

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

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

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

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SUMMARY

Vonage's opening comments in response to the *NPRM* suggested that, while Section 706 provides the Commission broad authority to promote an Open Internet, its reach, as interpreted by the D.C. Circuit under *Verizon v. FCC*, is limited when it comes to protecting the Open Internet against invidious discrimination by dominant network operators. Due to these limitations, Vonage urged the Commission to adopt a Title II framework for regulating the practices of broadband Internet ISPs. Vonage and other parties propose that the Commission classify the transmission component of broadband Internet access service as a telecommunications service. With the broad forbearance powers available to the Commission under Section 10, it can adopt a legal and regulatory framework that is nearly identical to the framework under which the industry operated between 2005-2014, first under the Commission's *Internet Policy Statement* and then under the Open Internet Rules.

The comments filed in this proceeding indicate broad support for adopting this approach, despite the Commission's initial preference to rely on its Section 706 authority. Further, the comments in this proceeding repudiate the rhetoric of the network operators that continue to raise the same tired refrain in an effort to prevent the Commission from adopting enforceable rules that will survive judicial review. While some operators like AT&T and Comcast claim to support the Open Internet and rules to protect it, it is plain, from their comments and opposition to the use of Title II, they prefer rules that will not survive judicial challenge. Comments from Open Internet supporters aptly demonstrate that the network operators' objections to an Open Internet regime predicated on Title II are unfounded.

While dominant providers like AT&T and Comcast argue that a reclassification decision will be subject to heightened scrutiny, they ignore the clear legal principle that the Commission has discretion under the Act to revisit its *Cable Modem Declaratory Ruling* decision that classified the transmission component of broadband as telecommunications rather than a telecommunications service. Under the statutory framework, the terms at issue are ambiguous and the Commission is free to change its interpretation as circumstances warrant, without being subject to “heightened” review or the doctrine of judicial estoppel.

In addition, the comments and the Commission’s own data reflect that the market for broadband has changed, undermining the assumptions on which the Commission’s original classification decisions were based. As Chairman Wheeler explained in recent remarks, the market for broadband is less competitive than it was in 2002. There is far more concentration among broadband ISPs, and consumers have less choice for true broadband services, with most consumers residing in duopoly or monopoly markets. Similarly, consumers use their broadband services differently than the Commission predicted in 2002. Consumers are far more reliant on third-party applications and services and have little interest in the features the ISPs bundle with their Internet access services. Similarly, caching and DNS services have moved to the edge as well, as content providers provide their own caching of content before delivery to the ISP rather than relying on ISP caching to speed delivery of transmissions. These changed circumstances support a finding that broadband Internet access includes a pure transmission component, separate and apart from the information service components of Internet access.

Broadband network operators opposed to reclassification raise other claims that equally lack merit. For example, they argue that reclassification will cause widespread disruption to the industry and that Title II does not allow the Commission to determine that paid prioritization is *per se* unreasonable under either Section 201 or 202. But the *Open Internet Order* did not bar all paid priority arrangements, it only established a rebuttable presumption. They also ignore that the Commission has already taken steps under Section 201 to eliminate the two-sided market for intercarrier compensation for voice traffic. It not only has authority to do the same for Internet traffic, but it would be arbitrary to adopt a different regime.

The incumbent network operators also seek to dissuade the Commission from pursuing reclassification because they suggest such effort, including the exercise of the Commission's statutory forbearance authority, is too time consuming and will result in uncertainty due to protracted litigation. These providers had no such concern when they repeatedly fought Commission efforts to adopt Open Internet rules using other statutory powers. These network operators simply do not want to admit that they want to profit from discrimination against edge providers and that Title II stands as an obstacle to such profiteering.

The incumbent operators' objections are clearly contrived. Judicial precedent affords the Commission substantial discretion in conducting its forbearance analysis and nothing in the statutory forbearance criteria would prevent the Commission from using Title II to adopt Open Internet anti-blocking and anti-discrimination rules while leaving the status quo in place for regulating other aspects of the Broadband Internet transmission service. In short, the Commission need only retain certain sections of Title II, such as

Sections 201, 202 and 208, and only to the extent necessary to adopt and enforce its Open Internet rules.

Lastly, once the Commission has decided on the legal framework for its Open Internet rules, they should apply those rules consistently across both mobile wireless and fixed broadband services. The comments in this proceeding provide broad support for such an approach. Given the convergence between mobile data services and Wi-Fi services, which frequently can be used simultaneously on the same mobile device, it would be arbitrary to adopt rules that applied one standard to fixed wireless and a lighter standard to mobile wireless. The Commission's flexible principle of "reasonable network management" is sufficient to afford mobile wireless providers the ability to manage their networks to avoid congestion while not running afoul of the Open Internet bar on blocking and discrimination.

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Vonage Holdings Corp. (“Vonage”) respectfully submits these Reply Comments in response to the Federal Communications Commission’s Notice of Proposed Rulemaking¹ regarding the D.C. Circuit remand of the *Open Internet Order*² and “the best legal framework for protecting and promoting the open Internet.”³

I. Introduction

Comments filed in this proceeding reflect strong support for Commission rules aimed at preserving the Open Internet.⁴ Even the nation’s largest broadband ISP has indicated it supports some basic level of Open Internet protection.⁵ Parties filing comments in this proceeding recognize the need to protect the Open Internet that has allowed the Internet economy to flourish. Open Internet rules promote investment both in edge services and high speed broadband networks, and promote innovation as the virtuous circle of investment drives consumer demand for better and faster applications across a broad spectrum of services.

Further, the Open Internet has fostered greater demand for robust mobile broadband services. While such services are not yet replacements for high-speed fixed

¹ *In the Matter of Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, (2014) (“*NPRM*”).

² *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905 (2010) (“*Open Internet Order*”).

³ Public Notice, *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service*, GN Docket No. 10-127, DA 14-748, at 1 (rel. May 30, 2014).

⁴ See Amy Schatz, *No Kidding? FCC Chairman Says Broadband Market Isn’t Competitive*, re/code, (September 4, 2014) available at <http://recode.net/2014/09/04/no-kidding-fcc-chairman-says-broadband-market-isnt-competitive/> (citing study of Open Internet NPRM comments concluding that “that less than one percent of commenters were opposed to net neutrality rules.”).

⁵ Comments of Comcast Corporation, GN Docket Nos. 14-28, 10-127, at p. 2 (filed July 18, 2014) (“Comcast Comments”).

broadband services, they serve an important function and benefit from the same virtuous circle applicable to the fixed broadband ecosystem.

These Internet ecosystems, both for fixed and mobile services, have evolved in a regulatory environment where network operators and edge providers alike understood that the Commission would act to protect edge services from anti-competitive behavior by network operators possessing terminating monopolies for access to their customers. From 2005 to 2010 when the D.C. Circuit issued its opinion in *Comcast v. FCC*,⁶ network operators and edge providers operated under the Commission's *Internet Policy Statement*.⁷ Under this scheme, anti-competitive practices such as blocking customers from using their ILEC supplied broadband connection to obtain third party VoIP services was prohibited.⁸

From the adoption of the Commission's Open Internet rules in December 2010, until *Verizon v. FCC*, the Commission's rules were the standard governing network operators' dealings with edge providers. These rules prohibited blocking and

⁶ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

⁷ *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 (2005) (“*Internet Policy Statement*”).

⁸ *Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110, Consent Decree, 20 FCC Rcd 4295 (E.B. 2005) (“*Madison River Consent Decree*”); *See also* Comments of Vonage Holdings Corp. GN Docket Nos. 14-28, 10-127, at p. 8 (filed July 18, 2014) (“*Vonage Comments*”), Comments of ADTRAN, Inc., GN Docket No. 14-28 at p. 9 (filed July 15, 2014) (“*ADTRAN Comments*”), Comments of Information Technology and Innovation Foundation, GN Docket No. 14-28 at p. 4 (filed July 18, 2014) (“*ITIF Comments*”).

unreasonable discrimination, and established a rebuttable presumption that paid prioritization would run afoul of the nondiscrimination rule. While these rules were in effect, including the period between the release of the *Open Internet Order* and the effective date of the rules, the Internet ecosystem continued to grow, experiencing significant innovation and investment in both edge services and broadband networks.

At this juncture, however, due to Verizon’s legal challenge, these rules are no longer on the books. The vast majority of comments in this proceeding support reinstating these rules in some form.⁹ The flash point of disagreement is the statutory underpinnings of such rules. Those in favor of meaningful and enforceable rules favor use of Title II as the best course to ensure such rules both protect edge services from discrimination by network operators and survive judicial review. Opponents urge the Commission to choose another path, despite the clear teaching of *Verizon* that fully protecting edge providers against network operator discrimination inevitably is deemed a *per se* common carrier regulation.¹⁰ As Vonage explains in these reply comments, the clear message from commenting parties is that Title II remains the best avenue for adopting sustainable, meaningful and enforceable Open Internet rules.

II. The Commission Should Use its Title II Authority to Adopt Open Internet Rules By Reclassifying the Transmission Component of Broadband as a Telecommunications Service

The D.C. Circuit’s decision in *Verizon* confirmed that the Commission has broad authority under Section 706 to promote the deployment of broadband.¹¹ The Court endorsed the Commission’s rationale for adopting Open Internet rules, recognizing the

⁹ See e.g. Comcast Comments at p. 2.

¹⁰ See *Verizon v. FCC*, 740 F.3d 623, 657 (D.C. Cir. 2014) (“*Verizon*”).

¹¹ See *Verizon* 740 F.3d. at 637.

ability and incentives possessed by broadband ISPs to discriminate against edge providers.¹² But it ultimately found that the Commission’s no-blocking and anti-discrimination rules were *per se* common carriage obligations that, by statute, the Commission could not impose on entities the Commission itself had classified as non-common carriers.¹³ As Vonage explained in its opening comments, this leads to the inevitable conclusion that the Commission, to protect the Open Internet from discrimination by network operators, must choose a different legal framework to govern Broadband ISPs and their relationships with edge providers, namely Title II of the Act.

A. While the Commission Retains Broad Authority Under Section 706 That Authority is Inadequate for Protecting the Open Internet.

The D.C. Circuit’s opinion in *Verizon* endorsed the Commission’s rationale for adopting rules that prohibit broadband ISPs from blocking or discriminating against edge services, including its rebuttable presumption regarding paid priority arrangements.¹⁴ There is no evidence in the record suggesting that the passage of time since the *Open Internet Order* has lessened the incentives that broadband network operators have to block, degrade or discriminate against edge services, especially those that compete or hold the potential to compete with the network operators own or affiliated voice or video services. Prohibiting such anti-competitive behavior that threatens the Open Internet should be the central objective of any Open Internet regulatory regime.

¹² *Id.* at 646-47.

¹³ *Id.* at 657.

¹⁴ *Verizon*, 740 F.3d. at 643-49.

The comments contain broad support for such an approach.¹⁵ Even Comcast, the largest broadband network operator, agrees that some Open Internet rules are needed, although Comcast’s proposal falls well short of acceptable.¹⁶

1. Comments Demonstrate the Need to Address Paid Prioritization

In its opening comments, Vonage urged the Commission to restore its 2010 rule prohibiting blocking, restore its ban on unreasonable discrimination and to state its presumption that paid prioritization most likely would violate the Open Internet rules.¹⁷ Comments filed in response to the *NPRM* support precluding network operators from entering into paid priority arrangements with edge providers as central to the broader objective of protecting the virtuous circle of innovation and investment.¹⁸

Vonage agrees with the Ad Hoc Telecommunications Users that paid prioritization distorts the market in two ways.¹⁹ First, because broadband network

¹⁵ Comments of NTCA -The Rural Broadband Association, GN Docket No. 14-28 (filed July 18, 2014) (“NTCA Comments”); Comments of Cogent Communications Group, Inc. GN Docket Nos. 14-28, 10-127 (filed July 15, 2014) (“Cogent Comments”), Comments of Netflix, Inc. GN Docket Nos. 14-28, 10-127 (filed July 15, 2014) (“Netflix Comments”), Comments of Public Knowledge, Benton Foundation and Access Sonoma Broadband, GN Docket Nos. 14-28, 10-127, 09-191, WC Docket No. 07-52 (filed July 15, 2014) (“Public Knowledge Comments”); Comments of COMPTTEL, GN Docket No. 14-28 (filed July 15, 2014) (“COMPTTEL Comments”).

¹⁶ See Comcast Comments at pp. 18-22.

¹⁷ Vonage Comments at p. 21.

¹⁸ See e.g., Comments of the Attorneys General of Illinois and New York (“AG Comments”) at pp. 6-8; Comments of Ad Hoc Telecommunications Users Committee (“Ad Hoc Comments”) at p. 14. (“This market failure requires that any reformulation of the now vacated nondiscrimination rule include a ban on paid prioritization agreements as well as a prohibition against ISPs imposing or collecting charges for priority (discriminatory) treatment of a specific content provider’s traffic”) . See also Comcast Comments at pp. 23-24 (Comcast would not be opposed to a rebuttable presumption that “paid prioritization” arrangements are commercially unreasonable.”).

¹⁹ Ad Hoc Comments at pp. 19-20.

operators have a “terminating monopoly,” they lack economic incentives to price such agreements efficiently “nor would there be any competitive pressure to do so.”²⁰ And second, such arrangements “would distort the consumer’s choices among content and edge providers.”²¹

There are other reasons the Commission should focus its rules on addressing the double recovery of broadband network operators’ costs. Allowing recovery of costs through charges to edge providers for use of bandwidth that the customer has already paid for is unreasonable. Such arrangements assume that edge services “impose costs or burdens on broadband access networks that are not already being recovered from consumer subscription fees.”²² Unlike the development of access charges, there is no cost data provided to the Commission to support the rates charged; they are imposed by network operators that face little or no competition.

Vonage thus agrees with the New York and Illinois AGs that paid prioritization is “double-dipping or double recovery of costs by broadband access providers.”²³ Allowing such profit taking is particularly dangerous because network operators can create a market for prioritization “by simply degrading the service offered to those unwilling to pay for priority,” thereby creating “real risks that it will not only create a two-tiered Internet, but that overall service will slow to a level below consumers’ current expectations.”²⁴ For these reasons, the Commission should presume that paid

²⁰ *Id.*

²¹ Ad Hoc Comments at pp. 19-20.

²² AG Comments at p. 6.

²³ *Id.* at p. 7.

²⁴ *Id.*

prioritization arrangements are inconsistent with the rule prohibiting unreasonable discrimination.

2. There Are Serious Doubts That Section 706 Authority as Construed in *Verizon* is Sufficient to Protect Against Discrimination Including Paid Prioritization

Comments from those favoring Commission action to protect the Open Internet provide broad support for the position that Section 706, while giving the Commission broad power to promote the Open Internet as a means to promote broadband deployment does not give the Commission sufficient tools it needs to guard against invidious discrimination by broadband network operators.²⁵ As the Consumer Federation explains, if the Commission concludes, as it must, that its “powers [under section 706] are not sufficient, it must explore additional powers under Title II.”²⁶

In order to survive judicial review, commenting parties urge the Commission to ground its Open Internet rules in its Title II authority.²⁷ Any Open Internet rules promulgated under Section 706 must comply with the limits in *Verizon* and avoid imposing a *per se* common carriage requirement.²⁸ As the American Cable Association explains, “the extent of Commission regulatory authority under Section 706 ... is subject to the same constraints identified by ... *Verizon* ...: the need to avoid the imposition of *per se* common carrier obligations.”²⁹

²⁵ Free Press Comments, at p. 125; NASUCA Comments at pp 12-13; Netflix Comments at p. 20.

²⁶ Comments of Consumer Federation of America, GN Docket No. 14-28, at p. 67, (filed July 15, 2014).

²⁷ *Supra* n. 18.

²⁸ *See Verizon*, 740 F.3d. at 654.

²⁹ Comments of American Cable Association, GN Docket Nos. 14-28 and 10-127 at p. 52, (filed July 17, 2014) (“ACA Comments”).

Vonage thus agrees with Mozilla that “using Section 706 as a basis for authority carries overwhelming risk [of being] overturned at the D.C. Circuit Court.”³⁰ It is of course no surprise that those broadband network operators that adamantly oppose the Commission’s efforts to adopt meaningful and enforceable Open Internet rules also cast doubt on the Commission’s ability to employ Section 706 to adopt Open Internet rules.³¹ The Commission must take the threat of losing on judicial review again seriously and turn to more stable authority.

3. The “Commercially Reasonable” Standard Does Not Adequately Protect Against Discrimination That Will Harm Internet Openness

At the heart of the *Verizon* decision is the D.C. Circuit’s view that the Commission’s unreasonable discrimination standard, adopted in the 2010 Open Internet order, is an impermissible *per se* common carriage regulation.³² The *Verizon* court, however, left the door open for the Commission to adopt a lower bar on discrimination, similar to the “commercially reasonable” standard the Commission adopted in its *Data Roaming Order*,³³ that the same court sustained because it left enough room for individual bargaining that it did not impose a *per se* common carriage where the statute prohibited it.³⁴

³⁰ Comments of Mozilla, GN Docket Nos. 14-28 and 10-127 at p. 5, (filed July 15, 2014).

³¹ Comments of CenturyLink, GN Docket Nos. 14-28 and 10-127 at p. 55 (filed July 17, 2014) (“CenturyLink Comments”); (“The proposed rules, or some of them, exceed the scope of any purported Commission authority under Section 706.”).

³² *Verizon*, 740 F.3d at 657.

³³ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services* 26 FCC Rcd 5411 (2011) (“*Data Roaming Order*”).

³⁴ *Verizon*, 740 F.3d at 652, 656-657.

Allowing such individual bargaining, however, denies the Commission the ability to prohibit the kinds of paid prioritization and discrimination that pose the gravest threat to an Open Internet.³⁵ Vonage agrees that “[t]he D.C. Circuit’s opinion in *Verizon v. FCC* . . . makes it abundantly clear that the Commission must allow substantial discrimination if it resorts to Section 706.”³⁶ Thus, any “rules that effectively protect the open internet from discrimination or blocking by ISPs under 706 authority are therefore unlikely to withstand court scrutiny.”³⁷ In short, “Section 706 may not be enough to achieve an open internet.”³⁸

The Commission should instead adopt a more flexible approach using Title II. As Cogent explains, “Section 706 simply does not provide the breadth of authority and flexibility that would come with reclassification.”³⁹

III. Despite the Claims By Incumbent Network Operators, the Commission Has Broad Authority to Reclassify the Transmission Component of Broadband as a Telecommunications Service

In their effort to deny the Commission the ability to effectively curb discrimination, the incumbent broadband ISPs argue that the Commission cannot easily move to a Title II regime for the Open Internet.⁴⁰ These operators offer three main

³⁵ Comments of Internet Infrastructure Coalition Docket Nos. 14-28, 10-127 at p. 8 (filed July 15, 2014) (“Section 706 does not provide solid legal authority for the Commission to implement the no-blocking rule and the prohibition on commercially unreasonable practices.”).

³⁶ Comments of Free Press, Docket Nos. 14-28, 10-127, 09-191 at p. 137 (filed July 18, 2014) (“Free Press Comments”).

³⁷ Public Knowledge Comments, at pp. 32-33.

³⁸ Comments of National Association of State Utility Consumer Advocates, Docket Nos. 14-28, 10-127 at p. 13 (filed July 15, 2014) (“NASUCA Comments”).

³⁹ Cogent Comments at p. 12.

⁴⁰ Comcast Comments at p. 54-55.

arguments, all of which lack merit. First, they argue that reclassification of the transmission component of broadband Internet service would be subject to “heightened scrutiny” on judicial review.⁴¹ Second, they ignore the broad deference the courts give to the Commission as an expert agency construing ambiguous terms in the Act.⁴² Third, they underestimate the impact the evolution of the market for broadband Internet service has had on the facts relied on by the Commission in its 2002 classification.⁴³

A. The Commission Has the Authority Under the Act to Change Course Without Being Subject to “Heightened” Scrutiny Under Judicial Review

Comcast, the nation’s largest broadband ISP (attempting to get even larger), argues that judicial scrutiny of a Commission decision to reclassify the transmission component of broadband would be “heightened when the agency’s prior position has ‘engendered serious reliance interests’ or its new position ‘rests upon factual findings that contradict those which underlay its prior policy.’”⁴⁴ But this fundamentally misreads precedent, including the Supreme Court’s decision in *FCC v. Fox Television Stations, Inc.*⁴⁵

In that decision, the Court articulated that there is “no basis in the Administrative Procedure Act or in [Supreme Court] opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard.”⁴⁶

⁴¹ Verizon Comments at p. 57.

⁴² *Id.* at p. 61 (arguing that reclassification would violate the Act).

⁴³ Comments of Alcatel Lucent GN Docket Nos. 14-28, 10-127 at p. 11 (filed July 15, 2014) (“Alcatel Lucent Comments”).

⁴⁴ Comcast Comments at p. 54 quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009) (“*Fox Television Stations*”).

⁴⁵ *FCC v Fox Television Stations*, 556 U.S. 502 (2009).

⁴⁶ *Id.* at 514.

The Court did declare that it would be arbitrary for an agency to ignore the fact that “it is changing position.”⁴⁷ But no party is suggesting the Commission ignore the factual underpinnings of its earlier classification of broadband Internet transmission services. Rather, advocates for reclassification urge the Commission to confront directly its “incorrect assumptions and inaccurate predictions,” and revise them to account for changed circumstances.”⁴⁸

It is not controversial that where the agency’s prior decision rested on certain facts or engendered reliance, it must take such matters “into account.”⁴⁹ But this does not mean “that further justification is demanded by the mere fact of policy change” but simply means “that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁵⁰ Indeed, the APA “makes no distinction ... between initial agency action and subsequent agency action undoing or revising that action.”⁵¹ Thus the Commission’s decision to reclassify the transmission component of broadband as a telecommunications service, rather than just mere telecommunications will not be subjected to “heightened review” but will instead be subject to the same arbitrary and capricious standard of review that governs all Commission decisions involving interpretation of ambiguous provisions of the Act.

⁴⁷ *Id.* at 515.

⁴⁸ Free Press Comments at p. 75.

⁴⁹ *Supra*, n. 45 at 515.

⁵⁰ *Id.* at 516.

⁵¹ *Id.* at 515.

B. The Commission Receives Deference From Reviewing Courts When Interpreting Ambiguous Terms of the Act

The broadband network operators claim that the Commission cannot easily revisit the 2002 era classification decisions regarding broadband Internet access.⁵² This argument runs directly counter to the Supreme Court’s *Chevron* framework.⁵³ That framework requires reviewing courts to defer to agencies’ interpretation of ambiguous provisions of their implementing statutes,

not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.⁵⁴

As the Supreme Court has explained, an agency’s changed interpretation of the regulatory scheme it is charged with implementing “is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”⁵⁵ In order to avoid the logical consequence of application of the *Chevron* framework to the classification of broadband Internet transmission, those opposed to the Commission’s proposed rules have erected baseless but elaborate obstacles that they argue would impede Commission action. USTA, for example, argues that the equitable doctrine of judicial estoppel cements into stone for perpetuity the

⁵² Verizon Comments at p. 47.

⁵³ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁵⁴ *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740-41 (1996) citing *Chevron*, 467 U.S. at 843–844.

⁵⁵ *Smiley*, 517 U.S. at 742.

Commission's 2002 interpretation of an ambiguous statute.⁵⁶ These arguments simply cannot be squared with the *Chevron* framework or *Brand X*.

1. *Brand X* Makes Clear That the Statutory Terms at Issue are Ambiguous

The Supreme Court expressly said that the Commission's *Cable Modem Declaratory Ruling* classification⁵⁷ of broadband transmission was not the only permissible classification under the statute. In *Brand X*, the Court "conclu[ded] that the Communications Act is ambiguous about whether cable companies 'offer' telecommunications with cable modem service."⁵⁸ The Court concluded that the "regulatory history ... confirms that the term "telecommunications service" is ambiguous."⁵⁹ Further, Justice Breyer's concurrence and Justice Scalia's dissent strongly imply that while the *Cable Modem Declaratory Ruling*'s classification may have been permissible, it was not the best construction of the statute.⁶⁰ The panel in *Verizon* also appears to agree, explaining that since prior to 1996 broadband was treated as common carriage "one might have thought, as the Commission originally concluded, that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously."⁶¹

⁵⁶ See Comments of United States Telecom Association, Docket Nos. 14-28, 10-127 at p. 28 (filed July 16, 2014) ("USTA Comments") ("the doctrine of judicial estoppel bars the agency from opportunistically changing its view of the facts simply because its interests may have changed.") See also Alcatel-Lucent Comments, at p. 11-12.

⁵⁷ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd*, *National Cable & Telecomms. Assoc. v. Brand X Internet Svcs.*, 545 U.S. 967 (2005) ("*Brand X*").

⁵⁸ *Brand X*, 545 U.S. at 993.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1003 (J. Breyer *conc.*); *Brand X*, 545 U.S. at 1010 (J. Scalia *dissent.*).

Verizon and Verizon Wireless, however, claim that reclassification would violate the Act and that Congress intended to deregulate broadband providers.⁶² There is simply no basis to conclude that the Commission’s 2002 era classification is set in stone. Rather, the Commission is free to continually evaluate the wisdom of its interpretations of the Act and has done so before in the context of addressing broadband. For instance, before the *Cable Modem Declaratory Ruling* and *Brand X*, the Commission determined that DSL based Internet access included a separate telecommunications service.⁶³ Plainly the Commission was not bound by this decision when it addressed cable modem service or wireline broadband services.⁶⁴ Nor did the Commission’s original interpretation of Section 706 preclude the D.C. Circuit from finding that the Commission’s subsequent and different interpretation of the same statutory provisions was reasonable.⁶⁵ This is because, as Senator Ron Wyden of Oregon observes, under the *Chevron* doctrine, the Commission “must consider varying interpretations and the wisdom of its policy on a continuing basis.”⁶⁶

⁶¹ *Verizon*, 740 F.3d at 638-39.

⁶² Verizon Comments at pp. 61-62.

⁶³ See, e.g., *Computer II Final Decision; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24017 ¶ 11 (1998) (“*Advanced Services Order*”).

⁶⁴ See *generally Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 1 (2005) (“*Wireline Broadband Order*”).

⁶⁵ *Verizon*, 740 F.3d at 637.

⁶⁶ Comments of Senator Ron Wyden, Docket No. 14-28 at p. 6 (filed July 15, 2014) (“Wyden Comments”) See also *Brand X*, 545 U.S. 967, 981.

2. There is No Merit to the Claims that Judicial Estoppel Bars the Commission From Reclassifying the Transmission Component of Broadband Internet Access

Despite the *Chevron* framework, opponents of Title II cling to inapplicable equitable doctrines such as judicial estoppel to deny the Commission authority to reclassify broadband internet transmission.⁶⁷ Judicial estoppel does not apply here since “it is well settled that the Government may not be estopped on the same terms as any other litigant.”⁶⁸

As the Supreme Court has explained, “broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests.”⁶⁹ Further, “the government should not be unduly hindered from changing its position if that shift is the result of a change in public policy.”⁷⁰ Clearly this equitable doctrine has no application where an administrative agency charged by Congress with implementing a complex regulatory regime is interpreting ambiguous terms in that statute. To read otherwise would entirely nullify *Chevron*, as every time an agency defended a rule in court on judicial review it would be bound to that rule for perpetuity. Such a concept cannot be squared with the *Chevron*-based principle that “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”⁷¹

⁶⁷ See Alcatel-Lucent Comments, at p. 11-12. (“the doctrine of judicial estoppel stands as a substantial obstacle to the classification of broadband as a telecommunications service.”).

⁶⁸ *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 60 (1984).

⁶⁹ *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001).

⁷⁰ *U.S. v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995).

⁷¹ *Smiley*, 517 U.S. at 742.

Consistent with these principles, the Ninth Circuit rejected an attempt to lock in the Commission’s interpretation of ambiguous statutory language after a successful defense of its rules under judicial review. In *New Edge Network v. FCC*,⁷² CLECs challenged the Commission’s decision to eliminate the pick and choose rule that allowed CLECs to pick individual sections of interconnection agreements instead of selecting a single agreement under the Act’s opt-in provision in Section 252(i).⁷³ The Commission had previously defended this rule from challenges by the ILECs before the Supreme Court and prevailed in part in *AT&T v. Iowa Utils. Bd.*⁷⁴ CLECs that wished to retain the rule argued that judicial estoppel barred the Commission from eliminating it.

The Ninth Circuit found that “judicial estoppel does not preclude the FCC from changing its interpretation of” ambiguous provisions of the Communications Act.⁷⁵ This is, in part, because “public policy considerations allow the government to change its position in ways that might be inappropriate if merely a matter of private interest.”⁷⁶

The parties advancing this tortured legal argument completely misread the applicable doctrine. The doctrine “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”⁷⁷ The factors the Supreme Court established in *New Hampshire to*

⁷² *New Edge Network Inc. v. Federal Communications Commission* 461 F.3d 1105 (9th Cir. 2006) (“*New Edge*”).

⁷³ 47 U.S.C. § 252(i).

⁷⁴ *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) While the agency defended the pick and choose rule by arguing that Section 252(i) was unambiguous, the Supreme Court determined the language was ambiguous and that the Commission’s interpretation of the statute was reasonable. *Id.* at 725.

⁷⁵ *New Edge*, 461 F.3d at 1114.

⁷⁶ *Id.* citing *New Hampshire*, 532 U.S. at 755.

⁷⁷ *New Hampshire*, 532 U.S. at 749 quoting *Pegram v. Herdrich*, 530 U.S. 211,

analyze claims of judicial estoppel demonstrate that the doctrine does not apply where an administrative agency such as the Commission seeks to revise its interpretation of a statute that it has previously defended in judicial review but only applied when the agency was engaged in pending litigation. For instance, the Court explained that one of the factors to consider is “whether the party has succeeded in persuading a court to accept that party’s earlier position, so that *judicial acceptance* of an inconsistent position in a later proceeding would create “the perception that either the first or the second court was misled.”⁷⁸ Further, a successful claim of judicial estoppel must establish a “risk of inconsistent court determinations.”⁷⁹ The Sixth Circuit has explained that the doctrine is designed to “prevent parties ‘from playing ‘fast and loose with the courts.’”⁸⁰ These concerns simply do not apply here as there is no court proceeding; the Commission is contemplating revising its legal and regulatory framework to fill the gap in an ambiguous statute through a rulemaking proceeding.⁸¹ There is no risk of inconsistent court decisions

227, n. 8, (2000).

⁷⁸ *New Hampshire*, 532 U.S. at 750 quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982). The doctrine is also inapplicable because in defending the *Cable Modem Declaratory Ruling* on judicial review, the Commission neither asserted nor prevailed on a claim that the statute mandated its classification; only that its construction of the ambiguous terms of the statute were reasonable. *See* Brief of FCC, Supreme Court, Docket Nos. 04-277/281, at p. 18 (filed January 18, 2005). (“The Commission reasonably concluded that cable modem service should be classified as an information service and not a telecommunications service for purposes of the Communications Act.”).

⁷⁹ *New Hampshire*, 532 U.S. at 751, quoting *United States v. C.I.T. Constr. Inc.*, 944 F.2d 253, 259 (5th Cir. 1991).

⁸⁰ *Edwards v. Aetna Life Insurance Co.*, 690 F.2d 595, 598–99 (6th Cir.1982).

⁸¹ The cases USTA cites in footnote 104 of its Comments and its recitation of the history of the proxy prices set by the Commission in the *Local Competition Order* simply do not apply since the issues in all of those cases concerned the agency’s position in pending litigation. There is no pending litigation here and *Chevron* and the Supreme Court’s judicial estoppel decisions clearly contemplate an administrative agency having the ability to change its interpretation of ambiguous provisions of the statute Congress

because there is no court proceeding. The judicial estoppel doctrine does not encompass an administrative agency’s reversal of positions set forth in previous agency rules that it now wishes to change. The doctrine only “is intended to prevent ‘improper use of judicial machinery.’”⁸²

C. The Commission’s Assumptions Regarding the Broadband Market on Which its Classification Decisions are Predicated Have Been Proven Incorrect

Opponents of reclassification contend that the Commission is bound by the factual conclusions it reached in 2002 and thus cannot adopt Open Internet rules using Title II. The American Cable Association, for example, contends that “[b]roadband Internet service offered today ... is not factually different than when the Commission last examined this question.”⁸³ There is ample evidence, however, that the broadband market has changed dramatically since the Commission’s earlier classification decisions and that consumers use these services differently than the Commission assumed in 2002. First, there is much less competition than the Commission originally predicted. Second, consumers are far more reliant on third party applications and services than on the bundled Internet services and functions provided by their ISPs.

1. Competition Has Not Evolved as the Commission Predicted

In justifying its decision to reverse its previous ruling that wireline based broadband services include a separate telecommunications service,⁸⁴ the Commission in

directed it to administer even if it previously and successfully defended that prior interpretation in the courts.

⁸² *New Hampshire*, 532 U.S. at 750 quoting *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980).

⁸³ ACA Comments at p. 43.

⁸⁴ *Advanced Services Order*, 13 FCC Rcd 24017 ¶ 11.

the *Wireline Broadband Order* explained that “a wide variety of competitive and potentially competitive providers” are emerging.⁸⁵ Besides cable companies and ILECs, it said, “other existing and developing platforms, such as satellite and wireless, and even broadband over power line” indicate that “broadband Internet access services in the future will not be limited to cable modem and DSL service.”⁸⁶ This predictive judgment plainly was not accurate.

In fact, it is fair to say that today, according to the Commission’s data, “there is simply no competitive choice for most Americans ... three-quarters of American homes have no competitive choice”⁸⁷ for broadband above 25 Mbps and must use the cable company if they want the “25 Mbps connection [that] is fast becoming “table stakes” in 21st century communications.”⁸⁸ And twenty percent of American homes lack access to broadband at such speeds altogether.⁸⁹

Where did the promised competition go? Broadband over power line never got off the ground; mobile broadband is “not a full substitute for fixed broadband, especially given mobile pricing levels and limited data allowances.”⁹⁰ Satellite no longer qualifies as broadband since, as of the *Eighth Broadband Report*, “there was no[] ... commercially available satellite offering that could provide 4/1 Mbps service to consumers.”⁹¹

⁸⁵ *Wireline Broadband Order*, 20 FCC Rcd at 14880-81 ¶ 50.

⁸⁶ *Id.*

⁸⁷ “The Facts and Future of Broadband Competition”, Prepared Remarks of FCC Chairman Tom Wheeler, at p. 4, Sept. 4, 2014.

⁸⁸ *Id.* at p. 3.

⁸⁹ *Id.* at p. 4.

⁹⁰ *Id.* at p. 5.

⁹¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of*

This lack of competition, in part, gives rise to the need for meaningful Open Internet rules. As the D.C. Circuit explained, “if end users could immediately respond to any given broadband provider’s attempt to impose restrictions on edge providers by switching broadband providers[,]” this could offset the broadband provider’s gatekeeper power.⁹² This lack of competition justifies the Commission reversing course and adopting a Title II regime to protect the Open Internet.

2. Consumers Use Their Broadband Service Differently Than in 2002

In its opening comments, Vonage explained that consumers use their broadband Internet connections for streaming video from third party suppliers such as Netflix and Amazon and obtain VoIP services from independent providers such as Vonage and email services from Google and Microsoft.⁹³ While the ISPs offer similar service they are not a core part of the broadband experience. Indeed, it is the broadband pipe that is the core of the consumer’s essential broadband experience. Similarly, the focus of ISP marketing is speed, not email or home portal pages. If the Commission is to truly analyze the service from the consumer’s perspective it is inescapable that the applications offered by the ISP are utterly irrelevant to the consumer broadband experience.

Verizon and Verizon Wireless contend that these arguments merely repackage claims dismissed in the original classification decisions and mischaracterize the services broadband providers sell.⁹⁴ Vonage agrees, however, with Senator Wyden, who explains

1996, as Amended by the Broadband Data Improvement Act, Eighth Broadband Progress Report, 27 FCC Rcd 10342, 10368 ¶ 41 (2012) (“Eighth Broadband Progress Report”). While some satellite companies have proclaimed availability of higher bandwidth, the high latency of satellite calls into question whether satellite allows end users to send and receive high quality voice and video as required by section 706. See id. ¶ 42.

⁹² *Verizon*, 740 F.3d at 646.

⁹³ Vonage Comments at p. 38.

that the “marketplace of Internet applications -- email, social networks, search engines, content -- is full of independent information services and service providers and very few customers choose to use the suite of information services also offered by their access providers.”⁹⁵ It is plain that “the broadband access provider is not inextricably intertwining any information service with its telecommunications offering, and the basis for this original notion is certainly not accurate now.”⁹⁶

As Netflix explains,

Consumers pay ISPs for the delivery component that allows them to connect with Netflix, Google, Reddit, Etsy, Amazon, and the multitude of other applications and services available online. Today, most consumers receive email accounts for free and those accounts are nearly always provided by someone other than an ISP. It can hardly be said that applications such as email are bundled with underlying transmission to such a degree that this bundling justifies a sweeping decision to take all residential broadband connections out of Title II of the Communications Act.

...

That the classification of a broadband delivery service continues to rest upon ISPs’ bundling of their own affiliated applications (like free email), which few consumers want or use, is the regulatory equivalent of the tail wagging the dog.”

Opponents of reclassification continue to point to caching and Domain Name Services (DNS) as the key pieces of the ISP offering that compelled the conclusion that the “transmission” was inextricably intertwined with the ISP offering rather than a stand-alone offer of telecommunications service.⁹⁷ But viewed from the customer’s perspective,

⁹⁴ Verizon Comments at p. 63.

⁹⁵ Wyden Comments at p. 7.

⁹⁶ Free Press Comments at p. 69.

⁹⁷ *Brand X*, 545 U.S. at 999-1000.

“DNS is no different than any other behind-the-scenes switching service, and it should be treated as such.”⁹⁸

As Justice Scalia observed in his dissent, DNS and caching can reasonably be classified as adjunct to basic or basic service since their core function is “scarcely more than routing information, which is expressly excluded from the definition of information service.”⁹⁹ Public Knowledge and other commenters correctly state that the definition of information service in 47 U.S.C. § 153(20)¹⁰⁰ provides that DNS is not an information service since the statute codified “Commission precedent that found that services necessary to route, manage, or otherwise use telecommunications services are themselves regulated as telecommunications services.”¹⁰¹

D. Broadband ISPs Have No Reasonable Reliance Interest In The Commission Maintaining the Title I Classification

The incumbent broadband network operators urging the Commission to forsake the Open Internet claim the 2002 classification decision “engenders” the “serious reliance interest of broadband providers.”¹⁰² But CenturyLink and other incumbents misconstrue the Supreme Court’s reference to “serious reliance interests.” The concept of a reliance interest on the basis of an agency rule simply does not apply in a proceeding where the agency conducts a new rulemaking to revise its rule. For example, in *United States v.*

⁹⁸ Public Knowledge Comments at p. 76.

⁹⁹ *Brand X.*, 545 U.S. at 999 (J. Scalia dissent) *citing* 47 U.S.C. §153(20) (definition excludes “use of any such capability for the management, control, or operation of a telecommunications system.”).

¹⁰⁰ 47 U.S.C. § 153(20) (2014).

¹⁰¹ Public Knowledge Comments at p. 69.

¹⁰² CenturyLink Comments at p. 45; Alcatel-Lucent Comments pp. 11-12; Comcast Comments, at p. 54.

Pennsylvania Industrial Chemical Corp.,¹⁰³ the Supreme Court remanded the defendant’s conviction under a statute that prohibited discharging material into the waterways.¹⁰⁴ The defendant was convicted despite Army Corps of Engineers regulations that interpreted the statute to prohibit discharge of objects that impede navigation of the water ways rather than chemical pollutants.¹⁰⁵ The defendant’s conviction, however, was predicated on conduct that occurred prior to the Corps’ revised regulation that construed the statute to apply to pollutants as well.¹⁰⁶ The Court held that the defendant should have been allowed to present evidence regarding its reliance interest.¹⁰⁷ In other cases, applying this precedent, the Court rejected claims of reliance, concluding that the doctrine does not apply unless there is “a case in which some new liability is sought to be imposed on individuals for *past actions* which were taken in good-faith reliance on [agency] pronouncements” and involve “fines or damages.”¹⁰⁸

Plainly no such reliance interest exists here. Neither the Commission nor commenters are proposing enforcement action for conduct preceding the adoption of the proposed new rules. Rather, Vonage and other supporters of meaningful, enforceable Open Internet rules urge the Commission to adopt new rules and enforce those rules — but only as to conduct that occurs after the rules are adopted. There are no reliance

¹⁰³ *United States v. Pennsylvania Industrial Chemical Corp*, 411 U.S. 655, 670–675 (1973).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 672-73.

¹⁰⁶ *Id.* at 659-660.

¹⁰⁷ *Id.* at 675.

¹⁰⁸ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (emphasis supplied).

interests here that the Commission must account for in revising its classification of the transmission component of broadband Internet access.

E. Reclassification of the Transmission Component of Broadband Internet Access to a Telecommunications Service Will Not Cause Major Industry Disruption

The entrenched incumbents that prefer that the Commission not interfere with their ability to favor their own affiliated content and services to the detriment of competition argue that reclassification will have a profound impact across the industry and will lead to great uncertainty. Verizon, for example, has the audacity to contend that “[a]ll of the Internet-based services ...offer[ed] consumers, including search engines, social networks, and messaging applications, also incorporate transmission [and] could be swept up into Title II’s reach under any reclassification.”¹⁰⁹ These Chicken Little claims have no merit whatsoever and are simply aimed at confusing the public regarding the reclassification proposals offered in this proceeding. Vonage agrees with the NTCA that “there should be no risk whatsoever that applying Title II to underlying transport and transmission networks would be tantamount to ‘regulating the Internet.’”¹¹⁰

Classifying the transmission component of broadband internet access service as a telecommunications service will not impact any other information service besides broadband Internet access service. Contrary to the claims of Alcatel-Lucent, reclassification will not “threaten[] to reopen long settled debates about the classification of a host of information services — like voice mail and interactive voice response technologies.”¹¹¹ Nor will it subject search engines to Open Internet rules.¹¹² Unlike

¹⁰⁹ Verizon Comments at p. 16.

¹¹⁰ NTCA Comments at p. 11.

¹¹¹ Alcatel-Lucent Comments at p. 16.

broadband Internet services, these services do not include a raw transmission capability—the ability to communicate with anyone anywhere. Voice mail services and search engines simply cannot be compared to the broad interactive communications available via a broadband Internet connection.

Nor is there any support for claims that reclassification of the transmission component of broadband to a telecommunications service will deter investment.¹¹³ The Commission’s data from the early stages of broadband deployment is illuminating on this point. While broadband was still in its early stages of technological development and deployment there was considerable growth of xDSL based broadband services even when it was subject to Title II regulation as well as mandatory access through Section 251 and the *Computer Inquiry* rules,¹¹⁴ neither of which would apply under the Title II regime Vonage urges the Commission adopt here.

For example, in the *Third Broadband Report*,¹¹⁵ the Commission examined growth of cable modem services and xDSL-based wireline broadband services, and found that while cable modem services grew 271% from the end of 1999 to June 2001,¹¹⁶ over the same period, ADSL subscribership grew over twice as much at a clip of 575%.¹¹⁷ And

¹¹² Verizon Comments at p. 16.

¹¹³ See Comcast Comments at p. 46; Verizon Comments at p. 46; Time Warner Comments, p. 17; AT&T Comments, p. 56.

¹¹⁴ See e.g., *Advanced Services Order*, 13 FCC Rcd at 24029-31 ¶ 35-37.

¹¹⁵ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 FCC Rcd 2844 (2002) (“*Third Broadband Report*”).

¹¹⁶ *Id.* at 2864 ¶ 44 (showing increase of cable modem subscriptions from 1.4 million to 5.2 million).

¹¹⁷ *Id.* at 2865-66 ¶ 49 (showing increase of ADSL subscriptions from 0.4 million to 2.7 million).

in both the *Second Broadband Report* and the *Third Broadband Report*, the Commission concluded deployment and investment continued at reasonable pace.¹¹⁸ While there were more cable modem lines in service even then, the *Third Broadband Report* showed that DSL grew from 13% of all broadband lines to 28% between the end of 1999 and June 2001.

This data undermines the major operators contention that reclassification will grind investment to a halt. As the Commission and D.C. Circuit reasonably concluded, investment in broadband will continue as long as edge providers continue to have economic incentives to develop new services and applications fueling demand for more robust broadband services.¹¹⁹

IV. Title II Provides the Commission Broad Authority to Limit Paid Prioritization

In their zeal to pressure the Commission to forego Title II re-classification, the broadband network operators also claim that Title II does not allow the Commission to bar paid prioritization arrangements or other discrimination because Sections 201 and 202 only prohibit “unreasonable” discrimination.¹²⁰ Contrary to these claims, the Commission has broad authority under Sections 201 and 202 to construe the terms of the

¹¹⁸ *Id.* at 2845 ¶ 1 (finding that “investment in infrastructure for advanced telecommunications remains strong”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 FCC Rcd 20913, 20918 ¶ 8 (2000) (“*Second Broadband Report*”) (finding that “rapid buildout of infrastructure continues” and “extensive investment is pouring in” to deploy more broadband to American residences and businesses).

¹¹⁹ *Open Internet Order*, 25 FCC Rcd at 17910–11, 17970 ¶¶ 14; *Verizon*, 740 F.3d at 644 (the Commission “has more than adequately supported and explained its conclusion that edge-provider innovation leads to the expansion and improvement of broadband infrastructure.”).

¹²⁰ *See* Alcatel-Lucent Comments, at p. 10.

Act and re-establish its 2010 rule that establishing a rebuttable presumption that paid prioritization is unreasonable discrimination. In fact, the Commission has, in similar circumstances, prohibited telecommunications carriers from demanding certain payments for carriage on their networks under Section 201, as in its recent reform of the intercarrier compensation regime. It should do so likewise with respect to the carriage of Internet traffic requested by an ISP's customer.

A. There Is No Merit to the Claims Of Incumbent Network Operators That Title II Does Not Allow the FCC to Limit Paid Prioritization

Numerous network operators claim that reclassification using Title II would not achieve the objective of restraining paid prioritization because reasonable discrimination in telecommunications services is allowed.¹²¹ Simply because certain individualized contracts have been found to be reasonable, however does not mean the same applies to broadband Internet transmission services. In terms of broadband Internet transmissions, “the prioritization of certain traffic in a non-congested network can happen only at the expense of other content providers.”¹²²

First, the communication at issue — packets from an edge provider — are affirmatively requested by the ISP's customer; for instance, by clicking on a link in web browser, or an icon representing a streaming video on a tablet or television. Second, Vonage agrees with Free Press that there is “a fundamental difference between the

¹²¹ See Comments of Cox Communications, Inc., GN Docket Nos. 14-28, 10-127 at p. 33 (filed July 18, 2014) ; Comments of National Cable Telecommunications Association, Docket Nos. GN 14-28, 10-127 at p.27 (filed July 15, 2014) (“NCTA Comments”); Comments of Time Warner Cable, Inc., Docket Nos. GN 14-28, 10-127 at p. 14 (filed July 15, 2014) (“TWC Comments”) at p. 14; USTA Comments at p. 41; Verizon Comments at p. 51.

¹²² Comments of The Internet Association, GN Docket No. 14-28 at p. 17 (filed July 14, 2014).

routing of IP traffic” and the routing of services analyzed under Section 202 cases.¹²³ One of the central distinctions is that when carrier A offers service to customer B at price X but to customer C at price Y (and $Y > X$), there is no degradation of customer C’s service. And even where the service to customer B is offered with higher SLAs than the services to customer C, customer C’s service is carried at the rate contracted for regardless of the SLA applicable to Customer B. But it does not work this way for delivering packets over broadband ISPs’ last mile networks. These packets are routed on a best efforts basis without any guarantees other than the bandwidth provided for under the customer’s agreement with the ISP. In traditional voice communications there would be “no net discrimination against parties that did not seek or agree to the individualized terms.”¹²⁴ In the absence of a ban on paid prioritization, however, “every party that does not enter into a prioritized arrangement is by definition slowed down, and thus discriminated against.”¹²⁵ Vonage agrees with Free Press that “the fundamental realities of this zero sum game, combined with the Commission’s court-affirmed findings that ISPs offering preferential treatment harm the “virtuous circle of investment,” form a strong basis for a rebuttable presumption that paid prioritization is a form of unreasonable discrimination.”¹²⁶

B. Under Title II, the Commission Could Bar Two Sided Transactions and Require Broadband Providers to Recoup Their Costs From Their End Users Instead of Creating Another Access Charge Regime

There is a strong correlation between the edge provider relationship with broadband ISPs and their mutual customers and the relationship between IXC and LECs

¹²³ Free Press Comments at p. 51.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at n. 94.

and their mutual customers. In each case, both service providers possess a customer relationship with the same customer. In both situations, the edge provider/IXC must have cooperation from the ISP/LEC to serve its customer. In both situations, the access provider has an effective monopoly over transmissions terminating to that particular end user. And, in both situations, the edge provider/IXC is called upon by the other provider's customer to deliver information to the customer, at the customer's request.

Under its old model for intercarrier compensation the LEC would bill its customer for service and bill separately the service providers that used its connection to the customer to deliver long distance calls. But the Commission rejected that regime on a going forward basis in an all-IP world, requiring LECs to recover their costs directly from their customers rather than from other providers with whom they shared a customer.¹²⁷

The Commission found substantial benefits under this regime. As the Ad Hoc Users explain, this “model keeps markets honest and the resulting downward pricing pressure, incentives to innovate, and heightened economic efficiencies benefit both consumers and marketplace competition, all of which best serve the public interest.”¹²⁸ Vonage agrees that allowing “service providers to hide their true costs and efficiencies by using their terminating monopoly to extract payments from interconnecting providers or content providers does none of these things.”¹²⁹

¹²⁷ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17904 ¶ 737 (2011) (“*Connect America Fund Order*”) *aff'd In re FCC 11-161*, Case No 11-9900, slip op. Intercarrier Compensation pp.43-44 (May 23, 2014).

¹²⁸ Ad Hoc Comments at p. 18.

¹²⁹ *Id.*

Further this regime is “consistent with the Commission’s broader cost-causation principles in the access arena. The Commission has long recognized that each party to a communication should pay its own share of the costs. In particular, the called party (meaning, in the case of Internet access, the downloading party) should pay for its connection since “the subscription decisions of the [downloading] party play a significant role in determining the cost of [downloading content] to that party.”¹³⁰

V. The Commission Has Broad Authority to Use Forbearance to Maintain the Status Quo

Most supporters of adopting Open Internet rules predicated on the Commission’s Title II authority urge the Commission to use its broad statutory forbearance authority to minimize the regulatory burden on Internet access services.¹³¹ Because they prefer ineffective rules or no rules at all, network operators claim that forbearance is not workable.¹³² It is more than ironic that some of the same companies that have been most aggressive about invoking the Commission’s section 10 forbearance authority, having thereby achieved substantial deregulation, now disavow use of such a tool because it would lead to litigation. This is the height of hypocrisy, especially because those companies, like Verizon, have been the most strident opponents of the agency’s Open Internet efforts and moved swiftly to challenge the Commission’s rules in court four years ago. Verizon and AT&T lack credibility when it comes to dissuading the Commission from the use of a tool they prefer only be wielded when it benefits incumbents.

¹³⁰ *Id.*

¹³¹ *See* NTCA Comments at p. 13; Netflix Comments at p. 24.

¹³² *See* Verizon Comments at p. 51; Comments of AT&T Services, Inc., GN Docket Nos. 14-58, 10-127 at p. 64 (filed July 17, 2014).

Verizon urges the Commission to forego using Title II coupled with forbearance because “even if the Commission sought to forbear from certain provisions of Title II, that approach would cause an additional legal battle over the scope of such action: which provisions do, or do not, apply, and why that is so.”¹³³ But Verizon cannot argue, of course, that litigation over forbearance would somehow be worse, more costly, or more time-consuming than the litigation it inevitably will initiate, if history is any guide, if the Commission adopts any Open Internet rules on any other statutory basis.

Nor should the Commission give any weight to the argument of Charter, who argues that the Commission should avoid the challenge of using reclassification and forbearance because “such decisions would likely be tied up in litigation for years to come, further destabilizing the legal, regulatory, and investment environment.”¹³⁴ Charter’s analysis, however, fails to consider that if the Commission had used its authority to reclassify broadband transmission in 2010, the judicial process might well have concluded by now. The fact that four years later the Commission continues to search for a sustainable legal regime suggests that using Section 706 or any other authority is just as likely to lead to uncertainty.

Indeed, the opponents of Title II classification seem to ignore the broad power the Commission has under Section 10. While the Commission elected to use an analytically rigorous framework to assess UNE forbearance in the *Qwest Phoenix Forbearance Order*,¹³⁵ that does not preclude the Commission from adopting a less nuanced approach

¹³³ Verizon Comments at p. 51.

¹³⁴ Comments of Charter Communications, Inc., GN Docket Nos. 14-28, 10-127 at p. 17 (filed July 18, 2014) (“Charter Comments”).

¹³⁵ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622 (2010) (“*Qwest Phoenix Forbearance Order*”) *aff’d*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

here. As the DC Circuit explained in *EarthLink v. FCC*,¹³⁶ Section 10 does not command the FCC to analyze individual markets. And the Commission can employ different standards when analyzing different product markets, as the forbearance analysis is not tied to any particular standard other than the factors set forth in Section 10. Here, the Commission can use its statutory forbearance power to protect the status quo in the broadband market except for the Open Internet rules.

A. The Commission Need Only Retain Those Sections of Title II Necessary to Adopt and Enforce the Open Internet Rules Thereby Maintaining the Status Quo for Broadband ISPs

Other than the lack of meaningful Open Internet protections, the status quo for regulating the provision of broadband internet access remains suitable and need not be disturbed. Rather than debate each individual section of Title II in its forbearance analysis, the Commission could limit its Title II authority to those provisions necessary to adopt and enforce Open Internet rules and forbear from applying all other provisions and rules under Title II that do not bear on the Open Internet rules originally codified in 2010.

Vonage agrees with NTCA that “the Commission should not blindly apply any and all legacy Title II regulations to the transmission and transport capacity at issue here. As the Commission’s long-standing, extremely ‘light touch’ treatment of long distance telecommunications services demonstrates, for example, Title II need not – and should not – be synonymous with heavy-handed regulation.”¹³⁷ Netflix’s proposal is similar, suggesting that the Commission’s “Open Internet rules under Title II need go no further than the basic tenets laid down by the FCC in 2010.”¹³⁸ Vonage agrees that “Title II does

Cir. 2012).

¹³⁶ *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

¹³⁷ NTCA Comments at p. 13.

not mean more regulation. It simply provides the FCC with the authority needed to restore the very same open Internet principles that virtually everyone, including ISPs, says they support.”¹³⁹

VI. Broad Support Exists For the Proposal to Treat Wireline and Wireless Broadband Under the Same Set of Open Internet Rules

In the *Open Internet Order*, the Commission adopted a lighter touch framework for mobile broadband. The Commission based its decision on a belief that the market for mobile broadband was still developing and that more competition existed for fixed broadband.¹⁴⁰ The factual predicate for this disparate treatment of wireline and mobile wireless broadband no longer exists today. “Regardless of the wisdom of treating wireless differently from wired internet access in the Commission’s original order, today the Commission must take into account the substantial mobile marketplace changes since 2010.”¹⁴¹ In short, the growing use of mobile broadband and consumer’s reliance on their mobile broadband connections when they are way from their more robust fixed connections warrant similar treatment under any new Open Internet rules. Uniformity is required because “[w]ireline and mobile networks are converging in ways that will make a separate set of rules favoring mobile ISPs confusing and harmful to consumers and to competition.”¹⁴²

¹³⁸ Netflix Comments at p. 24 n. 42.

¹³⁹ *Id.*

¹⁴⁰ *Open Internet Order*, 25 FCC Rcd 17956-58 ¶¶ 94-96.

¹⁴¹ Public Knowledge Comments at p. 25.

¹⁴² Comments of New America Foundation and Benton Foundation, GN Docket Nos. 14-28, 1-127, at p. 35 (filed July 17, 2014).

For example, “consumers who are deaf or hard of hearing” increasingly rely on wireless broadband services for “accessing video and other critical applications on mobile devices.”¹⁴³ In addition, the devices used for mobile broadband service regularly include the ability to access fixed networks through Wi-Fi service. Treating the two services, accessed via the same device, differently makes little sense and appears arbitrary. Indeed, if “consumers may have non-discriminatory Internet access on their smartphone while on their home Wi-Fi and wireline connection, they should have non-discriminatory Internet access when they step outdoors and use their smartphones on the 4G LTE network.”¹⁴⁴ Vonage agrees that it “seems inappropriate for a consumer’s online experience to vary based upon whether they have otherwise seamlessly transferred from a mobile broadband network to a fixed wireline Wi-Fi network.”¹⁴⁵ Vonage believes that imposing two sets of rules would be arbitrary since “a single data stream could be subject to different regulatory standards depending on whether it was being delivered via the mobile provider’s licensed wireless service or had been offloaded to an unlicensed Wi-Fi service.”¹⁴⁶

Further, maintaining separate regimes for wireless and fixed broadband providers runs afoul of the Commission’s policy to implement technologically neutral rules.¹⁴⁷

¹⁴³ Comments of Telecommunications for the Deaf and Hard of Hearing et al, GN Docket No. 14-28 at p. 5 (filed July 18, 2014).

¹⁴⁴ Comments of Bright House Networks, GN Docket No. 14-28 at p. 5 (filed July 15, 2014).

¹⁴⁵ Comments of Frontier Communications, GN Docket No. 14-28 at p. 9 (filed July 18, 2014 (“Frontier Comments”).

¹⁴⁶ NCTA Comments at p. 75.

¹⁴⁷ Comments of The Open Technology Institute at the New America Foundation and Benton Foundation, GN Docket Nos. 14-28, 10-127, at p. 27 (filed July 17, 2014 (“OTI Comments”).

Commenting parties agree that the Commission’s Open Internet rules should be applied “in a technology-neutral manner.”¹⁴⁸

Nor should the Commission jettison its principle of technological neutrality because of competition in the wireless sector as it did in 2010.¹⁴⁹ Competition in the mobile market does not eliminate need for strong Open Internet rules, especially since there has been significant consolidation in the last 4 years in the mobile market, reducing competition. As the NCTA observes, the *Open Internet Order* relied on the assumption that “most consumers have more choices for mobile broadband than for fixed.”¹⁵⁰ The level of competition, however, has changed since 2010 and is of little significance since there is evidence that competition alone does not discipline broadband providers’ incentive to block or discriminate against edge traffic.¹⁵¹

A. The Wireless Industry’s Arguments for Separate Rules Lack Merit

The wireless industry, having received a free pass in 2010, is determined to make that free pass permanent. Clinging to the Commission’s dubious conclusion in 2010 that “wireless broadband is still in a nascent stage, with technology and services rapidly evolving[,]” the wireless industry argues that the 2010 rules were sufficient.¹⁵² The wireless industry’s principal claim is that “the fundamental constraint on capacity

¹⁴⁸ Comments of Frontier Communications, filed July 18, 2014 at p. 8.

¹⁴⁹ OTI Comments at p. 46.

¹⁵⁰ NCTA Comments at p. 74.

¹⁵¹ Letter from Barbara van Schewick to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-91, 14-28 at 2 (filed March 4, 2014) (documenting abuses by European broadband network operators that were not subject to any Net Neutrality rules); *see also Verizon*, 740 F.3d at 646-47 (explaining Commission’s analysis that even when consumers have competitive choice they may not find it suitable to switch providers.).

¹⁵² ITIF Comments at p. 20.

imposed by limited availability to spectrum means that ... wireless networks require specialized management so that they can meet customers' expectations.¹⁵³

But managing scarce resources does not require the ability to wantonly block or discriminate against third-party edge traffic. There are nondiscriminatory ways for carriers to manage scarce capacity under the significant leeway the *Open Internet Order* rules afford ISPs for reasonable network management. For instance, the major CMRS carriers are under investigation for singling out customers on unlimited plans for reduced throughput in times of congestion. The CMRS carriers of course deny that they are targeting unlimited subscribers, but their failure to adopt a less restrictive method for reducing congestion demonstrates their shameless attempt to coerce unlimited users to decamp for lucrative (to the carrier) plans. The CMRS carriers defend their ability to manage congestion, suggesting that unlimited users are responsible for the congestion in most cases because they use the most bandwidth.¹⁵⁴ But if the carriers are able to identify those customers that use the most bandwidth they should simply cap usage by those subscribers in times of congestion. But this is not economical for the CMRS carriers because this would involve throttling usage by customers that pay extra for data consumption above their regular plan.

It then makes sense that the broad categorical difference reflected in the 2010 rules need not remain. Instead, the reasonable network management exception in the 2010 rules provides wireless carriers the ability to manage the scarce spectrum capacity in a non-discriminatory fashion. As Public Knowledge explained, to “the extent that

¹⁵³ *Id.*

¹⁵⁴ Letter from Kathleen Grillo, Verizon to FCC Chairman Thomas Wheeler, (Aug. 1, 2014).

legitimate differences between wireless and wireline exist, reasonable network management can accommodate them, just as it does for differences between DSL, cable, and fiber.”¹⁵⁵

VII. Conclusion

For the reasons stated herein, Vonage respectfully urges the Commission to use its broad authority under the Act to interpret ambiguous terms in the statute to classify the transmission component of broadband Internet access as a separate telecommunications service, and to forbear from the application of provisions of Title II beyond those necessary to protect the Open Internet. This will restore the *status quo* that existed up until the D.C. Circuit’s decision in *Verizon*. In addition the same Open Internet rules should be applied to fixed and mobile broadband services.

¹⁵⁵ Public Knowledge Comments at p. 29.

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