BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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

**REPLY COMMENTS OF COMCAST CORPORATION**


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**COMMENTS OF COMCAST CORPORATION**

Comcast Corporation ("Comcast") hereby replies to comments filed in response 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 reiterates its support for the Commission to adopt new, strong open Internet rules pursuant to Section 706 of the Telecommunications Act of 1996.[2] Initial comments filed in this proceeding reflect a broad consensus as to the need for and the shape of new open Internet rules. The differences among commenters primarily relate to the source of authority for those rules, and Comcast believes it is clear that Section 706 provides the best approach.

## I. INTRODUCTION AND SUMMARY

For the first time since the Commission has considered adopting open Internet rules, there is nearly universal support for it to do so. Broadband providers, content and application providers, device manufacturers, equipment vendors, content delivery networks, state

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1 *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (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*, Public Notice, 29 FCC Rcd. 5856 (2014).

2 47 U.S.C. § 1302.

commissions, think tanks, and public interest groups all largely agree that new rules will strengthen the open Internet and ensure that it remains a vital engine for innovation, economic growth, and free expression. The Commission should seize this opportunity and avoid any drastic steps that would jeopardize this unprecedented consensus.

Commenters overwhelmingly agree that the Commission should continue to use the transparency rule as a central means of promoting openness, reinstate the 2010 no-blocking rule with a revised rationale, and adopt a nondiscrimination rule to govern direct commercial relationships between broadband providers and edge providers relating to the transmission of Internet traffic over broadband Internet access service. These steps will establish strong protections for the open Internet, and because the rules would enjoy consensus support from across the Internet ecosystem, this approach will minimize the risk of ensnaring the Commission in protracted litigation. Few doubt that the Commission can establish this framework pursuant to Section 706, and those that do plainly misinterpret the D.C. Circuit's opinion in *Verizon*.

The record makes equally clear that pursuing reclassification of broadband Internet access service as a Title II "telecommunications service" would be profoundly unwise, factually unsupported, and very likely legally invalid. Proponents of reclassification fail to rebut the overwhelming record evidence demonstrating the substantial harms to broadband investment and innovation that would result from such a move. Proponents also fail to recognize that Title II would not prohibit the types of arrangements they are trying to ban. And they fail to demonstrate that the "factual particulars" of broadband Internet access service have changed in a manner that could conceivably justify upending nearly two decades of precedent classifying the service as an "information service." Moreover, the record now provides even more grounds for rejecting the "alternative" Title II approaches advanced by Mozilla and others, and confirms the

Commission's long-held view that forbearance likely would only add to the innovation-squelching and investment-dampening uncertainty surrounding reclassification. For all these reasons, it is clear that the "risk/benefit analysis" tilts decisively against Title II reclassification, and in favor of the Commission's tentative conclusion to adopt targeted rules under Section 706 to establish effective oversight while promoting continued investment in broadband infrastructure and innovation in the broadband economy.

The record also confirms that the Commission has ample authority under Section 706 to address specific conduct that may threaten Internet openness, including anticompetitive "paid prioritization" arrangements. Notwithstanding that no party is contemplating entering into paid prioritization deals, a wide array of broadband ISPs have voiced their strong support for a variety of possible regulatory measures under Section 706 to restrict paid prioritization arrangements. These proposals under Section 706, which include a strong presumption against such arrangements and other robust restrictions, provide a clear and effective path forward, and demonstrate that it is entirely unnecessary to pursue Title II reclassification in order to address concerns regarding hypothetical paid prioritization arrangements.

Although Comcast supports the broad framework proposed in the NPRM and, in particular, is firmly committed to ensuring that consumers have access to meaningful information that empowers them to make informed choices about their broadband Internet access service, a number of commenters raise legitimate concerns regarding certain proposed expansions of the transparency rule. Before adopting any such expansions, the Commission should make certain that the benefits to consumers would outweigh any new burdens, privacy concerns, or potential security risks, a test that many of the proposals do not meet.

Finally, the record lacks support for the Commission to depart from its tentative conclusion to exclude traffic exchange arrangements from the scope of the rules. The competitive marketplace has successfully governed Internet traffic exchange since the inception of the Internet, and there is no basis in the record to reverse course now. Wading into traffic exchange issues in this proceeding would not only preempt the Commission's efforts to study this issue in other contexts, and upend a successful, longstanding, competitive marketplace, but it also would jeopardize the widespread support that presently exists for the Commission's open Internet proposals.

## II. THERE IS BROAD SUPPORT FOR THE GENERAL CONTOURS OF THE OPEN INTERNET RULES PROPOSED IN THE NPRM

The record demonstrates that a broad consensus has formed around the core proposals set forth in the NPRM. As is the case in most rulemaking proceedings, there are some disagreements over the details of the rules, and some parties oppose the legal roadmap validated by the D.C. Circuit in *Verizon*. But these disagreements should not obscure the widespread agreement that now exists on the central components of the proposed rules.

To begin with, commenters agree that transparency should continue to serve as a critical part of the Commission's open Internet framework. Transparency "discourages intentional blocking or discrimination against edge services by inviting intense scrutiny from the public, the press, and regulators," and thus deters practices that are contrary to Internet openness "[p]erhaps more than any regulation."[3] As ITIF explains, "[r]equiring broadband providers to explicitly disclose their network management practices allows consumers, advocacy groups, regulators, and edge providers to know what is being done and how it affects them."[4] By empowering

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3 CEA Comments at 8.

4 ITIF Comments at 21.

consumers and entities across the Internet ecosystem in this manner, such disclosures "allow the marketplace to function more effectively and more efficiently."[5] Minor modifications to the transparency rule may be appropriate if they provide consumers with access to meaningful information about their service options. However, commenters largely agree that the disclosures that broadband providers already make appropriately empower consumers to make informed choices, and that the proposed expansions of the rules should in large part be rejected.[6]

In addition, there is widespread consensus that the Commission should reinstate the 2010 no-blocking rule with the revised rationale proposed in the NPRM, consistent with the D.C. Circuit's guidance in *Verizon*. Even those commenters that caution against excessive regulation are not opposed to this approach,[7] and nearly all agree that such a rule could be adopted pursuant Section 706.[8] There is also broad consensus as to the form that this rule should take. Even

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5 ADTRAN Comments at 41.

6 *See, e.g.*, NCTA Comments at 48 ("[T]he Commission should find that the current rules have been effective and that additional disclosure obligations for ISPs would be unwarranted."); AT&T Comments at 80 ("[T]he record clearly demonstrates that AT&T and other providers are not only complying with their obligations under the transparency rule, but surpassing them."). Vonage offhandedly alleges that Comcast's disclosures lack sufficient technical detail about its network management practices, but Comcast maintains a comprehensive Network Management Information Center that Vonage overlooks completely. *See* Vonage Comments at 26-27. Ironically, Microsoft faults Comcast, among others, for providing *too much* technical detail in its disclosures. *See* Microsoft Comments at 30 & n.71.

7 *See, e.g.*, TIA Comments at 23-24 (suggesting that the Commission could adopt a no-blocking rule despite the fact that "marketplace discipline is the most effective and efficient mechanism for ensuring Internet openness"); Cox Comments at 22 ("Cox would not oppose the proposal to reinstate the rule adopted by the Commission in 2010, as long as the Commission extends such a prohibition to both fixed and mobile broadband providers and to edge providers," even though broadband providers already have "every incentive to encourage customers to make full use of the network.").

8 CCIA's argument that the court went to "painstaking lengths to explain why the [no-blocking rule] cannot be seen as anything but common carrier regulation[]" is simply wrong. CCIA Comments at 12; *see also* Common Cause Comments at 12-13. Indeed, "[a]lthough the D.C. Circuit vacated the 2010 no-blocking rule, it proposed a path forward for the Commission

parties supporting aggressive regulation believe that mandating a "minimum level of access" based on quantitative performance standards "would strangle the evolution of innovative edge services by freezing the minimum level of service in time."[9] And the record is virtually devoid of support for an undefined "reasonable person" standard. Such a standard would be "vague," "subject to manipulation," and would "fail[] to deliver edge service providers the certainty needed to encourage investments in new edge services."[10] Indeed, the only "minimum level of access" that commenters broadly support is a requirement for broadband providers to deliver Internet traffic on a "best efforts" basis, which Comcast supports.[11]

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to re-adopt the same rule under a revised rationale." AT&T Comments at 73; *see also Verizon v. FCC*, 740 F.3d 623, 658 (D.C. Cir. 2014). Specifically, 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 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." *Verizon*, 740 F.3d at 658.

[9] Microsoft Comments at 16; *see also* Mozilla Comments at 16 (stating that "[s]uch a standard would effectively empower the Commission to determine what level of performance is needed for Internet applications and services to be satisfactory to users," and "scaling such a standard over time seems prohibitively difficult"); Public Knowledge Comments at 47 (stating that "any nationwide guaranteed minimum standard will slow the growth of higher speed networks by locking in a speed that is slower than is available in many parts of the country").

[10] Microsoft Comments at 18. As AARP notes, the only assumption that the Commission should make about a reasonable person's expectations is that "the typical consumer expects that when they purchase a broadband connection that advertises an 'up-to' speed, they will have the potential to reach all Internet content at the speed for which they pay." AARP Comments at 33-34; *see also* Ericsson Comments at 15 (explaining that the "reasonable person" standard could simply "require that consumers get what they pay for").

[11] *See* Comcast Comments at 19-21; *see also* Verizon Comments, Katz Decl. ¶ 32 ("A carefully crafted rule that ensures that traffic will not be blocked or degraded over an end user's best-effort Internet access service would provide assurances that end users could access the content and applications that they desire and that edge providers would continue to have a path to reach end users."); Online Publishers Association Comments at 11-12 ("This standard would be flexible and could evolve over time as common consumer uses of the Internet change. Adopting a flexible and consumer-facing approach like this one will provide ISPs and edge providers the flexibility to reach arrangements that promote innovation, protect against ISP behavior that

Likewise, the record contains broad support for the Commission to adopt an anti-discrimination rule to govern commercial relationships between broadband providers and edge providers relating to the transmission of Internet traffic over broadband Internet access service. While parties differ as to the exact formulation that should be used to implement this standard, the record reflects more agreement than disagreement.[12] For example, Comcast and other major broadband providers agree that the Commission could prohibit any "paid prioritization" arrangements that threaten Internet openness or would harm consumers or competition.[13] And even commenters that urge the Commission to reclassify broadband under Title II recognize that an anti-discrimination rule should not be (and indeed cannot be) "absolute or inflexible."[14] Regardless of what form this safeguard takes, the record lacks support for a standard that would extend beyond discrimination and that would apply to all broadband provider "practices," as the proposed rule could be interpreted to do.[15]

Furthermore, commenters agree that the Commission should not abandon its tentative conclusion that any new open Internet rules should apply only to mass market broadband Internet

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diminishes the ability of edge providers to deliver content and applications over standard Internet connections, and avoid a prescriptive technical standard which will quickly become outdated.").

12 Various proposals are discussed in Section III below.

13 *See* Comcast Comments at 24 (suggesting that the Commission could adopt a rebuttable presumption against paid prioritization arrangements); Verizon Comments at 38 ("On an appropriate record demonstrating that certain paid prioritization practices have clear anti-competitive or anti-consumer effects, the Commission even could create a rebuttable presumption that those specific practices are unreasonable – without lapsing into common carriage."); AT&T Comments at 31-39 (proposing that the Commission could (1) adopt a ban on all paid prioritization that is not user-directed, or (2) apply more heavy-handed regulation to broadband providers that do not voluntarily commit to refrain from paid prioritization).

14 CDT Comments at 9.

15 *See* AT&T Comments at 94 (explaining that the standard should be focused on "ensuring that ISPs transmit packets over their last-mile networks in a nondiscriminatory fashion").

access services, and for good reason. Extending open Internet rules to specialized services would discourage network investment and squelch the development of new and innovative service offerings.[16] There is simply "no evidence that the specialized services exemption was used to circumvent the open Internet rules when they were in effect, and there is no basis to diverge from the approach the Commission took in 2010."[17] Likewise, all but a handful of commenters recognize that traffic exchange issues "raise fundamentally different considerations" than those at the core of this proceeding.[18] Any attempt to shoehorn these issues into this

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[16] The ability to offer specialized services could be critical to advancements in areas such as "remote surgery, distance learning, and the Internet of Things," and these are just the categories services currently on the horizon. Verizon Comments at 76; *see also* TIA Comments at 30 ("[Specialized services] deliver significant benefits. For consumers, these range from potentially life-saving treatments coordinated through telehealth services such as remote surgery to high-quality video entertainment to energy savings delivered via remote home monitoring."). Indeed, "[t]he specialized services demanded by consumers 12 months from now may not even exist today, given the dynamic nature of the application, web service and cloud service marketplace." Alcatel-Lucent Comments at 18. Given the wide range of performance characteristics required by different applications, the Commission should "defer to service providers and consumers, who should be free to (continuously) decide the future set of specialized services and the performance required for an optimal user experience." *Id.*

[17] CEA Comments at 12. Indeed, extending open Internet rules to *any* services that do not meet the definition of mass market broadband Internet access could produce harmful results. For example, the Alarm Industry Communications Committee suggests that the rules should be applied to enterprise services, AICC Comments at 4, but such an expansion would dramatically reduce providers' ability to customize their services to enterprise customers' needs. *See* Verizon Comments at 78 ("[I]mposing new terms that enterprise customers might not desire and have not bargained for could render certain enterprise offerings uneconomic (e.g., by reducing investment incentives and altering bargaining power) and undesirable (e.g., by disabling priority features specifically sought by private IP enterprise customers)."); Cox Comments at 14 ("[B]usiness customers frequently enter into long-term contracts for customized service packages that are individually negotiated after the issuance of a request for proposals."); CompTel Comments at 17 n.48 (supporting "the Commission's proposal to continue recognizing the distinction between residential services and enterprise services, 'which are typically offered to larger organizations through customized or individually negotiated arrangements' and thus not subject to the proposed Open Internet Rules") (quoting NPRM ¶ 58).

[18] NCTA Comments at 78; *see also* Cox Comments at 16 ("Internet traffic-exchange arrangements of the type described in the NPRM present a distinct and significantly more

rulemaking would risk derailing the Commission's process and undermining the widespread agreement that the otherwise exists in the record.

The Commission should acknowledge—and act on—the consensus that has formed around these issues. Adopting a framework consistent with these principles will strongly promote the development of the open Internet while minimizing the risk of creating uncertainty in the Internet ecosystem due to a years-long legal battle. It will thus allow broadband providers and edge providers alike to continue investing and innovating to the benefit of consumers.

## III. THE RECORD MAKES CLEAR THAT TITLE II IS NOT A VIABLE PATH FORWARD

Just as the opening comments provide a clear mandate to the Commission regarding the appropriate content and scope of the new open Internet rules, it is equally apparent from the record that the Commission should *not* rely on Title II in adopting those rules. As explained below, proponents of reclassifying broadband Internet access service as a "telecommunications service" under Title II fail to overcome the voluminous record evidence of the serious policy harms presented by such an approach, and likewise fall well short of offering any compelling legal argument for reversing the Commission's repeated, fact-based, reliance-backed determinations that broadband Internet access is properly classified as an "information service." The comments also confirm that the alternative proposals advanced by Mozilla and others for adopting rules under Title II are without merit, and that the Commission could not effectively cure the legal and policy ills of a Title II-based approach through forbearance proceedings. The Commission thus should categorically reject the Title II-based proposals in the record, and

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complex set of issues than the delivery of Internet content and services over a single network operator's last-mile facilities.").

instead follow the guidance of the D.C. Circuit by relying on Section 706 as legal authority for the new open Internet rules.

### A. Proponents of Title II Reclassification Misapprehend the Policy Implications of Such a Dramatic About-Face

The record in this proceeding reflects widespread recognition that reclassifying any component of broadband Internet access service as a Title II "telecommunications service" would represent a harmful reversal of policy, and that the profound risks associated with reclassification substantially outweigh any putative benefits. As Comcast explained in its opening comments, heavy-handed common-carrier regulation would be a poor fit for the rapidly evolving and dynamic broadband marketplace, and would threaten to slow or reverse the substantial investment and innovation in broadband driven by years of light-touch regulation that has been embraced on a bipartisan basis.[19] A wide array of commenters agree. Numerous parties that have actually invested in the infrastructure that makes up the Internet recognize that application of Title II would squelch the incentive to continue investing.[20] A number of other stakeholders similarly espouse the benefits of proceeding under Section 706 and acknowledge

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19 *See* Comcast Comments at 43-50.

20 *See, e.g.*, NCTA Comments at 18 ("Reversing course now and subjecting current and future broadband services and networks to common-carrier regulation would dramatically upset the private sector incentives that have fueled the explosive growth of the Internet."); Cisco Comments at 27 ("[R]eclassification would clearly disrupt the reliance interests of network providers, who have invested billions in building networks based on the expectation that broadband Internet access service is subject to light-handed regulation as an information service. . . . Reclassification would engender regulatory uncertainty, discouraging investment in facilities and stifling the innovation and dynamism that characterizes the broadband Internet market today."); Akamai Comments at 10 ("Any slowing of investment in the underlying networks will make it more difficult for providers, like Akamai, to deploy innovative services and handle the vastly increasing volume of Internet traffic. Indeed, all players in the Internet ecosystem must work in tandem to provide consumers with the capabilities they demand. Without new investment in networks, the existing incentives to further innovate on those networks will diminish.").

the potential harms to innovation and investment that would result from reclassification under Title II.[21] Even several prominent edge providers urge the Commission to adopt "light-touch rules" and stop conspicuously short of endorsing Title II as the legal basis for such rules.[22] These comments dovetail with a report released by the White House in 2013, touting the Commission's historical "light-touch" approach under Section 706 as a means of protecting consumers effectively while "foster[ing] both innovation in applications and deployment of infrastructure."[23]

Those commenters who call for reclassification are mistaken as to the policy implications of applying Title II in the broadband context. For example, Free Press makes the outlandish claim that Title II is a "highly deregulatory framework and market-driven approach" that Congress intended to apply to mass-market broadband services[24]—seemingly unaware of the absurdity of characterizing common-carrier, utility-style regulation dating back to 1934 as "deregulatory." Netflix likewise asserts that Title II "does not mean more regulation"[25]—apparently oblivious to the fact that parties are objecting to such an approach precisely because

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21 *See, e.g.*, Free Market Advocates Comments at 5 ("Instead of boosting broadband deployment, Title II would stifle core infrastructure investment."); CWA & NAACP Comments at 15 ("[T]he Commission correctly concludes that Section 706 provides a sound legal grounding for its Open Internet rules, rules that will continue the successful track record of the 2010 rules in protecting Internet freedom and encouraging investment by in network and edge providers.").

22 *See, e.g.*, Internet Association Comments at 16-18 (commenting on behalf of Amazon, Google, Facebook, and other leading edge providers, supporting the adoption of "simple, light-touch rules," and not endorsing a Title II-based approach).

23 White House, Office of Science and Technology Policy & The National Economic Council, *Four Years of Broadband Growth* 14, 20-21 (June 2013), *available at* http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf.

24 Free Press Comments at 36-46, 55-63.

25 Netflix Comments at 24 n.42.

of the substantial, unwarranted, and harmful regulatory burdens that Title II would impose on the broadband marketplace.

Of course, these assertions could not be further from the truth. The Commission itself has already recognized that regulating broadband Internet access providers as common carriers could "seriously curtail the regulatory freedom that . . . was important to the healthy and competitive development of the enhanced-services industry."[26] The Commission's petition for certiorari in the *Brand X* case similarly acknowledged that reclassification would impose a host of onerous regulatory burdens that would "fundamentally change the regulatory environment"—noting that ISPs "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," among other obligations.[27] Free Press itself concedes elsewhere in its comments that Title II would result in more onerous restrictions on ISPs than would apply under Section 706.[28] And as discussed below, any suggestion that the Commission could quickly and easily use its forbearance authority to address the excessive regulatory burdens associated with Title II is both unrealistic and disingenuous, particularly given the assertions elsewhere by Free Press that any forbearance measures should be sharply

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[26] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 ¶ 46 (1998) ("*Universal Service Report*").

[27] 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), *available at* http://transition.fcc.gov/ogc/documents/filings/2004/BrandX.pet.final.pdf ("FCC/DOJ Petition for *Cert.*") (citing 47 U.S.C. §§ 201(a) and (b), 202(a), 203, 251(a)).

[28] *See* Free Press Comments at 128 (stating its view that "[a] restoration of basic common carriage is the Commission's only option to achieve the high-level goals" of the NPRM).

curtailed and must overcome very high hurdles.[29] Accordingly, there is no serious dispute that reclassifying broadband providers as common carriers under Title II would lead to substantially more burdensome regulation of broadband providers and services.

The Commission likewise should reject Free Press's incredible claim that treating ISPs as common carriers somehow would lead to an *increase* in broadband investment and innovation.[30] As noted above, the record in this proceeding—which includes concrete evidence of sustained investments in lightly regulated broadband services that "far outstrip the level of investment in other industries"[31] and multiple studies contrasting the high level of broadband investment in the United States with diminished European investment in broadband services regulated as public utilities[32] —exhaustively demonstrates that the opposite is true.[33] In particular, Free Press is

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29 *See infra* Section III.B.

30 Free Press Comments at 98-112.

31 NCTA Comments at 7-9 (citing White House, Office of Science and Technology Policy & The National Economic Council, *Four Years of Broadband Growth* (June 2013); Progressive Policy Institute, *The State of U.S. Broadband: Is It Competitive? Are We Falling Behind?* (June 2014), *available at* http://www.progressivepolicy.org/slider/the-state-of-u-s-broadband-is-it-competitive-are-we-falling-behind/; Progressive Policy Institute, *Investment Heroes: Who's Betting on America's Future?* (July 2012), *available at* http://progressivepolicy.org/wp-content/uploads/2012/07/07.2012-Mandel_Carew_Investment-Heroes_Whos-Betting-on-Americas-Future.pdf).

32 *See* NCTA Comments at 9-10, 20-21 (citing Roslyn Layton, American Enterprise Institute for Public Policy Research, *The European Union's Broadband Challenge* (Feb. 2014), *available at* http://www.aei.org/files/2014/02/18/-the-european-unions-broadband-challenge_175900142730.pdf; Prof. Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* (June 2014), *available at* https://www.law.upenn.edu/live/files/3353-us-vseuropean-broadband-deployment-summary); *see also* Comcast Comments at 47-48 (citing 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), *available at* http://www.copenhageneconomics.com/Website/News.aspx?PID=3058&M=NewsV2&Action=1&NewsId=708).

simply wrong when it attempts to attribute a spike in infrastructure investment in the late 1990s to some "expect[ation]" on the part of cable operators that their nascent broadband services would be subject to Title II.[34] Cable operators have never been subject to common-carrier regulation with respect to their broadband services, and had no reason to "expect[]" in the late 1990s that such regulation was on the horizon. To the contrary, the Commission's 1998 *Universal Service Report*, which coincided with the "spike" observed by Free Press, expressly declined to subject information service providers to common-carrier regulation under Title II and characterized such proposals as bad policy.[35] Moreover, Free Press willfully ignores other, more obvious reasons behind the increase and later decrease in infrastructure spending in the late 1990s and early 2000s—namely, the dot-com bubble, which burst right as Free Press's figures show a decline in industry spending.[36] If Free Press's strident claims regarding the supposed *positive* effect of common-carrier regulation on broadband investment and innovation seem too counterintuitive to be true, that is because they are.

### B. The Record Also Demonstrates That Forbearance Is Not an Effective Solution to the Legal and Policy Problems Posed by Title II

The comments also confirm that the Commission cannot rely on forbearance as a cure-all for the significant harms presented by Title II reclassification. Proponents of a Title II-based

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[33] In fact, recent reports have found that, as a result of this underinvestment in European broadband networks regulated as public utilities, "[t]he surge in data flowing through video-streaming services such as Netflix Inc. could be more than Europe's networks can handle." *See* Cornelius Rahn & Amy Thomson, *Netflix May Strain European Networks on Video Demand*, Bloomberg, Sept. 4, 2014, *available at* http://www.bloomberg.com/news/2014-09-03/netflix-may-strain-european-networks-as-streaming-demand-swells.html.

[34] Free Press Comments at 103.

[35] *Universal Service Report* ¶ 46.

[36] *See* Andrew Beattie, *Market Crashes: The Dotcom Crash*, Investopedia, *available at* http://www.investopedia.com/features/crashes/crashes8.asp.

approach often assert that "[t]he Commission's forbearance authority is more than adequate to prevent any regulatory overreach" and to provide certainty as to broadband providers' obligations under Title II.[37] But these assertions fly in the face of the Commission's longstanding recognition that its forbearance authority "is not in this context an effective means of remov[ing] regulatory uncertainty."[38] As the Commission has explained, "[f]orbearance proceedings would be time-consuming and hotly contested and would assuredly lead to new rounds of litigation, and there is no way to predict in advance the ultimate outcome of such proceedings."[39] Accordingly, forbearance proceedings likely would only add to the uncertainty surrounding reclassification, and would not ensure that ISPs avoid the full panoply of burdensome and often inapposite Title II obligations.

Indeed, a closer look at the positions advanced by proponents of Title II makes clear that any forbearance efforts would be far from guaranteed. Many of these parties propose only minimal forbearance measures, and expressly urge the Commission to retain a broad swath of Title II regulation post-reclassification.[40] CompTel, which, as noted above, praises forbearance as a means of avoiding "regulatory overreach," later provides a long list of Title II requirements that it believes should be put in place for broadband ISPs, including the full suite of interconnection and unbundling obligations under Sections 251 and 252 and universal service

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37 CompTel Comments at 21-22; *see also* CCIA Comments at 9; Vonage Comments at 46; Public Knowledge Comments at 80-83.

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

39 *Id.*

40 *See, e.g.*, Public Knowledge Comments at 88-95; CompTel Comments at 21-24; New Media Rights Comments at 25; Mozilla Comments at 13; NARUC Comments at 14-16; Rural Broadband Policy Group Comments at 8-9.

contribution obligations under Section 254.[41] Public Knowledge proposes forbearing from only *four* of Title II's provisions, while identifying dozens of provisions that it believes should not be subject to forbearance.[42] Moreover, many of these parties argue in other contexts that the forbearance standard is and should remain very difficult to satisfy, requiring detailed and highly granular market-specific analyses,[43] while some even claim that the Commission would have to initiate an entirely separate proceeding to consider *any* forbearance proposals.[44] The Commission thus would encounter substantial opposition to any effort to grant broadband ISPs meaningful forbearance from Title II regulation.

And while some parties argue that forbearance would preserve the traditional "light touch" regulation that has always applied to broadband services, others see Title II as a springboard from baseline open Internet rules to "open access" requirements that would entail intrusive, unprecedented, and unworkable wholesale unbundling obligations.[45] The Commission recognized long ago that a forced access regime would undercut incentives to infrastructure investment—precisely the opposite of the goal that the Commission seeks to advance.[46] Such

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41 CompTel Comments at 21-24.

42 Public Knowledge Comments at 88-89.

43 *See, e.g.*, Free Press Comments, GN Docket No. 12-353, at 8 n.6 (filed Jan. 28, 2013) ("[W]e strongly believe the public interest is best served when the Commission considers Section 10 forbearance in specific cases for specific carriers in specific markets, with the Commission's general rulemaking procedures most appropriate for questions about the continued necessity of generally applicable rules.").

44 Public Knowledge Comments at 95-97.

45 *See, e.g.*, CompTel Comments at 19; i2Coalition Comments at 11-13; EFF Comments at 21-23.

46 *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 ¶ 43 (2002) ("*Cable Modem Order*").

efforts to effect a radical expansion of the 2010 rules through Title II, rather than maintaining a largely deregulatory framework, powerfully illustrate that the hypothetical availability of forbearance would not readily lead to the imposition of narrowly tailored rules.

### C. The Record Is Devoid of Any Legal or Factual Basis for Reclassifying Broadband Internet Access Service Under Title II

In addition, proponents of reclassifying broadband Internet access service under Title II have failed to demonstrate that such a dramatic about-face would be supported by facts, as the law requires. As the Supreme Court has explained, and as Comcast and several other parties point out in their comments,[47] the appropriate classification of broadband Internet access service turns on "whether the transmission component of [the service] is sufficiently integrated with the finished service to . . . describe the two as a single, integrated offering"[48]—a question that, in turn, depends on "the factual particulars of how Internet technology works and how it is provided."[49] The Commission has long held that the relevant "factual particulars" demonstrate that broadband Internet access service is properly classified as an "information service" under Title I rather than a "telecommunications service" under Title II. In the 2002 *Cable Modem Order*, the Commission found that broadband Internet access service provided via cable modem is an "information service" because it "combines the transmission of data with computer processing, information provision, and computer interactivity,"[50] and explained that while "cable modem service provides the[se] capabilities . . . 'via telecommunications,'" that

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47 *See* Comcast Comments at 56-57; *see also, e.g.*, NCTA Comments at 30-31; TWC Comments at 10-11; AT&T Comments at 47.

48 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005).

49 *Id.* at 991.

50 *See Cable Modem Order* ¶ 38.

telecommunications component is not "separable from the data-processing capabilities of the service."[51] The Supreme Court expressly upheld this fact-based determination,[52] and the Commission has applied the same reasoning over the years in classifying DSL,[53] broadband over power lines,[54] and wireless broadband services[55] as "information services" rather than "telecommunication services."

Most supporters of a Title II-based approach do not even attempt to argue that the "factual particulars" of broadband Internet access somehow support reclassifying the service as a "telecommunications service." Instead, many parties urge the Commission to pursue reclassification merely because they conflate Title II regulation with "net neutrality" or because they believe Title II provides a clearer path to their preferred policy outcome.[56] Such arguments reveal a fundamental misunderstanding of the relevant legal standards. To begin with, Title II

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51 *Id.* ¶ 39.

52 *See Brand X*, 545 U.S. at 1000 (noting that "'[t]he service that Internet access providers offer to members of the public is Internet access,' not a transparent ability (from the end user's perspective) to transmit information," and therefore holding that "the Commission's construction was reasonable" (internal citations omitted)).

53 *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 ¶ 9 (2005) ("*Wireline Broadband Order*").

54 *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd. 13281 ¶ 1 (2006) ("*BPL Order*").

55 *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901 ¶ 26 (2007) ("*Wireless Broadband Order*").

56 *See, e.g.*, reddit Comments at 9 (asserting a belief that "the FCC cannot [adopt] a bright line rule against discrimination without Title II," and that "in order to enact the rules it must, the FCC needs to classify broadband providers . . . as 'telecommunications services' under Title II of the Communications Act"); WGA West Comments at 30 ("[T]he Commission should use its Title II authority because it provides the clearest, most straight-forward path to protect an open Internet.").

likely would *not* support an outright ban on paid prioritization or other "bright-line" rules that proponents of reclassification appear to favor, as Comcast and others have explained at length.[57] And even if Title II were able to support such rules, that would not be a basis to justify reclassification. As the D.C. Circuit has made clear, the Commission is flatly prohibited from "impos[ing] common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance."[58] Such an approach would rely on policy "ends" to justify legal "means," and almost certainly would be deemed arbitrary and capricious by a reviewing court.

Meanwhile, the few Title II supporters who do attempt to engage the dispositive question of the "factual particulars" of broadband Internet access service fail to identify any material factual changes that could conceivably warrant reclassification.[59] As an initial matter, Free Press, Public Knowledge, and Netflix all mischaracterize the factual basis underlying the Commission's classification of cable modem service as an "information service" in the 2002 *Cable Modem Order*. These parties suggest that the Commission's determination that cable modem service is a functionally integrated "information service" rested largely on the notion that most broadband subscribers took advantage of the e-mail, newsgroup, and webpage creation

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[57] *See* Comcast Comments at 50-54; NCTA Comments at 27-30; *see also infra* Section IV.

[58] *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (holding that the Commission may not confer common-carrier status "depending upon the regulatory goals it seeks to achieve").

[59] Free Press goes so far as to argue that the Commission's classification decisions in this arena have been "wrong" from the beginning, dating back before broadband to earlier "enhanced" services addressed under *Computer II* and *Computer III*, and thus calls into question the validity of more than *two decades* of reasoned policymaking that, as Comcast and other have explained, has fueled the explosive growth of the Internet. *See* Free Press Comments at 54-55, 71-83.

services offered by ISPs as part of their broadband Internet access service, and did not rely on e-mail and other services offered by third parties.[60] Free Press in particular asserts that the classification analysis in the *Cable Modem Order* turned on a finding that "when the consumer buys Internet access service, he purchases the ability to run a 'variety of applications,'" including the ISP's own e-mail and newsgroup applications, and that broadband subscribers in 2002 "'did not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account.'"[61]

But Free Press and others rely on selective and out-of-context quotations to distort the Commission's holding; fairly read, the *Cable Modem Order* plainly confirms that the Commission's classification analysis did not turn on whether consumers relied on e-mail or other services offered by the ISP itself. To the contrary, the *Cable Modem Order* expressly recognizes that broadband subscribers in 2002 were "free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft's 'Hotmail,'" and that "[w]hether the subscriber chooses to utilize functions offered by his cable modem service provider or obtain them from another source, these functions currently are all included in the standard cable modem service offering."[62] The Commission went on to explain in the 2005 *Wireline Broadband Order* that "[t]he information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the

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60 *See, e.g.*, *id.* at 78; Public Knowledge Comments at 70-74; Netflix Comments at 22-25.

61 Free Press Comments at 78 (quoting *Cable Modem Order* ¶¶ 11, 36) (internal alterations omitted).

62 *Cable Modem Order* ¶ 25.

service (*e.g.*, e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service."[63]

It is, therefore, of no moment that, according to Public Knowledge, many consumers "access the [I]nternet in order to access independent, third-party services and make little to no use of [services such as e-mail or web hosting] that ISPs may happen to offer when doing so."[64] Nor is it relevant that, "[t]oday, most consumers receive email accounts for free and those accounts are nearly always provided by someone other than an ISP," as Netflix asserts.[65] The mere fact that various capabilities made available by ISPs (such as email and DNS services) are also available from third parties does not change the integrated nature of the service ISPs continue to *offer* their end users.

If anything, broadband providers' services now include *more* enhanced and functionally integrated components than when the Commission made these classification decisions. In the *Cable Modem Order*, the Commission identified the e-mail, newsgroup, and web-hosting functions noted above, *as well as* other information-processing functions that are tightly integrated with broadband Internet access service, including "protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching."[66] The record in this proceeding reflects that ISPs today have incorporated even more functionally integrated, information-processing elements into broadband

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63 *Wireline Broadband Order* ¶ 15.

64 Public Knowledge Comments at 74.

65 Netflix Comments at 24.

66 *Cable Modem Order* ¶¶ 17-18.

Internet access service, such as "spam protection, pop-up blockers, [and] parental controls,"[67] along with ISP-provided "anti-virus and anti-botnet technologies," cloud-based storage, and "protections against denial-of-service attacks."[68] And with the rise of IPv6 as the eventual replacement for IPv4 as the protocol for identifying and routing Internet content, Comcast and other ISPs also now provide the functionality necessary to transform an IPv4 address into an IPv6 address (and vice versa).[69] Without this processing function performed by ISPs, an end user on the IPv6 Internet could not receive content from an edge provider on the IPv4 Internet.[70] These newer information-processing features and functionalities, like those identified in the Commission's prior classification orders, are "part and parcel" of broadband Internet access service,[71] and further confirm that the "information service" classification adopted by the Commission and validated by the Supreme Court remains valid today.

The related assertions by Title II proponents that broadband Internet access service entails only "transparent" transmission by ISPs, and, therefore, constitutes the offering of a "telecommunications service" to end users, are wrong for the same reasons.[72] As the

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67 AT&T Comments at 49.

68 CTIA Comments at 44.

69 *See* Cisco Systems, White Paper, *NAT64 Technology: Connecting IPv6 and IPv4 Networks* 3 (Apr. 2012), *available at* http://www.cisco.com/c/en/us/products/collateral/ios-nx-os-software/enterprise-ipv6-solution/white_paper_c11-676278.pdf (explaining that ISP-provided functionalities that translate between IPv6 and IPv4 are vital to facilitating the "gradual migration to IPv6 by providing seamless Internet experience to greenfi[el]d IPv6-only users, accessing IPv4 Internet services," and enable "[e]xisting content providers and content enablers [to] provide services transparently to IPv6 Internet users . . . with little or no change in the existing network infrastructure, thus maintaining IPv4 business continuity").

70 *Id.*

71 *Brand X*, 545 U.S. at 997.

72 *See, e.g.*, Free Press Comments at 66-71; Public Knowledge Comments at 70-78.

Commission has repeatedly explained, because "broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications," the end user "receives more than transparent transmission whenever he or she accesses the Internet."[73] The Supreme Court upheld this conclusion, noting that "Internet service is *not* transparent in terms of its interaction with customer supplied information,"[74] and contrasting the information-processing functionalities of broadband Internet access service from the "'pure' or 'transparent' transmission" that characterizes classic voice telephony, which merely "enable[s] the consumer to transmit an ordinary-language message to another point, with no computer processing or storage of the information."[75] As explained above, these conclusions are just as correct today as there were a decade ago—and are even more clearly justified, given the new functionalities now available as part of ISPs' offering of broadband Internet access service.

The record is therefore devoid of any evidence demonstrating that the "factual particulars" of broadband Internet access service have changed in a manner that warrants upending the Commission's long-held and judicially validated "information service" classification. The factual assertions and legal arguments advanced by Free Press, Public Knowledge, Netflix, and others are entirely unsupported, and certainly cannot satisfy the heightened standard for reversing the Commission's prior determinations—rulings that, as Comcast and other have explained, have "engendered serious reliance interests" by ISPs in constructing their networks.[76] Indeed, while Free Press is fond of asserting that the Commission

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73 *Wireline Broadband Order* ¶ 15.

74 *Brand X*, 545 U.S. at 993 (internal quotation marks and citations omitted, emphasis added).

75 *Id.* at 976.

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

repeatedly "got it wrong" in various classification decisions over the past 20 years,[77] the sheer number of times the Commission has classified a broadband Internet access service as an "information service" only underscores how much the Commission would need to undo in order to reverse course as Free Press suggests. The Commission thus should reaffirm its consistent, fact-based classification of broadband Internet access service as an "information service" and, as discussed above, rely on its broad authority under Section 706 to adopt new open Internet rules.

### D. The Record Confirms That Alternative Proposals Under Title II Should Be Rejected As Well

The comments also make clear that the proposals by Mozilla and by Professors Wu and Narechania to separate out and reclassify the transmission functionality available to edge providers as a distinct "telecommunications service" are fundamentally flawed. As Comcast and several other parties pointed out,[78] the proponents of this approach are simply incorrect in suggesting that the classification of such edge-provider-facing transmission functionality is an open question. This proposal would directly contravene the Commission's repeated findings that broadband Internet access service is an "integrated, end-to-end" service for "transmit[ting] data communications *to and from* the rest of the Internet."[79] Moreover, the technical realities of broadband providers' delivery of edge provider traffic confirm that they do not "offer" edge providers "telecommunications" on a stand-alone basis, severed from the information-processing elements of broadband Internet access service.[80] As NCTA correctly explains, "there is no

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77 *See, e.g.*, Free Press Comments at 54.

78 *See* Comcast Comments at 60-61; *see also, e.g.*, NCTA Comments at 39-40; TWC Comments at 20.

79 *Cable Modem Order* ¶ 17 (emphasis added).

80 *See* Comcast Comments at 62.

'service' being offered to edge providers that is distinguishable in any way from the 'service' being offered to end users," and any suggestion to the contrary "runs up against the realities of how the Internet functions."[81] Nor can modern broadband communications be neatly segregated into separate "calls" and "responses" as Wu and Narechania suggest, given that the flow of packets over Internet protocol is dynamic and multidirectional.[82] In light of these serious shortcomings, even commenters that support or are open to reclassification question the validity or effectiveness of these proposals.[83]

Several parties also point out that these proposals run afoul of the definitional requirement that a "telecommunications service" must be offered "for a fee."[84] Mozilla's proposal is that, upon somehow finding a telecommunications service between the ISP and edge providers, the Commission could order that ISPs not *charge* for that service—a step that would remove a necessary foundational element for finding a service to be a telecommunications service in the first instance. In its comments, Mozilla attempts to overcome this fatal flaw by asserting that the "fee" for this hypothesized edge-provider-facing service is the one paid by the ISP's "local subscribers."[85] But the inherent contradiction in Mozilla's position is obvious; Mozilla cannot maintain that the service that ISPs supposedly offer to edge providers is distinct

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81 NCTA Comments at 42.

82 *See* Comcast Comments at 62-63.

83 *See, e.g.*, AARP Comments at 43-44 (noting that the proposals advanced by Mozilla and by Wu and Narechania are "inappropriately grounded in the 'client/server' perspective of Internet architecture, which ignores Mozilla's own assessment of the nature of today's (and tomorrow's) Internet"); City of Los Angeles Comments at 10, 16-17.

84 47 U.S.C. § 153(53); *see, e.g.*, Comcast Comments at 64; Verizon Comments at 64; NCTA Comments at 43.

85 Mozilla Comments at 12.

and severable from the one offered to end users, yet at the same time characterize the rates charged to end users as "fees" attributable to edge providers.[86] Mozilla then suggests that "fee" requirement is somehow satisfied by an amorphous "value" that ISPs derive from delivering edge-provider content.[87] But Mozilla cites no precedent for such a significant departure from the plain meaning of the term "fee," and to Comcast's knowledge, no such authority exists. Moreover, there is no sense in which ISPs "offer" this supposed service to edge providers, as ISPs have no direct relationship with the vast majority of edge providers today and, as Mozilla acknowledges, transmit edge providers' data almost exclusively as a result of their business relationships with end users and with their interconnection partners, and not based on privity with edge providers.[88] The record, therefore, strongly supports rejecting the proposals by Mozilla and others to classify the "transmission" service supposedly offered by ISPs to edge providers as a "telecommunications service" under Title II.

## IV. THE COMMISSION HAS SUFFICIENT AUTHORITY UNDER SECTION 706 TO ENSURE THAT BROADBAND PROVIDERS AND EDGE PROVIDERS DO NOT ENTER INTO PAID PRIORITIZATION ARRANGEMENTS THAT THREATEN INTERNET OPENNESS

In all events, the Commission certainly should not pursue a destabilizing and legally risky Title II approach for the sole purpose of adopting rules addressing so-called "paid prioritization"

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86 Notably, Professor Barbara van Schewick, who appears to support Mozilla's aims, recognizes that its proposal would be unlawful on this basis. *See* Letter from Professor Barbara van Schewick to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191, 14-28, at 1 (Aug. 6, 2014).

87 Mozilla Comments at 12.

88 *See* Mozilla, Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, GN Docket Nos. 09-191, 14-28, at 3-4 (filed May 5, 2014).

arrangements between ISPs and edge providers.[89] Apart from the fact that, as noted above, the Commission may not impose Title II regulation "on the basis of the desired policy goal the Commission seeks to advance,"[90] it is entirely unnecessary to reclassify ISPs as common carriers as a prelude to adopting limits on paid prioritization. To begin with, the record clearly demonstrates that no ISP is engaging in paid prioritization or has any plans to do so.[91] Some ISPs even question whether "there would be much benefit to most Internet traffic from prioritization" over last-mile networks, "particularly given the widespread use of CDNs and other innovative technical means to ensure high-quality transmission of content and the ever-improving capabilities of broadband networks."[92] Accordingly, the prospect that any ISP would ever enter into an agreement that might trigger restrictions on "paid prioritization" remains very remote.[93]

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89 Several commenters have urged the Commission to impose common-carrier regulation on broadband providers for the sole or predominate purpose of restricting paid prioritization arrangements. *See, e.g.*, Netflix Comments at 4-10, 20-22; Open Technology Institute Comments at 22-26; Public Knowledge Comments at 32-34; reddit Comments at 8-9; Vimeo Comments at 15-17.

90 *Sw. Bell*, 19 F.3d at 1481; *see also Nat'l Ass'n of Regulatory Util. Comm'rs*, 525 F.2d at 644 (holding that the Commission may not confer common-carrier status "depending upon the regulatory goals it seeks to achieve").

91 *See, e.g.*, AT&T Comments at 31 ("AT&T has no intention of creating fast lanes and slow lanes or otherwise using prioritization for discriminatory or anticompetitive ends."); Verizon Comments at 37 ("[N]either Verizon nor any other broadband providers of which we are aware has introduced any form of paid prioritization arrangement to date, nor expressed a public interest in doing so. Verizon has no plans for such a service[.]"); Sandvine Comments at 3 ("[T]o the best of our knowledge, none of the innovative service plans that Sandvine has helped implement across our customer base have involved payments between operators and edge providers for traffic priority—so-called Pay for Priority.").

92 Verizon Comments at 37.

93 Public Knowledge attempts to use the current discussion around paid prioritization to air its longstanding criticisms of Xfinity TV On Demand for Xbox and TiVo. Public Knowledge Comments at 52-53; *see also* WGAW Comments at 14. But its description of these

Moreover, even if the Commission were to conclude that restrictions on paid prioritization are necessary, there is broad agreement among ISPs and various other participants in the Internet ecosystem that the Commission can rely on Section 706 to prohibit any paid prioritization arrangements that threaten Internet openness. Indeed, several commenters—including ISPs—offer constructive proposals for addressing paid prioritization under Section 706. In its initial comments, Comcast proposed a rebuttable presumption against "paid prioritization" arrangements that would entirely preclude "exclusive arrangements and arrangements that prioritize a broadband provider's own affiliated Internet content vis-à-vis unaffiliated content" and place a heavy burden on the broadband provider to justify any other "paid prioritization" arrangement.[94] Other commenters have suggested similar approaches. The National Minority Organizations, for example, propose that the Commission establish a rebuttable presumption against paid prioritization, "while ensuring that such presumption can be overcome by business models that sufficiently protect consumers and have the potential to benefit consumer welfare (for example, telemedicine applications)."[95] CWA and the NAACP support "a rebuttable presumption against a vertically-integrated broadband provider favoring its own applications, content, services, or devices."[96] And other ISPs agree that the Commission could adopt a rebuttable presumption barring "certain types of paid prioritization" that "harm

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functionalities is misinformed; they are part of Comcast's Title VI cable service, are available only to Comcast's cable subscribers, and are not offered over a consumer's broadband Internet access service connection. Accordingly, they have nothing to do with paid prioritization.

94 *See* Comcast Comments at 24.

95 *See* National Minority Organizations at 11.

96 *See* CWA & NAACP Comments at 19.

competition or consumers," while leaving "adequate room for other types of differentiated arrangements."[97]

Other broadband providers also have offered alternative strategies. For example, AT&T submitted detailed comments outlining two additional avenues for addressing paid prioritization under Section 706. First, AT&T suggests that the Commission could rely on Section 706 to prohibit all paid prioritization arrangements "where such prioritization is not authorized by end users."[98] And second, AT&T proposes an approach under Section 706 that would entail "imposing additional transparency, no-blocking, and nondiscrimination rules on fixed broadband Internet access providers that do not agree voluntarily to refrain from entering into paid prioritization arrangements."[99]

This collection of proposals in the record offers a strong basis for adopting an effective and legally defensible prohibition against anticompetitive paid prioritization arrangements under Section 706. The *Verizon* court confirmed that Section 706 provided the "requisite affirmative authority" to regulate paid prioritization arrangements that pose a threat to the open Internet.[100] Indeed, the court held that Section 706 provided the *affirmative* authority to adopt the 2010 anti-discrimination rule, which the court understood as essentially entailing a complete *ban* on paid

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97 Verizon Comments at 36-37; *see also* Cox Comments at 27 (urging the Commission to consider "presumptions that provide as much certainty as possible to broadband providers and edge providers" contemplating two-sided arrangements); *cf.* ITIF Comments at 20 ("[T]he Commission is right to subject certain kinds of arrangements to higher scrutiny. In particular, no prioritization arrangement should be exclusive.").

98 *See* AT&T Comments at 31-32; *see also* TechAmerica Comments at 8 ("If ISPs simply offer faster access to certain content, without forcing it upon their customers, those types of arrangements between ISPs and edge providers should be deemed 'commercially reasonable.'").

99 AT&T Comments at 26; *see also id.* at 37-38.

100 *Verizon*, 740 F.3d at 635.

prioritization arrangements.[101] That same authority would authorize proposals that strictly limit paid prioritization arrangements (or outright bar anticompetitive or otherwise harmful agreements). In addition, unlike the 2010 anti-discrimination rule, these proposals would not "regulate broadband providers as common carriers."[102] Although they differ in their particulars, each proposal would impose strict limits on paid prioritization without altogether precluding procompetitive and pro-consumer arrangements. They would, therefore, leave *some* room for "'individualized bargaining'" between ISPs and edge providers, and that is all that is required to avoid subjecting broadband providers to common carriage.[103]

Each proposal thus provides the Commission with a viable option under Section 706 for ensuring that paid prioritization does not become a problem, even apart from the record evidence indicating that broadband providers and edge providers have no interest in pursuing such arrangements. If the Commission decides to address paid prioritization arrangements in this proceeding, using one or a combination of these approaches, or a comparable approach, the Commission can arrive at a solution that meets its aims. At a minimum, these proposals powerfully demonstrate that the Commission can adopt strong restrictions on paid prioritization arrangements *without* resorting to Title II reclassification and subjecting the broadband marketplace to the investment-crushing, innovation-squelching regulatory burdens that inevitably would accompany such a move.

Indeed, Title II not only is unnecessary to achieve the policy objective of limiting paid prioritization, but would not authorize measures that are any more restrictive than those outlined

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101 *Id.* at 649-50.

102 *Id.* at 650.

103 *Id.* at 657 (citation omitted).

above. As Comcast and others have explained, Section 202's prohibition on "unreasonable discrimination" and Section 201's requirement for "just and reasonable" practices both require a fact-specific, case-by-case analysis of the contextual "reasonableness" of the challenged conduct, and thus cannot support the adoption of an *ex ante*, categorical ban on all paid prioritization arrangements.[104] Free Press is simply wrong when it argues that the Commission could prohibit paid prioritization by declaring that it constitutes "*per se* unreasonable" discrimination under Section 202(a).[105] This argument ignores the threshold requirement for finding unreasonable discrimination under Section 202(a)—that the "services" being compared are "functional[ly] equivalen[t]."[106] To begin with, as noted above, ISPs cannot be said to offer any "service" to edge providers, as ISPs have no direct relationship with the vast majority of edge providers. But even if the standard, non-prioritized delivery of edge provider traffic over an ISP's last-mile network could be deemed a "service" offered to edge providers, any paid prioritization arrangement would necessarily entail a materially *different*, "faster" service to the prioritized edge provider than to other edge providers.[107] Thus, by Free Press's own logic, the Commission

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104 *See* Comcast Comments at 50-54; *see also* Alcatel-Lucent Comments at 10; Bright House Networks at 27-28; ITTA Comments at 5-7; NCTA Comments at 27-30; Verizon Comments at 51-53.

105 *See* Free Press Comments at 47-54.

106 *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990).

107 *See* Free Press Comments at 50. Nor does Free Press's assertion that "packet routing is a zero sum game," *id.*, remotely establish that *all* hypothetical priority arrangements would be unreasonable, *see Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1136 (D.C. Cir. 1984) ("The reasonableness of the price disparity must be judged by the circumstances in which it is assessed."). Not all Internet traffic has the same speed and latency needs. "Few would quibble with prioritizing traffic associated with remote heart surgery or other telemedicine applications, or emergency 911-like communications placed using an Internet connection, over email traffic or other applications for which high speed and low latency are not critical." NCTA Comments at 63-64.

could never apply Title II's nondiscrimination requirement to prohibit paid prioritization, even in a case-by-case analysis, because any non-prioritized and prioritized "services" supposedly offered by ISPs would not be functionally equivalent to one another.[108] *A fortiori*, the Commission plainly could not rely on Title II to ban paid prioritization arrangements outright.

## V. THE COMMISSION SHOULD HEED COMMENTERS' CONCERNS REGARDING CERTAIN PROPOSED EXPANSIONS OF THE TRANSPARENCY RULE

As Comcast explained in its comments, the Commission's lodestar in shaping disclosure obligations should be ensuring that consumers receive the information they need to make informed choices. Some of the proposed expansions to the transparency rule, such as the proposal to require disclosure of more performance data and the OIAC's proposal for a "standardized label," could effectively promote this goal. However, a number of commenters raise legitimate concerns that other proposed expansions of the rule would yield little, if any, benefit to consumers. As T-Mobile points out, "inundating users with highly technical statistical information . . . would only cause confusion and make it more difficult for customers to act on pertinent information."[109] Indeed, consumers would suffer if open Internet disclosures became

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[108] Thus, for example, if an ISP were to agree to prioritize the delivery of a particular social network's traffic over its last-mile network, a competing social network experiencing non-prioritized delivery would be unable to bring a successful discrimination claim under Title II, because the non-prioritized delivery afforded to the latter, if a "service" at all, would be different in kind from the prioritized "service" provided to the former. The competing social network *would*, however, be able to take advantage of the restrictions that Comcast and others suggest that the Commission could adopt under Section 706, including any presumption against paid prioritization arrangements.

[109] T-Mobile Comments at 10; *see also* TIA Comments at 22-23 ("Given the relatively sparse evidentiary foundation the Commission has on this issue to date, the FCC should be cautious about adding new disclosure requirements that mandate discussion of technical information that would not be useful to the average consumer."); Frontier Comments at 6 ("It is incongruous for the Commission to affirm that 'recent research suggests that consumers have difficulty understanding commonly used terms associated with the provision of broadband

so dense and lengthy that they resembled the terms of service for a software application or the fine print in a credit card agreement. Thus, it is vital that any new disclosure obligations produce not just *more* data but *meaningful* information that promotes the proper functioning of the marketplace.[110]

Ensuring concrete benefits is essential in light of the substantial new burdens that certain proposed expansions to the rule would create. As the Competitive Carriers Association explains, "providers have already put business processes into place to comply with the existing rules," and "[c]hanging the rules of the game" will require providers to expend considerable resources revisiting and reshaping those processes.[111] A major revamping of existing disclosures would "create an unnecessary burden on providers, particularly on small and rural providers whose resources are already stretched extremely thin."[112] These new burdens would be particularly acute with respect to the Commission's proposal to require entirely new disclosures tailored to edge providers and "providers who seek to exchange traffic with broadband provider networks."[113] As NCTA explains, "ISPs have no way to anticipate the needs of millions of content providers," and it would be "completely impractical" for ISPs to attempt to maintain

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services' and then to require disclosure of highly-technical performance characteristics.") (quoting NPRM ¶ 68).

110 *See* NPRM, Dissenting Statement of Commissioner Michael O'Rielly ("The Notice devotes several pages to a wish list of disclosures, reporting requirements, and certifications that will impose new burdens and carry real costs, but may not even be meaningful to end users.").

111 CCA Comments at 7-8.

112 *Id.* at 7.

113 *See* NPRM ¶¶ 75-76.

disclosures that meet these needs.[114] Nor is it clear that there is any need for this requirement because, as Comcast explained in its opening comments, one of the principal characteristics of the Internet is that any IP-based service can be delivered over it, without special tailoring to a broadband provider's network or a direct relationship with that broadband provider.[115] Moreover, this requirement would be particularly troubling given that edge providers and networks seeking to exchange traffic would have "no reciprocal obligation."[116] Tellingly, even commenters that support major expansions of the transparency rule recognize the flaws in this proposal.[117]

In addition, commenters widely agree that the Commission's proposal to require disclosure of data regarding "application-specific usage" or "which user or device contributed to which part of the total data usage" would be unworkable.[118] While mobile broadband providers already disclose device-specific usage information, "for customers of fixed broadband Internet access services, different users and devices within a single household are not authenticated

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114 NCTA Comments at 52; *see also* Charter Comments at 31 ("Charter is skeptical that it is feasible for broadband providers to monitor and put together technical information about their systems tailored to the varied, possibly idiosyncratic, and ever-changing needs of countless other parties in the Internet ecosystem.").

115 *See* Comcast Comments at 16-17. In the few instances where there *is* a direct relationship between a broadband provider and an edge provider, it is a commercial relationship in which the entities are in direct privity, and the broadband provider *does* share information supporting its contractual obligations.

116 Bright House Comments at 14 ("We question the feasibility of creating disclosures tailored to the varied and potentially unique needs of the hundreds of such providers, particularly with no reciprocal obligation. We also question the need for undertaking such an extraordinary (and one-sided) burden, considering that edge providers, CDNs, cloud computing and software-as-a-service have flourished without such a regulatory mandate.").

117 *See, e.g.*, Online Publishers Association Comments at 9.

118 NPRM ¶ 73.

separately when they use the local network."[119] Thus, NCTA is correct that reporting application-specific data "likely would necessitate significant use of deep packet inspection in an attempt to determine the user or device responsible for originating or receiving particular Internet traffic."[120] This would "require significant ISP resources as well as significant customer coordination."[121] And in any event, edge providers are in a far better position than broadband providers to provide consumers with usage data specific to their applications and services.

Moreover, several commenters rightly point out that certain proposed requirements could raise significant security and competitive concerns. Requiring broadband providers to provide highly granular network information about the management of their networks and interconnection points "could enable cybercriminals to compromise networks or enable other bad actors [to] game the system and degrade service quality for all users."[122] And as Cox explains, some of the proposed expansions "risk exposing commercially sensitive and proprietary information" to competitors that could exploit this information to gain an edge in the marketplace.[123] The knowledge that competitors would gain access to proprietary information about network management tools "might well deter providers from developing new tools

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119 AT&T Comments at 87.

120 NCTA Comments at 50.

121 *Id.*

122 AT&T Comments at 90; *see also* ADTRAN Comments at 43 ("[T]here is a risk that detailed reporting of the ISPs' network management practices could provide a roadmap to entities that seek to exploit the network for cybercrime or cyberterror."); Cisco Comments at 19 ("[T]he Commission should take steps to ensure that any additional obligations will not undercut the flexibility that broadband providers need to operate their networks amidst burgeoning usage and constantly evolving threats.").

123 Cox Comments at 21.

designed to help consumers, thereby stifling innovation."[124] ITIC suggests that this information could be "suitably protected, consistent with existing FCC procedures for treatment of confidential information," but this misses the point entirely.[125] Open Internet disclosures are made to the public, not just to the Commission, and requiring individual consumers to sign protective orders in order to access this information would be absurd. The only practical way for the Commission to avoid dissemination of sensitive information is to refrain from requiring broadband providers to disclose it in the first place.

## VI. THE COMMISSION SHOULD NOT PERMIT THIS PROCEEDING TO BE DERAILED BY TRAFFIC EXCHANGE ISSUES

The comments broadly support the Commission's tentative conclusion to exclude Internet traffic exchange arrangements from the scope of the rules, which is unsurprising given the success of the Commission's hands-off approach to date. The Commission has consciously left Internet traffic exchange unregulated, and the marketplace has performed extraordinarily well.[126] Akamai explains how, in the "relaxed regulatory environment in which the Internet ecosystem historically has been allowed to operate," it was able to become a pioneer in the content delivery industry, devising first-in-the-industry solutions and deploying approximately 150,000 servers

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124 Cisco Comments at 20.

125 ITIC Comments at 5.

126 *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 . . ."). The Commission properly maintained this approach when it adopted the original open Internet rules in 2010. *See Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905 ¶ 67 n.209 (2010) (explaining that the rules were not intended "to affect existing arrangements for network interconnection, including existing paid peering arrangements").

worldwide.[127] Investment and innovation by firms like Akamai have produced a variety of pathways into broadband providers' networks and rapidly declining rates for the transmission of Internet traffic. The Commission should welcome these continuing developments and reject calls to change course now. Indeed, "the projected exponential growth of Internet traffic" will make the ability of market participants to develop innovative traffic exchange solutions "increasingly important to the robust functioning of the Internet,"[128] and "regulations cabining the scope of permissible interconnection arrangements would undercut consumer interests, distorting or impeding the Internet's ability to serve consumers' ever-changing needs."[129]

A few parties who stand to benefit financially are muddying this proceeding and arguing for the Commission to regulate this competitive marketplace in new and unprecedented ways. For example, Level 3 and Netflix ask the Commission to assert authority to review *all* traffic exchange arrangements and apply either a presumption against, or an outright prohibition of, payment from one interconnecting party to the other.[130] However, economic arrangements among interconnecting parties are instrumental in allocating the enormous investment required to transmit the growing volumes of traffic across the Internet, and prohibiting such arrangements would require broadband providers and their end-users alone to bear these costs. While such a policy might reduce operating costs for companies like Level 3 and Netflix, it would also turn on its head the efficient operation of the traffic exchange marketplace, thereby harming the Internet

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127 Akamai Comments at 3-9.

128 *Id.* at 7.

129 Verizon Comments at 74.

130 Level 3 Comments at 14; Netflix Comments at 18.

ecosystem as a whole.[131] Notably, these commenters do not call on the Commission to analyze or regulate the commercial arrangements that they have with *their* customers.

Some go so far as to argue that the Commission should mandate settlement-free traffic exchange, which they characterize as a simple extension of the bill-and-keep model adopted for the voice telephony marketplace in the *Intercarrier Compensation Order*.[132] However, in order to apply such a policy to Internet traffic exchange, the Commission would first need to conclude broadband providers are providing a Title II service to interconnecting parties, that this service should be subject to regulation, that this regulation should include rate regulation (e.g., based on a finding of market power), and that the only just and reasonable rate for this service is free. There is no basis in the record for any of these conclusions, let alone all of them. Moreover, in the *Intercarrier Compensation Order*, the Commission eliminated a longstanding regime of regulated rates and implicit subsidies that years of experience had demonstrated to be inefficient. In contrast, Internet traffic exchange has been governed by a well-functioning competitive marketplace, with steeply declining prices, where private incentives and negotiations have given rise to a broad array of peering, transit, and CDN options for parties seeking to exchange

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131 Netflix also grossly mischaracterizes the circumstances that led up to its recent interconnection agreement with Comcast. Netflix Comments at 12-16. Netflix could have chosen from a number of routes, including routes through various transit providers and CDNs, to reach Comcast's network. But it instead decided that paying Comcast to establish a direct interconnection was a better option. It is no surprise that Netflix would like the Commission to mandate arrangements under which edge providers and others may transport and deliver an unlimited amount of traffic for free, but that would fly in the face of industry standards that have been in place since the advent of the Internet. And Netflix's transparent desire to shift costs to others plainly provides no basis for reasoned policymaking.

132 *E.g.*, Ad Hoc Comments at 16-19; CompTel Comments at 11; Public Knowledge Comments at 106; *see also* Netflix Comments at 17; Microsoft Comments at 10 n.22.

traffic.[133] And unlike the unilateral tariffs that establish rates for terminating voice traffic, the exchange of Internet traffic has always been governed by bilateral, commercially negotiated agreements. The marketplace for Internet traffic exchange thus presents a far different set of facts for which a bill-and-keep regime would be ill-suited.

Similarly, unlike in the last mile marketplace, where there have been no paid prioritization arrangements, which makes it relatively painless to adopt a framework that continues to generally bar them, a rule that suddenly bars or puts into question all paid traffic exchange agreements would cause significant upheaval for arrangements and businesses across the backbone, from transit providers and CDNs to ISPs, big and small. This disruption would have far-reaching business, investment, traffic flow, and end user rate implications that are unforeseeable and could potentially be calamitous.

## VII. CONCLUSION

There is broad agreement that the Commission should adopt new open Internet rules consistent with the discussion above. The Commission should seize this opportunity and avoid taking drastic steps, such as reclassifying broadband as a Title II telecommunications service, that would jeopardize this unprecedented level of support.

Respectfully submitted,

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[133] *See* CenturyLink Comments at 18; Online Publishers Association Comments at 12; TWC Comments at 30; Verizon Comments at 70.