

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

COMMENTS OF COMCAST CORPORATION

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Comcast Corporation (“Comcast”) hereby responds to the Commission’s May 15, 2014 Notice of Proposed Rulemaking and the Wireline Competition Bureau’s May 30, 2014 Public Notice in the above-captioned proceedings.¹ Comcast has been a longstanding and consistent supporter of the Commission’s open Internet policy and the *2010 Open Internet Order*.² Due to a voluntary commitment, Comcast is currently the only broadband provider that is legally bound by the no-blocking and nondiscrimination rules adopted in that Order.³ Comcast supports the Commission’s proposal to adopt new rules and urges the Commission to do so expeditiously

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (May 15, 2014) (“NPRM”); *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service*, GN Docket No. 10-127, Public Notice, DA 14-748 (May 30, 2014).

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

³ *See Applications of Comcast Corp., General Electric Co. & NBCUniversal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd. 4238 ¶ 94 (2011) (“*Comcast/NBCUniversal Merger Order*”); Letter from Kathryn A. Zachem, VP, Regulatory and State Legislative Affairs, Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Jan. 17, 2011).

pursuant to its judicially recognized authority under Section 706 of the Telecommunications Act of 1996.⁴

I. INTRODUCTION AND SUMMARY

Comcast agrees with the Commission that “[t]he Internet is America’s most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment.”⁵ These benefits are closely tied to the Internet’s openness, which enables a “virtuous circle” of innovation, demand for Internet-based content and applications, and deployment of broadband infrastructure. Thus, just as Comcast recognized the importance of the *2010 Open Internet Order* and was one of its strongest supporters, Comcast again supports the Commission’s proposal to adopt new, enforceable rules in furtherance of its goal of maintaining an open Internet. In designing these rules, it is essential that the Commission strike an appropriate balance between establishing effective oversight and promoting investment in broadband infrastructure.

To achieve this balance, the Commission should follow the D.C. Circuit’s guidance and base its new rules on Section 706 of the Telecommunications Act of 1996. This provision, as interpreted by the court, provides the Commission with ample authority to fulfill its objectives in this proceeding. Although the court vacated the Commission’s 2010 no-blocking and nondiscrimination rules because they improperly imposed common carrier regulation on information service providers, it also cleared the way for the Commission to adopt sensible and legally sound open Internet rules that would not run afoul of this prohibition. This marks the

⁴ 47 U.S.C. § 1302.

⁵ NPRM ¶ 1.

first time that an appellate court has recognized clear legal authority for the Commission to adopt open Internet rules.

Relying on this authority, the Commission should reaffirm the importance of its transparency framework, reinstate a “no blocking” rule with a revised legal rationale, and establish a “commercial reasonableness” standard to govern direct commercial relationships between broadband providers and edge providers relating to the transmission of Internet traffic over broadband Internet access service. Following this path will enable the Commission to build confidence across the Internet ecosystem and strengthen the “virtuous circle” that has produced abundant benefits for consumers, businesses, and the economy as a whole.

Furthermore, the Commission should adopt its tentative conclusions to limit the scope of the rules to the provision of broadband Internet access services. As the Commission and the Open Internet Advisory Committee (“OIAC”) have recognized, allowing specialized services to develop without the constraints of open Internet rules has the potential to yield significant benefits for consumers and competition. And, to the extent the Commission seeks to evaluate the marketplace for Internet backbone traffic exchange, it should do so separate and apart from this proceeding, as the issues presented are distinct.

At the same time, the Commission should ensure that its open Internet rules properly address services that *do* involve the provision of broadband Internet access to end users, and to that end, should carefully examine whether the regulatory distinctions adopted in 2010 between fixed and mobile broadband services continue to be justified or need to be updated in some manner. However the Commission ultimately decides to treat licensed mobile broadband services, it should apply the same treatment to public Wi-Fi services that offer comparable

capabilities. Treating these two categories of wireless services differently would be irrational as a policy matter and unworkable as a practical matter in today's marketplace.

In all events, the Commission should not reclassify broadband Internet access service, or any component thereof, as a Title II telecommunications service. Doing so is unnecessary because Section 706 provides the Commission with sufficient authority to fulfill its objectives. It also would be unwise in that it would stifle capital investment and dynamic innovation at the very time the Commission is seeking to encourage the deployment of higher speed services. And it would present needless risk as a legal matter, resulting in years of protracted litigation and uncertainty. If the Commission's intention is to protect and promote the development of the open Internet, and to do so promptly, it should keep faith with the classification decision it made in 2002, successfully defended before the Supreme Court, and applied further in 2005, 2006, and 2007, especially now that the D.C. Circuit has recognized the Commission's authority under Section 706.

II. THE COMMISSION SHOULD CALIBRATE ITS RULES IN A MANNER THAT PRESERVES STRONG INCENTIVES FOR PRIVATE SECTOR INVESTMENT.

Consumers across the nation routinely enjoy access to the open Internet that is one thousand times as fast as the dial-up access that was prevalent when the Telecommunications Act of 1996 became law. Consumers today obtain broadband Internet access service from cable companies, telephone companies, wireless companies, and even satellite companies. The vast increase in speeds, and the growing choice among providers, flow directly from the willingness of broadband providers to invest and innovate.

Since 1996, broadband providers have invested a staggering \$1.2 trillion in their networks in the United States, which they have used to provide consumers in virtually every

corner of the country with increasingly robust access to the open Internet.⁶ For its part, Comcast offers broadband to over 50 million homes and business, has increased broadband speeds 13 times in the last 12 years, and now provides its residential subscribers with speeds up to 505 Mbps and its commercial customers with speeds up to 10 Gbps.⁷ These investments are the foundation of the “virtuous circle,” giving edge providers a platform to develop and offer innovative applications that utilize greater and greater amounts of bandwidth. Broadband providers’ decisions to make these investments have been driven not by government intervention, but by vision, opportunity, competition, and consumer demand. In designing its rules, it is essential that the Commission strike an appropriate balance between ensuring effective oversight and maintaining strong incentives for infrastructure investment.

A. Broadband Providers Have Strong Incentives To Continue Providing Increasingly Robust Access to the Open Internet.

As the NPRM notes, the Commission previously found that broadband providers may have some incentive to “limit Internet openness” under certain circumstances.⁸ But as the Commission attempts to regulate conduct theoretically flowing from any such incentive, it must bear in mind the marketplace realities of the broadband industry. Providing access to the open Internet has become an essential component of cable operators’ and other broadband providers’

⁶ See *Broadband, Investment*, USTelecom, <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment> (last visited July 8, 2014).

⁷ Over 21 million customers around the country subscribe to Comcast’s broadband Internet access service. Comcast offers service to all households in the communities that it serves, regardless of race, income, and other demographic factors. It does not, and cannot under most of its franchise agreements, refuse to deploy service to certain neighborhoods simply because they exhibit low levels of demand. See NPRM ¶ 33.

⁸ See *id.* ¶ 42. The D.C. Circuit held this conclusion was “adequately supported and explained” based on the record before the Commission in 2010. See *Verizon v. FCC*, 740 F.3d 623, 645 (D.C. Cir. 2014).

businesses, and consumers have come to expect and demand the ubiquitous and unrestricted access that these companies have consistently offered them. If a provider were to block or degrade Internet applications or content, the provider would incur substantial subscriber losses and reputational harm. Thus, in order to undertake such a strategy, a broadband provider would first need to conclude that any theoretical benefits of the strategy outweigh these very real costs.

In light of the significant and still-growing level of competition in the broadband marketplace, it is hard to envision a situation in which this would be the case. As Comcast has documented elsewhere, it faces competition from companies providing broadband Internet access services across a range of technological platforms.⁹ ILECs provide fiber-to-the-premises services to a growing number of American households and are upgrading their DSL-based services, in many cases by building fiber-to-the-node, to offer faster speeds across the country.¹⁰ Cable overbuilders, new entrants like Google fiber, municipal providers, fixed wireless providers, and satellite broadband providers also exert significant competitive pressures. And

⁹ See Comcast Corp. and Time Warner Cable Inc., Applications and Public Interest Statement, MB Docket No. 14-57, at 42-56 (Apr. 8, 2014).

¹⁰ Verizon currently offers DSL service at speeds up to 15 Mbps, Frontier offers speeds up to 25 Mbps, CenturyLink offers speeds up to 40 Mbps, and AT&T offers speeds up to 45 Mbps. See Letter from Lynn R. Charytan, SVP, Legal Regulatory Affairs and Senior Deputy General Counsel, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, Ex. A, Pt. 3, at 10 (Feb. 21, 2014) (detailing competitive standalone broadband options in Comcast's top 30 markets). Many ILECs are upgrading their DSL-based services by investing in technologies such as VDSL2 and pair bonding. See, e.g., Glen F. Post, President and CEO, CenturyLink, Inc., Q4 2013 Earnings Call, Tr. at 5 (Feb. 12, 2014) ("We have utilized and continued to utilize a balanced capital investment approach, including gigabit fiber, VDSL2, and pair bonding deployments to efficiently enable higher speeds, enhanced services to consumers and businesses in our markets."); Robert W. Starr, Treasurer & SVP, Frontier Communications Corp., Goldman Sachs TMT Leveraged Finance Conference, Tr. at 5 (Mar. 19, 2014) (noting Frontier is "compet[ing] against [cable] today on the residential and on the small business side and we're taking share away from them on the residential side [W]e think that our opportunit[y] against the cable companies continue to be a very good one").

well-capitalized and aggressive nationwide mobile broadband providers now offer services that provide speeds comparable to many of the fixed broadband services that consumers purchase.¹¹

Indeed, even during the short period since the Commission adopted the *2010 Open Internet Order*, consumer demand for Internet-based content and applications has skyrocketed,¹² and broadband providers have raced to give consumers the best access to the content and applications that they demand. For example, in 2010, AT&T offered only traditional ADSL service to the significant majority of the 76 million households in its wireline footprint¹³ and had announced no plans to upgrade its network in these areas. Today, AT&T is well into the process of deploying a mix of fiber-to-the-premises, fiber-to-the-node, IP-DSLAM, and fixed wireless

¹¹ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eighth Broadband Progress Report, 27 FCC Rcd. 10342 ¶ 6 (2012) (noting that mobile providers are “deploying new, faster, and more spectrally efficient mobile network technologies, most notably Long Term Evolution (LTE), which offers advertised download speeds as high as 5-12 Mbps”).

¹² Netflix’s subscriber base, for example, grew from approximately 20 million to nearly 50 million (including over 35 million in the United States alone) during this period. Compare Netflix, *Q1 2014 Letter from Reed Hastings, CEO, and David Wells, CFO, to Shareholders 1* (Apr. 21, 2014), <http://ir.netflix.com/common/download/download.cfm?companyid=NFLX&fileid=745654&filekey=fb5aaae0-b991-4e76-863c-3b859c8dece8&filename=Q114 Earnings Letter 4.21.14 final.pdf>, with Netflix, *Q4 2010 Letter from Reed Hastings, CEO, and David Wells, CFO, to Shareholders 1* (Jan. 26, 2011), <http://ir.netflix.com/common/download/download.cfm?companyid=NFLX&fileid=437075&filekey=925e81c4-3d5d-44b6-ae5e-a70c91251131&filename=Q410 Letter to shareholders.pdf>. The number of downloads from Apple’s App Store increased by approximately 50 percent in the last year alone. See Seth Fiegerman, *Apple App Store Tops 75 Billion Downloads*, June 2, 2014, Mashable, <http://mashable.com/2014/06/02/apple-app-store-stats-2014/>.

¹³ Press Release, AT&T Inc., AT&T Reports Record 2.8 Million Wireless Net Adds, Strong U-verse Sales, Continued Revenue Gains in the Fourth Quarter (Jan. 27, 2011), <http://www.att.com/gen/press-room?pid=18952&cdvn=news&newsarticleid=31519&mapcode=financial> (indicating that U-Verse passed 27 million of the living units in AT&T’s footprint in Q4 2010).

broadband technologies to as many as 70 million customer locations.¹⁴ Google, CenturyLink, Cox, and others have also announced ambitious plans to roll out fiber-to-the-premises networks and have begun to set these plans into motion.¹⁵ In 2010, none of the four nationwide mobile broadband providers had even begun to deploy LTE networks until Verizon began its deployment in December of that year.¹⁶ Now, all four major wireless providers operate LTE networks that collectively blanket the nation.¹⁷

¹⁴ See Press Release, AT&T, Inc., AT&T to Acquire DIRECTV (May 18, 2014), http://about.att.com/story/att_to_acquire_directv.html (“AT&T/DirecTV Press Release”).

¹⁵ See *Exploring New Cities for Google Fiber*, Google Fiber Blog (Feb. 19, 2014), <http://googlefiberblog.blogspot.com/2014/02/exploring-new-cities-for-google-fiber.html>; Press Release, CenturyLink, Inc., CenturyLink Brings 1 Gigabit Fiber Service to Las Vegas (Oct. 9, 2013), <http://news.centurylink.com/news/centurylink-brings-1-gigabit-fiber-service-to-las-vegas-2598362>; Press Release, Cox Communications, Cox Communications Kicks Off Plan to Offer Residential Gigabit Speeds (May 22, 2014), <http://cox.mediaroom.com/index.php?s=43&item=753>.

¹⁶ *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*, Fifteenth Report, 26 FCC Rcd. 9664 ¶¶ 108-114 (2011) (describing the four nationwide mobile broadband providers’ initial efforts to test and deploy LTE services); see also Press Release, Verizon, Blazingly Fast: Verizon Wireless Launches the World’s Largest 4G LTE Wireless Network on Sunday, Dec. 5 (Dec. 3, 2010), <http://www.verizonwireless.com/news/2010/12/pr2010-12-03.html> (touting Verizon’s LTE network, which launched in 38 cities in December 2010, as “the world’s largest”).

¹⁷ See *The Verizon Wireless 4G LTE Network*, Verizon, <http://www.verizonwireless.com/news/LTE/Overview.html> (last visited July 9, 2014); *About Our Network*, AT&T, <http://about.att.com/news/wireless-network.html> (last visited July 9, 2014); *4G LTE Launched Markets*, Sprint, <http://newsroom.sprint.com/news-releases/4glte-launchedmarkets.htm> (last visited July 9, 2014); *T-Mobile 4G LTE*, T-Mobile, <http://t-mobile-coverage.t-mobile.com/4gcitylist.aspx> (last visited July 9, 2014). The Commission notes in the NPRM that LTE subscriptions grew by a factor of nearly 500 during this period, see NPRM ¶ 48 n.110, and SNL Kagan predicts that there will be 224 million unique 4G subscriptions in the United States by 2018, see SNL Kagan, *Covered Pops & Subscribers by Technology in U.S. Wireless* (July 2013). Mobile data traffic is projected to grow three times faster than fixed IP data traffic between 2013 and 2018. See Cisco, *Visual Networking Index: Forecast and Methodology, 2013-2018*, at 3 (2014), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html.

These competitive developments are reflected in the Commission’s Form 477 data. In the *2010 Open Internet Order*, the Commission relied on the December 2009 iteration of this data to assess the level of competition among fixed broadband providers.¹⁸ The most recently released round of this data is from June 2013 and thus does not account for significant additional progress that has been made in the past year. But even the June 2013 data reveal a remarkable increase in competition since the Commission’s previous review:

Number of Fixed Broadband Providers¹⁹	% of Households in Applicable Census Tracts as of December 31, 2009	% of Households in Applicable Census Tracts as of June 30, 2013
At Least 3	28%	78%
At Least 2	76%	99%
At Least 1	97%	100%

Furthermore, in the *2010 Open Internet Order*, the Commission concluded that, based on the 2009 data, “[i]ncluding mobile broadband providers does not appreciably change these numbers.”²⁰ The same cannot be said today:

¹⁸ See *2010 Open Internet Order* ¶ 32.

¹⁹ This chart displays the number of households located in census tracts where fixed broadband providers reported offering broadband Internet access service speeds of at least 3 Mbps downstream and 768 kbps upstream. See FCC, *Internet Access Services: Status as of December 31, 2009*, at 7 & fig. 3(a) (Dec. 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303405A1.pdf; FCC, *Internet Access Services: Status as of June 30, 2013*, at 9 & fig. 5(a) (June 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf.

²⁰ *2010 Open Internet Order* ¶ 33.

Number of Fixed or Mobile Broadband Providers²¹	% of Households in Applicable Census Tracts as of December 31, 2009	% of Households in Applicable Census Tracts as of June 30, 2013
At Least 3	40%	99%
At Least 2	80%	100%
At Least 1	97%	100%

This heightened competition undoubtedly raises the costs to a broadband provider of attempting to limit Internet openness.

Moreover, there is no reason to believe that “switching costs” would prevent a consumer from changing among these competitors if a provider were to interfere with his or her connection to the open Internet.²² Although certain advocates for regulation allege that subscribers are “captive” to their broadband providers, they have failed to provide any evidence indicating that churn rates are lower for broadband than they are for other services such as video or voice.²³ Indeed, a recent survey conducted by Consumer Reports found that *71 percent* of respondents would be inclined to switch to a competing broadband provider if their provider were to “block, slow down, or charge more” for certain high-bandwidth content or applications.²⁴ And as the

²¹ This chart displays the number of households located in census tracts where fixed broadband providers reported offering broadband Internet access service speeds of at least 3 Mbps downstream and 768 kbps upstream *or* mobile broadband providers reported operating a network capable of such speeds. See FCC, *Internet Access Services: Status as of December 31, 2009*, at 8 & fig. 3(b) (Dec. 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303405A1.pdf; FCC, *Internet Access Services: Status as of June 30, 2013*, at 10 & fig. 5(b) (June 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf.

²² See NPRM ¶ 46.

²³ See, e.g., Comments of Vonage Holding Corp., GN Docket No. 14-28, at 5-6 (Mar. 21, 2014) (making an unsupported claim that “a broadband subscriber is captive to his or her access provider”).

²⁴ *71% of U.S. Households Would Switch from Providers that Attempt to Interfere with Internet*, Consumer Reports, Feb. 18, 2104, <http://www.consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm>.

data above demonstrate, consumers seeking to do so could choose among a growing number of competitors.

B. Broadband Providers Have Demonstrated Strong Commitments to the Open Internet.

The Internet ecosystem has been growing and evolving rapidly for decades, with astonishingly few difficulties. Although advocates for heavy-handed regulation have repeatedly predicted the demise of the open Internet, none of their predictions has ever come true.²⁵ Despite the fact that the open Internet rules were only in effect from November 2011 until January 2014 (a period of 26 months), openness and pro-consumer practices have consistently flourished throughout the history of the Internet.²⁶ Indeed, the “virtuous circle” has been enabled by broadband providers’ strong and continuing commitments to openness.

And no company has been more committed to the openness of the Internet than Comcast. Comcast ultimately supported the *2010 Open Internet Order* because it struck “a workable balance between the needs of the marketplace and the certainty that carefully-crafted and limited rules can provide to ensure that Internet freedom and openness are preserved.”²⁷ In connection with the acquisition of NBCUniversal, Comcast voluntarily committed to abide by the rules in that Order regardless of judicial challenge thereto. Thus, in the wake of the *Verizon* decision,

²⁵ See Comments of Comcast Corp., Docket Nos. 09-191 & 07-52, at 15-17 (Jan. 14, 2010) (compiling predictions that broadband providers would limit Internet openness, which were later proven to be wrong).

²⁶ Although the Open Internet rules were adopted in December 2010, they did not go into effect until November 20, 2011. See Preserving the Open Internet, 76 Fed. Reg. 59192, 59192 (Sept. 23, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf> (establishing an effective date of November 20, 2011).

²⁷ See David L. Cohen, *FCC Proposes Rules to Preserve an Open Internet*, Comcast Voices (Dec. 1, 2010), <http://corporate.comcast.com/comcast-voices/fcc-proposes-rules-to-preserve-an-open-internet>.

Comcast is now the only broadband provider in America that is legally bound by the no-blocking and nondiscrimination rules adopted in the Order. This commitment will automatically extend to systems Comcast acquires from Time Warner Cable and Charter upon the approval and consummation of the transactions now pending before the Commission.

Although other providers are not similarly bound, they and their representatives have been vocal about their commitments to openness as well:

- **NCTA**: “The cable industry has always embraced the principles of an open Internet and the Court decision will not change that. Consumers have always been entitled to enjoy the legal web content of their choosing and they will continue to do so. An open Internet is good for our customers, and good for our business.”²⁸
- **AT&T**: “AT&T has built its broadband business, both wired and wireless, on the principle of Internet openness. That is what our customers rightly expect, and it is what our company will continue to deliver. That is also why we endorsed the FCC’s original rule on net neutrality, and is why we pledged to adhere to openness principles even after the recent court decision.”²⁹
- **Verizon**: “Verizon has long been committed to an open Internet for a simple reason: Our customers demand it. This was true before the FCC ever considered putting rules in place, and serving our customers will ensure our commitment to an open Internet regardless of what the FCC does in the future.”³⁰
- **USTelecom**: “Our industry has long operated in a manner consistent with the Federal Communications Commission’s Internet freedoms, and nothing about [the

²⁸ Press Release, NCTA, Statement of NCTA President & CEO Michael Powell Regarding Today’s Decision by the U.S. Court of Appeals for the D.C. Circuit (Jan. 14, 2014), <https://www.ncta.com/news-and-events/media-room/article/3117>.

²⁹ Press Release, AT&T Inc., AT&T Statement on Net Neutrality (Feb. 19, 2014), <http://publicpolicy.att.com/att-open-internet-policy-statement>. In addition, AT&T has committed to abide by the 2010 Open Internet rules for three years if its acquisition of DirecTV is approved. See *AT&T/DirecTV Press Release*.

³⁰ Press Release, Verizon, Verizon Comments on FCC’s Proposed Rules for Open Internet (May 15, 2014), <http://newscenter.verizon.com/corporate/news-articles/2014/05-15-statement-on-fcc-proposed-rules-for-open-internet/>.

Verizon] decision changes that. We will continue to offer consumers the highest quality broadband experience.”³¹

- **CTIA:** “As we have said many times, CTIA’s members share a longstanding commitment to an open Internet and a vibrant wireless ecosystem because that’s what wireless customers demand, not because of regulation.”³²

Comcast supports the Commission’s effort to adopt new, strong, effective, common-sense rules, but it is key that the Commission not disrupt the pro-consumer incentives that are already driving the broadband industry today. Unnecessarily applying regulations that are more intrusive than those adopted in 2010 would risk doing just that.

III. THE COMMISSION SHOULD FOLLOW THE D.C. CIRCUIT’S GUIDANCE AND REAFFIRM THE IMPORTANCE OF ITS TRANSPARENCY FRAMEWORK WHILE ADOPTING NEW RULES PURSUANT TO SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996.

The *Verizon* decision established a clear roadmap for the Commission to promulgate sensible and legally sound open Internet rules pursuant to Section 706 of the Telecommunications Act of 1996. Section 706(a), the D.C. Circuit explained, “vest[s] the Commission with actual authority” to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”³³ Moreover, upon a finding that “advanced telecommunications capability” is not being “deployed to all Americans in a reasonable and timely fashion,” Section 706(b) provides the Commission additional authority to “take immediate action to accelerate deployment of [advanced telecommunications] capability

³¹ Press Release, USTelecom, USTelecom Statement on Court Net Neutrality Ruling (Jan. 14, 2014), <http://www.ustelecom.org/news/press-release/ustelecom-statement-court-net-neutrality-ruling>.

³² Press Release, CTIA, CTIA Statement on the FCC’s Net Neutrality Announcement (Feb. 19, 2014), <http://www.ctia.org/resource-library/press-releases/archive/fcc-net-neutrality>.

³³ 47 U.S.C. § 1302(a); *see Verizon*, 740 F.3d at 636-40.

by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”³⁴

The D.C. Circuit upheld the Commission’s 2010 conclusion that promoting and protecting the open Internet fell squarely within these grants of authority. The court characterized the Commission’s finding that Internet openness is crucial to edge-provider innovation and drives end-user demand, which in turn stimulates investment in broadband infrastructure—i.e., the “virtuous circle”—as “both rational and supported by substantial evidence.”³⁵ That core justification thus plainly empowers the Commission to adopt new rules under Section 706(a) to protect and provide for such openness as a way to “encourage the deployment” of advanced telecommunications capability.³⁶ Because the Commission also has concluded that “broadband deployment to *all* Americans is not reasonable and timely,”³⁷ the Commission can similarly justify new rules protecting Internet openness under Section 706(b) as a means of “‘accelerat[ing] [broadband] deployment’” by “removing ‘barriers to infrastructure investment’ and promoting ‘competition.’”³⁸ The Commission should follow the court’s roadmap by reaffirming the importance of the transparency framework and adopting new open Internet rules pursuant to Section 706.

³⁴ 47 U.S.C. § 1302(b); *see Verizon*, 740 F.3d at 640-42.

³⁵ *Verizon*, 740 F.3d at 644.

³⁶ *Id.* at 642.

³⁷ *Id.* at 640 (quoting *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Sixth Broadband Deployment Report, 25 FCC Rcd. 9556 ¶ 2 (2010)); *see id.* at 642.

³⁸ *Id.* at 642 (quoting 47 U.S.C. § 1302(b)).

A. The Commission Should Reaffirm the Importance of Its Transparency Framework.

The *Verizon* court unanimously upheld the 2010 transparency rule,³⁹ and thus assured that consumers will continue to receive robust disclosures describing the terms, conditions, and performance attributes of broadband Internet access services. As the Commission recognizes, well-designed disclosure rules are “the most effective and least intrusive regulatory measures at the Commission’s disposal” for protecting the open Internet.⁴⁰ Such rules bolster competition in the communications marketplace by enabling end users to make informed decisions about choosing (and deciding whether to keep) their broadband provider. They also provide assurances to regulators, edge providers, and the broader Internet community that broadband providers will remain committed to the open Internet. As reflected in the existing disclosures of all major broadband providers, including Comcast, there is widespread support and a public commitment from broadband providers to maintain open Internet policies and practices.⁴¹

Section 706 provides abundant authority to reaffirm the Commission’s 2010 transparency rule and to make reasonable adjustments calibrated to support the “virtuous circle” of innovation and increased competition. Some of the Commission’s new proposals could yield such benefits. For example, the Commission may well wish to require greater disclosure than it currently does for how actual broadband speeds compare with advertised speeds, as consumers should know

³⁹ *Id.* at 659; *id.* at 660 & n.3, 668 & n.9 (Silberman, J., dissenting).

⁴⁰ NPRM ¶ 66.

⁴¹ *See, e.g., Frequently Asked Questions About Network Management*, Comcast, <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Network-Management>; *Network Management Disclosure*, Time Warner Cable, <http://business.timewarnercable.com/legal/network-management-disclosure.html>; *Broadband Information*, AT&T, <http://www.att.com/gen/public-affairs?pid=20879>.

whether they are receiving the full benefit of the services that they purchase.⁴² Many broadband providers, including Comcast, already disclose far more information on this issue than is required.⁴³ In addition, the Commission may well find that the OIAC’s proposal for a “standardized label” would make broadband providers’ disclosures more accessible and useful for consumers.⁴⁴

The Commission should ensure, however, that any new disclosure obligations are appropriately tailored to its objectives in this proceeding. Certain proposals in the NPRM threaten to impose substantial burdens while providing consumers with minimal or no countervailing benefits. For instance, the Commission should not require broadband providers to make additional disclosures tailored to edge providers or to “providers who seek to exchange traffic with broadband provider networks.”⁴⁵ The current transparency rule already requires broadband providers to disclose information “sufficient for . . . content, application, service, and device providers to develop, market, and maintain Internet offerings.”⁴⁶ Beyond this, it is

⁴² See NPRM ¶¶ 73, 79-80. In nearly all cases, American broadband subscribers *are* receiving the full benefit of their services, unlike broadband subscribers in many other countries. For example, while American broadband providers, on average, deliver 101 percent of the speeds that they advertise, broadband providers in the European Union deliver only 76 percent. Compare FCC, *2014 Measuring Broadband America – Fixed Broadband Report* 14 (2014), available at <http://data.fcc.gov/download/measuring-broadband-america/2014/2014-Fixed-Measuring-Broadband-America-Report.pdf> (“*Measuring Broadband America Report*”) with SamKnows Ltd., European Commission, *Quality of Broadband Services in the E.U.* 59 (Oct. 2013), available at <http://ec.europa.eu/digital-agenda/en/news/quality-broadband-services-eu-samknows-study-internet-speeds>.

⁴³ See Network Management Information Center, *Your Internet Service Performance*, Comcast, <http://networkmanagement.comcast.net/index.php/component/content/article?id=48> (last visited July 9, 2014).

⁴⁴ See NPRM ¶ 72.

⁴⁵ *Id.* ¶¶ 75-76.

⁴⁶ See 47 C.F.R. § 8.3.

unclear what information these entities would need in order to make their offerings available on an open network like the Internet. Indeed, one of the principal characteristics of the Internet is that any IP-based service can be delivered over it, without special tailoring.⁴⁷ In addition, the Commission should not require broadband providers that have data caps or usage thresholds to collect and disclose data regarding consumers’ “application-specific usage” or “which user or device contributed to which part of the total data usage.”⁴⁸ These proposals would require broadband providers to inspect and track their customers’ usage in ways that broadband

⁴⁷ In the majority of cases, broadband providers do not have direct relationships with the edge providers whose traffic they are transmitting. They simply transmit traffic to and from their subscribers without regard for its source or destination. Indeed, broadband providers are often unaware of the existence of a given edge provider. Requiring broadband providers to try to anticipate the needs of the myriad parties that make up the Internet ecosystem would be impractical, excessively burdensome, and contrary to the nature of the service that broadband providers offer. Such a requirement would create more confusion than clarity in broadband providers’ disclosures, leaving consumers (with whom broadband providers *do* have direct relationships) worse off than they are under the current transparency rule.

⁴⁸ NPRM ¶ 73. Although Comcast opposes these proposals, Comcast acknowledges that requirements for broadband providers to disclose certain information about “data caps” or other usage-based billing practices may be appropriate. Comcast’s broadband service is not subject to “data caps,” but Comcast is trialing data usage plans in select markets. In these markets, Comcast clearly specifies the terms of its offerings, including the applicable usage thresholds and charges associated with incremental consumption. *See Questions & Answers About Our New Data Usage Plan Trials*, Comcast, <http://customer.comcast.com/help-and-support/internet/data-usage-trials> (last updated May 29, 2014). Comcast also provides subscribers in these markets with a “data calculator” to assist them in predicting their monthly usage, *see How Much Data Do I Use?*, Comcast, <http://datacalculator.comcast.net/index.html>; a “usage meter” to keep track of their usage, which has repeatedly been verified by a third-party source to be highly accurate, *see* Peter Sevcik, NetForecast, *Third Accuracy Assessment of Comcast’s Internet Usage Meter* (May 2014), http://www.netforecast.com/wp-content/uploads/2014/05/NFR5116_Comcast_Meter_Accuracy_Report.pdf; and subscriber alerts when they near their usage thresholds, *see Will I Be Alerted When I Near Or Exceed My Data Usage Plan?*, Comcast, <http://customer.comcast.com/help-and-support/internet/data-usage-trials-will-i-be-alerted-data-usage> (last updated May 29, 2014). Information of this kind enables consumers to make more informed choices about their service.

providers often do not today. Aside from the obvious burdens inherent in such a requirement, this policy could raise legitimate concerns regarding consumer privacy.⁴⁹

But setting aside these discrete problematic proposals, Comcast agrees with the Commission that it should use transparency as a critical means of promoting Internet openness. With relevant and accessible information about their options, consumers can make more informed choices and spur companies to continue providing services that meet their needs.

B. The Commission Should Reinstate a No-Blocking Rule Designed to Guarantee End Users Access to the Entire Internet.

The *Verizon* decision also supplies a sound basis for the proposed reinstatement of the Commission’s no-blocking rule.⁵⁰ Although the court struck down the 2010 no-blocking rule, it did so because the Commission had not provided a valid legal rationale to support it under Section 706—not because such a rationale did not exist.⁵¹ In fact, the court indicated that the 2010 no-blocking rule *would* have been valid if it were understood to simply establish a minimum level of service on a broadband provider’s network, while leaving room for providers

⁴⁹ If the Commission wishes to mandate disclosure of application-specific usage information, it should look to edge providers, who are far better positioned to provide this information. Many mobile devices already track usage information on an application-specific basis. In addition, application and content providers possess comprehensive data regarding their customers’ usage and could present this data in the appropriate context for their services. For example, an over-the-top video provider could present usage information in terms of how many megabytes were associated with the streaming of a given video file. As industry observers have explained, such edge provider disclosures would empower consumers to more effectively manage their data consumption. *See, e.g.*, Peter Sevcik, NetForecast, *Empowering Internet Users to Manage Broadband Consumption* (June 2012), http://www.netforecast.com/wp-content/uploads/2012/06/NFR5109_Empowering_Internet_Users_to_Manage_Broadband_Consumption.pdf.

⁵⁰ NPRM ¶¶ 89-109.

⁵¹ *See Verizon*, 740 F.3d at 658-59 (“We are unable to sustain the Commission’s action on a ground upon which the agency itself never relied. Nor may we defer to a reading of a statutory term that the Commission never offered.”) (internal citations omitted).

to “negotiate separate agreements with . . . individual edge provider[s]” regarding a greater level of service and to charge similarly situated edge providers “different prices for the same service.”⁵² The Commission should utilize the court’s reasoning and reinstate a no-blocking rule that guarantees that end users can access the entire Internet.⁵³

1. *Any “Minimum Level of Service” Should Be Defined as a Requirement To Deliver Traffic on a “Best Efforts” Basis.*

The NPRM tentatively concludes that “the revived no-blocking rule should be interpreted as requiring broadband providers to furnish edge providers with a minimum level of access to their end-user subscribers.”⁵⁴ The Commission asks whether it should interpret this standard as a requirement to deliver traffic on a “best efforts” basis; as a requirement to deliver traffic in a

⁵² *Id.* at 658. Moreover, “the Commission has significant latitude to determine the bounds of common carriage.” *Cellco P’ship v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012). If a regulation imposes an obligation that falls within the gray area between *per se* common carriage and *per se* private carriage, the Commission’s determination “that a regulation does or does not confer common carrier status warrants deference.” *Id.* A no-blocking rule that establishes a minimum service requirement while leaving open substantial room for individualized bargaining will fall comfortably within the Commission’s authority. *Cf. id.* at 548 (upholding the data roaming rule because, “[a]lthough the rule obligate[d] Verizon to come to the table and offer a roaming agreement where technically feasible, [it] largely le[ft] the terms of the agreement up for negotiation”).

⁵³ The language of the rule adopted in the *2010 Open Internet Order*, which the Commission has proposed to re-adopt, is properly tailored to this goal. Departing from the language of that rule is unnecessary, and doing so to promote other objectives would be inappropriate. For example, to the extent that the Commission seeks to restrict “priority agreements with edge providers,” it should not do so under the no-blocking rule. *See* NPRM ¶ 89. Whatever the merits of or potential concerns regarding such arrangements, they cannot credibly be deemed to “block” access to anything. As the Commission has proposed, the no-blocking rule should remain separate and operate independently from any “commercial reasonableness” screen. *See id.* ¶ 90. And, as was the case for the 2010 no-blocking rule, any new no-blocking rule should be subject to reasonable network management.

⁵⁴ *Id.* ¶ 97.

manner that satisfies certain quantitative performance parameters; or as a requirement to deliver traffic in a manner that would meet the expectations of a “reasonable person.”⁵⁵

Any “minimum level of service” that the Commission adopts should be interpreted only as a requirement that broadband providers deliver traffic to end users on a “best efforts” basis. “Best efforts” traffic delivery is a well-understood engineering concept.⁵⁶ Among other things, it ensures that no resources are pre-allocated, pre-reserved, or prioritized in the delivery of “best effort[s]” traffic. This standard would ensure that the goal of the no-blocking rule—to guarantee end users access to the entire Internet—is fulfilled.

In contrast, any attempt to establish minimum quantitative performance parameters would be ineffective, as this approach would fail to account for the variability inherent in providing broadband Internet access service. Broadband providers engineer their networks to optimize performance across metrics such as throughput, latency, and jitter. However, performance inevitably still varies based on factors such as contention in the last mile and the distance between the endpoints of a transmission, as well as several factors that are wholly within customers’ control, such as the modems, Wi-Fi routers, or devices they use to access the network. Indeed, the Commission’s data show that even the performance of broadband providers that over-deliver on their advertised speeds is subject to significant variation.⁵⁷

⁵⁵ See *id.* ¶¶ 101-104.

⁵⁶ See NPRM ¶ 102 n.225 (citing S. Floyd & M. Allman, *Comments on the Usefulness of Simple Best-Effort Traffic* 9-14, Internet Engineering Task Force (July 2008)). It would be unnecessary and counterproductive for the Commission to formulate a new definition for this term.

⁵⁷ See *Measuring Broadband America Report* at 41-47 (measuring variability in download and upload speeds for fixed broadband services).

The Commission should not micro-manage these issues. As the NPRM acknowledges, any technical performance standards—even if they could account for the factors out of the broadband provider’s control—would become quickly outdated as technologies evolve and performance capabilities change.⁵⁸ It would be impossible for the Commission to continuously modify its parameters to account for these developments, and the entire Internet ecosystem would thus remain subject to ill-fitting standards. In other proceedings, the Commission has properly declined to adopt technical thresholds in favor of standards based on functional performance.⁵⁹ It should do so again here by requiring “best efforts” traffic delivery rather than mandating technical standards.⁶⁰

2. *The No-Blocking Rule Should Not Interfere with Free and Low-Cost Service Offerings.*

The Commission should make certain that the no-blocking rule does not limit or foreclose the offering of low-cost broadband Internet access services. For example, through the *Internet Essentials* program, Comcast provides low-income families with broadband Internet access for \$9.95 per month. This service offers speeds of up to 5 Mbps downstream and up to 1 Mbps upstream. *Internet Essentials* has connected over 300,000 low-income families (over 1.2 million individuals) to the Internet, and no other program of any kind has done as much to advance the Commission’s goal of expanding broadband adoption. If the Commission were to

⁵⁸ See NPRM ¶ 103.

⁵⁹ See, e.g., *The Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, 27 FCC Rcd. 2650 ¶ 90 (2012) (adopting a VoIP outage reporting standard based on “complete loss of service or connectivity” rather than packet loss, latency, and jitter thresholds).

⁶⁰ A vague “reasonable person” standard would also be problematic. See NPRM ¶ 104. Such a standard would yield widespread uncertainty in the industry, leaving broadband providers guessing as to which practices or performance issues would or would not violate the rule.

define its “minimum level of service” in terms of a quantitative performance standard (which, as explained above, it should not do), it should make absolutely clear that this standard would not interfere with the offering of *Internet Essentials* or other low-cost services in any way.⁶¹

C. The Commission Should Establish a Legal Standard To Govern Direct Commercial Relationships Between Broadband Providers and Edge Providers Relating to the Transmission of Internet Traffic Over Broadband Internet Access Service.

In *Verizon*, the court struck down the “no unreasonable discrimination” rule but left room for the Commission to adopt a new rule pursuant to Section 706 to govern any direct commercial relationships between broadband providers and edge providers that address transmission of Internet traffic over broadband Internet access service, such as “paid prioritization” arrangements. As an initial matter, it is important to recognize that, for all the talk about “fast lanes” and “slow lanes,” broadband providers and edge providers have not entered into “paid prioritization” arrangements throughout the many years when there has been no legal prohibition of such arrangements. Indeed, broadband providers’ response to consumer demand for higher speeds has not been to create “fast lanes” but rather to make the entire Internet faster for everyone. For its part, Comcast has not entered into a single “paid prioritization” arrangement, has no plans to do so in the future, and does not even know what such an arrangement would entail as a practical matter. Nonetheless, Comcast supports the Commission in its effort to apply an enforceable legal standard for determining which limited arrangements should be permitted.

⁶¹ The Commission should also ensure that the no-blocking rule is not construed to stifle the development of free or low-cost services that allow end users to access only a limited subset of Internet endpoints.

1. *The Commission Should Apply a “Commercial Reasonableness” Standard To Govern These Relationships.*

Under *Verizon*, it is highly unlikely that the Commission could impose a categorical ban on “paid prioritization” arrangements pursuant to Section 706.⁶² In striking down the FCC’s “no unreasonable discrimination” rule, the court found the Commission’s statement that “it is unlikely that pay for priority would satisfy the ‘no unreasonable discrimination’ standard” to be evidence that “the Commission will likely bar broadband providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of \$0.”⁶³ Because this left “no room at all for ‘individualized bargaining,’” the “‘no unreasonable discrimination’” rule amounted to an impermissible common carrier mandate.⁶⁴ A categorical ban on paid prioritization, which would be even *more* restrictive than the language in the *2010 Open Internet Order*, almost certainly would not pass muster.

The court did suggest, however, that the Commission could lawfully apply a “commercial reasonableness” standard to govern these relationships.⁶⁵ A requirement for all direct commercial relationships between broadband providers and edge providers relating to the transmission of Internet traffic over broadband Internet access services to be “commercially

⁶² As explained in Part V.B.1 below, the Commission’s authority under Title II almost certainly would not support such a ban either.

⁶³ *Verizon*, 740 F.3d at 657 (quoting *2010 Open Internet Order* ¶ 76).

⁶⁴ *Id.*

⁶⁵ Indeed, the court invalidated the 2010 nondiscrimination rule precisely *because* the court concluded it did not resemble this standard. *See id.* at 657 (“Unlike the data roaming requirement at issue in *Cellco*, which set forth a ‘commercially reasonable’ standard, the language of the *Open Internet Order*’s anti-discrimination rule mirrors, almost precisely, section 202’s language establishing the basic common carrier obligation not to ‘make any unjust or unreasonable discrimination.’”) (internal citations omitted).

reasonable,” determined case-by-case based on “the totality of the circumstances,”⁶⁶ would closely mirror the rule suggested in *Verizon*.⁶⁷ It would leave sufficient room for “individualized negotiation” between broadband providers and edge providers, and would build in “considerable flexibility for providers to respond to the competitive forces at play in the [broadband Internet access] market.”⁶⁸ Under *Verizon* and *Cellco*, this formulation of the “commercially reasonable” standard would be legally sound.

Comcast supports the application of such a standard. Comcast also would not be opposed to a rebuttable presumption that “paid prioritization” arrangements are commercially unreasonable. This presumption could be interpreted to preclude, among other things, exclusive arrangements and arrangements that prioritize a broadband provider’s own affiliated Internet content vis-à-vis unaffiliated content. A broadband provider seeking to justify any “paid prioritization” arrangement could be required to bear the burden of showing that the arrangement is commercially reasonable and fair to consumers and edge providers. Comcast believes that few arrangements would be deemed to overcome the presumption.

However, the Commission should *not* establish a policy that would preclude *all* experimentation in this area. Arrangements could emerge between broadband providers and edge providers that could have widely varying implications for competition and consumer welfare based on the terms of an individual arrangement, the parties involved, and the markets

⁶⁶ NPRM ¶ 136.

⁶⁷ Compare *Cellco*, 700 F.3d at 548 (“The rule itself actually spells out sixteen different factors plus a catch-all ‘other special or extenuating circumstances’ factor that the Commission must take into account in evaluating whether a proffered roaming agreement is commercially reasonable.”), with *Verizon*, 740 F.3d at 657 (“[T]he *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains [similarly] flexible.”).

⁶⁸ *Cellco*, 700 F.3d at 548.

affected. As FCC General Counsel Jon Sallet recently explained, “[c]ase-by-case enforcement offers a potentially more dynamic approach, permitting the Commission to respond to and learn from the rapid pace of change in the communications market.”⁶⁹

2. *The Commission Should Not Apply a Roving “Commercial Reasonableness” Standard to All Broadband Provider Practices.*

The Commission’s proposed rule could be interpreted to reach far beyond direct commercial relationships between broadband providers and edge providers that address the transmission of Internet traffic over broadband Internet access service.⁷⁰ This would be overly broad and would seriously expand the scope of this proceeding. The 2010 nondiscrimination rule applied only to unreasonable *discrimination* by a broadband provider with respect to the transmission of broadband Internet access service exclusively—not to any and all unreasonable *practices* in any context.⁷¹

⁶⁹ Prepared Remarks of Jonathan Sallet, General Counsel, FCC, *The Jurisprudence of Innovation*, at 2 (June 23, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-327844A1.pdf. By the same token, any factors that the Commission adopts to govern the application of a “commercial reasonableness” standard should permit and encourage experimentation. For example, the Commission should consider established “industry practices” to be commercially reasonable, but it should not limit the “industry practices” to those specifically identified by standards-setting organizations. *See* NPRM ¶ 134. Many practices that broadband providers engage in every day are not reviewed by these organizations, such as their policies for adding capacity to account for increases in network traffic. And even those practices that are reviewed by standards organizations can take years to proceed through the standards-setting process after they have been widely adopted in the marketplace. The Commission should not encourage broadband providers to delay the adoption of efficient practices until this process is complete.

⁷⁰ *See* NPRM, App. A, Proposed Rule § 8.7 (prohibiting broadband providers from engaging in all “commercially unreasonable practices”).

⁷¹ The Commission explained that this rule was intended to address the possibility of discriminatory actions such as degrading the traffic of actual or potential competitors, inhibiting end user access to certain content or applications on a discriminatory basis, and impairing free expression by slowing traffic from sources with whose viewpoint the broadband provider disagreed. *See 2010 Open Internet Order* ¶ 75.

But the rule proposed in the NPRM is different. Because on its face, it seems to prohibit *all* “commercially unreasonable practices,” the rule could be construed to create a roving standard of conduct governing everything a broadband provider does. It thus threatens to subject broadband providers to new and uncertain obligations and invite abuse from other parties. For example, an over-the-top video provider might claim that it is a commercially unreasonable practice to provide customers with discounts for purchasing a bundle consisting of both broadband and video services. Or perhaps the developer of a file-sharing application would claim that it is a commercially unreasonable practice to decline to allocate a larger amount of bandwidth to upstream traffic. These issues were clearly beyond the scope of the 2010 nondiscrimination rule and are distinct from the issues that this proceeding was designed to address.⁷²

The Commission should make clear that the “commercial reasonableness” rule is not intended to reach these issues. It can do so by limiting the application of this standard to direct commercial relationships between broadband providers and edge providers relating to the delivery of Internet traffic over broadband Internet access service. This approach would permit the Commission to address the practices that it is chiefly concerned about, such as “paid prioritization” arrangements, while minimizing the potential for misapplication of the standard.

⁷² See, e.g., *id.* ¶ 77 (“The rule we adopt provides broadband providers’ sufficient flexibility to develop service offerings and pricing plans, and to effectively and reasonably manage their networks.”); *id.* ¶ 79 (explaining that broadband providers would be permitted to decide “what connection speed(s) to offer, and at what price”).

IV. THE COMMISSION SHOULD ENSURE THAT THE SCOPE OF ITS RULES IS APPROPRIATELY TAILORED TO THE RELEVANT POLICY INTERESTS.

The Commission's NPRM also raises several questions regarding the scope of the new rules.⁷³ When the Commission adopted its 2010 open Internet rules, it made clear that the rules applied only to "broadband Internet access service," defined as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service."⁷⁴ The Commission determined that it was "appropriate to limit the application of the rules to broadband Internet access service" because the rules were "an outgrowth of the Commission's *Internet Policy Statement*," which the Commission and "private-sector stakeholders" had "always understood" to be aimed at ensuring openness for retail broadband subscribers.⁷⁵ The Commission thus properly declined to extend its initial open Internet rules to services and arrangements that did not fall within the rubric of "broadband Internet access service," including so-called "specialized services" and traffic-exchange arrangements.⁷⁶

⁷³ NPRM ¶¶ 54-62.

⁷⁴ *2010 Open Internet Order* ¶ 44; *see also id.* (noting that the definition also "encompasses any service that the Commission finds to be providing a functional equivalent" of the mass-market retail service described above, "or that is used to evade the protections" adopted in the *2010 Open Internet Order*).

⁷⁵ *Id.* ¶ 50.

⁷⁶ *Id.* ¶ 67 n.209 (declining to extend Open Internet rules to "arrangements for network interconnection, including existing paid peering arrangements"); *id.* ¶ 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."); *id.* ¶ 113 (declining to extend Open Internet rules to "specialized services"). The Commission took a similar approach in the "third way" Notice of Inquiry. *See Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, FCC 10-114 ¶ 107 (May 15, 2010) ("Nor do we intend here to address or disturb our treatment of services that are not sold by facilities-based Internet service providers to

Comcast agrees with the Commission’s tentative conclusion that, as before, the new open Internet rules should address only the provision of “broadband Internet access service” to end users.⁷⁷ At the same time, however, the Commission should ensure that its rules holistically address any openness concerns that *do* pertain directly to consumers’ use of broadband Internet access services. Thus, the Commission should carefully examine whether the regulatory distinctions adopted in 2010 between fixed and mobile broadband services continue to be justified or need to be updated in some manner.⁷⁸ At a minimum, the Commission should ensure that licensed mobile broadband services and unlicensed, public Wi-Fi services that offer similar capabilities are treated comparably.⁷⁹

A. The Commission Should Adopt Its Tentative Conclusion To Exclude Specialized Services from the Scope of the Rules.

The Commission properly excluded specialized services from the scope of the no-blocking and nondiscrimination rules it adopted in 2010, and it should “maintain this approach” in adopting new rules, as the NPRM proposes.⁸⁰ The *2010 Open Internet Order* appropriately recognized that “broadband providers offer services that share capacity with broadband Internet access service over providers’ last-mile facilities, and may develop and offer other such services

end users in the retail market, including, for example, Internet backbone connectivity arrangements. In short, the Commission proposes not to change its treatment of services that fall outside a commonsense definition of broadband Internet service.”); *id.* ¶ 108 (“We do not intend to address the classification or treatment of these [specialized] services in this proceeding.”).

⁷⁷ NPRM ¶ 55.

⁷⁸ *See id.* ¶ 62 (seeking comment on treatment of mobile broadband Internet access service under any new rules).

⁷⁹ Comcast uses the term “public” Wi-Fi services to refer to services provided via hotspots that are accessed outside of users’ own homes. Such services should not be deemed to include a fixed broadband subscriber’s access to his or her own home Wi-Fi network.

⁸⁰ *Id.* ¶ 60.

in the future.”⁸¹ The Commission explained that such “specialized services” fundamentally “differ from broadband Internet access service”—in particular because services provided over a broadband provider’s last-mile facilities and that do not use the public Internet, even if they rely on Internet Protocol (“IP”) technology, are properly treated as distinct from services that enable access to the public Internet.⁸² The Commission further found that such services “supplement[] the benefits of the open Internet,” by “driv[ing] additional private investment in broadband networks and provide end users valued services.”⁸³ The Commission thus concluded that, “rather than adopt[] policies specific to such services,” it would “closely monitor” specialized services through tailored disclosure obligations aimed at collecting “information about specialized services’ impact, if any, on last-mile capacity available for, and the performance of, broadband Internet access service.”⁸⁴

This restrained approach has proven effective. There is no record evidence that any of the concerns raised by the Commission in the *2010 Open Internet Order*—that specialized services might “bypass[] open Internet protections,” “supplant[] the open Internet,” or “enabl[e] anticompetitive conduct”—have come to pass.⁸⁵ In any event, the proposed rules are appropriately designed to prevent evasion of open Internet principles. As the NPRM acknowledges, the codified definition of “broadband Internet access service,” which the *Verizon*

⁸¹ *2010 Open Internet Order* ¶ 112.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* ¶¶ 113-14.

⁸⁵ *Id.* ¶ 112.

decision “did not disturb,”⁸⁶ already “encompasses any service that the Commission finds to be providing a functional equivalent” of broadband Internet access service “or that is used to evade the protections” set forth in the rules.⁸⁷ This definition thus fulfills the Commission’s goal of “ensur[ing] that the specialized services exception is not used to circumvent our open Internet rules.”⁸⁸ Because there is no realistic prospect that a broadband provider could effectively “bypass[] open Internet protections” through the provision of a specialized service—much less *evidence* to support any hypothesized theory of harm—there is no sound basis for imposing new regulations to prevent such circumvention from occurring.⁸⁹

While it is unnecessary to impose additional mandates on specialized services, the Commission should clarify the definition of specialized services to provide increased certainty regarding the scope of its open Internet rules.⁹⁰ Specifically, the Commission should clarify, as it did in its order approving Comcast’s acquisition of NBCUniversal, that the definition of “specialized services” does not encompass interconnected VoIP services or “services regulated either as telecommunications services under Title II of the Communications Act or as MVPD

⁸⁶ NPRM ¶ 55.

⁸⁷ *Id.* ¶ 54 (quoting 47 C.F.R. § 8.11(a)).

⁸⁸ *Id.* ¶ 60.

⁸⁹ See FTC Staff Report, *Broadband Connectivity Competition Policy* 157 (June 2007) (noting “the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace”); Ex Parte Filing of the United States Department of Justice, WC Docket No. 07-52, at 2-3 (Sept. 6, 2007) (warning that the premature imposition of regulatory restraints on “dynamic and evolving” services, absent any showing of harm, “can inefficiently skew investment, delay innovation, and diminish consumer welfare”).

⁹⁰ See NPRM ¶ 60 & n.138 (seeking comment on whether the Commission should define “specialized services,” and noting that the *2010 Open Internet Order* merely “described them as ‘services that share capacity with broadband Internet access service over providers’ last-mile facilities’”) (quoting *2010 Open Internet Order* ¶ 112).

services under Title VI of the Communications Act.”⁹¹ Such services are already subject to well-developed regulatory regimes that provide robust protections for consumers and competitive safeguards. And those voice and video services are an essential component of the communications marketplace, as they fulfill several core values embraced by Congress. There is accordingly no basis for subjecting such services, whether offered using legacy protocols or IP, to any rules that might apply more broadly to “specialized services” provided over last-mile IP networks. Indeed, imposing overlapping and duplicative regulatory schemes would make no sense.

If the Commission excludes telecommunications services, VoIP, and Title VI video services from the definition of specialized services, it can then define that term to include any other IP-enabled service offered over the same last-mile facilities used to provide broadband Internet access service. That approach would aptly capture the Commission’s intention to describe a class of services that ride over the same last-mile infrastructure as broadband Internet access yet offer a distinct functionality and user experience, such as a managed broadband connection designed to link doctors with patients in remote locations.

However the Commission ultimately defines “specialized services,” it should ensure that its rules preserve broadband providers’ flexibility to make multiple uses of their networks. There can be no doubt that multi-use networks maximize efficiency. According to the 2013 report from the Commission’s OIAC, which was tasked in the *2010 Open Internet Order* with monitoring the development of specialized services, broadband providers’ unfettered ability to offer multiple services over the facilities used to deliver broadband Internet access service has

⁹¹ See *Comcast/NBCUniversal Merger Order*, App. A, § I.

been, and will continue to be, an important basis for investment in broadband networks.⁹² The report found that, in recent years, “[t]he business case to justify the investment in the expansion of fiber optics and improved DSL and cable technology which led to higher broadband speeds was fundamentally predicated upon the assumption that the operator would offer multiple services” over the provider’s last-mile broadband facilities.⁹³ This finding is plainly correct in Comcast’s experience; Comcast’s own network was initially constructed primarily to provide multichannel video service, and this investment later gave rise to high-speed broadband service for tens of millions of Americans. The Commission’s decision in 2010 to avoid unnecessary regulatory burdens on the development of such services thus was undoubtedly correct, and continues to reap significant benefits for consumers today.

B. The Commission Should Adopt Its Tentative Conclusion To Exclude Traffic Exchange from the Scope of the Rules.

The Commission also should “maintain th[e] approach” adopted in the *2010 Open Internet Order* with respect to peering, transit, and other traffic-exchange arrangements and reaffirm that such arrangements remain outside the scope of the open Internet rules.⁹⁴ The Commission made clear that the rules adopted in the *2010 Open Internet Order* were not intended “to affect existing arrangements for network interconnection, including existing paid peering arrangements.”⁹⁵ The NPRM accordingly acknowledges that the Commission “did not apply the no-blocking or unreasonable discrimination rules to the exchange of traffic between

⁹² FCC Open Internet Advisory Committee, *2013 Annual Report* 67 (Aug. 20, 2013), available at <http://transition.fcc.gov/cgb/oiac/oiac-2013-annual-report.pdf>.

⁹³ *Id.*

⁹⁴ NPRM ¶ 59.

⁹⁵ *2010 Open Internet Order* ¶ 67 n.209.

networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection.”⁹⁶

As Comcast and others have explained at length, the Commission’s decision to exclude traffic-exchange arrangements from the scope of the initial open Internet rules was plainly the correct approach in 2010,⁹⁷ and it remains so today.⁹⁸ These economic arrangements concern the business relationships for transporting Internet traffic across the increasingly complex and dynamic “backbone” architecture of the Internet, and are negotiated based on the exchange of traffic—not the type, content, or source of traffic—between the parties’ networks. And the redundant relationships on the backbone, as well as the dual roles many entities play (CDN, content provider, transit provider, etc.) make the marketplace dynamics wholly different from those relating to the last mile, where relationships are more static and the network’s final leg is necessarily controlled by the broadband service provider chosen by the customer. These commercial arrangements thus have no bearing on and are entirely distinct from any issues that are the subject of the Commission’s open Internet rules, which have always been aimed at ensuring consumers’ ability to “access the lawful Internet content of their choice” and to “run applications and use services of their choice.”⁹⁹ Traffic-exchange arrangements have nothing to

⁹⁶ NPRM ¶ 59.

⁹⁷ See, e.g., Comments of Comcast Corp., WC Docket No. 10-90, at 28-52 (Feb. 24, 2012); Letter of Ian Dillner, VP, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191 (Jan. 13, 2011); Letter from James W. Cicconi, AT&T Inc., and Kyle McSillarow, NCTA, to Julius Genachowski, Chairman, FCC, GN Docket No. 09-191 (Feb. 14, 2011).

⁹⁸ See NPRM ¶ 59 (stating the Commission’s “tentative conclu[sion]” that it should not subject traffic-exchange arrangements to regulation).

⁹⁹ *2010 Open Internet Order* ¶ 13 (internal quotation marks and citations omitted).

do with the ability of end users to access particular content or to use particular applications or services, and nothing to do with the priority with which content might be delivered to end users over a broadband Internet access service. For these reasons, Chairman Wheeler correctly acknowledged in his statement accompanying the NPRM that traffic exchange “is a different matter that is better addressed separately” from this proceeding,¹⁰⁰ and explained to industry stakeholders in February that traffic exchange “is not the same issue” as net neutrality.¹⁰¹

Nevertheless, critics of the Commission’s approach to traffic-exchange arrangements under the *2010 Open Internet Order* have, in a transparent effort to gain a competitive advantage in the marketplace, urged the Commission to expand the scope of the new open Internet rules to encompass such arrangements. For example, Level 3 has asked the Commission to require broadband providers to engage in traffic exchange on “commercially reasonable” terms—a standard that, according to Level 3, would require providing traffic-exchange services *for free* (and thus would turn the word “commercial” on its head).¹⁰² Relatedly, Cogent has asked the

¹⁰⁰ NPRM, Statement of Chairman Tom Wheeler, at 2.

¹⁰¹ See Interview by Stacey Higginbotham, GigaOm, of Chairman Tom Wheeler, FCC, at the 2014 State of the Net Conference (Jan. 28, 2014) (“A lot of people seem to think that the whole peering and interconnection topic is the same as net neutrality. It’s not. It’s a different issue, it’s a cousin, maybe a sibling, but it is not the same issue.”), <http://gigaom.com/2014/02/23/the-netflix-comcast-agreement-isnt-a-network-neutrality-violation-but-it-is-a-problem/>. Indeed, Chairman Wheeler recently announced that the Commission has begun collecting information on traffic-exchange arrangements outside the context of this proceeding. See News Release, FCC, Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion (June 13, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327634A1.pdf.

¹⁰² See Comments of Level 3 Communications, LLC, GN Docket No. 14-28, at 11 (Mar. 21, 2014) (“Level 3 PN Comments”) (urging the Commission to conclude that “an ISP interconnects on commercially reasonable terms” only if “the ISP agrees to provide interconnection, including augmenting existing interconnection capacity when congested, without charge,” or if “the ISP identifies a location in each local market (or larger geographic area) where it will provide sufficient interconnection capacity, including augmenting interconnection capacity as necessary, to exchange traffic for that area without charge”); see also Michael Mooney, *Heads ISPs Win*,

Commission to adopt a rule that would give rise to enforcement proceedings against broadband providers (and broadband providers alone) whenever interconnection points experience “sustained states of congestion”¹⁰³—even though it is well-established that the congestion of ports is often not within the sole control of a broadband provider.¹⁰⁴

The Commission should reject these proposals. There is a long line of Commission precedent treating Internet backbone and interconnection arrangements as distinct from last-mile broadband Internet access service.¹⁰⁵ To address traffic-exchange arrangements in this proceeding would complicate the Commission’s regulatory efforts enormously and increase the likelihood of serious legal challenges. Indeed, importing the complexities and divergent

Tails You Lose (And a Way to Fix It), Beyond Bandwidth: Level 3 Communications Blog (July 7, 2014) (arguing that “ISPs must interconnect with content companies and backbone providers without charging them a fee”).

¹⁰³ See Comments of Cogent Communications Group, Inc., GN Docket No. 14-28, at 25 (Mar. 21, 2014) (“Cogent PN Comments”) (urging the Commission to “promulgate a rule that authorizes the Commission to institute an enforcement proceeding (either on its own motion or pursuant to a complaint), upon evidence showing a sustained state of congestion at one or more interconnection points between a broadband ISP’s network and another network, that directs the broadband ISP to show cause why it should not be required to implement promptly remedial measures to relieve the sustained state of congestion”).

¹⁰⁴ See Julie Knapp & Walter Johnson, *Internet Traffic Exchange: Time to Look Under the Hood*, FCC Blog (June 18, 2014), <http://www.fcc.gov/blog/internet-traffic-exchange-time-look-under-hood> (“No one company defines your personal Internet experience.”); Sandvine, *Global Internet Phenomena Report 19* (1H 2014) (describing an example of the control that edge providers have in determining how their traffic is delivered to end users); DrPeering International, Abstract, *The Art of Peering: The Peering Playbook*, <http://drpeering.net/white-papers/Art-Of-Peering-The-Peering-Playbook.html#9> (describing tactics such as “bluffing performance problems” to pressure broadband providers to peer).

¹⁰⁵ See, e.g., *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 ¶¶ 62-63 (1998) (“*Universal Service Report*”) (distinguishing services offered by Internet backbone providers and Internet access providers); *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662 ¶¶ 125, 133 (2007) (distinguishing Internet backbone services from mass market Internet access services).

considerations relating to traffic-exchange arrangements into this proceeding would greatly slow down the rulemaking process and frustrate the goal of putting in place binding open Internet rules in the near future.

Even apart from such timing and practical concerns, it would be profoundly unwise and counterproductive for the Commission to reverse course and subject peering, transit, and similar arrangements to regulation. Unlike potential arrangements involving the prioritization of traffic over last-mile networks—arrangements that simply do not exist in today’s marketplace—peering, transit, and similar arrangements for the routing of traffic over the Internet backbone are elements of a well-developed (and constantly evolving) commercial ecosystem.¹⁰⁶ Interfering with these commercial arrangements—or even worse, prohibiting such arrangements whenever they involve monetary settlement—would dramatically upset the economic relationships that have long undergirded the Internet and encourage arbitrage and regulatory gamesmanship. Such interference would also have serious and inevitably unintended consequences, including hindering innovation and investment in broadband infrastructure.

Moreover, the Commission consistently has found that the backbone marketplace is competitive. For instance, in approving the Verizon/MCI merger in 2005, the Commission explained that, “[b]ecause we conclude that the Internet backbone market is sufficiently competitive and will remain so post-merger, it follows that the prices and terms of

¹⁰⁶ See, e.g., Michael Powell, *Why is Netflix Strong Arming the Net Neutrality Debate*, NCTA Blog (June 12, 2014), <https://www.ncta.com/platform/public-policy/why-is-netflix-strong-arming-the-net-neutrality-debate/> (explaining that “the myriad business arrangements by which thousands of ISPs, content providers, transit providers, and content distribution networks exchange Internet traffic was not part of Commission’s 2010 Open Internet proceeding and should not be now,” as “dragging these complex commercial relationships into the net neutrality proceeding would upset a well-functioning marketplace and make restoration of appropriate Open Internet rules even more difficult than it would be otherwise”).

interconnection in the market will also be competitive.”¹⁰⁷ The Commission reached the same conclusion in approving the SBC/AT&T transaction, noting that “interconnection between Internet backbone providers has never been subject to direct government regulation, and settlement-free peering and degradation-free transit arrangements have thrived.”¹⁰⁸ The Commission then echoed these findings in approving the 2011 Global Crossing/Level 3 transaction, and expressly rejected arguments that the combined company would have an incentive to engage in anticompetitive transit and peering practices.¹⁰⁹ According to the Commission, any effort to engage in such practices would cause the entity to “lose customers to its remaining peers, because those entities would still enjoy ubiquitous Internet connectivity and, hence, would be more attractive to customers.”¹¹⁰

The same is true today. The traffic-exchange marketplace remains dynamic, robustly competitive, and extraordinarily efficient. Indeed, competition has caused traffic-exchange fees to plummet, even as broadband use has continued to climb.¹¹¹ Accordingly, there is no basis to depart from the Commission’s hands-off regulatory approach to peering, transit, and other traffic-exchange arrangements. The record is simply devoid of evidence of any dramatic shift in

¹⁰⁷ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433 ¶ 133 (2005).

¹⁰⁸ *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290 ¶ 132 (2005).

¹⁰⁹ *Applications Filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, Memorandum Opinion and Order and Declaratory Ruling, 26 FCC Rcd. 14056 ¶ 27 (2011).

¹¹⁰ *Id.*

¹¹¹ DrPeering International, Abstract, *Internet Transit Prices – Historical and Projected*, <http://drpeering.net/white-papers/Internet-Transit-Pricing-Historical-And-Projected.php> (detailing dramatic reduction in traffic-exchange costs since 1998).

the competitiveness of the traffic-exchange marketplace that could warrant such regulatory intervention.¹¹²

Just as the proposals to regulate traffic exchange are misplaced, so too are calls to require disclosure of information regarding traffic exchange under the open Internet transparency rule.¹¹³ As a threshold matter, broadband providers do not possess sufficient firsthand information to recognize many instances of congestion that arise. While broadband providers can determine the percentage of an interconnection point's capacity that is being utilized, they cannot determine in real time the extent to which the interconnecting network is attempting to deliver traffic *beyond* the full capacity of that interconnection point.¹¹⁴ Moreover, broadband providers possess little if

¹¹² See Michael Kende, Director of Internet Policy Analysis, FCC, *The Digital Handshake: Connecting Internet Backbones*, Office of Plans and Policy Working Paper No. 32, at 26 (Sept. 2000), available at http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf (“Any regulation of the Internet backbone market would represent a significant shift in the unregulated status quo under which the Internet industry has grown at unprecedented rates, and therefore would require a corresponding shift in the competitiveness of the market.”).

¹¹³ See NPRM ¶¶ 81-83 (tentatively concluding that the Commission should require disclosure of “meaningful information regarding the source, location, timing, speed, packet loss, and duration of network congestion” even when such congestion originates “beyond the broadband provider’s network or in the exchange of traffic between that network and others”). Cogent also urges the Commission to regulate broadband providers’ traffic exchange practices in several other unjustified and counterproductive ways. See Cogent PN Comments at 20-23. But Cogent’s own conduct provides perhaps the most illustrative example of how a transit provider can deliberately cause congestion and degrade the end user experience. Cogent has repeatedly agreed to provide transit services to edge providers for volumes of traffic that exceed the capacity of Cogent’s interconnections with broadband providers. When broadband providers have declined to expand the capacity of these interconnection points to accommodate Cogent’s new business, Cogent has characterized this as interference with its right to unlimited peering capacity for free. Of course, Cogent has no such right, and its suggestion to the contrary flies in the face of more than two decades of established norms in the traffic exchange marketplace. See Scott Wooley, *The Day the Web Went Dead*, Forbes, Dec. 2, 2008, http://www.forbes.com/2008/12/01/cogent-sprint-regulation-tech-enter-cz_sw_1202cogent.html (recounting Cogent’s peering dispute with Sprint that led to one of the only times in history that certain Internet users could not access all Internet endpoints).

¹¹⁴ In other words, an interconnection point will appear to the broadband provider to be running at 100 percent utilization (i.e., at capacity) regardless of whether the interconnecting

any firsthand information regarding instances of congestion that originate beyond their networks and interconnection points. And congestion events, both on and off a provider's network, are often fleeting—they may occur for a brief period of time and be promptly resolved. Thus, a rule requiring broadband providers to disclose information regarding *all* instances of “congestion” would be unworkable.

Even if it were possible, such a rule would also not be helpful to anyone. Disclosure of traffic exchange information would be unnecessary vis-à-vis connecting networks or edge providers, who actually have a better sense of whether their traffic exceeds the interconnection capacity than the target broadband provider does. And this information would be at best useless and more likely confusing and unhelpful to most consumers, who typically would have no idea whether the congested route in question is one over which the sites they wish to visit or the content they seek to download is delivered—and who may in all events be unaffected if the edge provider serves *their* home or device using a *noncongested* route—which is the edge provider's choice to make.

In all events, imposing such an obligation would directly contradict the Commission's tentative conclusion to keep traffic exchange outside the scope of this proceeding. The Commission should maintain the distinction between addressing issues concerning broadband Internet access service and issues concerning traffic exchange, and it should not address the latter in its open Internet rules.

network is attempting to hand off 100 percent, 125 percent, or 150 percent of the full capacity. This makes instances in which the interconnecting network is purposely running at 100 percent utilization (which is often the case for some networks) difficult or impossible to distinguish from instances in which the interconnection point is congested. Only the interconnecting network possesses this information in real time.

C. The Commission Should Carefully Examine Regulatory Distinctions Between Fixed and Mobile Broadband Services.

The Commission should consider how to ensure that its open Internet rules properly address services that *do* involve the provision of broadband Internet access to end users—particularly mobile broadband Internet access service. As the NPRM notes, the *2010 Open Internet Order* distinguished between fixed and mobile broadband services and adopted different rules for each service.¹¹⁵ Unlike the broad no-blocking and nondiscrimination rules applicable to fixed services, the no-blocking rule for mobile services applied only to websites and to applications that “compete with the provider’s voice or video telephony services,”¹¹⁶ and there was no non-discrimination rule at all for mobile services.¹¹⁷ While such regulatory distinctions might have been defensible in 2010,¹¹⁸ the NPRM’s recognition of the “significant changes since 2010 in the mobile marketplace”—including “how mobile providers manage their networks, the increased use of Wi-Fi, and the increased use of mobile devices and applications”—supports at least a refreshed examination of that approach. There is no question that wireless is increasingly becoming a closer substitute for wireline broadband for many uses and for many Americans. The Commission should carefully consider arguments as to whether the current technological environment continues to justify the differential treatment accorded to fixed and mobile broadband services, especially in light of the fact that the rules will be in place over the long run,

¹¹⁵ See NPRM ¶ 62.

¹¹⁶ *2010 Open Internet Order* ¶ 99.

¹¹⁷ See NPRM ¶ 62.

¹¹⁸ See *2010 Open Internet Order* ¶¶ 94-95 (asserting that mobile services present “special considerations that suggest differences in how and when open Internet protections should apply,” including the notion that mobile broadband services in 2010 were still developing into robust competitive alternatives to fixed services and that mobile networks faced “capacity” issues and other “operational constraints that fixed broadband networks do not typically encounter”).

and should be forward-looking and flexible enough to fit the broadband marketplace as it continues to evolve.

However the Commission ultimately decides to treat licensed mobile broadband services, it should treat public Wi-Fi-based services that offer similar capabilities in the same manner. The *2010 Open Internet Order* left considerable ambiguity as to whether Wi-Fi-based Internet access services were governed by the rules for fixed wireline services or the rules for mobile wireless services. Going forward, it is clear that an approach that would subject public Wi-Fi services to the rules that govern fixed wireline services would be not only irrational as a policy matter but entirely unworkable as a practical matter in today's marketplace. Where licensed mobile broadband and unlicensed Wi-Fi services provide comparable capabilities, applying different rules would cause significant distortions that inevitably would result in inefficient allocations of capital. Indeed, as many Wi-Fi bands now offer expanded range and as licensed mobile broadband networks increasingly rely on small cell deployments that resemble Wi-Fi hotspots, licensed mobile broadband networks and Wi-Fi networks have much in common, and subjecting licensed mobile broadband services and unlicensed Wi-Fi services to distinct rules is even more untenable.

Moreover, as the Commission recognized in the NPRM, Wi-Fi-based services are increasingly used to offload mobile broadband traffic traditionally carried over licensed mobile broadband networks.¹¹⁹ Accordingly, a given wireless user may be accessing the Internet over a licensed mobile broadband network one minute and over an unlicensed Wi-Fi network the next

¹¹⁹ See NPRM ¶ 108 (noting “the growing use of Wi-Fi by end users for the off-load of wireless broadband”); see also Wireless Broadband Alliance, *Industry Report 2013: Global Trends in Public Wi-Fi 3* (Nov. 18, 2013), <http://www.wballiance.com/wba/wp-content/uploads/downloads/2013/11/WBA-Industry-Report-2013.pdf> (reporting on advances in “technologies which enable public Wi-Fi to be integrated far more seamlessly with other networks such as 3G/4G”).

with the same device. It would be unreasonable—and likely arbitrary and capricious—to subject such traffic to one set of rules while it is delivered over a licensed mobile broadband network and a different set of rules whenever it is offloaded or shifted to a Wi-Fi network. After all, from the *consumer’s* perspective, which has consistently been the focus of the Commission’s efforts to promote Internet openness,¹²⁰ shifting between licensed mobile broadband connections and Wi-Fi connections often may go unnoticed, and there is certainly no reason for consumers to expect that Internet openness protections would be enhanced or diminished as a result of these shifts. The arbitrariness of this approach demonstrates the need for symmetrical rules for licensed mobile broadband and unlicensed Wi-Fi-based broadband services.

V. THE COMMISSION SHOULD REFRAIN FROM RECLASSIFYING ANY COMPONENT OF BROADBAND INTERNET ACCESS SERVICE UNDER TITLE II.

The NPRM asks whether the Commission should “revisit the Commission’s classification of broadband Internet access service as an information service” or “separately identify and classify as a telecommunications service a service that ‘broadband providers . . . furnish to edge providers.’”¹²¹ Comcast strongly supports the Commission’s tentative conclusion that Section 706, as interpreted by the *Verizon* decision, provides “ample authority” to protect and promote

¹²⁰ See, e.g., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd. 14986 ¶ 4 (2005) (articulating four “Internet freedoms”—freedom to access content, to use applications, to attach personal devices, and to obtain service plan information—all phrased in terms of the rights of “consumers”).

¹²¹ NPRM ¶ 148 (quoting *Verizon*, 740 F.3d at 656).

the open Internet.¹²² By contrast, reclassification of broadband Internet access as containing a distinct telecommunications service under Title II is not only entirely unnecessary but would be unwise and likely unlawful.

A. Reclassifying Broadband Internet Access Under Title II Would Be Counterproductive from a Policy Standpoint.

For more than a decade, broadband Internet access service has been properly classified exclusively as an “information service” under the Communications Act—“an offering . . . which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications,” with a transmission component that is “not . . . separable from the data processing capabilities of the service.”¹²³ That determination has been repeatedly re-examined and affirmed by the Commission,¹²⁴ and has been upheld by the Supreme Court.¹²⁵ It has enabled light-touch regulation that has fostered dynamic innovation and unprecedented investment in broadband networks such as Comcast’s and allowed the broader Internet ecosystem to thrive. Seeking to reverse the classification now would be a profound mistake.

¹²² *Id.* ¶ 142.

¹²³ *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 ¶¶ 38-39 (2002) (“*Cable Modem Order*”).

¹²⁴ *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) (“*Wireline Broadband 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*, Memorandum Opinion and Order, 21 FCC Rcd. 13281 (2006) (“*BPL Order*”); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901 (2007) (“*Wireless Broadband Order*”).

¹²⁵ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Unlike common carrier regulation, which would be a poor fit for the dynamic and rapidly evolving broadband Internet marketplace, the Commission’s longstanding light-touch regulation of the Internet has been endorsed by Congress and followed under Democratic and Republican FCC leadership.¹²⁶ As the Commission well knows, the approach has been a boon for the Internet economy, fostering an environment in which network investment, innovation, and broadband availability have flourished.¹²⁷ Due to sustained investment by broadband providers, more than 99 percent of Americans now have access to either fixed or wireless broadband service.¹²⁸ Increases in the speed of these connections have also been staggering. In the last decade, top broadband speeds have increased by 1500 percent.¹²⁹ From 2010 to 2013, the percentage of Americans with access to broadband service of over 50 Mbps jumped from 46 to 81 percent.¹³⁰ These widely available high-speed Internet connections are fueling innovation and competition in cloud services, streaming video and audio, home automation, and more.¹³¹

¹²⁶ See, e.g., 47 U.S.C. § 230(b)(2) (“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.”); see also News Release, *FCC Chairman Kennard Shares Goal of Local Governments to Achieve Open Broadband Access; Continues to Believe that Vigilant Restraint is the Right Way to Get There* (Aug. 11, 1999), http://transition.fcc.gov/Bureaus/Cable/News_Releases/1999/nrcb9014.html (endorsing and describing benefits of Commission’s policy of “vigilant restraint”).

¹²⁷ See NPRM ¶¶ 30-32.

¹²⁸ National Broadband Map, *Broadband Statistics Report, Access to Broadband Technology by Speed 3* (Feb. 2014) (“June 2013 National Broadband Map Statistics”), <http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf>.

¹²⁹ John Sununu & Harold Ford, Jr., *Don’t Make the Internet a Public Utility*, SFGate, May 14, 2014, <http://www.sfgate.com/opinion/openforum/article/Don-t-make-the-Internet-a-public-utility-5478946.php>.

¹³⁰ Compare National Telecommunications and Information Administration, *U.S. Broadband Availability: June 2010 – June 2012*, at 4, 7, tbl. 3 (May 2013),

Reclassification of broadband, or any component thereof, as a “telecommunications service” would threaten to slow or reverse these trends. The Commission itself, along with the Department of Justice (DOJ), recognized in seeking Supreme Court review in the *Brand X* case that reclassification would impose a series of onerous regulatory burdens that would “fundamentally change the regulatory environment” for broadband and may require providers to “raise their prices and postpone or forego plans to deploy new broadband infrastructure.”¹³² In so doing, the Commission explained that reclassification would threaten to undermine “one of the central objectives of federal communications policy since 1996”—“[e]ncouraging the deployment of broadband services throughout the Nation.”¹³³

http://www.ntia.doc.gov/files/ntia/publications/usbb_avail_report_05102013.pdf (“*NTIA Broadband Report*”), with *June 2013 National Broadband Map Statistics* at 4.

¹³¹ See, e.g., Stu Roberts, *Honeywell Announces Lyric, a Competitor to the Nest Smart Thermostat*, gizmag, June 13, 2014, <http://www.gizmag.com/honeywell-lyric-smart-thermostat/32539/>; Kia Makarechi, *Amazon Prime Music Has Launched, But Which Streaming Service Should You Use?*, Vanity Fair, June 13, 2014, <http://www.vanityfair.com/online/daily/2014/06/amazon-prime-music-launch-which-streaming-service>; Quentin Hardy, *The Era of Cloud Computing*, N.Y. Times, June 11, 2014, <http://bits.blogs.nytimes.com/2014/06/11/the-era-of-cloud-computing/>; Ewan Spence, *Let the Battle of the Clouds Commence as Apple’s OSX Continuity Challenges Microsoft’s Windows Live*, Forbes, June 2, 2014, <http://www.forbes.com/sites/ewanspence/2014/06/02/let-the-battle-of-the-clouds-commence-as-apples-continuity-challenges-microsofts-windows-live-osx-yosemite-ios-wwdc/>.

¹³² Petition for a Writ of Certiorari by U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-281, at 25-26 (Aug. 27, 2004), <http://transition.fcc.gov/ogc/documents/filings/2004/BrandX.pet.final.pdf> (“FCC/DOJ Petition for *Cert.*”); see *id.* (“Service providers would be under a new federal duty to furnish ‘communication service upon reasonable request therefor’; to charge ‘just and reasonable’ rates; to refrain from engaging in ‘unjust or unreasonable discrimination’; to comply with FCC requirements for filing and abiding by written tariffs; and to interconnect with other carriers.” (citing 47 U.S.C. §§ 201(a) and (b), 202(a), 203, 251(a)).

¹³³ *Id.* at 24.

Leading industry observers have expressed similar concerns. One such observer recently explained that reclassification would “dramatically slow the pace of advance in the technologies, business models, and network and service innovations of the future.”¹³⁴ This echoed the Washington Post editorial board’s prior conclusion that reclassification “could damage innovation in what has been a vibrant and rapidly evolving marketplace.”¹³⁵ Another commentator went so far as to call reclassification “the worst idea in communications policy to emerge in the last 75 years.”¹³⁶ To put it bluntly, it “would be disastrous.”¹³⁷

Indeed, even opening the door to such heavy-handed regulation by the Commission—and possibly 51 different state public utility commissions as well—would impose significant costs. The sheer uncertainty surrounding such a regulatory environment would produce “a profoundly negative impact on capital investment.”¹³⁸ By itself, reduced investment would inhibit job creation, hinder the deployment of broadband infrastructure, and undermine the foundation of the “virtuous circle” of innovation that the open Internet rules are designed to advanced. The last time the Commission considered imposing such a regime stands as a stark illustration. In the days immediately following the Commission’s 2010 proposal to reclassify broadband Internet

¹³⁴ Bret Swanson, *The Real ‘Slow Lane’ Threat to the Internet*, Forbes, June 2, 2014, <http://onforb.es/1p1z0vM>.

¹³⁵ Editorial, *Internet oversight is needed, but not in the form of FCC regulation*, Wash. Post, Apr. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041604610.html>.

¹³⁶ Larry Downes, *What’s in a Title? For Broadband, It’s Oz vs. Kansas*, CNET News, Mar. 11, 2010, http://news.cnet.com/8301-1035_3-20000267-94.html.

¹³⁷ 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/>.

¹³⁸ Craig Moffett, *Quick Take-U.S. Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear*, Bernstein Research (2010).

access service as a “telecommunications service” under the so-called “third way,” “approximately ten percent of some ISPs’ market cap” was “eras[ed]” in public trading.¹³⁹

And recent empirical studies reinforce these concerns. In a 2013 comparison of the United States and the European Union, for example, economists at Copenhagen Economics found that, although “[t]he US and the EU share considerable similarities in terms of demographics, wealth, and other factors” that might affect broadband deployment, “the US generally comes out better in terms of broadband supply, quality and price.”¹⁴⁰ The difference, the authors concluded, was explained in part by the divergent regulatory approaches to broadband adopted by the two regions: when the United States chose a lighter regulatory approach that encouraged facilities-based competition, the EU treated broadband as a public utility, requiring unbundling and encouraging non-facilities-based competition instead.¹⁴¹ A decade later, “investment in telecommunications networks in the US per capita is more than 50% higher than in Europe.”¹⁴² A 2014 study by Professor Christopher Yoo of the University of Pennsylvania Law School found similar results. Professor Yoo conducted a regression analysis that confirmed that facilities-based competition promotes investment in broadband networks,

¹³⁹ Letter of Brian L. Roberts, Chairman and CEO, Comcast Corp., et al., to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly, GN Docket No. 14-28, at 1 (May 13, 2014), <http://www.broadbandforamerica.com/sites/default/files/CEOLettertoFCC-5.13.14.pdf>.

¹⁴⁰ Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, *Europe Can Catch Up with the US: A Contrast of Two Contrary Broadband Models* 3 (June 2013), <http://www.copenhageneconomics.com/Website/News.aspx?PID=3058&M=NewsV2&Action=1&NewsId=708>.

¹⁴¹ *Id.* at 3-4.

¹⁴² *Id.* at 6.

both nationwide and in rural areas in particular.¹⁴³ In contrast, this analysis indicated that the European model has had a demonstrably negative impact on European network coverage.¹⁴⁴ Indeed, after a decade of employing the two regulatory approaches, the United States leads Europe in fiber and LTE deployment, investment, download speeds, and price.¹⁴⁵ These observations ring particularly true in light of our nation’s experience with public-utility-style regulation, which has led to severely diminished investment in the electrical grid and transportation infrastructure, as well as in the legacy telephone networks subject to Title II.¹⁴⁶

The NPRM suggests, as the Commission had hypothesized previously, that forbearance from certain provisions of Title II might “strike the right balance between minimizing the regulatory burden on providers and ensuring the public interest is served.”¹⁴⁷ But forbearance is not a viable solution for the problems described here. Although forbearance from “applying all but a handful” of Title II’s duties and obligations is certainly preferable to full-blown common carrier regulation, it would do little to remedy the uncertainty a reclassification decision would sow. The Commission and the DOJ recognized in their *Brand X* petition for certiorari that “the FCC’s forbearance authority is not in this context an effective means of remov[ing] regulatory

¹⁴³ See Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* 11-12 (June 2014), <https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment>.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at i-ii.

¹⁴⁶ See American Society of Civil Engineers, *2013 Report Card for America’s Infrastructure*, <http://www.infrastructurereportcard.org> (last visited July 9, 2014); see also Letter of Rick Chessen, National Cable & Telecommunications Association, to Marlene Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (May 14, 2014).

¹⁴⁷ NPRM ¶ 153.

uncertainty” and may ultimately *exacerbate* such uncertainty.¹⁴⁸ As the petition explained, “[f]orbearance proceedings would be time-consuming and hotly contested and would assuredly lead to new rounds of litigation,” making it impossible “to predict in advance the ultimate outcome of such proceedings.”¹⁴⁹ Moreover, the Commission provides no precedent for such preemptive forbearance on an industry-wide, nationwide basis, and investors and broadband providers would have little assurance that such a decision was even legally permissible.¹⁵⁰

Reclassification also would promise to enmesh the Commission in years of needless litigation. An order reclassifying broadband Internet access service is certain to invite legal challenges from those faced with the burdens of common-carriage regulation imposed on such a tenuous basis. (If the order simultaneously decided that forbearance from most of Title II was justified, the range of potential legal challenges would only broaden.) Even if the order survived, such litigation could drag on for years, compounding the uncertainty in the regulatory environment.

Finally, reclassification could have broader implications globally and weaken the United States’ positions regarding international Internet regulation. The United States’ policy preference for competition over heavy-handed regulation has not been confined to domestic communications. As then-Assistant Secretary of State Philip Verveer explained, reversing that position domestically “may well end up having an effect that will cause us at the [S]tate

¹⁴⁸ FCC/DOJ Petition for *Cert.* at 28.

¹⁴⁹ *Id.*

¹⁵⁰ *Cf. AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (“[T]he hypothetical nature of a particular forbearance petition [may] render[] it impossible to determine whether it satisfies section 10(a)’s substantive requirements.”).

[D]epartment to have to engage in a lot of discussions with our foreign counterparts.”¹⁵¹ A reclassification decision, he warned, “could be employed as a pretext or as an excuse for undertaking public policy activities that we would disagree with pretty profoundly.”¹⁵² Relatedly, imposing common-carrier regulation on broadband services could undermine the United States’ resistance to greater oversight of the Internet by the UN’s International Telecommunication Union. That opposition has been grounded, in part, on U.S. opposition to “replac[ing] the existing, bottom-up form of Internet oversight with a government-led model.”¹⁵³ As Assistant Secretary of Commerce Lawrence Strickling put it, proponents of such regulation “fail to acknowledge how fundamentally different the Internet is to the forms of communication which preceded it. The Internet does not operate under the anachronistic model of monopoly telephone providers that control all aspects of their networks within their countries.”¹⁵⁴ Such arguments would ring hollow if the U.S. government began treating them the same.

B. Title II Would Not Support the Type of Categorical Ban Many Reclassification Proponents Seek.

For all the problems that reclassification would cause, Title II almost certainly would not provide the Commission the authority that many proponents of reclassification seek. Those

¹⁵¹ John Eggerton, *FCC’s Net Neutrality Proceeding Means More Work for State Department*, *Broad. & Cable*, Mar. 17, 2010, <http://www.broadcastingcable.com/news/washington/fccs-net-neutrality-proceeding-means-more-work-state-department/57276>.

¹⁵² *Id.*

¹⁵³ Eric Pfanner, *U.S. Rejects Telecommunications Treaty*, *N.Y. Times*, Dec. 13, 2012, <http://www.nytimes.com/2012/12/14/technology/14iht-treaty14.html>.

¹⁵⁴ Lawrence E. Strickling, Assistant Secretary of Commerce, Remarks at the Brookings Institution’s Center for Technology Innovation (Jan. 11, 2012), <http://www.ntia.doc.gov/speechtestimony/2012/remarks-assistant-secretary-strickling-brookings-institutions-center-technology>.

parties seem to believe that Title II provides a clear path to a flat ban of paid prioritization. Not so.

First, Section 202(a) of the Communications Act plainly would not support a blanket ban on commercial arrangements between broadband providers and edge providers that address the transmission of Internet traffic over broadband Internet access service. That section prohibits a telecommunication carrier from engaging in “unjust or unreasonable discrimination” in connection with its telecommunications service, or providing any person or class of persons “undue or unreasonable preference or advantage [or] . . . disadvantage.”¹⁵⁵ The provision prevents telecommunications carriers from charging “*unjustifiably* different rates for the *same* service.”¹⁵⁶ But it does not prevent telecommunications carriers from offering customers *different* levels of service, as likely would occur in the event a broadband provider offered paid prioritization. And even if a prioritized delivery service were deemed to be the same service as the provider’s standard delivery service, Section 202(a) does not prohibit service providers from charging different prices for similar services where there is a “neutral, rational basis underlying [the] apparently disparate charges.”¹⁵⁷ Moreover, determining whether two services are functionally equivalent for purposes of Section 202(a) or whether any price disparity is reasonable requires laborious, fact-specific, case-by-case determinations.¹⁵⁸

Longstanding Commission precedent applying the relevant standards makes clear that differential treatment of customers, far from being presumptively (much less categorically) off

¹⁵⁵ 47 U.S.C. § 202(a).

¹⁵⁶ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) (emphases added).

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 1136; *Am. Broad. Cos. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980).

limits, is quite often found reasonable, and thus permissible. For example, the Commission has long held that rate differentials based on cost considerations are reasonable.¹⁵⁹

Telecommunications carriers also have been permitted to impose differential charges based on amounts of use.¹⁶⁰ Selective discounting or “haggling” has been found permissible in response to competitive marketplace conditions.¹⁶¹ Likewise, the interest in meeting a competitor’s price can be a valid ground for discriminating among customers.¹⁶²

And such permissible discrimination is by no means limited to pricing differentials. Courts have “affirmed a common carrier’s ability to refuse service to certain information providers if the telco determines that such carriage would harm its corporate reputation.”¹⁶³ Moreover, courts have upheld the ability of common carriers to enter into individualized contracts, with varying terms and conditions, without vitiating their common-carrier status.¹⁶⁴ By the same token, despite the requirement that a common carrier hold itself out indifferently to

¹⁵⁹ See, e.g., *Ameritech Operating Cos. Revisions to Tariff FCC No. 2*, Order, 10 FCC Rcd. 1960 (CCB 1994) (ILEC’s disparate rates to different customers may be justified based on cost savings from serving one customer versus another); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd. 85 ¶ 15 (CCB 1993) (change in costs over time justified difference in pricing).

¹⁶⁰ See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs*, 737 F.2d at 1133.

¹⁶¹ See *Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless, and New Par*, Memorandum Opinion and Order, 17 FCC Rcd. 8987 ¶¶ 16-24 (2002), *aff’d sub nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

¹⁶² See *AT&T Co. v. FCC*, 449 F.2d 439, 448 (2d Cir. 1971).

¹⁶³ *Telephone Company – Cable Television Cross-Ownership Rules, Sections 63.54 – 63.58*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781, 5878 (1992) (statement of Commissioner James H. Quello) (citing *Carlin Commc’ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987)).

¹⁶⁴ See, e.g., *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

the “public,” courts have made clear that a common carrier may serve specialized classes of users, including even a single affiliated customer.¹⁶⁵ The Commission would accordingly face a serious hurdle in concluding that application of Section 202(a) in *this* instance somehow supported a far more draconian rule.

Second, Section 201(b) also would not provide a basis for any categorical ban on a broad range of hypothetical commercial arrangements between broadband providers and edge providers. That provision requires all “charges, practices, classifications, and regulations” for and in connection with a telecommunications service to be “just and reasonable.”¹⁶⁶ The Commission has historically relied on this provision to address discrete consumer protection issues, such as deceptive billing practices,¹⁶⁷ or “blocking or otherwise restricting or degrading” communications to rural consumers.¹⁶⁸ Potential commercial agreements in which edge providers agree to pay a higher price for a higher level of service (without diminishing or degrading the quality of existing broadband Internet access service) are nothing like these practices. Indeed, they are far more akin to individualized contract tariffs that have been long been *permitted* under the Act.¹⁶⁹ Again, the Commission would have to show why here, the same provision produces an outright prohibition on arrangements that mirror many that have previously been permitted under the same statute. And, in all events, because such arrangements scarcely exist in today’s marketplace (if any exist at all), there is no record evidence to support a

¹⁶⁵ See, e.g., *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275-76 (D.C. Cir. 2009).

¹⁶⁶ 47 U.S.C. § 201(b).

¹⁶⁷ See *NOS Communications, Inc., and Affinity Network Incorporated*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd. 8133 ¶ 6 (2001).

¹⁶⁸ *Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 16154 ¶ 29 (2013).

¹⁶⁹ See *Sw. Bell*, 19 F.3d at 1481.

conclusion that the costs of any such hypothetical agreements would invariably outweigh the benefits, which is the finding that would be needed to sustain a blanket prohibition.

C. Reclassifying Broadband Internet Access Under Title II Likely Would Be Unlawful.

Even if reclassification under Title II were sound as a matter of policy and would advance proponents' goals, such an approach likely would be unlawful. An agency is, of course, permitted to alter or even reverse its own prior positions and interpretations of statutes Congress has entrusted to its administration.¹⁷⁰ But it cannot do so purely for results-oriented reasons. It must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."¹⁷¹ It "must show that there are *good reasons* for the new policy."¹⁷² And the requirement is only heightened when the agency's prior position has "engendered serious reliance interests" or its new position "rests upon factual findings that contradict those which underlay its prior policy."¹⁷³ Reclassification of broadband Internet access as including a distinct "telecommunications service" would be precisely the sort of reversal that would upend settled reliance interests and require repudiation of consistent factual findings. And the Commission would be hard-pressed to show "good reasons" for a such a dramatic about-face.

The reliance interests flowing from the classification of broadband Internet access service as solely an "information service" are overwhelming. Since the Commission first classified

¹⁷⁰ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

¹⁷¹ *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

¹⁷² *Fox Television Stations*, 556 U.S. at 515 (emphasis added).

¹⁷³ *Id.*

retail broadband Internet access service in 2002, Comcast and other broadband providers have built their broadband networks in reliance on the Commission’s consistent pledge that they would not be regulated as “common carriers” under Title II of the Communications Act. For example, Comcast has poured tens of billions of dollars into expanding and enhancing its network and has made business and technical decisions relying on the Commission’s rulings that it would not be required to unbundle its network or incur the multitude of other potential regulatory duties and costs that Title II regulation may entail.¹⁷⁴

Indeed, that is what the Commission intended. The Commission explained in the *Cable Modem Order* that it believed “broadband services should exist in a minimal regulatory environment that promotes investment” and limits “unnecessary and unduly burdensome regulatory costs”¹⁷⁵—a view, it noted, that Congress shared.¹⁷⁶ The Commission thus sought to “remove regulatory uncertainty” to encourage “investment and innovation.”¹⁷⁷ It reiterated these points in the *Wireline Broadband Order*,¹⁷⁸ the *BPL Order*,¹⁷⁹ and the *Wireless Broadband*

¹⁷⁴ See, e.g., 47 U.S.C. § 201(a) (requiring common carriers to furnish communication “upon reasonable request”); *id.* § 201(b) (to charge “just and reasonable” rates as determined by the Commission); *id.* § 203 (to file schedules of all charges with the Commission); *id.* § 211 (to file copies of all contracts and agreements with other carriers); *id.* § 214 (to seek permission of construction of any new line or extension of any line).

¹⁷⁵ *Cable Modem Order* ¶ 5.

¹⁷⁶ *Id.* ¶ 4; see 47 U.S.C. § 230(b)(2) (“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.*”) (emphasis added).

¹⁷⁷ *Cable Modem Order* ¶ 5.

¹⁷⁸ *Wireline Broadband Order* ¶ 3 (explaining that a “lighter regulatory touch . . . will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms”).

Order.¹⁸⁰ The Commission would face a heavy burden providing good reasons for why, after purposely and explicitly engendering such massive reliance interests on the existing regulatory regime, the Commission should reverse course now.

Abandoning the Commission’s long-held position on the nature of broadband Internet access service would be all the more difficult in light of the factual nature of that determination. The proper classification of broadband Internet access service hinges on “whether the transmission component of [the service] is sufficiently integrated with the finished service to . . . describe the two as a single, integrated offering.”¹⁸¹ That determination, the Supreme Court has explained, turns on “the factual particulars of how Internet technology works and how it is provided.”¹⁸² And the reality is that the particulars of how broadband Internet access service is provided have not materially changed since the Commission found in 2002 that it was offered as “a single, integrated service that enables the subscriber to utilize Internet access service through [the] provider’s facilities and to realize the benefits of a comprehensive service offering,”¹⁸³ or since it re-analyzed broadband Internet access services provided over other platforms and reaffirmed the relevant findings in 2005,¹⁸⁴ 2006,¹⁸⁵ and 2007.¹⁸⁶

¹⁷⁹ *BPL Order* ¶ 2 (“[A] minimal regulatory environment for BPL-enabled Internet access service . . . promotes our goal of ubiquitous availability of broadband to all Americans.”).

¹⁸⁰ *Wireless Broadband Order* ¶ 27 (“Through this classification, we provide the regulatory certainty needed to help spur growth and deployment of these services.”).

¹⁸¹ *Brand X*, 545 U.S. at 990.

¹⁸² *Id.* at 991.

¹⁸³ *Cable Modem Order* ¶ 38.

¹⁸⁴ *Wireline Broadband Order* ¶ 9 (“Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.”).

Broadband Internet access service continues to be offered to customers as a comprehensive service offering, including very visible information-service capabilities such as web browsing and email,¹⁸⁷ but importantly also less visible but vital capabilities such as Domain Name System (“DNS”) and Dynamic Host Configuration Protocol (“DHCP”) functionality, as well as integrated security features including spam filtering and distributed denial-of-service (“DDoS”) protection. Proponents of reclassification argue that today many broadband customers rely on third-parties for functions for which customers used to rely on their broadband providers, like Google’s email service, Gmail.¹⁸⁸ But the rise in popularity of some of these third-party services cannot bear the weight Title II proponents would have it carry.

As an initial matter, despite the popularity of some of these services, large numbers of Comcast customers still use the email and web-browsing services that Comcast provides.

¹⁸⁵ *BPL Order* ¶ 14 (“We conclude, consistent with the Commission’s finding in the *Wireline Broadband Internet Access Services Order*, that the use of th[e] telecommunications transmission component as part of a facilities-based provider’s offering of BPL-enabled Internet access service to end users . . . is part and parcel of the Internet access service’s information service capabilities.”).

¹⁸⁶ *Wireless Broadband Order* ¶ 26 (“Like cable modem service, wireline broadband Internet access service, and BPL-enabled Internet access service, wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications.”).

¹⁸⁷ *See Universal Service Report* ¶¶ 75-76 (describing in detail how both functions constitute “information services”).

¹⁸⁸ *See* Letter from Tejas N. Narechania and Tim Wu, Columbia University, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 16-17 (Apr. 14, 2014) (“Narechania & Wu Ex Parte Letter”) (“[T]oday, separate email services, such as Gmail and Outlook.com (formerly Hotmail), dominate those that are affiliated with broadband service.”); Brian Fung, *The Decades-Old Idea That Could Break the Net Neutrality Logjam*, Wash. Post, Apr. 21, 2014, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/04/21/the-decades-old-idea-that-could-break-the-net-neutrality-logjam/> (“The old days of looking out at the world through your ISP’s Web portal are over.”).

Moreover, not all third-party services are created equal. While many customers may look to other email providers, the same is not true of all other functions included in a comprehensive offer of broadband Internet access. Comcast customers, for example, overwhelmingly rely on Comcast's DNS and DHCP functionality. In fact, these services are inextricably intertwined with nearly every use of the integrated transmission service that Comcast provides. Every request to transport data from an end user to an edge provider and back through a domain name—like “netflix.com,” “gmail.com,” or “facebook.com”—relies on DHCP to supply the end user's originating IP address and DNS to translate the domain name that the end user enters or clicks on into the edge provider's destination IP address. Reclassification proponents argue that DNS capabilities should not matter because DNS lookup is “no more than a functional step carried out in service of [a] transmission.”¹⁸⁹ But that argument was advanced by the *dissent* in *Brand X*,¹⁹⁰ and it was specifically rejected by the *Brand X* majority.¹⁹¹

In any event, customer reliance on third-party applications is nothing new. The Commission recognized the possibility in the *Cable Modem Order* itself, but concluded that it did not change the nature of the *offering*: “We find that cable modem service . . . is an information service . . . regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service.”¹⁹² The same is true

¹⁸⁹ Narechania & Wu Ex Parte Letter at 18.

¹⁹⁰ See *Brand X*, 545 U.S. at 1012-13 (Scalia, J., dissenting) (“DNS . . . is scarcely more than routing information, which is expressly excluded from the definition of ‘information service.’”).

¹⁹¹ See *id.* at 999 & n.3 (majority opinion) (“[T]he definition of information service does not exclude ‘routing information.’”).

¹⁹² *Cable Modem Order* ¶ 38; see also *id.* ¶ 25 (“Whether the subscriber chooses to utilize functions offered by his cable modem service provider or obtain them from another source [e.g.,

today. The “factual particulars” of broadband Internet access service, today no less than when the Commission first classified it, establish that broadband providers offer a single, integrated information service—with “no separate offering of telecommunications service.”¹⁹³

D. The Commission Should Not Attempt to Identify a Distinct Telecommunications Service to Edge Providers or Rely on Title II as Backstop Authority.

Recognizing the serious obstacles to abandoning the Commission’s classification of broadband Internet access service, some have suggested that the Commission should attempt to invoke Title II in other ways. The NPRM seeks comments on two alternative reclassification approaches: (1) that the Commission could distinguish between the service broadband providers offer to their customers and the transmission capability they furnish to edge providers, classifying only the latter as a telecommunications service subject to common carrier regulation under Title II;¹⁹⁴ and (2) that the Commission could rely on Section 706 for the open Internet rules but invoke Title II as “backstop authority” in case a court later holds that Section 706 is

content from Fox News or email from Microsoft’s Hotmail], these functions currently are all included in the standard cable modem service offering.”).

¹⁹³ *Id.* ¶ 7. The NPRM suggests in passing that, even if broadband providers do not currently offer a separate telecommunications service, the Commission might compel them to do so. *See* NPRM ¶ 150. That would, of course, be inconsistent with the Commission’s long-held view that “[s]uch radical surgery is not required.” *Cable Modem Order* ¶ 43. More fundamentally, the NPRM identifies no source of authority for imposing such a requirement, and, as the D.C. Circuit has explained, the Commission “may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.” *Sw. Bell*, 19 F.3d at 1481. Such a command “must come specifically from Congress.” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 (1979).

¹⁹⁴ *See* NPRM ¶ 152 (citing Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-91, 14-28, at ii, 10-13 (May 5, 2014) (“Mozilla Petition”) and Narechania & Wu Ex Parte Letter).

insufficient to sustain the rules.¹⁹⁵ Neither approach is viable, and neither avoids the pitfalls of broader reclassification theories.

1. *Broadband Providers Do Not Offer a Distinct Telecommunications Service to Edge Providers.*

Certain commenters argue that, although broadband Internet access as furnished to end users is an information service under existing law, the Commission should reclassify the transmission functionality available to edge providers as a distinct telecommunications service.¹⁹⁶ Their arguments misconstrue both Commission precedent and the *Verizon* decision and, in any event, cannot be reconciled with the integrated nature of broadband Internet access service.

As an initial matter, the claim that the transmission of edge providers' content—what Mozilla calls a “remote delivery service,”¹⁹⁷ and what Professors Narechania and Wu call a “response transaction” or “‘sender-side’ traffic”¹⁹⁸—falls “outside the category of services previously designated by the Commission”¹⁹⁹ is plainly false. To the contrary, the Commission made clear in the *Cable Modem Order* and in its subsequent classification decisions that what the Commission classified as an information service was the “single, integrated service that enables

¹⁹⁵ NPRM ¶ 150 (quoting Letter from Rep. Henry Waxman, Ranking Member, Committee on Energy and Commerce, to Thomas Wheeler, Chairman, FCC, at 2 (May 14, 2014)), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Wheeler-Title-II-Backup-Option-2014-5-14.pdf>).

¹⁹⁶ See Mozilla Petition at ii-iii; Narechania & Wu Ex Parte Letter at 1-2.

¹⁹⁷ Mozilla Petition at 7.

¹⁹⁸ Narechania & Wu Ex Parte Letter at 13-14.

¹⁹⁹ Mozilla Petition at 9; see also Narechania & Wu Ex Parte Letter at 13 (asserting that “[c]lassifying such ‘sender-side’ traffic as a telecommunications service is, perhaps surprisingly, consistent with the *Cable Modem Order*”).

the subscriber to utilize Internet access service”—that is “to transmit data communications *to and from* the rest of the Internet.”²⁰⁰ For the Commission now to carve out and reclassify a portion of that service as a telecommunication service that is being provided to edge providers would undoubtedly require repudiating that precedent, just as broader reclassification theories would.²⁰¹ By the same token, the Commission’s classification of broadband Internet access as an *interstate* information service rested on its “end-to-end analysis” of Internet traffic, which is premised on the understanding that packets flowing among an end user’s location, the broadband provider, and remote servers are all part of an integrated communications stream.²⁰² That jurisdictional analysis would no longer be tenable—with profound implications for the Internet ecosystem—if “call” and “response” transmissions were severed and treated as entirely distinct services.

Just as these advocates misread Commission precedent, they misconstrue the *Verizon* decision. Far from suggesting that broadband Internet access providers can be characterized as offering a common carrier “telecommunications service” (as distinct from “telecommunications”) to edge providers, the court emphasized that “[t]he question is *not* whether, absent the [2010] *Open Internet Order*, broadband providers would or did act as common carriers with respect to edge providers.”²⁰³ Rather, the question before the court was

²⁰⁰ *Cable Modem Order* ¶¶ 17, 38 (emphasis added); see also *Wireline Broadband Order* ¶ 39 (“[E]ach platform provides the user with the ability *to send and receive* information at very high speed, and to access the applications and services available through the Internet.”) (emphasis added).

²⁰¹ See *Verizon*, 740 F.3d at 650, 653 (finding it “obvious” that obligating broadband providers to “act as common carriers with respect to edge providers” was inconsistent with the *Cable Modem Order*).

²⁰² *Cable Modem Order* ¶ 59.

²⁰³ *Verizon*, 740 F.3d at 653 (emphasis added).

whether the Commission could lawfully *compel* broadband providers to offer service as common carriers. And based on the court’s core holding that the *2010 Open Internet Order* impermissibly imposed such a duty,²⁰⁴ there can be little doubt that the court understood broadband providers were not independently acting in such a capacity. After all, if broadband providers were offering a telecommunications service to edge providers, they would be deemed common carriers and subject to the full panoply of Title II obligations as a matter of law, and the court would have had no basis to invalidate the no-blocking and nondiscrimination rules.

In any event, these reclassification theories cannot be squared with technical realities. While Professors Narechania and Wu contend that the service a broadband provider furnishes to an end user consists only of transmitting requests (or “calls”) for data from the end user to the edge providers, and that the transmission of a “response” from the edge provider back to the end users is wholly separate, those characterizations are incorrect.²⁰⁵ Modern broadband communications cannot be neatly segregated into “calls” and “responses”; rather, even relatively simple operations like downloading a webpage can entail a significant number of interactions among the website, the end user, and third parties that provide, for example, authentication, analytics, advertising, or other services. For example, when streaming a video from an edge provider, there is a constant two-way communication between the edge provider and the user’s

²⁰⁴ *See id.*

²⁰⁵ Narechania & Wu Ex Parte Letter at 13. Mozilla’s petition implicitly recognizes the technical shortcomings of the Narechania/Wu proposal, as it concedes that the ostensibly distinct “call” and “response” transmissions “do not correspond to separate physical network segments, or separate directions of traffic flow, or any other ‘hard’ technical distinctions.” Mozilla Petition at 8. Rather, in Mozilla’s view, a broadband provider’s service to end users and service to edge providers should be seen as “logically and legally distinguishable,” even if not “physically separable.” *Id.* at 7.

device that ensures that the packets with the information and content the edge provider is attempting to deliver are being delivered and assembled as the edge provider intended.

Accordingly, broadband providers offer a multifaceted ability to interact with the myriad services and sources of content the Internet has to offer, as the Commission has long recognized.²⁰⁶ Comcast’s Xfinity Internet service, for example, empowers its users to “[c]hat, surf, [and] stream HD movies and TV shows and games online.”²⁰⁷ Every one of those activities requires Comcast not to just transmit the end user’s “calls” for data to edge providers, but to actually deliver that data in return as part of a seamless end user experience. Particularly where end users participate in dynamic real-time activities online, such as gaming, the constant flow of packets among the user, the broadband provider, and various remote servers belies the simplistic and artificial effort to segregate Internet transmissions into distinct “call-and-response” transmissions. Indeed, Xfinity’s tiers of service, like those of other providers, are primarily defined by the speed at which the service delivers edge providers’ responses (i.e., download speed), not the end user’s request, further underscoring that the supposedly distinct “response” functionality is part and parcel of the retail Internet access service.²⁰⁸

Moreover, in striving to identify a “telecommunications service” to every edge provider—not just to some hypothetical edge provider that accepts an offer to purchase some type of telecommunications capability for a fee—Mozilla brushes aside the undisputed fact that broadband providers have no direct relationship with the vast majority of edge providers today. As Mozilla acknowledges, broadband providers transmit edge providers’ data as a result of their

²⁰⁶ See, e.g., *Cable Modem Order* ¶¶ 17, 38; *Wireline Broadband Order* ¶ 39.

²⁰⁷ *Xfinity Internet*, Comcast, <http://www.comcast.com/internet-service.html> (last visited July 9, 2014).

²⁰⁸ *Id.* (offering Internet packages at four different download speeds).

business relationships with end users and with their interconnection partners, not based on privity (with respect to the vast majority of edge providers).²⁰⁹ Neither isolated disagreements between some broadband providers and their interconnection partners,²¹⁰ nor a broadband provider’s internal network management,²¹¹ can change that fact.

Even if the Commission could identify—technologically or logically—a separate service that is actually “offered” to edge providers, it could not legally classify that service as a telecommunications service any more than it could reclassify the service to end users. A “telecommunications service” under the Communications Act is an “offering of telecommunications for a fee directly to the public.”²¹² But, with the exception of a handful of interconnection agreements that are outside the scope of these proceedings,²¹³ broadband providers do not “offer” anything “directly” to edge providers. Broadband providers certainly do not offer edge providers any such service “for a fee,” as the statutory definition of “telecommunications service” requires. Indeed, that is precisely what many proponents of reclassification seem to believe Title II would prevent.

Notably, if the Commission were to isolate and extract a “telecommunications service” from the integrated information service that broadband providers currently offer, as proposed, the decision may have much broader effects than direct reclassification. Once the Commission

²⁰⁹ Mozilla Petition at 3-4.

²¹⁰ *Id.* at 4-5.

²¹¹ *Id.* at 7.

²¹² 47 U.S.C. § 153(53).

²¹³ NPRM ¶ 59. Even if the Commission were to consider these individualized agreements, moreover, they do not constitute an offer “directly to the public, or to such classes of users as to be effectively available directly to the public.” 47 U.S.C. § 153(53).

begins artificially divorcing transmission functions from integrated information processing, there is no logical basis for limiting such surgery to retail broadband Internet access service. The same reasoning would warrant isolating the transmission components utilized by other actors in the Internet ecosystem—content delivery networks, transit providers, and certain edge providers that own or lease facilities—and classifying such components as “telecommunications services” as well. In the end, the supposedly “minimal”²¹⁴ action proposed by Mozilla and Professors Narechania and Wu could have sweeping and unpredictable consequences, as it may well lead to the imposition of heavy-handed Title II regulation on large swaths of the Internet ecosystem.²¹⁵ Such an outcome could not possibly be squared with Congress’s mandate “*to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.*”²¹⁶ Nor would it serve the Commission’s goals of encouraging increased investment and innovation.

2. *The Commission Cannot Rely on Title II as a Backstop Authority for the Open Internet Rules.*

Nor can the Commission avoid the harms of reclassification by relying on Title II only on a “contingent” basis. Some have argued that the Commission could issue a contingent reclassification decision that would be given effect only if a court were to conclude that the Commission lacked sufficient authority to promulgate the open Internet rules under

²¹⁴ Mozilla Petition at 12.

²¹⁵ See Letter from Robert W. Quinn, SVP, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 5 (May 9, 2014) (detailing the array of unintended consequences that could flow from Title II reclassification and how many players in the Internet ecosystem might become subject to common carrier regulation).

²¹⁶ 47 U.S.C. § 230(b)(2).

Section 706.²¹⁷ But for all the reasons Title II is unavailable as primary authority, it is unavailable as a backstop. The facts and the law do not support reclassification, and the policy is misguided. If the Commission concludes that the ample authority provided by Section 706 is insufficient to protect the open Internet, the solution is to request that authority from Congress, not to overreach under a different provision.

Moreover, an order that reclassified broadband Internet access services as a “telecommunications service” only if a court were to conclude Title II was necessary to adopt the open Internet rules would be internally inconsistent. As detailed above, the classification of broadband Internet access service must rest on the “factual particulars” of the offered service. Broadband providers either offer a single, integrated information service, or they offer a distinct telecommunications service that is subject to common carrier regulation under Title II. The Commission cannot rationally purport to find both at the same time, depending on how a court might subsequently interpret the Commission’s legal authority. In other words, the proper legal basis for regulating broadband Internet access service depends on the functional nature of the service; the Commission cannot first decide the legal basis for its rules in a vacuum and then come up with a characterization of the facts that fits that legal theory.²¹⁸

The Commission similarly should reject proposals to adopt an order reclassifying a component of broadband Internet access service as a telecommunications service and forbearing

²¹⁷ See NPRM ¶ 150.

²¹⁸ See Brief for the Federal Petitioners at 23, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), <http://www.justice.gov/osg/briefs/2004/3mer/2mer/2004-0277.mer.aa.pdf> (stating that “the question whether a particular service constitutes a ‘telecommunications service’ under the Communications Act *must be* resolved by reference to the nature of the provider’s ‘offering . . . to the public,’ and thus the classification ‘turns on the nature of the *functions* that the end user is offered.’”) (quoting 47 U.S.C. § 153(53) (formerly 47 U.S.C. § 153(46)) (emphasis added).

from any no-blocking and nondiscrimination requirements under Title II while any rules adopted under Section 706 remain in place. It is reclassification itself that poses the legal and policy difficulties described above, not asserting Title II authority as the basis for the open Internet rules. Reclassification alone would impose a bevy of common carrier duties on broadband providers, deterring network investment and innovation and fostering tremendous uncertainty. And a decision to forbear from portions of Title II would have the same shortcomings if contingent on a ruling regarding the validity of the open Internet rules as would any non-contingent forbearance decision.

VI. THE COMMISSION SHOULD ADOPT FAIR AND EFFICIENT ENFORCEMENT MECHANISMS.

The NPRM raises a number of constructive proposals regarding enforcement of the new open Internet rules, and Comcast welcomes the opportunity to begin a dialogue on how best to establish fair and efficient enforcement mechanisms going forward. Comcast agrees with the Commission that any new enforcement procedures must “provide legal certainty, so that broadband providers, end users and edge providers alike can better plan their activities in light of clear Commission guidance,” and at the same time should allow for sufficient “flexibility to consider the totality of the facts in an environment of dynamic innovation.”²¹⁹ The Commission also is correct in tentatively concluding that the best way to balance these goals while also ensuring “effective access to dispute resolution[.]” would be to rely primarily on the same three enforcement mechanisms that it has used to enforce the 2010 open Internet rules—self-initiated investigations, informal complaints, and formal complaints.²²⁰

²¹⁹ NPRM ¶ 163.

²²⁰ *Id.*

In developing these enforcement mechanisms, however, the Commission should take concrete steps to ensure their transparency and fairness. As an initial matter, it is vital that the Commission provide broadband providers that are the subject of any investigations or complaints with sufficient information as to the alleged conduct being investigated, the alleged target of such conduct, and the time period over which such conduct allegedly occurred. Without this information, broadband providers would be limited in their ability to respond adequately to such inquiries—thus preventing broadband providers from defending themselves effectively, and potentially depriving the Commission of critical information that could inform its case-by-case analysis. While Comcast does not suggest that the Commission cannot take anonymous complaints into account as it attempts to monitor any emerging problems,²²¹ broadband providers should not be called upon to respond to complaints that lack full information as to the circumstances being complained of and the complainant involved, and plainly should not be subject to administrative penalties without an adequate opportunity to respond.

While the NPRM notes concerns about possible “retaliation” in the event of a complaint, such concerns are misplaced.²²² The Commission processes tens of thousands of non-anonymous complaints of all kinds each year by forwarding them to telephone, cable, satellite, and wireless companies. The NPRM cites no evidence that this well-established procedural mechanism has led to “retaliation” of any sort against subscribers. Indeed, any adverse action by a broadband provider against an individual or entity that files a complaint with the Commission would be self-defeating, in light of the loss of goodwill and competitive harm that inevitably would result from such conduct. The Commission has appropriately declined to adopt proposals

²²¹ See *id.* ¶ 172 (asking whether the Commission should “permit individuals to report possible noncompliance with our Open Internet rules anonymously”).

²²² *Id.*

in other contexts that would have allowed anonymous complaints based on unsubstantiated retaliation concerns, such as in its 2011 order establishing a complaint-based regime for the enforcement of new rules under the Twenty-First Century Communications and Video Accessibility Act of 2010.²²³ The Commission should reject similar proposals here.

The Commission also should take this opportunity to explore additional procedural mechanisms that would increase the legal certainty surrounding its rules. Given the dynamic nature of the Internet ecosystem, the Commission should consider possible avenues for providing authoritative guidance to parties considering such new services or arrangements, in order to ensure that the development of innovative and socially beneficial offerings is not stymied by the threat of adverse enforcement action. As the NPRM acknowledges, one possible mechanism for providing clarity to parties would be the issuance of declaratory rulings, either in response to specific petitions or on the Commission's own motion.²²⁴ Comcast also remains open to other potential mechanisms for providing guidance—such as a business-review-letter process, non-binding staff opinions, or enforcement advisories.²²⁵ However, if the Commission pursues these alternative mechanisms, it should ensure that such mechanisms provide consistency and clarity in the enforcement of the rules, not contradictory guidance and confusion.

²²³ See *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 14557 ¶ 250 (2011) (rejecting proposal to permit anonymous complaints based on “concern[s] about retaliation”). While the Commission did permit individuals in that proceeding to “anonymously apprise the Commission of possible unlawful conduct” that might “trigger an investigation by the Commission on its own initiative,” the Commission made clear that “supplying such information is not tantamount to filing an informal complaint” that would *automatically* trigger certain procedures. *Id.*

²²⁴ 47 C.F.R. § 1.2(a); see also NPRM ¶ 165 (raising the possibility of issuing “declaratory rulings” to provide certainty regarding the Commission’s rules).

²²⁵ See NPRM ¶ 165.

Additionally, the Commission should seek the input of technical advisory groups, such as the OIAC, the Broadband Internet Technical Advisory Group (“BITAG”), the Internet Engineering Task Force (“IETF”), and the North American Network Operators Group (“NANOG”), to assist the Commission in developing a set of industry best-practices that could serve as presumptive safe harbors in enforcement proceedings.²²⁶ Comcast has long supported proposals to develop a government-led “co-regulatory” framework under which the Commission would leverage the expertise of one or more third-party groups in providing guidance to broadband providers and other marketplace participants.²²⁷ As Comcast has explained in the past, such an approach has a variety of benefits, including the development of norms that reflect maximum stakeholder input and thereby reinforce the collaborative and symbiotic nature of the Internet ecosystem, and the increased likelihood that Internet openness standards keep pace with evolving marketplace practices and conduct.²²⁸ The Commission thus should carefully examine how to incorporate the contributions of OIAC, BITAG, IETF, NANOG, and potentially other organizations and institutions into its policymaking and regulatory efforts in this area.

VII. CONCLUSION

For the foregoing reasons, the Commission should adopt rules consistent with the discussion above to protect and preserve the open Internet. The Commission should not adopt rules that are more intrusive than those it adopted in 2010, and in all events, should not reclassify

²²⁶ *Id.* ¶ 176.

²²⁷ *See, e.g.*, Reply Comments of Comcast Corp., GN Docket No. 09-191, at 5 (Apr. 26, 2010).

²²⁸ *See id.* at 9 (citing Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. Davis L. Rev. 529, 569-72 (Dec. 2009)).

broadband Internet access service, or any component thereof, as a Title II telecommunications service.

Respectfully submitted,

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