadcasting stream which prevents digital television reception equipment from redistributing broadcast content because the Communications Act limits the Commission's jurisdiction to wire and radio communications – that is transmission. The court found the broadcast flag to affect receiver devices only after the transmission is complete.[118] Inasmuch as subject matter jurisdiction is a predicate to the Commission's ability to exercise its "ancillary authority," the lack of subject matter jurisdiction over digital television receivers after the transmission was complete was fatal.

ACA demonstrated in its comments that the Commission has both subject matter jurisdiction and regulatory authority under Title I to regulate Internet edge providers.[119] They, like broadband ISPs, are properly classified as "information service" providers under the Act because they offer users the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[120] Facebook, for example, uses telecommunications to offer a service to the public that permits members of the public to send their information to Facebook, which will store and make it available to both the sender and other people – often "friends" – who seek to retrieve it. It could be called a "classic" information service provider.[121] Pursuant to the *Verizon* decision, the

[118] American Library Ass'n, 406 F.3d at 691.

[119] ACA Comments at 47-53.

[120] ACA Comments at 50.

[121] *See* Harold Feld, The Wet Machine; Tales of the Sausage Factory, "Want to Play FCC Fantasy Baseball? Follow The Title II Debate," (May 16, 2010) ("Facebook offers to the public: 'if you can get your information to me, I will store it and make it available to people.' …Facebook uses broadband, it does not offer broadband access. It therefore remains a classic 'information service' provider no matter what the FCC says about the nature of broadband access service."), *available at*

Commission's regulatory authority under Section 706 "encompasses the power to regulate broadband ISP's economic relationships with edge providers if, in fact, the nature of those relationships influences the rate and extent to which broadband providers develop and expand their services for end users."[122] As ACA observed, "[t]o the extent Internet content provider actions influence the rate and extent to which broadband ISPs develop and expand their services for end users, the Commission may exercise the same authority to regulate their behavior."[123]

Nor is ACA alone in taking this position. TWC too maintains that "there is no legitimate argument that entities other than broadband Internet access providers are somehow outside the scope of the Commission's legal authority. The rationale for regulation endorsed by the D.C. Circuit in Verizon—that is, the "triple-cushion shot" theory that restrictions on broadband providers protect edge providers, which in turn drives demand, which in turn promotes competition and investment—applies more directly to regulation of edge providers that engage in blocking or discrimination that curtails access to online content and services. Most edge providers transmit information by wire or radio over owned or leased facilities in conveying information to and from transit providers and ISPs. Thus, the Commission has clear authority under Section 706 to adopt rules that prevent edge providers as well as ISPs from interfering with Internet openness."[124] Cox agrees that, "[f]rom the Commission's perspective, it should not make any difference whether the entity engaging in blocking or other discrimination is a broadband provider or an edge provider that hosts its content online. As long as the edge

http://www.wetmachine.com/tales-of-the-sausage-factory/want-to-play-fcc-fantasy-baseball-follow-the-title-ii-debate/.

[122] ACA Comments at 50.

[123] *Id.* at 50-51.

[124] TWC Comments at 26.

provider in question engages in transmission by wire or radio—as many, if not most, do today—the Commission's authority under Section 706 authorizes the extension of a no-blocking rule to such entities. Therefore, to the extent the Commission seeks to restrict entities from engaging in blocking or discrimination with respect to online content and services, it should adopt competitively neutral rules that apply to network operators and edge providers alike."[125]

CDT next argues that Commission regulation of Internet content or applications would raise serious constitutional issues. It urges the Commission to "build bulwark against broader Internet regulation in its order."[126] CDT's constitutional claims are, in a word, flawed.

CDT first asserts that courts have repeatedly struck down efforts to regulate Internet content and that, on the Internet "*all* the data contained [in] the communications between two endpoints is protected speech."[127] From this, CDT categorically concludes that "the interactions between Internet users and other Internet endpoints, including online services, are constitutionally protected from regulation."[128] However, CDT's assertions concerning the breadth and depth of constitutional protection for the treatment of Internet communications at issue with open Internet rules are wildly overbroad. The First Amendment protects the free exchange of ideas, but "is not an 'absolute right' . . . and is 'not so 'all-encompassing as to include all activity in which an idea, goal or value is promoted.'"[129] As the Commission itself has

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[125] Cox Comments at 13.

[126] CDT Comments at 27.

[127] *Id.* at 27 (emphasis added), citing, e.g. *Reno v. ACLU*, 521 US 844; Ashcroft v. ACLU, 542 US 656 (2004); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 86 (2d Cir. 2003); *Cyberspace Communications, Inc. v. Engler*, No. 99-2064, slip op. (6th Cir. Nov. 15, 2000), aff'g, 55 F. Supp. 2d 737 (E.D. Mich. 1999); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). The cases cited by CDT cover statutes that aimed to protect children from indecent and obscene content (i.e., content-based restrictions on expression). Applying the Commission's "no blocking" and commercial reasonableness rules to Internet edge providers does not constitute a content-based restriction.

[128] CDT Comments at 27.

[129] Illinois Bell Tel. Co. v. Village of Itasca, IL, 503 F. Supp.2d 928, 947 (N.D. Ill. 2007), *quoting C.L.U.B v. City of Chicago*, 157 F.Supp.2d 903, 915 (N.D. Ill. 2001).

found, the conduct of First Amendment speakers may be regulated in appropriate circumstances, and with respect to its open Internet rules, "speaker-based distinctions are permissible so long as they are 'justified by some special characteristic of' the particular medium being regulated' – here the ability of broadband providers to favor or disfavor Internet traffic to the detriment of innovation, investment, competition, public discourse, and end users."[130]

Any open Internet regulations adopted by the Commission in this proceeding that reach edge providers similarly would not be directed at the content they place on a website, but rather with their conduct – the manner in which the Internet content provider's servers and routers are programmed to selectively block or degrade access to content otherwise made freely available to all non-blocked consumers on the basis of the IP-address assigned by their ISP or some other means.

The Commission has rejected arguments that its open Internet rules violate the First Amendment rights of broadband ISPs in both the 2010 Open Internet Order and its brief on appeal before the D.C. Circuit in *Verizon*. In the 2010 Open Internet Order, the Commission rejected First Amendment challenges, *inter alia*, by arguing that its regulations (i) were supported by its predictive judgments as an expert agency; (ii) were content neutral restrictions on speech that did not implicate expressive activity because they were independent of viewpoint; and (iii) passed muster under "intermediate" First Amendment scrutiny because they were narrowly tailored to further an important government interest unrelated to the suppression of free expression and the means chosen did not burden substantially more speech than was necessary.[131]

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[130] *See* 2010 Open Internet Order, ¶ 145.

[131] Open Internet Order, ¶¶ 141-148 (also arguing that broadband ISPs are not speakers protected by the First Amendment); FCC Brief at 68-75 (arguing that broadband ISPs are not First Amendment speakers and that even if the court were to conclude that the First Amendment applies, the Open Internet rules satisfy intermediate scrutiny). *See* also Brief Amici Curiae of the Center for Democracy & Technology and Legal Scholars in Support of Appellee, USCA Case #11-1355, filed Nov. 15, 2012, Verizon, at 19-28

On review of its 2010 Open Internet Order before the D.C. Circuit in *Verizon*, the Commission's brief maintained that the "government as at least three substantial interests in preserving the openness of the Internet. First, openness drives infrastructure investment, which fulfills numerous policies that benefit the public. . . Second . . . the Open Internet rules protect competition both among edge providers and between edge providers and access providers. Protecting consumers through market forces is plainly an important government interest. Third, the Open Internet Rules protect the ability of all Internet users to receive all content of their choice and to share that content with others through YouTube or a letter to the editor, thus 'assuring that the public has access to a multiplicity of information sources,' which 'is a governmental purpose of the highest order."[132] The brief reasoned further that the rules would have a minimal effect on speech because Verizon "would remain free to provide any information it chooses to its customers and other Internet users, and it also may offer edited access services in which Verizon selects the content available to end users."[133]

For similar reasons, open Internet rules targeting selective blocking and degradation of consumer access to content made freely available online by powerful Internet edge providers would pass First Amendment muster under the intermediate scrutiny standard.[134] First, non-

(the Open Internet Rules do not target speech -- "[n]on-discrimination rules are content neutral by definition" and apply independent of subject matter, viewpoint, or format – and satisfy intermediate scrutiny because they further at least three important government interests – (i) promoting infrastructure investment; (ii) promoting competition between online services, and (iii) protecting Internet users' ability to receive and share the content of their choice – while restricting no more speech than is necessary and are narrowly tailored to apply only where "a broadband providers' physical control of the communications conduit create a clear bottleneck that would enable content gatekeeping antithetical to First Amendment values.").

[132] FCC Brief at 73-74.

[133] *Id.* at 74-75.

[134] *See*, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (under intermediate scrutiny, a content-neutral regulation will be sustained if "it furthers an important or substantial government interest…unrelated to the suppression of free expression," and if "the means chosen" to achieve that interest "do not burden substantially more speech than is necessary."). Regulations generally are content neutral if justified without reference to content or viewpoint. Id. at 643; *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998); *Time Warner Entm't Co., L.P. v. FCC,* 93 F. 3d 957, 966-67 (D.C. Cir. 1996).

discrimination rules are inherently content neutral. A prohibition on selective or discriminatory blocking and degradation by an Internet edge provider does not implicate the content of its website or its communications, simply the manner in which it operates its servers and routers. Such rules would survive intermediate scrutiny for largely the same reasons the Commission believes open Internet rules applicable to broadband ISPs would pass muster: the rules would further at least three important government interests and would have a minimal effect on edge provider speech because edge providers would remain free to provide any information they choose to consumers or put all their content behind paywalls. Those interests, as the Commission had found, are (i) protecting the openness of the Internet that drives infrastructure investment, which fulfills numerous policies that benefit the public; (ii) protecting consumers by ensuring competition both among edge providers and between edge providers and access providers; and (iii) protecting the ability of all Internet users to receive all content of their choice and to share that content with others through freely available online platforms, "thus 'assuring that the public has access to a multiplicity of information sources,' which 'is a governmental purpose of the highest order.'"[135] The only behavior prohibited to edge providers would be selective blocking or degradation that threatens the open Internet – innovation at the edge, suppression of consumer demand for Internet content and access, and consequently, investment in and broadband deployment by broadband ISPs.

For all of the foregoing reasons, CDT interposes no sound policy, legal or constitutional bar to Commission adoption of even-handed open Internet rules targeted at behavior that threatens an identified public interest, regardless of the identity of the perpetrator.

[135] *See* FCC Brief at 74.

V. THE RECORD DOES NOT SUPPORT ADOPTION OF THE PROPOSED TRANSPARENCY RULE ENHANCEMENTS

There is little disagreement over the proposition, that appropriately tailored disclosures can be the most effective and least intrusive regulatory measures at the Commission's disposal.[136] But, as ITTA observes, "that is true only if the burdens do not outweigh the benefits associated with such requirements."[137] While ACA fully supports providing consumers with clear and adequate information concerning the services its members offer and provide, the record lacks evidence demonstrating deficiencies in the current transparency rule and that adopting the extreme proposals contained in the NPRM are warranted.

Simply put, the case has not been made that any of the enhancements to the transparency rules proposed or discussed in the NPRM should be adopted. The primary reason the relatively few who support enhanced transparency requirements give is that they will aid the Commission in detection of Open Internet rule violations. But neither the NPRM nor the record indicates that the Commission has been hampered in this way. Other reasons given in the NPRM for adopting enhanced transparency requirements also are not supported by the record. The commenters supporting enhancements do not indicate they were personally and directly hampered in their ability to provide services or develop new applications by limitations in the existing rules. There does not seem to be an actual problem in the marketplace to be solved that would justify expansion of the current disclosure obligation on broadband ISPs. ACA fully agrees with ITTA's assessment that the transparency enhancements proposed "are a solution in search of a problem."[138] While the record lacks evidence of a problem to be solved, the record is clear that the proposed solutions would impose excessive and costly burdens on broadband

[136] NPRM, ¶ 66; ACA Comments at 21-22.

[137] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of ITTA at 8 (filed July 15, 2014) ("ITTA Comments").

[138] *Id.* at 8.

ISPs that would hamper investment in broadband. For this reason, in the event the Commission decides to adopt additional disclosure requirements, it should create an exemption for smaller providers, who have not been identified as the source of any open Internet problem.

A. The Record Confirms that the Existing Transparency Rules Have Been Successful in Achieving the Commission's Goals.

The record does not support the Commission's premise that enhancements to the transparency rule are needed. No problem with the current rules has been revealed that requires the "solution" proposed in the NPRM. The stated rationale for the enhancements is to "(i) help end users make informed choices regarding the purchase and use of broadband services and increase end users' confidence in broadband providers' practices; (ii) ensure that edge providers have access to broadband providers' network information necessary to develop innovative new applications and services; and (iii) inform the Internet community and the Commission about broadband providers' practices and conduct that could impact Internet openness."[139] In its comments, ACA described how the existing transparency rules have worked well to meet the Commission's goals by effectively informing consumers, edge providers, and the Commission as to how broadband ISPs manage their networks, while affording broadband ISPs the flexibility to make disclosures in the manner they believe is most effective.[140] The record in this proceeding either explicitly endorses this position or fails to offer evidence that the existing transparency rules have failed in any way to achieve the Commission's goals.[141]

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[139] NPRM, ¶ 66.

[140] ACA Comments at 27.

[141] ACA is not alone in observing that the existing transparency rules have been generally effective. For example, Cisco agrees that the existing transparency rules have successfully fulfilled their function. Cisco argues that "with appropriate limitations, disclosure requirements ensure that consumers understand the comparative benefits and drawbacks of competing offerings and can choose the ones best suited to their needs." However, Cisco is careful to acknowledge that the Commission's existing transparency rules meet these goals given that they are already broad reaching and that there is "an absence of evidence demonstrating a need for new disclosure requirements." Cisco cites the NPRM's

More specifically, the evidence shows that edge providers are generally well served by the disclosures being made under the existing transparency rules. As part of their disclosure practices, broadband ISPs generally post contact information for personnel that manage their network. As ACA stated in its Comments, it has been the experience of ACA members that when edge providers have questions about a broadband ISP's network practices, they contact the broadband ISP directly.[142] It is noteworthy that no party supporting additional disclosures, apart from the few seeking detailed real time congestion disclosures, states that they have tried and been unable to obtain additional network management information from those posted contacts, or any other contacts, despite their calls for the Commission to require disclosure of additional information.[143]

Additionally, edge providers are not lacking the information necessary to initiate public disputes with large broadband ISPs when they feel that their traffic is being unfairly treated. During recent highly publicized peering and interconnection disputes, major edge providers have been able to describe in detail to the Commission and the public the broadband ISP practices that they believe to be unfair.[144] These allegations prompted the Commission to begin

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failure "to offer evidence demonstrating that additional disclosures will further promote consumer choice and competition." *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Cisco at 18-19 (filed July 17, 2014) ("Cisco Comments").

[142] ACA Comments at 35.

[143] *See*, *e.g.*, Netflix Comments at 19 (Netflix's sole proposal related to transparency was to require real time congestion disclosures); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of Microsoft at 29-33 (filed July 18, 2014) ("Microsoft") (Nowhere in Microsoft's transparency enhancement proposal does it assert that it had tried and/or failed to acquire information or clarifications from ISPs). It is possible that the Commission could easily achieve all of its objectives for the Open Internet transparency rule by simply codifying the common practice of ISPs listing their network manager's contact information in their transparency disclosure.

[144] For example, in its dispute with Comcast and Verizon, Netflix alleges in detail that Comcast and Verizon have been engaging in network management practices that have slowed Netflix's online video streaming service. *See*, *e.g.*, Ken Florance, Netflix US & Canada Blog, "The Case Against ISP Tolls," (Apr. 24, 2014), *available at* http://blog.netflix.com/2014/04/the-case-against-isp-tolls.html. *See* also Mark Taylor, Beyond Bandwidth: Level 3 Communications Blog, "Verizon's Accidental Mea Culpa," (July 17, 2014), *available at* http://blog.level3.com/global-connectivity/verizons-accidental-mea-culpa/ for allegations from a transit provider. For Comcast and Verizon's rebuttal to these allegations *see* David

an investigation to determine if there is any wrong doing occurring.[145] Ultimately, these disputes demonstrate that edge providers have sufficient information under the existing transparency rules or otherwise to publicize their concerns over broadband ISP network management practices.

Further, the record shows that the existing transparency rules have accurately informed consumers as to the nature of the service to which they are subscribing. ACA and others have observed that the relatively small number of anecdotal informal consumer complaints cited in the NPRM does not support the Commission's conclusion that either the current rule is not working or that it requires enhancements.[146] NCTA asserts that a relatively low number of informal complaints does not conclusively show that there was any wrong doing by an ISP since network performance can be affected by a wide variety of sources often outside of the control of a broadband provider.[147] NCTA cites the lack of formal complaints regarding inadequate disclosure in the three years that the rule has been in effect as proving a different point: that the rules are working well.[148] Additionally, NCTA notes that the NPRM's concerns over broadband ISPs' supposed failures to provide advertised speeds are based on a single informal complaint and run contrary to the years of rigorous testing conducted through the Measuring Broadband Program ("MBA").[149] Not only are there relatively few consumer complaints, but, as ITTA points out, the NPRM acknowledges that "it is difficult to discern [from these complaints] whether the

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Young, Verizon Policy Blog, "Why is Netflix Buffering? Dispelling the Congestion Myth," *available at* http://publicpolicy.verizon.com/blog/entry/why-is-netflix-buffering-dispelling-the-congestion-myth; Jennifer Khoury, Comcast Voices, "Comcast Response to Netflix," (Apr. 24, 2014), *available at* http://corporate.comcast.com/comcast-voices/comcast-response-to-netflix.

[145] James O'Toole, CNN Money, "FCC to investigate Netflix-Verizon spat," (Jun. 13, 2014), *available at* http://money.cnn.com/2014/06/13/technology/fcc-netflix-verizon/.

[146] ACA Comments at 30.

[147] NCTA Comments at 48-49.

[148] ACA Comments at 30; NCTA Comments at 48-49.

[149] NCTA Comments at 48-49.

consumer's frustration is with slow speeds or high prices generally, or instead with how the service as actually provided differs from what the provider has advertised."[150]

Nor does it appear that the existing transparency rules have failed to provide the Commission with the necessary information to investigate incidents where it is concerned that open Internet principles are being violated. As described above, the Commission has gathered sufficient information based on public reports to initiate an investigation for potential variances from open Internet principles in recent highly publicized peering and interconnection disputes involving Verizon and Comcast.[151] The record does not contain any indication that the Commission itself has initiated formal investigations specifically related to the adequacy of the existing disclosures or otherwise found them lacking in aiding its enforcement efforts with respect to the open Internet rules in the three years they were in effect.

B. Enhancements to the Transparency Rules Supported by Other Parties, if Adopted, Would Impose Substantial Financial and Logistical Burdens on Broadband ISPs With Little Expected Benefit.

The Commission's existing transparency rules require that broadband ISPs "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[152] The Commission determined that this will likely include "information concerning 'some or all' of the following topics: (1) network practices, including congestion management, application-specific behavior,

[150] ITTA Comments at 8 (citing NPRM at ¶ 163).

[151] *See* Statement of Chairman Thomas Wheeler on Broadband Consumers and Internet Congestion, (Jun. 13, 2014), *available at* http://www.fcc.gov/document/chairman-statement-broadband-consumers-and-internet-congestion. *See also* James O'Toole, CNN Money, "FCC to investigate Netflix-Verizon spat," (Jun. 13, 2014), *available at* http://money.cnn.com/2014/06/13/technology/fcc-netflix-verizon/.

[152] NPRM, ¶ 63.

device attachment rules, and security measures; (2) performance characteristics, including a general description of system performance (such as speed and latency) and the effects of specialized services on available capacity; and (3) commercial terms, including pricing, privacy policies, and redress options."[153] Much of the information that commenters called for to be included in the transparency rule "enhancements" for edge providers and consumers is already covered under the broad, yet flexible requirements of the Commission's existing transparency rules.

For instance, Microsoft lists a variety of information that it believes broadband ISPs should disclose, while acknowledging that many ISPs already disclose such information under the existing rules.[154] Microsoft's main concern however, appears to be that there is no common language by which ISPs report such metrics.[155] Public Knowledge/Benton/Access Sonoma also note the types of information already subject to the disclosure under the 2010 rules, and show how for example, "blocking, throttling, and pay-for-priority arrangements fall[ ] under 'congestion management' and 'application-specific behavior."[156]

The Commission rightly opted to forgo creating prescriptive reporting requirements in the 2010 Open Internet Order.[157] As Chairman Wheeler has recognized in another context – the

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[153] NPRM, ¶ 64 (noting that "[i]n 2011, the Commission's Enforcement Bureau and Office of General Counsel issued advisory guidance to further clarify compliance with the transparency requirements regarding point-of-sale disclosures, service descriptions, security measures, and the extent of required disclosures, while noting that "these particular methods of compliance are not required or exclusive; broadband providers may comply with the transparency rule in other ways.").

[154] Including congestion thresholds that trigger traffic shaping, the consequences of traffic shaping, the types of edge services or protocols (if any) that a broadband ISP treats in a non-neutral manner, and policies for settlement-free interconnection. Microsoft Comments at 31-32.

[155] Microsoft Comments at 31-32.

[156] Public Knowledge et al Comments at 116.

[157] 2010 Open Internet Order, ¶¶ 53-62. The Commission explained that "We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models." Id., ¶ 56. *See also id.*, ¶ 59 ("[T]he transparency rule we adopt today gives broadband providers some flexibility to determine what information to disclose and how to disclose it.").

development of cybersecurity standards –enshrining technical language requirements into regulations can create numerous compliance headaches as technologies evolve and could stifle innovation in the development of new congestion management techniques.[158] Instead, the Commission should affirm its existing transparency rule and address any "common language" problem it identifies by developing and publishing of a standard, industry-wide guide with industry input, for consumers to use when considering what they need in broadband service based on what their expected uses are. ACA has advocated for the development and publication of such a standard, industry-wide guide for consumers to use when considering what they needed in broadband service based on what their expected uses were.[159] Such a guide could contain a glossary defining various network management terms from which broadband ISPs could easily draw when crafting their disclosure statements. ACA continues to believe that this is a far more effective way of educating consumers since it will give consumers access to standardized guidelines without creating unnecessary burdens on broadband ISPs or unnecessarily increasing transaction costs in an era where consumers are more and more technologically savvy.

Furthermore, the additional disclosure requirements proposed by commenters would impose unworkable and costly burdens on broadband ISPs. Netflix, for example, proposes that broadband ISPs must disclose "meaningful" information concerning network congestion through real-time updates regarding the source, location, timing, speed, packet loss and duration of network congestion. Netflix defines "meaningful" as "immediate" information about network and

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[158] *See* Statement of Chairman Thomas Wheeler at the American Enterprise Institute, (June 12, 2014) (Describing the need for flexible approach to cybersecurity: "We cannot hope to keep up if we adopt a prescriptive regulatory approach. We must harness the dynamism and innovation of competitive markets to fulfill our policy and develop solutions. We are therefore challenging private sector stakeholders to create a 'new regulatory paradigm' of business-driven cybersecurity risk management."), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327591A1.pdf.

[159] ACA Comments at 32 n.78.

performance problems with a terminating ISP's network "in real time."[160] Netflix also suggests that a terminating ISP should be required to notify its consumers when its network is congested through a means intended and likely to reach the consumer in real time. Netflix suggests this will aid consumers in making informed choices about their services.[161] Microsoft asks the Commission to require broadband ISPs to "report periodically on the congestion status of their interconnection points," including information on maximum capacity, typical traffic volumes at peak and off-peak hours, and typical congestion resolution timelines. Cogent seeks disclosure of download speeds on a stand-alone basis for the ISP's own proprietary services to create a benchmark against which the download speeds of unaffiliated content can be compared.[162]

The Commission was correct to reject adoption of overly burdensome disclosure requirements in 2010 and nothing has changed in the intervening four years to disturb the wisdom of that approach.[163] The various reporting requirements proposed by Netflix, Microsoft, and Cogent would necessitate extremely onerous expenditures of both personnel hours and financial resources for the filing of detailed reports and sending real-time notifications that do not reveal more information than ISPs already provide in their network practices disclosures or that could be obtained through a Commission information request to a specific provider. Additionally, any such congestion reports would be inherently incomplete given the complexities

[160] Netflix Comments at 19.

[161] *Id.*

[162] Cogent Comments at 20-22. *See* also *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the Electronic Frontier Foundation at 29 (filed July 15, 2014) ("EFF Comments") (EFF urges the Commission to require ISPs to disclose information on jittering (change in latency over time), uptime (when the network is available), pack loss and corruption even when congestions is not occurring. The proposed justification for these rules is to ensure that application developers are able to "debug" the performance of many types of network applications).

[163] 2010 Open Internet Order, ¶¶ 53-62. The Commission explained that "We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models….the transparency rule we adopt today gives broadband providers some flexibility to determine what information to disclose and how to disclose it"). *Id.*, ¶¶ 56, 59.

involved in tracking down the sources of congestion that can occur along various points of various interconnected networks and devices.[164] Further, requiring this type of reporting would divert an ISP's resources away from actually mitigating any congestion that does occur.

For example, Netflix's vastly expanded edge-provider disclosure obligation concerning network congestion would require substantial investment in notification and monitoring systems to provide notification to consumers of something that ISPs have little control over, happens sporadically and rarely, depending on the habits of other users on the network. Netflix's recommendations that terminating ISPs notify their consumers "in real time" when their networks are congested is highly impractical and unlikely to produce any meaningful consumer benefits, since congestion is sporadic and fleeting. Such a requirement would be especially impractical and burdensome for smaller broadband ISPs who manage their own networks and may have only a handful of network operators, engineers and head end staff dealing with congestion, to take time out from dealing with the problem to modify the open Internet disclosures posted to the website, let alone email notice to customers of congestion or any time they change their disclosures. Even for those using a third-party for network management, real time customer network congestion notifications would be impractical and burdensome.

Likewise, the information sought by Cogent does not need to be included by a broadband ISP in its open Internet disclosures. Edge providers and others have sufficient tools to alert them when an ISP might be prioritizing its own content or discriminating against unaffiliated content. Edge providers like Netflix and others have not hesitated to use these tools to root out problems, and Netflix and public interest groups like Free Press and Public Knowledge have historically wasted no time in publicizing suspected violations once they

[164] NCTA Comments at 53. *See also* ACA Comments at 40 (*citing* NPRM, ¶ 83).

become aware of them.[165] The Internet has proven a very resilient medium for spreading word of suspected net neutrality violations and there is no reason to believe this "feedback loop" aspect of the Internet is any way threatened. Upon hearing of allegations of prioritization or discrimination, there is nothing preventing the Commission from asking an ISP for information of this nature. In fact, the Commission has sought such information directly from Comcast and Verizon when their network management practices have been called into question.[166] In short, there is no problem for which Cogent's proposal offers the correct solution.

Some commenters support requiring two sets of disclosures, one to end users and one to edge providers, without explaining how they have been hampered by the unitary disclosure now required and/or been unable to get needed information through the broadband ISP's listed point of contact. One common reason cited in support of the transparency enhancements for end users is that it will aid in assigning blame when customers are experiencing a problem.[167] The most common reason given for establishing a second and more detailed set of disclosures aimed at edge providers is to reveal deviations from "standard protocols" and to aid in developing new applications without asking permission and debugging the functioning of existing applications.[168] Finally, some commenters cite aiding Commission enforcement of the open Internet rules as a reason for the additional disclosures.[169]

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[165] *See*, *e.g.*, Harold Feld, Public Knowledge Blog, "Netflix CDN v. The Cable Guys or "Comcast v. Level 3 Part Deux—Peering Payback!" (Jan. 17, 2013), *available at* https://www.publicknowledge.org/news-blog/blogs/netflix-cdn-v-cable-guys-or-comcast-v-level-3.

[166] *See* Statement of Chairman Thomas Wheeler on Broadband Consumers and Internet Congestion, Jun. 13, 2014, *available at* http://www.fcc.gov/document/chairman-statement-broadband-consumers-and-internet-congestion. *See also* James O'Toole, CNN Money, "FCC to investigate Netflix-Verizon spat," (Jun. 13, 2014), *available at* http://money.cnn.com/2014/06/13/technology/fcc-netflix-verizon/.

[167] *See*, *e.g.*, EFF Comments at 26.

[168] *See*, *e.g.*, Microsoft Comments at 30; EFF Comments at 26.

[169] *See*, *e.g.*, EFF Comments at 26; Microsoft Comments at 31 (Microsoft seeks to aid in Commission efforts in monitoring compliance); Cogent Comments at 19 (Cogent seeks to allow the Commission to enforce compliance with open Internet rules); Public Knowledge/Benton Foundation Comments at 115 (to

Little need for tailored transparency disclosures for edge providers has been demonstrated in the record. The explosion of edge services and application development in recent years demonstrates that application developers have been able to flourish under the existing transparency rules.[170] Even if edge providers truly need the various types of enhanced disclosures they want the Commission to require, they would most likely prefer to obtain that information from the largest ISPs similar to the way developers program their applications to run on the most popular platforms and app stores.[171] As NCTA highlights, imposing a rule requiring tailored disclosures for edge providers is unfair, especially for small broadband ISPs who cannot anticipate the needs of numerous content providers and are at a "huge disadvantage in any dealings with large content providers like Google, Amazon, and Netflix, all of which operate networks that are far more extensive than those operated by many small broadband ISPs."[172]

C. The Record Supports an Exemption for Small Providers Should the Commission Determine that Additional Disclosures Are Required.

None of the commenters proposing additional transparency and disclosure requirements specifically identify small providers as the root of their concerns regarding potential violations of

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ensure that the public, providers and the Commission have sufficient information to monitor open Internet compliance).

[170] For example, Netflix's revenues, based largely on their online video delivery application has surpassed HBO's revenue. Sam Thielman, Adweek, "Reed Hastings Says on Facebook That Netflix Has Passed HBO in Subscriber Revenue," (Aug. 7, 2014), *available at* http://www.adweek.com/news/television/reed-hastings-says-netflix-has-passed-hbo-subscriber-revenue-facebook-159351; *see also* Stuart Parkerson, App Developer Magazine, "StartApp Provides 2014 Predictions as They Relate to App Developers," (Jan. 8, 2014), *available at* http://appdevelopermagazine.com/972/2014/1/8/StartApp-Provides-2014-Predictions-on-Mobile-Industry-Trends-as-They-Relate-to-App-Developers/ (Revenues in the mobile ad market are expected to reach $20.3 billion in 2014).

[171] *See* Chunka Mui, Forbes, "Who Wins, iOS or Android? Both, But Pity Everyone Else," (Jan. 14, 2013), *available at* http://www.forbes.com/sites/chunkamui/2013/01/14/who-wins-ios-or-android-both-but-pity-everyone-else/ (describing how Apple's iOS and Google's Android mobile app stores benefit from a network effect attracting more app developers and users at the expense of other competing app stores including those managed by Microsoft, Amazon, and RIM). *See also* Gartner, "Gartner Says Mobile App Stores Will See Annual Downloads Reach 102 Billion in 2013," (Sept. 19, 2013), *available at* http://www.gartner.com/newsroom/id/2592315 (predicting that iOS and Android app stores are forecasted to account for 90 percent of global downloads in 2017).

[172] NCTA Comments at 53-55.

open Internet principles. As ACA discussed in its Comments, for edge providers, not all broadband ISPs are created equal in terms of their ability to leverage their networks to the detriment of other Internet actors.[173] Smaller providers lack the scale that would be necessary to seek commercial prioritization and peering agreements that some commenters postulate would violate open Internet principles. WISPA, as noted earlier, observes that rather than smaller broadband ISPs seeking payment from edge providers and content delivery networks, it is far more likely that large edge providers and content delivery networks will seek compensation from or withhold the provision of content from smaller ISPs if they are receiving payments from a competitor that has the incentive to foreclose competition.[174] WISPA's observation is confirmed by Level 3, who complains solely about the actions of "several large eyeball ISPs that have allowed their interconnection points to congest and [are] refusing to augment capacity unless the provider pays the ISP a toll."[175] The fact that not all ISPs are equal from the perspective of edge providers in terms of their ability to threaten Internet openness is also evidenced by comments filed in the Comcast-TWC merger review asserting that smaller broadband ISPs do not present the same kind of interconnection problems that Internet edge providers have experienced with some large terminating ISPs. For example, Netflix devotes a substantial portion of its comments in the Comcast-TWC merger proceeding describing how only four major terminating ISPs currently have the market power, based on their customer base to congest the routes into their networks in order to extract terminating access fees from edge providers.[176] Netflix contrasts this ability with small broadband providers who "cannot charge an [online video distributor] for direct interconnection because failure to reach an agreement with a

[173] ACA Comments at 23-24.

[174] WISPA Comments at 23.

[175] Level 3 Ex Parte at 2; Level 3 Comments at 2-3.

[176] Netflix Petition to Deny at 42-43.

network that accounts for a very small portion of an OVD's customers would not be financially detrimental [to the OVD]."[177] Further, Netflix acknowledges that a small broadband ISP "does not have the same ability to manipulate its interconnection points to create artificial congestion," noting that most broadband ISP partner with Netflix's Open Connect program without requiring payment from Netflix, in order to improve their subscribers' experience making the broadband connection more valuable to the user.[178] This is consistent with the experience of ACA members recited in its Comments – amicable marketplace negotiations with bandwidth-intensive edge providers are the norm for smaller ISPs because both sides are seeking mutual benefit.[179] The only time it's not amicable is when a large Internet content provider is engaging in blocking or discrimination against them, like Viacom's blocking of access to some of its otherwise freely available online content.

Other commenters familiar with what it takes for smaller providers to build and operate broadband networks widely recognize the need for special consideration or an exemption for small broadband ISPs. WISPA, like ACA, argues for an exemption for small broadband providers and describes how the proposed enhanced disclosure requirements would increase costs for small broadband ISPs with small staffs who are unable to cope with the compliance,

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[177] *Id.* at 52.

[178] *Id.*; Comments of Cogent in GN Docket No. 14-57 (Cogent alleges that when it began carrying Netflix's traffic, Comcast began refusing to upgrade connections with Cogent. Cogent states that "smaller residential broadband networks continued to upgrade both peering and transit ports and Cogent has had no congestion problems with those networks."); Comments of Roku in GN Docket No. 14-57 (Roku describes how Comcast, the largest MVPD/Broadband ISP, refused to enable the HBO Go application on Roku boxes for Comcast subscribers. Roku contrasts Comcast's behavior with that of TWC, a large MVPD/ISP but one that is, pre-merger, far smaller than Comcast that enabled an HBO Go app experience on Roku that nearly mimicked the full TWC cable service offering).

[179] *See* ACA Comments, Declaration of Edward McKay, ¶ 12 ("Recently, for example, two large Internet content providers reached out to Shentel to negotiate arrangements to allow them to directly peer with our network and to put dedicated caching services in our network to support delivery. These negotiations were conducted and completed extremely amicably, and the end result was cost savings for the two edge providers and Shentel due to a direct peering connection with our network, more efficient operation of our service for our customers accessing these two providers, which account for more than half of all the broadband Internet access on Shentel's network.").

monitoring, and reporting burdens such requirements would impose.[180] According to WISPA, these burdens will have the effect of diverting and/or reducing the resources small companies have to invest in broadband and result in increased prices for consumers.[181] WTA cites an estimate that it would cost approximately $150,000 simply to purchase the necessary monitoring system that gathers usage and congestion information in addition to the need to hire an employee to conduct and report on any monitoring, as well as "the recurring costs of inspecting, maintaining and recalibrating such monitoring equipment," in support of its request for a small provider exemption.[182] WTA notes that while some small broadband providers have already made an investment in this technology, it would be quite costly for those who have not made such an investment.[183] CCA too argues that "requiring that even more segmented disclosures be made in this constantly evolving environment would be a significant waste of small-carrier resources," and "worse, smaller carriers may be discouraged from optimizing the customer experience on their networks for fear of having to revise even more burdensome disclosures…"[184] It is clear from the record that applying the proposed enhancements would create tremendous burdens on small broadband ISPs without any benefits of a corresponding magnitude.

[180] WISPA Comments at 7, 16; ACA Comments at 37.

[181] *Id.* at 16-17.

[182] WTA Comments at 8 n.1.

[183] *Id.* at 8.

[184] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the Competitive Carriers Association, at 9 (filed July 16, 2014).

D. ACA's Proposal that Any Enhancements to the Existing Transparency Rules to Address Congestion Should Also Focus on all Entities on the Internet Transmission Path that Could be Responsible for Such Congestion is Well-Supported in the Record.

In its comments, ACA highlighted the NPRM's acknowledgment that congestion, as experienced by an end user, could originate from a variety of sources other than the broadband ISPs serving that end user.[185] As a result, a customer experiencing congestion could file an unjustified complaint against a broadband provider if the source of the congestion is elsewhere.[186] Therefore, any new transparency requirement implemented to illuminate network congestion should apply to all entities from which the congestion could emanate, including edge providers, content, delivery networks, and transit providers.[187]

Several commenters agree with ACA's call for disclosures up and down the Internet transmission path if additional congestion disclosure rules are imposed on broadband ISPs. According to TWC, "if the Commission believes it to be important for consumers to have access to "meaningful" information about congestion and is inclined to expand or supplement the existing transparency rules, the logical solution is to require the entities that possess such information to disclose it."[188] This would include edge providers and transit providers who control how they route their traffic and can cause congestion.[189] Otherwise, broadband ISPs would have to respond to such practices in an "informational vacuum."[190] By requiring edge providers and transit providers to share information on how they manage their traffic,

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[185] ACA Comments at 39.

[186] *Id.* at 40.

[187] If the Commission is concerned about harming innovation from start-up edge providers, it could provide a small edge provider exemption similar to the small broadband ISP exemption advocated for by ACA and others.

[188] TWC Comments at 32.

[189] *Id.* at 33.

[190] *Id.*

terminating broadband ISPs would be better able to manage the traffic on their networks to prevent a degraded experience for the end user.[191]

Likewise, NCTA points out a number of studies that describe how edge providers have significant control over how they deliver their traffic to ISPs.[192] For instance, large content providers may choose particularly congested routes from transit providers rather than investing the resources to route traffic through open links from CDNs.[193] Verizon has similarly observed how all entities on the transmission path [including edge providers] can be the source of network congestion.[194] In its dispute with Netflix over network congestion, Verizon cited evidence suggested that Netflix was largely responsible for its performance problems because it selected to use over-utilized transit options when it had better alternatives, and that performance only began to suffer when Netflix took over the routing controls for their video traffic with their own CDN, Open Connect.[195]

Because congestion can occur at any point on the transmission path along the Internet, not only should all transparency rules related to the management and reporting of congestion apply equally to all interconnected entities, the Commission should apply the entirety of the transparency to all entities interconnected to broadband ISPs.[196] As ACA argues above in Section III, the Commission's failure to apply open Internet rules equally to all actors capable of acting in such a manner that would threaten open Internet principles, would not only render the

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[191] *Id.*

[192] NTCA Comments at 53 n.172.

[193] *Id.* at 53-54.

[194] Verizon Comments at 16.

[195] *Id.* at 17 n. 12.

[196] ACA Comments at 39.

Commission's rules ineffective, but would also create marketplace distortions that would undermine the "virtuous cycle" of broadband investment and innovation.

VI. CONCLUSION

The record confirms that the Commission should choose the path of prudence and restraint by rejecting calls to apply an out of date, burdensome, and ineffective Title II regulatory scheme on broadband Internet access in name of ensuring an open Internet. Instead, the Commission can achieve meaningful protections for the open Internet by heeding the call of ACA and others to use its Section 706 authority to adopt flexible and targeted rules that apply equally to all Internet actors capable of degrading the Internet's openness thereby stalling broadband deployment. Finally, the Commission should affirm the success of its existing transparency rules by rebuffing proposals that would saddle broadband ISPs, especially small providers, with immensely burdensome and expensive compliance and reporting obligations. These decisions combined would continue the Commission's effective "light touch" approach towards regulating broadband Internet access, thereby ensuring continued robust private investment in broadband deployment to the benefit of consumers, edge providers, and the United States as a whole.

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