12-2023

# ACLP - Comments to the FCC re Net Neutrality - December 2023

New York Law School

December 14, 2023

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

**RE: Comments Regarding WC Docket No. 23-320**

Dear Ms. Dortch,

The ACLP at New York Law School respectfully submits the following comments in the above-reference proceeding. Attached to these comments are the following materials, which the ACLP respectfully urges the FCC to review and incorporate into the record:

- **Attachment #1**: *ACLP Comments re WC Docket No. 17-108 (In the Matter of Restoring Internet Freedom),* filed July 17, 2017.[1]

- **Attachment #2**: *ACLP Comments re GN Docket No. 14-28 (In the Matter of Protecting and Promoting the Open Internet),* filed September 15, 2014.[2]

- **Attachment #3**: *Joint Filing Signed by 27 Subject-Matter Experts re GN Docket 09-191 (In the Matter of Preserving the Open Internet)*, filed April 26, 2010.[3]

- **Attachment #4**: *ACLP Reply Comments to the FCC re WC Docket No. 07-52 (In the Matter of Broadband Industry Practices)*, filed February 27, 2008.[4]

These materials, which are referenced in the following comments, detail in far greater depth the ACLP's longstanding concerns regarding FCC overreach vis-à-vis proposals to regulate fixed and wireless broadband services as common carriers. The Commission has yet again proposed imposing onerous Title II regulation on dynamic internet access services that have thrived for decades under a light-touch regulatory framework. Accordingly, the ACLP is

[1] Available at http://comms.nyls.edu/ACLP/ACLP-Comments-Restoring-Internet-Freedom-WC-Docket-No-17-108.pdf.

[2] Available at https://www.fcc.gov/ecfs/document/6019173123/1.

[3] Available at https://www.fcc.gov/ecfs/document/6015582605/1.

[4] Available at https://www.fcc.gov/ecfs/document/5514998456/1.

resubmitting the attached comments in the hope that the Commission will finally take seriously the concerns and arguments included in them.

Should you have any questions after reviewing these comments, or if the ACLP can otherwise be of assistance, please do not hesitate to contact us.

Kind regards,

*/s/*
Michael J. Santorelli, Director

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Alex Karras, Senior Fellow

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## 1. INTRODUCTION & OVERVIEW

The case for net neutrality rules has never been strong and has only grown weaker over time.

As the ACLP and numerous other commenters have detailed at length in previous proceedings, net neutrality has always been "a solution in search of a problem."[5] Over the past two decades, there have been fewer than a handful of instances where ISPs arguably have engaged in behavior that may have exceeded accepted norms of reasonable network management. Indeed, the Commission's current proposal for reclassifying broadband as a Title II service and reimposing onerous net neutrality rules can muster only two examples of such behavior, with the most recent dating to 2008.[6]

Recognizing that there is a complete lack of compelling evidence supporting regulatory intervention, the Commission has opted for a different tack in its attempt to substantiate its proposal for regulating broadband as a common carrier. In particular, the Commission has now decided to leverage the COVID-19 pandemic as the primary basis for its proposed action:

> "In the time since the *RIF Order*, propelled by the COVID-19 pandemic, BIAS has become even more essential to consumers for work, health, education, community, and everyday life. In light of this reality, we believe that looking anew at the classification of BIAS is necessary and timely given the critical

[5] *See generally Attachment #1, Attachment #2, Attachment #3,* and *Attachment #4.*

[6] *In the Matter of Safeguarding and Securing the Open Internet,* at ¶5, fn. 7, WC Docket No. 23-320, FCC (Oct. 19, 2023) ("*Open Internet NPRM*").

> importance of ensuring the Commission's authority to fulfill policy objectives and responsibilities to protect this vital service."[7]

Attempting to leverage the pandemic and the myriad impacts it had on broadband connectivity as an evidentiary basis for net neutrality rules evinces desperation and an implicit acknowledgment that the Commission's proposal otherwise lacks compelling real-world support. In short, citation to the pandemic is not convincing. Rather, it is grotesque, self-aggrandizing, and representative of the worst kind of disaster opportunism.[8]

Broadband was and remains a vital tool for Americans before, during, and after the pandemic. As discussed in **Section 2**, broadband boomed during the pandemic because it was not subject to onerous Title II regulation. Instead, the light-touch regulatory approach to broadband that has prevailed since 2018 and for all but two years over the last two decades ensured that ISPs were able to quickly adjust their business models in response to rapid shifts in consumer demand. Broadband speeds continue to rise; prices continue to fall; and consumers continue to have the ability to use their broadband connections however they wish.

**Section 3** addresses the potential legal consequences of the Commission's use of the pandemic as justification for reclassifying broadband. The emergence of the "major questions doctrine" (MQD) in the Supreme Court suggests that an attempt by the FCC to reclassify broadband will have to clear a much higher legal bar than previous attempts. Indeed, there is little doubt that a proposal to regulate broadband – an essential service used by nearly every American, business, and government entity – raises a major question of economic and political significance.

Whether and how the MQD is applied to the FCC's current proposal will undoubtedly be debated at length in this proceeding. A threshold question is whether Congress has authorized the FCC to engage in reclassification *ad infinitum*? Some will argue that the text of the Communications Act, as adopted in 1934 and amended in 1996, and as interpreted by the courts, provides the Commission with significant latitude in this respect.[9] Others will argue that the MQD supersedes previous instances of courts extending *Chevron* deference

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[7] *Open Internet NPRM* at ¶ 16.

[8] As the ACLP has detailed elsewhere, disaster opportunism occurs when policymakers and advocates attempt to leverage a tragedy or disaster in support of intrusive new regulations. *See, e.g.,* Charles M. Davidson and Michael J. Santorelli, *Briefing: Communications Network Outages – Learning from Hurricane Sandy,* ACLP at New York Law School (Dec. 2012), http://comms.nyls.edu/ACLP/ACLP-Briefing-Network-Outages-December-2012.pdf; Michael Santorelli, *How to Fight COVID-Inspired Disaster Opportunism in the Broadband Space,* May 4, 2020, Forbes.com, https://www.forbes.com/sites/washingtonbytes/2020/05/04/how-to-fight-covid-inspired-disaster-opportunism-in-the-broadband-space.

[9] *See, e.g.,* Harold Feld, *Does SCOTUS EPA Case Impact Net Neutrality? Here's Why I Say No,* July 1, 2022, Wetmachine.com, https://wetmachine.com/tales-of-the-sausage-factory/does-scotus-epa-case-impact-net-neutrality-heres-why-i-say-no/.

to the adoption of net neutrality rules, thereby casting the instant proposal in significant legal doubt.[10]

As discussed in Section 3, the ACLP offers an additional perspective that addresses the Commission's use of the pandemic as justification for reclassifying broadband. In particular, the ACLP notes that, during the pandemic, Congress was unusually active in passing laws, many of which were enacted in response to the public health emergency. As such, Congress had numerous opportunities to address the regulatory framework for broadband. It could have leveraged any number of stimulus packages or omnibus bills to undo the classification of broadband as an information service. However, on each occasion, Congress elected not to change the regulatory framework. Instead, it called on the Commission and other federal agencies to engage in a variety of activities within the current framework.

The overall thrust of these actions and non-actions is that Congress did not view the light-touch regulatory framework for broadband as a problem that needed to be addressed. Rather, Congress viewed the framework as conducive to the array of broadband-related programs and provisions that it included in a series of bills over the course of 2020-2022. Accordingly, the ACLP argues that any attempt by the FCC to reclassify broadband would be in direct conflict with Congress's clear intent to preserve the prevailing light-touch framework.

**Section 4** discusses the myriad ways in which reclassification of broadband as a common carrier service would be inconsistent with and undermine the $42.5B Broadband Equity, Access, and Deployment (BEAD) grant program being administered by NTIA. In particular, the negative impacts of reclassification on broadband investment would likely discourage some ISPs from participating in BEAD. Similarly, the high compliance costs that will result from reclassification could prevent small and non-traditional ISPs from pursuing grants. These and other negative impacts on BEAD would place reclassification in direct conflict with the Infrastructure Investment and Jobs Act (IIJA), which created BEAD and includes numerous requirements aimed at maximizing participation by all ISPs.

## 2. BROADBAND THRIVED DURING THE PANDEMIC BECAUSE IT WAS LIGHTLY REGULATED

Since the early 2000s, broadband has been regulated largely in a hands-off manner, an approach that reflects clear – *and bipartisan* – Congressional intent to keep the internet "unfettered" from state or federal regulation.[11] During that time, broadband service has evolved to the point where internet access today, when measured in terms of speeds, pricing, service option variability, and ISP choice, is profoundly different when compared to

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[10] *See, e.g.,* Donald B. Verrilli and Ian Heath Gershengorn, *Title II "Net Neutrality" Broadband Rules Would Breach Major Questions Doctrine* (Sept. 2023), https://aboutblaw.com/baKo/ ("*Title II Would Breach*").

[11] The ACLP has made this point numerous times in the past. *See generally Attachment #1, Attachment #2, Attachment #3,* and *Attachment #4.*

even a decade ago. For this reason alone, the Commission should avoid reclassifying broadband access lest it undermine these robust market dynamics.

### 2.1 *Two Examples Illustrate the Real Harms of Title II Regulation to Broadband*

Proving the counterfactual – i.e., that these gains would not have happened had the FCC regulated broadband as a common carrier from the very beginning – is impossible. However, there are two examples that are relevant to the more important exercise of predicting how common carrier regulation will impact broadband going forward.

The first example comes from the brief period during which the FCC regulated broadband as a common carrier. The Title II era for broadband ran roughly from February 2015, when the Commission approved the reclassification order, until December 2017, when the Commission adopted the Restoring Internet Freedom (RIF) Order, which undid Title II reclassification. As noted in the RIF Order, there was a noticeable dip in investment in broadband networks after the Commission reclassified broadband as a common carrier service.[12] In its opinion upholding the RIF Order, the D.C Circuit Court of Appeals determined that the Commission's observation that heavy-handed common carrier regulation is less conducive to broadband infrastructure investment than the light-touch regulatory approach stemming from an information services designation was supported by substantial evidence and thus a valid reason for returning broadband to its information service classification.[13]

The FCC in its current proposal attempts to dismiss these findings out of hand, but the D.C. Circuit's analysis is clear: the RIF Order's assessment of investment impacts under different regulatory frameworks was reasonable and supported by ample evidence.[14] As a result, the FCC faces a very high evidentiary bar when attempting to refute these findings.

The second example of the negative impacts of heavy-handed regulation is evident in how broadband networks in the U.S. performed during the pandemic compared with those in Europe, where most broadband networks are subject to onerous Title II-like rules and regulations. From the earliest days of the pandemic, when lockdowns and shelter-in-place mandates forced millions to rapidly shift to remote everything, U.S. broadband networks withstood a tidal wave of increased demand for bandwidth.[15]

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[12] *In the Matter of Restoring Internet Freedom,* Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 364-368 (Jan. 4, 2018), https://docs.fcc.gov/public/attachments/FCC-17-166A1_Rcd.pdf.

[13] *Mozilla v. FCC*, 940 F.3d 1, 50-51 (D.C. Cir. 2019) ("*Mozilla*")..

[14] *Open Internet NPRM* at ¶ 12.

[15] *See, e.g.,* Jeff Baumgartner, *Home Internet Data Usage Surges Amid COVID-19 Crisis,* March 18, 2020, LightReading, https://www.lightreading.com/services/home-internet-data-usage-surges-amid-covid-19-crisis (reporting that "OpenVault, a company that specializes in the collection and analysis of household-level broadband usage data, found that average downstream usage per customer in urban areas rose 98.3%

The performance of U.S. broadband was especially impressive when compared with how networks around the globe responded to similarly significant increases in demand. Several analyses conducted over the course of 2020 and 2021 – i.e., during the height of the pandemic – compared the U.S. with its counterparts in Europe. In every case, data clearly demonstrated that broadband in the U.S. outperformed broadband in Europe in terms of speed and reliability.[16] Indeed, at a time when policymakers in Europe worried that networks there might falter under surging demand, U.S. networks easily adapted to the new realities dictated by the pandemic.[17]

The robustness and resilience of U.S. broadband was attributed to a variety of factors – decades of consistent investment; the emergence of robust intermodal competition; etc. – all of which stemmed directly from a light-touch regulatory framework grounded in a Title I information service designation.[18]

### 2.2 *Broadband Continues to Thrive in Response to a Light-Touch Regulatory Framework*

Broadband has continued to improve in response to this regulatory framework, echoing the RIF Order's finding of a positive correlation between Title I classification and robust market dynamics:

- *Investment.* In 2022, broadband providers invested a record $102B in their networks.[19] These investments were in addition to hundreds of millions of dollars allocated by states and localities from available stimulus funds to support network expansion.[20]

- *Speeds.* Average internet speeds have increased by more than 100Mbps over the last six years.[21] Average upload speeds have increased by 90% since 2020, reflecting

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while upstream usage per customer climbed 68.6% on Monday, March 16 [2020] compared to a week earlier.").

[16] *See, e.g.,* Anna-Maria Kovacs, *U.S. Broadband Networks Rise to the Challenge of Surging Traffic During the Pandemic,* Georgetown Center for Business and Public Policy (June 2020), https://georgetown.app.box.com/s/8e76udzd1ic0pyg42fqsc96r1yzkz1jf.

[17] *Id.*

[18] *Id. See also* Roger Entner, *U.S. Broadband Network Performance During COVID-19 and Beyond,* Recon Analytics (Nov. 2021), https://reconanalytics.com/2021/11/us-broadband-network-performance-during-covid-19-and-beyond/.

[19] *2022 Broadband Capex Report,* U.S. Telecom (Sept. 2023), https://ustelecom.org/wp-content/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf.

[20] For an overview of these allocations on a state-by-state basis, *see* BroadbandExpanded.com.

[21] *See, e.g.,* Camryn Smith, *The Average Internet Speed in the U.S. Has Increased by Over 100 Mbps Since 2017,* Aug. 4, 2023, AllConnect, https://www.allconnect.com/blog/internet-speeds-over-time.

increased consumer usage of real-time video and similar services needed for remote work, school, and healthcare.[22]

- *Network Innovation.* More than half the homes in the U.S. can access a fiber connection.[23] At the same time, cable operators are preparing to upgrade their networks to DOCSIS 4.0, which promises to deliver multi-gig symmetrical speeds.[24]

- *New Competition.* In-home fixed wireless 5G connections provided by entities like T-Mobile and Verizon have disrupted the market for residential broadband. Consumers are adopting these offerings in high numbers, highlighting the increasingly competitive nature of the retail broadband market.[25]

- *Prices.* As a result of robust intermodal competition across the country, the price of broadband has continued to decrease, with the cost of the highest-speed offerings dropping the most between 2016 and 2022.[26]

These data make clear that broadband continues to thrive under a light-touch regulatory framework. As discussed in the next section, to the extent government intervention has been necessary to address discrete broadband challenges, Congress has responded by allocating funding and directing specific actions by the FCC and other federal entities; it has not called for or required reclassification of broadband as a Title II service.

### 3. Reclassification Will Trigger Application of the Major Questions Doctrine, Placing the FCC's Proposal on Extremely Shaky Legal Footing

The Commission proposes to engage in reclassification at an inflection point in the evolution of legal jurisprudence governing the deference extended by courts to administrative agencies. Indeed, the FCC will face significant legal headwinds on several fronts if it chooses to reclassify broadband as a common carrier service:

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[22] *Measuring Fixed Broadband – Twelfth Report,* FCC (Jan. 2023), https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-fixed-broadband-twelfth-report.

[23] *See, e.g.,* Masha Abarinova, *More than 50% of U.S. Homes Now Have Access to Fiber, FBA Says,* Dec. 11, 2023, Fierce Telecom, https://www.fiercetelecom.com/broadband/more-50-us-homes-now-have-access-fiber-fba-says.

[24] *See, e.g.,* Jeff Baumgartner, *Comcast Completes Multi-Gig DOCSIS 4.0 Trial in Philly,* Dec. 12, 2022, Light Reading, https://www.lightreading.com/cable-technology/comcast-completes-multi-gig-docsis-4-0-trial-in-philly.

[25] *See, e.g.,* Mike Dano, *FWA to Remain 'Biggest Disruptor' Through 2024,* June 29, 2023, LightReading, https://www.lightreading.com/fixed-wireless-access/fwa-to-remain-biggest-disruptor-through-2024.

[26] *See, e.g.,* Jason Shevik, *Broadband Pricing Changes: 2016 to 2022,* May 5, 2023, BroadbandNow, https://broadbandnow.com/internet/broadband-pricing-changes.

- The Supreme Court will soon consider whether to overrule *Chevron,* the case that gave rise to the exceedingly deferential framework that has undergirded FCC rulemakings for decades.[27]

- This comes at a time of decreasing relevance for *Chevron* deference: the Supreme Court "has not upheld an agency action on the basis of *Chevron* deference in almost a decade."[28]

- Concomitant with *Chevron*'s ebb has been the emergence of the MQD, a more exacting standard of review of agency actions applied by the Supreme Court in cases of "deep economic and political significance."[29]

As discussed below, the Commission's reclassification proposal will be challenged in court and likely trigger application of the MQD. Given the profound economic importance of broadband; the fact that it has thrived under a light-touch regulatory framework; and recent Congressional action confirming its support for this framework, the Commission faces the impossible task of convincing the courts that Title II regulation is necessary and consistent with Congressional intent.

### 3.1 *Why Reclassification Will Trigger Application of the MQD*

Per recent Supreme Court precedent, the evolving MQD applies in "extraordinary cases" where the "history and the breadth of the authority that [an administrative agency] has asserted, and the economic and political significance of that assertion, provide a reason [for courts] to hesitate before concluding that Congress" meant to confer such authority."[30] The Commission seems confident that its proposed reclassification will survive legal challenge because all previous attempts by the FCC to classify broadband have been upheld under the more deferential *Chevron* framework.[31] For several reasons, it is likely that reclassification this time around will trigger the MQD.

First, how broadband is regulated matters now more than ever given its increasingly essential role in the U.S. economy, a dynamic that underscores the economic significance of reclassification. The Commission cites the vital role that broadband played during the pandemic as a primary basis for pursuing reclassification, reasoning that broadband has become too important not to be regulated. While the connection that the Commission draws

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[27] *Loper Bright Enterprises v. Raimondo,* Docket No. 22-451 (oral argument scheduled for Jan. 17, 2024).

[28] *Title II Would Breach* at p. 3.

[29] *King v. Burwell,* 576 U.S. 473, 486 (2015).

[30] *West Virginia v. EPA,* 142 S.Ct. 2587, 2595 (2022) (quoting *FDA v. Brown & Williamson Tobacco,* 529 U.S. 120, 159-160 (2000)) (internal quotation marks omitted).

[31] *Open Internet NPRM* at ¶¶ 81-84.

between the economic importance of broadband and the need for regulation is erroneous, the underlying conclusion – that broadband is a driver of economic activity – is correct.

Numerous studies have found that the ability of broadband to support remote work, schooling, and healthcare, among many other services, contributed greatly to reducing the negative economic impacts of the pandemic.[32] One study even found a correlation between increased broadband access and reduced mortality from COVID-19.[33] More broadly, studies have found that "[f]ixed broadband adoption drove 10.9% of the accumulated growth in the U.S. gross domestic product (GDP) between 2010 and 2020."[34] In short, there is little doubt that the regulatory treatment of broadband is economically significant, especially when certain regulatory approaches (i.e., Title II) have blunted its economic impact.

Second, net neutrality has long been politically significant. Each of the major presidential candidates during the last few election cycles has promised to address net neutrality one way or another.[35] Indeed, net neutrality has become a "cause" that has animated protests, publicity stunts, and other activities that have long been common in public debates over the most divisive political issues. Net neutrality has thus become yet another political football that is regularly seized upon by candidates, policymakers, and advocates across the ideological spectrum.[36]

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[32] *See, e.g.,* Raul Katz and Juan Jung, *The Role of Broadband Infrastructure in Building Economic Resiliency in the United States During the COVID-19 Pandemic,* Mathematics 2022, 10, 2988, https://www.mdpi.com/2227-7390/10/16/2988.

[33] *The Impact of Broadband Access on COVID-19 Mortality in the United States,* Digital Planet, The Fletcher School at Tufts University (June 2022), https://digitalplanet.tufts.edu/the-impact-of-internet-access-on-covid-19-deaths-in-the-us/.

[34] Joan Engebretson, *Study Finds Broadband Has a Major Impact on U.S. Economic Growth,* June 29, 2022, Telecompetitor, https://www.telecompetitor.com/study-finds-broadband-has-a-major-impact-on-u-s-economic-growth/ (citing Rual Katz and Juan Jung, *The Contribution of Fixed Broadband to the Economic Growth of the United States Between 2010 and 2020* (2022), https://network-on.org/wp-content/uploads/2022/08/Broadband-and-the-Economy_2022.pdf)/).

[35] *See, e.g., 2020 Democratic Party Platform,* Aug. 17, 2020, https://www.presidency.ucsb.edu/documents/2020-democratic-party-platform ("...Democrats will restore the Federal Communications Commission's (FCC) clear authority to take strong enforcement action against broadband providers who violate net neutrality principles through blocking, throttling, paid prioritization, or other measures that create artificial scarcity and raise consumer prices for this vital service.); *2020 Party Platforms and Cyber Policy,* Oct. 26, 2020, NSA Archive, https://nsarchive.gwu.edu/briefing-book/cyber-vault/2020-10-26/2020-party-platforms-cyber-policy (noting that "The Republican Party Platform instead commits to "support Internet policies that allow people and private enterprise to thrive, without providing new and expanded government powers to tax and regulate so that the internet does not become a vehicle for a dramatic expansion of government power."").

[36] *See, e.g.,* Larry Downes, *With More Net Neutrality Stunts, Broadband Becomes a Political Football,* May 24, 2018, Forbes, https://www.forbes.com/sites/larrydownes/2018/05/24/with-the-latest-net-neutrality-stunts-broadband-has-become-a-political-football/?sh=43383fc559ae/

Third, the way the Commission has toggled between classifications for broadband is extraordinary. This is the fourth time the Commission is proposing to classify or reclassify broadband in two decades, and the third time in eight years.[37] The Commission initially classified broadband internet access as a Title I information service in a series of orders in the late 2000s.[38] After several unsuccessful attempts to adopt and enforce network neutrality-like rules, the FCC in 2015 proceeded to reclassify broadband as a Title II common carrier service.[39] A few years later in the RIF Order, the FCC returned broadband to its initial information services classification.[40] It is unlikely that Congress intended for an administrative agency to be able to change its mind so often, especially on a matter as seemingly straightforward and foundationally important like classifying broadband.

Taken together, these factors indicate that (1) if the Commission insists on reclassifying broadband yet again, then it will likely trigger application of the MQD by reviewing courts, and (2) when that happens, the Commission will probably lose in court.

### 3.2 *Congressional Action During the Pandemic Made Clear Congress Supports the Current Regulatory Classification of Broadband*

Another important element of the MQD is the extent to which Congress has acted in a manner that indicates support for or opposition to a particular regulatory approach. In the context of reclassification, the relevant inquiry consists of determining whether recent Congressional action supports the light-touch regulatory framework built around the information services classification for wireline and wireless broadband. If Congress has acted in such a manner, then a proposal by the Commission to alter that framework would likely be seen as prohibited unless and until Congress acts otherwise.

This element of the MQD stems from *West Virginia v. EPA*. There, the Supreme Court noted that it could not ignore Congressional action that made clear Congress did not intend to permit the EPA to implement a sweeping program for "addressing carbon dioxide pollution from power plants."[41] The Court observed that Congress had "consistently rejected proposals to amend" federal law to create or allow a program like the one proposed by the EPA.[42] Accordingly, the Court found that the "importance of the issue, along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound

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[37] *Open Internet NPRM* at ¶¶ 4-15.

[38] *NCTA v. Brand X*, 545 U.S. 967 (2005) (upholding the information services classification for cable modem service).

[39] *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (upholding reclassification) ("*USTA*").

[40] *Mozilla.*

[41] *West Virginia v. EPA,* 142 S.Ct. at 2614.

[42] *Id.*

debate across the country…makes the oblique form of the claimed delegation all the more suspect."[43]

The Court again applied this element of the MQD in *Biden v. Nebraska,* which found that an attempt by the Secretary of Education to cancel $430B in student loan debt exceeded authority granted to the Department of Education in the HEROES Act.[44] In *Biden,* the Court invoked the MQD and noted that, *inter alia,* "Congress [was] not unaware of the challenges facing student borrowers" since it had considered dozens of bills aimed at addressing student loan issues.[45] Echoing *West Virginia,* the court held that "[a] decision of such magnitude and consequence on a matter of earnest and profound debate across the country must res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[46]

These cases are distinguishable from the reclassification proposal in several respects. Unlike the EPA and Secretary of Education, the FCC is not proposing a new or novel interpretation of the Communications Act. Rather, the FCC is advancing essentially the same legal theory as it did during its previous reclassification of broadband as a Title II service, which was upheld on appeal by the D.C. Circuit, which extended *Chevron* deference to the Commission's action.[47]

However, much like in *West Virginia* and *Biden,* the FCC is acting in the shadow of significant Congressional action on relevant issues. In *West Virginia* and *Biden*, the Court observed that Congress considered and rejected a variety of bills that, had they been enacted, would have realized the outcome proposed by the administrative agencies. The Court thus interpreted proposals by the EPA and the Secretary of Education as workarounds to achieving outcomes denied by Congress. Over the years, numerous net neutrality bills, including some that would have reclassified broadband as a Title II service, have been introduced and debated in Congress, but none have been enacted.[48]

In addition, reasonable arguments could be made that the converse to the approach by the Court in *West Virginia* and *Biden* is equally valid – that Congressional action on broadband issues indicated support for the light-touch regulatory framework.

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[43] *Id.*

[44] *Biden v. Nebraska,* 143 S.Ct. 2355 (2023).

[45] *Id.* at 2373-2374.

[46] *Id.* at 2374 (internal quotation marks omitted).

[47] *USTA*.

[48] *See, e.g.,* Maggie Farry, *Net Neutrality Is and Always Has Been a Bipartisan Issue,* Dec. 2, 2021, New America Foundation Blog, https://www.newamerica.org/oti/blog/net-neutrality-is-and-has-always-been-a-bipartisan-issue/ (providing examples of bills introduced in 2018 and 2019). For pre-pandemic examples, *see* ALA, Net Neutrality Legislative History, https://www.ala.org/advocacy/telecom/netneutrality/legislativeactivity.

During the pandemic, Congress was unusually active in enacting legislation, much of which focused on helping the economy recover from the shock of COVID-19. Most of the pandemic stimulus bills included provisions and programs focused on broadband. Specifically, these programs were devised to address specific challenges evident in the broadband space, including gaps in broadband availability, digital divides in certain communities, and the need for subsidies to address the affordability of broadband. At the FCC, some Commissioners viewed the persistence of these issues as a direct result of the light-touch regulatory framework and that a Title II classification would provide the Commission with ample authority to address these issues.[49]

In response, Congress addressed each of these issues but chose not to change the regulatory framework. Moreover, Congress elected to locate authority to implement major broadband programs in agencies other than the FCC, further indicating that Congress felt comfortable with these programs being deployed in the current regulatory environment. The table on the following page summarizes major broadband-related actions taken by Congress during the pandemic.

The Congressional record for each of these bills appears to be devoid of discussion about the inadequacy of the prevailing regulatory framework or a need to reclassify broadband. In addition, it does not appear that any bills or amendments were proposed that sought to impose common carrier regulation on broadband ISPs. An amendment that was included in the final IIJA prohibited the NTIA from engaging in rate regulation as part of BEAD.[50] Rate regulation is not permitted under the Title I regulatory framework but would be theoretically possible under Title II.[51] This provides additional evidence that Congress was cognizant of the regulatory environment in which it was legislating.

Congressional action during the pandemic is especially relevant to an MQD analysis given the FCC's use of COVID-19 as an impetus for its reclassification proposal. Viewed in that light, the intent of Congress is clear – it wishes for the regulatory classification to stay unchanged. Accordingly, in the absence of Congressional action authorizing reclassification, it appears that the Commission will exceed its authority if it proceeds with its proposal.

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[49] *See, e.g., In the Matter of Restoring Internet Freedom,* Statement of Commissioner Jessica Rosenworcel, Dissenting, WC Docket No. 17-108, FCC, https://docs.fcc.gov/public/attachments/FCC-20-151A5.pdf.

[50] IIJA § 60201(h)(D).

[51] *See, e.g., N.Y. State Telecom. Ass'n v. James*, 544 F. Supp. 3d 269 (E.D.N.Y. 2021) (currently on appeal to the Second Circuit).

**Table 1 – Major Broadband-Related Actions by Congress During the COVID-19 Pandemic**

| Statute | Broadband Action | Implementing Entity |
|---|---|---|
| Consolidated Appropriations Act of 2021[52] | Emergency Broadband Benefit ($3.2B allocation) | FCC |
| American Rescue Plan Act of 2021[53] | State and Local Fiscal Recovery Funds ($350B allocation, of which approximately $5.7B has been used by states and localities for broadband[54])<br><br>Capital Projects Fund ($10B allocation) | Department of Treasury |
| American Rescue Plan Act of 2021[55] | Emergency Connectivity Fund ($7.1B allocation) | FCC |
| Infrastructure Investment & Jobs Act of 2021[56] | BEAD ($42.5B allocation)<br><br>Middle-Mile Grant Program ($1B allocation)<br><br>Digital Equity Grant Program ($2.75B allocation) | NTIA |
| Infrastructure Investment & Jobs Act of 2021[57] | Digital Discrimination Inquiry | FCC |
| Infrastructure Investment & Jobs Act of 2021[58] | Future of the USF Report | FCC |
| Infrastructure Investment & Jobs Act of 2021[59] | Affordable Connectivity Program ($14B allocation) | FCC |

[52] H.R. 133, PL 116-230 (Dec. 2020), https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf.

[53] H.R. 1319, PL 117-2 (March 2021), https://www.congress.gov/bill/117th-congress/house-bill/1319/text.

[54] Based on ACLP calculations. *See* Alex Karras and Phoebe Kamber, *ACLP Releases ARPA SLFRF Summary Workbook,* BroadbandExpand.com, https://broadbandexpanded.com/posts/slfrfdata.

[55] H.R. 1319, PL 117-2 (March 2021), https://www.congress.gov/bill/117th-congress/house-bill/1319/text.

[56] H.R. 3684, PL 117-58 (Nov. 2021), https://www.congress.gov/bill/117th-congress/house-bill/3684.

[57] *Id.*

[58] *Id.*

[59] *Id.*

**4. RECLASSIFYING BROADBAND AS A COMMON CARRIER IS INCONSISTENT WITH AND WOULD UNDERMINE IMPLEMENTATION OF BEAD**

BEAD is by far the largest broadband grant program in history and arguably the most important as the nation seeks to finally close its digital divide. The Commission's reclassification proposal only mentions BEAD once in the context of how it might be able to streamline pole attachment processes, and therefore speed deployment, by leveraging newfound authority under section 224.[60] In reality, reclassification will *negatively* impact BEAD in several ways.

First, NTIA has devised its extensive BEAD rules and guidance to reflect the current regulatory framework for broadband. This is evident throughout the Notice of Funding Opportunity and myriad other documents. For example, NTIA notes that subgrantees may not "impose unjust or unreasonable network management practices," verbiage that reflects the standard adopted by the FCC in its RIF Order.[61] NTIA has also echoed the IIJA's ban on rate regulation in its guidance to states.[62]

If the Commission reclassifies broadband as a Title II service, these and other key aspects of the BEAD program would likely have to be changed. This would cause significant administrative delays given the need for providing adequate notice, soliciting public comments, and formalizing what could be sweeping changes in some instances. Moreover, new FCC rules could upend core terms and conditions included in subgrantee contracts. The confusion created by the imposition of an entirely new regulatory framework would only be compounded by the legal wrangling that will inevitably ensue once the order goes into effect. The practical impact is that BEAD grants may be delayed by months, if not years, as the legality of reclassification is addressed by the courts.

Second, the negative impacts of Title II regulation on broadband investment could manifest in several ways in the BEAD context. The most significant impact could be less robust participation in BEAD by ISPs that are unwilling or unable to risk scarce private capital on projects with unattractive returns in high-cost areas. Similarly, prospective applicants could pull back on their proposed matches of BEAD grants, thereby increasing the amount of BEAD funding needed for projects. Per the NTIA, a critical aspect of BEAD is a focus on

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[60] *Open Internet NPRM* at ¶ 47.

[61] *BEAD Notice of Funding Opportunity,* at p. 68, NTIA (May 2022), https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf.

[62] *BEAD FAQ v5,* at p. 43, NTIA (Nov. 2023), https://broadbandusa.ntia.doc.gov/sites/default/files/2023-11/Broadband_Equity_Access_Deployment_Program_Frequently_Asked_Questions_Version_5.0.pdf. The ACLP has noted elsewhere that, notwithstanding its acknowledgement of its inability to regulate broadband rates, NTIA and dozens of states nevertheless appear poised to adopt BEAD program provisions that will operate as rate regulation. *See, e.g., ACLP Comments to Tennessee Regarding BEAD Initial Proposal Volume 2,* ACLP at New York Law School (Dec. 2022), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1019&context=reports_resources.

minimizing the amount of grant funding needed for each project so that BEAD allocations can be stretched as far as possible.[63] To that end, NTIA has encouraged states to reward applicants that propose matches above the 25% minimum. States can also seek to waive the match requirement in certain instances.[64] Reclassification could result in ISPs proposing the bare minimum match, with some seeking an outright waiver. This could make it more difficult for states to close their digital divides with available BEAD funds.

Third, reclassification will raise compliance costs for all ISPs. This could discourage new entrants and smaller ISPs from participating in BEAD. Indeed, during previous reclassification efforts, numerous small ISPs framed the compliance costs that stemmed from the Commission's common carrier regime as onerous.[65] A core focus of BEAD, as expressed in the IIJA by Congress, is to encourage participation by as many traditional and non-traditional ISPs as possible, including new entrants and smaller ISPs.[66] Reclassification would thus operate contrary to Congressional intent due to the barriers that it would create for certain entities in the BEAD context.

In sum, the Commission has failed to adequately grapple with the myriad negative impacts that reclassification will have on the implementation of BEAD. For these reasons alone, the Commission should not proceed with its proposal.

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[63] *See, e.g., BEAD NOFO* at p. 20-21.

[64] *BEAD NOFO* at p. 22.

[65] *See, e.g.,* Jacob Kastrenakes, *The FCC Says Net Neutrality Destroys Small ISPs. So Has It?*, July 13, 2017, The Verge, https://www.theverge.com/2017/7/13/15949920/net-neutrality-killing-small-isps.

[66] IIJA § 60201(h)(1)(A)(iii).

**Attachment #1**
*ACLP Comments re WC Docket No. 17-108*
*(In the Matter of Restoring Internet Freedom)*
Filed July 17, 2017

ACLP
ADVANCED COMMUNICATIONS LAW & POLICY INSTITUTE
at New York Law School

NEW YORK LAW SCHOOL

July 17, 2017

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: Restoring Internet Freedom, WC Docket No. 17-108**

Dear Ms. Dortch,

The Advanced Communications Law & Policy Institute ("ACLP") at New York Law School respectfully submits the following comments in the above-referenced docket.[1]

*Overview*



[1] The ACLP focuses on identifying and analyzing key legal, regulatory, and public policy issues impacting stakeholders throughout the advanced communications ecosystem. The views expressed herein are those of the signatories only and do not necessarily represent those of New York Law School. For more information, please visit the ACLP's website.

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## 1. INTRODUCTION

The time has come for the great net neutrality debate to finally end.

After nearly two decades of contentious debate over how to regulate access to the Internet – a global technology that has evolved far beyond what anyone could have imagined when the Clinton administration commercialized it in the 1990s – the current Federal Communications Commission ("FCC" or "Commission") has taken the necessary step of launching a proceeding[2] to undo the mistakes of its predecessor, which erred in adopting a stifling and antiquated regulatory regime, one designed for voice telephony provided over copper wires, for this dynamic service.[3]

As discussed in this filing, the crux of the FCC's proposal – to return the broadband regulatory framework to one grounded in an "information services" classification for ISPs – is not only wise but also supported by ample legal precedent and reflective of the clear intent of a bipartisan Congress to leave the provision of internet access services free of legacy regulation. Indeed, when viewed against the backdrop of past efforts to develop a regulatory framework to govern the broadband ecosystem, the previous Commission's decision to treat a broadband provider as a common carrier in an attempt to legitimate its far-reaching net neutrality regime was a radical departure from the successful light-touch

[2] *In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (rel. May 23, 2017) ("*NPRM*").

[3] *In the Matter of Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) ("*2015 Open Internet Order*").

approach that evolved under previous Commissions guided by both Democratic and Republican Chairmen alike.

It is respectfully submitted that the Commission should act expeditiously to adopt the proposals at issue in the present docket. Closure is desperately needed for this issue. The never-ending debate surrounding net neutrality has become hostile, hyper-partisan, and unmoored from the facts. Moreover, it has become all-consuming, distracting the Commission from work on other critical issues, like helping to bolster broadband connectivity across the country.[4] Fortunately, the current Commission has prioritized regulatory reforms aimed at hastening broadband deployment to every corner of the United States.[5] That it is working on these issues concomitant with this proceeding is to be applauded.

Alas, for as much as the undersigned hope that this proceeding will be the last of its kind, the truth is that the net neutrality debate will likely rage on once this docket is closed. Litigation is a certainty, and even though the Commission stands a good chance of prevailing on appeal, the deference extended to the FCC in this context highlights the meta-issue that needs to be addressed: updating the Communications Act. Even so, it is essential to the health of the U.S. broadband market and to assuring continued consumer welfare gains that the Commission take this step toward recalibrating the broadband regulatory framework now so that it is in line with the light-touch approach that proved so impactful. Thereafter, Congress should act to not only address net neutrality but also to undertake a comprehensive update of the nation's telecommunications laws. That is the only way to ensure that future Commissions don't get caught in the net neutrality quagmire.

As an overview, these comments make the following core points, observations, and arguments regarding net neutrality and the proposals included in the FCC's proposal:

- Broad agreement exists regarding the parameters of ideal consumer protections in this space: no unreasonable blocking or throttling; no unreasonable or unduly discriminatory prioritization; and sufficient transparency on the part of service providers regarding their network management practices.

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[4] *See, e.g.,* Matt Hamblen, *Ex-FCC Official Says Internet Plan Won't Achieve Broadband Goals*, Feb. 16, 2015, Computer World, http://www.computerworld.com/article/2884338/ex-fcc-attorney-says-internet-plan-wont-achieve-broadband-goals.html (reporting on observations made by National Broadband Plan author Blair Levin that reclassifying broadband as a common carrier service would do little to address more pressing connectivity issues).

[5] The Commission under the leadership of Chairman Pai has launched many initiatives focused on these issues. For an overview, *see Bringing the Benefits of the Digital Age to All Americans*, March 15, 2017, Remarks of FCC Chairman Ajit Pai at Carnegie Mellon University's Software Engineering Institute, https://apps.fcc.gov/edocs_public/attachmatch/DOC-343903A1.pdf.

- Title II is not the same thing as network neutrality. To the contrary, the previous FCC chose Title II – wrongly, as argued below – as the legal foundation upon which to build the 2015 Open Internet Order.

- The FCC erred in its decision to reclassify broadband as a common carrier service in the 2015 Order, contradicting the clear intent of a bipartisan Congress and similarly bipartisan FCC precedent in response to that mandate.

- To the extent that threats exist to openness and neutrality online, they are most readily apparent at the network's edge.

- Undoing the many errors included in the 2015 Order will help to unleash much-needed investment in networks after a period of decline that occurred in response to reclassification; bolster innovation in service delivery; and facilitate further business model experimentation without the threat of arbitrary meddling via the vague General Conduct Standard.

## 2. WHAT IS THIS DEBATE REALLY ABOUT?

### A. *Widespread Agreement Exists Regarding the Parameters of "Good" & "Bad" Behavior in the Provision of Broadband Access*

Lost amidst all of the partisan bickering and breathless rhetoric that shrouds the current net neutrality debate is a significant amount of common ground. Indeed, there appears to be widespread agreement among ISPs,[6] edge companies,[7] consumer advocates,[8] and others

[6] *See, e.g.,* Dave Watson, *Comcast Customers Will Enjoy Net Neutrality Protections – Today and in the Future,* April 26, 2017, Comcast Voices Blog, http://corporate.comcast.com/comcast-voices/comcast-customers-will-enjoy-strong-net-neutrality-protections-today-and-in-the-future ("Here is what we stand for when we say we believe in an Open Internet. We do not block, slow down, or discriminate against lawful content. *And we believe in full transparency...you'll know what our customer policies are*." (emphasis in the original); AT&T, Broadband Information, https://www.att.com/gen/public-affairs?pid=20879; Seung Lee, *Tech Companies Take a Stand for Net Neutrality on 'Day of Action,'"* July 7, 2017, The Mercury News, http://www.govtech.com/policy/Tech-Companies-Take-a-Stand-For-Net-Neutrality-on-Day-of-Action.html (quoting an AT&T spokesperson as saying, "We've always supported our customers' right to an open internet… no blocking, no discriminatory throttling, no censorship, be transparent.").

[7] *See, e.g., Principles to Preserve & Protect an Open Internet*, at p. 3, Internet Association (June 2017), https://cdn1.internetassociation.org/wp-content/uploads/2017/06/InternetAssociation-Open-Internet-Principles-Full.pdf (noting "a remarkable level of consensus among parties typically seen as being on opposite sides of the net neutrality debate," *i.e.*, ISPs and Internet Association members, which include, among many others, Amazon, Etsy, Facebook, Google, Microsoft, and Netflix) ("*Internet Association White Paper*").

[8] *See, e.g., In the Matter of Protecting and Promoting the Open Internet*, Comments of Public Knowledge, GN Docket No. 14-28 (July 15, 2014), https://www.publicknowledge.org/assets/uploads/blog/Public_Knowledge_NN_NPRM_comments_2014_FINAL.pdf (detailing support for no blocking, no throttling, no unfair discrimination, and transparency).

regarding the parameters of "good" and "bad" behavior by stakeholders in the broadband space. In a nutshell, this echoes much of what the FCC has sought to enshrine in net neutrality rules over the last two decades: no unreasonable blocking or throttling; no unreasonable prioritization of content, especially if the practice is blatantly anti-competitive or unduly discriminatory;[9] and sufficient transparency so that consumers know what to expect from their ISP.

Perhaps more remarkable is that the foundation of this common ground can be traced back over a decade to the Powell Principles of 2005, which represented the first official foray by the FCC into the net neutrality nebula.[10] Those principles were broadly supported across the marketplace, with ISPs, content companies, hardware manufacturers, and consumer advocates all praising the basic thrust of the Commission's attempt to articulate consumer rights in the broadband ecosystem.[11] That common ground persisted through the Comcast-BitTorrent dispute, which turned on differing interpretations of reasonable network management,[12] and the Commission's 2010 open Internet rules,[13] which were adopted after the courts determined that the Powell Principles were not enforceable because they had been issued via a non-binding policy statement.[14] The 2010 rules were accepted as a palatable compromise by many, but they were mostly struck down because their legal grounding was deemed insufficient.[15] Even in the 2014-2015 Title II proceeding, nobody advocated for the ability to block or throttle content willy-nilly or to prioritize proprietary content in order to undermine rivals.

### B. *The Previous FCC Misunderstood the Power Dynamic in the Ecosystem: The Real Threats to Openness and Neutrality are at the Edge*

So where's the beef? A major substantive issue of contention in the present proceeding is the proper legal basis for enshrining rules prohibiting unreasonable blocking and throttling; allowing for some measure of reasonable prioritization; and assuring adequate

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[9] Paid priority is among the most contentious issues in the current debate. However, as noted, few appear to be advocating in favor of the ability to circumscribe what the antitrust laws expressly prohibit.

[10] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14986 (2005), https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

[11] *See, e.g.*, *FCC Adopts a Policy Statement Regarding Network Neutrality*, Tech Law Journal (2005), http://www.techlawjournal.com/topstories/2005/20050805.asp (quoting statements of support for the Powell Principles, as formalized in an FCC policy statement, by a range of entities).

[12] *See In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications,* Memorandum Opinion and Order, 23 FCC Rcd. 13028 (2008).

[13] *See In the Matter of Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010) ("*2010 Open Internet Order*").

[14] *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

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

transparency.[16] But at a more fundamental level, this debate has always been about power – which entities possess it; what are the incentives to wield it; and what is best way to ensure that it is not used in an anticompetitive manner. Of most relevance here is that, contrary to the assertions of some, including the Commission that adopted the 2015 Open Internet Order, the power dynamic in the broadband space has profoundly shifted.

This shift is important because the power dynamic described in the 2015 Order is woefully out of date.[17] Indeed, it espoused a view of ISP power that never really existed. Net neutrality rules have always been framed as prophylactic protection against "threats" rather than actual harms.[18] To that end, the 2015 Order's view reflected the realities of the marketplace in the late 1990s and early 2000s, when broadband providers arguably had some measure of power and opportunity to squash innovation at the network's edge.[19] But instead of exercising the power to, say, undermine the development of rival email, search, or video services like YouTube, ISPs opted not to meddle, even though these nascent offerings, which were vying for the attention of customers, were technically "free-riding" on their networks.[20] And even when some of those edge companies, led by Google, expressed interest in paying for a "fast lane," the ISPs turned them down.[21] Why? For one, they feared a public relations and consumer backlash.[22] But more importantly, they recognized that working constructively with a range of innovators, including possible competitors at the edge, offered consumers the most value.[23]

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[16] *See, e.g., Internet Association White Paper* at p. 3 (making this point). The ACLP's present comments address these issues *infra.*

[17] *See 2015 Open Internet Order* at ¶¶ 78-101.

[18] *See, e.g., id.* at ¶ 8.

[19] For a leading early description of this power dynamic, *see* Mark A. Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925 (2001) ("*End of End-to-End*").

[20] *See, e.g.,* Arshad Mohammed, *SBC Head Ignites Access Debate*, Nov. 4, 2005, Wash. Post, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302211.html (reporting on comments by then-CEO of SBC Ed Whitacre regarding the possibility of charging edge companies for using their "pipes"). The notion of "free-riding" still resonates in the net neutrality context. *See, e.g.,* Richard John, *The Next Net Neutrality Debate*, July 10, 2017, Bloomberg, https://www.bloomberg.com/view/articles/2017-07-10/the-next-net-neutrality-debate ("Now that it looks as if the Title II designation for ISPs is history, it is time to explore other options. What do to? To begin with, acknowledge that the current legal regime is anything but neutral and stop demonizing the ISPs. Amazon, Netflix and Alphabet, the parent of Google, have benefited hugely from the status quo without having channeled more than a trickle of their enormous profits into the maintenance and improvement of the existing information infrastructure. They are free-riding on a network that the ISPs built.").

[21] *See* Vishesh Kumar and Christopher Rhoads, *Google Wants its Own Fast Track on the Web,* Dec. 15, 2008, Wall St. Journal, https://www.wsj.com/articles/SB122929270127905065 ("*Google Wants*").

[22] *Id.*

[23] *Id.*

Now, the power dynamic has changed completely. Content companies and others at the network's edge possess enormous power to shape the online experience – for both good and ill. This stems from their having established themselves as essential to user enjoyment of the Internet.[24] And increasingly, their power extends offline as well. Indeed, a true measure of any digital entity's power is the extent to which it can shape outcomes in both the online world and the real world. To that end, the likes of Google, Facebook, and Amazon have the power to undermine rivals by prioritizing their own products in search results.[25] They can impact elections and shape public opinion by how they present the news.[26] They can decimate the workforce by pursuing automation as a growth strategy.[27]

Deciding whether or not to wield this power to meddle in the user experience – and in the lives of users generally – boils down to incentives. The difference in business models – *i.e.,* how these companies make money – makes this clear. ISPs derive the lion's share of their revenues from residential and business subscriptions to voice, video, and/or data products. This means that any effort to degrade or limit a person's enjoyment of their user experience – by, for example, blocking a popular website or unnecessarily throttling a

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[24] Some have gone so far as to label entities like Google and Facebook as public utilities. *See, e.g.,* danah boyd, *Facebook is a Utility; Utilities Get Regulated*, May 15, 2010, Zephoria.org, http://www.zephoria.org/thoughts/archives/2010/05/15/facebook-is-a-utility-utilities-get-regulated.html ("Your gut reaction might be to tell me that Facebook is not a utility. You're wrong. People's language reflects that people are depending on Facebook just like they depended on the Internet a decade ago. Facebook may not be at the scale of the Internet (or the Internet at the scale of electricity), but that doesn't mean that it's not angling to be a utility or quickly becoming one."); Harry McCracken, *Of Course Facebook is a Utility!*, Nov. 17, 2013, Time.com, http://techland.time.com/2013/11/17/of-course-facebook-is-a-utility/ ("On the web, the single biggest reason why giants collapse is because they don't react quickly enough to indirect, emerging threats of this sort. If Facebook blithely dismissed them, it would be cause for alarm. But if the company is looking like a utility for the masses rather than a hot property for young people, it's not a sign that the game has changed – it's Facebook being what it's been trying to be all along. And have you noticed? Utilities can be solid businesses. Maybe even better businesses than ones beloved by trendy teens."); Jonathan Taplin, *Is it Time to Break up Google?*, April 22, 2017, N.Y. Times, https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html (arguing that Google "has all of the characteristics of a public utility" and observing that "We are going to have to decide fairly soon whether Google, Facebook, and Amazon are the kinds of natural monopolies that need to be regulated…").

[25] *See, e.g.,* Mark Scott, *Google Fined Record $2.7 Billion in E.U. Antitrust Ruling*, June 27, 2017, N.Y. Times, https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html (reporting on a ruling by regulators in Europe that found that Google "unfairly favor[ed] some of its own services over those of rivals.").

[26] *See, e.g.,* Olivia Solon, *Facebook's Failure: Did Fake News and Polarized Politics Get Trump Elected?*, Nov. 10, 2016, The Guardian, https://www.theguardian.com/technology/2016/nov/10/facebook-fake-news-election-conspiracy-theories (reporting on the prominence of Facebook in the delivery and consumption of news by users and noting that "pressure is growing on Facebook to not only tackle the problem [of fake news] but also to find ways to encourage healthier discourse between people with different political views.").

[27] *See, e.g.,* Danielle Paquette, *People are Worried Amazon will Replace Whole Foods Workers with Robots*, June 16, 2017, Wash. Post Wonkblog, https://www.washingtonpost.com/news/wonk/wp/2017/06/16/people-are-worried-amazon-will-replace-whole-foods-workers-with-robots/?utm_term=.461d0c7b2c0e.

popular service – would harm their bottom lines, both from subscriber loss and public pressure that would likely harm their stock price.[28]

Edge entities, on the other hand, are fueled by economic incentives that drive them to mine user data stemming from their use of a range of online and offline-but-still-connected services.[29] Accordingly, content companies like Facebook and Google have every incentive to dominate – nay, monopolize – our online experience because their bottom lines hinge on their ability to monetize *our* data.[30] As such, they seek to entice us to use more of their services – by, for example, giving them away for "free" – while surreptitiously hoovering up more and more of *our* data.[31] This also drives their efforts to blunt any meaningful enforcement of privacy and antitrust laws and to shift the focus – and blame – for any online harms, real or theoretical, to others, most prominently the ISPs.[32]

This new power dynamic provides a powerful check on the potential for bad behavior by ISPs. Indeed, just imagine the public backlash if an ISP blocked Google search or Netflix. But it is also instructive to think about the converse: what if Google, on its own volition, successfully sought an exclusive deal with Verizon? The flexing of power by edge companies has grown significantly in recent years, demonstrating their emergent clout.[33] Indeed, the "Day of Action" held on July 12, 2017, is the most recent and perhaps most

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[28] *See, e.g.,* Michael Santorelli, *Cutting Through the Noise: Net Neutrality is an Infrastructure Issue*, May 18, 2017, Forbes.com Washington Bytes blog, https://www.forbes.com/sites/washingtonbytes/2017/05/18/cutting-through-the-noise-net-neutrality-is-an-infrastructure-issue/#451c662a3e60 )("*Cutting Through the Noise*").

[29] *See, e.g., Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Comments of the ACLP, WC Docket No. 16-106 (submitted May 27, 2016), http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Privacy-Comments-WC-Docket-No-16-106-052716.pdf (discussing these incentives at length) ("*ACLP Privacy Comments*").

[30] For example, the vast majority – about 86% – of the revenues for Alphabet, Google's parent company, stem from ad revenues, while just about all of Facebook's revenues come from ads. These and other companies of their ilk sell and place ads based on their ability to more precisely target them, which stems from their intimate knowledge of consumers' online behavior. *See* John Shinal, *Google is Grabbing More and More Ad Revenue from Partners*, April 27, 2017, CNBC, http://www.cnbc.com/2017/04/27/alphabets-google-unit-grabbing-ever-more-ad-revenue-from-partners.html (reporting Google's recent revenues); Josh Constine, *Facebook Beats in Q1 with $8.03B Revenue, Faster Growth to 1.94B Users*, May 3, 2017, TechCrunch, https://techcrunch.com/2017/05/03/facebook-q1-2017-earnings/ (reporting Facebook's recent revenues).

[31] *See generally ACLP Privacy Comments*

[32] *Id.*

[33] *See, e.g.,* Bryan Bishop, *Netflix is Withholding High-Quality Content to Push Open Connect Initiative, Says Time Warner Cable*, Jan. 16, 2013, The Verge, https://www.theverge.com/2013/1/16/3884756/netflix-withholding-high-quality-content-to-push-open-connect-says-time-warner-cable. This dynamic has long been evident in carriage disputes between content providers and programmers.

pertinent example of this power.[34] On this day, content companies made sure that their stance on this proceeding was prioritized on their sites;[35] contrary viewpoints were de-prioritized or blocked.[36] Is this behavior truly in furtherance of openness? Or is it indicative of just how much power edge companies possess to prioritize, persuade, and otherwise shape the user experience according to their own interests?[37] As discussed in more detail below, the current proposal better reflects this new power dynamic and the broad common ground that exists vis-à-vis core consumer protection principles.

## 3. THE CASE AGAINST TITLE II: EVALUATING THE PREVIOUS FCC'S RECLASSIFICATION ERROR

The FCC erred in its 2015 Open Internet Order when it reclassified all forms of broadband Internet access as common carrier services subject to Title II regulation. As discussed below, the FCC was in error for the following reasons[38]:

- Title II, which enshrined an exacting public utility-style common carrier regulatory regime for basic telephone service, was never meant to be applied to more dynamic communications services being provided in competitive markets.

- Imposing common carrier regulation, even with extensive forbearance, was contrary to a bipartisan Congress's intent that Internet access be minimally regulated.

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[34] *See, e.g.,* Madeline Purdue & Rachel Sandler, *Net Neutrality Day of Action: Here's What Will Happen,* July 20, 2017, USA Today, https://www.usatoday.com/story/tech/2017/07/11/net-neutrality-day-action-heres-what-happen/460459001/.

[35] *See, e.g.,* Ali Breland, *Net Neutrality Protests to Blanket the Internet*, July 11, 2017, The Hill, http://thehill.com/policy/technology/341565-net-neutrality-protests-to-blanket-internet ("Some participating internet companies, organized by pro-net neutrality advocacy group Fight for the Future, will have prompts and banners on their websites urging users to fight back against Pai's initiative. Vimeo, for example, plans to show users who visit its site a pop up video with an explanation of its arguments on net neutrality before prompting its users to file comments to the FCC in support of the regulations."); Thuy Ong, *Tech Giants Rally Today in Support of Net Neutrality*, July 12, 2017, The Verge, https://www.theverge.com/2017/7/12/15957800/day-of-action-protest-net-neutrality ("Sites across the web will display alerts on their homepages showing "blocked," "upgrade," and "spinning wheel of death" pop-ups to demonstrate what the internet would look like without net neutrality, according to advocacy group Battle for the Net."); Cecilia Kang, *See How Tech Companies Got Together for a Day of Online Protest,* July 12, 2017, N.Y. Times, https://www.nytimes.com/2017/07/12/technology/see-how-tech-companies-got-together-for-a-day-of-online-protest.html.

[36] *See, e.g.,* Fred Campbell, *Is Twitter Blocking Net Neutrality Opinions That it Doesn't Like?*, July 11, 2017, Forbes.com, https://www.forbes.com/sites/fredcampbell/2017/07/11/is-twitter-blocking-net-neutrality-opinions-it-doesnt-like/#34a249ce3c2d.

[37] *See, e.g.,* Jonathan Taplin, *Can the Tech Giants Be Stopped?*, July 14, 2017, Wall St. Journal, https://www.wsj.com/articles/can-the-tech-giants-be-stopped-1500057243?mg=prod/accounts-wsj.

[38] Additional reasons are discussed in section 4, *infra.*

- Title II regulation has cast a palpable pall over the provision of broadband access services since adoption of the 2015 Order.

- Reclassification has fundamentally limited the ability of consumers to shape innovative new service offerings and business models.

Each error is discussed in turn below.

### A. *Title II Was Never Meant to be Applied to a Dynamic Service Being Provided in a Competitive Marketplace*

Title II was designed to regulate the provision of a single service (voice) over a single platform (the copper-wire telephone network) involving a single device (the telephone). The previous FCC fundamentally – indeed, willfully – misunderstood Congress's intent for developing and applying common carrier regulation to basic telephone service. A brief historical overview provides essential context.[39]

The contours of the regulatory approach developed for telephone service in the early 20th century reflected principles of common carriage, which had evolved out of common law and been applied previously to the telegraph.[40] These notions were built into early state-level telephone regulations and were later formalized in several federal statutes, culminating in enshrinement in the Communications Act of 1934.[41]

Title II of the 1934 Act set forth a "detailed set of 'common carriage' obligations" for telephone providers, including "furnishing service on reasonable request, charging just and reasonable rates, and making unlawful unreasonable price or service discrimination."[42] Enforcement of these obligations was split between the states, which were responsible for regulating intrastate elements of telephone service, and a newly created FCC, which oversaw interstate aspects. Their combined efforts revolved mostly around rate-making and otherwise ensuring that the dominant firm at the time, legacy AT&T (aka Ma Bell), was

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[39] Much of the following discussion is adapted from Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 Berkeley Tech. L. J. 1131 (2014), http://btlj.org/data/articles2015/vol29/29_2/29-berkeley-tech-l-j-1131-1204.pdf ("*Federalism in Transition*").

[40] *See, e.g.*, Susan P. Crawford, *Transporting Communications*, 89 B.U. L. Rev. 871, 878-879 (2009) ("*Transporting Communications*"); Herbert H. Kellogg, *The Law of the Telephone*, 4 Yale L.J. 223, 225 (1895). Indeed, "statutory public service regulation augmented common law common carriage rather than supplanted it." *See* Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 Telecomm. Pol'y 435, 437 (1994).

[41] *Id. See also* ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 99-100 (1989) ("IRONY OF REGULATORY REFORM").

[42] *Transporting Communications* at 880.

properly constrained but still able to make available reliable and affordable service to every person in the United States.[43]

The common carrier regulatory framework articulated in the 1934 Act was, in many ways, the natural result of a policy choice made years before by regulators. Once it became clear that the market at the time for providing telephone service was a natural monopoly – *i.e.,* that the provision of telephony was optimally provided by a single private firm at scale – it was incumbent upon federal and state policymakers to develop a regulatory framework that could effectively manage the dominant firm and ensure that it was able to meet its many service obligations.[44] In short, the common carrier framework that emerged in the early 20th century was shaped largely by market conditions and a desire to assure that consumers would have universal access to affordable telephone service.[45]

From the vantage of being responsive to technological change – a prime consideration in the present proceeding – the common carriage model proved to be suboptimal, which vividly demonstrates why it was never meant to be applied to more dynamic services. Because it was focused first and foremost on preserving a specific set of market conditions, the model created a perverse set of incentives for the dominant firm vis-à-vis innovation. Indeed, on numerous occasions between 1934 and the break–up of the telephone monopoly in the early 1980s, AT&T was accused of either impeding competition in discrete segments of the market or seeking to extend its dominance to new services (*e.g.*, computing).[46] Oftentimes, AT&T argued that its efforts were essential to preserving and bolstering the integrity of the vast and sprawling communications network for which it and it alone was responsible.[47] Over time, though, the prevailing regulatory model began to

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[43] For discussion of these general dynamics, *see, e.g.,* Peter Temin & Geoffrey Peters, *Is History Stranger Than Theory? The Origin of Telephone Separations*, 75 Am. Econ. Rev. 324 (1985) Charles J. Cooper & Brian S. Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. Telecomm. & High Tech. L. 293 (2008).

[44] IRONY OF REGULATORY REFORM at 100-101 (discussing what has become known as the "Kingsbury Commitment").

[45] It would take several decades before the framework formally embraced technological considerations about the underlying communications infrastructure (*e.g.*, mandated nondiscrimination in transmission of content). *See, e.g.,* Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?,* 51 Houston L. Rev. 545, 563-569 (2013) (discussing relevant case law).

[46] *See, e.g.,* Miles W. Hughes, *Telecommunications Reform and the Death of the Local Exchange Monopoly*, 24 Fla. St. U. L. Rev. 179 (1996) (discussing several antitrust cases brought against AT&T, including one in the 1940s that resulted in a consent decree impacting the firm's ability to participate in the telephone equipment market); Elizabeth E. Bailey, *Price and Productivity Change Following Deregulation: The U.S. Experience*, 96 ECON. J. 1, 4 (1986) (discussing FCC rulings that authorized the deployment of competitive telephone networks in the 1960s). *See also* Harry M. Trebing, *Common Carrier Regulation – The Silent Crisis,* 34 Law & Contemporary Problems 299 (1969) (discussing these motivations in the context of technological innovation in the 1960s) ("*Common Carrier Regulation – The Silent Crisis*").

[47] *See, e.g., Use of the Carterfone Device in Message Toll Tel. Serv.,* 13 F.C.C.2d 420 (1968) (discussing and rebutting this type of argument in a case where the FCC permitted the attachment of any type of device to the telephone network so long as it did not harm the network).

strain under the pressure of rapid technological innovation that managed to emerge.[48] Regulators were thus increasingly forced to choose between protecting the common carrier and facilitating innovation that might ultimately undermine the common carrier's ability to meet its service obligations.[49] Congress understood these pressures and responded in the 1996 update to the federal telecom laws.

### B. *Title II is Contrary to Bipartisan Congressional Intent and FCC Precedent*

In the wake of the 1996 Act, Democratic- and Republican-led Commissions correctly interpreted the clear intent of Congress: the heavy hand of common carrier regulation was to remain off of the fledgling market for Internet access. This is best seen in comments from the FCC Chairmen who grappled with these issues as the market for broadband services quickly evolved:

- *Chairman Bill Kennard (1999)*: "Government policy can have a profound impact on Internet development; it can either foster it or hinder it. To date, the Internet has flourished in large part due to the absence of regulation. A "hands-off" approach allows the Internet to develop free from the burdens of traditional regulatory mechanisms."[50]

- *Chairman Michael Powell (2004)*: "Based on what we currently know, the case for government imposed regulations regarding the use or provision of broadband content, applications and devices is unconvincing and speculative. Government regulation of the terms and conditions of private contracts is the most fundamental intrusion on free markets and potentially destructive, particularly where innovation and experimentation are hallmarks of an emerging market. Such interference should be undertaken only where there is weighty and extensive evidence of abuse."[51]

- *Chairman Kevin Martin (2009)*: "We have worked hard to create a regulatory – or rather a deregulatory – environment to encourage investment and

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[48] *See, e.g.,* SUSAN E. MCMASTER, THE TELECOMMUNICATIONS INDUSTRY 87 (2002) ("The improvements in technology during the period from 1934 to 1956 opened the door to telephone competition slightly as alternatives to duplicating the wire-line system emerged. Although AT&T continued to monopolize the market and tried to increase its control…the technological developments put cracks in the barriers that had protected its monopoly.").

[49] *See, e.g., Common Carrier Regulation – The Silent Crisis* (discussing these general tensions in the 1960s as AT&T faced a number of potential new competitors).

[50] *See* William Kennard, Chairman, FCC, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community*, at IX-2 (1999), http://www.fcc.gov/connectglobe/regguide.pdf.

[51] *See* Michael Powell, Chairman, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry*, at p. 4, Remarks at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law, Feb, 8, 2004, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

> promote broadband deployment in the U.S…we removed legacy [common carrier] regulations, like tariffs and price controls which discouraged providers from investing in broadband networks. Since then, broadband penetration has increased while the prices of DSL and cable modem services have decreased. We have also worked to establish a level playing field by making sure that all of the companies are subject to the same basic rules. As a result of our efforts, today all broadband delivery platforms whether they are cable modem, DSL, or wireless are classified as information services and are subject to the same light regulatory touch."[52]

- *National Broadband Plan (2010)* (developed under Chairman Julius Genachowski): "While we must build on our strengths in innovation and inclusion, we need to recognize that government cannot predict the future. Many uncertainties will shape the evolution of broadband, including the behavior of private companies and consumers, the economic environment and technological advances. As a result, the role of government is and should remain limited."[53]

Such an approach to dynamic new communications technologies has a long history at the FCC.

The development and implementation of minimalist policies for these kinds of services began largely as a reaction by the FCC to the emergence of an array of new telecommunications and computing technologies in the 1960s and 1970s. Over the course of the following decades, continued innovation and competition in the provision of long-distance telephone and data computing services, along with the rise of entirely new platforms like mobile and high-speed Internet access, made clear that fresh regulatory approaches were needed to foster growth in these nascent markets.[54] Critically, the contours of this new framework encompassed more than just a "hands off" approach to emerging services – they also highlighted a clear policy choice by federal policymakers to begin shifting away from the rigidities of the traditional common carrier regulatory model for communications services.

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[52] *See* Kevin Martin, Chairman, FCC, *Balancing Deregulation and Consumer Protection,* at p. 3, Remarks at the Reg-Markets Center of the American Enterprise Institute, Jan. 8, 2009, https://apps.fcc.gov/edocs_public/attachmatch/DOC-287777A1.pdf.

[53] *See Connecting America: The National Broadband Plan,* at p. 5, FCC (2010) ("*National Broadband Plan*").

[54] These efforts dovetailed with broader efforts by policymakers to reassess traditional regulatory approaches in sectors like the trucking, airline, and railroad industries, which were undertaken in an effort to introduce competition into what some observed to be a stagnant U.S. economy. *See, e.g.,* PAUL A. LONDON, THE COMPETITION SOLUTION 78-81 (2005) (explaining that "after [World War II] ended people began to complain that limits on competition involved a lot of red tape and some obvious waste. By the 1960s, the idea began to take root…that cheaper and better service might be available if regulation could be streamlined and, perhaps in some areas, replaced by competition").

In general, the regulatory paradigm for dynamic and competitive new services has tended to move rather quickly from a hands-on approach, reminiscent of how the Commission approached basic telephony, to one of resolute minimalism – *i.e.,* the light-touch approach to which the FCC wishes to return via its current proposal. Indeed, this is the exact approach that Congress and the FCC followed after the emergence of broadband Internet access.

The initial regulatory response to broadband tilted towards common carriage for certain providers, specifically incumbent telephone companies that offered DSL. That service initially fell under the regulatory regime for data services that grew out of the Computer Inquiries, which required these providers to make available the underlying basic transmission component on a nondiscriminatory basis to competitors.[55] However, firms operating outside the common carrier market for telephony – notably cable companies – were not subject to these rules.[56] Such a bifurcated regulatory approach raised concerns. Some argued that, in the absence of common carrier-like policies, cable companies would be free to "impose whatever conditions they desire[d] on their customers" and exert too much control over the content flowing through their networks.[57] Others, however, voiced concerns around the need for achieving regulatory parity and fostering a competitive environment in what was at that time a rapidly growing market.[58]

Regulators were thus presented with a clear policy choice: impose heavy-handed common carrier rules on all broadband providers in an effort to assure parity, or implement minimalist policies along the lines of those first espoused decades ago when the FCC acknowledged that certain "enhanced" services required such an approach. The FCC ultimately opted for the latter approach, and between 2002 and 2007 it developed and successfully defended in court a light-touch regulatory framework for every type of broadband Internet access service.[59]

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[55] *See, e.g.,* James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale J. on Reg. 40, 61-69 (2000) (discussing the regulatory treatment of these access services).

[56] *Id.*

[57] *See End of End-to-End* at 927.

[58] *See, e.g.,* FCC Chairman William Kennard, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community*, at IX-2 (1999), http://www.fcc.gov/connectglobe/regguide.pdf (observing that "Government policy can have a profound impact on Internet development; it can either foster it or hinder it. To date, the Internet has flourished in large part due to the absence of regulation. A "hands-off" approach allows the Internet to develop free from the burdens of traditional regulatory mechanisms."); Michael K. Powell, Chairman, FCC, *The Great Digital Broadband Migration*, Remarks before the Progress & Freedom Foundation (Dec. 8, 2000), http://transition.fcc.gov/Speeches/Powell/2000/spmkp003.html ("Convergence is radically altering economic assumptions and underlying cost structures. It is changing the game of capital formation and altering business models. The culmination of these changes is what I am referring to by the Broadband Digital Migration. The challenge for us is to make a similar leap from analog-rooted regulations to ones that are applicable and relevant to the digital environment.").

[59] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002), *aff'd Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005); *Appropriate*

The Commission was able to choose this path because Congress had (1) made clear that it intended for the Internet to remain "unfettered by" regulation at the state and federal levels, and (2) codified the enhanced services category for dynamic, competitive services, thereby providing the FCC with the ability to remove these offerings from exacting regulation by classifying them as "information services."[60] That Congress intended to "limit [FCC] authority" over the Internet should not be controversial.[61] But the explicit absence of reference to this clear statutory mandate in the 2015 Order, as well as the majority opinion upholding the decision, is telling.

### C. *Common Carrier Regulation Harms Investment in Broadband Networks*

In practice, common carrier regulation undermines incentives to invest in new services. As noted above, this regulatory approach creates an artificial monopoly-like environment where the regulated firm seeks to maximize returns while investing as little as possible. This echoes the dynamic that tends to play out in the regulation of public utilities, which are also treated as natural monopolies subject to exacting scrutiny.[62] Such frameworks encourage conservatism on the part of regulated entities because most actions they take – *e.g.,* investing in existing resources or developing innovative new services – are carefully examined by regulators in a "Mother-may-I" environment.[63]

Since adoption of the 2015 Open Internet Order, this dynamic has begun to play out in the broadband space. The introduction of common carrier regulation, even with extensive

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*Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14,853 (2005); *Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd. 13281 (2006); *In the* Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd. 5901 (2007).

[60] 47 U.S.C. § 230(b)(2).

[61] *See* Kevin Werbach, *Off the Hook*, 95 Cornell L. Rev. 535, 558 (2010).

[62] Historically, public utility regulation and common carriage have been similar means of achieving similar ends for regulators: engaging in a *quid pro quo* with dominant firms wherein private entities cede certain rights and shoulder specific service obligations in exchange for a range of legal protections (*e.g.*, limited liability) and business model guarantees (*e.g.*, market dominance; a predetermined rate of return on investments). For further discussion, *see Federalism in Transition* at 1141.

[63] This is a core element of both public utility and common carrier regulation. *See, e.g.,* JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES 8-11 (2d ed., 1988) (identifying the contours of traditional public utility regulation); ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, VOL. II 127-129 (1988) (identifying the contours of utility-style common carrier regulation of basic telephone service). For further discussoion of the similarities and differences between the two regimes, *see Federalism in Transition* at 1140-1142. *See also* Charles M. Davidson & Michael J. Santorelli, *Realizing the Smart Grid Imperative: A Framework for Enhancing Collaboration Between Energy Utilities & Broadband Service Providers,* Time Warner Cable Research Program on Digital Communications (2011), http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/TWC_Davidson.pdf ("*Realizing the Smart Grid Imperative*").

forbearance, has resulted in a noticeable dip in network investment by ISPs.[64] Some have attempted to refute these findings by looking at a broader range of metrics – *i.e.,* those beyond investments in core network infrastructure[65] – an approach that offers a highly skewed, and therefore less relevant, analysis.[66] Similarly, some have pointed to statements by ISP executives about their continued commitment to investing in broadband regardless of the regulatory environment.[67] Such statements are to be expected from those with a fiduciary responsibility to shareholders to successfully navigate any barriers or impediments to growth that might arise. Indeed, statements to the contrary – *e.g.,* that broadband company X was pulling back all of its investments or significantly slashing them because of a "bad" regulatory outcome – would likely be viewed as a breach of that responsibility.

Examples of practical adjustment in the face of potentially harmful outcomes from elsewhere in the broadband ecosystem are numerous. At various points during the decades-long net neutrality debate, Google and Microsoft, for example, have significantly modified their approaches to the issue many times, including, in the case of Microsoft, by once pursuing a strategy of disengagement.[68] At the same time, the public stances of firms like Netflix have vacillated in line with the ebb and flow of the policy discussion, oftentimes dictated by "self-interest" above all else.[69]

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[64] *See, e.g.*, George S. Ford, *Reclassification and Investment: A Statistical Look at the 2016 Data*, Phoenix Center Perspectives 17-08 (July 13, 2017), http://phoenix-center.org/perspectives/Perspective17-08Final.pdf; Hal Singer, *Bad Bet by FCC Sparks Capital Flight from Broadband,* March 2, 2017, Forbes.com Washington Bytes blog, https://www.forbes.com/sites/washingtonbytes/2017/03/02/capital-flight-from-broadband-in-the-title-ii-era/#3fd1681735cf; Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era*, March 1, 2017, Hal Singer Blog, https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/; Patrick Brogan, *Broadband Investment Ticked Down in 2015*, U.S. Telecom (Dec. 2016), https://www.ustelecom.org/sites/default/files/Broadband%20Investment%20Down%20in%202015.pdf.

[65] *See, e.g.,* S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, Free Press (May 2017), https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf ("*It's Working*").

[66] *See, e.g.,* Doug Brake, *Broadband Myth Series, Part 1: What Financial Data Shows About the Impact of Title II on ISP Investment*, ITIF Innovation Files Blog, https://itif.org/publications/2017/06/02/broadband-myth-series-part-1-what-financial-data-shows-about-impact-title-ii.

[67] *See, e.g., It's Working* at 10-11.

[68] *See, e.g., Google Wants* (quoting a Microsoft official in 2008 as saying, "Network neutrality is a policy avenue the company is no longer pursuing."); Jon Brodkin, *Google Changes Stance on Net Neutrality Four Years After Verizon Deal*, Sept. 10, 2014, Ars Technica, https://arstechnica.com/tech-policy/2014/09/four-years-after-deal-with-verizon-google-changes-mind-on-net-neutrality/ (describing Google's shifting positions and strategies vis-à-vis net neutrality advocacy).

[69] *See, e.g.,* Jacob Kastrenakes, *A Timeline of Netflix's Conflicting Stances on Net Neutrality*, March 20, 2017, The Verge, https://www.theverge.com/2017/3/20/14960154/netflix-net-neutrality-stances-timeline (chronicling Netflix's shifting advocacy strategy and noting that "if you look back through Netflix's history of supporting open internet protections, a pretty clear picture starts to emerge of self-interest, with Netflix only looking out for net neutrality when it was a business advantage and ignoring it when doing so was more convenient.").

Continuing forward with Title II regulation could have even more profound negative impacts on – and could prove devastating to – the provision of broadband services over the long term. It is difficult to project with any accuracy how broadband capital expenditures might change over time, but the history of under-investment in network infrastructure by entities subject to heavy-handed regulation is illustrative of how the broader trend might shake out.

In the telecom space, the 1996 Act called for the implementation of a hybrid common carrier approach in an effort to "manufacture" competition in local telephone markets. Congress delegated to the FCC the authority to engage in detailed, prescriptive policymaking that proved too rigid to be effective. The approximately 200 pages of statutory text generated thousands of pages of FCC rules, which in turn provoked dozens of lawsuits, court decisions, remands, and other such actions that left the telecommunications market in disarray for a decade.[70] Ultimately, the attempt by federal policymakers to synthesize competition among firms failed because it was an unnatural fit for the marketplace.[71] In particular, the Act created the perception that some business models were much more viable and lucrative than they were, which contributed to overinvestment, network overbuilds, and, ultimately, to huge losses.[72] In addition, the Act and the rigidity of the policies that flowed from it failed to account for the "rate of technological innovation in the industry."[73] In short, by prescribing how a particular market should operate, regulators undermined the ability of the market to adapt, dooming many firms and diverting resources that might have been invested elsewhere.

This dynamic is especially pertinent to the present proceeding given the several hundreds of *billions* of dollars that many agree will be needed over the next decade to support the deployment of new infrastructure, more fiber, 5G networks, and other expenditures aimed at hastening the spread of broadband to rural areas and further into key sectors (*e.g.,* via

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[70] *See, e.g.,* ROBERT W. CRANDALL, COMPETITION AND CHAOS: U.S. TELECOMMUNICATIONS POLICY SINCE THE 1996 TELECOM ACT 9, 11 (2005).

[71] *See* Douglas H. Ginsburg, *Synthetic Competition*, 16 Media L. & Pol'y 1, 11-12, 15 (2006) (explaining that "synthetic competition" describes "a market subject to a regulatory regime designed to assure there are multiple sellers regardless whether fewer sellers, perhaps only one, would be more efficient" and arguing that, "in synthetic competition, the preferences of regulators – not consumers – are paramount").

[72] *See* Thomas Hazlett et al., *Sending the Right Signals: Promoting Competition through Telecommunications Reform*, at p. 33, A Report to the U.S. Chamber of Commerce (Sept. 2004), http://www.uschamber.com/sites/default/files/reports/0410_telecommstudy.pdf ("The Telecommunications Act of 1996 created a new set of rules that artificially inflated the returns of some businesses and depressed the returns of others. Entrepreneurs, eager to take advantage of the new rules, formed a large number of new businesses. Optimistic business plans attracted massive amounts of capital and thus drove up stock price multiples and set the stage for the technology bubble") ("*Sending the Right Signals*").

[73] *See* Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired,* 22 Yale J. on Reg. 315, 320 (2005).

the Internet of Things).[74] As such, evidence of even the slightest decline in capital investment in broadband networks should not be written off, nor should it be rationalized as the price to be paid for assuring continued innovation at the edge.[75] The only way to unlock more investment in broadband, which is needed to continue upgrading and expanding this dynamic technology, is to undo the error of treating these services as common carriers.

### D. *Title II Regulation Limits Consumer Power to Shape the Broadband Space*

The 2015 Open Internet Order included a range of prohibitions on the kind of business model and service delivery experimentation that has long benefited broadband consumers in the United States. Foreclosing opportunities to experiment with paid priority, for example, undermines the development of services that might appeal to consumers. It also constrains the ability of consumers to dictate whether a new offering is viable or not. Ideally, popular services will be able to thrive; unpopular ones will be shelved. Similarly, establishing an amorphous General Conduct Rule created an intimidating sentinel with a vague but powerful mandate that has loomed ominously over every provider in the broadband market.[76]

As the ACLP has noted in comments submitted in prior net neutrality-related dockets (three of these are attached; we respectfully request that they be reviewed anew), there are many compelling business, security, and consumer-focused reasons for allowing active network management and reasonable prioritization.[77] Among the many points and examples included in those previous filings, the one that stands out is the viability of paid

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[74] *See, e.g., Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities*, Accenture (2017), https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf (estimating that service providers will need to invest some $275 billion in deploying 5G networks).

[75] *See 2015 Open Internet Order* at ¶ 410 ("Although we appreciate carriers' concerns that our reclassification decision could create investment-chilling regulatory burdens and uncertainty, we believe that any effects are likely to be short term and will dissipate over time as the marketplace internalizes our Title II approach, as the record reflects and we discuss further, below. More significantly, to the extent that our decision might in some cases reduce providers' investment incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote." (citations omitted)).

[76] *See, e.g.,* Corynne McSherry, *Dear FCC: Rethink the Vague "General Conduct" Rule*, Feb. 24, 2015, EFF Deeplinks blog, https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.

[77] *See In the Matter of Broadband Industry Practices,* Reply Comments of the ACLP, WC Docket No. 07-52 (submitted Feb. 27, 2008), https://ecfsapi.fcc.gov/file/6519847577.pdf; *In the Matter of Preserving the Open Internet,* Joint Filing of Ad Hoc Coalition of Interested Stakeholders, GN Docket No. 09-191 (submitted April 10, 2010), https://ecfsapi.fcc.gov/file/7020437182.pdf ("*Joint Filing*"); *In the Matter of Protecting and Promoting the Open Internet*, Reply Comments of the ACLP, GN Docket, No. 14-28 (submitted Sept. 15, 2014), https://ecfsapi.fcc.gov/file/7522699123.pdf ("*ACLP 2014 Filing*") (appended to these comments without the many voluminous attachments included with the original).

prioritization. A joint filing from 2010 that was endorsed by two dozen stakeholders – including state legislators and regulators; healthcare innovators; nonprofit professionals working with seniors and people with disabilities; and other policy experts – identified several guiding principles for responsible broadband policymaking that are relevant to, and should thus inform, the instant proceeding:

- "Increased utilization of broadband by larger numbers of Americans and by additional sectors of the economy will increase the amount of traffic flowing through broadband infrastructure. This will spur further investment in bolstering networks, but will also invite more intensive utilization of broadband by individual and institutional consumers. Thus, regardless of how much bandwidth is available, network congestion and other issues will continue to challenge service providers.

- "Consistent with the FCC's vision for broadband in America, certain types of socially-valuable tools and services will require priority when networks are congested in order to assure reliable delivery. Failure to allow for these types of arrangements could impede further development and deployment of life-enhancing services…

- "Consumers should have the ability to work with service providers to ensure that the content they demand is delivered without delay. For example, a senior household should have the ability to assign priority to its telemedicine services, while college students living in off-campus housing should have the ability to assign priority to movie downloads. Similarly, service providers should have the ability to subject these agreements to reasonable network management needs in order to assure a reliable and consistent user experience in furtherance of the FCC's vision of broadband in America."[78]

Similar points were made in an ACLP filing submitted in 2014 as part of the previous reclassification proceeding. These also remain relevant and should inform the FCC's current efforts to undo the errors in the 2015 Order:

> "Consumers also tolerate and benefit from many business practices that some in this proceeding argue are anti-consumer. A leading example here is the idea of prioritization, a notion that rankles many because it seems inherently contradictory to the ethos of the Internet. Much like in the real world, the online experience has long been a managed one. Content is curated and filtered by algorithms carefully developed by firms seeking to provide end-users with better services (e.g., more relevant search results) and to support business models built around such highly targeted content (*e.g.*, ads for products that reflect a user's online habits and preferences).

[78] *Joint Filing* at 8-9 (footnotes omitted).

> Customers generally appreciate these kinds of services (privacy concerns aside) because it echoes long-standing practices that support a range of services at different prices. For example, those who wish to skip airport security lines can do so for a fee via TSA Pre. Those who wish to receive a package faster from a retailer can pay more for overnight shipping. Online, freemium models have thrived. These provide free access for all consumers, while also allowing more active users to purchase premium add-on services. Similarly, tiered pricing packages for broadband service are also popular, allowing users of all kinds to purchase plans that meet their distinct needs (*e.g.*, high bandwidth plans for gamers).
>
> "From a social policy perspective, support for prioritized services of both the analog and digital variety makes practical sense. Consumers have a high tolerance for these kinds of outcomes, reflecting an acknowledgement of a simple fact: certain things are more important than others. In other words, not every good or service is equal. For example, drivers who are snarled in gridlock nevertheless tolerate giving ambulances prioritized access through traffic during emergencies. Similarly, in the aftermath of major natural disasters, residents of impacted areas tend to support emergency response efforts that prioritize critical institutions over other needs (*e.g.*, prioritizing efforts to restore electricity to hospitals over households). As such, there is no reason why firms should be prevented from engaging in this type of behavior online. *Although some might be loath to admit it, not all Internet content has the same social value.* The brief history of the Internet teaches that, regardless of how much capacity might be available, there will always be some level of congestion. Accordingly, there is significant evidence to support allowing firms to prioritize certain kinds of socially important content (*e.g.*, a telemedicine application) over others (*e.g.*, streaming a movie) if the conditions warrant such an outcome."[79]

As such, limits on reasonable prioritization – paid and unpaid – should be removed.

The General Conduct Rule should also be eliminated because it, too, serves as a constraint on innovation, particularly with respect to business model experimentation. As sketched out in the 2015 Order, the Rule is essentially a catch-all – a hedge against any coverage holes that might emerge in the blanket of regulations cast on the sector.[80] Fortunately, the Commission has not had occasion to use this Rule to formally squash innovation, although it nearly did so in the context of free data. How the FCC approached that issue – from the 2015 Order to present – provides a compelling case study in how not to react to innovation, especially an innovative business model that has proven to be extremely popular amongst consumers.

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[79] *ACLP 2014 Filing* at p. 4-5.

[80] *2015 Open Internet Order* at ¶¶ 20-21, 133-153.

After initially signaling wary acceptance of the practice in the 2015 Order – while also making sure to note that free data services "have the potential to distort competition" – the Commission nevertheless "decline[d] to make blanket findings about these practices" and committed to addressing issues "on a case-by-case-basis."[81] However, only a few months later, the FCC Chairman at the time "ask[ed] for informal meetings [with T-Mobile, AT&T, and Comcast] to discuss "some of the innovative things they are doing.""[82] The implication was that some of the free data services made available by these companies might be illegal or otherwise contrary to the 2015 Order.

But the consumer reality was much different. Contrary to the then-Chairman's view, consumers were embracing new offerings like T-Mobile's Binge On.[83] Nevertheless, the then-Chairman persisted in his inquiry, which culminated in a final report that was issued just before he left office.[84] The report accused some free data programs of running afoul of the 2015 Order. But the framework used to reach that conclusion was novel, having sprung into existence during the review process. Specifically, the Commission devised a review rubric based on hazy "core principles of consumer welfare and competition that have guided the design of government policy regarding network or infrastructure industries for many years."[85] In other words, the Commission appeared to be leveraging the vagueness of the Rule to suit a particular agenda. Fortunately, the present FCC closed the inquiry and rescinded the previous findings[86] after noting that these services are indeed pro-competitive.[87] The proof cited? The enormous popularity of these services among consumers. Respectfully, that is the better approach – taking cues from consumers – to fostering and promoting innovation.

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[81] *Id.* at ¶¶ 152-153.

[82] *See* Jim Puzzanghera, *FCC Asking if Free-Data Plans from T-Mobile, AT&T and Comcast Break Internet Rules,* Dec. 17, 2015, L.A. Times, http://www.latimes.com/business/la-fi-fcc-tmobile-free-video-20151217-story.html.

[83] For an overview, *see Understanding and Appreciating Zero-Rating: The Use and Impact of Free Data in the Mobile Broadband Sector*, MMTC (May 2016), http://mmtconline.org/WhitePapers/MMTC_Zero_Rating_Impact_on_Consumers_May2016.pdf.

[84] *See Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services*, Wireless Telecommunications Bureau, FCC (Jan. 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf.

[85] *Id.* at 5.

[86] *See Wireless Telecommunications Bureau Report: Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero Rated Content and Services*, Order, FCC (rel. Feb. 3, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0203/DA-17-127A1.pdf.

[87] *See Chairman Pai Statement on Free Data Programs*, FCC (rel. Feb. 3, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343345A1.pdf.

## 4. THE CASE FOR RECLASSIFYING BROADBAND AS AN INFORMATION SERVICE

The reasons why the FCC should proceed with reclassification, as set forth in the instant NPRM, are legion. Many stem from the simple fact that, as discussed at length above, the Title II voice telephony regulatory regime is a poor fit for the broadband space. Congress never meant for common carrier rules to be used to regulate dynamic services provided in competitive markets. But there is more to the case for reclassification than noting the incongruity of Title II vis-à-vis the regulation of broadband Internet access. First, as discussed in part A, there is abundant evidence demonstrating that broadband thrived for many years under the light-touch "information services" approach set forth in the instant proposal. Second, as discussed in part B, the Commission possesses significant authority to engage in the proposed reclassification, which would realign its regulatory approach with Congressional intent and FCC precedent. Part C of this section briefly discusses the potential continued relevance of section 706 in the regulation of other services across the broadband ecosystem.

### A. *The Broadband Ecosystem Thrived Under the Light-Touch Information Services Regime*

There is significant evidence underscoring the efficacy of the light-touch regulatory approach to broadband that prevailed for more than a decade prior to the imposition of common carrier regulation by the previous Commission. Network investment boomed, allowing for advanced infrastructure to be deployed across the country.[88] Wider availability of more robust broadband connections encouraged and enabled innovation at the edge, allowing consumers to reap enormous benefits.[89] In short, without such sustained levels of investment by ISPs, innovation across the broadband space – at the core and around the edges – simply would never have occurred.[90]

This context is essential because the slowing of network investment (discussed above) certainly makes clear that the introduction of such a radically different, hands-on, interventionist, command-and-control regulatory approach shocked the sector into pulling back some of its investments. This visceral reaction stemmed primarily from the loss of freedom to innovate and invest however ISPs felt they needed to in response to consumer demand.

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[88] For further discussion, *see* Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, at p. 19-28, A Report of the ACLP at New York Law School (June 2014), http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf.

[89] *Id.*

[90] *See, e.g., Cutting Through the Noise;* Richard Bennet et al., *The Whole Picture: Where America's Broadband Networks Really Stand*, ITIF (Feb. 2013), http://www2.itif.org/2013-whole-picture-america-broadband-networks.pdf.

There is a wealth of evidence indicating a causal relationship between the implementation of a deregulatory model in the broadband space and increases in investment, competition, and innovation.[91] These gains coincided with and fed into a fundamental transformation of consumer expectations for their communications services and the primacy of the network vis-à-vis enabling innovation. Indeed, another important indicator of the success of light-touch regulatory framework to which the instant proposal seeks to return is the key role that it has played in fostering the creation of an ecosystem of firms that spans discrete but related segments (*i.e.*, ISPs, content providers, device manufacturers).[92] Unlike under common carriage, which for many years focused on preserving a narrow set of market conditions to the ultimate detriment of would-be competitors and collaborators, light-touch regulation created the conditions under which such cross-sector partnerships have thrived. In short, the bright lines that once separated discrete segments of the communications space – and that were once enforced by common carrier-like rules – began to disappear as a result of a shift to regulatory minimalism.

Such a view of the "ecosystem," one where the network plays an essential role in enabling innovation, was embraced by the FCC until the notion no longer suited its purposes. Indeed, this is another area where the 2015 Order erred – in its description of how innovation occurs in the broader broadband ecosystem.

In order to justify imposition of net neutrality obligations solely on ISPs – and not other stakeholders in the ecosystem – the Commission had to fundamentally alter how it conceived of the broadband "ecosystem" and the related "value cycle" metaphor and how the network component fit into this schematic.[93] Instead of all segments working together to generate value, as the FCC previously acknowledged, the Commission in 2010 decided to view the "edge" – *i.e.,* those producing devices, content, and services – as the primary driver

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[91] The literature on this point is vast. A small sampling from the era of light-touch regulation includes: James Speta, *Deregulating Telecommunications in Internet Time,* 61 Wash. & Lee L. Rev. 1063 (2004); *Sending the Right Signals* (comparing and contrasting the regulatory frameworks for telephone and broadband services and finding that the exacting regulatory approach for the former would hinder, rather than advance, competition and innovation in the market for the latter) ("*Sending the Right Signals*"); Robert Crandall & Hal Singer, *The Economic Impact of Broadband Investment*, Broadband for America (Feb. 2010), *available at* http://www.broadbandforamerica.com/sites/default/themes/broadband/images/mail/broadbandforamerica_crandall_singer_final.docx (finding that "In a largely deregulatory climate, broadband penetration skyrocketed to nearly 65 percent penetration by the end of the decade as absolute and quality-adjusted prices fell, and first-generation technologies—cable modem, DSL, and 3G wireless—individually covered approximately 90 percent of all U.S. households and collectively covered even more*." Id.* at 1).

[92] *See National Broadband Plan* at 15-16 (providing a more detailed conceptual definition of the ecosystem).

[93] *See 2010 Open Internet Order* at ¶ 3 (describing "a self-reinforcing cycle of investment and innovation in which new uses of the network lead to increased adoption of broadband, which drives investment and improvements in the network itself, which in turn lead to further innovative uses of the network and further investment in content, applications, services, and devices.").

of innovation and value creation.[94] Net neutrality rules were thus positioned as a means of protecting these entities from theoretical harm (like blocking or content prioritization) at the hands of ISPs.[95] When the 2010 rules were mostly struck down on legal grounds (though the Court largely accepted the new "cycle" metaphor[96]), the FCC doubled-down on this new approach by deciding that the best way to offer protection to those on the edge was to truly neuter the network by reclassifying it as a telecommunications service. Thus, in the 2015 Order, the FCC made clear that the network itself was the primary threat to "openness" and "innovation" in the ecosystem.[97]

Although supporters of common carrier regulation for broadband celebrated this new paradigm as critical to supporting continued innovation,[98] marginalizing the network as the FCC did in the 2015 Order proved harmful to investment. As noted above, eliminating the ability of ISPs to experiment with models of service delivery in value-enhancing ways and otherwise constraining their ability to innovate has created disincentives to invest in their infrastructure.

Ultimately, viewing the "value cycle" as only moving in one direction – from the edges, in – dismisses entirely the role of the network as a driver of innovation. Without innovation at the network level, in the form of faster, more reliable, and more affordable connections, much of the innovation on the edge would never have occurred, or would have happened at a much slower pace. This is contrary to the FCC's assertions in the 2015 Order and more in line with the long history of vibrant investment and innovation that arose as a direct result of the light-touch regulatory framework that prevailed for more than a decade. Reclassifying broadband per the instant proposal would recast this flawed vision and reembrace the centrality of the network – and network investment – in driving innovation across the entire ecosystem.

### B. *The FCC Possesses Ample Legal Authority to Reclassify Broadband Yet Again*

At this point in the long history of the net neutrality debate, it should be uncontroversial that the Commission possesses ample authority to revisit its classification decisions and otherwise change its mind when conditions warrant (*e.g.,* when a particular regulatory

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[94] *Id.* at ¶ 14 ("Novel, improved, or lower-cost offerings introduced by content, application, service, and device providers spur end-user demand and encourage broadband providers to expand their networks and invest in new broadband technologies." (citations omitted)).

[95] *Id.*

[96] *Verizon,* 740 F.3d at 644-645.

[97] *See, e.g., 2015 Open Internet Order* at ¶ 75. The D.C. Circuit once again accepted this view of the broadband space as reasonable when reviewing the 2015 Order. *See U.S. Telecom v. FCC,* 825 F.3d 674, 734 (2016).

[98] *See, e.g.,* Evan Engstrom, *Starting up the Broadband Economy,* Dec. 3, 2015, Recode, https://www.recode.net/2015/12/3/11621108/starting-up-the-broadband-economy.

approach fails or becomes outdated[99]). In upholding the 2015 Order, the D.C. Circuit did not weigh in on the merits of the proposal.[100] To the contrary, all it did was (1) apply Supreme Court precedent by deferring to the Commission's interpretation of ambiguous provisions of the Communications Act regarding the classification of broadband,[101] and (2) accept as reasonable and sufficient the FCC's reasoning in support of this new construction.[102]

Extending *Chevron* deference to FCC interpretations of vague provisions in the Communications Act has deep roots. In the immediate aftermath of enactment of the 1996 Act, the federal courts had numerous opportunities to realize that, as the Supreme Court eventually put it, the Act itself is "not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."[103] Since then, deference to the FCC (and other federal agencies for that matter) has increased significantly, especially with regard to agency interpretations of vague statutes, their own rules, and their jurisdiction.[104] Courts are also increasingly inclined to be more deferential to agency actions involving scientific or technical analyses.[105] These trends are especially true at the FCC: the agency has one of the highest win rates among all administrative agencies when *Chevron* deference is applied by federal circuit courts during review of their decisions.[106] Consequently, the current FCC appears to be on solid legal footing as it works to undo the errors of the 2015 Order.[107]

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[99] *See, e.g., FCC v. Fox Television Studios, Inc.,* 556 U.S. 502 (2009).

[100] *U.S. Telecom,* 825 F.3d at 695-697 (noting that its role is "not to "inquire as to whether the agency's decision is wise as a policy matter; indeed, we are forbidden from substituting our judgment for that of the agency."" (citations omitted)).

[101] *Id*. at 701 (citing *NCTA v. Brand X*, 545 U.S. 967 (2005)).

[102] *Id.* at 705-707.

[103] *See AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 397 (1999).

[104] *See, e.g., City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013) (holding that courts should defer to an agency's interpretation of its own jurisdiction so long as that interpretation is reasonable); *Auer v. Robbins*, 519 U. S. 452, 461-462 (1997) (holding that agency interpretations of their own regulations deserve deference unless the interpretation is "plainly erroneous or inconsistent with the regulation[s]" or there is any other "'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."). A recent quantitative study of the use of *Chevron* by federal courts reveals that, when federal circuit courts apply this standard of review to an agency's interpretation, the agency is more likely to prevail than not: "…agencies won more in the circuit courts when *Chevron* deference applied, at least when the court expressly considered whether to apply *Chevron* deference." *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, at p. 30, Michigan Law Review (forthcoming 2017) (January 2017 draft), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848 ("*Chevron in the Circuit Courts*").

[105] *See generally* Emily Hammond Meazell*, Super Deference, The Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733 (2011).

[106] *Chevron in the Circuit Courts* at 51, Table 3.

[107] As noted in the NPRM, ample legal precedent supports Commission action that is animated by a desire to address erroneous interpretations and predictions. *NPRM* at ¶ 53.

The FCC has also presented a solid case vis-à-vis offering a sufficient explanation for seeking to reclassify broadband only a few years after having made such radical changes to the regulatory framework. On this point, Supreme Court precedent regarding the ability of the FCC to change its mind is controlling. As it noted in *Chevron*, "An initial agency interpretation is not instantly carved in stone." [108] More recently in *Fox,* the Court spelled out the standard for how agencies should go about explaining their change of direction: "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."[109] There are instances when a more detailed justification for a policy change might be required,[110] but the court reviewing the 2015 Order did not consider the radical departure from established FCC precedent enough to trigger such scrutiny.[111] Consequently, the fruits of the current proceeding should be treated the same on appeal.

When going about the business of actually addressing the many errors in the 2015 Order, the FCC will also have to unravel the array of related policy changes that the previous Commission made in order to substantiate the imposition of common carrier regulation on all forms of broadband service, including mobile. Those actions included several strained reinterpretations of key parts of the Act that, previously, had walled off mobile broadband from such a regulatory approach.[112] The FCC's actions in this docket, therefore, will be tantamount to restoring the broadband regulatory framework to its pre-2015 Order form. As discussed at length above, this is a reasonable action by the Commission, especially considering the many errors included in the 2015 Order, so every action in support of this larger effort should receive the same level of deference as the Commission's move to reclassify broadband as an "information service."

### C. *A Note Regarding Section 706*

The NPRM asks for comment regarding whether and how the FCC might reinterpret section 706.[113] In its 2010 Order, the FCC reinterpreted that section as an independent grant of authority to regulate broadband.[114] Since then, several federal appeals courts have

[108] *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 863 (1984).

[109] *FCC v. Fox*, 556 U.S. at 503.

[110] According to the Supreme Court, agencies "must" provide such an explanation when its "new policy rests upon factual findings that contradict those which underlay its prior policy" or "when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* at 515. *See also Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1209 (2015) (clarifying that such changes require the relevant administrative agency to "provide more substantial justification.).

[111] *U.S. Telecom,* 825 F.3d at 706-707.

[112] *2015 Open Internet Order* at ¶¶ 388-408.

[113] *NPRM* at ¶ 101.

[114] *2010 Open Internet Order* at ¶¶ 117-123.

accepted this reinterpretation.[115] Some have argued that this new interpretation has unlocked nearly unlimited authority by the Commission to "regulate the entire Internet."[116] The present proposal expresses some uneasiness with the current interpretation of section 706 because, at its core, it "reflects a deregulatory emphasis" and, in its text, it raises the possibility of "coequal authority" with state regulatory commissions.[117]

Concerns about the potential for inviting state regulation of broadband are legitimate given the clarity of the section's text. But as the ACLP has noted in several recent analyses of the general issue of federalism in the regulation of communications services[118] and the specific topic of the state role under the new interpretation of section 706[119] (a copy of the latter is attached to these comments; we respectfully ask that it be reviewed in-depth), there are many checks in place to prevent against such piecemeal action. In short, the FCC possesses an ample set of legal and regulatory tools to preempt or otherwise protect against inconsistent state action impacting broadband services.[120]

That section 706 is a broad grant of authority under the present reading is also correct.[121] As has been noted in several instances – in previous FCC orders and court opinions reviewing those orders – there are a few well-defined boundaries in place to prevent against the reckless use of this section.[122] But additional limits on this power might only arise as a result of costly and time-consuming litigation.[123] Equally as troubling is that, despite significant evidence to the contrary, including a number of prior Commission analyses, the previous FCC unlocked section 706 authority by finding that broadband was

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[115] *See Verizon,* 740 F.3d at 636-642; *U.S. Telecom,* 825 F. 3d at 733-734*; In re FCC 11-161,* 753 F.3d 1015, 1054 (10th Cir. 2014); *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (accepting without discussion the FCC's interpretation of section 706 but ruling that the section did not permit the Commission to preempt state laws impacting municipal broadband deployments because the section lacks a "clear statement" in support of that particular action).

[116] *See* Berin Szoka & Geoffrey Manne, *The Feds Lost on Net Neutrality, But Won Control of the Internet*, Jan. 16, 2014, Wired, https://www.wired.com/2014/01/one-talking-comes-net-neutrality/.

[117] *NPRM* at ¶ 101.

[118] *Federalism in Transition*.

[119] *See* Charles M. Davidson & Michael J. Santorelli, *Broadband, The States & Section 706: Regulatory Federalism in the Open Internet Era,* 8 Hastings Science & Tech. L. J. 211 (summer 2016), http://scienceandtechlaw.org/wp-content/uploads/2016/06/Broadband-the-States-and-Section-706-Regulatory-Federalism-in-the-Open-Internet-Era-1.pdf.

[120] *See generally id.*

[121] *Id.*

[122] *See, e.g., id.* at 229-234 (discussing these limitations as outlined in the 2010 Open Internet Order and *Verizon*, which struck down most of the Commission's net neutrality rules but ultimately accepted its reinterpretation of section 706).

[123] One additional limitation was identified by the Sixth Circuit in 2016. *See Tennessee v. FCC* (ruling that section 706 does not authorize federal preemption of state laws impacting municipal broadband deployment).

not being deployed in a "reasonable and timely" manner.[124] Even the D.C. Circuit, in its review of the FCC's reinterpretation of section 706 in *Verizon*, noted that the "timing of [that] determination [is] certainly suspicious."[125] The Commission in the instant proceeding worries that, if it preserves the current interpretation, its regulatory authority, and any rules adopted pursuant to it, might evaporate "if the Commission later found that [broadband] is being deployed to all American in a reasonable and timely fashion."[126]

These are all valid concerns. The ACLP offers its analyses regarding section 706 to the Commission to assist it in making the best determination vis-à-vis how to use that statutory provision when adopting rules to police bad behavior in the broadband space. But the undersigned would also like to highlight the theoretical usefulness of section 706 as a means of policing behavior at the network's edge that might, in some manner or another, undermine efforts to bolster broadband connectivity.

As noted above, edge entities have enormous power to impact the user experience for good and ill, making that the arena where the greatest threats to openness, neutrality, and consumer welfare are likeliest to arise. Indeed, as the stakes in the race for digital data dominance increase, these firms could very well engage in practices that ultimately harm consumers – both directly, in the form of algorithmic bias, and indirectly, in the form of greater privacy intrusions.[127] These harms could discourage more robust use of broadband, thereby stunting investment incentives for ISPs. In short, the threat to broadband connectivity – and, thus, to broadband deployment and investment – is real.

Unfortunately, the traditional approach to enforcing antitrust laws, a seemingly natural remedy for these harms, has proven mostly inadequate.[128] As a result, edge entities operate largely without any active oversight. And because many of their data gathering and analysis techniques (*e.g.,* the algorithms that drive many of the most popular edge services) operate far from public view – usually in what is tantamount to a proprietary black box – the ability to cause harm without anyone knowing is significant. Accordingly, the FCC might explore how to preserve a version of regulatory authority stemming from section 706 for use in these specific instances.

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[124] *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*; Sixth Broadband Deployment Report, 25 FCC Rcd. 9556 (2010).

[125] *Verizon*, 740 F.3d at 642.

[126] *NPRM* at ¶ 101.

[127] *See, e.g.,* CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016).

[128] *See, e.g.,* ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016).

## 5. CONCLUSION: THE BEST WAY TO PROTECT CONSUMERS GOING FORWARD IS BY RETURNING BROADBAND REGULATION TO THE PRE-2015 STATUS QUO

For the many reasons discussed in these comments, the undersigned support the Commission's proposal to undo the many errors in and address the many harms wrought by the 2015 Open Internet Order. Returning the regulatory framework to the one that prevailed for years prior to the previous FCC's radical departure from it will unleash additional broadband investment and spark further innovation across the ecosystem. It will also ensure that the regulatory framework better reflects the realities of the marketplace – *i.e.,* that ISPs lack any real incentive, financial or otherwise, to engage in the kinds of behavior (*e.g.,* unreasonable blocking or throttling) that the 2015 Order purported to address. A gap will remain, though, with respect to the ability of edge companies to engage in behaviors that could very well undermine broadband connectivity. And, of course, the possibility remains that future FCCs will act to undo what the present FCC seeks to accomplish in the present proceeding.

To properly address these issues – *i.e.,* the threat from edge companies and continued toggling between regulatory regimes – Congress must engage in a comprehensive update of the federal communications laws. In the meantime, though, the Commission should forge ahead with its current proposal so that the broadband sector can get back on track.

Respectfully submitted,

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**Attachment #2**

*ACLP Comments re GN Docket No. 14-28*

*(In the Matter of Protecting and Promoting the Open Internet)*

Filed September 15, 2014

September 15, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28**

Dear Ms. Dortch,

The Advanced Communications Law & Policy Institute ("ACLP") at New York Law School respectfully submits these reply comments and attached documents in the above-referenced docket.[1]

* * * * *

***A Common Sense Understanding of the Net Neutrality Debate***[2]

The Internet is many things – a borderless communications network unlike anything the world has ever seen; an unmatched enabler of innovation; a mighty leveler of playing fields between users of all kinds; a transformative tool for individuals and businesses – but it is not, despite the assertions of many, Utopia or a utopian medium. A diverse group of advocates, academics, and corporations, many of whom have commented in the instant proceeding, have long attempted to frame the Internet in just this way – as something more than just a "network of networks." For them and many others, the Internet is the digital realization of some undefinable, transcendent quality that has long been impossible in the analog world. But while the Internet has helped to facilitate innumerable positive outcomes for millions, if not billions, of users worldwide, it has

[1] The ACLP is an interdisciplinary program that focuses on identifying and analyzing key legal, regulatory, and public policy issues impacting stakeholders throughout the advanced communications market. For more information, please visit the ACLP's website.

[2] The following discussion builds upon analyses included in the attached documents. Reference to specific resources will be made in the foundational principles section.

done so not as an untarnished Eden, but as perhaps the most efficient – and potent – commercial vehicle in the history of the world. Indeed, for as much good as the Internet indisputably helps to accomplish – by enabling better healthcare and educational services; by improving the lives of vulnerable and at-risk users; by enhancing public engagement with government – it also generates significant economic opportunities and financial returns for every entity (from device manufacturers to content providers to network owners and others) involved in facilitating and shaping the online experience.

This might seem like a crass (yet obvious) point to make, but it is an incontrovertible truth of the Internet, and a basic tenet that seems to have gotten lost in the long debate over net neutrality. Moreover, it is a simple observation that, we respectfully submit, ought to be reflected in and respected by whatever rules that might emerge from the instant proceeding. Acknowledging this fundamental dynamic, and ensuring that any new rules further rather than impede it, will yield a regulatory framework that is grounded in reality, not the apocalyptic what-ifs of doomsayers or the collectivist yearnings of some intellectuals and technology elitists.

***E-Commerce is American Commerce***

A leading argument in favor of far-reaching rules that has been made by many in this docket is that, in the absence of a framework that can preserve idealistic notions of the Internet and network neutrality, innovation at the edge of the Internet will cease (i.e., the "next Google" or "next Facebook" will never emerge). Though a seemingly powerful argument, it nevertheless overlooks certain basic truths about how commerce – of the digital and analog kind – works in the United States. It also omits the fact that the vast majority of major Internet firms in the U.S. – content firms, hardware manufacturers, ISPs, etc. – emerged in a market that lacked enforceable network neutrality rules.

Those who argue for a rigid regulatory regime oftentimes have powerful incentives to keep their costs as low as possible. Major online firms seek to gain market share by offering free services – be it a search product, a social media platform, or a streaming media site. These firms are able to provide "free" services by (1) keeping their operating costs low (many edge firms employ only a few dozen employees) and (2) offsetting costs and generating profits by monetizing the personal data that stem from customers' use of their service. Advocating for a framework that eliminates the ability of partner firms to impose new or added costs is certainly a rational response by any entity that seeks to make a profit and remain competitive, yet it is a perspective that is rarely voiced by those arguing in favor of robust net neutrality rules.

Another strain of argument seeks to further idealized notions of fairness and "fair play" by noting that the absence of broad network neutrality rules would make it possible for larger content firms to carve out special deals with ISPs or other entities, which would in turn provide them with a competitive advantage over other, smaller firms (e.g., by paying for priority delivery to end-users). The implication here is that smaller firms – e.g., the new start-up that might unseat Netflix – would find it extremely difficult, if not impossible, to get started and forge a viable position in the market. But for anybody who has ever tried to launch a small business, be it a

lemonade stand or a restaurant, this has long been the reality of doing business in a market-based economy. Owing to the fact that few business operate in isolation, in *every* market, analog and digital, larger, more established companies have many advantages over smaller firms, especially when it comes to leveraging relationships with partners. Indeed, larger firms can and do leverage their scale to realize a range of benefits, including the ability to easily acquire volume discounts or priority service with any number of vendors. For example, a small retailer will likely have to pay significantly higher postage rates on a per package basis than Amazon. A mom-and-pop eatery may have higher food costs than chain restaurants. A solo practitioner (e.g., a doctor or a lawyer) may have much higher per capita overhead costs than those who are part of a larger network of service providers.

*The result of this dynamic – in both the real world and the online world – has not been the death of innovation, but rather the blossoming of competition among firms of all sizes.* Indeed, a unique characteristic of American capitalism is that it not only tolerates but encourages and thrives on the development of niche markets and niche service providers. So long as there is sufficient demand on the consumer side and rational business models on the retail side, companies of nearly every size can coexist in a particular market segment. The mom-and-pop restaurant can compete with McDonald's on a range of factors – higher quality meals, lower prices, being a local business, etc. – and if the local eatery thrives, there is nothing stopping it from growing larger, a dynamic that has catapulted many small companies (including McDonald's) into becoming regional, national, and international conglomerates.

Success in any business is never a given. Such indifference and viciousness is another critical characteristic of American commerce. Anybody can launch a business so long as they possess the requisite resources and have the will to compete. Established competitors will try to snuff out new entrants by engaging in any number of legal business practices, all in the spirit of preserving their standing in the eyes of consumers. Those that fail will see their businesses suffer. Some will go bankrupt or close up shop. Some might respond and compete more vigorously. That the outcome is not preordained and that there are many paths that can lead to success or failure is essential to our economy. Indeed, this cycle of business creation and destruction evokes a spirit of enterprise, creativity, and competitiveness that has long defined commerce in this country.

This same dynamic has long prevailed online. Content companies like Google, Netflix, and Facebook; device manufacturers like Apple; and ISPs like AT&T and Comcast have all benefited immensely from their pursuit of scale. They have sought every kind of advantage over would-be rivals and have become market leaders as a result. Yet when they began competing in their relevant market, they were not assured dominance or even the ability to generate a profit. Their success was never guaranteed. Indeed, in the dustbin of Internet history, there are many firms that tried, and failed, to unseat these firms, or that were unseated by them. Those that have survived have done so because of their ability to continue experimenting and tweaking their services and business models. They have never stood still because to do so would be to invite competitors to speed past them. And as in any American market, no position is safe. New challenges are always possible because the gateway to the market is open to anyone with capital to invest and expertise to apply. Indeed, such ubiquity of opportunity, coupled with targeted rules

(e.g., antitrust laws) and flexible regulatory frameworks, has ensured that the U.S. economy is not dominated by monopolists. Rather, most sectors, including many throughout the broadband ecosystem, are characterized by a relatively large number of firms – some big, some small, some new and some old – that fuel competition and push the market toward efficient outcomes.

***Learning About the Open Internet from Consumers***

From a consumer perspective, this ongoing cycle has yielded a rich array of choices for going online and participating in the emergent ecosystem of content, devices, and networks. Looking back over the last 14 years provides essential perspective regarding the many benefits that have flowed, and continue to flow, from the Internet business cycle. Whereas wireline broadband and mobile data services were in their infancy at the turn of the 21st century, today consumers in nearly every part of the country have multiple options for going online via a high-speed connection. Such robust capacity has prodded a growing universe of firms to develop cutting-edge content and devices in an effort to meet consumer demand for more immersive, relevant, and real-time digital services. Although some firms attempt to mask their real motives, the primary driving force behind these many gains has been a desire to grow market share, increase revenues, and generate returns for investors, a vital dynamic that provides companies with the ability to continue investing in new services and fanning consumer demand.

Consumers also tolerate and benefit from many business practices that some in this proceeding argue are anti-consumer. A leading example here is the idea of prioritization, a notion that rankles many because it seems inherently contradictory to the ethos of the Internet. Much like in the real world, the online experience has long been a managed one. Content is curated and filtered by algorithms carefully developed by firms seeking to provide end-users with better services (e.g., more relevant search results) and to support business models built around such highly targeted content (e.g., ads for products that reflect a user's online habits and preferences). Customers generally appreciate these kinds of services (privacy concerns aside) because it echoes long-standing practices that support a range of services at different prices. For example, those who wish to skip airport security lines can do so for a fee via TSA Pre. Those who wish to receive a package faster from a retailer can pay more for overnight shipping. Online, freemium models have thrived. These provide free access for all consumers, while also allowing more active users to purchase premium add-on services. Similarly, tiered pricing packages for broadband service are also popular, allowing users of all kinds to purchase plans that meet their distinct needs (e.g., high bandwidth plans for gamers).

From a social policy perspective, support for prioritized services of both the analog and digital variety makes practical sense. Consumers have a high tolerance for these kinds of outcomes, reflecting an acknowledgement of a simple fact: certain things are more important than others. In other words, not every good or service is equal. For example, drivers who are snarled in gridlock nevertheless tolerate giving ambulances prioritized access through traffic during emergencies. Similarly, in the aftermath of major natural disasters, residents of impacted areas tend to support emergency response efforts that prioritize critical institutions over other needs (e.g., prioritizing efforts to restore electricity to hospitals over households). As such, there is no reason why firms

should be prevented from engaging in this type of behavior online. *Although some might be loath to admit it, not all Internet content has the same social value.* The brief history of the Internet teaches that, regardless of how much capacity might be available, there will always be some level of congestion. Accordingly, there is significant evidence to support allowing firms to prioritize certain kinds of socially important content (e.g., a telemedicine application) over others (e.g., streaming a movie) if the conditions warrant such an outcome.

***Foundational Principles to Guide the FCC's Efforts***

As the Commission moves forward with formalizing rules in this proceeding, the undersigned respectfully offer the following foundational principles to guide its efforts.[3]

1. **The regulatory framework that has prevailed in this space for the last decade has yielded enormous consumer welfare gains and produced an intensely competitive, vibrantly innovative, and closely interconnected ecosystem.** There is ample data to suggest a causal relationship between the minimalist regulatory framework for broadband and the many consumer welfare gains evident throughout this space.[4] As such, the Commission must demonstrate, with clear and convincing evidence and objective data, that its proposed rules are in fact necessary to address actual harms.[5]

2. **The Internet is an extension of American commerce.** As discussed at length above, the Internet, despite assertions to the contrary, is primarily an engine for business creation and economic growth. However, some commenters in this proceeding have sought to disguise the financial interests of certain firms beneath a veneer of platitudes describing idyllic aspects of the Internet. Accordingly, the Commission should avoid crafting rules that, intentionally or unintentionally, favor one set of firms or another, or that have the practical impact of limiting particular kinds of business models.[6] Incorporating notions of regulatory parity and competitive neutrality into the rules would provide much-needed certainty to firms competing in this space and support continued investment in networks, services, and devices of all kinds.[7] A core feature of this approach would be crafting rules that recognize and reflect key technical differences between wireline and wireless networks.[8]

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[3] These principles stem from the preceding analysis and the array of documents that are attached to these comments, an overview of which is included at the end of this letter. We respectfully request that the Commission review the attached documents in their entirety in order to ensure that they are read and understood in proper context.

[4] Please see Attachments #2, 5, 6, 8, 9, 10, 11, and 12.

[5] Please see Attachments #1, 3, and 5.

[6] Please see Attachments #1, 3, and 5.

[7] Please see Attachments #2, 4, 6, 8, 9, 10, and 11.

[8] For an in-depth discussion, please see Attachment #4.

3. **Consumers are generally accepting of the very business practices that the Commission is seeking to nullify or modify in this proceeding.** Because the Internet is just another means of buying goods and consuming services, consumers are generally accepting of business practices and commercial notions – like prioritization, tiered service, having "cost-causers" pay their own way, etc. – that the Commission has labeled as troubling in the instant proceeding.[9] Rather than undermine consumer choice, the Commission should craft rules that encourage unfettered experimentation with service delivery. Moreover, the Commission should avoid using the relatively large number of commenters in this proceeding as cover for implementing far-reaching and aggressive net neutrality rules (i.e., those built on Title II). Though impressive, the large number of commenters in this proceeding evidences only enthusiastic participation by a highly engaged but tiny minority of Internet users and Americans.

4. **Not all online content is created equal from a social welfare perspective.** As discussed above, there is a compelling case to be made for prioritizing certain kinds of socially valuable content over others during times of network congestion. Similarly, there appears to be at least some support for a related notion – customers should be free to choose to have particular Internet services delivered in a prioritized manner. These notions were discussed at length and endorsed in a joint filing to the FCC by an *ad hoc* coalition of some two dozen stakeholders – doctors working with telemedicine; elected officials; state regulators; disabilities advocates; and digital literacy experts working with senior citizens – that was submitted in April 2010, and remain relevant in the instant proceeding.[10]

5. **Regulatory restraint will yield the strongest and most enduring set of open Internet rules.** In the instant proceeding, the Commission has explored two distinct paths for implementing legally enforceable rules. The first path revolves around a broad reading of section 706 of the Telecommunications Act of 1996; the second would necessitate reclassifying broadband as a public utility service subject to common carrier regulation under Title II of the Communications Act. As discussed at length in several of the attachments, the Title II path is both untenable from a legal perspective and troubling from a policy perspective.[11] Consequently, of the two options, the one based on section 706 is far preferable. But even that approach raises some tough questions with regard to the scope of Commission authority over broadband and broadband-enabled services.[12] As such, the FCC should exercise regulatory restraint when building open Internet rules around section 706. In particular, the Commission should be humble in its application of this provision by acknowledging that it does not, in fact, possess unfettered regulatory

[9] Please see Attachments #2 and 12.

[10] Please see Attachment #7.

[11] Please see attachments #1, 2, 3, and 5.

[12] Please see Attachments #1, 3 and 5.

> authority over the broadband ecosystem and by imposing limits on the reach of its perceived authority.[13]

Taken together, these principles, the preceding analysis, and the attached materials underscore the profound importance of assuring sufficient regulatory certainty in whatever outcome might result from the instant proceeding. Moreover, these resources echo critical findings and arguments included in an array of filings in this proceeding, namely that the U.S. broadband ecosystem has thrived under a specific kind of regulatory framework, one that is minimalist in nature and flexible enough to accommodate the breakneck pace of business model experimentation and technological innovation that has come to characterize this critical segment of the country's economy. Accordingly, the FCC has a duty to ensure that any rules that might emerge from this proceeding do not unduly disrupt the organic market forces that have shaped, and continue to shape, this vital sector and that have long undergirded American commerce.

* * * * *

The undersigned appreciate the opportunity to contribute to this discussion and look forward to working with the Commission and other stakeholders on these vital issues going forward.

Respectfully submitted,

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Submitted: September 15, 2014

[13] Please see Attachments #1 and 3.

**Attachment #3**

*Joint Filing Signed by 27 Subject-Matter Experts re GN Docket 09-191*
*(In the Matter of Preserving the Open Internet)*
Filed April 26, 2010

April 26, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52*

Dear Ms. Dortch,

The undersigned parties, representing a diverse *ad hoc* coalition of interested stakeholders, respectfully submit these comments in the dockets cited above.

***Overview of Comments***



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## A. Introduction

The current rulemaking proceeding addresses an issue of fundamental importance to key demographics and sectors of the economy: *how best to calibrate Internet-related public policy in a manner that continues to promote innovation and meaningful access to a universe of increasingly vital services and applications that are being delivered via broadband.* Consumers and service providers in a number of key demographics – such as senior citizens and people with disabilities – are utilizing broadband in a manner that is having profound and life-enhancing impacts. Broadband is a transformative tool that is poised to benefit the lives of everyone that uses it.

The impacts of broadband include, among others, *health-related benefits* (e.g., enabling remote, real-time monitoring of vital signs and real-time telemedicine consultations), *essential communications services* (e.g., real-time video relay between people who are hard of hearing or people who are deaf), *mental well-being & social benefits* (e.g., increasing feelings of connectedness amongst senior citizens), and *economic benefits* (e.g., providing people with disabilities an array of educational and employment opportunities that might not otherwise be readily available).

The FCC has outlined a bold vision for broadband in America.[1] If and when that vision is fully realized, a significant portion of daily life, including the delivery of critical services such as real-time healthcare monitoring, telemedicine services, and online educational instruction will be facilitated by broadband. In light of these trends and the myriad positive impacts that broadband is having on users across the United States, it is imperative that policymakers at all levels of government ensure that public policy not inadvertently hinder or disadvantage the very demographics or economic sectors for which broadband may be especially important.

As an overview, the undersigned, via these comments:

- Express support for an open Internet and for the FCC's existing four principles protecting the fundamental rights of Internet users[2];
- Encourage the FCC to reflect in its rulemaking that broadband has unique impacts and importance for key demographics (including senior citizens and people with disabilities) and in discrete sectors of the economy (including the healthcare, education, and energy arenas);

[1] This vision is outlined in the FCC's National Broadband Plan (released March 16, 2010).

[2] These principles protect a user's ability to: (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice (subject to the needs of law enforcement); (3) connect their choice of legal devices that do not harm the network; and (4) be able to choose among competing network providers, application and service providers, and content providers. Per the FCC, each of these principles is subject to reasonable network management.

- Underscore the importance of the myriad applications and services that are enabled by broadband to achieving many of the long-term social and policy goals articulated by the FCC; and

- Urge the Commission to implement a regulatory approach that is sufficiently flexible, adaptable, and accommodating of the many new uses and services that it is championing.

## B. Broadband is a Transformative Technology that Profoundly Impacts the Lives of Senior Citizens & People with Disabilities, Among Others

There is wide agreement that broadband is profoundly impacting the way senior citizens and people with disabilities, among others, live their lives. Appreciating the scale and scope of these impacts is critical in public policy discussions, since the populations of senior citizens[3] and people with disabilities[4] are expected to grow significantly over the next few decades. Broadband is poised to serve as a key medium for delivering critical services to and enhancing the lives of these users.

For seniors, broadband represents an interactive outlet to the world that "enhance[s] quality of life,"[5] "reconnect[s] them with distant family members, and provid[es] them with access to an infinite universe of information."[6] Seniors are using broadband to engage in an array of activities, from viewing digital photos of grandchildren to visiting remotely with family and friends via web-cams and low-cost IP-based telephone service.[7] In addition, seniors use their broadband connections to blog, launch small businesses, manage retirement savings, purchase affordable prescription drugs, and engage in a variety of other such activities from the comfort of their home.[8]

Broadband is also "increasingly critical to a healthy and engaged aging population."[9] Numerous studies have found that broadband utilization spurs new brain functions and lessens feelings of depression among older users, both of which can delay the onset of costly diseases.[10] In addition,

[3] The number of senior citizens living in the United States is expected to double by 2050. See Jack Goldstone, "The New Population Bomb," p. 35, Foreign Affairs (Jan/Feb 2010).

[4] As the senior population grows, so, too, will the number of people with disabilities. For example, per the Hearing Loss Association of America: "As baby boomers reach retirement age starting in 2010, [the number of Americans experiencing hearing loss] is expected to rapidly climb and nearly double by the year 2030."

[5] Comments of The 60 Plus Association, GN Docket No. 09-191 (Jan. 5, 2010).

[6] Comments of Older Adults Technology Services, Inc., GN Docket. No. 09-191 (Jan. 14, 2010).

[7] FCC National Broadband Plan, p. 179-180.

[8] The U.S. Chamber of Commerce, in December 2008, released a report that highlights an array of additional uses of broadband by seniors. The report is titled "The Impact of Broadband on Senior Citizens."

[9] Comments of Older Adults Technology Services, Inc., GN Docket. No. 09-191 (Jan. 14, 2010).

[10] The FCC posits that "One way to increase the relevance of broadband for older Americans is to highlight how broadband can improve their access to health care information and services." FCC National Broadband Plan, p. 179.

seniors are among the immediate beneficiaries of emerging telemedicine tools that enable in-home, remote monitoring services. *These tools, which allow healthcare providers to monitor vital signs and other health metrics in a **real-time** manner via broadband, are enabling seniors to age at home and to remain more independent for longer periods of time.*[11]

The disability community likewise "relies heavily on the network"[12] and uses broadband to access a universe of text- and video-based content. For example, the "blind and visually impaired population has benefitted greatly from…increased broadband connectivity and innovation over the past decade. New technologies have made what was once thought impossible [a] reality for many of those in [the] community. Communication, education and even recreation has become easier to access and all of these contribute to a greater sense of connectivity for people who are blind and visually impaired."[13] People who are deaf and people who are hard of hearing also benefit from broadband by, among other things, using new tools like Video Relay Services which operate in a ***real-time*** manner. As the FCC recently observed, these types of services have "revolutionized" the lives of many users with disabilities.[14]

Like with other demographics, people with disabilities are also using broadband to participate in a variety of educational and employment opportunities that might otherwise not be readily accessible.[15] For example, broadband enables a variety of targeted distance learning programs that can help increase educational achievement among the disability community. Broadband is also being used to launch small businesses and to telecommute, both of which are key to enhancing economic activity within this demographic group.[16]

## C. Broadband is Critical to Many Sectors of the Economy

In addition to impacting individual users, broadband is driving key innovations in the delivery of cutting-edge healthcare, education, energy, and government services. For example, broadband is:

- *Enabling the development and deployment of cutting-edge telemedicine and health information tools and services.* Such services include: video-enabled consultations between patients and doctors; real-time remote monitoring of vital signs; delivery of telerehabilitation services such as remote delivery of rehabilitation and home health services; the creation and maintenance of

[11] Ibid. at p. 202.

[12] Comments of the Center for Accessible Technology, GN Docket No. 09-191 (Jan. 8, 2010).

[13] Comments of the St. Louis Society for the Blind and Visually Impaired, GN Docket No. 09-191 (Jan. 13, 2010).

[14] Declaratory Ruling, The Matter of Structure and Practices of the Video Relay Service Program, at paragraph 1, CG Docket No. 10-51 (Feb. 25, 2010).

[15] In comments to the FCC in this proceeding, the American Associate of People with Disabilities (AAPD) cites to a recent report by the U.S. Chamber of Commerce – "The Impact of Broadband on People with Disabilities" – as a key resource that "captures much of [the relevant] research and data of the past several years" regarding the positive impacts of broadband on the disabled community. Comments of AAPD, GN Docket No. 09-191 (Jan. 14, 2010).

[16] FCC National Broadband Plan, p. 5.

electronic health records; and cybersurgery.[17] These services, many of which occur in a real-time manner, are expected to enhance the quality of medical care, shift the healthcare paradigm towards more individualized care, and result in enormous cost-savings.[18]

- *Allowing seniors to age longer at home.* Broadband is being used to remotely monitor the real-time movements of seniors in order to alert emergency personnel if they fall or fail to get out of bed in the morning, and to help doctors identify the onset of certain types of cognitive diseases (e.g., Alzheimer's).[19]

- *Transforming education from preschool through college.* A large number of studies have observed that effectively integrating broadband and broadband-enabled technologies into curricula improve learning outcomes across the continuum of education.[20] In addition, broadband-enabled education has the potential to facilitate more individualized and targeted learning opportunities for all students.[21]

- *Facilitating the deployment of a national smart grid that will enable a variety of key innovations in the transmission, distribution, and consumption of energy.*[22] A broadband-enabled smart grid will allow for the utilization of a wider array of fuel sources and will serve as a platform for a number of real-time, smart home innovations that empower consumers to more carefully manage consumption.[23]

- *Enhancing the openness and availability of government services.* Successfully leveraging broadband will allow local, state, and federal government agencies to provide more robust services online and to more fully engage the populace.[24]

[17] Ibid. at p. 200-203.

[18] The FCC estimates that increased utilization of these and other e-health tools could result in hundreds of billions of dollars in healthcare cost savings over the next 15-25 years. Ibid. at p. 201.

[19] Ibid. at p. 202.

[20] The FCC recently observed that students in hybrid learning environments – i.e., those that mix broadband and non-broadband components – tend to perform tasks more efficiently and score better on advanced placement tests than counterparts in traditional educational environments. Ibid. at p. 228.

[21] Ibid. at p. 225-226.

[22] Ibid. at p. 249-251.

[23] The FCC estimates that a national smart grid could cut down on carbon emissions by approximately 360 MM tons annually and could ultimately save billions of dollars for consumers. Presentation of the National Broadband Team, at slide 25, FCC Open Commission Meeting, Feb. 16, 2010.

[24] FCC National Broadband Plan, p. 283.

> Examples range from electronically filing tax returns to watching government proceedings live via streaming video.[25]

Such broadband-enabled innovations, too numerous to address in detail here, form the core of the FCC's vision for broadband in America.[26] Indeed, for the FCC and an array of stakeholders, broadband is a key component of a new social policy, whereby high-speed Internet is used to deliver services that are of critical importance to users.[27] Ubiquitous access to and robust adoption of broadband is poised to "unlock[] greater innovation, education, entrepreneurship, opportunity, and…social justice."[28] But if this vision is to be fully realized, then public policy must be sufficiently flexible to adapt to emerging and future uses of broadband and not so rigid as to discourage experimentation or impede innovation by technology developers, application and service providers, and network owners.

## D. The Delivery of Broadband-Enabled Services Requires Flexibility by Network Managers & by Regulators

The many uses of broadband described above – from increased use of in-home telemedicine services by seniors and people with disabilities to the deployment of a national smart grid – will drive the deployment of more advanced network infrastructure, more robust services, and more bandwidth-intensive applications to consumers and service providers across the United States. Increased capacity will undoubtedly invite more bandwidth-intensive usage by users and innovators in sectors like healthcare, education, and energy.[29] *Such increased usage and more high-capacity usage will, in turn, lead to moments of network congestion or other issues, that, if left unmanaged, could degrade the user experience for all users and possibly delay the delivery of critical services to some users.* At present, there appears to be some dissonance between the FCC's vision for broadband in America on the one hand and its proposed vision for a nondiscriminatory Internet (in the "traffic" sense) on the other.

[25] The cost savings associated with these types of uses are potentially enormous. For example, the FCC estimates that the IRS has saved over $300 million in processing tax returns over five years via electronic filing. Presentation of the National Broadband Team, at slide 34, FCC Open Commission Meeting, Feb. 16, 2010.

[26] As the FCC notes in the Introduction to its National Broadband Plan: "Broadband is a platform to create today's high-performance America – an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading, broadband-enabled health care, education, energy, job training, civic engagement, government performance, and public safety."

[27] This is framed most persuasively in a speech by Blair Levin titled "Wired for Social Justice," which was given during the Minority Media and Telecommunications Council's Broadband and Social Justice Summit on Jan. 22, 2010.

[28] Ibid.

[29] The FCC recently observed that "bandwidth supply and demand are co-dependent. More bandwidth begets more data-intensive applications which begets a need for more bandwidth. Indeed, it is this virtuous cycle that has made broadband an innovation growth engine over the past decade—but also makes forecasting difficult." FCC National Broadband Plan, p. 84.

We respectfully submit that there will be instances when broadband providers should have the latitude to prioritize or otherwise manage (in a "traffic" sense) those tools, services, and applications that are fundamental to the Commission's own vision of social justice and digital equity. Without sufficient regulatory latitude, service providers will likely be unable to guarantee reliable delivery of vital, real-time services for, as capacity increases, so, too, will the intensity of use across all user groups.[30]

We also respectfully submit that the proposed rules currently being considered could unduly limit the ability of service providers and innovators to ensure the delivery of important social, healthcare, communications, and other such services. The following examples highlight but several of the vital uses of broadband that, under the proposed rules, could be vulnerable to network congestion, reliability issues, or other problems in an environment where broadband providers are prohibited from managing or prioritizing traffic.

- *Broadband-enabled communication among users with disabilities.* Video Relay Services (VRS) are increasingly popular among people who are deaf and people who are hard-of-hearing since they facilitate real-life, face-to-face communication by providing real-time video connectivity. Delayed or dropped communications resulting from network congestion would deprive users of equal opportunities to participate in the full range of online activities.

- *Real-time, remote telemedicine services.* The FCC envisions a future where a "patient's heart rhythm can be monitored continuously, regardless of her whereabouts, and diabetics can receive continuous, flexible insulin delivery through real-time glucose monitoring sensors that transmit data to wearable insulin pumps."[31] The FCC has highlighted other such services, including: "Mobile sensors in the form of disposable bandages and ingestible pills relay real-time health data (e.g., vital signs, glucose levels and medication compliance) over wireless connections."[32] In order to be effective, many of these services must be delivered in real-time via broadband.[33] Delays could result in a missed dosage of

[30] As a preliminary matter, we agree with others that more broadband capacity is important. More capacity allows for more robust broadband-enabled services and applications. More capacity also encourages more bandwidth-intense innovation. As capacity increases, so does the proliferation of services that utilize that bandwidth. As such, no matter what the reasonable capacity of the nation's broadband networks, there will likely always be potential for congestion (and for other network-impairing scenarios as well). Ibid.

[31] Remarks of FCC Chairman Genachowski to the New America Foundation, "Mobile Broadband: A 21st Century Plan for U.S. Competitiveness, Innovation and Job Creation," Feb. 24, 2010.

[32] FCC National Broadband Plan, p. 202.

[33] The FCC has linked the ability of collecting health information in real-time to enhancing the ability of health agencies to bolster their responsiveness to disease outbreaks: "Accurately measuring health status, identifying trends and tracking outbreaks and the spread of infectious disease at a population level are extremely difficult. Health IT enables widespread data capture which in turn allows better real-time health surveillance and improved response time to update care recommendations, allocate health resources and contain population-wide health threats." Ibid. at p. 207.

medication or, more fatally, an oversight of symptoms leading up to a sudden health event.

- *Delivery of time-sensitive medical services.* Cybersurgery is another cutting-edge telemedicine service that relies on broadband.[34] As with traditional in-person surgical procedures, timing is critical. Delaying a procedure or communication among attending personnel could result in injury or death.

- *IP-based emergency calls.* The FCC has signaled a desire to transition towards an all IP-based telephone network, which means that VoIP-like telephone service will become standard in the near-future.[35] This also means that all emergency calls will eventually be sent over the IP network. Delays in delivering emergency communications could result in injury or loss of life.

- *Management of a national smart energy grid.* One of the many positive impacts of a national smart grid will be the ability of utilities to more closely manage fuel supplies, which will allow for the incorporation of renewable fuel sources (e.g., wind and solar), provided that they can be seamlessly swapped out for more reliable fuels whenever the wind dies down or the sun sets.[36] Indeed, without the ability to monitor fuel supplies in real-time via broadband, service providers would likely be unable to guarantee reliable delivery of cleaner, more affordable service to customers. Moreover, real-time monitoring of energy infrastructure could prevent large-scale blackouts.[37]

In a world where broadband-enabled tools and services are components of everyday life and especially important for key demographic groups (e.g., senior citizens and people with disabilities) and in core sectors of the nation's social and economic life (e.g., the healthcare and energy arenas), *there will likely always be instances when certain types of information packets should receive priority over others.* That is not to say that such prioritization can be based on speech, unfair competitive practices, or the like. *But, there will be times, for example, when a video relay communication between two people who are hearing impaired or the in-home, real-time monitoring of a senior citizen might have to be prioritized over other traffic, such as a peer-to-peer gaming application.*

Public policy, including this rulemaking by the FCC, must allow a sufficiently flexible regulatory approach to ensure that tools and services consistent with the FCC's vision of

[34] These services were briefly discussed during the FCC's staff workshop on health care, which was held on Sept. 15, 2009.

[35] NBP Public Notice No. 25, Comment Sought on Transition from Circuit-Switched Network to All-IP Network, FCC (Dec. 21, 2009); FCC National Broadband Plan, p. 59.

[36] FCC National Broadband Plan, p. 249

[37] Ibid.

broadband in America – one that leverages broadband to enhance social equity and advance key national purposes – are reliably and consistently delivered.

## E. Guiding Principles

In light of the above discussion, the undersigned offer the following principles to guide the FCC's policymaking efforts:

- Broadband is a transformative tool that is quickly becoming an integral component of life for all users and that is poised, in the short-term, to be an essential medium for delivering life-enhancing services to senior citizens and to people with disabilities.

- Increased utilization of broadband by larger numbers of Americans and by additional sectors of the economy will increase the amount of traffic flowing through broadband infrastructure. This will spur further investment in bolstering networks, but will also invite more intensive utilization of broadband by individual and institutional consumers. Thus, regardless of how much bandwidth is available, network congestion and other issues will continue to challenge service providers.

- Consistent with the FCC's vision for broadband in America, certain types of socially-valuable tools and services will require priority when networks are congested in order to assure reliable delivery. Failure to allow for these types of arrangements could impede further development and deployment of life-enhancing services.[38]

- The FCC's existing framework for addressing potential conflicts in managing networks – i.e., its four Internet principles – has, to date, proven to be sufficient in correcting the few instances of discriminatory behavior. As such, the undersigned support codifying the current approach until consumer demand for advanced broadband services and applications has matured.

- Consumers should have the ability to work with service providers to ensure that the content they demand is delivered without delay. For example, a senior household should have the ability to assign priority to its telemedicine services,

[38] For example, in its comments in this proceeding, the Center for Accessible Technology cautions that "uncertainty about the changes in regulation of [broadband] markets has the potential to lead to less innovation and less investment, which would be harmful for this community." Comments of the Center for Accessible Technology, GN Docket No. 09-191 (Jan. 8, 2010). Older Adults Technology Services makes a similar point in its comments: "ambiguous or overly narrow rules regarding certain services of immediate value to seniors (e.g., in-home health monitoring systems) could be challenged in court or could send mixed signals to innovators in the marketplace. As a result, key benefits stemming from the use of these innovations could be delayed." Comments of Older Adults Technology Services, Inc., GN Docket. No. 09-191 (Jan. 14, 2010).

> while college students living in off-campus housing should have the ability to assign priority to movie downloads. Similarly, service providers should have the ability to subject these agreements to reasonable network management needs in order to assure a reliable and consistent user experience in furtherance of the FCC's vision of broadband in America.

*******

## F. Conclusion

The undersigned are enthusiastic and optimistic about the ability of broadband to profoundly change lives for the better. The undersigned support the FCC's vision for broadband in America and look forward to working with the Commission to fully realize it. The undersigned also endorse the FCC's recent observation regarding the relationship between regulation and innovation in the broadband sector:

> "While we must build on our strengths in innovation and inclusion, we need to recognize that government cannot predict the future. Many uncertainties will shape the evolution of broadband, including the behavior of private companies and consumers, the economic environment and technological advances. As a result, the role of government is and should remain limited. We must strike the right balance between the public and private sectors."[39]

Thus, the undersigned respectfully urge the FCC to implement a sufficiently flexible and adaptable regulatory approach that encourages and supports continued innovation and adoption of new broadband-enabled services.

Respectfully submitted,[*]

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[39] FCC National Broadband Plan, p. 5.

[*] The comments herein represent, collectively, those of the individual signatories to the comments and do not necessarily represent the positions of their organizations.

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**Attachment #4**

*ACLP Reply Comments to the FCC re WC Docket No. 07-52*

*(In the Matter of Broadband Industry Practices)*

Filed February 27, 2008

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

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| In the Matter of | ) | |
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| Broadband Industry Practices | ) | WC Docket No. 07-52 |
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# Reply Comments of the Advanced Communications Law & Policy Institute at New York Law School

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**Reply Comments of the Advanced Communications Law & Policy Institute at New York Law School**

## I. INTRODUCTION

The Advanced Communications Law & Policy Institute (ACLP) at New York Law School[1] submits these comments in reply to the record in a Petition for Declaratory Ruling of Free Press et al. and a Petition for Rulemaking of Vuze, Inc., which have been incorporated into the above-captioned proceeding.

The Vuze petition seeks Commission action to "determine the parameters of "reasonable network management" by broadband network operators and to establish that such network management does not permit network operators to block, degrade, or unreasonably discriminate against lawful Internet applications, content or technologies."[2] Similarly, Free Press et al. urge the Commission to "declare through a ruling or rules that network providers cannot engage in discrimination against particular applications and that network providers must disclose their network management policies."[3] Both Petitions rely, in part, on the Commission's *Internet Policy Statement*, which was issued in 2005 to ensure that "broadband networks are widely

[1] The ACLP is an interdisciplinary public policy program of New York Law School that focuses on identifying and analyzing key regulatory and legal issues facing the advanced communications marketplace.

[2] *See In re Vuze, Inc. Petition To Establish Rules Governing Network Management Practices by Broadband Network Operators*, at 1, WC Docket No. 07-52 (Nov. 14, 2007) (hereinafter "Vuze Petition").

[3] *See* Comments of Free Press et al. in WC Docket No. 07-52, at 2 (hereinafter "Free Press et al. Comments").

deployed, open, affordable, and accessible to all consumers."[4] These principles were adopted "subject to reasonable network management,"[5] a standard that was left purposefully flexible by the FCC. These Comments endorse the Commission's *Internet Policy Statement*. "Reasonable network management" is a necessarily flexible standard that ought not to be decided by regulatory fiat. Rather, such a determination should be left to the market unless and until there is a clear market failure that negatively impacts consumers. In particular, these comments are grounded in the following:

*A "Hands Off" Regulatory Policy Works*

- The current "hands off" regulatory approach by the FCC and Congress has resulted in a vibrant, competitive market.
- Intrusive and potentially counterproductive regulation would hinder, not support, the broadband market.

*Network Owners*[6] *Require Latitude to Manage Networks*

- Network management is necessary to assure the efficient flow of data over networks, preclude network congestion that leads to slow-downs and to maintain network reliability and security.
- Network management facilitates the efficient flow of data for all consumers.
- Imposing rigid network management regulation would compromise the flexibility needed to effectively manage networks.

*Market-Based & Legal Remedies Exist to Address Alleged Harms*

- As a number of federal agencies have recognized, consumers are the best regulators.
- Existing legal rights and remedies, grounded in contracts law and antitrust law, are preferable to the prescriptive *ex ante* regulation suggested by some.

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[4] *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14986 (2005) (hereinafter "Internet Policy Statement").

[5] *Id.* at n. 15.

[6] In this filing, "network owners" refers to infrastructure owners (e.g., telephone and cable companies, wireless carriers, backbone providers, etc.) and any other participant in the broadband market that actively manages data and information within a network. This would include, for example, search engines like Yahoo! and Google, providers of browsers like Microsoft, and other application and service providers (*see infra* Section V for further discussion).

- The availability of these remedies, which would supplement the market-based approaches, cautions against government-mandated network management rules that would stifle competition in the broadband market.

*Continued Regulatory Restraint is the Best Approach*

- The Commission should continue to exercise regulatory restraint by examining cases of alleged "bad behavior" on a case-by-case basis.
- If regulation is ultimately necessary, any resulting rules should apply equally to all network owners – including content and application providers – that manage data and information within a network.

The current regulatory approach to broadband has proven to be enormously successful, resulting in widespread consumer welfare gains. Competition has spurred the development and deployment of broadband networks and broadband-enabled technologies, all to the benefit of consumers. Innovations in the delivery of broadband and in the services enabled by broadband have provided consumers with an unparalleled user experience. As such, the broadband marketplace requires the continued regulatory certainty of a "hands off" approach and of continued restraint by the Commission. Market-based and legal remedies exist to protect consumers in the event of actual harm. The imposition of rigid *ex ante* network management regulation would chill the marketplace, slow innovation and substitute the judgment of experienced network engineers with that of rigid a set of rules, ultimately to the detriment of consumers.

## II. BROADBAND HAS THRIVED UNDER A "HANDS OFF" REGULATORY APPROACH

Throughout the history and evolution of the Internet, Congress and the FCC have been deliberate in their deregulatory approach to it. As demand for Internet access has exploded, regulation has remained consistently "hands off." This approach has been necessary in order to

promote continued development and deployment of networks across the country.[7] As this section will detail, the "hands off" approach has helped spur a robustly competitive marketplace that provides consumers with competitive prices, a growing number of choices for getting online, and innovative new services. There is no evidence that a change in this approach is needed.

### A. The Evolution of the "Hands Off" Regulatory Approach to Broadband

In 1996, Congress made clear its intent to keep the regulatory hand off the Internet. In its overhaul of the 1934 Communications Act, Congress explicitly stated that "[i]t 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."[8] Regulatory authority for the Internet was delegated to the FCC, which has outlined a goal of "ubiquitous availability of broadband to all Americans."[9] To reach this objective, the FCC has fostered a "minimal regulatory environment" for Internet access technologies, especially those that deliver broadband service.[10] The primary tool that the Commission has used to facilitate continued innovation and build out has been the classification of broadband transmission technologies as "information services,"[11] an approach that has created a "consistent regulatory framework across broadband platforms by regulating like services in [a] similar manner."[12]

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[7] *See, e.g., Connecting the Globe: A Regulator's Guide to Building a Global Information Community*, at Section IX, FCC (June 1999), available at http://www.fcc.gov/connectglobe/sec9.html.

[8] 47 U.S.C. 230(b)(2).

[9] *See, e.g., In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, ¶ 2, 22 F.C.C.R. 5901 (2007).

[10] *Id.*

[11] According to the Communications Act, an "information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. 153(20).

[12] *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, ¶ 2, 22 F.C.C.R. 5901 (2007).

Classifying a technology as an "information service" exempts it from Title II common carrier regulation and places it under the FCC's Title I ancillary jurisdiction.[13] Over the past few years, the FCC has classified broadband cable modem service,[14] DSL broadband service,[15] broadband over power lines,[16] and wireless broadband[17] as "information services." Such regulatory harmony among broadband delivery technologies has provided the marketplace with certainty and parity, which has in turn spurred competition in the marketplace and has led to the deployment of more advanced networks. As a result, prices have dropped and the number of broadband users nationwide has increased dramatically.

The current investigation into broadband industry practices, which was initiated *sua sponte* by the Commission in April 2007, reflects the explosive growth of the broadband marketplace. By seeking to "enhance [its] understanding of the nature of the market for broadband and related services," the FCC has acknowledged that the broadband marketplace is growing faster than the speed of regulation.[18] The number and type of broadband access technologies, the number and type of broadband-enabled applications, and the number of broadband users have diversified and increased considerably over the last few years. A flexible "hands off" regulatory framework, deliberately established and implemented by the Commission, has created a competitive marketplace where consumer welfare is the primary concern.

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[13] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 968-969 (2005) (upholding the FCC's classification of broadband cable modem service as an "information service").

[14] *Id.*

[15] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking (September 23, 2005).

[16] *Classification of Broadband Over Power Line Internet Access Service as an Information Servic*, 21 F.C.C.R. 13281 (2006).

[17] *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901 (2007).

[18] *In the Mater of Broadband Industry Practices*, Notice of Inquiry, at ¶ 1, WC Docket No. 07-52 (released April 16, 2007).

### B. Result of the "Hands Off" Approach: The Broadband Market is Competitive

According to the most recent FCC data, the broadband marketplace is robustly competitive. As of December 31, 2006 there were 82.5 million broadband lines in service across the U.S.[19] This represents a 61 percent increase (or 31.3 million) in subscribership over the twelve-month period ending December 31, 2006,[20] and a 1,100 percent increase from 2000 when there were 6.8 million broadband subscribers.[21] Supply of broadband is robust, with availability in 99% of zip codes across the U.S.[22] Over 80 percent of residents live in areas with four or more broadband providers.[23] Nationwide there are nearly 1,400 different broadband providers that provide service in an increasingly diverse number of ways – via cable modem, DSL, wireless (mobile and fixed), satellite, electric power lines, and fiber-optic cables.[24] And service providers continue to invest heavily in their networks in order to attain a competitive advantage on rivals.

Traditional telecommunications firms like Verizon and AT&T have invested billions of dollars in fiber-optic networks that can deliver voice, video and data services to customers. Verizon began building out its FiOS network in 2004, and by 2010 it will have invested $23 billion to bring its customers faster broadband and video.[25] To date, Verizon has signed up over

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[19] *High-Speed Services for Internet Access: Status as of December 31, 2006*, at 1, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277784A1.pdf/ (hereinafter "FCC Broadband Stats").

[20] *Id.*

[21] *Id.* at Table 10.

[22] *Id.* at 1.

[23] *Id.* at Chart 12.

[24] *Id.* at Table 14; *see also Networked Nation: Broadband in America 2007*, at 13, Nat'l. Telecom. & Info. Admin. (NTIA) Report (January 2008) ("Perhaps the clearest evidence of the success of the Administration's pro-competitive, technologically-neutral approach lies in the sheer growth in the number of broadband service providers and the broad array of technological alternatives they represent."), available at http://www.ntia.doc.gov/reports/2008/NetworkedNationBroadbandinAmerica2007.pdf (hereinafter "Networked Nation").

[25] *FiOS Facts: Wrapping up 2007*, Verizon Policy Blog, Feb. 5, 2008, available at http://policyblog.verizon.com/PolicyBlog/Blogs/policyblog/CZBlogger1/420/FiOS-Facts-Wrapping-Up-2007.aspx.

one million customers.[26] Similarly, AT&T will invest some $5 billion over the course of the next year to continue the expansion of its fiber-based U-Verse system.[27] Thus far it is has attracted over 230,000 customers.[28] Combined, these new fiber systems have put pressure on cable companies and have begun to lure away traditional cable customers.[29] In response, the cable industry invested $13.7 billion for infrastructure maintenance and upgrades in 2007 alone.[30]

Increased competition between cable and telephone companies for voice, video and data customers has boosted competition and forced service providers to become more innovative and responsive to consumer demand. For example, Comcast recently unveiled a new broadband service that seeks to directly challenge the faster speeds offered by the telephone companies' new fiber systems.[31] Wireless carriers are also competing for broadband customers. According to the most recent FCC report on the broadband marketplace, over 21 million consumers receive broadband via mobile wireless systems.[32] The wireless industry invested over $20 billion to

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[26] *Verizon 4Q Profits up 3.9 Percent*, CNN MONEY (Jan. 28, 2008), available at http://money.cnn.com/news/newsfeeds/articles/newstex/AFX-0013-22585080.htm.

[27] Todd Spangler, *AT&T Ups U-Verse Spending Estimates by $500 million*, MULITCHANNEL NEWS, Nov. 6, 2007, available at http://www.multichannel.com/article/CA6497700.html.

[28] *Press Release: AT&T Delivers Strong Fourth Quarter, Reaffirms 2008 and Multi-Year Outlook*, AT&T, Jan. 24, 2008, available at http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25073.

[29] *See, e.g.*, Peter Grant & Dionne Searcey, *Verizon's FiOS Challenges Cable's Clout*, WALL ST. JOURNAL. Oct. 24, 2007.

[30] *NCTA Industry Statistics*, available at http://www.ncta.com/Statistic/Statistic/Statistics.aspx.

[31] *See* Ryan Kim, *Comcast Takes on AT&T with Faster Net Service*, SF GATE, Feb. 11, 2008, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/11/BUQ5USL6E.DTL.

[32] FCC Broadband Stats at Table 1, *supra*.

upgrade and expand next-generation networks in 2007,[33] and bidding in the most recent 700 MHz spectrum auction was expected to reach nearly $20 billion.[34]

Demand for broadband is similarly strong, increasing in line with network build-out and investment. According to the Pew Internet & American Life Project, nearly half of all adult Americans have a broadband connection at home.[35] This represents a five percent increase from 2006 and is nearly double the penetration level of three years earlier.[36] Moreover, the Consumer Electronics Association recently reported that 75 percent of households that are connected to the Internet rely on broadband.[37] The Pew Internet & American Life Project contextualized these trends when it stated that "with home broadband penetration poised to surpass 50% this year, it will have taken 9 years from the time the service became widely available for home high-speed to reach half the population. To put this in context, it took 10 years for the compact disc player to reach 50% of consumers, 15 years for cell phones, and 18 years for color TV. Each of those technologies, like broadband, represented an upgrade from a good or service with which most consumers had experience."[38]

### C. Conclusion: The Broadband Market Has Thrived Under the "Hands Off" Approach

The broadband marketplace is vigorously competitive and continues to thrive for three interrelated reasons. First, policy makers have kept the regulatory hand off the broadband

[33] *Wireless Quick Facts: Mid-year Figures*, CTIA – The Wireless Association, available at http://www.ctia.org/advocacy/research/index.cfm/AID/10323.

[34] W. David Gardner, *FCC 700 MHz Auction Bids Top $19.3 Billion*, INFORMATION WEEK, Feb. 12, 2008, available at http://www.informationweek.com/news/showArticle.jhtml?articleID=206501363.

[35] John Horrigan, *Home Broadband Adoption 2007*, at 1, Pew Internet & American Life Project (June 2007), available at http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf.

[36] *Id.*

[37] *Press Release: CEA Research Finds 72% of U.S. Adults Have Broadband Access*, Consumer Electronics Association, July 23, 2007, available at http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=11319.

[38] John Horrigan, *Commentary: U.S. Lags Behind*, at 1, Pew Internet & American Life Project (August 2007), available at http://www.pewinternet.org/pdfs/Broadband_Commentary.pdf.

market. A flexible regulatory framework that was developed with regulatory certainty and parity in mind has sent a clear signal to the market that there will not be any undue intrusion by regulators. Second, broadband providers have responded to this signal and to intensifying competition by investing tremendous resources into their networks. This strategy not only seeks to position companies favorably among each other, it also seeks to offer current and potential customers with reliable and affordable services. Third, consumer demand for broadband continues to increase as a result of intermodal competition. They can choose from among a number of intermodal competitors for physically accessing the Internet; they can choose which technology to use when accessing it; and, they can choose from among a variety of service plans depending on their usage.

As the demand for broadband and broadband-enabled technologies and applications continues to both increase and diversify, it is critically important that network owners are given wide latitude to effectively and efficiently manage their networks. Increased use of bandwidth-intensive applications[39] by a small percentage of users, for example, can result in network congestion and slow-downs for the majority of users. As discussed below in Section III, network management is thus a key tool for network owners to ensure that all consumers receive quality broadband Internet access.

## III. NETWORK OWNERS SHOULD BE AFFORDED WIDE LATITUDE TO MANAGE THEIR NETWORKS

Concomitant to the surge in demand for broadband Internet access has been a rise in demand for innovative broadband-enabled applications. More advanced broadband networks have spurred application innovation, which has ushered users into a new digital world where

[39] Innovative new products like streaming Internet video and peer-to-peer (P2P) file-sharing services have become enormously popular among one segment of users.

VoIP service, Internet video, e-commerce, e-government, immersive gaming, multimedia research, telemedicine and infinitely more services are available at the click of a button. Demand for these increasingly bandwidth-hungry services requires that network owners employ certain basic data management techniques to ensure that all users can enjoy a seamless web experience.

The Vuze petition argues that some network owners are "deliberate[ly] degrading and blocking" content, leading to the "arbitrary discrimination against traffic carried on their networks."[40] Vuze invokes the Commission's *Internet Policy Statement* and calls on the Commission to "determine the parameters of "reasonable network management" by broadband network operators."[41] The petition bases its call for network management rules on the argument that "[t]he public interest is harmed whenever network operators restrict innovation and access to content, censor political speech, or unreasonably discriminate against or frustrate the legitimate efforts of their competitors."[42] Similarly, Free press et al. cast the debate over network management as a "clash of civilizations," pitting "all citizens" against a handful of "network providers" in the battle for the future of the Internet.[43] *Hyperbole aside, the rulemaking called for by Vuze, Free Press and others is premature, unnecessary and anathema to continued robust competition in the broadband market.*

As discussed in this section, *ex ante* regulation is not necessary and would not be effective in the highly dynamic field of network management. Such regulation would serve only to handcuff network engineers who must adjust network management in a real-time manner depending on network traffic, congestion, time of day and any number of other variables.

[40] Vuze Petition at 2, *supra*.

[41] *Id.* at 1.

[42] *Id.* at 12-13.

[43] Free Press et al. Comments at 2, *supra.*

"Reasonableness" is a subjective measure of behavior and will change from situation to situation and from case to case. What is "reasonable" on one network at a given point in time on any given day might vary sharply from what is "reasonable" on another network at that same time. Network traffic is unpredictable and oftentimes volatile, which cautions against establishing rigid management standards.

In dynamic markets, *ex ante* regulation, however well-intentioned, cannot keep pace with innovation. The minute the ink dries, the regulations will likely be outdated. As demands on the networks evolve, as new devices, new applications and new content emerge, as new security issues threaten networks, and as a host of other variables come into play, network engineers need the flexibility – and the ability to utilize their academic and professional training, *i.e.*, their judgment – to act reasonably according to the totality of the circumstances at any point in time.

### A. Rising Demand for Bandwidth-Hungry Applications Spurs the Need for Effective Network Management

The evolution of the broadband market has empowered consumers in a number of ways. First, it has delivered to them broadband access to the Internet, which allows for a high-speed, always on connection to a universe of information. Second, by increasing the capacity of networks, service providers have enabled cutting-edge innovation in the applications and content delivered over these pipes. As a result, innovations at the network and applications layers have transformed the user experience from a passive, text-based one to an immersive, multimedia, interactive one that is luring more people online for longer periods of time. For example, the average adult American Internet user will spend approximately 31 hours per month online, participating in a wide range of activities, all of which consume varying amounts of bandwidth.[44]

[44] *Press Release: comScore Releases First Comprehensive Review of Pan-European Online Activity,* comScore, June 4, 2007, available at http://www.comscore.com/press/release.asp?press=1459.

For some users, the most popular bandwidth-intensive broadband-enabled application currently in the marketplace is Internet video, which can either be streamed or downloaded. Streamed video can be found on websites like You Tube, by far the most popular video site with over 30 percent market share.[45] To get a sense of how popular Internet video is, consider that in December 2007 U.S. users viewed 10 billion videos online, a new record.[46] And the amount of bandwidth consumed just by You Tube – a for-profit venture – is staggering. It uses as much bandwidth as the entire Internet did in 2000[47] and currently accounts for approximately seven percent of all U.S. Internet traffic.[48] Videos can also be downloaded, either in the "conventional" way (i.e., directly from a website) or by using a P2P file-sharing system. These systems are not new and have been around since the early days of the Internet. However, a new approach to P2P file-sharing has enabled larger videos to be trafficked more quickly to more users.

Decentralized or "torrent" P2P systems "make use of resources — bandwidth, storage, and processing power — on a decentralized basis, allowing large data transfers to be made more efficiently and cost-effectively than ever before."[49] Unlike traditional online data transfer (i.e., files are downloaded directly from the hosting site), "torrent" P2P systems distribute large files by breaking them up into much smaller pieces and routing them to the end user via a number of intermediary users. This model shifts the burdens and costs associated with data transmission away from the distributor and to the broadband infrastructure providers and to the intermediary

[45] *Press Release: U.S. Internet Users Viewed 10 Billion Videos Online in Record-Breaking Month of December*, comScore, Feb. 8, 2008, available at http://www.comscore.com/press/release.asp?press=2051.

[46] *Id.*

[47] FCC Commissioner Robert M. McDowell, *Text of Luncheon Address at the Broadband Policy Summit III*, at 13, June 7, 2007, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273742A1.pdf (hereinafter "McDowell Speech").

[48] *See* Bret Swanson & George Gilder, *Estimating the Exaflood*, Discovery Institute Report (Jan. 2008), available at http://www.discovery.org/a/4428 (hereinafter "Discovery Report").

[49] Vuze Petition at 7, *supra.*

and end users.[50] Despite the decentralized nature of these systems, they require substantial amounts of bandwidth to transfer files, which are usually very large (e.g., full-length high-definition movies, video clips and music files).

Even though only a minority of consumers uses these types of P2P applications, participants tend to be among the most active downloaders online. For example, while more than half of all U.S. Internet users have watched videos online,[51] less than 20 percent of this group is considered "heavy users." Indeed, those who are "heavy users" of such sites average 841 minutes of video viewing per month, compared to an average of 77 minutes for "moderate users" and just 7 minutes for "light users."[52] Even as more people view videos online, there continues to be a wide disparity between casual viewers who watch only a couple of minutes per day versus a minority of users who consume the vast majority of minutes. Over the past year, the number of videos being uploaded or downloaded online has increased 1,000 percent.[53] Across the board broadband customers are using 40% more bandwidth each year. [54] Yet according to Time Warner Cable, only five percent of its users account for more than 50 percent of bandwidth usage.[55]

Unlike P2P file sharing systems, a number of less bandwidth-intensive applications rely on a steady Internet connection for optimal use. These applications include VoIP telephony and streaming applications like telemedicine services. VoIP does not require a lot of bandwidth but it

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[50] Wikipedia, BitTorrent (protocol), available at http://en.wikipedia.org/wiki/BitTorrent_%28protocol%29.

[51] Mary Madden, *Online Video*, Pew Internet & American Life Project (July 2007), available at http://www.pewinternet.org/pdfs/PIP_Online_Video_2007.pdf.

[52] *Press Release: comScore and Media Contacts Study Highlights Behavioral Differences Among Online Video Viewer Segments*, comScore, Feb. 14, 2008, available at http://www.comscore.com/press/release.asp?press=2063.

[53] McDowell Speech at 13, *supra*.

[54] Amy Schatz, Dionne Searcey & Vishesh Kumar, *Officials Step up Net-Neutrality Efforts*, WALL ST. JOURNAL, A4, Feb. 13, 2008.

[55] *Id.*

is very sensitive to service degradation. Being a voice service of increasing popularity for the mainstream customer,[56] any drop in quality (e.g., a transmission delay) would be immediately apparent to both callers and might lead to a drop in demand. Similarly, streaming applications like telemedicine services require a steady connection in order to assure service quality and speedy transmission of time-sensitive material.[57]

Service degradation has a discernible negative effect on these types of real-time applications. Degradation stems from network congestion, which is often caused by the heavy data traffic associated with bandwidth-intensive applications like P2P file-sharing systems. Network managers have had to respond to increasingly congested networks by implementing a number of traffic management protocols to ensure that bits associated with a VoIP call or a telemedicine application travel to their destination more quickly than bits associated with a video download or email in order to sustain service quality for all customers.

### B. Network Management Facilitates the Efficient Flow of Information to the Benefit of all Consumers

On the most basic level, network management entails monitoring the flow of data over a network, correcting for congestion at various nodes throughout the network, and ensuring that all consumers have a reliable connection to the Internet. All networks share resources at some point in the network. Network managers use a number of tools to monitor data flows and to provide solutions in cases where a network is overwhelmed or too congested. While strategies and approaches differ from network to network and evolve as networks evolve, common management tools include deep packet inspection (DPI) and traffic shaping protocols.

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[56] According to TeleGeography, by mid-2007 there were 11.8 million VoIP subscribers in the U.S., up from 6.5 million in mid-2006. *See U.S. VoIP Market is Growing Fast – but Europe is Growing Faster*, available at http://www.telegeography.com/wordpress/?p=59.

[57] *See Report: e-Health and America's Broadband Networks*, U.S. Internet Industry Association (Aug. 2007), available at http://www.usiia.org/pubs/eHealth.pdf.

DPI allows network managers to identify and inspect each data packet traveling over the network regardless of type or origin.[58] Oftentimes DPI is used to scan packets for viruses, spam and other nefarious elements that might compromise network security.[59] DPI is especially helpful in prioritizing traffic so that data packets associated with sensitive applications like VoIP are given a priority over the data packets of a video download. Ultimately DPI allows network managers to better understand the data flowing over its network, model traffic and devise strategies for routing traffic in such a way that alleviates congestion.[60]

Once the data flowing over a network is analyzed with a tool like DPI, network managers usually employ another set of tools to actually manage the traffic. This is where an approach like traffic shaping is utilized. Traffic shaping tools can analyze the data packets flowing through a network and they can also "shape" or manage network traffic[61] by imposing a delay on some types of traffic in order to control traffic volume, transfer speeds or other aspects of data flow.[62] Moreover these tools have a variety of uses, which make them attractive to network managers. They can "identify and categorize specific types of network traffic," "set per-user traffic limits to ensure that network traffic is shared fairly among all users," and "define the relative importance, or priority, of different types of traffic."[63] Such tools can, for example, help ensure that a voice

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[58] *See Deep Packet Inspection: Introduction*, LIGHTREADING, Dec. 14, 2006, available at http://www.lightreading.com/document.asp?doc_id=111404.

[59] *See* Wikipedia, Deep Pack Inspection, http://en.wikipedia.org/wiki/Deep_packet_inspection.

[60] *See Deep Packet Inspection: Introduction*, LIGHTREADING, Dec. 14, 2006, available at http://www.lightreading.com/document.asp?doc_id=111404.

[61] *See* Rachelle Chong, *The 31 Flavors of the Net Neutrality Debate*, at 7, ACLP Scholarship Series (Dec. 2007), available at http://www.nyls.edu/pdfs/Rachelle%20Chong%20-%20Net%20Neutrality%20Essay%20-%20December%202007.pdf (hereinafter "Chong 31 Flavors").

[62] *See* Wikipedia, Traffic Shaping, http://en.wikipedia.org/wiki/Traffic_shaping.

[63] *See* Joe St. Sauver, *Understanding the Basics of Traffic Shaping*, COMPUTING NEWS (Univ. of Or., Winter 2002) *available at* http://cc.uoregon.edu/cnews/winter2002/traffic.html.

communication or telemedicine application takes priority over a simultaneous upload of five videos.

These and many other management tools have quickly become indispensable to service providers as more and more data flows through their networks. Without wide latitude to use these tools, networks would be more susceptible to crashing under the weight of congestion and data bottlenecks that often result from bandwidth-hungry applications like P2P file-sharing. Conversely the unmanaged flow of data risks depriving many users of a reliable Internet connection, as a consequence of the bandwidth-heavy activities of a few.

### C. Wide Latitude to Manage Networks is Required to Protects All Consumers

Managing a network to ensure the efficient flow of data is fraught with uncertainty. For example, there are often surges in bandwidth demand and data traffic during the online release of new games, software, music and videos.[64] In addition, new converged wireless devices like the iPhone, which offer users an unparalleled mobile Internet experience, are driving "unheard-of levels of mobile internet usage" around the world.[65] With Internet usage and demand for applications like Internet video continuing to skyrocket, and with the marketplace for similar applications poised to explode over the next five or ten years,[66] service providers should be afforded wide latitude to manage their networks in order to assure the efficient transmission of data and ensure that all users have a reliable Internet connection.

The capacity-related criticisms made against network owners are not persuasive. In response to the regulatory clarity given by Congress and the FCC, and in response to increasing

[64] *See, e.g., Sandvine: Xbox, iTunes Grow*, LIGHTREADING, Dec. 5, 2006, http://www.lightreading.com/document.asp?doc_id=112037.

[65] *See Vodafone, 02Test Femtocells*, LIGHTREADING, Feb. 11, 2008, available at http://www.lightreading.com/document.asp?site=gsma&doc_id=145618.

[66] A recent report predicts that "[t]he U.S. Internet of 2015 will be at least 50 times larger than it was in 2006" and Internet traffic will increase by 50-60% over the next few years. *See* Discovery Report, *supra.*

demand for broadband, network operators – including traditional telecom firms, cable companies, wireless companies and others – have invested and continue to invest billions in risk capital to increase the capacity and functionality of broadband networks. *Whatever the capacity of the networks at any point in time, there will always be applications, content, innovations and usages that, under certain circumstances, challenge networks.* As recent data cited above makes clear, the heavy demands of a few users can sometimes outstrip supply of available bandwidth on networks. As such, there will always be a compelling need for network engineers who have the ability and the flexibility to maintain reliable and safe networks for consumers. To this end, network management benefits all users in three fundamental ways.

First, network management ensures the safety and security of the network. By using techniques such as DPI and traffic shaping, network managers can protect consumers from virus infiltration, reduce the amount of spam and foster a safe environment for the transfer of information and applications. Second, network management guarantees a uniform user experience regardless of how much or how little bandwidth the consumer uses. This will ensure that the heavy uploading and downloading of a minority of users will not impair the online experience of a majority of more casual users. Finally, for those using applications sensitive to data latency (e.g., VoIP telephony and telemedicine), network management will prioritize these packets over the packets of less time-sensitive applications like email.

The overall consumer benefits associated with reasonable network management outweigh the likely harm to consumers that would result if network engineers were deterred from implementing the network management strategies they consider to be appropriate under the circumstances. However, in the event that there are abuses by network owners, a number of

market-based and legal remedies exist for users to avail themselves of rather than saddling a robustly competitive marketplace with unnecessary regulation.

## IV. MARKET-BASED AND LEGAL REMEDIES SHOULD BE EXHAUSTED BEFORE THE IMPOSITION OF PRESCRIPTIVE REGULATION ON THE BROADBAND MARKET

Effective market monitoring and enforcement can occur without the need for the prescriptive regulation suggested by some. Perhaps the most significant consequence of a competitive broadband marketplace has been the empowerment of consumers to regulate the market. Market forces will address consumer needs in a more efficient and more targeted way than rigid regulation. Furthermore, well-established legal regimes – grounded in contracts law and in antitrust law – provide additional layers of protection against allegedly improper conduct.

The availability of these multiple layers of consumer protection establishes a high burden of proof required for making the case that regulation is the only remedy. It is respectfully suggested that such burden has not been met.

### A. In a Competitive Marketplace, Consumers are the Best Regulators

The rise of intermodal competition between cable and telephone companies, and the advent of additional broadband competitors in the wireless realm, has given consumers enormous power to regulate the broadband marketplace. The availability of ready substitutes for broadband service, along with decreasing switching costs, has made customer retention a critical part of a network owner's business strategy. Bundling services into an affordable "triple play" has long been a key point of competition when luring customers to a specific service provider. But with more firms able to offer substitutable bundles, network owners are competing ever more fiercely on price, speed, technological innovation and, most importantly, customer service. To this end, service providers are beginning to cater to more individualized user needs and focusing more attention on resolving consumer complaints. For example, a growing number of

service providers are offering users tiers of service based on their bandwidth needs. Basic packages cater to the more casual user while enhanced packages target more avid users like online gamers and P2P participants. Robust competition, evident in the broadband market, leads to better customer service,[67] thus empowering consumers.

Recent analyses of consumer welfare in the broadband market by a number of government agencies support the conclusion that the consumer is the best regulator of the marketplace. The Department of Justice (DOJ), which shares regulatory oversight of the broadband market with the Federal Trade Commission (FTC) and the FCC,[68] stated in an *Ex Parte* filing in this docket that "free market competition, unfettered by unnecessary governmental regulatory restraints, is the best way to foster innovation and development of the Internet…Past experience has demonstrated that, absent actual market failure, the operation of a free market is a far superior alternative to regulatory restraints."[69]

Similarly the FTC recently issued a staff report on broadband competition policy, which found that, given the recent inquiries and press attention on "net neutrality" issues, "many consumers are now aware of such issues," making them even more vigilant to how they are treated by network owners.[70] The report concluded that "[c]onsumers – particularly online consumers – have a powerful collective voice that should not be ignored by businesses."[71] In

[67] *See* Robert D. Atkinson, *The Role of Competition in a National Broadband Policy*, 1-3, 5, The Info. Tech. & Innovation Foundation (Oct. 2007), available at http://www.itif.org/files/BroadbandCompetition.pdf.

[68] FTC Staff Report, Broadband Connectivity Competition Policy, at 2 (June 2007) available at http://www.ftc.gov/reports/broadband/v070000report.pdf (hereinafter "FTC Staff Report").

[69] *See Ex Parte Filing of the United States Department of Justice*, In the Matter of Broadband Industry Practices, WC Docket No. 07-52 (Sept. 6, 2007), available at http://www.usdoj.gov/atr/public/comments/225767.htm (hereinafter "DOJ Filing").

[70] FTC Staff report at 161, *supra.*

[71] *Id.*

other words, empowered consumers have the ability to correct adverse network owner behavior more quickly and much more directly than regulation.

Finally, the National Telecommunications and Information Administration (NTIA), the principal adviser to the United States President on telecommunications and information policy, recently echoed these findings in its *Networked Nation* report: "Experience teaches that when government tries to substitute its judgment for that of the free market, or otherwise anticipate consumer demand by favoring one product or vendor over another, it can easily distort the marketplace, resulting in the diversion of investment and/or discouraging the research and innovation necessary to bring new and better products or services to market."[72]

Competition in the broadband market has empowered consumers and made them the most effective regulators, including by providing them with the ability to switch providers or plans. While consumer action offers a strong check on alleged improper conduct, this power is augmented by the existence of various legal regimes geared to addressing actual harm.

### B. Contract Law Offers a Viable Alternative to Additional Regulation

In addition to the market-based solutions available to consumers described above, contract law provides parties with a comprehensive set of both rights and remedies. It offers a well-established legal regime for responding to real world problems with fact-specific and narrowly tailored remedies. Such is preferable to the prescriptive *ex ante* regulation suggested by some.

As is the case with the purchase of much in the hi-tech world (e.g., computers, software, communication devices, service plans and website access), purchasers of broadband typically agree to a specific set of obligations, often forth in a Terms of Service agreement, when signing

[72] Networked Nation at 5, *supra.*

up for service with any network owner. These agreements describe the terms and conditions that every user must comply with during the length of the contract. Many users also have the ability to choose, as a matter of contract, between varying service plans. In some instances, casual users who go online to check email and read the news can purchase less expensive, more basic bandwidth plans from some providers. More active users, like avid gamers, might purchase more expensive service plans to accommodate their heavy use of bandwidth-hungry applications. Further, large or enterprise users, like a telemedicine service provider, a community college, a government agency, or an IP video company can negotiate key terms and conditions of service with a provider.

In all of these instances, users can avail themselves of the rights and remedies under their contracts, and under the law, to protect against allegedly wrongful conduct. If a service provider were to violate the Terms of Service agreement, then a user has a viable contract claim. Conversely, if the service provider has clearly outlined the parameters of accepted use in its Acceptable Use Policy,[73] and the user breaches those terms, then the service provider can enforce the terms of the contract to ensure that the actions of one or a small number of users do not jeopardize the network or unduly degrade the Internet connection or online experience of the majority of users.[74]

The petitions of both Vuze and Free Press et al. call on the Commission to require network owners "to disclose their network management tactics" in addition to the disclosures

[73] Most broadband service providers have Acceptable Use Policies. *See, e.g.*, Comcast Acceptable Use Policy for High-Speed Internet Services, at http://www6.comcast.net/terms/use/; AT&T Acceptably Use Policy, at http://my.att.net/csbellsouth/s/s.dll?spage=cg/legal/att.htm&leg=aup; Time Warner Cable, Operator Acceptable Use Policy, at http://help.twcable.com/html/twc_misp_aup.html.

[74] This sort of enforcement precipitated the current petitions at issue here. *See* Peter Svensson, *Comcast Blocks Some Internet Traffic*, AP, Oct. 19, 2007, available at http://www.msnbc.msn.com/id/21376597/. Comcast enforced its "Acceptable Use Policy" when it slowed certain P2P traffic in order to alleviate network congestion that was affecting the connections of a majority of users.

already make in the Terms of Service.[75] Many broadband providers currently disclose customer use limitations. Further, many also provide in their Terms of Service that, while they do actively manage their networks in order to provide all users with reliable connections, they do not block or degrade service.[76] To the extent that network owners have not publicized such customer-oriented standards, policies encouraging them to do so are appropriate.

It is respectfully suggested that the Commission should not require network owners to disclose the actual network management practices they utilize. Specific network management tools and strategies relate inherently to the architecture of the infrastructure and to the security and functionality of the infrastructure. Requiring disclosure of specific, proprietary network management information could threaten to compromise network security by providing third parties with the information needed to skirt security protocols. Such information also risks network congestion by enabling third parties to bypass necessary data traffic management that is occurring for the benefit of all consumers.

The current level of specificity included in many Terms of Service agreements puts users on ample notice and provides them with sufficient remedies should the terms of the contract be breached. Remedies available include monetary damages, if any are incurred or equitable remedies (e.g., getting one's service restored or being released from a contract). In many instances, Terms of Service agreements and other service contracts between the user and the network owner include arbitration clauses, which seek to facilitate effective dispute resolution. The speed and lower costs associated with arbitration benefit the consumer and network owner

[75] Free Press Comment at 59, *supra.*

[76] *See, e.g.*, Comcast's High-Speed Internet Acceptable Use Policy, Prohibited Uses and Activities, at http://www.comcast.net/terms/use.jsp; Verizon Online – Terms of Service, at http://www.verizon.net/policies/vzcom/tos_popup.asp; AT&T High Speed Internet and Dial Terms of Service, at http://my.att.net/csbellsouth/s/s.dll?spage=cg/legal/att.htm&leg=tos.

equally. And in the rare instances where arbitration fails or provides an inequitable solution, more formal court proceedings are available.

The existence of these types of contract-based rights and remedies further empowers the consumer. Service providers are increasingly tailoring their service offerings to the individual needs of users. And they are doing so in a competitive environment in which customer satisfaction and retention is paramount. The threat of formal enforcement of contract provisions should not be disregarded. If nefarious behavior by a network owner is widespread and the network owner has done little to correct it, consumers will likely flock *en masse* to another provider or could band together for further legal action. In either case, the network owner is motivated to remedy any wrongful conduct. The "collective voice" of consumers, in the market, the public square or the privacy of a court room is an increasingly powerful force that can successfully regulate the broadband market.[77]

### C. The Additional Remedy of Enforcing Antitrust Laws is Available to Correct Anticompetitive Behavior that is Harmful to Consumers

A number of government agencies, including the U.S. Department of Justice and the Federal Trade Commission, charged with monitoring competition in markets, have the authority and the ability to enforce our nation's well-developed antitrust laws on a case-by-case, fact-specific basis. In the event of a clear market failure or an abuse of market power, such agencies have the jurisdiction to determine whether the particular conduct at issue is anticompetitive and harmful to consumers within the meaning of the antitrust laws.

Antitrust laws are "grounded in the principle that competition – "that state of affairs in which output is maximized, price is minimized, and consumers are entitled to make their own

[77] FTC Staff report at 161, *supra.*

choices"– serves to protect consumer welfare."[78] The FTC, in its staff report on broadband competition policy, outlined its approach to enforcing antitrust laws in the broadband market: "In conducting an antitrust analysis, *the ultimate issue would be whether broadband Internet access providers engage in unilateral or joint conduct that is likely to harm competition and consumers in a relevant market*."[79] The relevant questions in such an analysis would include: has the conduct at issue harmed competition generally and diminished consumer welfare; is there a legitimate business justification for the conduct at issue; do pro-consumer efficiencies result from the conduct in question; etc.

Consistent with the FCC's prior endorsement of "reasonable network management," an antitrust inquiry would focus on whether the conduct at issue was reasonable under the circumstances. In the case of network management, conduct on the part of a network owner that was alleged to be anticompetitive and that lessened overall consumer welfare could be examined under established laws and rules. For example, if the hypothetical network owner with market dominance employed certain network management tactics with the intent of lessening competition (e.g., by consistently blocking a popular application without any legitimate justification) and such conduct in fact harmed competition, the nation's antitrust laws provide a comprehensive legal framework for dealing with such conduct.[80]

Antitrust enforcement thus represents yet another buffer of protection for consumers in the broadband marketplace. As such, the Commission should continue to exercise regulatory restraint and examine alleged harmful conduct on a case-by-case basis, leaving regulation as an ultimate last resort.

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[78] *Id.* at 120.

[79] *Id.* (emphasis added).

[80] *Id.* at 161.

## V. THE COMMISSION SHOULD CONTINUE TO EXERCISE REGULATORY RESTRAINT, EXAMINING ALLEGED HARMFUL CONDUCT ON A CASE-BY-CASE BASIS, AND IF REGULATION IS ULTIMATELY IMPOSED ON BROADBAND PROVIDERS, IT SHOULD APPLY EQUALLY TO ALL NETWORK OPERATORS, APPLICATION/CONTENT PROVIDERS, AND OTHER NETWORK OWNERS

The point that a diverse array of conditions precedent must be satisfied before regulation is even considered has been laboriously argued because of the real consumer costs associated with premature and unnecessary regulation. By one estimate, the cost of *ex ante* "net neutrality" regulation would be upwards of $24 to $32 billion in consumer welfare losses over the next few years.[81] Another study found that the restrictions on price, product and service differentiation associated with "net neutrality" rules would result in the loss, by consumers, of $69 billion in potential benefits over the next 10 years.[82] In the absence of overwhelming evidence of a broad market failure that cannot be rectified by the market-based and legal remedies available in the American legal system, the Commission should continue investigating allegedly anticompetitive behavior by network owners on a case-by-case basis.

The Commission has an established precedent of using regulatory restraint for examining alleged harmful behavior by a network owner. In 2005, for example, the FCC opened an inquiry to investigate claims that Madison River Telephone Company was blocking ports for VoIP applications, thus precluding consumers from using an alternative voice service. The FCC, after issuing a Letter of Inquiry, brokered a Consent Decree among the parties to solve the problem.[83] The deliberate process established by this case reflects the dynamic nature of the broadband market and cautions against the adoption of sweeping yet rigid policies in the absence of a

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[81] *See Consumer Gram: Internet Regulations Would Harm Consumers*, American Consumer Institute (ACI), available at http://www.aci-citizenresearch.org/NN2.pdf.

[82] *See* Stephen B. Pociask, *Net Neutrality and the Effect on Consumers*, at 2, ACI (May 2007), available at http://www.aci-citizenresearch.org/ACI%20NN%20Final.pdf.

[83] *See Madison River Commc'ns*, 20 F.C.C.R 4295 (Enf. Bur. 2005).

critical mass of complaints against network owners.[84] One need only look at the 1996 Telecommunications Act to see how fast policies that are intended to be forward-looking can become antiquated.

If an additional layer of rules and regulations is ultimately deemed necessary, notwithstanding the advances in and competitive nature of the broadband market, then regulatory parity and notions of fundamental fairness dictate that any such rules apply with equal force to any entity that manages the flow of Internet-related data over a network. A user's Internet experience is impacted by a number of networks, including the user's web browser, hardware (e.g., device, chipset, memory, etc.), software, broadband connection, search engine, online applications and content, etc. Each of these networks is managed by the respective network owners, and none of these networks is subject to prescriptive government mandates.

The network management practices at issue here are not unique to the broadband service market. Indeed virtually every network that delivers, or impacts the delivery of, information over the Internet is managed. For example, Google manages, organizes and prioritizes the data delivered over its network to end-users. Indeed, the express mission of Google is to "organize the world's information and make it universally accessible and useful"[85] – a laudable and extremely profitable goal[86] but one that is grounded nonetheless in manipulating and prioritizing the content delivered to users. Although Google does provide minimal information regarding

[84] Chong 31 Flavors at 14, *supra.*

[85] Google Corporate Information – Company Overview, at http://www.google.com/corporate/.

[86] *See, e.g.*, JOHN BATTELLE, THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE 75 (2005). Google has "created a ranking system rewarding links that come from sources that were important, and penalizing those that did not." The breakthrough was "to create an algorithm – dubbed PageRank … - that manages to take into account both the number of links into a particular site, and the number of links into each of the linking sites." This system is monetized by pricing the terms and keywords that lead to search results, *at* 106.

how it actually organizes information,[87] it is not required to treat all content equally or is it required to disclose the protocols and algorithms it uses to manage traffic. Requiring Google or any search firm to disclose its exact algorithm (i.e., how it manages its network) would compromise its network, just as requiring any other network operator to disclose the specifics of its network management would jeopardize that network.

If broadband providers, however, were ultimately subjected to prescriptive network management rules, then regulatory certainty and parity would require that any such rules be applicable to all network operators – including content and application providers – that manage data and information within a network. Given all the networks involved in a user's online experience (*i.e.*, web browser, hardware, software, broadband connection, search engine, online applications and content), a rational basis does not exist for concluding that a broadband access provider should be subject to data management rules but that providers of other online services and content should not be.

However, as the preceding comments have made clear, regulation is not required at this point in the broadband market's evolution. The imposition of reporting requirements, more detailed disclosures of network management techniques and related rules on network owners would simply reflect the substitution of the judgment of network engineers with a set of static, prescriptive rules that run counter to hands-off approach that is driving innovation, investment and consumer choice. Rather than risk chilling the vibrant innovation in the broadband marketplace by levying rigid network management rules, the Commission should continue to investigate and address complaints within its jurisdiction on a case-by-case basis.

[87] Google Corporate Information – Technology Overview, at http://www.google.com/corporate/tech.html.

## VI. CONCLUSION

Network owners require wide latitude to manage their networks in order to ensure that all users have a reliable Internet experience. Management techniques vary from provider to provider, from network to network, and often change from day to day. A competitive marketplace will police itself and correct behavior that does not contribute to overall consumer welfare. Any effort to impose unnecessary *ex ante* regulation would chill the broadband market, resulting in certain consumer welfare losses. Accordingly, the petitions for declaratory ruling and rulemaking should be denied.

Respectfully submitted,

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