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
	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191

REPLY COMMENTS OF FREE PRESS

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EXECUTIVE SUMMARY

Title II provides a flexible, light-touch approach for the preservation of open communications networks. Common carrier principles in general are both perfectly suited and absolutely necessary to maintaining nondiscrimination principles and nondiscriminatory outcomes. This is true not only in monopoly settings, but in deregulated and competitive markets too. It's true for all telecom services, not just those delivered on copper telephone wires.

The Commission has tremendous ability to tailor Title II for different markets. It even has the extraordinary power to forbear not only from its own rules, but even from statutes and congressional acts themselves. Yet the first question in this proceeding is not whether the Commission can forbear from parts of Title II; whether Title II impacts broadband investment; or even whether the agency "needs" to reclassify in order to restore the Open Internet rules.

The answer to each of those questions is clear: forbearance can be routine, investment will occur, and Section 706 will not work for the protections contemplated. The so-called compromises on authority that the Commission has struck in the past, and that some commenters call for again, make for bad law and bad policy. Title II, on the other hand, provides ample authority for the Commission to prevent blocking, undue discrimination, paid prioritization, terminating access charges, and all manner of unjust and unreasonable practices.

The foremost question before the Commission remains the correct interpretation of the Communications Act provisions that bound the agency's authority and bind its discretion. The Commission must ignore results-oriented arguments of those who argue – incorrectly – that Section 706 is a good enough basis for Open Internet protections, or that Title II would have undesirable consequences. It must reclassify broadband Internet access as a telecom service and adopt rules on that strong foundation.

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I. TITLE II IS THE LAW THAT PROPERLY GOVERNS TELECOMMUNICATIONS SERVICES SUCH AS BROADBAND INTERNET ACCESS.

A. The Legal Classification Decision Before the Commission Does Not Turn Merely on Whether the Commission "Needs" Title II to Protect the Open Internet.

Title II provides a flexible, light-touch approach for the preservation of open communications networks. As described in our initial comments,[1] and as revisited in these replies, common carrier principles in general are both perfectly suited and absolutely necessary to maintaining nondiscrimination principles and nondiscriminatory outcomes. This is true not only in monopoly settings, but in deregulated and competitive markets too. And it's true for all telecom services, not just for traditional telephone services or certain types of wires.

The Commission has tremendous ability to tailor Title II for these different markets and different services. It even has the extraordinary power under Section 10 of the Communications Act to forbear not only from application of its own rules, but even from the application of statutes and congressional acts themselves. As we reiterate below, the Commission has used this power for other telecommunications services in the past.[2] It readily could – and would – use it after classifying broadband Internet access services as common carrier services once again.

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[1] *See generally* Comments of Free Press, GN Docket No. 14-28, at 26-54 (filed July 18, 2014) ("Free Press July 2014 Comments"); *see also id.* at 42 (citations omitted):

> The 1996 Act's deregulatory approach to the application of Title II (*i.e.*, preserving Sections 201 and 202, and their nondiscriminatory outcomes, as the core duties of common carriers) is itself based on the Commission's approach towards non-dominant carriers. Congress first codified this framework in its 1993 amendments to the Act, which detailed the deregulatory Title II approach to oversight of Commercial Mobile Wireless Services.

[2] *See id.* at 43-46 (explaining that the application of Title II to mass market broadband telecommunications services would resemble the application of common carrier duties to providers of wireless voice, enterprise broadband, interexchange services, non-dominant local exchange carriers ("LECs"), and hundreds of LECs that offer broadband DSL services on a common carrier basis. Title II classification for broadband Internet access would *not* require or lead to rate regulation, tariffs, resale and open access requirements, or any other obligations from the litany of false fears that large broadband providers unthinkingly recite).

Yet the first question before the Commission in this proceeding is not whether it can forbear appropriately from Title II once it corrects its predecessors' classification mistakes. We address that question again in Part II below. And the answer, of course, is that the Commission can and would adapt our nation's telecommunications laws for application to the broadband Internet access services market.

Nor is the first question here how to determine the impact that this classification decision might have on broadband investment. Free Press and others have shown repeatedly that ISPs have no evidence for their tall tales and alarmist claims on this point. We briefly provide those answers once again in Part III below. Yet the effect on infrastructure buildout and adoption – whether that assessment is based on the real-world results we use, or on the phantoms conjured by the carriers – is not determinative on the legal questions either.

The primary consideration before the Commission is not even whether it "needs" to reclassify in order to restore Internet users' protections against blocking and discrimination by broadband providers. That answer is clear, and we once again turn to it in Part IV of these replies. Whatever the merits of Section 706 for other purposes, it is entirely inadequate as the legal foundation for restoring the Open Internet rules struck down by the D.C. Circuit in January 2014. Section 706 promises nothing but uncertainty should the Commission once more needlessly attempt to find a supposedly effective, yet in the end always shoddy way around the core common carriage principles. The so-called compromises that the Commission has struck in the past, and that some commenters call for again, make for bad law and bad policy too. Title II, on the other hand, provides ample authority for the Commission to prevent blocking, undue discrimination, paid prioritization, terminating access charges, and all manner of unjust and unreasonable practices by broadband Internet access providers.

For all of that, the foremost question before the Commission is the correct interpretation of the Communications Act provisions that bound the agency's authority and bind its discretion. The Commission should ignore the results-oriented pleas of those who argue – incorrectly and unpersuasively, but persistently – that Section 706 is a good enough basis for Open Internet protections, or that Title II would have undesirable consequences. They are wrong on both counts, but the flaw in their reasoning goes deeper than that.

The Commission cannot merely seek what it presently considers a desirable outcome from this proceeding, then pick and choose what it thinks the best legal route to get there. There should be no debate about this simple truth. Even Chairman Powell – before he went to head the cable lobby, and when he was still in office and starting the agency down this wrong path in its classification decisions – recognized that the Commission has nothing like "unconstrained discretion to pick its preferred definition or classification, as some imply. The Commission must attempt to faithfully apply the statutory definition to a service, based on the nature of the service, including the technology used and its capabilities, and the nature of the interactive experience for the consumer."[3] As he correctly acknowledged:

> The Commission is not permitted to look at the consequences of different definitions and then choose the label that comports with its preferred regulatory treatment. That would be contrary to law. The Commission must apply the definition and then accept the regulatory regime that adheres to that classification and that which Congress chose when it adopted the statute.[4]

Chairman Powell reached the wrong result when reading the law, but at least he did so on the basis of the correct belief that his agency's job is to interpret and implement that law faithfully.

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[3] *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*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (Separate Statement of Chairman Michael K. Powell) (*Cable Modem Declaratory Ruling*).

[4] *Id.*

Just so in this docket with T-Mobile, which sets out the correct test – before flunking it. T-Mobile rightly concludes that "[t]he task before the Commission is not to determine what regulations it wishes to adopt and then to select a definition according to that preference, but rather to assess which of Congress's definitions best describes broadband Internet service and then to regulate accordingly."[5] T-Mobile's conception of how the Commission should "describe[ ]" broadband is hopelessly outdated, based as it is on assumptions that the Commission made in 1998 – based on a very different market for broadband and for Internet access.[6] Yet at least T-Mobile starts with the proper question for the Commission to address.

Contrast this approach with those commenters who call on the Commission to refrain from reclassification because it would be "unwarranted and unnecessary," allegedly because the D.C. Circuit's affirmance of substantive authority under Section 706 "is sufficient" for "rules prohibiting blocking" and requiring commercially reasonable dealings between broadband ISPs and edge providers.[7] The sufficiency of Section 706 is gravely in doubt, at best; but the claim misses the point. If broadband Internet access is indeed a telecom service, then the Commission cannot refrain from restoring the Title II classification on the basis of a fanciful substitute.

The central theme of AT&T's comments in the present proceeding is that the Commission's "guiding task" must be "to maintain the balance reflected in the 2010 rules by addressing the legal concerns raised by the *Verizon* court."[8] Balance is a wonderful thing. The Commission certainly can achieve it under the flexible approach that Title II commands. But the

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[5] Comments of T-Mobile USA, Inc., GN Docket No. 14-28, at 19 (filed July 18, 2014) ("T-Mobile Comments").

[6] *See* Free Press July 2014 Comments at 72-75; *see also infra* Part I.B.

[7] Comments of the American Cable Association, GN Docket No. 14-28, at 41 (filed July 17, 2014).

[8] *See, e.g.*, Comments of AT&T Services, Inc., GN Docket No. 14-28, at 12 (filed July 15, 2014) ("AT&T Comments").

Commission's guiding principle here must be the law that Congress wrote for the agency and for broadband telecom services – not just the outcome that AT&T (or anyone else) desires.

Others who oppose the adoption of sensible and meaningful Open Internet rules under Title II can be a conspiratorial and condescending crew. And they certainly don't mind contradicting themselves either (as we'll see below, when we discuss varying views on the Commission's power to prevent harmful practices under Section 706 versus Title II). Opponents of reclassification sometimes whisper that Open Internet proponents don't know what Title II entails, suggesting preposterously that all of us call for restoration of Congress's intent because we're bent on winning rules to burden ISPs and help edge companies.[9] Then these same opponents will flip that conspiracy theory on its head and suggest that Open Internet efforts are just a Trojan Horse for imposing additional Title II regulation on broadband carriers.[10] Both inapposite claims rest on baseless speculation about the motives of Open Internet advocates, as well as demonstrably false assumptions about the impact of such rules and classifications.

Yet speculate as they may, none of these far-fetched theories can do anything to change the law nor relieve the Commission of its duty to enforce that law. And Title II unmistakably applies to broadband Internet access – telecommunications service that it is – even though the Commission made the mistake of changing that classification in its decisions last decade. As we have said time and again, when idle chatter turns to guessing the "real" motivation for adherence to the law and a return to Title II, we rely on Justice Scalia (that noted leftist rabble rouser, legal lightweight, and big government fan) and his landmark dissent in *Brand X*.

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[9] *See, e.g.*, Phoenix Center, "Title II Reclassification Will Force Broadband Service Providers to Charge Edge Providers for Terminating Access," Press Release, Sept. 9, 2014 ("Reclassification is mostly promoted by people with no idea about what Title II formally entails.").

[10] *See, e.g.*, Comments of Verizon and Verizon Wireless, GN Docket No. 14-28, at 46 (filed July 15, 2014) ("Verizon Comments").

As indicated in his analysis of the decision to treat cable modem as an information service rather than a telecom service, whenever the Commission attempts "to concoct a whole new regime of regulation (or of free-market competition) under the guise of statutory construction," the agency's "implausible reading of the statute . . . exceed[s] the authority given it by Congress."[11] A "whole new regime of non-regulation [might] make for more or less free-market competition, depending upon whose experts are believed" – but it is not grounded in the law. The Commission's decision to remove broadband from the telecommunications services classification was wrong when issued, as Justice Scalia easily figured out. It's even more clearly wrong today. There is no time like the present to reverse it.

B. Broadband Internet Access is a Telecommunications Service That Does – and Must – Allow Broadband Users to Send and Receive Information of Their Choosing.

The Commission's proposal for protecting the Open Internet with Section 706 contains fatal flaws. The reliance on it from certain quarters of the 8th Floor is all the more puzzling when you review the Chairman's statements about the true nature and true importance of broadband Internet access service. His separate statement on the *Notice* that launched this proceeding confirmed, both eloquently and briefly, the need for common carriage – no matter what network technology or facilities we use to connect and communicate. Chairman Wheeler summarized not only what consumers expect from the market, but what he intended this proceeding to preserve. He said the connectivity that broadband Internet access users purchase "should be open and inviolate; it is the simple purchase of a pathway."[12]

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[11] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (internal quotation marks omitted).

[12] *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) ("*Notice*") (Statement of Chairman Tom Wheeler).

As we explained in our initial comments, the phrase "the simple purchase of a pathway" is an easily understood lay definition of a common carrier telecommunications service.[13] The more technical definition is that a telecom service is an offer to the public that enables the transmission of information of a user's choosing, between points specified by the user, without change to the form or content of that information.[14] Outside of this proceeding, Chairman Wheeler's understanding of the need for open and inviolate pathways is even more pronounced.

For instance, in his opening day blog upon taking the Chair in November 2013, Chairman Wheeler outlined his view of the "historic compact between networks and users" – emphasizing that "a change in technology" used to provide the service "does not change the rights of users or the responsibilities of networks."[15] When viewed in that light, it's difficult to comprehend how and why the Federal Communications Commission became such a willing perpetrator in the utter disappearance of mass-market broadband telecommunications and in the massive market failure that this disappearance represents.[16] If broadband carriers and their few supporters in this docket have their way again, the Commission would once again be led to conclude that there is no such thing as residential broadband telecommunications services any more – a result that would have shocked the authors of the 1996 law expressly intended to help "American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[17]

Chairman Wheeler's dedication to preserving open and inviolate pathways did not end last November with his first days at the Commission, and in fact his concern for them was on

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[13] *See* Free Press July 2014 Comments at 13.

[14] *See* 47 U.S.C. § 153(50), (53).

[15] Tom Wheeler, FCC Chairman, "Opening Day at the FCC: Perspectives, Challenges, and Opportunities," Official FCC Blog, Nov. 5, 2013.

[16] *See* Free Press July 2014 Comments at 88-89.

[17] Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56.

display again in one of his most recent speeches. Focusing largely on the lack of competitive options for the high-speed, wireline broadband services that are rapidly becoming a necessity for modern uses, he noted that "the entire Open Internet proceeding is about ensuring that the Internet remains free from barriers erected by last-mile providers."[18] As he noted in those remarks, "the exercise of uncontrolled last-mile power is not in the public interest. This has not changed as a result of new technology."[19]

Preserving open and nondiscriminatory communications pathways, and protecting them against the exercise of uncontrolled power over the last mile, are the paramount aims of our nation's communications laws. These communications pathways are nothing less than the foundation of our democracy and our entire economy. It would be surprising to learn that we had somehow outgrown our need for them, or that technological advances had diminished their users' rights. Yet this is the bizarre notion that some Section 706 supporters champion: carriers' "commercially reasonable" judgment, subject to review by a Commission with no real power to stop harmful practices, now trumps the choices of those sending and receiving the information.

This would be not just an unfortunate result, but clearly the wrong one too if the Commission were to apply the definitions in the Act correctly. Commenters properly analyzing the broadband Internet access service offered today, and reading the statutory definitions faithfully, understand that the Commission's prior classification decisions no longer make sense – if ever they did. We can contrast the good readings of the facts and the law with the bad ones made by other commenters who cling to long-obsolete concepts about Internet access providers solely to justify continued misapplication of the statutory definitions to broadband carriers today.

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[18] Prepared Remarks of FCC Chairman Tom Wheeler, "The Facts and Future of Broadband Competition," Sept. 4, 2014.

[19] *Id.*

For instance, it is of little import and vanishing significance today that the Commission in 1998 suggested that "Internet access services [were] appropriately classed as information, rather than telecommunications, services."[20] These Internet access providers were *not* the same types of entities as the broadband ISPs of today, nor did they offer the same kinds of services or own the same kinds of network assets. The *Stevens Report*, the 1998 opinion on which T-Mobile relies in its argument on this point, provided a list of the kinds of Internet access providers to which it applied this determination: America Online, Earthlink and the Microsoft Network, along with numerous other dial-up Internet access providers and what we would today refer to as "over-the-top" providers.[21] The Commission also found that the kinds of Internet access providers it was discussing back then "generally do not provide telecommunications"[22] and "typically, own no telecommunications facilities"[23] but instead leased lines and acquired telecommunications capability from ILECs and others. That has all changed today, of course, when those same ILECs, cable companies, and wireless providers all serve as facilities-based ISPs.

An even sloppier reading of the *Stevens Report*, or perhaps a downright disingenuous one, turns up in the comments of the National Cable & Telecommunications Association. Rather than merely misunderstanding this distinction between facilities-based broadband ISPs and third-party ISPs, NCTA actively works to obscure the obvious differences between today's broadband providers and the over-the-top applications that its member cable companies helped to drive out

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[20] T-Mobile Comments at 19 (citing *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶ 73 (1998) ("*Stevens Report*")).

[21] *See Stevens Report*, ¶ 63.

[22] *Id.*, ¶ 15; *see also* Free Press July 2014 Comments at 72-75 (discussing these and other differences between the broadband and ISP markets today and those extant in 1998 when the *Stevens Report* drew its conclusions).

[23] *Stevens Report*, ¶ 81.

of business.[24] On NCTA's read of the *Stevens Report*, that 1998 document warned "that regulating broadband Internet access providers as common carriers could 'seriously curtail the regulatory freedom that . . . was important to the healthy and competitive development of the enhanced-services industry.'"[25] But to prove and even stretch its point, NCTA unfortunately substituted a few key words in the primary source. The *Stevens Report* in this passage did not discuss facilities-based "broadband Internet access providers," as NCTA's selective paraphrase would have it. As the passages we cited above make clear, the Internet access providers of that time rarely if ever owned their own telecom facilities. In reality, the paragraph that NCTA cited refers not to broadband network providers but "a broad range of information service providers" like the third-party, over-the-top ISPs of that now bygone era.[26]

NCTA's argument is thus perfectly circular – a trait we shall also see again when looking at Open Internet opponents' claims below. NCTA's line of reasoning amounts to nothing more than the suggestion that the Commission should treat Internet access service as an information service because it is appropriately classed as an information service. But to even enter that circle in the first place, NCTA bends the words of the *Stevens Report* to warp the document and fit it to the cable lobby's story.

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[24] *See, e.g.*, Free Press July 2014 Comments at 5:

> The Commission's [classification decisions] based on those facts, and its predictions of how the market would develop, have been proven spectacularly wrong. For example, in 2002 and 2005 the FCC predicted that classifying broadband Internet access as an integrated information service would promote both inter- and intra-modal competition, and that third-party ISPs would continue to gain access to last-mile facilities. What happened instead was a tightening of the duopoly home access market and the complete annihilation of the independent ISPs.

[25] Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28, at 18-19 (filed July 15, 2014) ("NCTA Comments").

[26] *Stevens Report*, ¶ 46.

Other commenters offer a far more convincing (and less convoluted) take on the law and the validity of the Commission's classification precedents. Ad Hoc Telecommunications Users Committee explains that "changes in the engineering and deployment of network and Internet technologies" mean that the Commission's classification of Internet access as an information service "is simply out of step with reality."[27] As Ad Hoc reports, most Internet access providers in the 1990s "did not provide telecommunications service at all; end users obtained those services separately from their local telephone company."[28] Compared to that predecessor, "today's Internet access would be unrecognizable."[29] Now, "customers obtain Internet access service on an entirely separate basis from web hosting, web browsers, applications, . . . customer premise equipment . . . , email servers" and other functions – all of which "ISPs are free to offer" but "no longer 'inextricably intertwined' with Internet access to create an information service."[30]

AARP concludes that broadband "disrupted the dial-up Internet access world" on which the classification decisions rested.[31] "[T]he nature and usage of Internet access services have fundamentally changed since the early 2000s, making Title I classification an historical anachronism"[32]; "broadband facilities are primarily utilized to provide telecommunications," so the Commission's "determination that information services were inexorably linked to telecommunications is no longer the case."[33] AARP illustrates that third-party ISPs no longer sit

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[27] Comments of the Ad Hoc Telecommunications Users Committee, GN Docket No. 14-28, at 1-2 (filed July 18, 2014) ("Ad Hoc Comments").

[28] *Id.* at 5.

[29] *Id.* at 6.

[30] *Id*.

[31] Comments of AARP, GN Docket No. 14-28, at 5 (filed July 15, 2014) ("AARP Comments").

[32] *Id.* at 6.

[33] *Id.*

as intermediaries between end-users and edge companies. E-mail is now provided by those third parties directly, and U.S. broadband providers do "not even mak[e] the top 25 of U.S. web hosting services."[34] Those broadband providers may or may not offer these types of applications to their customers, who may or may not use the broadband providers' versions of them; but "the broadband service that consumers rely on primarily today is *pure transmission* between their device and remote computing resources or content of their choice."[35]

NASUCA hits upon the same conclusion, explaining that "[t]he FCC has spent more than a decade seeking to create a patchwork regime that has failed to adequately address the issues associated with net neutrality (and evolving telecommunications networks in general)" and that the obvious answer is "reclassification of broadband transport and access service as Title II."[36] So do a broad and diverse range of consumer advocates, public interest, technology policy, and Internet freedom groups, including the ACLU, Common Cause, Consumers Union, the Electronic Frontier Foundation, Public Knowledge, and the Open Technology Institute.[37]

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[34] *Id.* at 11 (noting as well that "even DNS service is no longer the exclusive domain of broadband providers – broadband subscribers regularly utilize third-party DNS services to improve their Internet experience").

[35] *Id.* (emphasis in original); *see also id.* at 12 (citing a rise of over-the-top video, audio, and voice applications that "clearly illustrates broadband providers supply of *telecommunications*" that constitutes "nothing more than pure transmission").

[36] Comments of the National Association of State Utility Consumer Advocates, GN Docket No. 14-28, at 9 (filed July 15, 2014).

[37] *See, e.g.*, American Civil Liberties Union Comments, GN Docket No. 14-28, at 2, 7 (filed July 15, 2014); Comments of Common Cause, GN Docket No. 14-28, at 13-15 (filed July 15, 2014); Comments of Consumers Union, GN Docket No. 14-28, at 9 (filed July 15, 2014); Electronic Frontier Foundation's Comments, GN Docket No. 14-28, at 13-14 (filed July 15, 2014) ("EFF Comments"); Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, GN Docket No. 14-28, at 60-80 (filed July 15, 2014) ("Public Knowledge Comments"); Comments of the Open Technology Institute at the New America Foundation, and Benton Foundation, GN Docket No. 14-28, at 19 (filed July 17, 2014) ("OTI Comments").

It is not just these independent policy experts and end-user advocates that support the application of Title II to broadband, reasoning as EFF does that "[r]eclassification is pure common sense" because broadband Internet access is a transmission service.[38] It is also broadband providers themselves who reach this conclusion, dispelling the inside-the-Beltway conventional wisdom that the common carriage question pits Internet users and edge companies on one side against the network infrastructure providers on the other.

Thus, as COMPTEL reasons in its excellent comments in this proceeding, the Commission should use Title II authority both to "protect against discrimination and blocking while simultaneously making clear that it will not tolerate anticompetitive practices in the exchange of Internet traffic."[39] As NTCA asserts, "[c]ircumstances have evolved such that it is time for the Commission to reexamine" its earlier broadband classification framework, "particularly and specifically as it applies to *the transport and transmission component* underpinning broadband Internet access and carriage of data across networks of all kinds."[40] There can and will be discussions about the application of specific provisions in Title II to different aspects of broadband Internet access and related services. Yet there is support from all corners that it is long past time to have those discussions rather than continuing to ignore the law.

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[38] EFF Comments at 13; *see also* Comments of the Center for Democracy & Technology, GN Docket No. 14-28, at 9 (filed July 17, 2014).

> The service that broadband providers offer to the public is widely understood today, by both the providers and their customers, as the ability to connect to anywhere on the Internet . . . for whatever purposes the user may choose. It provides a classic example, in other words, of "transmission, between or among points specified by the user, of information of the user's choosing."

Id. (citation omitted).

[39] Comments of COMPTEL, GN Docket No. 14-28, at 9 (filed July 15, 2014) ("COMPTEL Comments").

[40] Comments of NTCA – the Rural Broadband Association, GN Docket No. 14-28, at 8 (filed July 18, 2014) ("NTCA Comments") (emphasis in original).

C. Title II Would Not Turn All Internet Applications into Telecommunications Services, Nor Require Disparate Treatment for Similar Services or Protocols.

As we explained in our initial comments, the service that broadband providers sell to the mass market is a common carrier service under the *NARUC* test, and a telecommunications service under the Act.[41] That service transmits "between or among points specified by the user, [ ] information of the user's choosing, without change in the form or content of the information as sent and received."[42] Cisco, for one, attempts to talk its way out of the first part of this clear statutory definition by claiming somewhat ridiculously that "[b]roadband Internet access users certainly don't choose the specific points of transmission – the information they are requesting may be delivered from any number of different servers in different locations using different routes."[43] This is much like saying that mobile voice is not a telecom service because the caller has no way of knowing the location of the person she is calling; that her dialing a customer service line involves no telecom service because she doesn't know the precise identity of the person who will answer; or that during her interconnected VoIP call she has no idea who she is calling because the packets she sends may travel "using different routes." These types of arguments can be dismissed out of hand.

Slightly thornier, on the surface at least, is the notion that broadband Internet access performs some kind of "change in the form or content of the information as sent and received," because, well, computers. That's about it. Yet as we noted in our initial comments, if a

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[41] *See* Free Press 2014 Comments at 63-71; *see also* Public Knowledge Comments at 69 ("Under the traditional *NARUC* analysis, it is clear that broadband providers are common carriers. . . . [T]he general public primarily uses internet access service as a conduit for third-party content—to interact with information services such as email and social networking, to shop online, to watch movies and listen to music, . . .").

[42] 47 U.S.C. § 153(50).

[43] *See* Comments of Cisco Systems, Inc., GN Docket No. 14-28, at 26 (filed July 17, 2014) ("Cisco Comments").

broadband carrier did use protocols modifying the content or format of customer data, this would break the Internet and make it completely insecure. Encryption protocols like HTTPS and IPSEC so critical to online commerce wouldn't work. When a user connects a computing device to her broadband access network, she can send information in IP format to any other computer connected to the Internet. Her carrier, and those with which it interconnects, look at IP packets' address headers and route them on their way. This is a basic service, not an enhanced one.[44]

Nothing in the comments submitted by those opposing restoration of Title II refute this basic reality. Carriers such as Time Warner Cable characterize its offering of software commonly available from other vendors, such as parental controls and online storage, as somehow "inextricably intertwined" features that render its telecommunications service an information service.[45] Yet these services are no more inextricably intertwined with the basic transmission service than they are when offered by third-party vendors unaffiliated and even unknown to Time Warner Cable. The broadband Internet access service that this cable company offers allows its customers to use such information services, and just as all information services are these functions are made available "via telecommunications."[46] The same analysis applies whether or not Time Warner Cable offers that additional information-processing capability itself or merely the pathway used to reach other purveyors of those applications. This claim is ridiculous, as well as contrary to the plain intent of Congress.

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[44] *See* Free Press 2014 Comments at 68-69; *see also* NTCA Comments at 6 ("[W]hen the rather straightforward exchange of data between parties was not clouded by claims that the exchange itself was somehow 'enhanced' merely because the data originated in a certain type of protocol, the industry and consumers had a regulatory backstop to ensure that connections would be maintained and consumers would not suffer . . . .").

[45] *See* Comments of Time Warner Cable Inc., GN Docket No. 14-28, at 12 (filed July 15, 2014) ("TWC Comments").

[46] 47 U.S.C. § 153(24).

So too is the notion advanced by AT&T that reclassifying its own broadband service as a Title II service would somehow require extending that same classification "to Internet search engines and online advertising companies such as Google; to online video services like Netflix; and to cloud-computing services like Amazon.com's EC2,"[47] making these information service offerings into telecommunications services. This is a ludicrous proposition. First, many of these firms utilize in portions of their business already *today* an array of enterprise broadband offerings that are today classified as Title II telecommunications services (in addition to reliance on private carriage transmission services). Yet retaining the classification of enterprise broadband as a Title II service did not magically transform the services offered by those who utilize these inputs into Title II carriers themselves.

But more importantly, restoring Title II services that transmit information of a user's choosing, between points of that user's choosing, without change in the form or content of that information, does not somehow "contaminate" the real information services that are delivered via telecommunications but that actually *do* transform or generate information. Google stores information on its servers, and sends this information to users upon request. This is an information service, just as stock ticker and news archive services were considered enhanced services under the *Computer Inquiry* framework developed and refined in the 1960s and 1970s.

Just like NCTA above,[48] AT&T attempts an argument so circular that you could roll it right down K Street. It claims that broadband is an information service because it is an information service; and by that illogic, indistinguishable from all others. Yet there is a perfectly sound method to distinguish between things like the stock tickers (or modern day stock apps on your smartphone) and the telecommunications services (currently masquerading as "information

[47] AT&T Comments at 57.

[48] *See supra* note 26 and accompanying text.

services") that we all use to access that information. AT&T's argument only sounds semi-coherent because of the Commission's mistaken classification decisions of the past decade or more, which AT&T assumes but does not show to be true. With its scare tactics, AT&T ignores decades of unambiguous Commission precedent on "contamination theory."[49] The Commission should return the favor and ignore AT&T's attempts to mislead. The Commission must instead simply focus on its own well established history and, of course, the definitions in the law.

D. Broadband Reclassification Would Not Require the Commission to Carry Any Extra Burden of Proof or Overcome Any Special Legal Hurdles.

Lastly when it comes to the question of the proper definitions and treatment for broadband Internet access, some broadband industry commenters suggest[50] that the Commission faces an insurmountable barrier to reclassification in the form of the Supreme Court's decision in *Fox Television Stations, Inc. v. FCC*.[51]

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[49] In the *Frame Relay Order*, the Commission rejected AT&T's argument that sale of frame relay service to customers only on an "enhanced service" basis made the entire offering into an enhanced service. The Commission also rejected AT&T's interpretation that contamination theory applied in that instance. Contamination theory does hold that if an enhanced service provider sells a service that is a combination of computing and basic transmission, the entire service is "enhanced," and the provider is not obligated to abide by Title II. As the Commission made clear in the *Frame Relay Order*, however, contamination theory is not meant to apply to facilities-based providers such as AT&T because that "would allow circumvention of the Computer II and Computer III basic-enhanced framework" and avoidance of the framework in those decisions "for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result." See *Independent Data Communications Manufacturers Association Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶¶ 41-44 (1995) ("*Frame Relay Order*") ("The assertion . . . that the enhanced protocol conversion capabilities . . . . bring it within the definition of an enhanced service is beside the point. Under the Commission's *Computer II* and *Computer III* decisions, AT&T must unbundle the basic frame relay service, regardless of whether the [service] offering also provides a combined, enhanced protocol conversion and transport service for those customers who require it.").

[50] *See, e.g.*, Verizon Comments at 58; Cisco Comments at 25.

[51] 556 U.S. 502 (2009).

Contrary to these commenters' baseless assertions, that decision in fact affirms that the Commission has no higher burden for making a change in its policies of the sort that reclassification would entail. The *Fox* Court said that "the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one."[52] While the Commission would indeed need to provide a "detailed justification" beyond that which might "suffice for a new policy created on a blank slate," it is not that "further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[53]

Should the Commission agree with the reasoning put forward by Free Press and all of the other commenters formally calling for reclassification, the agency would of course explain the need for the change and the reasons that prompted it. The Commission wouldn't write "we reclassify, so there!" in the Federal Register one day, and leave it at that. It would proceed through an explanation much like the one in these replies, in our initial comments, and in dozens other filings in the record. That explanation would more than suffice for purposes of *Fox*.

Verizon argues not only that reclassification would "face a higher legal hurdle than the Commission's prior rules" – although it wouldn't – this giant broadband telecom provider also has the nerve to complain that reclassification "would result in years of investment-deterring litigation." Free Press laid bare in our initial comments the utter lack of evidence for carriers' horror stories about the investment-deterring impacts of Title II. We revisit some of those conclusions briefly in Part III below.

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[52] *Id.* at 515 (emphasis in original).

[53] *Id.*

But coming from the company that filed suit, and put us all through four more years of wrangling by having those 2010 "prior rules" struck down, this claim about the perils of litigation displays either an utter lack of self-awareness or a bracingly dark sense of humor on Verizon's part.

Suffice it to say that the Commission undoubtedly will be sued in this proceeding no matter what it does. The Commission gets sued when it falls out of bed in the morning, thanks to our ever-litigious cadre of hundred billion dollar conglomerates so often offended – nay, wounded – by the agency's decisions. The question is whether this time the Commission will choose a strong basis on which to defend that lawsuit, or whether it will retreat once more to compromised grounds and incoherent theories. The answer should be clear. It should choose the strong foundation of Title II rather than lose for the third time defending a bad attempt at Justice Scalia's "non-regulation."

II. TITLE II OFFERS A FLEXIBLE FRAMEWORK FOR PRESERVING OPEN COMMUNICATIONS PATHWAYS IN COMPETITIVE MARKETS.

A. The Core Principles of Title II Apply to Modern Telecommunications Networks and Markets, Not Just to Copper Wire Monopolies.

Title II is the law applicable to broadband Internet access service, and there's no way around it. That much is clear from Part I of these replies, immediately above. What's more, Title II is the best and the only way to protect the open Internet, prevent broadband provider overreach, and overcome the difficulties caused for that endeavor by the agency's last loss in court on this topic in January 2014. That much will be made clear again in Part IV below.

Yet the saddest part of prior Commissions' labors to avoid the proper application of the law, and of the current Commission's exploration in this proceeding of doomed routes around the law once again, is that Title II causes none of the side effects that its opponents contemplate.

Title II represents a highly deregulatory framework for competitive telecommunications markets, just as Congress intended, if only the Commission would follow that framework faithfully. As outlined comprehensively in our initial comments, Title II is hardly just for communications monopolies. It is not intended to apply solely to voice communications. It is not a burdensome regulatory regime, but a paradigm drawn from the 1996 Telecommunications Act's preference for competition over regulation.[54] It is not synonymous with rate regulation, nor with open access and resale requirements for anyone who cares to read the operative statutes.[55] And whatever Title II entails on the face of those statutes, the Commission can (and frequently does) forbear from applying *all* of the provisions in Title II to different telecommunications services, save for those laws necessary to preserve nondiscriminatory outcomes, open pathways, and users' rights to access the information of their choosing on telecom networks.[56]

COMPTEL echoed these facts in its initial comments here, noting that "[t]he Commission's forbearance authority is more than adequate to prevent any regulatory overreach following Title II classification" and that a "'light-touch' Title II regulatory approach has proved successful for wireless providers" among others.[57] That is the fact about the famed "light-touch" for mobile service that Title II opponents always overlook. Wireless voice service always has been and remains to this day a telecommunications service. From the tenor of this debate, some observers might be led to believe that light-touch Title II regulation is an oxymoron. Nothing could be further from the truth. Title II is where the light touch that CTIA so often praises got its start, and where that regulatory framework remains at home today.

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[54] *See* Free Press July 2014 Comments at 26.

[55] *See, e.g.*, *id.* at 41, 44-45.

[56] *See id.* at 39-42.

[57] *See* COMPTEL Comments at 21.

For all of its incessant repetition of the benefits from these light-touch Title II rules, CTIA continues to cast doubt on the use of a similarly light version of Title II for broadband Internet access services. Stretching back at least to 2010, CTIA has attempted to develop an argument against using for broadband the same successful approach set out in Section 332(c)(1)(A) of the Act. That law permitted the Commission to forbear from much of Title II for wireless voice service, even before the passage of more general forbearance authority in 1996, so long as nondiscrimination and protections from unreasonable practices were assured.

First CTIA claimed in its 2010 broadband framework comments that the analysis depends on the direction in which we're traveling. Somehow, application of the same principles to two similar services would have wildly different consequences, per CTIA, if one were previously subject to greater regulation and the other subject to less.[58] CTIA posits a meaningful difference based on the fact that "wireless service was taken *out of* the highly-regulated common carrier environment and moved *into* a largely deregulated environment."[59] CTIA then suggests that application of the very same laws that apply to mobile voice – or, in fact, application of even fewer provisions in Title II than apply to mobile voice – would shock the broadband industry by moving it into a heavily regulated environment. All of this nonsensical train of thought misses the point that core common carrier principles are not unduly burdensome, and that application of the same principles in each instance would have the same beneficial effects.

CTIA finished its breathless warnings in 2010 by noting that it was *Congress* rather than the Commission who prescribed continued adherence to Sections 201, 202, and 208 for wireless voice – ignoring the simple facts that (i) Congress left those same provisions available to the

[58] Comments of CTIA – the Wireless Association, GN Docket No. 10-127, at 40 (filed July 15, 2010) ("CTIA 2010 Comments").

[59] *Id.* (emphasis on prepositions in original).

Commission for all telecom services (including broadband telecom services such as those described in Part II.B below) and (ii) it was the Commission that wrongly chose not to retain the telecom service classification and Sections 201, 202, and 208 for wireless broadband. Lastly, CTIA proclaimed in 2010 that "nowhere in the Commission's regulatory framework for wireless voice are any of the net neutrality principles that are being considered as a part of this proceeding" – forgetting the simple reality that the Open Internet rules under consideration then as now are nothing more than a differently articulated set of common carrier requirements to serve all comers on indiscriminate terms.[60]

Has CTIA seen the light in the four years since filing of those 2010 comments? Decidedly not. Flashing forward to this new proceeding, we find the association once more bemoaning the potential application of a few key provisions in Title II to its members' wireless broadband offerings – even when these same provisions already apply unequivocally to those same companies' wireless switched voice products. According to CTIA, for instance, the application of Section 202's prohibition on *unreasonable* discrimination would "severely limit the flexibility that allows mobile broadband providers to manage limited network resources and experiment with new business models."[61] Should anyone observing this proceeding wonder what all the fuss is about, there you have it: the trade association representing the nation's largest, most dominant wireless providers beseeching the Commission to grant them the freedom for *unreasonable* discrimination, based on the apparent belief that reasonable discrimination and allowances for network management do not allow for what wireless carriers demand of the agency charged with promoting the public interest.

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[60] *Id.* at 41.

[61] Comments of CTIA – the Wireless Association, GN Docket No. 14-28, at 49 (filed July 18, 2014) ("CTIA 2014 Comments").

CTIA even chides Free Press for warning (correctly) against the dangers of wireless discrimination and blocking in our own 2010 comments, with the association calling on everyone to "applaud" policies permitting providers to block and discriminate against those few apps nominally protected by the 2010 Open Internet rules' inadequate protections for mobile.[62]

Luckily, other parties understand the value of maintaining workable and enforceable protections against blocking and discrimination on the basis of Sections 201, 202, and 208 in Title II of the Act. And they understand that the Commission can and would forbear from other provisions. We noted in our initial comments that in contrast to the Section 706 proposal floated in this proceeding, "Title II . . . is built on a long history that . . . is highly deregulatory and bound by a very specific objective: to ensure that the practices of telecommunications carriers are not unjust or unreasonably discriminatory."[63] AARP agrees,[64] saying that the Commission

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[62] *See id.* at 13. The weak rules adopted for mobile in 2010 permitted AT&T to prohibit the use of FaceTime on its network for all but a limited subset of its customers when mobile use of that application became possible. This continued an AT&T Mobility tradition of inhibiting use of applications that compete with the carrier's legacy voice business and eat into those revenues. *See* Matt Wood, "More Weasel Words from AT&T," Free Press Blog, June 6, 2014. As CTIA flashes the applause sign for discrimination, AT&T on cue praises its own handling of the FaceTime rollout. *See* AT&T Comments at 24-25. Contrary to AT&T's rosy hindsight, its mishandling of the FaceTime situation – and its apparent violation of the 2010 rules in the process – proved the same harms that AT&T glibly dismissed in its own 2010 reply comments. *See* Reply Comments of AT&T Inc., GN Docket No. 09-191, at 20 (filed Apr. 26, 2014) ("[A]s a practical matter, broadband providers can[not]block traffic.").

[63] Free Press July 2014 Comments at 142.

[64] AARP Comments at 41 ("[T]he Commission should reclassify and implement a policy of forbearance, i.e., the Commission should impose only the Title II requirements necessary to enable the Section 706 framework that it designed in the *Open Internet Order*."). AARP relies on the *PCIA Forbearance Order* precedent that our initial comments likewise emphasized. *See, e.g.*, Free Press July 2014 Comments at 30 n.43. That order established that "Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years." *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 15 (1998).

could and would forbear from most provisions in Title II, while preserving those required to protect and promote the Open Internet. That means chiefly Sections 201 and 202, because "[a]lthough these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis."[65]

Commenters such as EFF, Ad Hoc, and Public Knowledge emphasized this same truth in their submissions. They argued persuasively that any new Open Internet rules should be "enacte[d] and enforce[d] based on Title II authority," with bright-line "prohibitions on blocking, application-specific discrimination, and paid prioritization," but with forbearance "from any common carrier regulation that is not clearly essential to meet the above goals."[66] EFF noted correctly as well that the Commission can forbear on its own motion, without any of the petitions and the process that broadband providers so often claim to dread.[67] "The Commission," thus, "can easily avoid unnecessary regulation of Internet access, despite its status as a telecommunications service, by using the Act's forbearance authority to de-regulate Internet access services wherever marketplace competition protects consumers and the public interest."[68] And while some public interest groups urge the Commission to *use* its this authority judiciously, that is precisely because forbearance is "a powerful tool" granting "the Commission flexibility to respond to a dynamic marketplace."[69]

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[65] *PCIA Forbearance Order*, ¶ 15.

[66] EFF Comments at 16.

[67] *Id.* at 16 n.53 (citing *Cable Modem Declaratory Ruling*, ¶ 94); *see also* Free Press July 2014 Comments at 42 & nn.70, 72 ("[T]he Commission forbore on it own motion, and on a national basis, from applying sections 203, 204, 205, 211, 212 and 214 to CMRS providers").

[68] Ad Hoc Comments at 3.

[69] Public Knowledge Comments at 80.

B. The Commission's Experiences With the Wireless Voice, Enterprise Broadband, and Rural LEC DSL Markets Illustrate the Deregulatory Nature of Title II.

In their comments in this docket, AT&T and Verizon try to paint the problems with reclassification in the starkest possible terms.[70] There is one general flaw in their portrait, however: it may be an imaginative masterpiece, but it bears no resemblance to reality.

AT&T was not always so disinclined to retain Title II. Once upon a time, AT&T was an actual competitor, in that middle period between the old Bell monopoly and the new regional monopolies reconstituted with SBC's purchase of the company. When that middle-period competitive company was not yet so heavily involved in last-mile wireline and wireless businesses as its present-day namesake, then wouldn't you know it, AT&T held very different views on matters of competition policy, nondiscrimination law, and even Title II itself. So in 2002, an AT&T representative named Jim Cicconi met with an FCC Commissioner named Kevin Martin, and he "affirmed AT&T's opposition to the reclassification of any wireline broadband service as an unregulated Title I service, noting that such a reclassification would produce broad and undesirable consequences."[71] This AT&T representative also noted that the information services classification just placed on the table in 2002 "was unnecessary to create broadband investment incentives" since the rules were "sufficiently flexible to fully compensate the Bell Companies for any new investment in facilities for . . . advanced services."[72]

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[70] *See, e.g.*, Verizon Comments at 46-47 (describing reclassification as a radical and risky step that would jeopardize our nation's goals); AT&T Comments at 55 ("Reclassification of Broadband Internet Access Service Also Would Have Far-Reaching and Unintended Disastrous Consequences for the Rest of the Internet Ecosystem.").

[71] Letter to Ms. Marlene Dortch, Secretary, Federal Communication Commission, from Joan Marsh, Director, Federal Government Affairs, AT&T, CC Docket No. 02-33 *et al.*, at 2 (filed Aug. 16, 2002).

[72] *Id.*

How did AT&T's views of Title II transform so much that yesterday's desirable consequences from retaining Title II for broadband turned into this era's (so-called) "disastrous" ones? Some might point cynically, but fairly, to the change in the nature of AT&T's business after the SBC merger. Others might point, plausibly at least on a superficial level, to the possibility of changed circumstances over years. Yet the truth is that AT&T's feelings about Title II haven't even changed that much when it comes to services other than mass market broadband Internet access. Filing in the special access reform docket in April 2013 – long after the reclassification debates were again underway, though prior to the D.C. Circuit's latest Open Internet remand – AT&T proclaimed the benefits of light-touch Title II provisions for certain non-TDM-based services.[73] AT&T praised the Commission for recognizing the competitive dynamics of that marketplace and therefore *retaining* "Sections 201 and 202 and the Section 208 complaint process" while granting forbearance from requirements such as tariff filing.[74] In its wisdom, according to AT&T, the Commission also retained the "requirement that AT&T offer the underlying basic transmission to enhanced service providers on a nondiscriminatory basis."[75]

Based on the rhetoric in the present docket, you could only imagine that keeping these other AT&T services under Title II's nondiscrimination rule might have destroyed the entire communications industry. But no, both incumbent LECs and their competitors in this space alike happily "invested billions of dollars to deploy state-of-the-art broadband networks, confirming the Commission's conclusion that *forbearance would promote* the paramount federal policy of fostering *deployment of advanced services*."[76]

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[73] *See* Comments of AT&T Inc., WC Docket Docket No. 05-25 (filed Apr. 16, 2013).

[74] *Id.* at 2.

[75] *Id.*

[76] *Id.* at 3 (emphases added).

Let's repeat that one more time. Title II with forbearance can promote broadband deployment, says AT&T. That is just what Congress hoped for in 1996 when it updated the Communications Act – never intending to eradicate nondiscriminatory "telecommunications services" in the process. That kind of result is just what might be expected once the Commission reclassifies broadband Internet access here. But if there must be still more proof that Title II is not the end of world nor an investment dampener, we need look no further than these examples from wireless voice market, enterprise broadband offerings, and even a broad swath of residential broadband DSL services provided to more than *two million* customers in 46 states.[77] More than 1,000 rural phone companies today still voluntarily offer broadband as a Title II common carrier service,[78] with nary a sign of the dangers and damage that larger LECs predict.

C. Reclassification Would Not Require Tariff Filings by Broadband Internet Access Providers, Nor Tie the Commission's Hands on Forbearance from Other Measures.

Some few broadband industry commenters in the docket betray an unnatural fear of tariff imposition under Section 203 of the Act.[79] Public interest advocates walking the halls of Congress also hear frequent whispers about tariffs and their untimely return if the Commission moves ahead with reclassification. Most recently, in a report not yet filed in this docket in our understanding, certain industry-funded analysts have insisted not only that the Commission

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[77] *See* NTCA Comments at 9 (explaining that wireline providers were allowed by the 2005 *Wireline Broadband Order* to "offer the transmission component of broadband Internet access as common carriers under Title II on a permissive basis.") Many rural carriers took this approach in order to take part in in National Exchange Carrier Association ("NECA") tariff pools, which allow small carriers to spread costs and risks amongst themselves. *See* Free Press July 2014 Comments at 46.

[78] *See* Free Press July 2014 Comments at 46. The number of rural LECs participating in these tariff pools is even higher than we suspected and reported in our initial comments, where we put the number at 800. The number in 2012 stood at 1,040 providers. *See* NECA, "Trends: A report on rural telecom technology" (July 2013), http://usa.son-conference.com/files/2014/01/Rural-Telco-Trends-in-the-US.pdf.

[79] *See, e.g.*, CTIA 2014 Comments at 48-49.

would not forbear from Section 203 tariffing requirements for mass market broadband service, but that it *could* not.[80] This is all based on a cocktail of reasons allegedly flowing from the Commission's recognition of a terminating access monopoly for broadband Internet access service providers, as well as the D.C. Circuit's opinion in *Verizon* suggesting that edge providers are in fact customers of every end-user's broadband carrier.[81]

This argument requires no more than a cursory response for now. Suffice it to say that (1) Section 10 forbearance authority has no special disallowance for forbearance from Section 203; (2) the Commission certainly has forborne from tariff requirements for other services, like CMRS during the Section 332 implementation process, that function as "terminating access monopolies" with respect to the customers of individual terminating carriers; and (3) nothing changes in this forbearance authority based on the supposed (and newly suggested) customer relationship between residential broadband providers and the edge companies whose websites and online services their broadband subscribers visit and use.

III. TITLE II DOES NOT HARM BROADBAND PROVIDERS' INVESTMENT LEVELS OR THEIR STOCK PRICES.

In their comments, several broadband providers and their representatives still go to great lengths to scare the Commission away from faithfully implementing the law, suggesting that a return to the deregulatory Title II legal framework would negatively impact future network investment. As shown above in these replies, that's simply not true. The Commission's deliberations in this proceeding must be based in the law and in fact. And the law is clear: if the service in question is in fact a telecommunications service, then Title II applies and the

[80] *See* Phoenix Center, "Title II Reclassification Will Force Broadband Service Providers to Charge Edge Providers for Terminating Access" and accompanying report, *supra* note 9.

[81] *See Verizon v. FCC*, 740 F.3d 623, 653-56 (D.C. Cir. 2014).

Commission has the authority to forbear from the portions of the law that are not required to ensure services are offered in a reasonable and not unreasonably discriminatory manner.

How *specific* policies impact network investment is of course a paramount public interest concern, but these concerns are irrelevant to the central question of whether or not the services are Title II services in the first place. Analyzing these investment impacts also is not a good way to understand or address the massive market failure that the utter lack of broadband telecom service offerings in the United States today would entail, if the Commission were to incorrectly conclude that ISPs are not currently providing telecommunications services.

Fortunately, all the available facts demonstrate conclusively that this debate, specifically about reclassification, Network Neutrality, and network investment levels, is one giant red herring. Broadband providers *want* the Commission (and more importantly, want political Washington) to fear restoration of the law, and they go to great lengths to paint this move as a nuclear option that will cause irreparable harm. Since the amorphous concept of "network investment" is something everyone supports, threatening that a policy will "harm" investment is an easy and effective threat. And that's why industry repeatedly makes it in numerous proceedings,[82] with no attempt ever to explain the mechanics of how such an impact would flow from the policies under consideration, nor an attempt to quantify the size of the impact.

As we've repeatedly explained,[83] a firm's investment decisions are driven by a multitude of factors, chiefly expectations about demand. Regulation or the potential for regulation rarely registers in these decisions, certainly not at the macro-industry level. And to the extent that regulation may impact investment, it matters greatly of course what the regulation or potential

[82] *See, e.g.*, Comments of Free Press, GN Docket 09-191, at App. A (filed Jan. 14, 2010).

[83] *See* Comments of Free Press, GN Docket No. 10-127, at 90 (filed July 15, 2010) ("Free Press July 2010 Broadband Framework Comments"); Free Press July 2014 Comments at 94 n.200.

regulation entails. In the telecommunications context, we've demonstrated quite clearly that the mere applicability of the core of Title II cannot be said to have negatively impacted investment.[84] Numerous segments of the telecommunications industry, from the most heavily regulated RBOCs to the least-regulated enterprise broadband carriers, have all seen substantial increases in network investment under Title II. The sectors removed from Title II have shown declines. These historical investment curves closely track the network investment curves of the cable industry, indicating clearly that market realities, not regulations or expectations about possible future regulations, are what have historically determined investment in the broadband sector.

And as we discussed in our initial comments, what gets lost in the current debate is the fact that *past investment decisions* matter perhaps more than any other factor. If there is network plant in the ground capable of delivering multiple gigabits of capacity to end-users, then there is simply little need for future network investment by the firms that control that infrastructure. Indeed, this is the reality of today's broadband market, where coaxial cable's inherent capabilities have made the cable modem platform the undisputed winner of the platform wars. Consider Comcast, the nation's largest Internet Service Provider. From 2008 through 2012, the company deployed DOCSIS 3.0 throughout its entire footprint and deployed the nation's largest Wi-Fi network, and it did so while *decreasing its network investment each subsequent year* through this time period (see Figure 1 below).[85]

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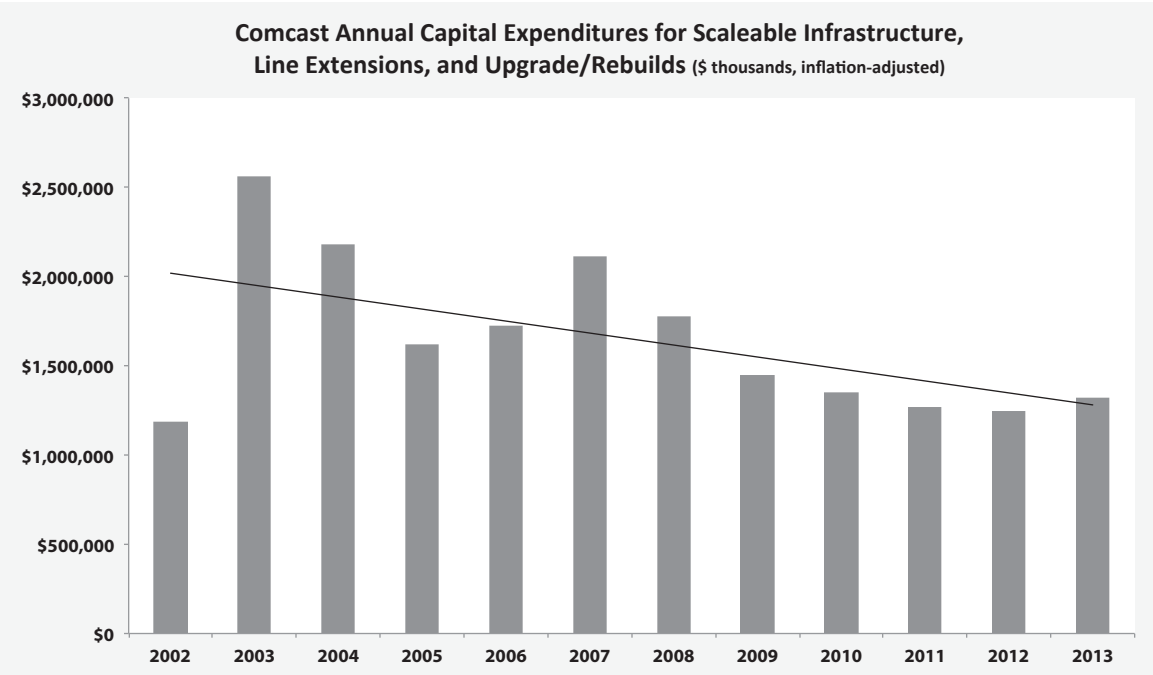
[84] *See* Free Press July 2014 Comments at 90-125.

[85] This figure captures investments that actually went into Comcast's physical plant, or the electronics needed to operate the network. Whenever the cable industry cites its investments, it always includes total capital spending, which includes customer premise equipment such as modems and set top boxes. The Commission should not consider these expenditures in its policy analysis, as they are not *network* investments; they are investments in a segment of the industry that is not beset by natural monopoly issues (and that, in theory at least, should be subject to competition); and given the increasingly exorbitant rental fees, they are an "investment" with a guaranteed return on investment within a matter of months.

Figure 1:



Source: Free Press Research, based on analysis of Comcast SEC filings. "Scalable infrastructure" captures investments that enabled additional pay-TV services as well as higher capacity broadband.

The Commission must ignore the noise around investment and focus on the facts and market fundamentals. As the agency understands, there are few industries in America with barriers to entry as high as those present in last-mile wired and nationwide wireless communications. Though technology has changed how we communicate, nothing has changed about the natural monopoly economics of the last mile, nor the substantial entry barriers in the wireless market. There were two wires connected to most homes three decades ago, and those two wires are still there today (and there is an ever-dwindling number of wireless providers, with no new entry in the past decade). In wireline, coaxial cable had a far cheaper technological upgrade path than copper. Perhaps a fifth to a quarter of the country will see the ILEC make the investment in fiber-to-the-home, but the rest will have to live with something less (short loop vectored DSL copper) or substantially less (non-vectored ADSL). ADSL will quickly fade away,

leaving half the country in monopoly, the other half in duopoly.[86] There is no third-party ISP competition. And there are no basic common carrier obligations, so consumers and content companies have no legal protections against unreasonable discrimination.

These realities facing the Commission, and its duty to faithfully interpret the Communications Act, should drive the agency's decision-making – not industry's fact-free sloganeering and scare tactics about network investment. These facts are well known by industry analysts, and the companies themselves. Yet in their comments, several broadband providers and their representatives could not help but go back to the old playbook, trotting out the same old outright myths and falsehoods about network investment.

The most notable of these falsehoods is the notion that the Commission's 2010 so-called "Third Way" NOI somehow harmed broadband providers' valuations, which cable and telecom filers imply *might have led* to decreased network investment. Consider NCTA's suggestion that the "financial markets' response to the Commission's 2010 proposal to reclassify broadband Internet access service under Title II powerfully demonstrates that even the threat of reclassification can seriously undermine broadband investment."[87] NCTA notes the movement of cable and telecom stocks in the days and weeks following the Commission's announcement of the Third Way proposal, and concludes from these *partial readings* of the share prices of these companies that these changes were *due to the FCC's proposal*, and that these temporary changes in stock valuations impaired "the ability of broadband providers to raise the capital necessary to invest in new networks and to bring innovative services to market."[88] Similarly, in its comments

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[86] *See* Prepared Remarks of FCC Chairman Tom Wheeler, "The Facts and Future of Broadband Competition," *supra* note 18

[87] NCTA Comments at 21.

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

Verizon claimed that the Third Way announcement caused "investors to withdraw capital from the communications sector."[89]

But the Commission should see these claims for what they are: at best ignorant, at worst misleading. As we exhaustively demonstrated in our initial comments,[90] "[w]hatever concerns investors had about the Third Way largely vanished within days, and paled in comparison to the larger macroeconomic jitters created by the European debt crisis and the financial meltdown in Greece."[91] The simple reality is that during the period cited by NCTA, *the entire market was melting down* and many companies and industry sectors with no relation to the Commission saw far larger drops in their valuations. Indeed, as we noted in our comments, during this period many ISP stocks were bright spots in a market performing poorly. Indeed, while "cable shares overall ultimately were down 5.1 percent in May 2010, [ ] this was better than the broader market declines of 10.6 percent for the NASDAQ and 9.1 percent for the Dow."[92]

NCTA and other proponents of their highly misleading stock-market meltdown argument never confront this basic counterfactual: if the Commission's "threat" of Title II harmed ISP valuations, then this threat should have aided the valuations of the edge companies and competitive carriers calling for this policy change; and the data should show a drop in valuations for ISPs, with statistically worse performance for ISPs than for stocks in other sectors. But this simply did not happen. Our review of the changes in various firms' and sectors' valuations for the week preceding and three weeks subsequent to Chairman Genachowski's Third Way speech shows "that not only was the broader market moving down, but the stocks of the companies

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[89] Verizon Comments at 15.

[90] *See* Free Press July 2014 Comments at 112-125.

[91] *Id.* at 115.

[92] *Id.*

calling for reclassification did worse than the ISP stocks. Unrelated sectors like banking also did worse than the ISPs."[93]

Indeed, during the 1-month period described above, SNL Kagan's U.S. Banking Industry index lost 13.5 percent of its value, while the firm's New Media index lost 12.5 percent. During this period the ILECs saw a decline of less than 4 percent while cable companies lost 6 percent. The Commission is powerful, but surely NCTA would not suggest that Chairman Genachowski's speech tanked the banking sector, or more relevant, the edge company sector, and did so with an impact more than three times greater than it supposedly had on ILECs. Yet this is precisely the conclusion that NCTA and Verizon want the Commission to draw, as they seem to think context-free movements in share prices are relevant evidence. As we've shown, this entire discussion is misleading at best, and the Commission should recognize it as such.

Competition and consumer demand spur investment in this industry. A return to the deregulatory application of Title II, which will guarantee consumers legal protection against unreasonable discrimination, will in no way impact a cable company's decision to move from DOCSIS 3.0 to 3.1, nor will it impact most ILECs' decisions to continue avoiding investment in fiber-to-the-home, no matter how great the bonus depreciation tax credits Congress is willing to provide to those same ILECs. Indeed, at the heart of this proceeding is carriers' desire to create bandwidth scarcity and then benefit from that scarcity with discriminatory practices, in order to capture a portion of the economic value occurring at the edges of the network. Allowing rampant "commercially reasonable" discrimination is not going to incentivize broadband investment. It will merely give cable a green light to withhold additional capacity, and will incentivize ILECs to *never* invest in full fiber networks.

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[93] *Id.* at 113.

Finally if there are any concerns that "regulatory uncertainty" might have an impact on network investment, there should be substantial concern about the framework proposed in the *Notice*. The *Verizon* court's finding on the policymaking authority under Section 706 lays out a new and untested legal theory; just as uncertain is the "commercially reasonable" standard. This stands in stark contrast to the history of Title II as applied in non-monopoly industries. Indeed, to the extent that price regulation is the ultimate concern that, according to broadband providers, could impact network investment, such action is completely improbable under Title II but certainly possible under Section 706's call for "timely" deployment aided "price cap regulation."

Yet industry demonizes Title II while cheering Section 706. This alone indicates how little emphasis the Commission should place on industry's claims about investment impacts. And it should signal the dire uncertainty from relying on the Commission's *de novo* reading of Section 706 in place of the plain meaning of the Communications Act, and in favor of Congress's intent when amending the Act in 1996.

IV. BROADBAND PROVIDERS TRY, BUT FAIL, TO OBSCURE THE RELATIVE STRENGTHS OF TITLE II AND SECTION 706 FOR OPEN INTERNET RULES.

Much ink has been spilled already, in this docket and elsewhere, on the relative merits of Title II and Section 706 as the legal bases for new Open Internet rules. Much more ink certainly will be spilled on this question as the Commission wends its way towards a decision in the months ahead. As explained above, this is not the determining factor in the Commission's classification decision, which can and should be based on a fair reading of the statutory definitions regardless of the relative merits of Title II and Section 706 for these rules. Yet it remains an important question for this proceeding, and the answer is clear.

A. 706 Would Not Permit the Commission to Prevent Paid Prioritization, Access Fees, Blocking, Or Other Unreasonable Practices.

There is neither need nor time to repeat in these replies all of the arguments about these two theories, as they play out in the wake of the *Verizon* decision. But there are two key inquiries we can use to boil down the debate to a manageable choice: does Section 706 provide a basis for the Commission to restore and strengthen the protections struck down by case? Whether yes or no, does Title II provide a better basis for the same kinds of principles and protections?

The answer with respect to Section 706 is clear – though it is interesting to watch industry giants contradict each other on this point in the docket. Section 706 does not authorize the Commission to prohibit unreasonable and discriminatory practices by broadband providers. Nor does it even let the Commission reliably prohibit outright blocking, pursuant to the *Notice*'s unworkable "minimum level of service" guarantee[94] or otherwise.

Once more, for those still in doubt about the case, the *Verizon* decision bans the Commission from applying common carrier obligations to providers it has chosen to exempt from common carrier treatment.[95] So the Commission cannot require "broadband providers to serve all . . . without unreasonable discrimination" using its Section 706 authority alone.[96] And the court found that a key indicator of the Open Internet rules common carrier character was that the Commission's 2010 order "ominously declares" (ominous to the court, that is) "it is unlikely that pay for priority would satisfy the no unreasonable discrimination standard."[97]

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[94] *Notice*, ¶¶ 97-104.

[95] *See Verizon v. FCC*, 740 F.3d at 628. As detailed throughout these replies, that exemption was wrong when granted and is long overdue to be corrected with reclassification now. But until the Commission makes a new declaration on broadband, it stands.

[96] *Id.* at 655-56.

[97] *Id.* at 657 (internal citations and quotation marks omitted).

Under a Section 706 regime then, in the words of the *Verizon* decision, the commission must leave "substantial room for individualized bargaining and discrimination in terms" in the provision of broadband Internet access services.[98] This is a result that simply cannot be squared with any concept of meaningful Open Internet rules, which are designed and intended solely to preserve the open and nondiscriminatory communications pathways we all need. As COMPTEL aptly puts it, using Section 706 for the Open Internet rules and adopting the commercial reasonableness standard that the court suggests would "necessarily allow (and indeed invite) broadband providers to discriminate against individual edge providers."[99]

With apologies for resorting to an analogy for a moment, we can perhaps use it to explain the Commission's powerlessness here – and to clarify the depth of this loss, no matter what some academics and analysts improbably have continued to defend as a victory for the agency.[100] The *Verizon* decision says broadband providers can invite anyone they want to the party, and they can treat those guests differently once they get there – or even refuse to admit them in the first place.[101] The Commission cannot require the broadband providers to serve all comers indiscriminately. The Commission is thus unable to ban even unreasonable discrimination.

Now AT&T shows up late for its own party – late as usual, AT&T! – and it tries to take some of the sting out of the Commission's loss. The court has told the Commission in no uncertain terms "you can't ban these practices, period." AT&T attempts to slip an extra word or two into this sentence, just to give the Commission a little bit of false hope. AT&T says to the

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[98] *Id.* at 652 (internal citations and quotation marks omitted).

[99] COMPTEL Comments at 3.

[100] *See* S. Derek Turner & Matt Wood, "Wonkblog Gets It Wrong: The FCC's Shrinking Legal Authority Isn't Enough to Save Net Neutrality," Free Press Blog, Jan. 16, 2014.

[101] For a brief recitation of why the *Verizon* decision precludes the Commission from prohibiting even outright blocking of websites, services, and applications, see Free Press July 2014 Comments at 131.

Chairman "well maybe you can't ban *all* of these practices . . . but surely that means you can ban the bad ones as long as you let the good ones go." To finally bring this party to an end, AT&T argues that the Commission gets to decide after all who's allowed in, so long as it preserves *some* discretion for the broadband provider.

If that sounds like it doesn't makes much sense, that's because it doesn't. AT&T suggests in its comments that the Commission could use its Section 706 authority to institute a flat ban on paid prioritization so long as the Commission allows other forms of traffic differentiation, such as user-directed prioritization.[102] This approach, in AT&T's strained interpretation, would permit broadband providers to "retain sufficient flexibility to make individualized decisions."[103] Yet it would allow for paid prioritization to be banned without the Commission impermissibly instituting *per* se common carriage obligations.

This supposition of a permissible flat ban is a flat contradiction of the ruling in the *Verizon* case. In fact, the court had already anticipated such arguments and rejected them in advance. For one thing, the court "ominously" found even a presumptive ban of paid prioritization to be a common carriage obligation, as we noted above. Yet AT&T would find it permissible to institute this kind of presumptive ban under Section 706 – the very result that the court struck down. Moreover, as an earlier passage in the case makes clear, permitting some user-driven choices would not remove this common carrier obligation that is forbidden to the Commission under Section 706. "[A] limited exception permitting *end users* to direct broadband providers to block certain traffic by no means detracts from the common carrier nature of the obligations imposed on broadband providers."[104]

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[102] *See* AT&T Comments at 31, 34.

[103] *Id.* at 34.

[104] *Verizon v. FCC*, 740 F.3d at 656-57.

Contrast AT&T's overly optimistic view of Section 706 authority with the cable industry's more dour – but unfortunately, more accurate – view of the limitations of that provision. Comcast quite obviously states a better case than AT&T when it reasons that the D.C. Circuit opinion makes it "highly unlikely that the Commission could impose a categorical ban on 'paid prioritization' arrangements pursuant to Section 706."[105] In light of that Section 706 allowance, while these cable interests claim that "no broadband provider has expressed any intention of prioritizing one class of Internet traffic at the expense of another,"[106] the simultaneously extol the potential benefits of paid prioritization in some contexts.[107]

B. Title II Would Provide the Commission With All of the Authority It Needs to Ban Categorically Any Such Unreasonable and Harmful Practices.

It is cable's turn to err once more, however, when it over-extends its correct analysis about the limits of Section 706 and incorrectly suggests such limitations under Title II.[108] For instance, Time Warner Cable is foolishly proud to unearth this rather obvious truism from reading the statute: "Title II expressly *permits* service providers to treat customers differently as long as such 'discrimination' is not 'unreasonable.'"[109]

Yet as we explained in our initial comments and several filings preceding them, the Commission has ample authority under Title II to declare certain practices *per se*

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[105] Comments of Comcast Corporation, GN Docket No. 14-28, at 23 (filed July 15, 2014) ("Comcast Comments"); *see also* TWC Comments at 14.

[106] TWC Comments at 25; *see also* NCTA Comments at 58, 62.

[107] *See* TWC Comments at 16; NCTA Comments at 63-64.

[108] *See* Comcast Comments at 51-52; TWC Comments at 14; NCTA Comments at 27 ("The ultimate irony of the renewed calls for Title II reclassification is that, for all the harms such an approach would cause, it would not even achieve the policy objectives that proponents of reclassification seem to favor.") Yet NCTA and its members are wrong on both counts – about the alleged harms of Title II and its limitations with respect to prohibiting undesirable practices.

[109] TWC Comments at 14-15 (emphasis in original).

unreasonable.[110] Pretending that Section 202 is some kind of green light for paid prioritization and other unreasonable practices is incongruous with the statute, and with the Commission's duty to prohibit unlawful practices under it. And it is the Commission that decides which practices are unreasonable and, therefore, unlawful.

In a presumably routine decision, but one that illustrates this principle perfectly, the Commission's Pricing Policy Division in the Wireline Competition Bureau issued – just one week before these replies were due – an order finding a tariff to be "patently unlawful, in violation of sections 201 and 208 of the Communications Act."[111] We realize that the very mention of the term "tariff" will send some cable and telecom lobbyists into a tizzy, likely firing off messages to reporters and Hill staffers to proclaim that Free Press used the dreaded T-word in our filing. Yet this case involved interstate access services still subject to a tariff – unlike a whole host of detariffed, competitive telecom services still classified as Title II offerings.

Returning to this decision, we can move quickly past the rather interesting discussion of the unreasonable and hence unpermitted arbitration clauses in the tariff, and turn instead to its pronouncements on call blocking. Rather than assuring customers that it would not block their calls, the carrier in question *required* its customers to block such traffic if those customers wished to cancel their service.[112] In this situation, the Division wasted no time finding this practice to be unlawful.

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[110] Free Press July 2014 Comments at 47-49; *see also, e.g.*, Public Knowledge Comments at 102-03; OTI Comments at 25 ("Title II, on the other hand, *would* allow the Commission to protect against the full scope of harms identified above, including blocking, discrimination, and access fees. The Commission could, by reclassifying broadband access service under Title II, implement a bright-line rule that creates a presumption against discrimination under § 201[.]").

[111] *In the Matter of GS Texas Ventures, LLC, Tariff F.C.C. No. 1*, WCB/Pricing File No. 14-2, Order, DA 14-1294 (rel. Sept. 8, 2014).

[112] *See id.*, ¶ 3.

Why? Because "[t]he Commission generally has established that call blocking is an unjust and unreasonable practice under section 201(b) of the Act," and "[a]s such, *no carrier* may block, choke, reduce, or restrict traffic in any way, including to avoid paying transport and termination charges."[113] There are some allowances for blocking, it must be acknowledged, though the decision found no applicable allowances here. Having determined the practice in this instance to be unlawful, the Commission staff prohibited it. There could be no rational suggestion that blocking traffic in this manner would be reasonable if the blocking were applied "indiscriminately" to all customers of the carrier in question, or if such blocking were required "indifferently" for whole classes of content, information, or senders. The practice was unlawful in the Commission's determination, and thus banned when it arose.

CONCLUSION

The Commission has a chance once more to restore the law and provide a solid foundation for Open Internet rules at the same time. It should do so without delay, confident that Title II applies in deregulated and competitive telecom industries. There is no evidence of Title II harming investment either. The Commission should fulfill the network compact that Chairman Wheeler describes, reclassify broadband services, and protect the open pathways we all need.

Respectfully submitted,

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[113] *See id.*, ¶ 7 (emphasis added).