

**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

COMMENTS OF TIME WARNER CABLE INC.

Steven N. Teplitz
Terri B. Natoli
TIME WARNER CABLE INC.
901 F Street, NW, Suite 800
Washington, DC 20004

Marc Lawrence-Apfelbaum
Jeff Zimmerman
Julie P. Laine
TIME WARNER CABLE INC.
60 Columbus Circle
New York, NY 10023

Matthew A. Brill
James H. Barker
Alexander L. Stout
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY1

DISCUSSION.....7

I. THE COMMISSION SHOULD EXERCISE ITS AUTHORITY UNDER SECTION 706 RATHER THAN REVISIT AND REVERSE ITS BROADBAND CLASSIFICATION DETERMINATIONS.....7

 A. Section 706 Provides Ample Authority to Adopt Open Internet Protections.....7

 B. The Commission Should Reject the Various Proposals to Reclassify a Component of Broadband Internet Access as a Title II Telecommunications Service.....9

II. ANY RULES SHOULD ENCOMPASS ALL POTENTIAL THREATS TO ONLINE ACCESS FOR PURCHASERS OF BROADBAND INTERNET ACCESS SERVICES.....23

 A. The Commission Has Both the Authority and a Strong Policy Basis to Extend the Open Internet Rules to Other Entities That Can Thwart Access to Content and Services on the Internet.....23

 B. Any Rules Should Be Technologically Neutral and Apply to All Facilities-Based Broadband Providers.....27

 C. The Commission Should Not Regulate Services that Do Not Implicate the Concerns Underlying the NPRM.....28

III. THE COMMISSION SHOULD PROCEED WITH CAUTION IN CONSIDERING EXPANDED DISCLOSURE OBLIGATIONS FOR BROADBAND PROVIDERS31

CONCLUSION.....35

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Time Warner Cable Inc. (“TWC”) hereby submits its comments in response to the Notice of Proposed Rulemaking (“NPRM”) and Public Notice in the above-captioned dockets.¹

INTRODUCTION AND SUMMARY

The NPRM’s central goal—“protecting and promoting Internet openness”²—enjoys near-universal support. While there have been differences in opinion concerning the most effective (and lawful) means of preserving the open Internet, there has never been any disagreement about the importance of doing so. In particular, TWC and other broadband Internet access service providers not only have been consistent champions of the open Internet—they built it in the first place. Indeed, broadband Internet access providers, despite being portrayed by some advocates as posing a threat to the open Internet, are primarily responsible for its emergence as a robust and essential platform for innovation, economic growth, and free expression.

The private sector has fueled the proliferation of broadband services throughout most areas of the nation. Leading the way have been cable operators, such as TWC, which offered broadband Internet access as an alternative to dial-up long before telephone companies offered

¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28 (rel. May 15, 2014) (“NPRM”); *see also 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; Pleading Cycle Established*, Public Notice, GN Docket No. 10-127, DA 14-748 (rel. May 30, 2014).

² NPRM ¶ 4.

DSL to end users. And the emergence of broadband Internet access services, in turn, opened the door for a host of other online innovators. Broadband providers have continued to pour billions of dollars into expanding and enhancing their networks and services, all in the interest of meeting the evolving needs and expectations of consumers. As a matter of competitive necessity, broadband providers continue to have a compelling interest in ensuring that consumers can use this platform to gain unfettered access to services, applications, and content online.

TWC's experience is illustrative. TWC has long been an innovator in the broadband arena, establishing a remarkably successful track record in the provision of broadband-based services to residential and enterprise customers for nearly two decades. With its Road Runner offering, TWC was one of the first service providers to launch a broadband Internet access service, in 1996. Thereafter, TWC has continued to invest heavily in its broadband networks, becoming one of the country's leading providers of broadband Internet access with approximately 11.6 million subscribers across its footprint. Driven by the vigorous and growing competition it faces with respect to all of its services, TWC has maintained a commitment to empowering consumers by giving them choice and control over their communications experience. TWC's broadband subscribers can access any application, service, or content of their choosing and can select from among an array of service tiers offering a wide range of maximum download and upload speeds at different price points.³ And despite concerns raised by some advocacy groups that broadband providers are poised to introduce so-called "fast lanes,"

³ TWC's service tiers generally offer speeds from up to 2 Mbps downstream and up to 1 Mbps upstream (through its Everyday Low Price offerings) to up to 50, 75, or 100 Mbps downstream and up to 5 Mbps upstream (through its Ultimate offerings). In select areas (starting with New York City and Los Angeles), pursuant to its Maxx initiative, TWC recently began offering maximum speeds of up to 300 Mbps downstream and up to 20 Mbps upstream, and TWC will continue to deploy such enhanced capabilities more broadly.

TWC has not sought to prioritize any class of Internet traffic at the expense of another. Rather than divide the Internet into a world of “haves” and “have nots,” TWC’s business interests and corporate values spur it to give customers unfettered access to online content and services.⁴

The sustained, massive investment that allowed TWC and others to build today’s broadband networks would not have been possible were it not for the environment of minimal regulation that prevailed during most of the past several decades. In light of that experience, TWC continues to believe that the Commission could preserve the Internet’s openness by maintaining vigilance and acting only in response to demonstrated problems, and that overbroad regulation—especially in its most extreme form, fashioned under Title II—would pose particular risks to the Internet’s vitality that far outweigh any benefits.

Nevertheless, TWC appreciates that there remains widespread support, particularly in the wake of the D.C. Circuit’s *Verizon* decision,⁵ for adopting certain baseline protections to ensure that all participants in the Internet ecosystem continue to thrive. Consistent with that consensus, TWC supports the Commission’s existing transparency rules, which create a strong foundation for consumers to make informed choices among broadband providers and service levels. TWC also believes that reinstatement of a “no blocking” rule will create a helpful regulatory backstop, provided it is applied evenhandedly and construed in a manner that does not unduly constrain the flexibility of broadband providers. And a new rule that would enable the Commission to screen any business arrangements between broadband access providers and edge providers for “commercial reasonableness,” if properly tailored to the realities of the broadband marketplace, could bolster stakeholders’ confidence that the virtuous circle that drives the Internet’s success

⁴ As discussed below, it is far more likely that content owners would seek payment from broadband providers, rather than the other way around. *See infra* at 23.

⁵ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

will remain in force. Moreover, in connection with TWC's pending merger with Comcast, the open Internet conditions that already apply to Comcast will be extended to all of the TWC systems as well.⁶

In short, TWC urges the Commission to proceed in a manner that will best achieve the NPRM's stated goals without causing marketplace distortions or discouraging the investment that is essential to the open Internet's continued growth. To that end, TWC focuses these comments on three key recommendations.

First and foremost, rather than rely on the heavy-handed Title II approach favored by some advocates, the Commission should adopt new rules pursuant to its broad authority under Section 706 of the Telecommunications Act of 1996, consistent with the D.C. Circuit's guidance in *Verizon*. Reclassifying any part of broadband Internet access as a telecommunications service under Title II simply is not a viable alternative to the court-sanctioned roadmap, from either a legal or a policy perspective. As TWC previously has explained and reiterates below, effectuating such a sea-change would require the Commission to overcome a series of legal hurdles that likely are insurmountable, particularly in light of pertinent record evidence regarding the factual particulars of how broadband Internet access service is offered and broadband providers' long-term, investment-backed reliance on the Commission's prior rulings. Moreover, the specter of Title II regulation would risk undermining the private investment that has made the Internet such an extraordinary success and that remains necessary to fulfill the core objectives of the *National Broadband Plan*.⁷ Even if the Commission could effectively exercise its

⁶ See Applications and Public Interest Statement, MB Docket No. 14-57, at 3, 59, 163-64 (filed Apr. 8, 2014).

⁷ Federal Communications Commission, *Connecting America: A National*

forbearance authority to mitigate some of the problems, the prospect of more intrusive regulation (including prescriptive rate and service-quality regulation) would undercut incentives to expand and enhance broadband networks. And such serious harms would not even be counterbalanced by any meaningful benefits, as Title II would not expand the Commission’s authority with respect to the no-blocking and commercial reasonableness rules at issue. In contrast, not only does Section 706 give the Commission ample authority to adopt the proposed safeguards, but it will enable the Commission to do so in a far more certain and stable manner that avoids the profound risks that would flow from upending parties’ reliance on well-settled statutory classifications.

Second, consistent with the NPRM’s interest in ensuring that purchasers of broadband Internet access have unfettered access to online content and services, the Commission should address the entire Internet ecosystem in a technologically and competitively neutral manner, rather than singling out providers of fixed broadband Internet access for unique restrictions. This more holistic approach to preserving Internet openness would be an important correction to the Commission’s previous attempt to regulate in this area. As TWC and others have observed, while there continues to be no evidence that wireline broadband Internet access service providers are actually acting in furtherance of purported incentives to restrict openness, several large edge providers have not only the ability to restrict access to online content and services but also troubling track records of doing so. Thus, the new rules should apply evenhandedly to edge providers that engage in transmission by wire or radio (as almost all large edge providers today

Broadband Plan for Our Future at 136 (rel. Mar. 26, 2010) (“National Broadband Plan”) (recognizing that meeting just one of the Plan’s goals—extending terrestrial broadband infrastructure to seven million unserved households—would cost \$24 billion in 2010 present value).

do). Indeed, any regulatory regime that focuses solely on restricting entities that are promoting openness while exempting entities that have shown a willingness to thwart it would be irrational.

For similar reasons, the Commission should apply the same rules to fixed and mobile broadband providers. There is no basis for categorically exempting mobile broadband providers from any aspect of the open Internet rules, particularly given the significant enhancements to mobile platforms and the increased competition between fixed and mobile broadband providers since the *2010 Open Internet Order*. Any relevant technological differences should be addressed in assessing the reasonableness of network management practices or commercial arrangements, not in establishing legal duties in the first instance.

While all entities capable of blocking or degrading access to online content and services should be subject to a common set of rules, the Commission should not extend its regulations beyond Internet access. In particular, there is no basis (and certainly not in this proceeding) to regulate specialized services or traffic-exchange arrangements (such as peering, transit, and content delivery network (“CDN”) arrangements), as those contexts do not implicate the concerns underlying the NPRM.

Third, the Commission should not “enhance” existing disclosure requirements in a way that increases burdens on providers without yielding meaningful benefits. There is no evidence that current disclosures are inadequate, nor is there any reason to believe that the additional requirements proposed in the NPRM would yield meaningful information for consumers. And although the rules should remain focused on informing end users, the enhanced disclosure rules in question would not meaningfully benefit edge providers or transit providers, either. If anything, the Commission should focus on extending existing disclosure obligations upstream to edge, transit, and other providers that may create congestion or other network-related problems.

DISCUSSION

I. THE COMMISSION SHOULD EXERCISE ITS AUTHORITY UNDER SECTION 706 RATHER THAN REVISIT AND REVERSE ITS BROADBAND CLASSIFICATION DETERMINATIONS

The Commission issued the NPRM in response to the D.C. Circuit’s *Verizon* decision, in which the court “remand[ed] the case to the Commission for further proceedings consistent with [its] opinion.”⁸ The only jurisdictional option identified in the NPRM that could reasonably be deemed “consistent” with the court’s guidance is reliance on the Commission’s authority under Section 706. The Commission should follow the blueprint provided by the *Verizon* court and refrain from inviting the various harms associated with a radical reclassification of broadband Internet access service pursuant to Title II.

A. Section 706 Provides Ample Authority to Adopt Open Internet Protections.

In *Verizon*, the D.C. Circuit confirmed that the Commission has sufficient authority pursuant to Sections 706(a) and (b) to adopt the safeguards discussed in the NPRM and also set forth guidance on how the Commission could do so lawfully. Section 706 directs the Commission to take action to “encourage the deployment of broadband telecommunications capability.”⁹ Because the court agreed with the Commission that Internet openness fosters a “virtuous circle” of investment and innovation in broadband networks and services, it found that protecting openness through enforceable rules is within the Commission’s authority under Section 706.¹⁰ In particular, the court upheld the transparency rules adopted in the *2010 Open Internet Order*, which as noted above provide a solid foundation for preserving the open

⁸ *Verizon*, 740 F.3d at 659.

⁹ *Id.* at 634.

¹⁰ *Id.* at 644. For the same reasons, Section 706 authorizes the Commission to extend open Internet protections to edge providers, given that blocking or unreasonable discrimination by such entities poses an even more direct threat to openness. *See infra* at 23.

Internet;¹¹ it explained how the Commission could reinstate its no-blocking rule;¹² and it provided guidance that will enable the Commission to ensure “commercially reasonable” arrangements between broadband providers and edge providers.¹³

Despite upholding the Commission’s general authority over broadband Internet access and suggesting means to adopt new safeguards to prevent blocking and unreasonable discrimination, the court reaffirmed that the Commission cannot act in a “manner that contravenes any specific prohibition contained in the Communications Act.”¹⁴ As a result, the court held that the Commission’s “still binding decision” to classify Internet service providers (“ISPs”) as providers of “information services” and not “telecommunications services” prohibits regulating broadband providers as common carriers.¹⁵

The NPRM appropriately proposes that the Commission follow the *Verizon* “blueprint” in this proceeding,¹⁶ and TWC strongly urges it to do so. The *Verizon* decision provides a clear path to adopt legally sustainable open Internet protections that will achieve the Commission’s policy goals. It also eliminates the jurisdictional uncertainty that complicated previous efforts to develop open Internet protections. As discussed below, the last thing the Commission should do is to sacrifice this newly achieved and broadly beneficial certainty to pursue a destabilizing reclassification theory that would create significant legal risks and profound policy harms.

¹¹ *Id.* at 659.

¹² *See id.* at 658-59.

¹³ *See id.* at 657.

¹⁴ *Id.* at 649.

¹⁵ *Id.* at 650.

¹⁶ NPRM ¶ 4.

B. The Commission Should Reject the Various Proposals to Reclassify a Component of Broadband Internet Access as a Title II Telecommunications Service.

The Commission has consistently found that all transmission elements involved in the provision of broadband Internet access are part of a single, integrated information service. And that remains true today. Accordingly, there is no sound basis for reclassifying any “telecommunications” component as a stand-alone “telecommunications service”—to the contrary, doing so would invite substantial legal challenges and would prove counterproductive from a policy standpoint.

1. Reclassification of the Telecommunications Component Used to Provide Broadband Internet Access Would Be Legally Unsound.

Despite acknowledging that the *Verizon* decision offers a judicially sanctioned roadmap adopting the proposed open Internet safeguards, the NPRM suggests that the Commission nevertheless should “seriously consider” reclassifying the telecommunications component of broadband Internet access as a telecommunications service as a basis for imposing those rules.¹⁷ But even apart from the absence of any need to pursue that risky and destabilizing path, Title II simply is not a viable alternative to Section 706, and the Commission already has an extensive record detailing why. If anything, the case against reclassification is even stronger today than when the Commission last examined the issue. TWC’s previous submissions have set forth the serious problems with this approach in detail, and TWC incorporates those arguments by reference and summarizes them below.¹⁸

First, the Commission cannot simply abandon the factual findings underlying its long-standing classification decisions for policy-driven reasons. The Supreme Court made clear in

¹⁷ NPRM ¶ 4.

¹⁸ *See generally* Comments of Time Warner Cable Inc., GN Docket No. 10-127 (filed July 15, 2010) (“TWC Title II Reclassification Comments”).

Brand X that “[t]he entire question” in classifying broadband Internet access service “turns not on the language of the Act, but on the *factual particulars* of how Internet technology works and how it is provided.”¹⁹ In other words, the Commission’s task in classifying broadband Internet access is to undertake a factual analysis of what functions are actually offered to consumers, not to determine what classification would maximize the agency’s regulatory authority.²⁰ The Commission has analyzed broadband services based on the distinction it recognized between “basic” and “enhanced” services more than three decades ago in the *Computer Inquiry* proceedings,²¹ which Congress subsequently ratified in the Telecommunications Act of 1996 (now referring to those categories as “telecommunications services” and “information services”).²² Applying that rubric, the Commission has consistently found that broadband Internet access services, regardless of the technology platform over which they are provided, entail the *use* of telecommunications, rather than a stand-alone, retail *offering* of

¹⁹ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005) (emphasis added).

²⁰ *See, e.g.*, Brief for Petitioners Federal Communications Commission and the United States of America at 23; *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277 and 04-281), 2004 U.S. Briefs 277 at *23 (stating that “the question whether a particular service constitutes a ‘telecommunications service’ under the Communications Act *must be* resolved by reference to the nature of the provider’s ‘offering . . . to the public,’ and thus the classification ‘turns on the nature of the functions that the end user is offered.’”) (quoting 47 U.S.C. § 153(46)) (emphasis added). In any event, as explained below, Title II would not justify the expansive regulations its proponents seem to have in mind. *See infra* at 14-16.

²¹ *See* TWC Title II Reclassification Comments at 14 (citing *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 ¶ 5 (1980)).

²² 47 U.S.C. §§ 153(24), 153(53) (defining “information service” and “telecommunications service” based on the particular functions offered to end users).

telecommunications, because the telecommunications and information-processing elements are inextricably combined in the service furnished to end users.²³

Nothing about the “factual particulars” of how broadband Internet access is offered has changed. Cable operators have never offered the telecommunications component of broadband Internet access as a common carrier telecommunications service, and features such as Domain Name System (“DNS”) resolution and security capabilities remain core components of the ISP service offered to end users. Today, just as in years past, TWC’s broadband Internet subscribers rely on the advanced tools that TWC provides to access the Internet and to find and retrieve content. And while TWC’s service has continued to improve, there has been no material change in the capabilities offered to its subscribers. Subscribers retrieve the information they seek because the ISP’s DNS server delivers information-processing capabilities rather than mere

²³ See *Cable Modem Order* ¶ 38 (holding that, while “cable modem service provides the[se] [information-processing] capabilities . . . ‘via telecommunications,’” that telecommunications component is not “separable from the data-processing capabilities of the service”); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 9 (2005) (“*Wireline Broadband Order*”) (“Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.”); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 26 (2007) (“Like cable modem service, wireline broadband Internet access service, and BPL-enabled Internet access service, wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications.”); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 ¶ 1 (2006) (addressing the classification of “Broadband over Power Line” or “BPL” services and finding that “the transmission component underlying BPL-enabled Internet access service is ‘telecommunications,’ and that the offering of this telecommunications transmission component as part of a functionally integrated, finished BPL-enabled Internet access service offering is not a ‘telecommunications service’”).

transmission. Even when subscribers know the content they are seeking, they do not (and could not) know the end points of their communications, as these are a function of the service’s core information-processing capabilities. The routing of each Internet transaction, therefore, is not “between or among points *specified by the user*,” but is rather a circuitous and unpredictable journey to retrieve content from a virtual address in an unknown location.²⁴ As TWC has explained before, it is unimportant that DNS functions are sometimes provided by third parties, as the statute asks only what broadband Internet access providers actually *offer* end users, and not what they *could* offer, or what *others* may simultaneously offer.²⁵

The same is true for other information-processing capabilities, such as dynamic host configuration protocol (“DHCP”). TWC uses DHCP to assign IP addresses to its subscribers each time they connect to the Internet, a process without which subscribers would be unable to communicate with other IP-based servers and devices. Once connected, subscribers use countless third-party services and applications, but TWC also provides highly valued tools such as security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and file storage, and a customizable home page for each user—and all of these features involve “generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing” information.²⁶ In short, the technical realities that led the Commission to classify broadband Internet access as an information service have not changed.

The Commission would face a high hurdle in trying to justify a reversal of these findings. While the Commission as a general matter can change course to pursue a new policy direction

²⁴ 47 U.S.C. § 153(50) (emphasis added).

²⁵ See TWC Title II Reclassification Comments at 25.

²⁶ 47 U.S.C. § 153(24) (definition of “information service”); Time Warner Cable High Speed Internet Plans and Packages, *available at* <http://www.timewarnercable.com/en/internet/internet-service-plans.html>.

where it can provide a cogent rationale for doing so, it must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”²⁷ Both factors are present here. Any reclassification effort would require contradicting the Commission’s consistent factual findings. And, as noted above, TWC and other broadband providers invested many billions of dollars in reliance on the Commission’s consistent finding that broadband Internet access does not include a distinct telecommunications service offering that subjects them to common carrier regulation, and that reliance has continued—if not increased—since the Commission last compiled a record on this question.²⁸

As the foregoing analysis shows, TWC and similarly situated broadband providers are not *voluntarily* offering a telecommunications service to end users today; nor can the Commission *compel* them to do so based on policy preferences. To the contrary, the D.C. Circuit has made clear that the Commission cannot “impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.”²⁹ The

²⁷ *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

²⁸ Moreover, any perception that limitations imposed by the D.C. Circuit represent a “problem” to be “solved” cannot provide a sound basis for reclassifying broadband Internet access services; if the facts do not align with the Commission’s statutory authority, even where it wishes to provide “safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [agency] or the courts, to address.” *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

²⁹ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (holding that the Commission does not have unfettered discretion to impose common-carrier status “depending upon the regulatory goals it seeks to achieve”). In any event, as explained further below, Title II would not materially expand the Commission’s authority to

Commission has recognized that extracting the telecommunications component of broadband Internet access and forcing providers to offer it on a stand-alone basis would constitute “radical surgery.”³⁰ At a minimum, the Commission would be required to satisfy a stringent public interest test requiring a showing of market power to justify such an outcome.³¹ The Commission has not suggested (much less demonstrated) that any broadband Internet access service provider has market power,³² let alone the ability to charge “monopoly rents.”³³ Absent such a substantial showing and weighed against more than ten years of countervailing Commission decisions, the Commission plainly has no basis for upending the classification of broadband Internet access as an integrated information service.

2. *Reclassification Would Be Ineffectual and Profoundly Unwise from a Policy Standpoint.*

From a policy perspective, pursuing reclassification of broadband Internet access would fail to achieve proponents’ objectives and would result in substantial public interest harms. The impetus for reclassification proposals appears to be a desire to support a flat ban on paid prioritization arrangements or similar two-sided market deals between broadband access providers and edge providers. But Title II would not support a categorical ban on such practices any more than Section 706 would. Critically, Title II expressly *permits* service providers to treat

prohibit so-called “fast lanes” as compared to Section 706, making the supposed policy justification for reclassification illusory. *See infra* at 14-15.

³⁰ *Cable Modem Order* ¶ 43.

³¹ *See Virgin Islands Tele. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (requiring “sufficient market power to warrant regulatory treatment as a common carrier”).

³² *See NPRM* ¶ 49 (disclaiming a market-power theory as the justification for proposed open Internet rules).

³³ *AT&T Submarine Sys., Inc.*, 13 FCC Rcd 21585, 21589 (1998).

customers differently as long as such “discrimination” is not “unreasonable.”³⁴ The Commission recognized this limitation in the NPRM that preceded the *2010 Open Internet Order*, as it distinguished between a proposal to adopt an “unqualified prohibition[] on discrimination” and the “general prohibition on ‘*unjust or unreasonable* discrimination’ by common carriers in section 202(a) of the Act.”³⁵ And a long line of Commission precedent confirms that differential treatment (including the imposition of different prices or other terms and conditions) is reasonable where there is a “neutral, rational basis underlying [the] apparently disparate [terms].”³⁶ Accordingly, after examining alleged preferences or discrimination, courts and the Commission have often found that practices at issue were “reasonable” and thus permissible.³⁷

Against this backdrop, it is highly unlikely that Title II would support a flat ban on an entire category of potential business arrangements, such as paid prioritization. As a threshold matter, the provision of a prioritized delivery service might not be considered sufficiently “like” standard broadband transmission to support a discrimination claim at all.³⁸ Just as “an apple does not have to be priced the same as an orange” in order for the sale of either to be reasonable, broadband Internet access service providers can, and routinely do, provide business-class

³⁴ 47 U.S.C. § 202(a); *see also id.* § 201(b) (requiring “just and reasonable” practices).

³⁵ *Preserving the Open Internet; Broadband Industry Practice*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 ¶ 109 (2009) (emphasis in original).

³⁶ *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984).

³⁷ *See, e.g., Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (upholding carriers’ ability to offer differential discounts to retail customers); *Ameritech Operating Cos. Revisions to Tariff FCC No. 2*, Order, DA 94-1121 (CCB 1994) (upholding reasonableness of rate differentials based on cost considerations).

³⁸ *See, e.g., Ad Hoc Telecomms. Comm’n v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982) (applying “functional equivalency” test to determine the “likeness” of two service offerings, which asks “whether the services in question are ‘different in any material functional respect’”); *Am. Broad. Co., Inc. v. FCC*, 663 F.2d 138-39 (D.C. Cir. 1980) (noting that the issue of “likeness” is fact-specific and decided on a case-by-case basis).

services at different speeds and rates than residential consumer services, given that the two categories are not “like” services and thus can reasonably be offered on different terms.³⁹ In any event, it would not be rational for the Commission simply to declare all potential arrangements unreasonable, ignoring critical differences among them. For example, while the Commission might well determine that it would be unreasonable for a broadband provider to enter into an exclusive prioritization arrangement that would confer unique (and anticompetitive) benefits on an affiliated content provider, that analysis would by no means support the conclusion that a *non-exclusive* arrangement with an *unaffiliated* third-party—such as a prioritization arrangement intended to ensure the reliability of a telemedicine application—is unreasonable. Rather, the nature of the applicable nondiscrimination standard (as well as the similar “just and reasonable” standard set forth in Section 201(b)) requires a contextual, case-specific analysis.⁴⁰

Even apart from the flawed premise underlying calls for Title II reclassification, proponents ignore the thicket of unintended consequences it would produce. Most significantly, the prospect of imposing public utility regulation on cable broadband services for the first time would discourage the substantial investment in broadband networks and services that the Commission seeks to foster, and that Section 706 directs the Commission to support. As noted above, broadband providers have invested hundreds of billions of dollars to expand and enhance their networks in the 12 years since the *Cable Modem Order* made the regulatory status of those

³⁹ *Competitive Telecomms. Ass’n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993).

⁴⁰ Moreover, the Commission should be wary of too greatly restricting the ability of ISPs to continue to innovate in ways that could help facilitate the ability of startups to better compete against entrenched edge providers. For example, only the largest edge providers have the resources to build CDNs and other infrastructure that no true startup can even begin to match. In such circumstances, preserving the ability of ISPs to continue to innovate and develop new services could actually help serve to level the competitive playing field, rather than to exacerbate existing gaps between Internet haves and have nots.

networks clear. Network owners relied on the Commission’s steadfast assurances that its fact-based classification was fully aligned with the Commission’s interest in maintaining a light regulatory touch.⁴¹ Abandoning the settled classification rulings would signal a radical change, of course, that would have a devastating impact on investment and innovation, and thus would be starkly at odds with the core objectives that gave rise to this proceeding, as well as the goals at the heart of the National Broadband Plan.⁴² The uncertainty associated with Title II regulation also would impact many edge providers, some of whom could be ensnared within the broad scope of the enlarging regulatory regime. While TWC encourages the Commission to apply any new rules in a technologically neutral fashion to all facilities-based service providers, edge providers—like broadband Internet access service providers—might well find it more difficult to attract capital investment under a threat of Title II regulation, and thus might be impeded from innovating.⁴³ Making matters worse, pursuing Title II reclassification would make it far more likely that the Commission’s order would spur protracted legal challenges, thus miring all stakeholders in debilitating uncertainty.

⁴¹ See, e.g., *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 46 (1998) (finding 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”); *Cable Modem Order* ¶ 5 (seeking to “remove regulatory uncertainty that in itself may discourage investment and innovation” and “limit unnecessary and unduly burdensome regulatory costs”); *Wireline Broadband Order* ¶ 1 (establishing a “minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications”).

⁴² See *National Broadband Plan* at 18.

⁴³ See, e.g., Letter of Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 6 (filed May 9, 2014) (explaining how Title II reclassification could result in the application of common carrier rules to many edge providers, as “the logic behind reclassification would dictate that . . . [e]very entity that provides an over-the-top communications capability, whether it’s voice, text, or video, becomes either a facilities-based provider or a reseller (or both) of a telecommunications service”).

Finally, forbearance would not provide a viable means of mitigating these harms. While forbearance would be preferable to the implementation of the complete Title II regime, the promise of relief is illusory. As TWC has discussed previously,⁴⁴ in order to forbear from implementing a regulation the Commission must show that its application (1) is not necessary to ensure just and nondiscriminatory rates, (2) is not necessary to protect consumers, and (3) is inconsistent with the public interest.⁴⁵ While this statutory standard can be met by showing, among other things, that the marketplace for broadband Internet access service is highly competitive, such a demonstration would likely stand in stark contrast to any Commission determination seeking to justify the imposition of common carrier obligations on broadband providers. Therefore, it is unclear how the Commission could presume for the purposes of this proceeding that the broadband marketplace had failed, while thereafter supporting forbearance. Moreover, the Commission would be hard pressed to show why certain provisions of Title II are suddenly necessary while at the same time rejecting other provisions as decisively unnecessary.

Even if such justifications could be identified, there would remain substantial uncertainty about the required level of geographic granularity of the forbearance analysis.⁴⁶ The Commission's prior rulings granting forbearance requests likewise would leave broadband providers in a state of uncertainty and doubt as to whether blanket national forbearance could be justified as a legal matter.⁴⁷ And forbearance rulings would be subject to modification by future Commissions, posing the constant threat that full Title II regulations would be applied. For these

⁴⁴ See TWC Title II Reclassification Comments at 61.

⁴⁵ 47 U.S.C. § 160(a).

⁴⁶ NPRM ¶ 154.

⁴⁷ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135 (rel. June 22, 2010).

reasons, the Commission has previously recognized that its “forbearance authority is not in this context an effective means of removing regulatory uncertainty” and likely would only contribute to the uncertainty presented by reclassification.⁴⁸

Even the most earnest supporters of Title II paired with forbearance cannot provide any comfort that a reviewing court would uphold any forbearance decisions by the Commission. Nor could they guarantee that state regulators would be amenable to granting forbearance from their own burdensome regimes applicable to “telecommunications carriers” (including potentially taxes that the Commission could not preempt).⁴⁹ Even with forbearance from some of the more onerous requirements of Title II, reclassification would likely result in a patchwork of state regulations and heightened fees for broadband providers, which would deter further network deployment and innovations and increase costs for consumers.

3. *The Partial Reclassification Proposals Set Forth in the NPRM Are Equally Flawed.*

In an apparent effort to sidestep the Commission’s prior classification rulings, some parties argue that the Commission should reclassify *half* of the transmission functionality employed in providing broadband Internet access—specifically, the transmission of information between remote servers and end users, or a so-called “remote delivery service”⁵⁰ or “response

⁴⁸ Petition for Writ of Certiorari, U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-277, at 28 (Aug. 27, 2004).

⁴⁹ See TWC Title II Reclassification Comments at 68 (noting that a state’s taxation power is arguably beyond the scope of the Commission’s ability to preempt).

⁵⁰ See Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-91, 14-28, WC Docket No. 07-52, at 7 (filed May 5, 2014) (“Mozilla Petition”).

transaction.”⁵¹ Those proposals mischaracterize the relevant precedent as well as the technical realities of how broadband Internet access is provided.

Contrary to the claim that the transmission of edge-provider traffic in response to end user requests falls “outside the category of services previously designated by the Commission,”⁵² the Commission’s classification of broadband Internet access service as an information service has always encompassed both the telecommunications functionality used to transmit end user requests for information and the transmission of information from remote servers in response. As the Commission explained in the *Cable Modem Order*: “Cable modem service typically includes many and sometimes all of the functions made available through dial-up Internet access service, including ... the ability to *retrieve information from the Internet*, including access to the World Wide Web.”⁵³ More than simply an intranet for subscribers of the service, by its very nature broadband Internet access service requires the ISP to connect with the broader Internet and ensure the “steady and accurate flow of information between the cable system” and the Internet.⁵⁴

Although Professors Narechania and Wu argue that the Commission was referring in such passages primarily to the features offered by access providers to their subscribers (citing,

⁵¹ Letter from Tejas Narechania and Tim Wu, Columbia University to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28, at 13 (filed Apr. 14, 2014) (“Narechania & Wu *Ex Parte* Letter”).

⁵² Mozilla Petition at 9; *see also* Narechania & Wu *Ex Parte* Letter at 13 (asserting that “[c]lassifying such ‘sender-side’ traffic as a telecommunications service is, perhaps surprisingly, consistent with the *Cable Modem Order*”).

⁵³ *Cable Modem Order* ¶ 10 (emphasis added); *see also id.* ¶ 17 (“Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet.”); *Wireline Broadband Order* ¶¶ 14, 39 (finding that “wireline broadband Internet access service” is “a single, integrated service” that “provides the user with the ability to *send and receive* information at very high speed, and to access the applications and services available through the Internet”).

⁵⁴ *Id.* ¶¶ 14, 17.

for example, newsgroups),⁵⁵ the Commission has always focused on the outward-facing possibilities of Internet access. “Click-through access” was and is a vital part of the broadband service classified by the Commission.⁵⁶ The Commission noted that, for example, “a subscriber to Comcast’s cable modem service may bypass that company’s web browser, proprietary content, and e-mail,” and is “free to download and use” other sources of content.⁵⁷ The Commission even had the foresight to envision the “sophisticated ‘real time’ applications” that broadband Internet service could provide.⁵⁸ These applications, such as multi-player online gaming, require a constant stream of call-and-response transmissions, all of which are interdependent on each other and traverse the breadth of the global Internet. The Commission also spoke of network platforms becoming more “multi-purpose in nature and more application-based, rather than existing for a single, unitary, technologically specific purpose.”⁵⁹ In short, the Commission from the outset has recognized that broadband Internet access service not only includes integrated transmission between the end user and the ISP, but also the ISP’s delivery of Internet content from remote servers.

Moreover, such a determination was critical to the Commission’s assertion of exclusive jurisdiction over Internet access services, which is premised on the *interstate* communication they enable. The Commission defined broadband Internet access service as an “interstate information service” based on an “end-to-end analysis” of Internet traffic, which regularly

⁵⁵ Narechania & Wu *Ex Parte* Letter at 8, 16.

⁵⁶ *Cable Modem Order* ¶ 25.

⁵⁷ *Id.* ¶ 25.

⁵⁸ *Id.* ¶ 10.

⁵⁹ *Wireline Broadband Order* ¶ 40.

traverses state and national boundaries.⁶⁰ The foundation for this jurisdictional analysis would disappear if the information service classification excluded points beyond the access provider's network, or at the very least, would require a fact-specific analysis for each Internet transaction. If the Commission was merely classifying the portion of broadband Internet access service that traveled between the subscriber and service provider, that connection would most often be intrastate. In a typical arrangement, subscriber network traffic travels via its local node, through fiber trunks, and to a headend, which is usually in the same state as the subscriber. Yet the Commission determined that Internet traffic is predominantly interstate, which can only be true when considered "end-to-end"—from the subscriber, via his or her service provider, to the content provider, and back again. This jurisdictional analysis undergirds the entirety of the Commission's past rulings on broadband Internet access service and further confirms the unified nature of the classified service.

Finally, just as the Commission cannot compel broadband providers to offer a telecommunications service to end users absent a finding of market power, the same restriction prevents the Commission from compelling the provision of common carrier services to edge providers. And even if the Commission could develop a market-power theory that would justify a compulsion to initiate such a common carrier offering (notwithstanding that the NPRM does not propose any such analysis), it would ultimately prove self-defeating to the extent the goal was to preclude the imposition of fees on edge providers. Far from prohibiting such fees, a telecommunications-service classification of any transmission provided to edge providers would

⁶⁰ *Cable Modem Order* ¶ 59.

require the imposition of a fee, as that is a necessary element of any telecommunications service.⁶¹

II. ANY RULES SHOULD ENCOMPASS ALL POTENTIAL THREATS TO ONLINE ACCESS FOR PURCHASERS OF BROADBAND INTERNET ACCESS SERVICES

In adopting new rules under Section 706, the Commission should pay careful attention to the scope of those requirements. TWC submits that the Commission should apply any new open Internet requirements evenhandedly to access providers and edge providers alike, as well as to fixed and mobile broadband providers. But there is no basis to extend regulation to specialized services or traffic-exchange arrangements.

A. The Commission Has Both the Authority and a Strong Policy Basis to Extend the Open Internet Rules to Other Entities That Can Thwart Access to Content and Services on the Internet.

The NPRM focuses singularly on the prospect that broadband Internet access providers will act as “gatekeepers” to the Internet by granting or denying access to content, services, and applications as they see fit.⁶² But the NPRM fails to acknowledge that the real—and growing—threat to Internet openness continues to be posed by entities *other than* broadband Internet access providers, and instead merely declares without elaboration that while “other forms of discrimination in the Internet ecosystem may exist, ... such conduct is beyond the scope of this proceeding.”⁶³

As with prior attempts to regulate in this area, the NPRM is thin on examples of actual harms caused by broadband Internet access providers—in fact, it even concedes that there have

⁶¹ 47 U.S.C. § 153(53) (defining a telecommunications service as the transmission of information of the user’s choosing “for a fee”).

⁶² *See, e.g.*, NPRM ¶ 46.

⁶³ NPRM ¶ 52, n.118.

been “relatively few” problems.⁶⁴ Instead, the NPRM relies on broadband providers’ purported incentives to undermine Internet openness.⁶⁵ But in crediting the Commission’s policies as the only force holding these alleged incentives in check,⁶⁶ the NPRM ignores the countervailing incentives that prevent broadband providers from impeding Internet openness in the ways the NPRM fears. Most notably, as Chairman Wheeler recently observed, the cable industry’s “principal business . . . has become, and will continue to be, broadband.”⁶⁷ The economic imperative to recover the substantial costs of building and operating broadband networks by attracting and retaining customers creates a significant *disincentive* to acting in ways that would alienate consumers, and thereby reduce revenues. The NPRM overlooks the reality that large edge providers often have far more market leverage than a broadband ISP; as a result, there is little prospect that they would agree to enter into commercial arrangements that limit their ability to innovate and thrive.

In contrast, TWC has described in detail how entities other than broadband Internet access service providers—some of which are much larger (boasting much higher market capitalizations, far larger customer bases, and, very often, a global presence)—actually engage in practices that limit consumers’ access to online content and services and can inflict real harms.⁶⁸ Perhaps the most notable incident occurred in connection with TWC’s well-publicized retransmission consent dispute with CBS, during which CBS blocked TWC’s broadband

⁶⁴ NPRM ¶ 40.

⁶⁵ *See generally* NPRM ¶¶ 39-53.

⁶⁶ NPRM ¶ 40.

⁶⁷ Remarks of Chairman Tom Wheeler, 2014 NCTA Cable Show, at 3 (Apr. 30, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf.

⁶⁸ *See generally* TWC 2010 Net Neutrality Comments at 73-94.

subscribers from accessing programming on CBS.com as a blatant means of obtaining leverage in retransmission consent negotiations.⁶⁹ Chairman Wheeler recently expressed “concern” about broadcasters’ blocking access to online programming and agreed that such incidents represent an issue “that we should all worry about.”⁷⁰ Relatedly, the Commission previously has recognized that the principles of Internet openness apply equally to other participants in the broadband ecosystem.⁷¹

The NPRM’s discussion of so-called “fast lanes” likewise reflects an overly myopic view of the sources of potential harm to consumers and to principles of openness. The NPRM focuses on the hypothetical prospect that broadband Internet access providers will pursue paid prioritization arrangements through which they would charge edge providers for access or prioritized access to end users.⁷² But that concern is a red herring. To TWC’s knowledge, no broadband provider has expressed any intention of prioritizing one class of Internet traffic at the expense of another. If anything, it is more likely that some content owners might well seek payment *from* broadband Internet access providers as a condition of delivering their content—

⁶⁹ That incident is described more fully in Letter from Matthew A. Brill, Counsel to Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71 (filed Aug. 2, 2013).

⁷⁰ Doug Halonen, *Wheeler “Concerned” Over Online Blackouts*, TVNewsCheck, May 20, 2014, available at <http://www.tvnewscheck.com/article/76465/wheeler-concerned-over-online-blackouts>.

⁷¹ *Internet Policy Statement* ¶ 4 (recognizing that the principles at stake were relevant not only for broadband Internet access providers, but also for “application and service providers, and content providers”); *Broadband Industry Practices NOI* ¶ 8 (seeking “a fuller understanding of broadband market participants today, including network platform providers, broadband Internet access service providers, other broadband transmission providers, Internet service providers, Internet backbone providers, content and application service providers, and others”).

⁷² See, e.g., NPRM ¶ 6.

paralleling the business model that already exists on MVPD platforms. The Commission should not turn a blind eye to actual marketplace dynamics in developing open Internet protections.

Given the NPRM's stated goals of ensuring that purchasers of broadband Internet access have unfettered access to online content and services, there is no sound reason to single out broadband Internet access providers and exclude other sources of harm from the scope of any rules. Indeed, if the mere existence of hypothesized "incentives" is sufficient to justify regulatory intervention (as the NPRM presupposes), other participants in the Internet ecosystem have demonstrated not only an incentive to limit access to freely available online content to enhance their commercial leverage, but a willingness to act on such incentives.

A regime that applies only to broadband Internet access providers would not only be ineffective but also potentially unlawful, as such underinclusiveness would threaten the rationality and thus legal viability of the rules. Particularly given the absence of any cogent explanation for the selectivity proposed by the NPRM, failing to address comparable practices by others in the Internet ecosystem would be arbitrary and capricious under the Administrative Procedure Act and would risk violating the Constitution. An agency acts arbitrarily and capriciously when it "applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record."⁷³

Finally, there is no legitimate argument that entities other than broadband Internet access providers are somehow outside the scope of the Commission's legal authority. The rationale for regulation endorsed by the D.C. Circuit in *Verizon*—that is, the "triple-cushion shot" theory that restrictions on broadband providers protect edge providers, which in turn drives demand, which in turn promotes competition and investment—applies more directly to regulation of edge

⁷³ *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

providers that engage in blocking or discrimination that curtails access to online content and services. Most edge providers transmit information by wire or radio over owned or leased facilities in conveying information to and from transit providers and ISPs. Thus, the Commission has clear authority under Section 706 to adopt rules that prevent edge providers as well as ISPs from interfering with Internet openness.

B. Any Rules Should Be Technologically Neutral and Apply to All Facilities-Based Broadband Providers.

For similar reasons, the Commission should not adopt different rules for mobile and fixed broadband providers, but should instead hold all facilities-based providers to the same standards. The NPRM itself notes that the few incidents reflecting potential violations of Internet openness principles have been localized in the wireless sector.⁷⁴ Yet, the Commission historically has sought to subject wireless broadband providers to less stringent requirements.

The rationale for that disparate treatment has always been questionable, and it is even more so now. As TWC and others have explained, mobile wireless providers are not uniquely situated, in that all broadband providers face capacity constraints and therefore must retain flexibility to manage traffic on their networks.⁷⁵ Meanwhile, competition between fixed and mobile broadband services continues to grow, with wireless services increasingly standing as a viable substitute—as the Commission has recognized.⁷⁶ Indeed, wireless providers have followed up their 3G deployments with upgrades to 4G LTE technology, offering speeds comparable to those available through many wireline broadband services with the additional

⁷⁴ NPRM ¶ 41.

⁷⁵ See, e.g., TWC 2010 Net Neutrality Comments at 68-69.

⁷⁶ *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Report, 28 FCC Rcd 3700 ¶ 2 (2013).

benefits of mobility and national reach.⁷⁷ As depicted in TWC's and Comcast's application relating to their proposed merger, 4G services are available to virtually all consumers in the companies' combined footprint.⁷⁸ The Commission should not subject one class of competitors to more stringent rules than another.

In addition, within the wireless arena, Wi-Fi and licensed wireless services plainly should be treated the same. Unlicensed Wi-Fi services are increasingly viewed by consumers as an alternative as licensed wireless services, and they are typically accessed using the very same devices, thus eliminating any basis for differential treatment. Moreover, any other approach would be highly impractical. A single communication might hop between Wi-Fi and licensed networks, and the notion that a different set of rules would be temporarily triggered at each stop along the way would not be viable. Rather than arbitrarily delineating among various providers based on purported distinctions that are outdated at best, the Commission should develop a single set of rules that will apply evenly to all participants.

C. The Commission Should Not Regulate Services that Do Not Implicate the Concerns Underlying the NPRM.

The considerations that should prompt the Commission to act to restrain edge providers and wireless broadband providers from disrupting consumers' unfettered access to services and content online counsel in favor of *excluding* services and arrangements that do *not* present the same policy concerns. In particular, the Commission should adopt the NPRM's proposals to

⁷⁷ See, e.g., *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*, Eighth Broadband Progress Report, 27 FCC Rcd 10342 ¶ 6 (2012).

⁷⁸ See Applications and Public Interest Statement, MB Docket No. 14-57, at 52-53 (filed Apr. 8, 2014).

refrain from regulating “specialized services” as well as traffic-exchange arrangements, such as peering and CDN arrangements.⁷⁹

The Commission has refrained from regulating “specialized” or “managed” services since it coined these terms, and the NPRM proposes that the Commission continue that approach while monitoring the development of these offerings.⁸⁰ TWC supports that recommendation.

Fundamentally, because any specialized service will be offered independent of broadband Internet access, the open Internet rules do not and should not apply. TWC and others have described the benefits of a policy of vigilant restraint in connection with these services,⁸¹ and nothing has changed to warrant regulatory intervention now. In fact, specialized services remain very much an emerging and amorphous concept, such that any theorizing about their potential effect on Internet openness would involve multiple layers of speculation. Accordingly, the Commission lacks any reasoned basis to determine that they pose a threat, let alone a threat that outweighs the potential benefits of such services. Indeed, as the Commission’s Open Internet Advisory Committee has found, the ability to offer multiple services over the facilities used to deliver broadband Internet access has been an important spur to broadband investment.⁸² Moreover, to the extent this category is deemed to include existing IP voice and video services, those services already are subject to extensive Commission regulations that independently safeguard consumers’ interests.

⁷⁹ NPRM ¶¶ 59-60.

⁸⁰ NPRM ¶ 60.

⁸¹ TWC Specialized Services Comments at 3-4; TWC 2010 Net Neutrality Reply Comments at 77.

⁸² Open Internet Advisory Committee, 2013 Annual Report 67 (Aug. 20, 2013).

The Commission likewise should adopt the NPRM’s proposal that it refrain from regulating arrangements for network interconnection and traffic exchange.⁸³ The Commission has long refrained from regulating these economic arrangements, primarily because of the competitive environment in which they exist.⁸⁴ This proceeding hardly presents the right opportunity to change course, since, as with specialized services, arrangements for the exchange of Internet traffic between networks do not threaten the goal of ensuring that mass market consumers can access services and content online. Edge providers have significant discretion to route traffic using various of these arrangements to the networks of broadband Internet access providers.⁸⁵ As a result, the NPRM’s professed concern about gatekeeper control does not exist in the context of peering, transit, and CDN arrangements. Seeking to regulate such arrangements now thus would disrupt this portion of the marketplace—and in unpredictable and likely counterproductive ways—absent any clear justification. Accordingly, Chairman Wheeler has properly recognized that any policy concerns relating to the economics of exchanging Internet traffic between networks are distinct from the open Internet concerns that apply to Internet access services, and thus should be examined, if at all, in a separate proceeding.⁸⁶

⁸³ NPRM ¶ 59.

⁸⁴ See Daniel A. Lyons, *The Perils of Mandatory Disclosure of Private Interconnection Agreements Between Internet Networks*, at 3 (2014) (describing the “complex and dynamic” interconnection market) (citing Christopher S. Yoo, *THE DYNAMIC INTERNET: HOW TECHNOLOGY, USERS, AND BUSINESSES ARE TRANSFORMING THE NETWORK* at 55 (2012)).

⁸⁵ See, e.g., Sandvine, *Choices: Video Providers, CDNs, Peers, ISPs...and You*, <http://www.internetphenomena.com/2014/05/choices-video-providers-cdns-peers-isps-and-you/>.

⁸⁶ See, e.g., Bryce Baschuk, *Wheeler: Peering Not a Net Neutrality Issue But FCC Spokesman Says It Will Be Watched*, Bloomberg BNA, Apr. 2, 2014, <http://www.bna.com/wheeler-peering-not-n17179889335/>.

III. THE COMMISSION SHOULD PROCEED WITH CAUTION IN CONSIDERING EXPANDED DISCLOSURE OBLIGATIONS FOR BROADBAND PROVIDERS

TWC has long valued transparency for its subscribers. In addition to investing significant resources into complying with the existing disclosure requirements,⁸⁷ TWC has consistently provided clear and conspicuous disclosures to consumers regarding its acceptable use policies and the impact of its network management practices, as described in detail in this docket and others—and did so well before the Commission began to require such disclosures.⁸⁸ TWC thus supports the NPRM’s goal of ensuring that “accurate” information about broadband networks is available.⁸⁹ But as a practical matter, some of the NPRM’s proposals would veer from that objective and would simply burden broadband Internet access providers without making consumers or edge providers any more informed.

As a threshold matter, there is no reason to conclude that any changes in this area are necessary; rather, there is every reason to believe that the disclosure requirements now in place are working effectively. The NPRM presumes that neither the existing rule nor any voluntary disclosure practices are sufficient to inform consumers and other stakeholders, and it thus tentatively concludes that some sort of “enhancement” of the current disclosure obligations is

⁸⁷ TWC’s network management disclosures, provided pursuant to the existing rules, are available at:
http://help.twcable.com/description_of_network_management_practices.html (for residential and small business customer),
http://help.twcable.com/description_of_network_management_practices_wireless.html (for wireless broadband Internet access services), and
<http://business.timewarnercable.com/legal/network-management-disclosure.html> (for business class services).

⁸⁸ *See, e.g.*, TWC 2010 Net Neutrality Comments at 98 (citing previous comments); TWC “Need for Speed” Comments at 3-6.

⁸⁹ NPRM ¶ 66.

needed.⁹⁰ Yet, there is no basis for the NPRM’s pessimism in this regard. The NPRM points to informal consumer complaints that *may* “suggest[]” that some consumers are not satisfied with the information available to them.⁹¹ But if anything, the examples cited by the NPRM actually relate to the quality of the *service* provided, and have nothing to do with the quality of *information* available. The NPRM’s speculation to the contrary hardly offers a sound basis for policymaking.

Moreover, even if there were some basis for concluding that current disclosure practices should be refined, some of the NPRM’s proposals would fail to achieve the Commission’s objectives. The most problematic of these may be the suggestion that broadband providers should be required to disclose specific data about network congestion—including its source, location, timing, speed, and duration—“regardless of its cause.”⁹² Although the NPRM aspires to implement such a requirement in a “practical manner,” the impracticality of this proposal should be readily apparent. Indeed, the Commission already has compiled a substantial record demonstrating that substantial information concerning network congestion is beyond the knowledge of broadband Internet access providers, as any number of variables, in any variety of combinations, can cause network congestion.

If the Commission believes it important for consumers to have access to “meaningful” information about congestion and is inclined to expand or supplement the existing transparency rules, the logical solution is to require the entities that possess such information to disclose it. TWC has previously noted that there is no reason why broadband Internet access service

⁹⁰ NPRM ¶ 67.

⁹¹ NPRM ¶ 69.

⁹² NPRM ¶ 83.

providers should be held to a higher standard in terms of transparency.⁹³ For instance, edge providers and transit providers control how they route their traffic and can cause congestion that in turn degrades the consumer experience. Such practices create further problems for broadband Internet access providers like TWC, which must respond accordingly but must do so in an informational vacuum. Requiring such providers to disclose information about their routing practices would better enable TWC and others to manage traffic on their own networks and preserve the quality of the online experience for all stakeholders.

The Commission likewise should decline to require disclosures that are tailored to particular “subgroups.”⁹⁴ The NPRM posits that various entities that participate in the exchange of Internet traffic—such as edge providers and CDNs—have “distinguishable needs for information” to which broadband Internet access providers should cater; it even suggests that these categories can be refined further based on economic considerations, noting that a start-up edge provider may require different information than a more established company.⁹⁵ But this proposal overlooks the fact that there is a well-developed commercial ecosystem in which ISPs exchange information with transit providers and CDNs. In any event, apart from loosely describing what some of these various subgroups may be, the NPRM offers no structure to the proposal. For instance, it does not define any category, let alone suggest what information each should have. Given these very faint outlines, broadband Internet access providers would be left to guess at what information these providers need and when they need it—forcing them to try to satisfy targets that are in constant motion. Moreover, the NPRM acknowledges that different

⁹³ TWC 2010 Net Neutrality Comments at 99-100.

⁹⁴ NPRM ¶ 76.

⁹⁵ NPRM ¶¶ 75-76.

companies wear different hats, injecting further confusion into when they may need to know what.⁹⁶

For these reasons, the Commission should not presume that any “enhancements” of the current transparency rules as they apply to broadband Internet access service providers are needed; the Commission instead should consider expanding its rules to cover other relevant entities to the extent the record shows that additional information would be helpful to consumers.

⁹⁶ NPRM ¶ 76 (noting that Google and Amazon may act as content providers, CDNs, or cloud service providers).

CONCLUSION

TWC supports the NPRM's core goal of "ensur[ing] that the open Internet remains open."⁹⁷ The Commission can best achieve that objective by relying on its Section 706 authority rather than a destabilizing Title II reclassification, and by appropriately tailoring the scope and content of its rules to the relevant policy interests at stake.

Respectfully submitted,

TIME WARNER CABLE INC.

Steven N. Teplitz
Terri B. Natoli
TIME WARNER CABLE INC.
901 F Street, NW, Suite 800
Washington, DC 20004

Marc Lawrence-Apfelbaum
Jeff Zimmerman
Julie P. Laine
TIME WARNER CABLE INC.
60 Columbus Circle
New York, NY 10023

By: /s/ Matthew A. Brill
Matthew A. Brill
James H. Barker
Alexander L. Stout
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Its Attorneys

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⁹⁷ NPRM ¶ 2.