

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF AT&T SERVICES, INC.

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INTRODUCTION AND EXECUTIVE SUMMARY

For more than a decade, investment and innovation flourished throughout the Internet ecosystem despite the absence of any net neutrality rules. During that time, broadband Internet access providers poured more than a trillion dollars into next-generation networks capable of providing advanced services. That network investment paved the way for an explosion in content, applications, and services delivered over advanced networks. This remarkable growth in investment and innovation continued even after the Commission adopted net neutrality rules in 2010, in part because those rules successfully balanced concerns about Internet openness with the need to maintain incentives for Internet service providers to continue investing in advanced networks. The Commission should do nothing in this proceeding to upset that balance. Instead, the Commission should adopt targeted and flexible rules based largely on the 2010 model and thus promote continued investment and innovation by broadband and edge providers alike.

Although the D.C. Circuit invalidated the Commission’s “no-blocking” and nondiscrimination rules in *Verizon*,¹ nothing in the court’s decision requires a wholesale rethinking of the Commission’s approach to the open Internet. To the contrary, *Verizon* makes clear that the Commission has ample statutory authority under section 706 to adopt new rules that replicate the balance struck in 2010. Specifically, as the *NPRM* correctly recognizes, the Commission has legal authority to adopt new no-blocking and nondiscrimination rules that are precisely tailored to prohibit any practices that could pose a threat to the “virtuous circle” of investment and innovation that has enabled the Internet to thrive.²

¹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (reviewing Order, *Preserving the Open Internet et al.*, 25 FCC Rcd 17905 (2010) (“*Open Internet Order*”).

² Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 14-61 ¶¶ 2, 23 (May 15, 2014) (“*NPRM*”).

That approach is the most sensible and legally defensible path forward. Calls to use this proceeding to impose a host of additional regulatory controls on broadband Internet access providers should be firmly rejected, particularly because the record is devoid of evidence of any actual threat to Internet openness that could possibly warrant heavy-handed regulation. Indeed, adopting intrusive rules absent factual support would flout the Commission's commitment to fact-based and data-driven analysis and contravene section 706, rendering such rules highly vulnerable to legal challenge. And if there is one thing that *all* parties to this proceeding can agree on, it is that the Commission should ground its rules on a solid legal foundation to avoid the turmoil and investment-detering uncertainty that would follow yet another judicial remand.

In these comments, AT&T outlines such a legally defensible, measured approach in the wake of the *Verizon* decision. Part I explains why the Commission should adopt rules under section 706 that preserve Internet openness without upsetting the balance struck in 2010. The Internet has remained open for its entire history without intrusive net neutrality rules, and there is absolutely no evidence of any problem that could justify adopting more invasive measures now. Instead, the Commission should adopt rules under section 706 that, while fully consistent with the *Verizon* decision, nonetheless restore the equilibrium established by the *Open Internet Order*.

Those rules could include measures to address commercial arrangements in which an edge provider directs an Internet service provider to prioritize traffic over a consumer's last-mile connection for fixed broadband Internet access service without the knowledge and consent of the consumer. Such non-user-directed arrangements, which often are referred to as "paid prioritization" services, have been a flashpoint for net neutrality advocates, who have expressed

concerns that such paid prioritization will lead to a bifurcated Internet, with “fast lanes” for some content and inadequately “slow lanes” for other content.³

AT&T has no intention of creating fast lanes and slow lanes or of using prioritization arrangements for discriminatory or anti-competitive ends, as some net neutrality proponents fear. And AT&T does not oppose reasonable rules designed to protect against such conduct. Indeed, in Part II, AT&T explains how the Commission could address paid prioritization directly under section 706. The Commission could, for example, (i) ban paid prioritization outright or (ii) adopt additional safeguards to address the perceived threats of such prioritization—that is, enhanced transparency, no-blocking, and nondiscrimination rules—that would apply to those fixed broadband Internet access providers that do not voluntarily agree not to engage in paid prioritization. By adopting either approach, the Commission could eliminate any potential threat from paid prioritization in a legally defensible way without undermining the investment and innovation-friendly climate that has driven growth in the Internet ecosystem for the last two decades.

In Part III, AT&T explains that whatever the Commission concludes with respect to paid prioritization, it cannot and should not reclassify broadband Internet access service as a Title II service in an attempt to regulate it. To begin with, there is no valid legal rationale for reclassifying broadband Internet access providers as “telecommunications carriers.” Instead, the

³ As these advocates’ filings with the Commission make clear, they are not concerned with *all* commercial prioritization arrangements; rather, their chief concern is paid prioritization arrangements with edge providers that are invisible to, and not directed by, the end users over whose Internet connection packets are being prioritized. *See* Section II.A, *infra*. Consistent with that concern, AT&T uses the term “paid prioritization” throughout these comments to mean commercial arrangements in which an edge provider pays an Internet service provider to prioritize the edge provider’s traffic as it is delivered over a consumer’s fixed broadband Internet access service, where such prioritization is not at the direction of the consumer. “Paid prioritization” is thus distinct from user-driven prioritization.

plain language of the Communications Act and more than a decade of Commission and judicial precedent make clear that broadband Internet access is an information service. There also is no rational policy justification for such a radical change. Reclassification would mire the industry in years of uncertainty and litigation, and it would abruptly stall the virtuous circle of investment and innovation that has propelled the United States to the forefront of the broadband revolution and that is recognized as essential to continued economic growth and prosperity. Particularly because the Commission can address paid prioritization under section 706, there is no justification for inviting such regulatory chaos.

Indeed, contrary to the overly sanguine contentions of some reclassification proponents, the Commission could not even limit reclassification to providers of broadband Internet access service. In order to reclassify such providers as Title II carriers, the Commission would need to identify a severable transmission component of broadband Internet access service that could be classified as a “telecommunications service,” thus repudiating the “mutual exclusivity” principle, which provides that a single, unified offering cannot be both an “information service” and a “telecommunications service.” But as the Supreme Court recognized in *NCTA v. Brand X Internet Services*, such a determination by the Commission would have serious consequences for “all entities that use telecommunications inputs to provide information service[s],” because it “would subject to mandatory common-carrier regulation *all information-service providers that use telecommunications as an input to provide information service to the public.*”⁴ The Court’s analysis makes clear that the same rationale used to reclassify broadband Internet access providers would necessarily apply, as well, to broad swaths of the Internet ecosystem—including

⁴ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 994 (2005) (emphasis added).

content-delivery networks (“CDNs”) and many edge providers—thereby compounding the suppressive effects on investment and innovation throughout the ecosystem. That outcome simply could not be squared with the Commission’s obligations under section 706. At the very least, reclassification would call into question the regulatory status of countless information services, leading to more uncertainty and more litigation.

Finally, despite the claims of some net neutrality advocates, many of these severe consequences of Title II regulation could not be mitigated through forbearance. Advocates exaggerate both the ease with which forbearance could be effected and the extent to which it would reduce investment-detering uncertainty throughout the Internet ecosystem. In short, reclassification of broadband Internet access service would be directly contrary to the Commission’s charge under section 706 to promote broadband deployment. There is no need for the Commission to go down that path. It should, instead, continue to protect Internet openness under section 706.

In Part IV, AT&T addresses other proposals in the *NPRM* regarding no-blocking, nondiscrimination, and transparency, and, once again, urges the Commission to continue its balanced approach to preserving the open Internet. Many of these proposals seem to be grounded in concerns that the Commission lacks legal authority to prevent paid prioritization after *Verizon*. But if the Commission takes steps to address the purported harms of paid prioritization directly, there would be no conceivable need for these additional regulations, which go well beyond the rules adopted in 2010. Instead, the Commission should retain its existing transparency rule and re-adopt its no-blocking rules for fixed and mobile mass-market broadband Internet access services under an alternative rationale. In addition, the Commission should bar “commercially unreasonable” differentiation in the transmission of fixed broadband Internet

access service traffic.⁵ As in 2010, these rules would more than suffice to protect the open Internet, all the more so if the Commission directly neutralizes any potential threat from paid prioritization.

DISCUSSION

I. THE COMMISSION CAN ACHIEVE ITS STATED GOAL OF ENSURING THAT THE INTERNET “REMAINS OPEN” WITHOUT MORE INTRUSIVE NET NEUTRALITY RULES.

The Commission begins the *NPRM* by explaining that “the Internet has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social benefits that follow.”⁶ AT&T could not agree more. The Internet is a phenomenal driver of innovation, economic growth, and consumer welfare. Indeed, the evidence that today’s Internet is thriving is impossible to ignore, and all signs point to the continued vitality of the entire Internet ecosystem. Notably, and, contrary to the narrative of some net neutrality advocates, the remarkable growth of the Internet has occurred largely *because* of, not *despite*, the measured approach to regulation that the Commission has taken.

For nearly all of the Internet’s existence, and consistent with clear statements of congressional policy,⁷ the Commission has followed a decidedly “hands-off” approach to regulation, allowing the Internet to evolve free from regulatory burden or distortion. Consistent with that philosophy, the net neutrality rules that the Commission adopted in 2010 reflected a

⁵ As discussed below, given the operational and other constraints on mobile broadband Internet access services—for example, spectrum scarcity and the potential for harmful interference—the Commission should continue to limit the scope of any nondiscrimination rule to only the transmission of fixed broadband Internet access service traffic.

⁶ *NPRM* ¶ 1.

⁷ *E.g.*, 47 U.S.C. § 230.

purposeful balance between advancing the goals of an open Internet and ensuring continued investment in broadband infrastructure.⁸

Given the unqualified success of this approach, the Commission’s focus in the wake of the D.C. Circuit’s invalidation of two of the 2010 rules⁹ should be on restoring the balance struck by those rules. Particularly given the continued absence of any evidence of an “open Internet” problem that the 2010 framework would not address, there is no justification for adopting the new and intrusive net neutrality rules proposed by some advocates—rules that would drain investment, stifle innovation, and roll back the impressive gains that the Commission’s measured approach to Internet regulation has helped to secure.

A. The Internet Has Been and Remains “Open.”

The Internet has been and remains “open” today despite the continued absence of overly intrusive net neutrality regulations. For at least a decade, net neutrality advocates have raised concerns about the incentives and abilities of broadband Internet access providers to stifle the “open Internet.”¹⁰ These predictions have not borne out. Today’s Internet is free and thriving, as the *NPRM* recognizes. Indeed, the “fundamental question” guiding the *NPRM* is “[w]hat is the right public policy to ensure that the Internet *remains* open?”¹¹ That framing rightly acknowledges that the goal here should be preserving the status quo.

⁸ See *Open Internet Order*, 25 FCC Rcd 17905.

⁹ See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (reviewing the *Open Internet Order*).

¹⁰ See, e.g., Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* 176 (2001); Remarks of Michael J. Copps, Commissioner, FCC, *The Beginning of the End of the Internet? Discrimination, Closed Networks, and the Future of Cyberspace*, New America Foundation (Oct. 9, 2003).

¹¹ *NPRM* ¶ 2 (emphasis added).

By the Commission’s own account, the balanced and restrained approach that originated with Chairman Kennard’s “unregulation of the Internet”¹² and Chairman Powell’s Four Internet Freedoms,¹³ and was carried into the 2010 rules, has been an unmitigated success. The *NPRM* outlines the impressive growth of the Internet over the last decade¹⁴ and, in particular, since the Commission adopted the 2010 rules.¹⁵ That time period, the Commission finds, has been marked by “remarkable increases in investment and innovation.”¹⁶ The *NPRM* notes, for example, that “nearly \$250 billion in private capital has been invested in U.S. wired and wireless broadband networks since 2009.”¹⁷ The Commission also explains that “[w]hole new product markets have blossomed in recent years, and the market for applications has both diversified and exploded.”¹⁸

Evidence that the Internet ecosystem is flourishing is abundant. Access to very fast broadband connections has increased dramatically over the last few years, with 83 percent of households having access to a wireline broadband connection offering a download speed of at

¹² See Remarks of William E. Kennard, Chairman, FCC, before the National Cable Television Association, Chicago, Illinois, June 15, 1999, *available at* <http://transition.fcc.gov/Speeches/Kennard/spwek924.html>.

¹³ See Remarks of Michael K. Powell, Chairman, FCC, at the Silicon Flatirons Symposium, Boulder, Colorado, Feb. 8, 2004, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

¹⁴ See, e.g., *NPRM* ¶ 7 (stating that “as of January 2014, 87 percent of Americans used the Internet, compared to 14 percent in 1995. And it is a critical route of commerce, supporting an e-commerce marketplace that now boasts U.S. revenues of \$263.3 billion”).

¹⁵ See *NPRM* ¶¶ 29-32.

¹⁶ *Id.* ¶ 29.

¹⁷ *Id.* ¶ 30.

¹⁸ *Id.* ¶ 31; see also e.g., *id.* ¶ 8 (stating that “an economic study originally released in February 2012 and updated in July 2013 reported that the app economy is responsible for roughly 752,000 jobs in the United States, which is an increase from zero in 2007 when the iPhone was introduced”).

least 25 Mbps, compared to just under 50 percent in 2010.¹⁹ Indeed, a recent study has found that the United States far exceeds Europe in high-speed broadband deployment and investment.²⁰ It determined that, among other things, “[a] far greater percentage of U.S. households had access to Next Generation Networks . . . (25 Mbps) than in Europe”; the U.S. has better fiber and LTE deployment coverage; and network investment in the United States greatly outpaces Europe with \$562 of broadband investment per household in the United States compared with \$244 per household in Europe.”²¹ And U.S. investment in broadband networks shows no signs of slowing: USTelecom reports that broadband capital expenditures rose from \$64 billion in 2009 to \$68 billion in 2012.²² AT&T has been in the vanguard, devoting more than \$20 billion annually to capital investment.²³ Indeed, in the last six years, AT&T has invested more capital into the U.S. economy than any other public company.²⁴

¹⁹ See NTIA, “Nationwide Availability of Broadband Download Speed by Technology Type,” in *Broadband Statistics Report*, Feb. 2014, available at <http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf>; NTIA, “All Broadband Availability by Speed: June 2010, June 2011, and June 2012,” Figure 1 in U.S. Broadband Availability: June 2010 – June 2012, http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf.

²⁰ See Christopher S. Yoo, *U.S. v. European Broadband Deployment: What Do The Data Say?* (June 2014) (“Yoo European Study”), available at <https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment>.

²¹ *Id.* (Executive Summary).

²² See USTelecom, *Historical Broadband Provider Capex*, <http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex> (last visited June 20, 2014); Patrick Brogan, *Updated Capital Spending Data Showing Rising Broadband Investment in Nation’s Information Infrastructure 1*, USTelecom (Nov. 4, 2013), available at <http://www.ustelecom.org/sites/default/files/documents/103113-capex-research-brief-v2.pdf>.

²³ AT&T, *2013 Annual Report* at 4 (Feb. 10, 2014), available at http://www.att.com/Investor/ATT_Annual/2013/downloads/ar2013_annual_report.pdf (documenting \$25 billion investment in capital and spectrum in 2013); AT&T, Press Release, *AT&T to Invest \$14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services* (Nov. 7, 2012),

Edge providers too have continued to flourish under the rules adopted in 2010, as the Commission details in the *NPRM*.²⁵ In particular, online voice and video services have grown tremendously: Between 2010 and 2013, revenues from online video services grew 175 percent, from \$1.86 billion to \$5.12 billion.²⁶ VoIP usage has similarly continued to surge. The number of global over-the-top mobile VoIP subscribers increased by 550 percent in 2012.²⁷ Skype alone reported 47 million users in the United States in late 2012.²⁸ Online music services are thriving as well. Pandora tallied more than 200 million registered users as of December 31, 2013 and generated \$647.5 million in revenue—a 56% increase from the prior year.²⁹ And the use of social media applications has continued to explode. For example, Snapchat users shared 20

<http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode> (discussing AT&T plans to invest approximately \$14 billion in broadband improvements over three years, with total capital spending expected to be approximately \$22 billion each year).

²⁴ AT&T, *2013 Annual Report* at 4 (“Over the past six years, AT&T has invested more capital into the U.S. economy than any other public company — and more than \$140 billion when you combine capital and spectrum-driven acquisitions.”).

²⁵ See *NPRM* ¶¶ 31-32.

²⁶ This includes revenues from subscription services as well as sales and rentals of full-length television programs and movies. See SNL Kagan, *Media Trends Actionable Metrics, Benchmarks & Projections for Major Media Sectors* 262 (2013) (“*SNL Kagan Media Trends*”).

²⁷ Press Release, Infonetics Research, *Infonetics Research Raises VoLTE Forecast; Over-the-top Mobile VoIP Subscribers Nearing 1 Billion Mark*, July 8, 2013, <http://www.infonetics.com/pr/2013/Mobile-VoIP-Services-and-Subscribers-Market-Highlights.asp>.

²⁸ Microsoft, *Skype Audience Stats*, available at http://advertising.microsoft.com/es/WWDocs/User/display/cl/brand_subproperty/1589/global/Skype-Audience-Stats.pdf (reporting data from November 2012).

²⁹ See Pandora, *2014 Annual Report (Form 10-K)* at 1, 3 (Feb. 14, 2014), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjMwMjU4fENoaWxkSUQ9LTF8VHlwZT0z&t=1>.

million photos per day in October 2012; today, they share over 700 million.³⁰ As these and many other examples demonstrate, edge providers have thrived under the 2010 rules.

Importantly, the Internet has remained open—and the “virtuous circle” of investment and innovation throughout the Internet ecosystem has flourished—without the overly intrusive, top-down rules that many net neutrality advocates claim are essential. Indeed, for most of the Internet’s existence, openness has been achieved without *any* regulatory intervention at all. In 2005, the Commission adopted an *Internet Policy Statement*, but that statement was non-binding and only committed the Commission to incorporate the principles “into its ongoing policymaking activities.”³¹ Five years later, in 2010, the Commission adopted its first set of net neutrality rules—but those rules reflected a balanced approach designed to accommodate incentives to invest in broadband networks and the goal of preserving Internet openness.³² It bears emphasis, however, that investment and innovation were exceptionally robust even *prior* to adoption of the 2010 rules.³³

³⁰ See Alyson Shontell, *5 Months After Turning Down Billions, Snapchat’s Growth is Still Exploding*, Business Insider (May 2, 2014), <http://www.inc.com/alyson-shontell/snapchats-growth-still-exploding-after-turning-down-billions.html>; Billy Gallagher, *Snapchat Now Sees 350M Photos Shared Daily, Up From 200M in June*, TechCrunch (Sept. 9, 2013), <http://techcrunch.com/2013/09/09/snapchat-now-sees-350m-photos-shared-daily-up-from-200m-in-june/>.

³¹ See Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, ¶ 5 n.15 (2005) (“*Internet Policy Statement*”) (noting that the Commission was “not adopting rules in this policy statement”); see also *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (explaining that the policy statement was unenforceable).

³² See, e.g., *Open Internet Order*, 25 FCC Rcd at 17951 ¶ 80 (“Since at least 2005, when the Commission adopted the *Internet Policy Statement*, we have recognized that a flourishing and open Internet requires robust, well-functioning broadband networks, and accordingly that open Internet protections require broadband providers to be able to reasonably manage their networks.”).

³³ See Comments of AT&T, *Preserving the Open Internet*, GN Docket No 09-191, at 5 (Jan. 14, 2010) (“AT&T 2010 Net Neutrality Opening Comments”) (stating that, from 2005 to 2010,

In short, the record is clear that the Internet today is open and prospering, due in part to the restrained and balanced approach to regulation taken by the Commission. The Commission should give careful attention to that unambiguous historical record before it considers any additional regulation of the Internet.

B. Given the Healthy State of the Internet Ecosystem, the Commission’s Guiding Task Should Be to Maintain the Balance Achieved by the 2010 Rules.

The Commission explains in the *NPRM* that the “goal of this proceeding is to find the best approach to protecting and promoting Internet openness.”³⁴ As should be clear from the discussion above, the “best approach” would be to maintain the balance reflected in the 2010 rules by addressing the legal concerns raised by the *Verizon* court. The Commission has acknowledged that the 2010 model—which was followed by “remarkable increases in investment and innovation”—was a demonstrable success.³⁵ Common sense and sound regulatory policy counsel in favor of following an approach with a proven track record.

“[n]ew social networking applications (e.g., Facebook, Twitter) and multimedia sites (e.g., YouTube, Hulu) have exploded in popularity and reshaped American life[; w]ired broadband providers have invested tens of billions of dollars, and created tens of thousands of jobs, to upgrade their networks[; and] Internet access speeds have increased dramatically, even as the price of Internet access has plummeted in real terms (by units of bandwidth consumed).”); Robert E. Atkinson & Ivy E. Schultz, *Broadband in America: Where It Is and It Is Going (According to Broadband Service Providers)*, Columbia Institute for Tele-Information, at 11 (Nov. 11, 2009), http://www4.gsb.columbia.edu/null/download?&exclusive=filemgr.download&file_id=7212786 (discussing tens of billions of dollars invested annually in broadband infrastructure); Reply Comments of CTIA – The Wireless Association, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Including Commercial Mobile Services*, GN Docket No. 09-66, at 19 (filed Oct. 22, 2009) (reporting that for the twelve months ending June 2009, wireless providers reported capital investments of \$19.5 billion (not including spectrum investments)).

³⁴ *NPRM* ¶ 4.

³⁵ *Id.* ¶ 29.

The D.C. Circuit’s remand in *Verizon* provides no occasion for the Commission to change course and upset the balance struck by the 2010 rules. To be sure, that decision leaves the Commission with the task of promulgating legally defensible no-blocking and nondiscrimination rules. But *Verizon* in no way suggests, much less demands, that the Commission fundamentally rethink its approach to the open Internet—an approach that has helped to make the Internet a technological, social, economic, and cultural success story. To the contrary, the *Verizon* decision leaves open a simple and legally defensible path forward: the Commission should fine-tune its net neutrality rules to avoid imposing *per se* common carriage obligations on broadband Internet access providers but do so in a way that largely restores the balance reflected in the prior rules.³⁶

Below, AT&T details how the Commission could accomplish that objective consistent with section 706. First, the Commission could directly address any potential threat that paid prioritization might pose to the open Internet.³⁷ And if the Commission does so, any remaining rules should mirror those adopted in the *Open Internet Order*. Specifically, the Commission should retain its existing transparency rule, re-adopt its no-blocking rule under a different rationale, and adopt a slightly revised nondiscrimination rule that bars “commercially unreasonable” differentiation in the transmission of lawful traffic over a consumer’s fixed broadband Internet access service.³⁸ Nothing more is needed to preserve Internet openness.

³⁶ See *Verizon*, 740 F.3d at 651 (holding that the Commission’s rules on remand must permit broadband Internet access providers “to make individualized decisions, in particular cases, whether and on what terms to deal” with edge providers).

³⁷ See Part II, *infra*.

³⁸ See Part IV, *infra*.

C. The Commission Should Reject Calls to Turn Its Back on the Measured Approach Reflected in the 2010 Rules.

Without evidence of net neutrality violations or any harm to the open Internet, there is no justification, much less a compelling need, to do more than restore the basic equilibrium of the 2010 rules. Although the Commission’s tentative conclusions in the *NPRM* would largely follow that approach, the *NPRM* also calls for comment on a multitude of other possible regulatory approaches and interventions. Indeed, the *NPRM* needlessly opens up questions and issues that had seemingly been settled, and it floats an array of possible regulatory changes—even to the transparency rule already upheld in *Verizon*.³⁹ There is no sensible reason for considering, much less adopting, additional, intrusive controls without evidence of any problem that would justify such regulations.⁴⁰

There can be little dispute on the threshold point that prescriptive government regulation entails significant social costs.⁴¹ Those well-documented costs, moreover, increase

³⁹ See, e.g., *NPRM* ¶¶ 66-85 (seeking comment on new, enhanced transparency requirements, despite the transparency rule being upheld in *Verizon*).

⁴⁰ See, e.g., *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (holding that “[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking,” and vacating order where there was “zero evidence of actual abuse”); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (“[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.”) (internal quotation marks omitted).

⁴¹ See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1984) (acknowledging “the economic concern that strict [regulatory] schemes would retard industrial development with attendant social costs”); see also Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation - Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1493 (2002) (“Expensive regulation may well increase prices, reduce wages, and increase unemployment . . . Resources now being devoted to small or imaginary problems might be diverted instead to areas where, by all accounts, they could produce far more good.”); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807, 818-19 (1975).

exponentially when the government attempts to regulate a technologically evolving field (like the Internet). Indeed, the risk that regulatory controls will be unable to keep up with dynamic and fast-moving changes is substantial. As Chairman Wheeler has noted, “[t]he pace of innovation on the Internet is much, much faster than the pace of a notice-and-comment rulemaking. . . . We cannot hope to keep up if we adopt a prescriptive regulatory approach.”⁴²

Given the well-understood costs of excessive regulation, as a general rule regulatory intervention is appropriate when—and only when—there is a concrete need for such intervention *and* regulators have enough information to appropriately balance the costs against the benefits.⁴³ Here, there is evidence of neither. In the *NPRM*, the Commission acknowledges that actual instances of threats to Internet openness “have been relatively few” “for over a decade,” but speculates that this is because “[t]he Commission has had policies in place during the period in question that it has been ready to enforce.”⁴⁴ In reality, the Commission had *no* open Internet policy in place before the Commission adopted the *Internet Policy Statement* in 2005, and even that policy was generally unenforceable.⁴⁵ But regardless of the extent to which the Commission’s policies during the past ten years can be credited for protecting Internet openness, that track record certainly provides no basis for concluding that *additional* measures are warranted that go further than the rules and policies that were in place during that time.

⁴² Remarks of FCC Chairman Tom Wheeler, American Enterprise Institute, Washington, D.C. (June 12, 2014) (discussing the FCC’s new approach to cybersecurity).

⁴³ See note 41, *supra*.

⁴⁴ *NPRM* ¶ 40.

⁴⁵ See *Comcast*, 600 F.3d 642 (explaining that the policy statement was unenforceable); *Internet Policy Statement*, 20 FCC Rcd at ¶ 5 n.15 (noting the Commission was “not adopting rules in this policy statement”). In December 2006, AT&T agreed to comply with those principles as a merger commitment. See Memorandum Opinion and Order, *AT&T Inc. & BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, 5814-5815, Appendix F (2007).

Unfortunately, many of the grab-bag of regulations on which the Commission seeks comment would do just that. The Commission purports to justify these proposals, not with real-world evidence of a marketplace failure or a regulatory deficiency, but with *speculation* about purely *theoretical* incentives and abilities that broadband Internet access providers supposedly could have to engage in practices that might threaten the open Internet.⁴⁶ Such speculation is no substitute for reasoned decisionmaking, particularly given the record of the past decade.⁴⁷ But the Commission’s speculation about incentives and abilities is flawed even as a theoretical matter.

First, the Commission’s discussion of purported incentives to engage in discriminatory practices ignores the countervailing incentives that broadband Internet access providers have to maximize the value of their service to both end users and edge providers.⁴⁸ And the best path to that end is to offer end users what they want—namely, unfettered access to all safe and lawful Internet content, applications, and services. Indeed, broadband Internet access providers not only have incentives to offer such unfettered access, but also to encourage, support, and nurture innovation on their platforms. By doing so, these providers make those platforms more valuable to end users, enabling the providers to reap far greater economic benefits over time. That is why AT&T and other providers have worked hard to facilitate edge provider innovation and investment, as explained in more detail below.⁴⁹

⁴⁶ See *NPRM* ¶¶ 39, 42-44.

⁴⁷ See, e.g., *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994) (per curiam) (“[S]peculation is an inadequate replacement for the agency’s duty to undertake an examination of the relevant data and reasoned analysis.”).

⁴⁸ See, e.g., *NPRM* ¶¶ 42-50.

⁴⁹ See pages 85-86, *infra*.

Considerable economic research supports this common-sense notion. A broadband platform provider has strong and rational market-driven incentives to deal evenhandedly with independent application providers because to behave otherwise would ultimately decrease, not increase, the value of its platform.⁵⁰ As Nobel Prize-winning economist Gary Becker and Dennis Carlton have explained, “consumers are willing to pay more for access to more content and, as a result, broadband access providers face disincentives for restricting access to Internet content.”⁵¹

That incentive to maximize access to Internet content, applications, and services that consumers want would exist even if the market for broadband Internet access were *uncompetitive*.⁵² But competition in the marketplace is fierce, and it further propels providers to offer access to content and applications that consumers desire.⁵³ Indeed, any broadband Internet

⁵⁰ See, e.g., Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech. 85, 104 (2003); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 Geo. L.J. 1847, 1888-89 (2006).

⁵¹ Comments of AT&T Services, Inc., *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, at 17 (Mar. 21, 2014) (“AT&T Remand Comments”) (quoting Declaration of Gary S. Becker & Dennis W. Carlton at 12 (attached to Comments of Verizon, *Preserving the Open Internet et al.*, GN Docket No. 09-191 *et al.* (filed Jan. 14, 2010)); see also AT&T 2010 Net Neutrality Opening Comments at 115 (explaining that instead of consigning “best-effort Internet traffic to ‘the digital equivalent of a winding dirt road’ . . . cable companies [are] spending billions upon billions of dollars to upgrade their best-effort Internet access platforms to DOCSIS 3.0 so that their end users can enjoy download and upload speeds 10-50 times faster than in 2005”); *id.* at 130-31 (even though “AT&T and other providers have long offered QoS enhancements to business-class customers, no one has ever suggested that they have ever degraded bandwidth for the best-effort Internet access platform to increase the value of their prioritized services. To the contrary, such bandwidth has increased exponentially over the years, and the reason is simple: Customers demand it.”).

⁵² See AT&T 2010 Net Neutrality Opening Comments at 120-22.

⁵³ See, e.g., USTelecom, *Residential Broadband Competition*, <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/residential-competition> (last visited June 24, 2014) (“As of 2012, 88% of the U.S. population has a choice of two or more wired broadband competitors.”); Everett Ehrlich, Progressive Policy Institute, *The State of U.S. Broadband: Is It Competitive? Are We Falling Behind?* 12 (2014) (“Rather than a one-

access provider that prevents innovative new content and applications from using its platform would inflict considerable harm on itself because most consumers could switch to a different provider that does not engage in such self-defeating behavior.⁵⁴

Second, the Commission appears to misunderstand the technical capabilities of broadband Internet access providers. In particular, the Commission’s assumption that providers have the ability to engage in end-to-end prioritization of Internet traffic is incorrect in the vast majority of cases.⁵⁵ To engage in prioritization across connecting networks, it would be necessary to have a system coordinated among edge providers, backbone providers, and ISPs to mark certain packets for priority and to handle them accordingly. No such system exists today.

dimensional sprint, broadband competition is more of an n-dimensional ‘cage match.’”); *id.* at 14 (stating that, including both wired and wireless providers, “at a bare minimum, nearly every American can choose from 5-6 service providers”); *id.* at 17 (finding the broadband market competitive due to “sustained innovation and investment, responsiveness to consumer preferences and demand, and market pressure on prices and profits”); FCC, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2012*, at 9 (Dec. 2013) (showing that 76% of U.S. households have three or more ISPs providing at least 3 Mbps downstream and over 200 kbps upstream). Indeed, courts have long upheld Commission findings that the broadband marketplace is competitive. *See, e.g., United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (noting “robust competition . . . in the broadband market”); *EarthLink, Inc. v. FCC*, 462 F.3d 1, 11-12 (D.C. Cir. 2006) (noting that the court has “upheld in resounding terms” the FCC’s findings that the broadband marketplace is a “competitive environment”).

⁵⁴ AT&T Remand Comments at 17; *see also* AT&T 2010 Net Neutrality Opening Comments at 120 (“[A]s the Commission has explained, broadband competition keeps any individual provider from sabotaging the value of its broadband platform to consumers by anticompetitively degrading the complementary applications that ride on top of it.”); *id.* at 129 (“If Broadband Provider X began degrading its best-effort Internet access platform to favor its ‘prioritized’ content, such that most applications and content loaded more slowly on X’s network than on its rivals’ Internet access platforms, customers would begin switching to those rivals en masse.”).

⁵⁵ *See, e.g., NPRM* ¶¶ 51-53.

D. There Is No Justification for Any Changes to the Open Internet Rules for Mobile Broadband Internet Access Services.

The Commission also seeks comment on whether changes are necessary to the net neutrality rules adopted for mobile broadband Internet access providers in 2010.⁵⁶ The answer is no. In the *Open Internet Order*, the Commission appropriately recognized that “mobile broadband presents special considerations that suggest differences in how and when open Internet protections should apply” and, consequently, adopted a more measured approach to regulation.⁵⁷ The Commission based its determination on various factors, including the particularly robust investment, innovation, and competition in the mobile broadband marketplace,⁵⁸ as well as unique “operational constraints” that mobile providers face.⁵⁹ Those same factors exist today, amply supporting, if not compelling, the Commission’s “tentative[] conclu[sion]” to continue its measured approach to mobile broadband.⁶⁰

To begin with, as the Commission and others have recognized, investment and innovation have been extraordinarily strong in the mobile wireless ecosystem, both before the 2010 rules and after. For example, annual investment in U.S. wireless networks grew more than 40 percent between 2009 and 2012, from \$21 billion to \$30 billion.⁶¹ Private investment in mobile wireless infrastructure over the next five years will generate \$1.2 trillion in economic growth and create

⁵⁶ *E.g., id.* ¶ 62.

⁵⁷ *Open Internet Order*, 25 FCC Rcd at 17956 ¶ 94.

⁵⁸ *See id.* at 17956 ¶¶ 94-95.

⁵⁹ *See, e.g., id.* at 17956 ¶ 95 (“existing mobile networks present operational constraints that fixed broadband networks do not typically encounter”).

⁶⁰ *Id.* at 17941 ¶ 62.

⁶¹ Office of Science & Technology & The National Economic Council, *Four Years of Broadband Growth* at 2 (June 2013), available at http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf.

1.2 million jobs.⁶² Indeed, as Commissioner Pai recently noted, this investment has helped to make the United States the world’s “undisputed” “mobile broadband leader.”⁶³ The United States has “twice as many mobile broadband subscribers than any other country in the world” and 4G LTE “now covers 86 percent of Americans; in Europe, that number is only 27 percent.”⁶⁴

Furthermore, a total of \$8.33 billion has been raised since 2007 on mobile media ventures, a majority of the funds (\$4.7 billion) to companies that provide software services, including mobile Web development, provider-backend software, app development, and cloud-based services in the United States.⁶⁵ In 2013, over \$1 billion in venture capital funding was invested in mobile media startups,⁶⁶ and overall app use in 2013 posted 115 percent year-over-year growth.⁶⁷ According to CTIA, in 2012 there were more than 20 independent mobile application stores, offering over 3.5 million apps for 14 different operating systems.⁶⁸

This explosion in innovative broadband services and applications is driven by a number of factors. For one thing, mobile providers have made enormous financial investments in their

⁶² FCC, Fact Sheet: Internet Growth and Investment (Feb. 19, 2014), *available at* <http://www.fcc.gov/document/fact-sheet-internet-growth-and-investment>.

⁶³ Remarks of Ajit Pai, Commissioner, FCC, on “Reforming Communications Policy in the Digital Age: A View from the FCC,” Washington, D.C., at 3 (June 25, 2014) (“Pai Remarks”), *available at* <http://www.fcc.gov/document/comm-pai-remarks-reforming-communications-policy-digital-age>.

⁶⁴ *Id.*

⁶⁵ *See NPRM* ¶ 31.

⁶⁶ *SNL Kagan Media Trends* at 278.

⁶⁷ Flurry Analytics, *Mobile Use Grows 115% in 2013, Propelled by Messaging Apps*, Flurry Blog, Jan. 13, 2014, <http://blog.flurry.com/bid/103601/Mobile-Use-Grows-115-in-2013-Propelled-by-Messaging-Apps>.

⁶⁸ Letter from Scott K. Bergmann, Vice President, Regulatory Affairs, CTIA – The Wireless Association, to Thomas Wheeler, Chairman, FCC, WT Docket No. 13-135, GN Docket No. 09-51, at 2 (filed Nov. 13, 2013).

networks and, just like wireline providers, they therefore must increase the economic value of their networks to recover those investments.⁶⁹ And both economic research and common sense dictate that networks are more valuable to mobile providers the more end users subscribe to them, and the more data those users consume.⁷⁰ That imperative compels mobile providers to continue to ensure that customers can access the applications, services, and content of their choosing. Indeed, mobile providers enable customers to access an array of applications that compete in some sense with services that mobile providers offer—including, for example, Skype, You Tube, and text messaging apps. Those competing applications are used millions of times daily without incident, evidencing concretely the incentives that providers have to maximize the use of their networks and those networks' value to end users.

These developments are also driven by competition. The massive investments in state-of-the-art mobile networks are not happening in a vacuum; they are indicative of an intensely competitive marketplace for mobile broadband Internet access services. The Commission cited this competition in 2010 as one basis for treating mobile services differently from fixed services, and competition has only grown more intense since then. The Commission's most recent Report to Congress, issued in March 2013, documents that upward trend.⁷¹ It shows, among other things, not only the astounding pace of investment and innovation, but also a continuing legacy

⁶⁹ See AT&T Remand Comments at 16-17 (citing Becker and Carlton declaration).

⁷⁰ See *id.*; see also pages 16-18, *supra* (discussing similar incentives of wireline providers); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 *Geo. L.J.* 1847, 1888 (2006) (“One would . . . expect a network owner’s natural instinct would be to open up its network to all content and applications providers, because doing so would maximize the value of its network and thus maximize the amount that it could charge for network access.”).

⁷¹ See Sixteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 11-186 (Mar. 21, 2013) (“*Mobile Wireless Competition Report*”).

of declining prices and improving service quality.⁷² It also notes that 82.0 percent of the U.S. population had access to four or more mobile broadband Internet access providers,⁷³ whereas this figure was only 67.8 percent in 2011.⁷⁴ The Commission noted in the *Open Internet Order* that “most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband,” and that remains true today.⁷⁵ Competition is so fierce that some mobile providers have recently deployed promotional plans that *pay customers* for switching to their services.⁷⁶ Mobile providers thus must work hard to keep and win customers, including by providing access to the Internet applications and content that consumers demand.⁷⁷ Mobile providers know that if they were to artificially constrain the applications, services, or devices available on their networks, they would swiftly lose customers to competitors.

⁷² See, e.g., *id.* at 14 (“An examination of two key pricing indicators, the Wireless Telephone Services component of the Consumer Price Index and the per-minute price of voice service, shows that mobile wireless prices declined overall in 2010 and 2011.”); *id.* at 197 ¶ 298 (Nielsen’s 2011 national wireless data network performance report found that “[t]he small-file (0.2 MB) industry median download data speed increased from 0.398 Mbps with 98.2 percent reliability in 2009 to 0.523 Mbps with 98.3 percent reliability in 2011. The large-file (4 MB) industry median download data speed increased from 0.632 Mbps with 94.3 percent reliability in 2009 to 1.693 Mbps with 95.2 percent reliability in 2011.”).

⁷³ *Id.* at 7.

⁷⁴ See Fifteenth Report, Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, at 7 (June 27, 2011).

⁷⁵ *Open Internet Order*, 25 FCC Rcd at 17957 ¶ 95; see also *NPRM* ¶ 91 (noting “the generally greater amount of consumer choice for mobile broadband services than for fixed”).

⁷⁶ See, e.g., T-Mobile, Switch Carriers Without Early Termination Fees, available at <http://www.t-mobile.com/offer/switch-carriers-no-early-termination-fee.html> (last visited Jun. 20, 2014).

⁷⁷ See, e.g., AT&T 2010 Net Neutrality Opening Comments at 146-47 (detailing how “the wireless broadband marketplace is intensely competitive. It not only offers a broadband alternative to wireline service for some customers; it is itself the focus of significant intra-modal competition.”).

In addition, and importantly, mobile providers continue to face unique “operational constraints” that require a different approach to Internet openness than in the wireline context.⁷⁸ The Commission recognized in adopting the 2010 rules that special characteristics of mobile broadband infrastructure make it essential to afford mobile providers additional flexibility in how they operate their broadband services.⁷⁹ Specifically, as AT&T has previously explained in detail, mobile networks face spectrum constraints, a shared “last mile” radio access network, and other impediments that make it far more challenging to provide mobile broadband than wireline service.⁸⁰ These factors create capacity and quality-of-service challenges for mobile broadband Internet access providers that are particularly acute in the “last mile” radio access network. To ensure high-quality service for all customers, mobile providers need greater flexibility in how they address congestion over their networks—particularly in the “over-the-air” segment.⁸¹ Intrusive net neutrality rules that hamstring mobile providers’ efforts to grapple with such network management challenges would degrade the quality of mobile service for all users.⁸²

Given the exponential growth of bandwidth-intensive mobile data usage, these challenges show no sign of abating. As the Commission explained to Congress, “[i]t is estimated that U.S.

⁷⁸ *Open Internet Order*, 25 FCC Rcd at 17957 ¶ 95.

⁷⁹ *Id.*

⁸⁰ See AT&T 2010 Net Neutrality Opening Comments at 157-66; see also Jeffrey H. Reed & Nishith D. Tripathi, *The Application of Network Neutrality Regulations to Wireless Systems: A Mission Infeasible* (2010) (attached as Exh. 2 to AT&T 2010 Net Neutrality Opening Comments); Comments of AT&T Inc., *Preserving the Open Internet*, GN Docket No. 09-191 *et al.*, at 57-63 (Oct. 12, 2010).

⁸¹ See AT&T 2010 Net Neutrality Opening Comments at 157-72.

⁸² These considerations apply whenever providers use their mobile networks to offer broadband Internet access service. Therefore, the Commission should treat any fixed broadband services that use mobile networks as mobile broadband services for purposes of the net neutrality rules.

mobile data traffic increased 270 percent from 2010 to 2011, and that it has more than doubled each year for the past four years.”⁸³ Indeed, mobile data traffic on AT&T’s network has increased 30,000% from 2007 to 2012.⁸⁴ And recent data released by CTIA show that reported wireless data traffic more than doubled from 2012 to 2013.⁸⁵ Consumers’ near-insatiable demand for mobile broadband Internet access services, coupled with the exploding number of applications and services used over mobile broadband networks, require mobile providers to continue to dedicate substantial resources to network management and present the same serious “operational constraints” that the Commission concluded justified distinct mobile rules in 2010.⁸⁶

Finally, the absence of any problem to be solved in the mobile context also supports retaining the existing rules. Given the investment-backed imperative for mobile providers to expand rather than restrict the use of their networks, it is not surprising that there is no reliable evidence of a threat to Internet openness in the mobile broadband ecosystem. The Commission points to AT&T’s incremental introduction of FaceTime,⁸⁷ but that example does not suggest a need for additional regulation; in fact, it demonstrates the opposite. FaceTime—a highly bandwidth-intensive application—had been preloaded on tens of millions of AT&T customer

⁸³ *Mobile Wireless Competition Report* at 12.

⁸⁴ AT&T News Release, *AT&T Introduced Sponsored Data for Mobile Data Subscribers and Businesses*, Jan. 6, 2014, available at <http://www.att.com/gen/press-room?pid=25183&cdvn=news&newsarticleid=37366&mapcode=>.

⁸⁵ CTIA, *Annual Year-End 2013 To-Line Survey Results*, at 8 (2014) available at http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2.

⁸⁶ *Open Internet Order*, 25 FCC Rcd at 17957 ¶ 95.

⁸⁷ See *NPRM* ¶ 41.

iPhones.⁸⁸ When Apple deployed iOS6, FaceTime became available for use on cellular networks for the first time. AT&T was concerned that the launch of iOS6 could result in a flood of FaceTime usage that would adversely impact service quality for all customers.⁸⁹ AT&T was particularly sensitive to this concern because it was widely known at the time that AT&T had experienced congestion on its network as a result of the extraordinary popularity of the iPhone and the resulting surge in mobile broadband usage.

AT&T thus took the prudent course of action by phasing in FaceTime use over its cellular network. This process enabled AT&T to monitor any effects of FaceTime on network congestion and thereby ensure continued high-quality service for all of its customers.⁹⁰ The Commission's net neutrality rules explicitly recognize, as they should in such a capacity-constrained network structure, the imperative of reasonable network management for wireless providers. Far from demonstrating the need for additional rules, the FaceTime example demonstrates that mobile providers have every incentive to ensure that their customers can use the applications of their choosing, consistent with reasonable network management practices.

For all of the reasons discussed above, the Commission should continue to follow the sound course it took in 2010 with respect to mobile broadband Internet access service. As with the other 2010 rules, experience since those rules were adopted confirms that the Commission struck the right balance.

⁸⁸ See AT&T Public Policy Blog, *A Few Thoughts on FaceTime* (Nov. 8, 2012), available at <http://www.attpublicpolicy.com/consumers-2/a-few-thoughts-on-facetime/>.

⁸⁹ *Id.*

⁹⁰ *Id.*

II. THE COMMISSION COULD RESTORE THE BALANCE STRUCK IN THE *OPEN INTERNET ORDER* BY ENACTING RULES UNDER SECTION 706 THAT PRECISELY TARGET PAID PRIORITIZATION.

As explained above, the Commission need only tweak its rules in the wake of *Verizon* to reinstate the equilibrium attained in 2010 and promote investment and innovation throughout the Internet ecosystem. The Commission could do this in many different ways. But the most direct would be to adopt tailored rules under section 706 that precisely target the practices that net neutrality advocates fear could undermine an open Internet.⁹¹ The principal practice feared by such advocates, of course, is “paid prioritization.”

But it is crucial to have definitional clarity before the Commission considers regulating in this area. When net neutrality was last debated, advocates’ primary concern was paid prioritization that is invisible to—and not directed by—end users. The Commission has sufficient authority to address that concern under section 706. In fact, the Commission has a number of legally permissible options, including (i) banning such prioritization outright; or (ii) imposing additional transparency, no-blocking, and nondiscrimination rules on fixed broadband Internet access providers that do not agree voluntarily to refrain from entering into paid prioritization arrangements.⁹²

⁹¹ See *NPRM* ¶ 138 (seeking comment on how the Commission might regulate “pay-for-priority service[s]” under section 706, Title II, or otherwise).

⁹² See note 3, *supra* (defining “paid prioritization” to mean commercial arrangements in which an edge provider pays an Internet service provider to prioritize traffic over a consumer’s last-mile connection for fixed broadband Internet access service, where such prioritization is not at the direction of the consumer).

A. Net Neutrality Advocates Have Identified Non-User-Directed Paid Prioritization As the Principal Threat to Internet Openness.

Net neutrality advocates have long argued that paid priority arrangements pose a threat to the open Internet and therefore justify regulation.⁹³ In making these arguments, however, they have not claimed that all types of commercial prioritization arrangements are problematic. Instead, they have conceded that paid prioritization is a concern only when it is *not* directed by end users. These advocates have thus acknowledged—and rightly so—that “user-driven prioritization is *unobjectionable* and should be a capability that is preserved in the course of enacting any new Internet openness rules.”⁹⁴ As the Center for Democracy & Technology explained in 2010, “CDT and others have repeatedly made a clear distinction between paid prioritization and user-driven prioritization”; prioritization that “would occur on the user’s last-mile facilities *at the user’s request*” would be permissible.⁹⁵ That is because user-driven prioritization, CDT emphasized, poses no threat to “Internet openness.”⁹⁶ Similarly, Free Press has explained that its “long-held position” is that “prioritization over open Internet services” that is “purely edge-driven prioritization, such as the prioritization used in many business services

⁹³ See, e.g., Comments of Free Press, GN Docket No. 09-191, at 3 (Jan. 14, 2010) (“Free Press 2010 Comments”).

⁹⁴ Letter from Alissa Cooper, et al, Chief Computer Specialist, CDT, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191, at 2 (Sept. 8, 2010) (emphasis added); *see id.* (explaining that Differentiated Services architecture is different from paid prioritization that concerns net neutrality advocates because the former “would be a capability offered to users and would occur on the user’s last-mile facilities at the user’s request”).

⁹⁵ *Id.* (emphasis added).

⁹⁶ *Id.*

and protected through service level agreements,” is permissible.⁹⁷ In other words, Free Press has acknowledged that “user-driven method[s]” of prioritization are not objectionable.⁹⁸

The recognition that user-driven prioritization may prove beneficial is undoubtedly correct. There are many reasons why an end user might want to direct certain types of prioritization, and rational open Internet regulations should preserve such consumer choice and flexibility. For example, even net neutrality advocates have recognized that services such as AT&T’s Managed Internet Service, which allows customers to designate certain traffic for prioritization, have been used for years without any threat or harm to the open Internet.⁹⁹ They therefore concede that these services provide benefits to customers and should continue to “be permitted under the FCC’s proposed Open Internet framework.”¹⁰⁰ Notably, the majority of AT&T’s Managed Internet Service customers are small or medium-sized businesses, health care providers, or non-profit organizations, and they use the service to make the Internet work better for their own needs. For example, an AT&T customer might choose to prioritize latency- and jitter-sensitive VoIP packets or video conference packets over ordinary web browsing packets, and AT&T would honor those designations over that customer’s “last mile” Internet facilities.¹⁰¹

⁹⁷ Letter from Chris Riley, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 07-52, 09-191, at 1 (Oct. 6, 2010).

⁹⁸ Letter from S. Derek Turner, Research Director, Free Press, to Julius Genachowski, et al., Chairman, FCC, GN Docket No. 09-191, at 3 (Aug. 3, 2010).

⁹⁹ This service allows a customer to differentiate applications from one another, to map those applications into different classes, to assign a priority to each class, and to have AT&T transmit traffic according to that priority scheme.

¹⁰⁰ *Id.* at 3 & n.5; *see also* Letter from Aparna Sridhar, Policy Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191, at 1 (July 21, 2010) (“We urged the Commission to cabin prioritization and provider-driven quality of service to the universe of managed services.”).

¹⁰¹ *See generally* Letter from Robert W. Quinn, Jr., Sr. Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 10-127 (Sept. 15, 2010) (discussing AT&T’s Managed

There is no conceivable reason that such services, demanded and used widely by business customers today, should be foreclosed by regulatory fiat.

Consumers could benefit from other forms of user-directed prioritization as well. Such prioritization, for example, could facilitate life-saving telehealth services, particularly for consumers in rural areas.¹⁰² It might also be important to enable certain online educational services or to facilitate commerce more generally. In addition, end users who have a greater need for high-definition video conferencing might want the ability to direct their broadband Internet access providers to prioritize accordingly.

Importantly, such user-directed differentiation of Internet traffic is not foreign to the Internet, but instead was built into the Internet's DNA.¹⁰³ Since the early days of the Internet, engineers have recognized a need to build intelligence into the Internet Protocol to enable networks to distinguish among packets on the basis of their associated applications. They recognized that different applications would have different needs but that those needs could be addressed in part by dividing applications into different handling classes within an IP network. For example, the original standards "treat[ed] high precedence traffic as more important than other traffic" and defined informational flags for prioritization of packets traveling on Transmission Control Protocol/IP networks.¹⁰⁴ The standards document outlined the process for

Internet Service); Letter from Robert W. Quinn, Jr., Sr. Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191 and 10-127 (Aug. 30, 2010) (similar).

¹⁰² See, e.g., Report and Order, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, ¶ 1 (2012) (noting that "access to broadband for medical providers saves lives while lowering health care costs and improving patient experiences").

¹⁰³ See AT&T 2010 Net Neutrality Opening Comments at ii.

¹⁰⁴ Information Sciences Institute, Request for Comment (RFC) 791: Internet Protocol DARPA Internet Program Protocol Specification (Jon Postel ed., 1981), *available at* <http://www.ietf.org/rfc/rfc791.txt>.

automatically enforcing one of several separately defined policies, including minimizing delays in transmission, maximizing throughput, and increasing reliability.¹⁰⁵

Although much of the traffic on the Internet in the early days was not particularly sensitive to latency and jitter and thus did not need to exploit these differentiation capabilities, designers intended for the Internet to evolve to support new applications and services that would require differentiated treatment.¹⁰⁶ In fact, the Internet Assigned Numbers Authority (IANA), the body that administers common numeric value standards, still describes the standard type-of-service values as ways to enforce different standards for different types of content. The IANA suggests “[g]enerally, protocols which are involved in direct interaction with a human should select low delay, while data transfers which may involve large blocks of data . . . need high throughput.”¹⁰⁷ Preserving the ability of consumers to direct prioritization is thus entirely in keeping with the Internet’s history and structure.

B. The Commission Has Sufficient Statutory Authority Under Section 706 to Address Paid Prioritization.

Paid prioritization has been far more controversial than user-driven prioritization. Even though to AT&T’s knowledge a paid prioritization service has never been offered, net neutrality advocates express concern that, if offered, paid prioritization could lead to a bifurcated Internet

¹⁰⁵ Internet Assigned Numbers Authority (IANA), IP Option Numbers, <http://www.iana.org/assignments/ip-parameters> (last visited July 2, 2014). Subsequent standards documents expanded the traffic filtering and prioritization system. See Steven Blake et al., IETF Network Working Group, RFC 2475: *An Architecture for Differentiated Services* (1998), available at <http://www.ietf.org/rfc/rfc2475.txt>; Kathleen Nichols et al., IETF Network Working Group, RFC 2474: *Definition of the Differentiated Services Field (DS Field) in the IPv4 and IPv6 Headers* (1998), available at <http://www.ietf.org/rfc/rfc2474.txt>.

¹⁰⁶ See AT&T 2010 Net Neutrality Opening Comments at 37-38.

¹⁰⁷ Internet Assigned Numbers Authority (IANA), IP Option Numbers, <http://www.iana.org/assignments/ip-parameters> (last visited July 2, 2014).

with “fast lanes” and unworkably “slow lanes.” AT&T believes that these concerns are vastly overstated. Even net neutrality advocates have recognized that paid prioritization could offer, at most, limited benefits to a limited set of customers.¹⁰⁸ Thus, their claims that it could lead to the deliberate creation of a “slow lane” on the Internet are illogical in that they would have, not just the tail, but the tip of the tail, wagging the dog. In reality, paid prioritization could provide tangible but limited benefits to those consumers and edge providers that need a higher level of service for particular types of latency and jitter-sensitive applications—just as CDNs and other mechanisms do today, without any harm to the openness of the Internet.¹⁰⁹ Nonetheless, AT&T has no intention of creating fast lanes and slow lanes or otherwise using prioritization for discriminatory or anticompetitive ends, and AT&T does not oppose rules that are designed to prevent such behavior. As discussed below, the Commission has ample authority under section 706 to adopt such rules. We discuss, in particular, two of the many alternatives available to the Commission: an outright ban on paid prioritization and a two-path elective regime.

1. The Commission Could Ban Paid Prioritization over Fixed Broadband Internet Access Service.

The first option—a ban on paid prioritization—requires little explanation: it would prohibit providers from engaging in paid prioritization of traffic over mass-market fixed

¹⁰⁸ See, e.g., Free Press, *Paid Prioritization: The Antithesis of Openness on the Internet* (July 26, 2010), available at http://www.freepress.net/sites/default/files/resources/Paid_Prioritization.pdf.

¹⁰⁹ There are many other practices that edge providers and others engage in that are designed to differentiate traffic speed on the Internet. Indeed, mechanisms such as collocated CDNs may affect Internet traffic more than last-mile prioritization by ISPs. See, e.g., George Ou, *Data Shows CDN Prioritization More Harmful Than Router Prioritization*, Digital Society, Aug. 10, 2010, available at <http://www.digitalsociety.org/2010/08/data-shows-cdn-prioritization-more-harmful-than-router-prioritization/>; see also Reply Comments of AT&T Inc., GN Docket No. 09-191, at 49-53 (Apr. 26, 2010) (explaining why there is no “plausible basis for distinguishing as a policy matter between CDN collocation arrangements . . . and packet-prioritization techniques”).

broadband Internet access service where such prioritization is not authorized by end users. The Commission would implement this prohibition by concluding that paid prioritization is a *per se* commercially unreasonable practice under the theory that it threatens the open Internet. User-directed prioritization, as distinct from paid prioritization arrangements, would remain permissible.¹¹⁰

The Commission has statutory authority under section 706 to regulate paid prioritization in this manner. Under section 706(a), the Commission is required to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition . . . [and] other regulating methods that remove barriers to infrastructure investment.”¹¹¹ The D.C. Circuit held in *Verizon* that section 706(a) is an affirmative grant of statutory authority, but that any regulation must (i) “fall within the Commission’s subject matter jurisdiction over [interstate and foreign wires and radio] communications”;¹¹² (ii) advance the statutory goal of encouraging broadband deployment;¹¹³ and (iii) not “contravene[] any specific prohibition contained in the Communications Act.”¹¹⁴

Each of these requirements could be satisfied by a prohibition on paid prioritization. First, any such ban would fall within the Commission’s subject matter jurisdiction over interstate and foreign wires. Second, based on *Verizon*, it also would fall within the ambit of section 706 if the Commission makes reasonable findings as to why such a ban is necessary to advance the

¹¹⁰ See *NPRM* ¶ 138 (asking whether “all pay-for-priority practices, or some of them, could be treated as *per se* violations of the commercially reasonable standard”).

¹¹¹ 47 U.S.C. § 1302(a).

¹¹² *Verizon*, 740 F.3d at 640.

¹¹³ *Id.*

¹¹⁴ *Id.* at 649.

broadband objectives in section 706.¹¹⁵ Indeed, the D.C. Circuit has already upheld the Commission’s determination that “broadband providers’ potential disruption of edge-provider traffic [is] the sort of ‘barrier’ that has the ‘potential to stifle overall investment in Internet infrastructure.’”¹¹⁶ And, third, insofar as a ban on paid prioritization would not preclude user-directed prioritization, the Commission would avoid “contraven[ing] any specific prohibition contained in the Communications Act.”¹¹⁷ That is because the Commission could reasonably conclude that a restriction on such prioritization is not a *per se* common-carriage regulation of broadband Internet access providers in contravention of the statutory prohibition on treating Title I information service providers as common carriers.¹¹⁸

As a threshold matter, and as the D.C. Circuit has made clear, whether a regulation imposes a *per se* common-carriage obligation on a provider is a determination subject to *Chevron* deference.¹¹⁹ Furthermore, precedent establishes that “there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*.”¹²⁰ In other words, the mere fact that a regulation “bears some

¹¹⁵ See *id.* at 642-49 (holding that the 2010 rules would reasonably advance section 706 broadband objectives).

¹¹⁶ *Id.* at 642.

¹¹⁷ *Id.* at 649.

¹¹⁸ See 47 U.S.C. § 153(51) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . .”).

¹¹⁹ See *Verizon*, 740 F.3d at 650 (“We apply *Chevron*’s deferential standard of review to the interpretation and application of the statutory terms ‘common carrier.’”); see also *Cellco Partnership v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (“[T]he Commission’s interpretation and application of the term ‘common carrier’ warrants *Chevron* deference.”).

¹²⁰ *Verizon*, 740 F.3d at 652.

marks of common carriage” does not mean that it would “relegate” broadband Internet access providers “to common-carrier status.”¹²¹

With those background principles in mind, the Commission could conclude that restricting paid prioritization would not impose *per se* common-carrier obligations. The key feature of *per se* common-carrier regulation is a blanket prohibition on a provider’s flexibility to decide whether and on what terms to deal: “A common carrier does not ‘make individualized decisions in particular cases, whether and on what terms to deal.’”¹²² Thus, a regulatory regime that permits “individualized decisions in particular cases, whether and on what terms to deal” does not impose *per se* common-carriage obligations.

Under the approach outlined here, broadband Internet access providers would retain sufficient flexibility to make individualized decisions. This approach would permit *user-directed* prioritization as well as other individualized arrangements that are commercially reasonable and that do not involve prioritization of packets. Broadband Internet access providers could, for example, enter into commercially reasonable arrangements to host edge-provider content within their networks or to provide transit services. Likewise, subject to user direction and without any prioritization, a broadband Internet access provider could allow an edge provider to pay for an increase in the maximum bandwidth available to a customer; this would allow that edge provider to transmit at a higher speed than would otherwise be available under the customer’s chosen

¹²¹ *Cellco Partnership*, 700 F.3d at 545 (internal quotation marks and alterations omitted); *see id.* at 548 (the Supreme Court’s decisions in *Midwest Video I*, *Midwest Video II*, and *Southwestern Cable* “make[] clear that there is room for permissible regulation of private carriers that shares some aspects of traditional common carrier obligations”).

¹²² *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979); *see Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“[A] carrier will not be a common carrier . . . where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”).

broadband speed tier, obviating the need for the customer to pay for a higher-speed service just to obtain a better experience when using a particular application. Additionally, an ISP might enter into arrangements that provide incentives for edge providers to transmit their traffic during non-peak hours.

In short, there are many innovative arrangements that would still be permissible, provided that they were commercially reasonable. Broadband Internet access providers accordingly would not be categorically prohibited from entering into individual relationships with specific edge providers or compelled to carry edge providers' traffic on identical terms. Indeed, the Commission would not be banning all prioritization arrangements as an undifferentiated whole, but instead would be imposing restrictions on *when* such arrangements may be used (*i.e.*, at the direction of the end user). In that way, the rules would be akin to time, place, and manner restrictions—not a broad, unqualified *per se* common-carriage obligation.¹²³

The D.C. Circuit's decision in *Verizon* does not foreclose this line of argument.¹²⁴ The Commission's principal litigation defense in *Verizon* was that broadband Internet access service providers are not "carriers" with respect to edge providers. As the court of appeals explained, "[h]aving relied almost entirely on the flawed argument that broadband providers are not carriers with respect to edge providers, the Commission offer[ed] little" argument that the nondiscrimination rule at issue did not impose common-carrier obligations.¹²⁵

¹²³ Cf. *NPRM* ¶ 111 (tentatively concluding that the Commission may adopt a rule that "permit[s] broadband providers to engage in individualized practices, while prohibiting those broadband provider practices that threaten to harm Internet openness").

¹²⁴ See *id.* ¶ 147 ("[s]eek[ing] comment generally on how the court's *Verizon* decision should impact [the Commission's] exercise of authority").

¹²⁵ 740 F.3d at 656; Brief of Respondent-Appellee FCC, *Verizon v. FCC*, No. 11-1355, at 60-68 (D.C. Cir. Sept. 10, 2012).

Indeed, the text of the nondiscrimination rule at issue in *Verizon* tracked the language of the Title II obligation verbatim. It required broadband Internet access providers to “serve all edge providers without ‘unreasonable discrimination’” and in that way the “rule by its very terms compel[led] those providers to hold themselves out to ‘serve the public indiscriminately.’”¹²⁶ The court explained that the “language” of the rule “mirror[ed], almost precisely, section 202’s language establishing the basic common carrier obligation not to ‘make any unjust or unreasonable discrimination.’”¹²⁷ Absent any contrary explanation from the Commission, the court accordingly deemed the standards “equivalent.”¹²⁸

The approach proposed here would not suffer from these flaws. It would not mirror the Title II unjust and unreasonable discrimination standard. And as explained above, it would not require broadband Internet access providers to hold themselves out indiscriminately to edge providers, without room for individualized negotiations. The regime described here thus would not impose a “compelled carriage obligation . . . in *all* circumstances and with respect to *all* edge providers”—the vice of the nondiscrimination rule at issue in *Verizon*.¹²⁹ Instead, it would fall comfortably within the “gray area” between “*per se* common carriage and *per se* private carriage”—a gray area in which “the Commission’s determination that a regulation does or does not confer common carrier status warrants deference.”¹³⁰

¹²⁶ 740 F.3d at 656 (quoting *Nat’l Ass’n of Regulatory Comm’rs*, 525 F.3d at 642); *see also id.* (noting that it was “[s]ignificant[]” that the Commission “never argue[d]” that the “‘no unreasonable discrimination’ standard somehow differs from the nondiscrimination standard applied to common carriers generally”).

¹²⁷ *Id.* at 657 (quoting 47 U.S.C. § 202).

¹²⁸ *Id.*

¹²⁹ *Id.* at 656 (emphases added).

¹³⁰ *Cellco Partnership*, 700 F.3d at 547; *see also NPRM* ¶ 115 (“The D.C. Circuit suggested that a rule preventing certain types of conduct by broadband providers might be acceptable . . . if

2. The Commission Could Permit Broadband Internet Access Providers to Choose Between a Voluntary Ban and More Regulation.

A second option would be to permit fixed broadband Internet access providers to choose between (i) a voluntary commitment to refrain from paid prioritization or (ii) more substantial regulation designed to mitigate the perceived harms of such prioritization. Providers would be required to specify their chosen path in their transparency statements, rendering that choice enforceable under the Commission’s existing transparency rule and enforcement procedures.¹³¹

Providers selecting the first path would agree not to engage in paid prioritization over mass-market fixed broadband Internet access service. In addition, they would be subject to the existing transparency rule, the 2010 no-blocking rule, and a commercially reasonable nondiscrimination standard.¹³² There would seem to be little reason, however, to subject these providers to the additional safeguards on which the Commission seeks comment in the *NPRM*, because many of those proposals appear to be designed to address concerns relating to paid prioritization—in particular, the concern that paid prioritization could result in degradation of non-prioritized traffic.¹³³

the Commission articulated a discrete, flexible standard that prohibited practices that could reasonably be understood to harm Internet openness, while allowing individualized broadband provider practices. . . .”).

¹³¹ See 47 C.F.R. § 8.3 (“A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.”); see also *id.* § 8.14 (formal complaint procedures).

¹³² See Part IV, *infra*.

¹³³ Because the commitment is voluntary by definition, a broadband Internet access provider would be free to change its election later. But the provider would be required to give advance notice to consumers before doing so and to change disclosures in its transparency statement, as directed by the Commission.

By contrast, providers choosing the second path would be subject to *ex post* review of any paid prioritization arrangements they undertake, as well as additional regulations to address the concerns that have been expressed regarding possible impacts of paid prioritization arrangements on Internet openness. For example, the Commission could regulate such providers under a new regime of enhanced transparency that would require additional disclosures regarding any paid prioritization arrangements and their impact on other traffic. And the Commission also could apply enhanced no-blocking and nondiscrimination rules to such providers to address the purported risk that paid prioritization could result in degradation of non-prioritized traffic. These providers thus might be subject to many of the new regulatory proposals on which the Commission seeks comment in the *NPRM* or some variation thereon, which would ensure that any paid prioritization arrangement they enter into would not undermine Internet openness. To the extent that the election to offer paid prioritization would trigger additional prophylactic regulations, AT&T believes that few, if any, of the leading ISPs would select this second option.

The Commission would have clear authority to adopt this approach under section 706. *No* form of differentiation would be categorically banned—not even paid prioritization. Instead, broadband Internet access providers choosing the first path would *voluntarily* commit not to engage in such prioritization. And any provider choosing the second path would be permitted to offer commercially reasonable paid prioritization arrangements with edge providers, subject to additional no-blocking, nondiscrimination, and transparency rules designed to protect against practices that could pose a threat to the open Internet. In short, by offering fixed broadband Internet access providers a choice between forgoing paid prioritization or a regulatory regime in which such practices are permitted but subject to additional safeguards, the Commission could

achieve its open Internet goals without imposing anything resembling a *per se* common-carriage obligation.

III. REGULATING BROADBAND INTERNET ACCESS PROVIDERS UNDER TITLE II WOULD VIOLATE THE COMMUNICATIONS ACT AND CAUSE TREMENDOUS HARM TO THE INTERNET ECOSYSTEM.

Because the Commission can address any potential threat to Internet openness by exercising its authority under section 706, there is no policy need to resort to reclassification of broadband Internet access service.¹³⁴ Nonetheless, in the wake of the *Verizon* decision, some advocates have renewed calls for the Commission to regulate broadband Internet access providers as “telecommunications carriers” under Title II. That approach is badly misguided for several reasons.

First, there is no valid legal rationale for reclassifying broadband Internet access services. To the contrary, broadband Internet access fits squarely within the statutory definition of an “information service.” A long line of Commission and judicial decisions has confirmed that statutory classification, and nothing about broadband Internet access service has changed that would justify reversing those precedents. *Second*, there is no policy justification for such a radical change. Title II regulation would stifle broadband investment and pitch the industry into years of wasteful litigation and regulatory disputes. Reclassification also would unavoidably expose broad swaths of the Internet ecosystem—including CDNs and many edge providers—to Title II regulation as well, because once the Commission finds that the transmission component of an information service is actually a telecommunications service in its own right, there is no coherent basis for limiting that finding to broadband Internet access service. The ripple effects

¹³⁴ See Part II (discussing paid prioritization); Part IV (discussing all other forms of differentiation).

would cast a cloud over most of the Internet ecosystem, undermining investment and innovation throughout that ecosystem in direct contravention of section 706. And these effects would be compounded worldwide, because Title II reclassification would provide a blueprint for other governments to adopt even more burdensome public-utility-style regulations. *Finally*, while forbearance could partially mitigate these adverse effects, it is by no means the panacea that reclassification proponents make it out to be. To the contrary, it would be just another source of litigation and uncertainty for years to come.¹³⁵

A. There Is No Legal Basis to Regulate Broadband Internet Access Service as a “Telecommunications Service” Under Title II.

Broadband Internet access service providers do not offer consumers “telecommunications” or a separate Title II “telecommunications service;”¹³⁶ instead, they provide only a Title I “information service.”¹³⁷ This conclusion is compelled by the text and structure of the Communications Act. As the Commission has reiterated in a spate of decisions spanning a decade, and as the Supreme Court has affirmed, broadband Internet access service is a unitary Title I “information service” with no severable Title II “telecommunications service” component. Nothing has changed since the Commission last addressed this issue that could possibly justify any other outcome.

¹³⁵ AT&T addressed many of these issues in greater detail when the Commission last rejected calls to reclassify broadband Internet access service. We incorporate those filings by reference here. *See, e.g.*, Comments of AT&T, *Framework for Broadband Internet Service*, GN Docket No. 10-127 (July 15, 2010) (“AT&T Title II Opening Comments”); Reply Comments of AT&T, *Framework for Broadband Internet Service*, GN Docket No. 10-127 (Aug. 12, 2010) (“AT&T Title II Reply Comments”).

¹³⁶ 47 U.S.C. § 153(53). *See, e.g.*, Declaratory Ruling, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4825, 4828-31 ¶¶ 44, 52-55 (2002) (“*Cable Modem Order*”); *see Brand X*, 545 U.S. at 986-1000.

¹³⁷ 47 U.S.C. § 153(24).

1. Broadband Internet Access Service Must Be *Either* an Information Service *or* a Telecommunications Service—Not Both.

The Communications Act defines a “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”¹³⁸ And “telecommunications” is defined as “the transmission . . . of information of the user’s choosing, *without change in the form or content of the information as sent and received.*”¹³⁹ By contrast, an “information service” is the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications.*”¹⁴⁰ Because broadband Internet access service indisputably provides “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” as a straightforward textual matter, it necessarily is an “information service.”¹⁴¹

Some have argued, however, that broadband Internet access service also encompasses a severable “telecommunications” or “telecommunications service” component that can be regulated under Title II. This argument is irreconcilable with both the statutory text and nearly two decades of Commission and judicial precedent.

In the *Stevens Report*, the Commission concluded that the two statutory categories—“telecommunications service” and “information service”—are “mutually exclusive.”¹⁴² This

¹³⁸ *Id.* § 153(53).

¹³⁹ *Id.* § 153(50) (emphasis added).

¹⁴⁰ *Id.* § 153(24) (emphasis added).

¹⁴¹ *See, e.g., Brand X*, 545 U.S. at 987 (noting that it was “unchallenged” by any party that “cable modem service is an ‘information service’”; the only question was whether cable providers offered telecommunications and thus also provided a “telecommunications service”).

¹⁴² Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11524 ¶ 43 (1998) (“*Stevens Report*”) (“The language and legislative history of both the House

mutual exclusivity principle means that a service offered to consumers on a functionally unified basis cannot be said to consist of *both* a “telecommunications service” *and* an “information service.”¹⁴³ It must be one or the other, and “an entity offering a simple transparent transmission path, without the capability of providing enhanced functionality, offers ‘telecommunications.’”¹⁴⁴ In contrast, “when an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,’ it does not offer telecommunications. Rather, it offers an ‘information service’ even though it uses telecommunications to do so.”¹⁴⁵

The Commission’s “mutual exclusivity” conclusion is not only reasonable, but compelled by the plain statutory language, which focuses on what a provider is “*offering*” to consumers.¹⁴⁶ If a provider offers transmission integrated with data-processing, storage, or retrieval functionalities, it is by definition *not* offering the *sine qua non* of a “telecommunications service”—“transmission . . . *without* change in the form or content of the information as sent and

and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as *mutually exclusive* categories.”) (emphasis added); *see id.* at 11507 ¶ 13. The *Stevens Report* thereby reaffirmed the Commission’s similar finding in Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179-80 ¶¶ 788-89 (1997).

¹⁴³ *See Stevens Report*, 13 FCC Rcd at 11507 ¶ 13. The Commission noted that, although a “single entity can be both a telecommunications provider and an information services provider,” that is so “only in connection with its offering of separate services; it cannot gain that dual status merely as a result of its offering of a single service.” *Id.* at 11520 ¶ 39 n.77.

¹⁴⁴ *Id.* at 11520 ¶ 39.

¹⁴⁵ *Id.*

¹⁴⁶ *See* 47 U.S.C. §§ 153(53), (24) (defining telecommunications and information services, respectively, by reference to what the provider is “offering”).

received.”¹⁴⁷ Instead, it is offering a unitary information service. In passage after passage, the *Stevens Report* found—correctly—that the statutory text, structure, and history all compel that conclusion.¹⁴⁸ As the Commission explained, “the statute and the legislative history” preclude any conclusion that Congress intended to “subject [information] services to regulatory constraints by creating an expanded ‘telecommunications service’ category incorporating enhanced services,” thereby “effect[ing] a major change in the regulatory treatment of those services.”¹⁴⁹

The Supreme Court affirmed the Commission’s reading of the 1996 Act in *Brand X*.¹⁵⁰ It rejected calls to invalidate the “mutual exclusivity” principle and instead held that the touchstone for the classification analysis is what is being “offered” to the end user. As the Court explained, “[i]t is common usage to describe what a company ‘offers’ to a consumer as what *the consumer perceives to be the integrated finished product*, even to the exclusion of discrete components that compose the product”¹⁵¹ In fact, the Court added, it would be “odd” to construe the statutory language any other way. The Court rejected an argument to “classif[y] as

¹⁴⁷ 47 U.S.C. § 153(50) (definition of “telecommunications”) (emphasis added); *see id.* § 153(53) (defining “telecommunications service” as “the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used”).

¹⁴⁸ *E.g., Stevens Report*, 13 FCC Rcd at 11520-25, 11529-30, 11534 ¶¶ 39, 41 n.79, 43-45, 57-59, 69 n.138. For example, the *Stevens Report* explained that the “language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories.” *Id.* at 11522-23 ¶ 43.

¹⁴⁹ *Id.* at 11524 ¶ 45. Many other observers agreed with the Commission’s analysis. *See, e.g.,* Letter from Senator John Kerry et al. to William E. Kennard, Chairman, FCC, at 1 (Mar. 20, 1998) (“[N]othing in the 1996 (Telecommunications) Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.”).

¹⁵⁰ *Brand X*, 545 U.S. 967.

¹⁵¹ *Id.* at 990 (emphasis added).

telecommunications carriers all entities that use telecommunications inputs to provide information service,” because it “would subject to mandatory common-carrier regulation *all information-service providers that use telecommunications as an input to provide information service to the public.*”¹⁵² The Court concluded that Congress did not intend that absurd result.¹⁵³

2. Because the Transmission Element of Broadband Internet Access Service Is Inextricably Intertwined with Information Services, the Combined “Offering” Must Be an Information Service.

Starting in 2002 and continuing through 2007, the Commission applied this statutory interpretation to various broadband Internet access services and concluded that they all are properly construed as integrated “information services” without separate “telecommunications” or “telecommunications service” components.¹⁵⁴ That is so, the Commission found, because the service offered to consumers necessarily includes a range of integrated data-processing

¹⁵² *Id.* at 994; *see also* Brief for Petitioner Federal Communications Commission, *Brand X*, Nos. 04-277 & 04-281, 2005 WL 122088, at *26 (U.S. Sup. Ct. filed Jan. 19, 2005) (“Given that the Act’s definition of ‘information service’ expressly contemplates a ‘telecommunications’ component, whereas the definition of ‘telecommunications service’ does not similarly contemplate an information service component, the regulatory necessity of placing ‘offering[s]’ in one mutually exclusive category or the other amply justifies the FCC’s decision to place ‘mixed’ or ‘hybrid’ services like cable modem service on the information services side of the line.”).

¹⁵³ *Brand X*, 545 U.S. at 994-95.

¹⁵⁴ *See, e.g., Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶¶ 38-40, *aff’d Brand X*, 545 U.S. 967 (intermediate history omitted); Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14855-56 ¶¶ 1-3 (2005) (“*Wireline Broadband Order*”); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5902 ¶ 2 (2007) (“*Wireless Broadband Order*”); Report and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006); *see also Stevens Report*, 13 FCC Rcd at 11537-39 ¶¶ 76-80.

functions, including email, web-hosting, DNS look-up, and often caching.¹⁵⁵ These factual findings focused on the particularities of the service actually being “offered” to end users and involved a straightforward application of the Commission’s “mutual exclusivity” principle.

The Supreme Court affirmed the Commission’s statutory classification of broadband Internet access service. It held that “[t]he entire question is whether the [broadband Internet access] products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided”¹⁵⁶ The Court held that the Commission had reasonably answered that question by concluding that ISPs offer consumers a unified service consisting of functionally integrated telecommunications and data-processing components, including the DNS look-up and caching services discussed below.¹⁵⁷

Faced with this compelling interpretation of the statutory text and the weight of Commission and judicial precedent, some advocates of Title II reclassification attempt to manufacture precedent of their own. They claim that, prior to 2005, the Commission had viewed broadband Internet access service as a “telecommunications service,” and they urge the Commission to readopt that interpretation. But these advocates are simply wrong. The Commission has never considered *retail* broadband Internet access service—*i.e.*, the finished service that providers sell to end users—to be a common-carrier service. Those retail services have always been information services outside the scope of Title II, and this question was never

¹⁵⁵ See *Cable Modem Order*, 17 FCC Rcd at 4822-23 ¶ 38; *Wireless Broadband Order*, 22 FCC Rcd at 5910-11 ¶¶ 25-26.

¹⁵⁶ *Brand X*, 545 U.S. at 991.

¹⁵⁷ *Id.* at 999-1000.

even *up for debate* before the Commission first officially classified broadband Internet access service as an information service.¹⁵⁸

Granted, prior to their elimination in 2005,¹⁵⁹ the Commission’s *Computer Inquiry* rules required “facilities-based” wireline telecommunications companies to offer the underlying broadband transmission service as a *wholesale* “telecommunications service” to *other information service providers*.¹⁶⁰ But the latter providers would not have been eligible under the *Computer Inquiry* rules to obtain the underlying transmission service if the finished Internet access service *offered to consumers* was not an information service. Moreover, as the *Brand X* Court explained, the obligation to offer *wholesale* transmission did not alter the characterization of the underlying *retail* services that triggered the obligation, which were always considered “information services,” known as “enhanced services” before the 1996 Act.¹⁶¹ In short, Title II

¹⁵⁸ See *Stevens Report*, 13 FCC Rcd at 11536 ¶ 73 (“Internet access services are appropriately classed as information, rather than telecommunications, services” because they “do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport.”).

¹⁵⁹ See *Wireline Broadband Order*, 20 FCC Rcd at 14896 ¶ 80 (concluding that “the elimination of our *Computer Inquiry* requirements for wireline broadband Internet access service providers, subject to the transitional mechanism described below, best facilitates the accomplishment of our broadband goals and objectives in light of the rapidly changing market conditions for broadband Internet access services”).

¹⁶⁰ See *id.* at 14898 ¶ 85 (“[O]ur long-standing *Computer Inquiry* regulations, which apply only to wireline facilities-based carriers, have required wireline carriers to provide wholesale transmission for Internet access.”).

¹⁶¹ See 545 U.S. at 996 (“The differential treatment of facilities-based carriers was . . . a function not of the definitions of ‘enhanced-service’ and ‘basic service,’ but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. The Act’s definitions, however, parallel the definitions of enhanced and basic service, not the facilities-based grounds on which that policy choice was based[.]”).

proponents like Free Press either misunderstand or are attempting to rewrite history; broadband Internet access service has *never* been classified as a Title II service.¹⁶²

As this analysis makes clear, reclassification would run headlong into the Commission’s longstanding factual conclusions concerning broadband Internet access service—most critically, that, from an end user’s perspective, the transmission component is inextricably intertwined with information-processing capabilities. The Supreme Court recognized that this determination is not a legal question, but instead “turns . . . on the factual particulars of how Internet technology works and how it is provided.”¹⁶³ And, as the Court explained in *FCC v. Fox*, when an agency’s 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,” the agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”¹⁶⁴ Here, the Commission could not reclassify broadband Internet access services without both (1) “contradict[ing]” the still-unchanged facts underlying its characterization of broadband Internet access as a unitary “information service,” and (2) defeating the “serious reliance interests” that broadband Internet access providers have

¹⁶² See Letter from Matthew F. Wood, Free Press, to Marlene H. Dortch, Secretary, FCC, at 1 (June 11, 2014) (stating that “available data . . . shows that [Regional Bell Operating Companies’] capital expenditures *increased* while their broadband offerings remained under Title II, and *decreased* after the Commission’s 2005 *Wireline Framework Order* took effect in August 2006”) (emphasis in original). Indeed, even under the legacy *Computer Inquiry* framework, the Commission regulated only a discrete point-to-point service between the end user and an ISP’s point of presence. Title II reclassification would have a far broader reach, requiring common-carrier regulation of the complete broadband Internet access service. There is no precedent for that approach under any reading (or misreading) of the regulatory history.

¹⁶³ *Brand X*, 545 U.S. at 991.

¹⁶⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis added); see also *id.* at 537 (Kennedy, J., concurring in part and concurring in the judgment) (an “agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past”).

developed in the existing investment-friendly regime for the past decade—a regime that has fostered multi-billion-dollar investments in broadband networks and services.

The Commission’s factual findings have long led it to classify broadband Internet access as a Title I service, and there has been no change in the nature of that service that warrants a change of course. Indeed, ISPs’ current offerings are even more appropriately classified as “information services” than those the Commission has evaluated before, because the data-processing and transmission components of today’s broadband Internet access services are now even *more* functionally integrated.

One of the key data-processing components integrated with broadband transmission is DNS look-up. Among other things, DNS matches the Web site address that an end user types into her browser with the IP address of the Web page’s host server.¹⁶⁵ As the Supreme Court indicated in *Brand X*, the functional integration of broadband transmission with DNS look-up is sufficient by itself (though not necessary) to make the ensuing service a unitary “information service.”¹⁶⁶ Virtually all consumers today rely on their broadband ISPs to include DNS look-up functionality as an integral part of broadband Internet access service.¹⁶⁷

Apart from DNS functionality, broadband Internet access providers offer a host of non-transmission-related ISP functions and offerings as integral components of their broadband Internet access services, and consumers expect those services at no extra charge. AT&T, for example, includes the following as part and parcel of its residential Internet access service:

¹⁶⁵ See *Brand X*, 545 U.S. at 999.

¹⁶⁶ *Id.* at 999-1000.

¹⁶⁷ AT&T has discussed DNS look-up at length in its prior comments and does not repeat that analysis here. See, e.g., AT&T Title II Opening Comments at 71-73, 86-88; AT&T Title II Reply Comments at 35-43.

security screening, spam protection, pop-up blockers, parental controls, email with virtually unlimited storage, instant messaging with enhanced voice communication, a streaming music service, access to programming content, on-the-go access to the entire national AT&T Wi-Fi Hot Spot network, and the att.net Toolbar for quick access back to a customer's homepage, email, search, games, videos, music, and AT&T support tools.¹⁶⁸ AT&T's marketing materials illustrate that Internet access service is perceived and offered as far more than a pure "connectivity" service.¹⁶⁹ If anything, the data-processing functions of broadband Internet access service that the Commission found relevant in the *Cable Modem Order* have become more complex and more essential to the overall offering than they were in 2002.¹⁷⁰ All of AT&T's offerings involve investment, ongoing expense, and customer support requirements—yet, notably, they are provided to AT&T customers at *no extra charge*.¹⁷¹ This is because consumers view these as core components of their broadband service offering. And the same is true for other broadband Internet access providers. The market compels them to supply similar applications and capabilities, and the resulting offer is an integrated whole that responds to this consumer demand.¹⁷²

¹⁶⁸ See *AT&T High Speed Internet Access*, <http://www.att.com/shop/internet.html> (last visited June 23, 2014); *AT&T U-Verse High Speed Internet Access*, <http://www.att.com/shop/internet/u-verse-internet.html> (last visited June 23, 2014).

¹⁶⁹ See, e.g., *id.*; AT&T, *Mobile Broadband, Wi-Fi & High Speed Internet Services*, <http://about.att.com/mediakit/broadband> (last visited June 23, 2014).

¹⁷⁰ See *id.*; AT&T Title II Opening Comments at 74-78.

¹⁷¹ See *AT&T High Speed Internet Access*, <http://www.att.com/shop/internet.html> (last visited June 23, 2014); *AT&T U-Verse High Speed Internet Access*, <http://www.att.com/shop/internet/u-verse-internet.html> (last visited June 23, 2014).

¹⁷² See, e.g., Verizon, *High Speed Internet Service*, <http://www.verizon.com/home/highspeedinternet/> (last visited June 23, 2014); *High Speed Internet Service by XFINITY Internet from Comcast*, <http://www.comcast.com/internet-service.html> (last visited June 23, 2014).

3. An Ends-Based Approach to Reclassification Would Be Arbitrary and Capricious.

Whether broadband Internet access is a Title I information service or Title II telecommunications service thus depends on a legal question of statutory interpretation and a factual question of what broadband Internet access providers are “offering” to consumers. Despite that, the *NPRM* asks repeatedly whether the Commission could better achieve its net neutrality goals by reclassifying broadband Internet access as a Title II service. For example, the *NPRM* states:

- “How would such a reclassification approach serve our goal to protect and promote Internet openness? . . . Would reclassification and applying Title II for the purpose of protecting and promoting Internet openness impact the Commission’s overall policy goals and, if so, how?” *NPRM* ¶ 149.
- “How would the rule we propose today change if the Commission were to rely on Title II . . . to adopt rules to protect and promote Internet openness? We seek comment on how the goal of the proposed rule—to prevent those broadband provider practices that limit Internet openness—could best be achieved.” *Id.* ¶ 112.
- “The goal of this proceeding is to find the best approach to protecting and promoting Internet openness. . . . [T]he Commission will seriously consider the use of Title II of the Communications Act as the basis for legal authority.” *Id.* ¶ 4.
- “[W]e ask how . . . Title II . . . could be applied to ensure that the Internet remains open.” *Id.* ¶ 10.
- “We believe we have ample authority . . . for the enhanced transparency rule we propose today, whether the Commission ultimately relies on section 706, Title II, or another source of legal authority. We seek comment on whether and how—if at all—the source of the Commission’s legal authority relied upon to adopt other open Internet rules would affect the authority or authorities that provide the strongest basis for any improvements to the transparency rule or otherwise would inform how we define the goal of transparency in general.” *Id.* ¶ 65.
- “[W]e seek comment on whether we should adopt a no-blocking rule that does not allow for priority agreements with edge providers and how we would do so consistent with sources of legal authority other than section 706, including Title II.” *Id.* ¶ 89.
- “If the Commission were to ultimately rely on . . . Title II, we seek comment on whether and, if so, how we should prohibit all, or some, pay-for-priority arrangements, consistent with our authority, to protect and promote Internet openness.” *Id.* ¶ 138.

- “We also seek comment on the nature and the extent of the Commission’s authority to adopt open Internet rules relying on Title II” *Id.* ¶ 142.

By framing its request for comments on Title II reclassification in this way, the Commission is improperly focused on outcomes—its goals of “protecting and promoting Internet openness”—instead of adhering to the plain language of Title II and the actual nature of how end users perceive broadband Internet access service. As demonstrated above, both the law and the facts make clear that broadband Internet access is appropriately classified as a Title I information service. Reclassification thus would be susceptible to legal challenge as nothing more than a transparently outcome-based maneuver lacking both factual and legal foundation.

B. Regulating ISPs Under Title II Would Stifle Broadband Investment, Stall the “Virtuous Circle” of Innovation, and Countermand Congress’s Broadband Objectives As Set Forth in Section 706.

As the Commission recognized in the National Broadband Plan, “the American broadband ecosystem has evolved rapidly” over the past decade, and this evolution has been “[f]ueled primarily by private sector investment and innovation.”¹⁷³ Broadband Internet access providers are continuing to invest tens of billions of dollars each year into broadband services, creating thousands of new jobs.¹⁷⁴ But achieving the next phase of broadband deployment envisioned by the National Broadband Plan will require far more investment—according to the Commission’s own estimates, hundreds of billions more.¹⁷⁵ And such sums will not be sunk into

¹⁷³ *National Broadband Plan* at XI.

¹⁷⁴ See USTelecom, *Historical Broadband Provider Capex*, <http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex> (last visited June 20, 2014) (noting that annual broadband capital expenditures have increased from \$64 billion in 2009 to \$68 billion in 2012).

¹⁷⁵ Staff Presentation, *September Commission Meeting*, at 45 (Sept. 29, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf (“September 2009 Staff Presentation”).

broadband infrastructure if providers fear that their multi-billion-dollar investments will be subject to 1930s-style public utility regulation. Moreover, reclassification also would unleash a flood of litigation and regulatory disputes, further undermining stability in the marketplace and compounding the investment-chilling effects of Title II regulation.

In 1999, Chairman William Kennard rejected proposals to impose common-carrier regulation on then-dominant cable broadband providers because, “[i]f we’ve learned anything about the Internet in government over the last 15 years, it’s that it thrived quite nicely without the intervention of government.”¹⁷⁶ The marketplace has certainly borne out the wisdom of this approach. Since then, the Internet has experienced a decade and a half of unprecedented investment and innovation.¹⁷⁷ And after the Commission again rebuffed calls to impose common-carrier regulation on broadband Internet access providers in 2010, the marketplace has been healthier, more competitive, and more innovative than ever.¹⁷⁸

But continued investment is not assured. Indeed, a range of market analysts, stakeholders, and others have cautioned that broadband deployment and innovation would be stifled if the Commission were to break from the Title I framework in place today.¹⁷⁹ For example, Anna-Maria Kovacs of Georgetown University’s Center for Business and Public Policy explains that reclassification “would be disastrous”; would stifle the “massive investment in

¹⁷⁶ Remarks of Chairman Kennard, *The Road Not Taken: Building a Broadband Future for America* (June 15, 1999), <http://www.fcc.gov/Speeches/Kennard/spwek921.html>.

¹⁷⁷ See Pai Remarks at 1 (“Since the Telecommunications Act of 1996, telephone companies, cable operators, and wireless providers have invested more than \$1.2 trillion to deploy broadband to the American public, with more than \$68 billion invested in 2012 alone. For those keeping score, that’s one trillion dollars more than the Universal Service Fund has ever distributed, and about \$60 billion more than it distributed this past year.”).

¹⁷⁸ See Part I, *supra*.

¹⁷⁹ See AT&T Title II Reply Comments at 3-4, 13 n.21.

wired and wireless broadband networks” that is “[t]he lifeblood of [the] app economy”; and would discourage “incumbent phone companies to invest increasing amounts in broadband and IP.”¹⁸⁰ Other observers have expressed similar concerns, noting that reclassification would create tremendous uncertainty in a fast-evolving marketplace, inhibiting future investment by broadband Internet access providers and those from whom they raise capital. *See also* AT&T Title II Opening Comments at 2-5, 39-44 (detailing such comments from analysts, investors, legislators, and companies).¹⁸¹

When reclassification was considered in 2010, Congress expressed similar concerns, and emphatically so. More than half of the combined members of the House and Senate urged the Commission to reject any Title II reclassification. As the 74 Democratic Members signing one House letter explained, reclassification would “create regulatory uncertainty” and thus “distract[] from what should be our Nation’s foremost communications priority,” ubiquitous broadband deployment; and, perhaps most important, would “jeopardize jobs and deter needed investment for years to come.”¹⁸² They further admonished that reclassification is “not something that should be taken lightly and should not be done without additional direction from Congress. *We urge you not to move forward with a proposal that undermines critically important investment in broadband and the jobs that come with it.*”¹⁸³

¹⁸⁰ Anna-Maria Kovacs, *The Internet is Not a Rotary Phone*, Re/Code (May 12, 2014), <http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/>.

¹⁸¹ As AT&T has explained in prior comments, Title II regulation also would unreasonably interfere with ISPs’ investment-backed expectations. *See* AT&T Title II Opening Comments at 109-12.

¹⁸² *See* Letter from Representative Gene Taylor, Representative Gene Green, et al., to Julius Genachowski, Chairman, FCC (May 24, 2010), *available at* http://netcompetition.org/House_Democrat_Letter.pdf.

¹⁸³ *Id.* at 1-2 (emphasis added).

The Commission need look no further than Europe to see the potential consequences of ignoring these warnings. The European regulatory approach has been to regulate broadband Internet access providers as public utilities, and to impose telephone-style regulation. But this approach has had a significant deleterious impact on broadband investment. As discussed above, Europe seriously lags behind the United States in key indicators of broadband health, including service speeds, investment, and infrastructure.¹⁸⁴ Those differences, moreover, arise from Europe's reliance on a top-down, public-utility-model approach to broadband regulation.¹⁸⁵ The Commission should not commit the same mistake.

Reclassification also would unleash a torrent of litigation and regulatory disputes. These conflicts would increase uncertainty, exacerbating the investment-chilling effects discussed above. Threshold legal challenges to the Commission's reclassification decision could consume much of the next decade, depending on the number of judicial remands. And quite apart from direct legal challenges to the Title II classification itself, any reclassification decision would ignite multi-year regulatory controversies on a variety of other issues.

Title II is 80 years old and was designed to apply to monopoly-era telephone service, not to modern-day broadband Internet access service. That lack of fit is palpable, as advocates are forced to admit in their reliance on forbearance. It is therefore far from clear how common-carrier regulation would or should apply to broadband Internet access service. As discussed below, disputes inevitably would arise regarding such matters as which regulations should apply, which entities should be subject to those regulations, the precise extent of forbearance from

¹⁸⁴ See pages 8-9, *supra*.

¹⁸⁵ See, e.g., Yoo European Study at i (“Europe has relied on regulations that treat broadband as a public utility and focus on promoting service-based competition, in which new entrants lease incumbents’ facilities at wholesale cost (also known as unbundling).”).

particular Title II requirements, and, given the subjective nature of Title II standards, how the various provisions from which the Commission does *not* forbear would apply in this novel context.¹⁸⁶ As Commissioner Pai has inquired, “Why should we apply anti-consumer rules like tariffing to the broadband world? How would the Part 36 separations process apply to apportion the various components of the network between the several states and the FCC for regulatory purposes?”¹⁸⁷ Debating these and the multitude of other questions that reclassification would engender would foster uncertainty and divert time and resources away from deploying broadband networks and developing service innovations.

C. Reclassification of Broadband Internet Access Service Also Would Have Far-Reaching and Unintended Disastrous Consequences for the Rest of the Internet Ecosystem.

Although Title II proponents suggest that reclassification would affect only broadband Internet access providers, the consequences would not be so narrowly cabined. Rather, reclassification would have a significant impact on edge providers, backbone providers, CDNs, providers of Internet-enabled devices, and many others throughout the Internet ecosystem.

1. Any Interpretation of the Communications Act That Permits Reclassification of Broadband Internet Access Services Would Compel Reclassification of Many Other Services As Well.

There is no dispute that broadband Internet access providers are an essential element of the “virtuous circle” of investment and innovation lauded by the Commission. As the D.C. Circuit noted in *Verizon*, “[t]he Commission’s emphasis on this connection between edge-provider innovation and infrastructure development is uncontroversial.”¹⁸⁸ By deterring

¹⁸⁶ See Sections III.C and III.D, *infra* (discussing the effects of reclassification on the Internet ecosystem and forbearance, respectively).

¹⁸⁷ Pai Remarks at 2.

¹⁸⁸ *Verizon*, 740 F.3d at 644.

investments in broadband infrastructure, Title II regulation necessarily would have a ripple effect that stifles innovation and investment by other entities in the Internet ecosystem. But Title II regulation would have a much more direct impact as well. If the Commission were to reclassify broadband Internet access providers as telecommunications carriers, it could not limit the scope of reclassification to those providers alone. Instead, any reading of the Communications Act that deemed broadband Internet access service to be a telecommunications service would necessarily sweep many other services into that same category.

To reclassify broadband providers as Title II carriers, the Commission would need to identify a severable transmission component of broadband Internet access service that could be classified as a “telecommunications service.” In other words, it would need to repudiate the mutual exclusivity principle distinguishing an “information service” from a “telecommunications service.” But as the Supreme Court recognized in *Brand X*, such a determination would have serious consequences for “all entities that use telecommunications inputs to provide information service[s],” because it “would subject to mandatory common-carrier regulation *all information-service providers that use telecommunications as an input to provide information service to the public.*”¹⁸⁹ This analysis clearly is correct, and it is a serious practical impediment to reclassification of broadband Internet access services.

At its most basic level, the legal rationale proposed by reclassification proponents would *require* the Commission to classify as “telecommunications services” any entity in the Internet ecosystem that holds itself out to customers as *arranging* for the transmission of data from one point on the Internet to another, whether or not it *owns* transmission facilities. The Commission recognized this in the *Stevens Report*, noting that “if we interpreted the statute as breaking down

¹⁸⁹ *Brand X*, 545 U.S. at 994.

the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, *it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category.*¹⁹⁰

Indeed, as discussed below, the latter category would extend to ISPs such as Earthlink and AOL that do not own last-mile transmission facilities; to CDNs such as Akamai; to Internet backbone providers like Level 3; to providers of broadband-enabled devices such as Amazon.com and Garmin; 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. In short, Title II reclassification would be a sledgehammer, not a scalpel.¹⁹¹

Non-facilities-based ISPs. The Commission has previously suggested that Internet service providers that do not own last-mile transmission facilities, such as AOL and Earthlink, would not be subject to reclassification. For the reasons discussed below, it is irrelevant to the classification decision whether these entities own facilities.¹⁹² In any event, many of these ISPs do own network facilities that are indispensable to their provision of Internet access, including fiber-optic links connecting their local access equipment to cache servers and Internet backbone

¹⁹⁰ *Stevens Report*, 13 FCC Rcd at 11529 ¶ 57 (emphasis added).

¹⁹¹ Even some Title II proponents recognize the logical consequences for the rest of the Internet ecosystem. *See* Letter from Matthew Friendly, Data Foundry, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (filed June 11, 2010), Attach. at 3 (arguing that, to be effective, reclassification “would sweep in a far larger class of regulated entities” and would “subject[] to potential regulation . . . the non facilities based information service providers that previously were not subject to regulation under Title II”).

¹⁹² *See* Section III.C.2, *infra*.

networks.¹⁹³ And from a statutory-classification perspective, these ISPs are analogous to legacy long-distance carriers: they assume responsibility for transporting an end user’s data traffic throughout the Internet, even though they purchase, as an input, transmission supplied by another provider’s last-mile facilities. Today, such ISPs are considered “information service” providers because they provide classic information-service functionalities with their services, including DNS lookup, email, and often caching. But if the Commission reversed course and deemed those functionalities insufficient to shield broadband Internet access providers from Title II regulation, these ISPs would necessarily become Title II telecommunications carriers as well.

Content-delivery networks. The logic of reclassification would also extend to CDNs such as Akamai that hold themselves out to thousands of large and small business and edge-provider customers to transport data around the globe, to and from cache servers located closer to consumers. CDNs span the globe with dedicated fiber-optic transmission capacity, perform packet-distribution functions similar to those of backbone networks, and use much the same equipment and architecture as backbone networks. Akamai itself has made clear that it offers its services for a fee on a standardized basis to many thousands of end-user business customers.¹⁹⁴ That is more than sufficient to qualify it as a common carrier if the Commission determines, for example, that caching services do not prevent an Internet-based transmission provider from falling within the scope of Title II.¹⁹⁵ Indeed, reclassification advocates have argued as much.

¹⁹³ See *Stevens Report*, 13 FCC Rcd at 11534, 11536 ¶¶ 69, 73, & n.138.

¹⁹⁴ See AT&T Title II Opening Comments at 57-58.

¹⁹⁵ See Memorandum Opinion and Order, *Salsgiver Telecom, Inc., Complainant, v. North Pittsburgh Telephone Company, Respondent*, 22 FCC Rcd 9285, 9291-92 ¶ 14 (Enforc. Bur. 2007) (explaining that “the Commission has long regulated as common carrier services the provision of ‘private line’ [business-customer-only] services, which the Commission defines as ‘facilities or network transmission capacity dedicated to the use of an individual customer’”) (citations and internal quotations omitted) (citing Memorandum Opinion and Order,

Public Knowledge’s Harold Feld, for example, has noted that Akamai is “moving information from one place to another” and is “offering telecom” when it provides CDN services.¹⁹⁶

Internet backbone providers. Internet transport companies like Level 3, Savvis, Cogent, and Limelight offer backbone Internet access and content-delivery services to thousands of large and small businesses and edge providers using facilities they either own or lease. Therefore, just like CDNs, they transmit “information of the user’s choosing” over the Internet for a fee to a class of thousands of business customers “as to be effectively available directly to the public.”¹⁹⁷ Under reclassification, all of these historically unregulated peering and transit arrangements would be subject to common-carrier regulation designed for the legacy telephone network.

Broadband-enabled devices. Providers of devices with integrated broadband Internet access functionality, such as e-readers and GPS devices, also would fall within the scope of Title II. For example, Amazon.com’s Kindle provides Internet access through integrated 3G connectivity and web-browsing functionality.¹⁹⁸ Amazon thus assumes responsibility for “transmission of information of the user’s choosing” through the Internet “for a fee directly to

Investigation of Special Access Tariffs of Local Exchange Carriers, 8 FCC Rcd 4712, 4712 ¶ 2 (1993)); Third Report and Order, *MTS and WATS Market Structure, Phase I*, 93 FCC 2d 241, 249-50 ¶¶ 20-23 (1983); Notice of Inquiry and Proposed Rulemaking, *American Telephone & Telegraph Company; Private Line Rate Structure and Volume Discount Practices*, 74 FCC 2d 226 (1979) (investigating whether the pricing of AT&T’s competitive private line services was consistent with 47 U.S.C. § 202, which prohibits unjust discrimination by common carriers).

¹⁹⁶ Harold Feld, *Want to Play FCC Fantasy Baseball? Follow the Title II Debate*, Wetmachine.com, May 16, 2010, <http://tales-of-the-sausage-factory.wetmachine.com/content/want-to-play-fcc-fantasy-baseball-follow-the-title-ii-debate> (“Akamai is moving information from one place to another. That’s plainly ‘telecommunications.’”).

¹⁹⁷ 47 U.S.C. § 153(53).

¹⁹⁸ See Joanna Stern, *Among E-Readers, Competition Heats Up – Comparing the iPad, Kindle, Nook and Alex E-Readers*, N.Y. Times, June 9, 2010, <http://www.nytimes.com/2010/06/10/technology/personaltech/10TAB.html> (also mentioning other e-readers that function as multipurpose devices providing access to the Web and other applications).

the public.”¹⁹⁹ It too, and other device manufacturers with similar business models, also would necessarily be classified as providing a “telecommunications service.”

Internet search engines and online advertising companies. Companies like Google provide advertising-supported Internet search services and, on behalf of countless commercial customers, arrange for the transmission of search results and advertising messages to end users. Google charges fees to many businesses in exchange for a critical service that Google dominates: the paid transmission of advertisements and other content chosen by those businesses to end users who use Internet search engines. The logic behind reclassification would dictate that when a search engine connects an advertising network to a search request or effectuates a connection between a search user and an advertiser, it too would be providing a telecommunications service. The same would be true of other online advertising companies that do not rely on search functionality but nonetheless transmit online ads to end users at the direction of their customers.

Online video services. Similarly, providers of online video services like Netflix and Hulu self-provide or lease transmission capacity to offer video content over the Internet. For example, Hulu’s “Hulu Plus” service transmits video to end users in high-definition for a monthly fee of \$7.99.²⁰⁰ Under the proposed reclassification, that “transmission of information of the user’s choosing” over the Internet “for a fee directly to the public” would become a Title II telecommunications service.

Cloud-computing services. Providers of cloud-computing services, like Amazon.com’s Elastic Compute Cloud (“EC2”)²⁰¹ or Cloud Drive,²⁰² enable the transmission of customer data

¹⁹⁹ *Id.*

²⁰⁰ See Hulu, *Hulu Plus*, <http://www.hulu.com/plus> (last visited July 10, 2014).

²⁰¹ Amazon, *AWS Amazon Elastic Compute Cloud (EC2) – Scalable Cloud Hosting*, <http://aws.amazon.com/ec2/> (last visited July 11, 2014) (for business customers).

“of the user’s choosing” to and from cloud computing server farms “for a fee directly to the public.” Thus, these services too could not escape classification as “telecommunications services.”

All of the entities described above—as well as others that transmit data over the Internet, such as email providers or social networks that enable messaging or chat sessions—would be “telecommunications carriers” providing “telecommunications services” if the Commission were to reclassify broadband Internet access service. Once the Commission conceptualizes a line dividing a pure transmission function from information-processing capabilities, there is no principled way to cabin the reach of Title II to just one segment of the Internet and not others. Every entity that provides an over-the-top communications capability, whether voice, text, or video, would be either a facilities-based provider, or a reseller, of a telecommunications service.

2. Title II Reclassification Cannot Be Confined to Owners of Last-Mile Transmission Facilities.

Title II proponents may argue that, even though these entities provide transmission services, they should not be regulated as “telecommunications carriers” because they do not own the facilities over which those transmissions are made. This proposed limiting principle to Title II reclassification is both factually and legally wrong. First, many of the entities described above *do* own transmission facilities, including last-mile facilities that they use to deliver services to edge providers. For example, Google owns the multi-billion-dollar content-delivery network that it uses to transmit not just its own services, but also (among other things) paid advertisements from its many business customers to end users around the globe. Furthermore,

²⁰² Amazon, *Amazon Cloud Drive: Web*, <http://www.amazon.com/gp/feature.html?docId=1000796781> (last visited July 11, 2014) (for consumers).

many traditional dial-up ISPs, such as AOL and Earthlink, own network facilities indispensable to Internet access, including fiber-optic links connecting their local access equipment to cache servers and Internet backbone networks.²⁰³

More importantly, the distinction between facilities-based and non-facilities-based providers has no legal relevance. The Communications Act’s statutory text, Supreme Court precedent, and eighty years of Title II jurisprudence make clear that the classification of any provider as a telecommunications carrier does not depend on whether that provider owns transmission facilities, let alone last-mile facilities. Indeed, it is completely irrelevant to that classification. The statutory definitions of “telecommunications service” and “information service” each turn on what functionalities the *customer* receives, not how the *service provider* arranges behind the scenes for the provision of those functionalities.²⁰⁴

The *Brand X* majority agreed, holding that “the relevant [statutory] definitions do not distinguish facilities-based and non-facilities-based carriers.”²⁰⁵ That holding was essential to the Court’s decision to affirm the Commission’s classification of broadband Internet access as an “information service.” MCI and the other parties challenging that classification had argued that broadband Internet access should be deemed a “telecommunications service” simply because any provider offers telecommunications to the public as a key component of its service. The Court properly rejected that argument, explaining that this rationale would swallow up much of the

²⁰³ See *Stevens Report*, 13 FCC Rcd at 11534, 11536 ¶¶ 69, 73, & n.138.

²⁰⁴ See, e.g., 47 U.S.C. § 153(53) (telecommunications service is “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*”) (emphasis added).

²⁰⁵ 545 U.S. at 997.

Internet—and, specifically, would automatically “subject to common-carrier regulation non-facilities-based ISPs that *own no transmission facilities.*”²⁰⁶

Examples beyond the broadband context drive this point home. Calling-card providers and other resellers of long-distance services are “telecommunications carriers” subject to Title II even though they (i) may not own or even lease facilities and (ii) provide no “local” connectivity.²⁰⁷ Similarly, standalone long-distance companies (like the legacy AT&T Corp., MCI, and Sprint) are also Title II providers when they sell interexchange services, even though they rely on local exchange carriers to bridge the last few miles between their long-haul networks and their subscribers.

In short, any distinction between facilities-based and non-facilities-based providers for purposes of Title II classification would be indefensible. At the very least, attempts to insulate from Title II regulation non-facilities-based providers or those that do not provide the last-mile connection to end users would result in pitched regulatory battles and protracted litigation that could last a decade. Until resolved, these disputes would throw a cloud of uncertainty over the Internet that could throttle investment throughout the Internet ecosystem.

²⁰⁶ *Id.* at 994 (emphasis added).

²⁰⁷ *See, e.g.*, Declaratory Ruling and Report and Order, *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 7290, 7293-94, 7312 ¶¶ 10, 65 (2006) (“all prepaid calling card providers” “are subject to regulation as telecommunications carriers”), *vacated in part on other grounds by Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); Order to Show Cause and Notice of Opportunity for Hearing, *Nos Communications, Inc., Affinity Network Incorporated and Nosva Limited Partnership*, 18 FCC Rcd 6952, 6953-54 ¶ 3 (2003) (switchless long-distance reseller is subject to regulation under Title II); Report and Order, *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 265 ¶ 8 (1976) (“[A]n entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II.”), *aff’d sub nom, AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978); *see also Trans Nat’l Commc’ns, Inc. v. Overlooked Opinions, Inc.*, 877 F. Supp. 35, 38 (D. Mass. 1994) (discussing 1976 order).

D. Forbearance Would Not Alleviate Many of the Adverse Consequences of Reclassification.

Some advocates of reclassification contend that the Commission could eliminate many of these negative consequences by forbearing from the most burdensome aspects of common-carrier regulation. But this very notion of classifying broadband Internet access providers as Title II carriers yet forbearing from the vast majority of Title II *obligations* simply demonstrates how reclassification would shoe-horn those providers into a regulatory framework where they do not belong. When nearly everyone agrees that significant modifications would need to be made to the Title II regime to render it a suitable framework for regulating IP-enabled services, that is a powerful indication that reclassification is inconsistent with the text, structure, and design of the Communications Act and therefore inappropriate. In any event, forbearance could not possibly alleviate all of the adverse consequences of reclassification.

1. Forbearance Would Only Add to the Uncertainty and Confusion of Reclassification.

Sorting through which common-carrier obligations should apply to broadband Internet access providers, and which should not, would ignite prolonged controversy, disagreement, and litigation.²⁰⁸ It goes without saying that there will be those who favor maximum regulation of the Internet and who therefore would squarely oppose forbearance from virtually any significant provision of Title II.²⁰⁹ These entities could be expected to fight tooth and nail against forbearance from burdensome monopoly-era common-carrier requirements.²¹⁰

²⁰⁸ See Letter from Robert W. Quinn, Jr., Sr. Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2-4 (May 9, 2014) (“AT&T May 9 Letter”).

²⁰⁹ See Comments of Public Knowledge, *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 38-51 (July 15, 2010) (“Public Knowledge 2010 Comments”); Free Press 2010 Comments at 64-75.

²¹⁰ See AT&T Title II Reply Comments at 66-69.

Moreover, the Commission’s 2010 “Third Way” proposal, which included some level of forbearance, did not provide for forbearance from sections 201 and 202 of the Communications Act.²¹¹ And some passages in the *NPRM* suggest that this Commission might take the same approach.²¹² But those statutory provisions are vague, broad, and entirely untested in the broadband context. There is simply no telling how this or later Commissions would apply those sections in the context of the Internet, and thus no way of predicting what conduct would be prohibited. ISPs would thus have to assess litigation risk whenever, among other things, they engage in new anti-piracy measures, network-management techniques, or commercial arrangements with any content provider or other “person, class of persons, or locality.”²¹³ And the same would be true of the other entities that necessarily would be swept within Title II by the Commission’s reclassification decision.²¹⁴ All of this would work to the detriment of investment, which is crucial to innovation and the achievement of Congress’ and the Commission’s broadband objectives.²¹⁵

In the *Stevens Report*, the Commission itself recognized the limits of forbearance. In rejecting claims that forbearance would eliminate the policy harms of Title II classification, the Commission explained:

²¹¹ Austin Schlick, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* at 4, 8 (May 6, 2010), available at <http://www.fcc.gov/document/statement-fcc-general-counsel-austin-schlick-third-way-legal-framework-addressing-comcast-d>.

²¹² See, e.g., *NPRM* ¶ 121 (“If the Commission ultimately adopts a Title II approach, how should the Commission define the [nondiscrimination] rule in light of the requirements under sections 201 and 202 of the Act?”); *id.* ¶ 154 (mentioning sections 201, 202, 208, 222, 254, and 255).

²¹³ 47 U.S.C. § 202(a).

²¹⁴ See Section III.C.1, *supra*.

²¹⁵ See AT&T May 9 Letter at 5; AT&T Title II Opening Comments at 115-16.

Notwithstanding the possibility of forbearance, we are concerned that including information service providers within the “telecommunications carrier” classification would effectively impose a presumption in favor of Title II regulation of such providers. Such a presumption would be inconsistent with the deregulatory and precompetitive goals of the 1996 Act. In addition, uncertainty about whether the Commission would forbear from applying specific provisions could chill innovation.²¹⁶

The same remains true today. Identifying which Title II provisions should continue to apply to broadband Internet access providers would be incredibly contentious, and ISPs would remain perpetually in doubt about the nature of their obligations under sections 201 and 202. This would compound the uncertainty of Title II reclassification and stifle broadband investment and innovation.

2. Forbearance May Not Be as Simple to Effect and Maintain as Many Parties Claim.

Advocates also exaggerate the ease with which forbearance could be effected. To forbear from applying any Commission regulation or any provision of the Communications Act, the Commission must determine that “(1) enforcement of such regulation or provision is not necessary to ensure that the . . . practices . . . in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.”²¹⁷ And any such determination would have to be reconciled with the threshold findings that the Commission would need to make to conclude that Title II regulation is necessary in the first place. This tension makes the approach of “reclassification plus forbearance” a much more legally risky endeavor than its proponents have acknowledged. And if forbearance were

²¹⁶ *Stevens Report*, 13 FCC Rcd at 11525 ¶ 47.

²¹⁷ 47 U.S.C. § 160(a).

reversed by a reviewing court, broadband Internet access providers and any others swept into Title II would be forced to bear the full brunt of monopoly-era, common-carrier regulations, with devastating results for the entire Internet ecosystem.

Furthermore, forbearance may be even more difficult to accomplish as a practical matter than as a legal matter. Under recent Commission precedents, there are obstacles to a grant of forbearance on a nationwide basis, or even with respect to “broadband Internet access service” in general.²¹⁸ In the *Qwest Phoenix Order*, for example, the Commission set a high bar for forbearance and imposed a number of procedural hurdles that could impede an efficient decision here.²¹⁹ While AT&T believes that order was wrongly decided, it might nonetheless require the Commission to undertake a highly fact-specific and granular inquiry that demonstrates market-by-market and product-by-product that the exacting forbearance standard has been met.²²⁰ If so, forbearance would be an incredibly arduous task for both the Commission and the private sector. These forbearance proceedings could take years to conclude, all the while creating more uncertainty and increasing transaction costs.

And the initial forbearance determination would be far from the end of the matter. Any decision to forebear likely would spark protracted litigation from those who believe that broadband should be regulated just like twentieth-century common carriers. There also would be no assurance that later Commissions would adhere to the forbearance decisions made by this

²¹⁸ Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622, 8645-48 ¶¶ 41-45 (2010).

²¹⁹ *Id.*

²²⁰ See Pai Remarks at 2 (“In the *Qwest-Phoenix Order*, the Commission dramatically raised the bar for regulatory relief. It essentially presumed that relief should be denied. And it imposed onerous (perhaps impossible) evidentiary burdens on petitioners to prove otherwise in each particular geographic area where they request relief.”).

Commission. The Commission has emphasized that forbearance decisions are not irreversible. Thus, broadband Internet access providers—and any other IP-enabled service provider that becomes a “telecommunications carrier” by virtue of the Commission’s reclassification decision—would be kept in a constant state of regulatory uncertainty.²²¹

Even if *the Commission* were to forbear from certain provisions, reclassification could beget more regulation *by states* that seek to impose common-carrier regulation on ISPs.²²² As the Commission explained in the *Stevens Report*, “[t]he classification of information service providers as telecommunications carriers . . . could encourage states to impose common-carrier regulation on such providers. Although section 10(e) of the Act precludes a state from applying or enforcing provisions of federal law where the Commission has determined to forbear, it does not preclude a state from imposing requirements derived from state law.”²²³ Mobile providers have already experienced firsthand the ways in which state regulation and litigation can undermine the Commission’s national “deregulatory” regime.²²⁴ In the broadband context, some state regulators undoubtedly will not be as willing as the Commission to forbear from arduous, ill fitting, and arcane common-carrier regulations.

In short, even if the Commission could forbear from most of Title II, that would only reduce the adverse consequences of reclassification, not eliminate them. A decision to reclassify broadband Internet access service will thus disrupt or halt the virtuous circle of investment and innovation that such reclassification would be designed to protect.

²²¹ See AT&T Title II Opening Comments at 116-18, 123-24; AT&T May 9 Letter at 5-6; Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (May 14, 2014) (“May 14 Letter”).

²²² See AT&T Title II Opening Comments at 121-22.

²²³ *Stevens Report*, 13 FCC Rcd at 11525 ¶ 48.

²²⁴ See AT&T Title II Opening Comments at 121-22.

E. Title II Regulation Would Embolden Other Countries to Impose Even More Intrusive and Burdensome Regulations on Broadband Internet Access Providers.

Finally, Title II reclassification would seriously undermine efforts by the U.S. government to promote international Internet policy objectives. As Administration officials have explained, the “overriding goal in the Obama Administration is to the preserve an open, interconnected global Internet that supports continued innovation, economic growth and the free flow of information.”²²⁵ Title II reclassification could imperil that objective.

Specifically, a decision by the Commission to regulate broadband Internet access providers as Title II common carriers would provide a justification (and, indeed, a blueprint) for other foreign governments to regulate those providers under monopoly-era, public-utility-model regulation—or worse. Indeed, some members of the Administration have expressed concern that the Commission’s efforts to regulate broadband Internet access service under Title II could provide a green light for other governments to impose regulations that might go beyond common-carrier regulation to include such things as surcharges or content controls (including censorship of content).²²⁶

For example, some nations connected with the World Conference on International Telecommunications (“WCIT”)—a conference convened by the International

²²⁵ Keynote Speech by Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information (June 15, 2012), <http://www.ntia.doc.gov/spechtestimony/2012/keynote-speech-lawrence-e-strickling-assistant-secretary-commerce-communication>.

²²⁶ See John Eggerton, *FCC’s Net Neutrality Proceeding Means More Work for State Department*, Broadcasting and Cable (March 17, 2010), <http://www.broadcastingcable.com/news/washington/fccs-net-neutrality-proceeding-means-more-work-state-department/57276> (discussing speech by Ambassador Philip Verveer, Assistant Secretary of State and U.S. Coordinator for International Communications and Information Policy).

Telecommunications Union, part of the United Nations—have proposed intrusive regulation of the commercial arrangements between Internet networks as part of an international telecommunications treaty. Specifically, these countries have discussed a “sending party network pays” principle that would apply to Internet interconnection agreements.²²⁷ The U.S. government has adamantly opposed this and other regulations proposed in connection with WCIT.²²⁸ For example, as then-Chairman Genachowski explained, regulatory proposals considered by some countries in connection with the WCIT would “restrict the free flow of information online or otherwise threaten one of the most powerful engines for global economic growth in the world today—the open Internet.”²²⁹ He further explained that the “new layer of

²²⁷ See Larry Downes, *Why is the U.N. Trying to Take over the Internet?*, *Forbes* (Aug. 9, 2012), <http://www.forbes.com/sites/larrydownes/2012/08/09/why-the-un-is-trying-to-take-over-the-internet/>.

²²⁸ See, e.g., *Interview: US Ambassador David Gross Explains UN ‘Takeover’ of the Internet*, *Digital Trends* (Aug. 9, 2012), <http://www.digitaltrends.com/web/fmr-us-ambassador-david-gross-explains-un-takeover-of-the-internet/#!7JjrZ>; CNET, *EU Telcos Defend UN Internet Takeover Plans* (Sept. 23, 2012), <http://www.cnet.com/news/eu-telcos-defend-un-internet-takeover-plans/> (noting that “[t]he White House, the State Department, and Republican and Democratic commissioners of the FCC” have raised serious concerns with proposed international regulations, including the sending party network pays principle); *Communications Daily* (June 28, 2012) (describing Commissioner McDowell’s opposition).

²²⁹ See Statement of FCC Chairman Julius Genachowski on the Formation of the U.S. Delegation to the World Conference on International Telecommunications (WCIT) (Oct. 1, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-316566A1.pdf; *see also* Statement from FCC Chairman Julius Genachowski on the Senate Foreign Relations Committee Internet Governance Regulation (Sept. 19, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-316384A1.pdf (“[T]he [WCIT] must embrace the success of the last two decades of liberalization in telecom regulation . . . in order to ensure continued investment and growth of the Internet around the globe.”).

international Internet regulation” proposed by some at the WCIT would threaten the United States’ goal of “a virtuous cycle of innovation and investment” for the global Internet.²³⁰

A Title II reclassification decision would undercut the credibility of the United States’ opposition to Internet regulation and would provide momentum for this type of intrusive regulation of broadband Internet access providers’ international commercial arrangements. As Ambassador David Gross has put it:

We can continue to lead the world toward greater prosperity and the socially transformational benefits long associated with the internet. But if we fail to match our words with action; if we insist that others avoid an approach that imposes regulations and laws that limit the internet’s capacity to advance freedom, openness and creativity, micromanages markets, or limits competition and investment, but do otherwise at home, then the world will quickly recognize our hypocrisy.²³¹

None of these concerns, of course, could be remedied through forbearance. That is because a decision by the Commission to forbear from more burdensome common-carrier regulations may be one that other countries would not or could not follow. As the Commission explained in the *Stevens Report*, while the Commission “has authority to forbear from unnecessary regulation, foreign regulators may not have comparable deregulatory authority to avoid imposing the full range of telecommunications regulation on information services.”²³² A decision by the United States to pursue Internet openness at home through Title II regulation could thus have the paradoxical effect of crippling the growth and openness of the Internet

²³⁰ Statement from FCC Chairman Julius Genachowski on U.S. Actions at the World Conference of International Telecommunications (WCIT) (Dec. 14, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-317950A1.pdf.

²³¹ See Ambassador David A. Gross, *Walking the Talk: The Role of U.S. Leadership in the Wake of WCIT*, Bloomberg BNA (Jan. 17, 2013), <http://www.bna.com/walking-the-talk-the-role-of-u-s-leadership-in-the-wake-of-wcit-by-david-a-gross/>.

²³² 13 FCC Rcd at 11525 ¶ 48.

worldwide. Particularly given that the Commission can achieve its domestic Internet openness goals through section 706, there is no justification for adopting a regulatory approach that could invite international regulation that would threaten the viability of the global Internet.

IV. ADDRESSING PAID PRIORITIZATION DIRECTLY UNDER SECTION 706 WOULD ELIMINATE ANY POSSIBLE NEED FOR THE ADDITIONAL OBLIGATIONS CONTEMPLATED IN THE *NPRM*.

The discussion above makes clear that the Commission can and should address any potential threat from paid prioritization by adopting rules pursuant to section 706. And if fixed broadband Internet access providers are barred from engaging in paid prioritization (or if they voluntarily agree not to engage in it), there is no conceivable need for any of the grab-bag of additional regulatory changes contemplated in the *NPRM* that go beyond the rules adopted in the *Open Internet Order*. Instead, in these circumstances, the Commission should adopt its 2010 no-blocking rule under an alternative rationale; it should retain its existing transparency rule; and it should adopt the nondiscrimination rule proposed in the *NPRM* with minimal changes. The Commission has the legal authority to take this approach under 706, and doing so would ensure that the virtuous circle of investment and innovation continues unabated.

A. The Commission Should Re-Adopt Its No-Blocking Rule Using the New Rationale Identified by the *Verizon* Court.

To begin with, no substantive changes to the Commission’s 2010 no-blocking rule are necessary, particularly if paid prioritization is taken off the table through a Commission mandate or an ISP’s election.²³³ Instead, the Commission should “adopt the text of the no-blocking rule

²³³ See 47 C.F.R. § 8.5(a) (“A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.”); *id.* § 8.5(b) (“A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful Web sites, subject to

. . . , with a clarification that it does not preclude broadband providers from negotiating individualized . . . arrangements” with edge providers, so long as those arrangements comport with Commission rules (or the broadband provider’s election) governing paid prioritization.²³⁴

To the extent that the Commission deems it necessary to clarify the no-blocking rule by establishing a “minimum level of access,” the Commission should use the benchmark of a provider’s “best efforts” Internet access service—subject to reasonable network management—and it should reject calls to define a “minimum level of access” using a “quantitative” or “reasonable person” standard.²³⁵

This approach is fully consistent with *Verizon*. Although the D.C. Circuit vacated the 2010 no-blocking rule, it proposed a path forward for the Commission to re-adopt the same rule under a revised rationale. Specifically, the court suggested that the Commission could lawfully promulgate a no-blocking rule if it required that “broadband providers furnish . . . access to their subscribers generally, as opposed to access to their subscribers at the specific minimum speed necessary to satisfy the anti-blocking rules” and permitted sufficient individualized bargaining with edge providers above that minimum level of service.²³⁶ Such a rule, the court stated, “might . . . leave sufficient ‘room for individualized bargaining and discrimination in terms’ so as not to run afoul of the statutory prohibitions on common carrier treatment.”²³⁷ As noted, this would be true even if the Commission prohibits paid prioritization. The *NPRM* is thus correct that the

reasonable network management; nor shall such person block applications that compete with the provider’s voice or video telephony services, subject to reasonable network management.”).

²³⁴ *NPRM* ¶ 89; see also *NPRM*, App A, Proposed Rule 8.5.

²³⁵ *NPRM* ¶¶ 101, 104.

²³⁶ *Verizon*, 740 F.3d at 658.

²³⁷ *Id.* (quoting *Cellco Partnership*, 700 F.3d at 548).

Verizon court “suggested” that readopting the text of the no-blocking rule with this “revised rationale” would be “permissible rather than *per se* common carriage.”²³⁸

The question then becomes, “how [should] ‘minimum level of access’ . . . be defined” with paid prioritization off the table?²³⁹ AT&T strongly urges the Commission to use a “best efforts” standard if it answers this question. By “best efforts,” AT&T means that ISPs offer broadband Internet access service as they have to this point—by using “traditional” architecture to deliver packets to their intended destinations without intentionally degrading service quality for reasons unrelated to reasonable network management.²⁴⁰

The alternative minimum access standards contemplated by the Commission—a minimum quantitative performance standard or an objective, evolving reasonable person standard—should be rejected.²⁴¹ In particular, a minimum quantitative performance standard, that is, “a minimum level of access [defined] through specific technical parameters, such as minimum speed,”²⁴² is unnecessary, would be inconsistent with congressional policy,²⁴³ and could inflict serious harm.

²³⁸ *NPRM* ¶ 95.

²³⁹ *NPRM* ¶ 101.

²⁴⁰ Notice of Proposed Rulemaking, *Preserving the Open Internet*, 24 FCC Rcd 13064, 13086 ¶ 56 (2009); *see also* FTC Staff Report, *Broadband Connectivity Competition Policy*, 2007 WL 2506639, at *2 (June 2007) (“Traditionally, data traffic has traversed the Internet on a ‘first-in-first-out’ and ‘best-efforts’ basis”); *id.* at *19 (contrasting “new technologies to prioritize certain data traffic” with “the practice of transmitting data on a first-in-first-out and best-efforts basis”).

²⁴¹ *See NPRM* ¶¶ 103-04.

²⁴² *Id.* ¶ 103.

²⁴³ *See* 47 U.S.C. § 230(b) (“It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”).

There is no sensible policy reason for the Commission to adopt such a standard and, indeed, the arguments made by proponents are refuted by the record. *First*, broadband Internet access providers have powerful market incentives not to degrade their standard service offerings and, indeed, to provide customers with the best-quality service possible. There is ample proof of this in today’s marketplace. As AT&T has noted, broadband speeds and service quality continue to advance at an impressive pace.²⁴⁴ For example, as part of its “U-verse with GigaPower” service, AT&T now offers customers what would have been considered fanciful just a few years ago: a state-of-the-art, all fiber-optic network capable of offering download and upload speeds of 300 Mbps, with a planned free upgrade to 1 Gbps in 2014.²⁴⁵ These phenomenal speeds are not just limited to AT&T: the recently released Measuring Broadband America 2014 Report demonstrates that other ISPs are not only meeting advertised speeds, but surpassing them.²⁴⁶ Regulatory intervention is simply not necessary to ensure that providers continue to compete fiercely to provide faster, more reliable service.

Second, contrary to the claims of some net neutrality advocates, broadband Internet access providers have no incentives to degrade transmission for services that purportedly compete with those providers’ own services. For example, services such as text messaging,

²⁴⁴ See pages 8-9 and notes 14-24, *supra*; see also Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 20-21 (2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“*National Broadband Plan*”) (“Both telephone and cable companies continue to upgrade their networks to offer higher speeds and greater capacities.”); *id.* at 38-39 (“New choices—at new, higher speeds—are becoming available, as well.”); NTIA, *U.S. Broadband Availability June 2010-June 2012*, available at http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf (May 2013).

²⁴⁵ AT&T, *Introducing AT&T U-verse with GigaPower*, <http://www.att.com/shop/u-verse/gigapower.html#fbid=EIAIRpw4KjV>.

²⁴⁶ See Measuring Broadband America, *2014 Measuring Broadband America Fixed Broadband Report*, at 11 (2014) (“Many ISPs now closely meet or exceed the speeds they advertise, but there continues to be room for improvement.”).

YouTube, and VoIP all compete in various ways with broadband providers' offerings. Yet there is *zero* evidence that providers are degrading service for these competing services. The absence of any such evidence is not surprising. Degrading competing applications will only negatively impact end users' experiences, increasing the risk that the broadband Internet access provider will lose customers to competing providers. Market discipline thus provides a powerful safeguard against degradation and ensures that providers have appropriate incentives to provide consumers fast, high-quality service. And although net neutrality advocates claim that ISPs offering paid prioritization would have incentives to degrade non-prioritized traffic, obviously this would not be a concern if the Commission bans paid prioritization or providers voluntarily commit not to engage in it.

Finally, in the highly unlikely event that the disincentives to degrade service are insufficient and a broadband Internet access provider did engage in such conduct, the Commission could immediately rectify the problem through its nondiscrimination rule. Intentional degradation of service that harms consumers or edge providers would almost certainly constitute a commercially unreasonable practice. Indeed, degradation carried out for anticompetitive reasons likely would violate a "best efforts" standard as well—so this remote possibility is not a basis for a minimum quantitative performance standard at all.

A Commission-imposed minimum quantitative performance standard not only is unnecessary, but also would be ineffective or affirmatively harmful in multiple respects. *First*, setting such a standard would put unprecedented pressure on regulators to keep pace with fast-moving, dynamic technology and a rapidly evolving industry. As the *NPRM* acknowledges, the

Commission would need to revisit and update a minimum level of service frequently.²⁴⁷ And given the light-speed pace of innovation in the marketplace as well as differences among providers, it would be difficult, if not impossible, for the Commission to keep up with industry changes.²⁴⁸ Setting such prescriptive standards, moreover, would risk regulators effectively picking and choosing network technologies and making engineering decisions with respect to providers' networks. Particularly in the absence of any showing of need, there is no justification for government regulators to assume such an intrusive role in setting the very basic terms of Internet service providers' commercial offerings.

Second, a minimum quantitative performance standard could irrationally hold broadband Internet access providers accountable for broadband speed and service-quality issues over which they have no control. As the Commission has rightly acknowledged, network congestion may be the result of factors outside the "control of a consumer's ISP."²⁴⁹ Similarly, commenters have explained "that sources of congestion that impact end users may originate beyond the broadband provider's network."²⁵⁰ A minimum quantitative performance standard could arbitrarily and inappropriately place the regulatory costs and burdens of compliance on broadband Internet access providers. Compelled by regulation to respond to congestion or other performance issues

²⁴⁷ *NPRM* ¶ 103 ("[A] specific technical definition of minimum access could become outdated as available broadband network technologies change and available broadband speeds improve.").

²⁴⁸ *Id.*; see also Chairman Wheeler Remarks, American Enterprise Institute (June 12, 2014) ("The pace of innovation on the Internet is much, much faster than the pace of a notice-and-comment rulemaking. . . . We cannot hope to keep up if we adopt a prescriptive regulatory approach."), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0612/DOC-327591A1.txt.

²⁴⁹ Federal Communications Commission, *State of U.S. Broadband Report*, at 5-6 (2014), available at <http://data.fcc.gov/download/measuring-broadband-america/2014/2014-Fixed-Measuring-Broadband-America-Report.pdf>.

²⁵⁰ See *NPRM* ¶ 82.

not caused by their own networks, providers might be forced to try to over-engineer their networks to ensure that a quantitative minimum standard is met, resulting in an economically inefficient allocation of economic resources and unnecessarily increasing the cost of broadband service.

Third, a minimum quantitative performance standard would needlessly restrict consumer choice. Some consumers have no desire for ever-increasing broadband speeds. Such consumers likely would choose to pay less for Internet access service that is suitable for basic functions, such as web browsing or email. Establishing a minimum regulatory floor to service speeds that continues to ratchet up over time would risk driving up the price of broadband service for *all* consumers, potentially pricing some consumers out of the broadband market.

Fourth, a minimum quantitative performance standard could impede broadband deployment, particularly in already-underserved, hard-to-reach areas. In such areas, providers may not be economically or technologically capable of deploying very-high-speed broadband. Thus, a broadband Internet access provider might choose not to deploy service there if it fears that it will be too challenging to provide an ever-increasing Commission-mandated minimal level of service. Again, that outcome would impair broadband adoption. It also would directly undermine the chief goal of section 706, namely, ubiquitous deployment of Internet infrastructure. As the Consumer Federation of America and Consumers Union have emphasized: “[M]aximum coverage should be the goal, rather than chas[ing] a gold-plated network that will restrict the number of households that can be reached in the near future.”²⁵¹

²⁵¹ See Comments of the Consumer Federation of America and Consumers Union, *Report on Rural Broadband Strategy*, GN Docket No. 09-29, at 3 (Mar. 25, 2009).

In short, a minimum quantitative performance standard could increase the costs of broadband and inhibit deployment, stalling the virtuous circle that net neutrality rules are intended to promote. At the least, there has been no showing and there is no reason to believe that a “best efforts” standard would not be an effective benchmark for a no-blocking rule. There is thus no justification to use the no-blocking rule to arrogate to regulators unprecedented control over the Internet.²⁵²

B. The Commission Should Retain Its Existing Transparency Rule.

The Commission adopted the existing transparency rule in 2010, and that rule was upheld in *Verizon*. There is no credible evidence that this rule has not served its purpose. And there is no sound reason to revise it, at least in circumstances where broadband Internet access providers will not be offering paid prioritization.²⁵³ In these circumstances, the changes proposed in the *NPRM* would do little to promote a deeper understanding of providers’ practices, but they would inflict a variety of harms that far outweigh their purported marginal benefit. Among other things, more prescriptive transparency rules would confuse end users, short-circuit ongoing industry standards-setting processes, consume finite resources that could be devoted to

²⁵² The *NPRM* calls for comment on an objective, evolving “reasonable person” standard. *NPRM* ¶ 104. This cannot be a serious candidate for regulation. Such a standard would be even more misguided than a minimum quantitative performance standard. There is no “typical end user” with defined expectations against which the Commission could benchmark such a standard. *Id.* Thus, as the Commission recognizes, such a “reasonable person” standard would generate substantial and investment-detering uncertainty as to what is lawful under the no-blocking rule. *Id.*

²⁵³ And even outside those circumstances, any changes to the transparency rule should be narrowly targeted to remedy the purported harms of paid prioritization, unlike many of the unworkable and unnecessary requirements proposed in the *NPRM*. Instead, the Commission should require broadband Internet access providers offering paid prioritization to disclose the nature of those agreements and their impact on non-prioritized traffic.

improving and expanding broadband service, and enable cyber criminals and others to undermine effective network management.

1. The Existing Rule Ensures Ample Transparency for End Users, Edge Providers, and Other Members of the Internet Ecosystem.

The *NPRM* cites complaints from commenters “suggesting that, under the rule, broadband providers may not be providing end user consumers the accurate information they need and have a right to receive.”²⁵⁴ Even if this were true—and as discussed below, it is not—ISPs are *already* required to “disclose accurate information . . . sufficient for consumers to make informed choices.”²⁵⁵ The rule thus does not need to be *changed* but simply *enforced*. In any event, the record clearly demonstrates that AT&T and other providers are not only complying with their obligations under the transparency rule, but surpassing them.

AT&T provides ample information regarding network management, service performance, rates, data plans, and other terms through several mechanisms—in the network disclosure required by the existing transparency rule, on AT&T’s website and mobile app, in the point-of-sale disclosures for broadband Internet access service, and in AT&T’s terms of service. These disclosures provide all of the information consumers could conceivably need to make educated decisions about their broadband service. For example, the Broadband Information page on AT&T’s website collects in one place detailed information about AT&T’s network management practices, performance characteristics, and commercial terms, including: congestion management policies;²⁵⁶ statements regarding throttling and blocking;²⁵⁷ device attachment policies;²⁵⁸ factors

²⁵⁴ *NPRM* ¶ 69.

²⁵⁵ *Open Internet Order*, 25 FCC Rcd at 17937 ¶ 54.

²⁵⁶ AT&T, *Broadband Information*, <http://www.att.com/gen/public-affairs?pid=20879> (describing sources of congestion and AT&T’s potential responses in various circumstances).

that affect broadband performance (broken out separately for wired, mobile, and Wi-Fi services);²⁵⁹ speed and expected latency disclosures (again, broken out by service type);²⁶⁰ measures taken to guard against and respond to security threats such as viruses, botnets, and spam; rates and data plan information for wired, mobile, Wi-Fi, and small-business customers; links to usage calculators and other tools; and a variety of other information.²⁶¹ The Broadband Information page also provides links to other resources, such as AT&T’s Acceptable Use Policy and AT&T’s Terms of Service for wired, mobile, and Wi-Fi services.²⁶² Not only are these disclosures prominently displayed on AT&T’s website, but all AT&T customers are alerted to them when they subscribe; the order confirmation and related e-mails direct customers to the Broadband Information page.

These disclosures provide comprehensive information about broadband speeds. AT&T’s wireline disclosures detail a variety of service “Speed Tiers,” as well as the “Downstream Speed

²⁵⁷ *Id.* (“AT&T does not favor certain Internet applications by blocking, throttling or modifying particular protocols, protocol ports, or protocol fields in ways not prescribed by the protocol standards. However, in response to a specific security threat against our network or our customers, AT&T may occasionally need to limit the flow of traffic from certain locations or take other appropriate actions.”).

²⁵⁸ *Id.* (“AT&T customers may attach 3G- or 4G-capable devices of their choice to our wired, mobile and Wi-Fi broadband Internet access services, so long as the devices do not harm our network or other users.”).

²⁵⁹ *Id.*

²⁶⁰ *Id.* (“Though latencies can vary due to several factors, including some beyond AT&T’s control, our customers can typically expect the following round-trip latencies when accessing the Internet: Wired Service: approximately 30 to 55 milliseconds[;] Mobile Service: approximately 115 to 270 milliseconds for HSPA, approximately 110 to 170 milliseconds for HSPA+, and approximately 35 to 90 milliseconds for LTE[;] Wi-Fi Service: approximately 50 to 250 milliseconds.”).

²⁶¹ *Id.*

²⁶² *Id.* (providing separate links to the different Terms of Service for each of these products).

Range” for each tier of service.²⁶³ AT&T further explains how those service speeds are defined, and how they compare to other potential measures of performance.²⁶⁴ The Terms of Service, which are available on AT&T’s website and are provided to all customers, further expound on the various factors that may affect throughput speed.²⁶⁵ With respect to mobile service, AT&T discloses that it does not offer different speed tiers, but rather offers customers “the highest speed available from the network on a given device at any given point in time, subject to the many different factors . . . that can impact wireless network performance.”²⁶⁶ Similar information is disclosed to consumers regarding AT&T’s Wi-Fi service.²⁶⁷

AT&T also provides clear and accurate disclosures with respect to rates and other charges.²⁶⁸ AT&T’s website contains a wealth of information concerning the costs of different

²⁶³ *Id.*; see also AT&T, *Speed Tiers*, <http://www.att.net/speedtiers>.

²⁶⁴ See, e.g., AT&T, *AT&T High Speed Internet Terms of Service*, <http://www.att.net/csbellsouth/s/s.dll?spage=cg/legal/att.htm&leg=tos> (stating that Service Capability Speeds are “are the downstream rates at which your line transfers Internet access data between the network interface device at your home, office or apartment building to the first piece of routing equipment in AT&T’s network”).

²⁶⁵ *Id.* Such factors include “customer location, destination and traffic on the Internet, interference with high frequency spectrum on your telephone line, wiring inside your home, office or apartment, the capacity or performance of your computer or modem, the server with which you are communicating, internal network factors, and the networks you and others are using when communicating.” *Id.*

²⁶⁶ See AT&T, *Broadband Information*, <http://www.att.com/gen/public-affairs?pid=20879#terms-service>. For example, the Broadband Information page discloses that for “High Speed Packet Access (HSPA) services, typical download speeds range from approximately 700 Kbps up to 1.7 Mbps, and for HSPA+ typical download speeds range from approximately 2 Mbps up to 6 Mbps where AT&T has enhanced backhaul connections in place. For our Long Term Evolution (LTE) services, typical download speeds range from approximately 5 Mbps up to 12 Mbps (in most markets).”

²⁶⁷ See *id.*

²⁶⁸ See *NPRM* ¶ 69 (“Many consumers complain that they have been charged amounts greater than advertised rates, including fees and charges beyond basic rates.”).

broadband data plans.²⁶⁹ And the Broadband Information page synthesizes this information, providing separate links for consumer wired service, consumer mobile service, small business wired service, small business mobile service, and Wi-Fi.²⁷⁰ That page also supplies additional information about early termination fees.²⁷¹ In addition, every customer receives a comprehensive “Customer Service Summary” that details all relevant features and conditions of the specific service that the customer has ordered.²⁷² These materials discuss not just basic rates, but all other fees and potential charges.²⁷³ AT&T also provides clear disclosures regarding its tethering policies and plans.²⁷⁴ In short, AT&T provides customers with far more effective and tailored disclosures than would be possible under a one-size-fits-all solution mandated by prescriptive rules.

AT&T also provides detailed and timely information to customers about their broadband usage, and it offers tools to help them remain within their data plan allowances.²⁷⁵ For example, AT&T’s Data Calculator allows users to anticipate their data needs and adjust their plans

²⁶⁹ See AT&T, <http://www.att.com>.

²⁷⁰ See AT&T, *Broadband Information*, <http://www.att.com/gen/public-affairs?pid=20879#terms-service>.

²⁷¹ *Id.*

²⁷² See, e.g., AT&T, *About your Customer Service Summary*, http://www.att.com/esupport/article.jsp?sid=KB413369&cv=812&_requestid=7840#fbid=i5RyWxPjiPL.

²⁷³ See AT&T, *Facts About Your Plan*, <http://www.att.com/esupport/internet/usage.jsp#fbid=o94IfAeX2n8>.

²⁷⁴ See, e.g., AT&T, *Wireless Customer Agreement*, <http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#dataPlusDataProWithTeth> (“Wireless Customer Agreement”) (stating that “a data plan designated for use with a basic phone or a Smartphone may not be used with a LaptopConnect card, tablet, or stand-alone Mobile Hotspot device, by tethering devices together” but that “[a] data tethering plan, . . . may be purchased for an additional fee to enable tethering on a compatible device”).

²⁷⁵ *NPRM* ¶ 73.

accordingly.²⁷⁶ AT&T also provides mechanisms that allow customers to track how much data they have consumed in a given billing cycle. For example, the myAT&T webpage and mobile application allow customers to continuously track their data usage.²⁷⁷ And customers may dial *DATA# at any time from their mobile handsets to receive a free text message containing data usage information. AT&T also provides automated alerts to help customers avoid exceeding their data plan thresholds. When customers approach a data limit, AT&T sends them several personalized notices, which include SMS messages and e-mails, notifying them of their total broadband use and information about potential overage charges.²⁷⁸ AT&T is working hard to ensure that customers have all of the tools they need to understand data usage, and it has every incentive to continue to do so to maintain customer satisfaction and decrease churn.

AT&T's disclosures also include detailed information about network management practices. For example, AT&T's wireline Terms of Service explain that AT&T may engage in "reasonable network management practices" to protect the broadband network from "harm, compromised capacity, degradation in network performance or service levels, or uses of the Service which may adversely impact access to or the use of the Service by other customers."²⁷⁹ The Terms of Service further note that such "reasonable network management" practices may

²⁷⁶ See AT&T, *High Speed Internet Data Calculator*, <http://www.att.com/esupport/data-calculator/>.

²⁷⁷ See AT&T, *myAT&T*, <http://www.att.com/shop/myatt.html>.

²⁷⁸ See AT&T, *Facts About Your Data Plan*, <http://www.att.com/esupport/internet/usage.jsp#fbid=o94IfAeX2n8> ("You will receive a notice the first time your usage exceeds the data plan. We will send you alerts if your usage approaches or exceeds the amount of data included in your plan. If you exceed your monthly data plan a third time we'll charge you \$10 for each additional 50 GB of data provided to you that month. You'll be charged \$10 for every incremental 50 GB of usage beyond your plan.").

²⁷⁹ See AT&T, *AT&T High Speed Internet Terms of Service / att.net Terms of Use*, <http://www.att.com/shop/internet/att-internet-terms-of-service.html#fbid=EIAIRpw4KjV>.

“include, but are not limited to, the following: (i) a cap on data usage; (ii) a modification of a customer’s serving facility or service technology; and/or (iii) a modification of or a limitation on a customer’s data throughput speed or data consumption.”²⁸⁰ If network management is needed, AT&T notifies customers that it will “describe[] the network management practice, explain[] how it will work, and explain[] how it could impact” the customer’s service.²⁸¹

Finally, AT&T makes available ample information to edge providers, device manufacturers, and other entities. For example, on its Broadband Information page, AT&T provides links for device manufacturers and application developers to obtain information about the wide range of tools and resources AT&T has made available to help them design, test, and market their applications or devices for use on AT&T’s mobile network.²⁸² AT&T also teams with edge providers to bring new applications and services to customers through its Foundry innovation centers.²⁸³ Developers who work at AT&T Foundry facilities, now at five locations worldwide, gain unique access to AT&T network capabilities and test beds, as well as advice from AT&T technology experts and project coaches.²⁸⁴ In a related initiative, the AT&T Developer Program allows developers to access AT&T’s Application Program Interfaces (“APIs”) to develop and test new products.²⁸⁵ The Program also provides developers with access to the AT&T Application Resource Optimizer tool, which allows mobile app developers to

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² AT&T, *Broadband Information*, <http://www.att.com/gen/public-affairs?pid=20879>.

²⁸³ *See* AT&T, *Experience the AT&T Foundry*, <http://www.att.com/gen/press-room?pid=2949>.

²⁸⁴ *See* John Donovan, *Powering up the AT&T Foundry to Power Up Innovation*, Feb. 3, 2011, <http://www.attinnovationspace.com/innovation/story/a7704304>.

²⁸⁵ *See* AT&T, *AT&T Developer Program*, <http://developer.att.com/developer/forward.jsp?passedItemId=100006>.

“optimize the performance of mobile web applications, make battery usage more efficient, and reduce data usage.”²⁸⁶ AT&T also works with device manufacturers to help them develop phones, tablets, and a wide range of other devices that attach to the AT&T network.²⁸⁷

Additionally, AT&T recently launched an initiative to make the programming of its networks more open and accessible to third parties, including through software defined networking.²⁸⁸

And AT&T participates in an international forum designed to enable network function virtualization—which is designed in part to facilitate edge providers’ use of broadband networks.²⁸⁹

2. Additional Disclosures Would Be Infeasible, Counterproductive, or Both.

Many of the additional disclosures contemplated in the *NPRM* would be infeasible or even impossible for broadband Internet access providers to implement. Others could cause harm to consumers, edge providers, or the entire Internet ecosystem. Although well intentioned, these proposals should be rejected, particularly given that there is no evidence of any problem to fix.

Device-specific, user-specific, and application-specific usage. The *NPRM* asks whether the Commission should “require disclosures that permit end users . . . to distinguish which user

²⁸⁶ See AT&T, *AT&T Application Resource Optimizer*, <http://developer.att.com/application-resource-optimizer/docs>.

²⁸⁷ See AT&T, *Emerging Devices*, <http://www.att.com/edo>.

²⁸⁸ See AT&T, *AT&T Vision Alignment Challenge Technology Survey, AT&T Domain 2.0 Vision White Paper* (Nov. 13, 2013), available at http://www.att.com/Common/about_us/pdf/AT&T%20Domain%202.0%20Vision%20White%20Paper.pdf.

²⁸⁹ See European Telecommunications Standards Institute, *Network Functions Virtualisation – Introductory White Paper*, at 3 (Oct. 2012) (explaining that network function virtualization will, among other things, “open[] the virtual appliance market to pure software entrants, small players and academia, encouraging more innovation to bring new services and new revenue streams quickly at much lower risk”), available at http://portal.etsi.org/NFV/NFV_White_Paper.pdf.

or device contributed to which part of the total data usage.”²⁹⁰ AT&T already provides device-specific (and thus user-specific) usage information for mobile customers. However, for customers of fixed broadband Internet access services, different users and devices within a single household are not authenticated separately when they use the local network. Consequently, it would be infeasible for AT&T or any other ISP to provide device-specific or user-specific information about such data usage.

Requiring ISPs to provide usage information on an application-specific basis²⁹¹ would be impractical and raise other concerns. Broadband Internet access providers generally cannot identify which applications are responsible for usage without conducting Deep Packet Inspection (“DPI”). And requiring providers to conduct DPI for *all* traffic on their networks would surely prompt concerns from privacy and net neutrality advocates alike. Moreover, the increasing use of encryption and proxy servers would complicate efforts by providers to gather or disclose more granular usage information.

Congestion. For each of its broadband Internet access services, AT&T clearly discloses that advertised speeds are not guaranteed, but rather subject to conditions present on, and beyond, the network. As the Commission recognizes, the “sources of congestion that impact end users may originate beyond the broadband provider’s network,”²⁹² and thus are outside the provider’s control. AT&T already discloses what information it can to consumers concerning “the sources of congestion that might impair the performance of edge-provider services”²⁹³—

²⁹⁰ See *NPRM* ¶ 73.

²⁹¹ *Id.* (asking whether the Commission should “require disclosures that permit end users to identify application-specific usage”).

²⁹² *Id.* ¶ 82.

²⁹³ *Id.* ¶ 81.

such information is discussed on AT&T's Broadband Information page and Terms of Service.²⁹⁴

A formal regulation requiring more, such as “information regarding the source, location, timing, speed, packet loss, and duration of network congestion”²⁹⁵ would be impossible for ISPs to comply with given the broad array of external conditions that might affect broadband speed for an end user.²⁹⁶

New measurement categories. There are a number of reasons why the Commission should not require ISPs to disclose information on new measurement categories, such as packet loss, corruption, and jitter.²⁹⁷ First, there is a real risk of overwhelming consumers with information that would not be understandable to the vast majority of broadband users.²⁹⁸ Requiring ISPs to disclose information about highly technical service metrics would baffle all but the most sophisticated end users, unnecessarily cluttering disclosures and making it more difficult for consumers to ascertain information about other metrics that are actually relevant to their broadband purchasing decisions (such as throughput speed or data plan prices).

²⁹⁴ See AT&T, *Broadband Information*, <http://www.att.com/gen/public-affairs?pid=20879#terms-service>; see also AT&T, *AT&T High Speed Internet Terms of Service*, <http://www.att.com/shop/internet/att-internet-terms-of-service.html>; Wireless Customer Agreement (“Actual network speeds depend upon device characteristics, network, network availability and coverage levels, tasks, file characteristics, applications and other factors. Performance may be impacted by transmission limitations, terrain, in-building/in-vehicle use and capacity constraints.”).

²⁹⁵ *NPRM* ¶ 83.

²⁹⁶ Indeed, some congestion is ever-present in the network by design. The ubiquitous Transport Control Protocol is intended to cause brief and repeated periods of congestion during the life of a connection. See Information Sciences Institute, Request for Comment (RFC) 793: Transmission Control Protocol: DARPA Internet Program Protocol Specification (Sept. 1981), available at <http://www.ietf.org/rfc/rfc793.txt>.

²⁹⁷ See *NPRM* ¶ 72.

²⁹⁸ See *id.* ¶ 68 (“[S]ome recent research suggests that consumers have difficulty understanding commonly used terms associated with the provision of broadband services.”).

Second, requiring more technical disclosures would not yield meaningful benefits to edge providers or device manufacturers, because there is no single industry-accepted meaning or method of measurement for broadband metrics like corruption and jitter. Indeed, the only thing that the industry appears to agree on is that these measurements are meaningless unless they are provided separately for *each* different type of traffic (e.g., video, voice, email, web pages, etc.). Thus, requiring ISPs to disclose additional technical information would not facilitate apples-to-apples comparisons and would merely create disputes about how to accurately report such data.

Instead, the Commission should await the work of industry standards-setting bodies, which have begun taking steps to define the relevant terms and reach consensus on how to measure them. Although the issues are complex and substantive work is just beginning, many of the transparency questions that the Commission raises in the *NPRM* touch on issues being studied in various industry forums. For example, the Internet Engineering Task Force (IETF) has been working on sampling methods and metrics for measuring network performance.²⁹⁹ Additionally, the MEF, which works in the Ethernet technology space,³⁰⁰ has published specifications explaining some other performance parameters, such as Frame Delay and Inter-Frame Delay, among others.³⁰¹ Progress also is being made in the IETF and the Broadband Forum on large-scale measurement as part of a coordinated industry effort to define a framework for standardized configuration, management, and reporting of measurements.³⁰² These industry

²⁹⁹ IETF Network Working Group, *Network Performance Measurement with Periodic Streams*, RFC 3432 (Nov. 2002), available at <http://www.rfc-base.org/txt/rfc-3432.txt>.

³⁰⁰ See MEF, *About the MEF*, <http://www.metroethernetforum.org/about-us/mef-overview>.

³⁰¹ See MEF, *Technical Specification MEF 10.2.1*, Jan. 25, 2011, available at http://www.metroethernetforum.org/Assets/Technical_Specifications/PDF/MEF_10.2.1.pdf.

³⁰² See, e.g., <http://tools.ietf.org/html/draft-ietf-lmap-framework>; <http://tools.ietf.org/html/draft-ietf-ippm-lmap-path>; <http://tools.ietf.org/html/draft-ietf-lmap->

efforts, while preliminary in nature, are a necessary precursor to identifying metrics or measurement methods that might be useful in a regulatory broadband measurement program. Indeed, such a multi-stakeholder approach is essential because Internet quality issues can arise from a number of factors beyond the control of a broadband Internet service provider.³⁰³ The Commission should not prejudge this ongoing collaborative process, but instead should give these forums an opportunity to proceed with their work before considering new transparency requirements.

Additional harms. Finally, and importantly, enhanced transparency regulations could pose concrete threats to broadband networks, competition, and the Internet ecosystem as a whole. Requiring ISPs to disclose more granular information—such as how exactly they grapple with sources of congestion or the specific circumstances in which they engage in network management—could enable cybercriminals to compromise networks or enable other bad actors game the system and degrade service quality for all users. Additionally, requiring ISPs to disclose network practices associated with new service features “in advance of their implementation” would undermine competition in the broadband marketplace.³⁰⁴ Such

information-model; <http://tools.ietf.org/html/draft-ietf-ippm-metric-registry>;
<http://datatracker.ietf.org/liaison/1339/>; <https://tools.ietf.org/wg/lmap>.

³⁰³ Aspects of the Commission’s *NPRM* seem to be based on the premise that only broadband providers control the quality of the service that end users experience. But as the Commission has acknowledged before, that is not the case. See Federal Communications Commission, *State of U.S. Broadband Report*, at 5-6 (2014) (noting that “many factors contribute to end-to-end consumer broadband performance” and indicating that some of those “factors” are outside of the “control of a consumer’s ISP”); *NPRM* ¶ 82 (“[S]ome have suggested that sources of congestion that impact end users may originate beyond the broadband provider’s network.”). Accordingly, the Commission should encourage multi-stakeholder discussions as a way to address concerns about broadband measurement, and not prematurely rush to regulatory judgment in a way that could undermine these collaborative approaches.

³⁰⁴ See *NPRM* ¶ 73.

disclosures would give other providers an opportunity to respond to service and network innovations before they can be rolled out. And this, in turn, would blunt providers' incentive to develop and deploy such innovations in the first place.

In short, enhanced transparency rules not only are unnecessary, but also would be counterproductive. Rather than adopting additional onerous obligations, the Commission should focus on enforcing its existing rule.³⁰⁵

C. Only Minimal Changes to the Commission's Nondiscrimination Rule Are Necessary.

Finally, the Commission need make only minimal changes to the nondiscrimination rule proposed in the *NPRM*. If paid prioritization is forbidden (or Internet service providers agree not to engage in it), that would directly address the main discrimination concern. There could be no justification for adopting any of the more intrusive nondiscrimination obligations contemplated in the *NPRM*, all of which seem designed to counter the feared consequences of paid prioritization.³⁰⁶ Instead, AT&T submits that the best approach would be for the Commission (i) to establish a "commercially reasonable" standard to evaluate whether other forms of differentiation arrangements (if challenged) are consistent with preserving an open Internet, and

³⁰⁵ In the enforcement context, the Commission should not permit anonymous reporting of complaints. *See NPRM* ¶ 87. Anonymous reporting would make it impossible for ISPs to adequately investigate claims and to address issues directly with complainants if problems are identified. The *NPRM* indicates that anonymous reporting might prevent retaliation by ISPs against complainants. *Id.* But there is no evidence that *any* ISP has *ever* retaliated against a customer for making a complaint regarding transparency.

³⁰⁶ *See, e.g., NPRM* ¶ 119 (seeking comment on whether there are "alternative legal standards" to a commercial reasonableness standard in "analogous contexts or otherwise" that the Commission should consider); *id.* ¶ 121 (seeking comment on whether the Commission should "adopt a rule that prohibits unreasonable discrimination"); *id.* ¶ 126 (seeking comment on whether the Commission should "adopt a rebuttable presumption that a broadband provider's exclusive . . . arrangement prioritizing service to an affiliate would be commercially unreasonable"); *id.* ¶ 133 (seeking comment on whether the Commission should impose a good-faith negotiation requirement similar to retransmission consent).

(ii) to pair that standard with a safe harbor for non-exclusive arrangements with unaffiliated edge providers.

Specifically, the Commission should ban “commercially unreasonable” discrimination in the transmission of lawful traffic over a consumer’s fixed broadband Internet access service, but make clear that the commercial reasonability requirement does not amount to a Title-II-like obligation. Rather, consistent with the Commission’s *Data Roaming Order*,³⁰⁷ the commercial reasonability standard should allow individualized negotiations among providers for arrangements other than paid prioritization, subject only to the limitation that any such arrangements may not harm Internet openness and, by extension, the virtuous circle of innovation and investment.

In applying that standard, the Commission should undertake a case-by-case analysis that examines the competitive implications and effects on Internet openness, if any, of the arrangement. The Commission should use a fact-specific and data-driven approach that weighs both the benefits and costs of interfering with a commercially negotiated agreement. This approach would avoid imposing a *per se* common-carrier obligation. It also would best advance the goals of section 706 by providing needed regulatory predictability that will enable investment and innovation to continue to flourish, while empowering the Commission to address transmission arrangements that threaten an open Internet.

At the same time, the Commission should adopt a safe harbor or presumption of lawfulness for arrangements that, as a category, do not threaten the open Internet. In particular, non-exclusive arrangements that do not involve paid prioritization and that broadband Internet

³⁰⁷ Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011) (“*Data Roaming Order*”), *aff’d* by *Cellco Partnership*, 700 F.3d at 544.

access providers enter into with unaffiliated providers of Internet content, applications, or services should be deemed or presumed commercially reasonable. Such an approach makes good policy sense: in situations in which a provider is neither favoring its own content, applications, or services nor providing a service on an exclusive basis, it is difficult to conceive of how there could be a threat to Internet openness that could undermine the goals of section 706.³⁰⁸

Regardless of the specific approach that the Commission takes, however, there is one essential change that the Commission should make to its proposed nondiscrimination rule. Consistent with the 2010 rule, the Commission should make explicit that the proposed nondiscrimination rule applies to the “transmi[ssion] [of] lawful network traffic over a consumer’s broadband Internet access service.”³⁰⁹ The rule proposed in the *NPRM* sweeps more broadly, but it could easily be narrowed by adding similar language at the end of the rule’s first sentence, namely: “in the transmission of traffic over a consumer’s broadband Internet access service.”³¹⁰ Without such an express statement, the Commission could create needless confusion

³⁰⁸ See AT&T Remand Comments at 12.

³⁰⁹ See 47 C.F.R. § 8.7 (prohibiting fixed broadband providers from “unreasonably discriminat[ing] in transmitting lawful network traffic over a consumer’s broadband Internet access service”); see also *Open Internet Order*, 25 FCC Rcd at 17933 ¶ 47 n.150 (“We also note that our rules apply only as far as the limits of a broadband provider’s control over the transmission of data to or from its broadband customers.”).

³¹⁰ Compare Proposed Rule 8.8 (“A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice.”).

with respect to enterprise and specialized services—services the Commission affirmatively concluded in the *Open Internet Order* should be excluded.³¹¹

Furthermore, this clarification is necessary to ensure that the rule is not read broadly beyond the transmission context—that is, to regulate any and all practices relating to the provision of fixed broadband Internet access services. There is no possible justification for expanding net neutrality rules beyond ensuring that ISPs transmit packets over their last-mile networks in a nondiscriminatory fashion; such rules were never intended to be an overarching nondiscrimination policy that covered every aspect of an ISP’s business relationships with all other entities in the Internet ecosystem, including pricing, marketing, billing, etc. There is no record evidence of any need to expand the rule in that manner.

³¹¹ See *NPRM* ¶ 60; *Open Internet Order*, 25 FCC Rcd at 17965-66 ¶¶ 112-14 (specialized services); *id.* at 17933 ¶ 45 (enterprise services).

CONCLUSION

The Commission should embrace the opportunity presented by the D.C. Circuit's remand in *Verizon* by adopting the policies outlined above.

Respectfully submitted,

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