Federal Communications Commission
Washington, D.C. 20554

March 27, 2015

Jeffery N. Luthi, Clerk
United States Judicial Panel
on Multidistrict Litigation
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Room G-255, North Lobby
Washington, D.C. 20544

RE: *Protecting and Promoting the Open Internet*, FCC 15-24
(released March 12, 2015)

Dear Mr. Luthi:

Within ten days after the release of the above referenced order, the Federal Communications Commission was served with two petitions for judicial review of the order (one filed in the D.C. Circuit, the other filed in the Fifth Circuit).

In our view, both of these petitions are premature. We believe that because the order in question was issued in a notice-and-comment rulemaking proceeding, the period for seeking judicial review of the order does not commence until the order is published in the Federal Register. *See* 47 C.F.R. § 1.4(b)(1); *see also Verizon v. FCC*, 2011 WL 1235523 (D.C. Cir. Apr. 4, 2011) (dismissing appeals from 2010 Open Internet order as premature because they were filed before the order was published in the Federal Register). The Open Internet order that the FCC released on March 12, 2015 has not yet been published in the Federal Register.

In submitting the attached Notice of Multicircuit Petitions for Review, we are proceeding on the assumption that the issue of whether these petitions are premature should be resolved not by the Judicial Panel on Multidistrict Litigation, but by the court of appeals that the Judicial Panel randomly selects as the venue where the petitions will be consolidated. Once the Judicial Panel chooses that

court, we plan to file with the court a motion to dismiss the petitions as premature. If you believe that our assumption is incorrect, and if you think that we should proceed differently, please let us know.

Respectfully submitted,

/s/ Richard K. Welch

Richard K. Welch
Deputy Associate General Counsel

Attachments

NOTICE TO THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION
OF MULTICIRCUIT PETITIONS FOR REVIEW

IN RE: Federal Communications Commission, *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (released March 12, 2015)

MCP No. 128

NOTICE OF MULTICIRCUIT PETITIONS FOR REVIEW

Pursuant to 28 U.S.C. § 2112(a)(3) and the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, the Federal Communications Commission hereby notifies the United States Judicial Panel on Multidistrict Litigation of two petitions for review of the same final agency action. *See In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (released March 12, 2015).

These petitions for review were filed in two different courts of appeals within ten days after issuance of the agency action and received by the FCC from the petitioners within the applicable ten-day period. As required by Panel Rule 25.2, we submit with this notice: (1) a schedule (Attachment A) listing the petitions for review; (2) copies of each petition (Attachment B); and (3) the order the petitioners are challenging (Attachment C). In accordance with Panel Rule

25.3, as indicated in the attached certificate of service, the FCC is serving this notice on the clerks of the courts where petitions for review have been filed as well as on counsel for all parties in the circuit petitions for review.

Respectfully submitted

/s/ Richard K. Welch

Richard K. Welch
Deputy Associate General Counsel

James M. Carr
Counsel

Federal Communications Commission
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March 27, 2015

ATTACHMENT A

1. Issuance date of the relevant agency order: March 12, 2015

2. Cases filed:

Alamo Broadband Inc. v. FCC, et al.
Fifth Circuit No. 15-60201
Filed: March 23, 2015
Received by the FCC: March 23, 2015

United States Telecom Association v. FCC, et al.
D. C. Circuit No. 15-1063
Filed: March 23, 2015
Received by the FCC: March 23, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ALAMO BROADBAND INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Respondents.	Case No. 15-_____

2015 MAR 23 P 12: 26
FCC
OFFICE OF GENERAL COUNSEL

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, Alamo Broadband Inc. ("Alamo") hereby petitions this Court for review of the final order of the Federal Communications Commission ("FCC") captioned *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28 ("*Order*"). The *Order* was released on March 12, 2015.[1] A copy of the full text of the *Order* is attached as Exhibit A.

---

[1] The *Order* was issued in a "notice and comment" rulemaking proceeding and also contains a declaratory ruling, which creates some ambiguity regarding the date of "issuance of the order." 28 U.S.C. § 2112(a)(1); 47 C.F.R. § 1.4(b)(1)-(2). Alamo has thus filed this petition for review within ten days of the release date of the *Order* in an abundance of caution.

In the *Order*, the FCC adopts rules that regulate broadband Internet access service, which the *Order* reclassifies as a telecommunications service subject to regulation under Title II of the Communications Act of 1934. Alamo, which participated in the proceeding below, is a provider of broadband Internet access service subject to the regulations adopted by the *Order* and the requirements of Title II of the Communications Act from which the *Order* does not forbear. Alamo thus is aggrieved by the *Order* and possesses standing to challenge it. Venue is proper in this Court because Alamo resides in and has its principal office in the State of Texas. 28 U.S.C. § 2343.

Alamo seeks relief on the grounds that the *Order*: (1) is in excess of the Commission's authority; (2) is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act; (3) is contrary to constitutional right; and (4) is otherwise contrary to law. Accordingly, Alamo respectfully requests that this Court hold unlawful, vacate, enjoin, and set aside the *Order*, and provide such additional relief as may be appropriate.

Respectfully submitted,

By: s/ Brett A. Shumate
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Brett A. Shumate
Eve Klindera Reed
WILEY REIN LLP
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Washington, DC 20006

(202) 719-7000
bshumate@wileyrein.com

Dated: March 23, 2015

Counsel for Alamo Broadband Inc.

CERTIFICATE OF SERVICE

I, Brett A. Shumate, hereby certify that on March 23, 2015, I filed the foregoing Petition for Review via the Court's Appellate ECF filing system. I further certify that I directed that one copy be delivered via United States mail and electronic mail to:

Jonathan Sallet
Federal Communications Commission
Office of the General Counsel
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Washington, DC 20554
Jonathan.Sallet@fcc.gov

Counsel for the Federal Communications Commission

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Counsel for the United States of America

s/ Brett A. Shumate
Brett A. Shumate

Shumate, Brett

From: Shumate, Brett
Sent: Monday, March 23, 2015 12:17 PM
To: 'sabrina_short@ca5.uscourts.gov'
Subject: Alamo Broadband v. FCC/USA - petition for review
Attachments: Alamo Broadband Petition for Review.pdf

Sabrina,

Attached please find the as-filed version of Alamo Broadband's petition for review. This email will serve as confirmation that the petition was filed in the Fifth Circuit today.

Best regards,

Brett Shumate | Attorney At Law | **Wiley Rein LLP** | 1776 K Street NW | Washington, DC 20006
(Tel) 202.719.7168 | (Fax) 202.719.7049 | BShumate@wileyrein.com

Shumate, Brett

From: Sabrina_Short@ca5.uscourts.gov
Sent: Monday, March 23, 2015 12:20 PM
To: Shumate, Brett
Subject: Re: Alamo Broadband v. FCC/USA - petition for review

Mr. Shumate,

The petition was received in our court as of this date. If you have any other questions, please call or write.

Sincerely,

Sabrina B. Short
Clerk's Office
LA/MS/Agency Division of the
U.S. Court of Appeals, 5th Circuit
600 S. Maestri Place
New Orleans, LA 70130
504-310-7817
Sabrina_Short@ca5.uscourts.gov

From: "Shumate, Brett" <BShumate@wileyrein.com>
To: "sabrina_short@ca5.uscourts.gov" <sabrina_short@ca5.uscourts.gov>
Date: 03/23/2015 11:17 AM
Subject: Alamo Broadband v. FCC/USA - petition for review

Sabrina,

Attached please find the as-filed version of Alamo Broadband's petition for review. This email will serve as confirmation that the petition was filed in the Fifth Circuit today.

Best regards,

Brett Shumate | Attorney At Law | **Wiley Rein LLP** | 1776 K Street NW | Washington, DC 20006
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Shumate, Brett

From: paygovadmin@mail.doc.twai.gov
Sent: Monday, March 23, 2015 11:50 AM
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Subject: Pay.gov Payment Confirmation: USCA05 CM ECF

Your payment has been submitted to Pay.gov and the details are below. If you have any questions or you wish to cancel this payment, please contact Karen Comeaux at (504) 310-7645.

Application Name: USCA05 CM ECF
Pay.gov Tracking ID: 25KEPMCT
Agency Tracking ID: 05-169573-564
Transaction Type: Sale
Transaction Date: Mar 23, 2015 11:50:04 AM

Account Holder Name: Brett A. Shumate
Transaction Amount: $500.00
Billing Address: 1776 K Street, N.W.
City: Washington
State/Province: DC
Zip/Postal Code: 20006
Country: USA
Card Type: AmericanExpress
Card Number: **********1503

Attorney Name : Brett A Shumate
Contact Telephone Number : 202-719-7168
Person Completing Transaction: Brett A Shumate

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Amount: $500.00
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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

MAR 23 2015

RECEIVED

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 23 2015

CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM ASSOCIATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

15-1063

Case No. 15-_____

PROTECTIVE PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a), the United States Telecom Association ("USTelecom") hereby petitions this Court for review of the order of the Federal Communications Commission ("FCC") captioned *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24 (Mar. 12, 2015) ("Order"). USTelecom is providing an electronic copy of the Order on compact disc with this petition.

2015 MAR 23 P 2:00
OFFICE OF GENERAL COUNSEL

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

After this Court vacated and remanded the FCC's previous attempt at Internet regulation in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), the FCC

initiated a rulemaking proceeding and ultimately issued the Order under review. Order ¶¶ 7, 10.

USTelecom seeks review of the Order on the grounds that it is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; violates federal law, including, but not limited to, the Constitution, the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder; conflicts with the notice-and-comment rulemaking requirements of 5 U.S.C. § 553; and is otherwise contrary to law.

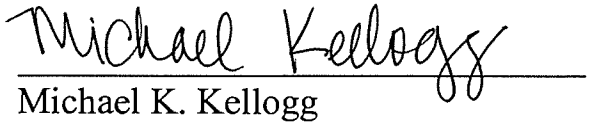
USTelecom is filing this protective petition for review out of an abundance of caution. In particular, it files the petition in case the FCC's Order (or the Declaratory Ruling part of that Order) is construed to be final on the date it was issued (as opposed to after Federal Register publication, which USTelecom believes is the better view), and the ten-day period in which a party must file a petition for review to "avail itself of procedures established for selection of a court in the case of multiple appeals" – *i.e.*, the lottery procedures under 28 U.S.C. § 2112(a) – is likewise construed to begin on that date. 47 C.F.R. § 1.13(a)(1); *see also id.* § 1.13(a)(2).

Accordingly, to the extent that this protective petition for review is timely filed, USTelecom respectfully requests that this Court hold unlawful, vacate,

enjoin, and set aside the Order, and that it provide such additional relief as may be appropriate.

Dated: March 23, 2015

Respectfully submitted,



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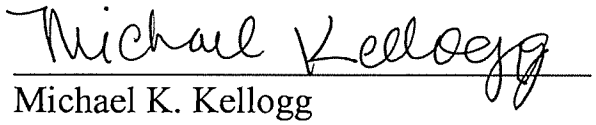
Counsel for Petitioner United States Telecom Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, USTelecom respectfully submits the following corporate disclosure statement. USTelecom states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: March 23, 2015

Respectfully submitted,



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Counsel for Petitioner United States Telecom Association

CERTIFICATE OF SERVICE

I hereby certify that, on March 23, 2015, I caused one copy of the foregoing Protective Petition for Review to be served on the following counsel by the manner indicated:

By First Class Mail and Electronic Mail

Jonathan Sallet
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By First Class Mail

Eric H. Holder, Jr.
Attorney General
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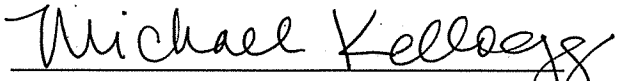

Michael K. Kellogg

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	

REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER

Adopted: February 26, 2015 **Released: March 12, 2015**

By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners Pai and O'Rielly dissenting and issuing separate statements.

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I. INTRODUCTION

1. The open Internet drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them. The benefits of an open Internet are undisputed. But it must remain open: open for commerce, innovation, and speech; open for consumers and for the innovation created by applications developers and content companies; and open for expansion and investment by America's broadband providers. For over a decade, the Commission has been committed to protecting and promoting an open Internet.

2. Four years ago, the Commission adopted open Internet rules to protect and promote the "virtuous cycle" that drives innovation and investment on the Internet—both at the "edges" of the network, as well as in the network itself. In the years that those rules were in place, significant investment and groundbreaking innovation continued to define the broadband marketplace. For example, according to US Telecom, broadband providers invested $212 billion in the three years following adoption of the rules—from 2011 to 2013—more than in any three year period since 2002.

3. Likewise, innovation at the edge moves forward unabated. For example, 2010 was the first year that the majority of Netflix customers received their video content via online streaming rather than via DVDs in red envelopes. Today, Netflix sends the most peak downstream traffic in North America of any company. Other innovative service providers have experienced extraordinary growth—Etsy reports that it has grown from $314 million in merchandise sales in 2010 to $1.35 billion in merchandise sales in 2013. And, just as importantly, new kinds of innovative businesses are busy being born. In the video space alone, in just the last sixth months, CBS and HBO have announced new plans for streaming their content free of cable subscriptions; DISH has launched a new package of channels that includes ESPN, and Sony is not far behind; and Discovery Communications founder John Hendricks has announced a new over-the-top service providing bandwidth-intensive programming. This year, Amazon took home two Golden Globes for its new series "Transparent."

4. The lesson of this period, and the overwhelming consensus on the record, is that carefully-tailored rules to protect Internet openness will allow investment and innovation to continue to flourish. Consistent with that experience and the record built in this proceeding, today we adopt carefully-tailored rules that would prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness. We also enhance our transparency rule to ensure that consumers are fully informed as to whether the services they purchase are delivering what they expect.

5. Carefully-tailored rules need a strong legal foundation to survive and thrive. Today, we provide that foundation by grounding our open Internet rules in multiple sources of legal authority—including both section 706 of the Telecommunications Act and Title II of the Communications Act. Moreover, we concurrently exercise the Commission's forbearance authority to forbear from application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations. This is a Title II tailored for the 21st century, and consistent with the "light-touch" regulatory framework that has facilitated the tremendous investment and innovation on the Internet. We expressly eschew the future use of prescriptive, industry-wide rate regulation. Under this approach, consumers can continue to

enjoy unfettered access to the Internet over their fixed and mobile broadband connections, innovators can continue to enjoy the benefits of a platform that affords them unprecedented access to hundreds of millions of consumers across the country and around the world, and network operators can continue to reap the benefits of their investments.

6. Informed by the views of nearly 4 million commenters, our staff-led roundtables, numerous *ex parte* presentations, meetings with individual Commissioners and staff, and more, our decision today—once and for all—puts into place strong, sustainable rules, grounded in multiple sources of our legal authority, to ensure that Americans reap the economic, social, and civic benefits of an open Internet today and into the future.

II. EXECUTIVE SUMMARY

7. The benefits of rules and policies protecting an open Internet date back over a decade and must continue.[1] Just over a year ago, the D.C. Circuit in *Verizon v. FCC* struck down the Commission's 2010 conduct rules against blocking and unreasonable discrimination.[2] But the *Verizon* court upheld the Commission's finding that Internet openness drives a "virtuous cycle" in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.[3] The *Verizon* court further affirmed the Commission's conclusion that "broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[4]

8. Threats to Internet openness remain today. The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like.[5] The 2010 rules helped to deter such conduct while they were in effect. But, as Verizon frankly told the court at oral argument, but for the 2010 rules, it would be exploring agreements to charge certain content providers for priority service.[6] Indeed, the wireless industry had a well-established record of

---

[1] *See, e.g.*, National Arts and Cultural Organizations Comments at 3 ("[B]roadband Internet service has inspired tremendous innovation, which has in turn enabled individual artists and arts organizations to reach new audiences, cultivate patrons and supporters, collaborate with peers, stimulate local economies and enrich cultural and civic discourse."); Common Cause Comments at 3-8 (arguing that the open Internet promotes free speech and civic engagement); Letter from Lauren M. Wilson, Policy Counsel, Free Press to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 13, 2015) (Free Press et al. Jan. 13, 2015 *Ex Parte* Letter) (describing the important role the open Internet plays in the work of public interest, social justice, and activist groups); Higher Education and Libraries Comments at ii ("Libraries and institutions of higher education depend upon an open Internet to carry out their missions and to serve their communities."); Engine Advocacy Comments at 3-13 (arguing that an open Internet has been essential to promoting entrepreneurship, economic growth, and innovation). Unless otherwise noted, all citations to comments in this item refer to comments filed in GN Docket No. 14-28. "Remand PN Comments" is used to denote comments that were filed in response to the Feb. 19, 2014 Public Notice released by the Wireline Competition Bureau. *See New Docket Established to Address Open Internet Remand*, GN Docket No. 14-28, Public Notice, 29 FCC Rcd 1746 (Wireline Comp. Bur. 2014). "Comments" or "Reply" are used to denote comments filed in response to the Notice of Proposed Rulemaking released by the Commission on May 15, 2014. *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*2014 Open Internet NPRM*).

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

[3] *Id*. at 659.

[4] *Id.* at 645.

[5] *See infra* Section III.B.

[6] *Verizon* Oral Arg. Tr. at 31 ("I'm authorized to state by my client [Verizon] today that, but for these rules, we would be exploring those commercial arrangements, but this order prohibits those, and in fact would shrink the types of services that will be available on the Internet."). *But see* Letter from William H. Johnson, Vice President & Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (filed Feb.

(continued….)

trying to keep applications within a carrier-controlled "walled garden" in the early days of mobile applications. That specific practice ended when Internet Protocol (IP) created the opportunity to leap the wall. But the Commission has continued to hear concerns about other broadband provider practices involving blocking or degrading third-party applications.

9. Emerging Internet trends since 2010 give us more, not less, cause for concern about such threats. First, mobile broadband networks have massively expanded since 2010. They are faster, more broadly deployed, more widely used, and more technologically advanced. At the end of 2010, there were about 70,000 devices in the U.S. that had LTE wireless connections. Today, there are more than 127 million.[7] We welcome this tremendous investment and innovation in the mobile marketplace. With carefully-tailored rules in place, that investment can continue to flourish and consumers can continue to enjoy unfettered access to the Internet over their mobile broadband connections. Indeed, mobile broadband is becoming an increasingly important pathway to the Internet independent of any fixed broadband connections consumers may have, given that mobile broadband is not a full substitute for fixed broadband connections.[8] And consumers must be protected, for example from mobile commercial practices masquerading as "reasonable network management." Second, and critically, the growth of online streaming video services has spurred further evolution of the Internet.[9] Currently, video is the

(Continued from previous page)
11, 2015) (Verizon Feb. 11 *Ex Parte* Letter) (arguing that "[t]he 'commercial arrangements' referenced by counsel had nothing to do with 'restrict[ing] access' to content"). Also, during the oral argument before the D.C. Circuit, Verizon stated that "in paragraph 64 of the Order the Agency also sets forth the no charging of edge providers rule as a corollary to the no blocking rule, and that's a large part of what is causing us our harm here." In response, Judge Silberman stated, "if you were allowed to charge, which are you assuming you're allowed to charge because of the anti-common carrier point of view, if somebody refused to pay then just like in the dispute between C[B]S and Warner, Time Warner . . . you could refuse to carry." Verizon's counsel responded: "[r]ight." Verizon Oral Arg. Tr. at 28.

[7] Fierce Wireless, *1H2014: LTE Share 33% of all Mobile Connections in the U.S. and Canada vs. 4% Worldwide*, (Sept. 2014), http://www.fiercewireless.com/press-releases/1h2014-lte-share-33-all-mobile-connections-us-and-canada-vs-4-worldwide (reporting remarkable growth with 16 million LTE connections at the end of June 2012; 63 million LTE connections as of June 2013; 127 million LTE connections as of June 2014).

[8] *See, e.g.*, *Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311 (Wireless Tel. Bur. 2014) (*17th Mobile Wireless Report*); Robert F. Roche and Liz Dale, *Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry* (June 2014); *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,* GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry, FCC 15-10, at para. 120 (rel. Feb. 4, 2015) (*2015 Broadband Progress Report*) ("We recognize that many households subscribe to both fixed and mobile services because they use fixed and mobile services in fundamentally different ways and, as such, view fixed and mobile services as distinct product offerings.").

[9] *See supra* para. 3; *see also* Netflix Inc., 2010 Annual Report (Form 10-K) (Feb. 18, 2011), http://files.shareholder.com/downloads/NFLX/3969047782x0x460274/17454c5b-3088-48c7-957a-b5a83a14cf1b/132054ACL.PDF; Letter from Reed Hastings, CEO and David Wells, CFO, Netflix to Shareholders of Netflix (Jan. 20, 2015), http://ir.netflix.com/results.cfm (follow "Q4 14 Letter to shareholders" hyperlink) (for 2014, Netflix reported 39.1 million domestic streaming subscribers compared to 5.8 million domestic DVD subscribers); Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, N.Y. Times (Oct. 16, 2014), http://www.nytimes.com/2014/10/17/business/cbs-to-offer-web-subscription-service.html; Brian Stelter, *ESPN on the web for $20 a month is coming soon*, CNN Money (Jan. 5, 2015), http://money.cnn.com/2015/01/05/media/dish-virtual-cable/; Alex Ben Block, *Discovery Founder Launching SVOD Service Described as Netflix "For Curious People,"* Hollywood Reporter (Jan. 14, 2014), http://www.hollywoodreporter.com/news/discovery-founder-launching-svod-service-763885; Jenelle Riley, *Amazon, 'Transparent' Make History at Golden Globes*, Variety (Jan. 11, 2015), http://variety.com/2015/tv/news/amazon-transparent-make-history-at-golden-globes-1201400485/.

dominant form of traffic on the Internet. These video services directly confront the video businesses of the very companies that supply them broadband access to their customers.[10]

10. The Commission, in its May *Notice of Proposed Rulemaking*, asked a fundamental question: "What is the right public policy to ensure that the Internet remains open?"[11] It proposed to enhance the transparency rule, and follow the *Verizon* court's blueprint by relying on section 706 to adopt a no-blocking rule and a requirement that broadband providers engage in "commercially reasonable" practices. The Commission also asked about whether it should adopt other bright-line rules or different standards using other sources of Commission authority, including Title II. And if Title II were to apply, the Commission asked about how it should exercise its authority to forbear from Title II obligations. It asked whether mobile services should also be classified under Title II.

11. Three overarching objectives have guided us in answering these questions, based on the vast record before the Commission: America needs more broadband, better broadband, and open broadband networks. These goals are mutually reinforcing, not mutually exclusive. Without an open Internet, there would be less broadband investment and deployment. And, as discussed further below, all three are furthered through the open Internet rules and balanced regulatory framework we adopt today.[12]

12. In enacting the Administrative Procedure Act (APA), Congress instructed expert agencies conducting rulemaking proceedings to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[13] It is public comment that cements an agency's expertise. As was explained in the seminal report that led to the enactment of the APA:

> The reason for [an administrative agency's] existence is that it is expected to bring to its task greater familiarity with the subject than legislators, dealing with many subjects, can have. But its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect.[14]

13. Congress could not have imagined when it enacted the APA almost seventy years ago that the day would come when nearly 4 million Americans would exercise their right to comment on a proposed rulemaking. But that is what has happened in this proceeding and it is a good thing. The Commission has listened and it has learned. Its expertise has been strengthened. Public input has "improve[d] the quality of agency rulemaking by ensuring that agency regulations will be 'tested by exposure to diverse public comment.'"[15] There is general consensus in the record on the need for the

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[10] *See* Public Knowledge, Benton Foundation, and Access Sonoma Broadband (Public Knowledge) Comments at 52-53 (discussing exemption of Xfinity online video application on Xbox from Comcast's data cap without similar exemption for unaffiliated over-the-top video services).

[11] *2014 Open Internet NPRM*, 29 FCC Rcd at 5562, para. 2.

[12] Consistent with the *Verizon* court's analysis, this Order need not conclude that any specific market power exists in the hands of one or more broadband providers in order to create and enforce these rules. Thus, these rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential. Moreover, it is worth noting that the Commission acts in a manner that is both complementary to the work of the antitrust agencies and supported by their application of antitrust laws. *See generally* 47 U.S.C. § 152(b) ("[N]othing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."). Nothing in this Order in any way precludes the Antitrust Division of the Department of Justice or the Commission itself from fulfilling their respective responsibilities under Section 7 of the Clayton Act (15 U.S.C. §18), or the Commission's public interest standard as it assesses prospective transactions.

[13] 5 U.S.C. § 553(c).

[14] Attorney General's Committee, *Final Report of the Attorney General Committee* at 102 (1941), http://www.law.fsu.edu/library/admin/pdfdownload/apa1941.pdf.

[15] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 641 (1st Cir. 1979)).

Commission to provide certainty with clear, enforceable rules. There is also general consensus on the need to have such rules. Today the Commission, informed by all of those views, makes a decision grounded in the record. The Commission has considered the arguments, data, and input provided by the commenters, even if not in agreement with the particulars of this Order; that public input has created a robust record, enabling the Commission to adopt new rules that are clear and sustainable.

A. Strong Rules That Protect Consumers from Past and Future Tactics that Threaten the Open Internet

1. Clear, Bright-Line Rules

14. Because the record overwhelmingly supports adopting rules and demonstrates that three specific practices invariably harm the open Internet—Blocking, Throttling, and Paid Prioritization—this Order bans each of them, applying the same rules to both fixed and mobile broadband Internet access service.

15. *No Blocking.* Consumers who subscribe to a retail broadband Internet access service must get what they have paid for—access to all (lawful) destinations on the Internet. This essential and well-accepted principle has long been a tenet of Commission policy, stretching back to its landmark decision in *Carterfone*, which protected a customer's right to connect a telephone to the monopoly telephone network.[16] Thus, this Order adopts a straightforward ban:

> *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.*

16. *No Throttling.* The 2010 open Internet rule against blocking contained an ancillary prohibition against the degradation of lawful content, applications, services, and devices, on the ground that such degradation would be tantamount to blocking. This Order creates a separate rule to guard against degradation targeted at specific uses of a customer's broadband connection:

> *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.*

17. The ban on throttling is necessary both to fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet, and to avoid gamesmanship designed to avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable. It prohibits the degrading of Internet traffic based on source, destination, or content.[17] It also specifically prohibits conduct that singles out content competing with a broadband provider's business model.

18. *No Paid Prioritization.* Paid prioritization occurs when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices. To protect against "fast lanes," this Order adopts a rule that establishes that:

> *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.*

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[16] *Use of the Carterfone Device in Message Toll Telephone Service; Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants), v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants)*, Docket Nos. 16942, 17073, Decision, 13 FCC 2d 420 (1968) (*Carterfone*), *recon. denied*, 14 FCC 2d 571 (1968).

[17] To be clear, the protections of the no-blocking and no-throttling rules apply to particular classes of applications, content and services as well as particular applications, content, and services.

> *"Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.*[18]

19. The record demonstrates the need for strong action. The *Verizon* court itself noted that broadband networks have "powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users."[19] Mozilla, among many such commenters, explained that "[p]rioritization . . . inherently creates fast and slow lanes."[20] Although there are arguments that some forms of paid prioritization could be beneficial, the practical difficulty is this: the threat of harm is overwhelming,[21] case-by-case enforcement can be cumbersome for individual consumers or edge providers, and there is no practical means to measure the extent to which edge innovation and investment would be chilled. And, given the dangers, there is no room for a blanket exception for instances where consumer permission is buried in a service plan—the threats of consumer deception and confusion are simply too great.[22]

2. No Unreasonable Interference or Unreasonable Disadvantage to Consumers or Edge Providers

20. The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls. Such conduct would, as the Commission concluded in 2010, "reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure."[23] In other words, when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.

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[18] Unlike the no-blocking and no-throttling rules, there is no "reasonable network management" exception to the paid prioritization rule because paid prioritization is inherently a business practice rather than a network management practice.

[19] *Verizon*, 740 F.3d at 645-46.

[20] Mozilla Comments at 20.

[21] *See, e.g.*, Free Press Comments at 50 ("In packet-switching, if there is no congestion, there is no meaning to priority.").

[22] AT&T Reply at 3 (proposing "a distinction between paid prioritization that is not directed by end users, and prioritization arrangements that are user-driven" and that "the Commission should not categorically foreclose such consumer-driven choices"). All Commission rules are subject to waiver requests and that principle applies to the open Internet rules. *See* 47 C.F.R. § 1.925; *Blanca Telephone Co. v. FCC*, 743 F.3d 860, 864 (D.C. Cir. 2014) ("When evaluating an agency's interpretation and application of a general, discretionary waiver standard '[o]ur review . . . is extremely limited.'") (quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C. Cir. 2003)). As Public Knowledge has recognized, "the Commission must not only permit such Petitions and waiver applications, but genuinely consider their merits [however,] the Commission has broad discretion with regard to what standard it will apply." Letter from Gene Kimmelman, President, Public Knowledge to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Nov. 7, 2014) (Public Knowledge Nov. 7, 2014 *Ex Parte* Letter). The Order requires any applicant to demonstrate that the proposed paid prioritization practice "*would provide some significant public interest benefit and would not harm the open nature of the Internet*." It is very important to understand that a party seeking a waiver is banned from an inappropriate practice. Its only recourse is to seek a waiver, and that waiver request would not be decided until the Commission, after public comment and its own investigation, reaches a decision.

[23] *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17911, para. 14 (2010) (*2010 Open Internet Order*), *aff'd in part*, *vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

21. The bright-line bans on blocking, throttling, and paid prioritization will go a long way to preserve the virtuous cycle. But not all the way. Gatekeeper power can be exercised through a variety of technical and economic means, and without a catch-all standard, it would be that, as Benjamin Franklin said, "a little neglect may breed great mischief."[24] Thus, the Order adopts the following standard:

> *Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.*

22. This "no unreasonable interference/disadvantage" standard protects free expression, thus fulfilling the congressional policy that "the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[25] And the standard will permit considerations of asserted benefits of innovation as well as threatened harm to end users and edge providers.

3. Enhanced Transparency

23. The Commission's 2010 transparency rule, upheld by the *Verizon* court, remains in full effect:

> *A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.*[26]

24. Today's Order reaffirms the importance of ensuring transparency, so that consumers are fully informed about the Internet access they are purchasing and so that edge providers have the information they need to understand whether their services will work as advertised. To do that, the Order builds on the strong foundation established in 2010 and enhances the transparency rule for both end users and edge providers, including by adopting a requirement that broadband providers always must disclose promotional rates, all fees and/or surcharges, and all data caps or data allowances; adding packet loss as a measure of network performance that must be disclosed; and requiring specific notification to consumers that a "network practice" is likely to significantly affect their use of the service. Out of an abundance of caution and in response to a request by the American Cable Association, we also adopt a temporary exemption from these enhancements for small providers (defined for the purposes of the temporary exception as providers with 100,000 or fewer subscribers), and we direct our Consumer & Governmental Affairs Bureau to adopt an Order by December 15, 2015 concerning whether to make the exception permanent and, if so, the appropriate definition of "small." Lastly, we create for all providers a "safe harbor" process for the format and nature of the required disclosure to consumers, which we believe will result in more effective presentation of consumer-focused information by broadband providers.

4. Scope of the Rules

25. The open Internet rules described above apply to both fixed and mobile broadband Internet access service. Consistent with the 2010 Order, today's Order applies its rules to the consumer-

[24] Benjamin Franklin, *Poor Richard's Almanac* (1757).

[25] 47 U.S.C. § 230(a)(3).

[26] 47 C.F.R. § 8.3.

facing service that broadband networks provide, which is known as "broadband Internet access service"[27] (BIAS) and is defined to be:

> *A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.*

26. As in 2010, BIAS does not include enterprise services, virtual private network services, hosting, or data storage services. Further, we decline to apply the open Internet rules to premises operators to the extent they may be offering broadband Internet access service as we define it today.

27. In defining this service we make clear that we are responding to the *Verizon* court's conclusion that broadband providers "furnish a service to edge providers" (and that this service was being treated as common carriage *per se*). As discussed further below, we make clear that broadband Internet access service encompasses this service to edge providers. Broadband providers sell retail customers the ability to go anywhere (lawful) on the Internet. Their representation that they will transport and deliver traffic to and from all or substantially all Internet endpoints includes the promise to transmit traffic to and from those Internet endpoints back to the user.

28. *Interconnection.* BIAS involves the exchange of traffic between a broadband Internet access provider and connecting networks. The representation to retail customers that they will be able to reach "all or substantially all Internet endpoints" necessarily includes the promise to make the interconnection arrangements necessary to allow that access.

29. As discussed below, we find that broadband Internet access service is a "telecommunications service" and subject to sections 201, 202, and 208 (along with key enforcement provisions). As a result, commercial arrangements for the exchange of traffic with a broadband Internet access provider are within the scope of Title II, and the Commission will be available to hear disputes raised under sections 201 and 202 on a case-by-case basis: an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and Content Delivery Networks (CDNs), that act on behalf of smaller edge providers.

30. But this Order does not apply the open Internet rules to interconnection. Three factors are critical in informing this approach to interconnection. First, the nature of Internet traffic, driven by massive consumption of video, has challenged traditional arrangements—placing more emphasis on the use of CDNs or even direct connections between content providers (like Netflix or Google) and last-mile broadband providers. Second, it is clear that consumers have been subject to degradation resulting from commercial disagreements,[28] perhaps most notably in a series of disputes between Netflix and large last-

[27] We note that our use of the term "broadband" in this Order includes but is not limited to services meeting the threshold for "advanced telecommunications capability," as defined in Section 706 of the Telecommunications Act of 1996, as amended. 47 U.S.C. § 1302(b). Section 706 defines that term as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S.C. § 1302(d)(1). The *2015 Broadband Progress Report* specifically notes that "advanced telecommunications capability," while sometimes referred to as "broadband," differs from the Commission's use of the term "broadband" in other contexts. *2015 Broadband Progress Report* at n.1 (rel. Feb. 4, 2015).

[28] *See* Letter from Sarah J. Morris, Senior Policy Counsel, Open Technology Institute, New America Foundation to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (filed Oct. 30, 2014), Attach. MLab, *ISP*

(continued….)

mile broadband providers. But, third, the causes of past disruption and—just as importantly—the potential for future degradation through interconnection disputes—are reflected in very different narratives in the record.

31. While we have more than a decade's worth of experience with last-mile practices, we lack a similar depth of background in the Internet traffic exchange context. Thus, we find that the best approach is to watch, learn, and act as required, but not intervene now, especially not with prescriptive rules. This Order—for the first time—provides authority to consider claims involving interconnection, a process that is sure to bring greater understanding to the Commission.

32. *Reasonable Network Management*. As with the 2010 rules, this Order contains an exception for reasonable network management, which applies to all but the paid prioritization rule (which, by definition, is not a means of managing a network):

> *A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.*

33. Recently, significant concern has arisen when mobile providers' have attempted to justify certain practices as reasonable network management practices, such as applying speed reductions to customers using "unlimited data plans" in ways that effectively force them to switch to price plans with less generous data allowances. For example, in the summer of 2014, Verizon announced a change to its "unlimited" data plan for LTE customers, which would have limited the speeds of LTE customers using grandfathered "unlimited" plans once they reached a certain level of usage each month. Verizon briefly described this change as within the scope of "reasonable network management," before changing course and withdrawing the change.

34. With mobile broadband service now subject to the same rules as fixed broadband service, the Order expressly recognizes that evaluation of network management practices will take into account the additional challenges involved in the management of mobile networks, including the dynamic conditions under which they operate. It also recognizes the specific network management needs of other technologies, such as unlicensed Wi-Fi networks.

35. *Non-Broadband Internet Access Service Data Services*. The 2010 rules included an exception for "specialized services." This Order likewise recognizes that some data services—like facilities-based VoIP offerings, heart monitors, or energy consumption sensors—may be offered by a broadband provider but do not provide access to the Internet generally. The term "specialized services" can be confusing because the critical point is not whether the services are "specialized;" it is that they are not broadband Internet access service. IP-services that do not travel over broadband Internet access service, like the facilities-based VoIP services used by many cable customers, are not within the scope of the open Internet rules, which protect access or use of broadband Internet access service. Nonetheless, these other non-broadband Internet access service data services could be provided in a manner that undermines the purpose of the open Internet rules and that will not be permitted. The Commission expressly reserves the authority to take action if a service is, in fact, providing the functional equivalent of broadband Internet access service or is being used to evade the open Internet rules. The Commission will vigilantly watch for such abuse, and its actions will be aided by the existing transparency requirement that non-broadband Internet access service data services be disclosed.

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Interconnection and Its Impact on Consumer Internet Performance, A Measurement Lab Consortium Technical Report (Oct. 28, 2014) (MLab ISP Interconnection Report).

5. Enforcement

36. The Commission may enforce the open Internet rules through investigation and the processing of complaints (both formal and informal). In addition, the Commission may provide guidance through the use of enforcement advisories and advisory opinions, and it will appoint an ombudsperson. In order to provide the Commission with additional understanding, particularly of technical issues, the Order delegates to the Enforcement Bureau the authority to request a written opinion from an outside technical organization or otherwise to obtain objective advice from industry standard-setting bodies or similar organizations.

B. Promoting Investment with a Modern Title II

37. Today, our forbearance approach results in over 700 codified rules being inapplicable, a "light-touch" approach for the use of Title II. This includes no unbundling of last-mile facilities, no tariffing, no rate regulation, and no cost accounting rules, which results in a carefully tailored application of only those Title II provisions found to directly further the public interest in an open Internet and more, better, and open broadband. Nor will our actions result in the imposition of any new federal taxes or fees; the ability of states to impose fees on broadband is already limited by the congressional Internet tax moratorium.

38. This is Title II tailored for the 21st Century. Unlike the application of Title II to incumbent wireline companies in the 20th Century, a swath of utility-style provisions (including tariffing) will *not* be applied. Indeed, there will be fewer sections of Title II applied than have been applied to Commercial Mobile Radio Service (CMRS), where Congress expressly required the application of Sections 201, 202, and 208, and permitted the Commission to forbear from others. In fact, Title II has never been applied in such a focused way.

39. History demonstrates that this careful approach to the use of Title II will not impede investment. First, mobile voice services have been regulated under a similar light-touch Title II approach since 1994 — and investment and usage boomed.[29] For example, between 1993 and 2009 (while voice was the primary driver of mobile revenues), the mobile industry invested more than $271 billion in building out networks, during a time in which industry revenues increased by 1300 percent and subscribership grew over 1600 percent.[30] Moreover, more recently, Verizon Wireless has invested tens of billions of dollars in deploying mobile wireless services since being subject to the 700 MHz C Block open access rules, which overlap in significant parts with the open Internet rules we adopt today.[31] But that is not all. Today, key provisions of Title II apply to certain enterprise broadband services that AT&T has

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[29] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (*CMRS Second Report & Order*) (forbearing from various Title II requirements for CMRS).

[30] *See* CTIA Wireless Industry Indices: Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry Year-End 2013 Results, 2014 at 25, 76, 97.

[31] *See* Verizon Communications, Inc., Financial Reporting Quarterly Reports 2008-2014 (Form 10-K) http://www.verizon.com/about/investors/quarterly-reports/ (last visited Feb. 23, 2015); *see also Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review-Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule*, WT Docket Nos. 07-166, 06-169, 06-150, 03-264, 96-86, PS Docket No. 06-229, CC Docket No. 94-102, Second Report and Order, 22 FCC Rcd 15289, 15364, paras. 203-204 (2007) (*700 MHz Second Report and Order*); 47 C.F.R. § 27.16.

described as "the epicenter of the broadband investment" the Commission seeks to promote.[32] Title II has been maintained by more than 1000 rural local exchange carriers that have chosen to offer their DSL and fiber broadband services as common carrier offerings. And, of course, wireline DSL was regulated as a common-carrier service until 2005—including a period in the late '90s and the first five years of this century that saw the highest levels of wireline broadband infrastructure investment to date.[33]

40. In any event, recent events have demonstrated that our rules will not disrupt capital markets or investment. Following recent discussions of the potential application of Title II to consumer broadband, investment analysts have issued reports concluding that Title II with appropriate forbearance is unlikely to alter broadband provider conduct or have any negative effect on their value or future profitability.[34] Executives from large broadband providers have also repeatedly represented to investors that the prospect of regulatory action will not influence their investment strategies or long-term profitability; indeed, Sprint has gone so far to say that it "does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services."[35] Finally, the recent AWS auction, conducted under the prospect of Title II regulation, generated bids (net of bidding credits) of more than $41 billion—further demonstrating that robust investment is not inconsistent with a light-touch Title II regime.[36]

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[32] Comments of AT&T, Inc., WC Docket No. 05-25, at 2-3 (filed Apr. 16, 2013).

[33] *See* US Telecom Research Brief, *Latest Data Show Broadband Investment Surged in 2013* at 2, Chart 2 (Sept. 8, 2014) (wireline broadband capital expenditures peaked at $79 billion in 2000), http://www.ustelecom.org/sites/default/files/documents/090814%20Latest%20Data%20Show%20Broadband%20Investment%20Surged%20in%202013.pdf.

[34] *See, e.g.*, Philip Cusick et al., *Net Neutrality: Prepared for Title II but We Take Less Negative View*, J.P. Morgan, (Nov. 11, 2014) ("We wouldn't change any of the fundamental assumptions on cable companies under our coverage under Title II, and shares are likely to rebound over time."); Paul Gallant, *Title 2 Appears Likely Outcome at FCC, but Headline Risk May Exceed Real Risk*, Guggenheim Securities, LLC, (Dec. 8, 2014) ("We would not view a Title II decision by the FCC as changing the existing Washington framework for cable broadband service. The marketplace reality under Title II would be far less problematic for cable/telcos than most believe."); Paul de Sa et al., Bernstein Research, (Nov. 17, 2014) ("We think net neutrality is largely irrelevant for fundamental value drivers. But headline noise in the coming months will likely result in fears about price regulation, increasing volatility and perhaps temporarily depressing cable & telco equity values.").

[35] Letter from Stephen Bye, Chief Technology Officer, Sprint, to Chairman Wheeler, FCC, GN Docket No. 14-28, at 1 (filed Jan. 16, 2015) (Sprint Jan. 16. 2015 *Ex Parte* Letter); *see also* Transcript of Verizon Communications Presents at UBS 42nd Annual Global Media and Communications Conference Call, Seeking Alpha (Dec. 9. 2014), *available at* http://seekingalpha.com/article/2743375-verizon-communications-vz-presents-at-ubs-42nd-annual-global-media-and-communications-conference-transcript?all=true&find=John%2BHodulik (quoting Verizon CFO Fran Shammo as saying "I mean, to be real clear, I mean this does not influence the way we invest. I mean we're going to continue to invest in our networks and our platforms, both in Wireless and Wireline FiOS and where we need to. So nothing will influence that. I mean if you think about it, look, I mean we were born out of a highly regulated company, so we know how this operates."); Brian Fung, *Verizon: Actually Strong Net Neutrality Rules Won't Affect our Network Investment*, Washington Post (Dec. 10, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/; Brian Fung, *Comcast*, *Charter and Time Warner Cable All Say Obama's Net Neutrality Plan Shouldn't Worry Investors*, Washington Post (Dec. 16, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/16/comcast-charter-and-time-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much/; Letter from Angie Kronenberg, COMPTEL to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Dec. 11, 2014) (COMPTEL Dec. 11, 2014 *Ex Parte* Letter).

[36] *See* John Eggerton, *AWS-3 Powers Past $44 Billion*, Broadcasting & Cable (Dec. 16, 2014), http://www.broadcastingcable.com/news/washington/aws-3-powers-past-44-billion/136438.

C. Sustainable Open Internet Rules

41. We ground our open Internet rules in multiple sources of legal authority—including both section 706 and Title II of the Communications Act. The *Verizon* court upheld the Commission's use of section 706 as a substantive source of legal authority to adopt open Internet protections. But it held that, "[g]iven the Commission's still-binding decision to classify broadband providers . . . as providers of 'information services,'" open Internet protections that regulated broadband providers as common carriers would violate the Act.[37] Rejecting the Commission's argument that broadband providers only served retail consumers, the *Verizon* court went on to explain that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers,'" and held that the 2010 no blocking and no unreasonable discrimination rules impermissibly "obligated [broadband providers] to act as common carriers."[38]

42. The *Verizon* decision thus made clear that section 706 affords the Commission substantive authority, and that open Internet protections are within the scope of that authority. And this Order relies on section 706 for the open Internet rules. But, in light of *Verizon*, absent a classification of broadband providers as providing a "telecommunications service," the Commission could only rely on section 706 to put in place open Internet protections that steered clear of regulating broadband providers as common carriers *per se*. Thus, in order to bring a decade of debate to a certain conclusion, we conclude that the best path is to rely on all available sources of legal authority—while applying them with a light touch consistent with further investment and broadband deployment. Taking the *Verizon* decision's implicit invitation, we revisit the Commission's classification of the retail broadband Internet access service as an information service and clarify that this service encompasses the so-called "edge service."

43. Exercising our delegated authority to interpret ambiguous terms in the Communications Act, as confirmed by the Supreme Court in *Brand X*,[39] today's Order concludes that the facts in the market today are very different from the facts that supported the Commission's 2002 decision to treat cable broadband as an information service and its subsequent application to fixed and mobile broadband services. Those prior decisions were based largely on a factual record compiled over a decade ago, during an earlier time when, for example, many consumers would use homepages supplied by their broadband provider. In fact, the *Brand X* Court explicitly acknowledged that the Commission had previously classified the transmission service, which broadband providers offer, as a telecommunications service and that the Commission could return to that classification if it provided an adequate justification.[40] Moreover, a number of parties who, in this proceeding, now oppose our reclassification of broadband Internet access service, previously argued that cable broadband should be deemed a telecommunications service.[41] As the record reflects, times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a "telecommunications service."

44. The *Brand X* decision made famous the metaphor of pizza delivery. Justice Scalia, in dissent, concluded that the Commission had exceeded its legal authority by classifying cable-modem service as an "information service."[42] To make his point, Justice Scalia described a pizzeria offering

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[37] *Verizon*, 740 F.3d at 650.

[38] *Id.* at 653.

[39] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (*Brand X*).

[40] *Id.* at 986, 1001.

[41] *See infra* para. 314 & n.810.

[42] *Id.* at 1005 (Scalia, J., dissenting).

delivery services as well as selling pizzas and concluded that, similarly—broadband providers were offering "telecommunications services" even if that service was not offered on a "stand-alone basis."[43]

45. To take Justice Scalia's metaphor a step further, suppose that in 2014, the pizzeria owners discovered that other nearby restaurants did not deliver their food and thus concluded that the pizza-delivery drivers could generate more revenue by delivering from any neighborhood restaurant (including their own pizza some of the time). Consumers would clearly understand that they are being offered a delivery service.

46. Today, broadband providers are offering stand-alone transmission capacity and that conclusion is not changed even if, as Justice Scalia recognized, other products may be offered at the same time. The trajectory of technology in the decade since the *Brand X* decision has been towards greater and greater modularity. For example, consumers have considerable power to combine their mobile broadband connections with the device, operating systems, applications, Internet services, and content of their choice. Today, broadband Internet access service is fundamentally understood by customers as a transmission platform through which consumers can access third-party content, applications, and services of their choosing.

47. Based on this updated record, this Order concludes that the retail broadband Internet access service available today is best viewed as separately identifiable offers of (1) a broadband Internet access service that is a telecommunications service (including assorted functions and capabilities used for the management and control of that telecommunication service) and (2) various "add-on" applications, content, and services that generally are information services. This finding more than reasonably interprets the ambiguous terms in the Communications Act, best reflects the factual record in this proceeding, and will most effectively permit the implementation of sound policy consistent with statutory objectives, including the adoption of effective open Internet protections.

48. This Order also revisits the Commission's prior classification of mobile broadband Internet access service as a private mobile service, which cannot be subject to common carrier regulation, and finds that it is best viewed as a commercial mobile service or, in the alternative, the functional equivalent of commercial mobile service. Under the statutory definition, commercial mobile services must be "interconnected with the public switched network (as such terms are defined by regulation by the Commission)."[44] Consistent with that delegation of authority to define these terms, and with the Commission's previous recognition that the public switched network will grow and change over time, this Order updates the definition of public switched network to reflect current technology, by including services that use public IP addresses. Under this revised definition, the Order concludes that mobile broadband Internet access service is interconnected with the public switched network. In the alternative, the Order concludes that mobile broadband Internet access service is the functional equivalent of commercial mobile service[45] because, like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications, including voice, on their mobile device.

49. By classifying broadband Internet access service under Title II of the Act, in our view the Commission addresses any limitations that past classification decisions placed on the ability to adopt strong open Internet rules, as interpreted by the D.C. Circuit in the *Verizon* case.

50. Having classified broadband Internet access service as a telecommunications service, we respond to the *Verizon* court's holding, supporting our open Internet rules under the Commission's Title

[43] *Id.* at 1007-09.

[44] 47 U.S.C. § 332(d)(2).

[45] Section 332 of the Act defines "private mobile service" as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission." 47 U.S.C. § 332(d)(3).

II authority and removing any common carriage limitation on the exercise of our section 706 authority. For mobile broadband services, we also ground the open Internet rules in our Title III authority to protect the public interest through the management of spectrum licensing.

D. Broad Forbearance

51. In finding that broadband Internet access service is subject to Title II, we simultaneously exercise the Commission's forbearance authority to forbear from 30 statutory provisions and render over 700 codified rules inapplicable, to establish a light-touch regulatory framework tailored to preserving those provisions that advance our goals of more, better, and open broadband. We thus forbear from the vast majority of rules adopted under Title II. We do not, however, forbear from sections 201, 202, and 208 (or from related enforcement provisions),[46] which are necessary to support adoption of our open Internet rules. We also grant extensive forbearance, minimizing the burdens on broadband providers while still adequately protecting the public.

52. In addition, we do not forbear from a limited number of sections necessary to ensure consumers are protected, promote competition, and advance universal access, all of which will foster network investment, thereby helping to promote broadband deployment.

53. *Section 222: Protecting Consumer Privacy.* Ensuring the privacy of customer information both directly protects consumers from harm and eliminates consumer concerns about using the Internet that could deter broadband deployment. Among other things, section 222 imposes a duty on every telecommunications carrier to take reasonable precautions to protect the confidentiality of its customers' proprietary information.[47] We take this mandate seriously. For example, the Commission recently took enforcement action under section 222 (and section 201(b)) against two telecommunications companies that stored customers' personal information, including social security numbers, on unprotected, unencrypted Internet servers publicly accessible using a basic Internet search.[48] This unacceptably exposed these consumers to the risk of identity theft and other harms.

54. As the Commission has recognized, "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services."[49] Thus, this Order finds that consumers concerned about the privacy of their personal information will be more reluctant to use the Internet, stifling Internet service competition and growth.[50] Application of section 222's protections will help spur consumer demand for those Internet access

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[46] Specifically, we do not forbear from the enforcement authorities set forth in sections 206, 207, 208, 209, 216, and 217. To preserve existing CALEA obligations that already apply to broadband Internet access service, we also decline to forbear from section 229. 47 U.S.C. § 229. *See also* 47 C.F.R. §§ 1.20000 *et seq*.

[47] 47 U.S.C. § 222(a); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6959, para. 64 (2007) (*2007 CPNI Order*).

[48] *See TerraCom, Inc. and YourTel America, Inc. Apparent Liability for Forfeiture*, File No.: EB-TCD-13-00009175, Notice of Apparent Liability, 29 FCC Rcd 13325, 13335-40, paras. 31-41 (2014).

[49] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14930, para. 148 (2005) (*Wireline Broadband Classification Order*); *see also id.* at 14931, para. 149 & n.447 (noting that "long before Congress enacted section 222 of the Act, the Commission had recognized the need for privacy requirements associated with the provision of enhanced services and had adopted CPNI-related requirements in conjunction with other *Computer Inquiry* obligations").

[50] *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, *and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, *as Amended by the Broadband Data Improvement Act*, GN Docket No. 11-121, Report, 27 FCC Rcd 10342, 10410, para. 154 (2012) (*2012 Eighth Broadband Progress Report*).

services, in turn "driving demand for broadband connections, and consequently encouraging more broadband investment and deployment," consistent with the goals of the 1996 Act.[51]

55. *Sections 225/255/251(a)(2): Ensuring Disabilities Access.* We do not forbear from those provisions of Title II that ensure access to broadband Internet access service by individuals with disabilities. All Americans, including those with disabilities, must be able to reap the benefits of an open Internet, and ensuring access for these individuals will further the virtuous cycle of consumer demand, innovation, and deployment. This Order thus concludes that application of sections 225, 255, and 251(a)(2) is necessary to protect consumers and furthers the public interest, as explained in greater detail below.[52]

56. *Section 224: Ensuring Infrastructure Access.* For broadband Internet access service, we do not forbear from section 224 and the Commission's associated procedural rules (to the extent they apply to telecommunications carriers and services and are, thus, within the Commission's forbearance authority).[53] Section 224 of the Act governs the Commission's regulation of pole attachments. In particular, section 224(f)(1) requires utilities to provide cable system operators and telecommunications carriers the right of "nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled" by a utility.[54] Access to poles and other infrastructure is crucial to the efficient deployment of communications networks including, and perhaps especially, new entrants.

57. *Section 254: Promoting Universal Broadband.* Section 254 promotes the deployment and availability of communications networks to all Americans, including rural and low-income Americans—furthering our goals of more and better broadband. With the exception of 254(d), (g), and (k) as discussed below, we therefore do not find the statutory test for forbearance from section 254 (and the related provision in section 214(e)) is met. We recognize that supporting broadband-capable networks is already a key component of Commission's current universal service policies. The Order concludes, however, that directly applying section 254 provides both more legal certainty for the Commission's prior decisions to offer universal service subsidies for deployment of broadband networks and adoption of broadband services and more flexibility going forward.

58. We partially forbear from section 254(d) and associated rules insofar as they would immediately require mandatory universal service contributions associated with broadband Internet access service.[55]

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[51] *2007 CPNI Order*, 22 FCC Rcd at 6957, para. 59; *see also* FCC, *Connecting America: The National Broadband Plan* at 55 (*National Broadband Plan*) (explaining that without privacy protections, new innovation and investment in broadband applications and content may be held back, and these applications and content, in turn, are likely the most effective means to advance many of Congress's goals for broadband).

[52] As explained in greater detail below, this Order does, however, forbear in part from the application of TRS contribution obligations that otherwise would apply to broadband Internet access service. Section 251(a)(2) precludes the installation of "network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256." *See infra* Section V.

[53] *See, e.g.*, Letter from Kathryn Zachem, Senior Vice President, Comcast, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 at 25 n.107 (filed Dec. 24, 2014) (Comcast Dec. 24, 2014 *Ex Parte* Letter); Letter from Matthew Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 21 (Dec. 23, 2014) (NCTA Dec. 23, 2014 *Ex Parte* Letter); *see also, e.g.*, Letter from Marvin Ammori and Julie Samuels, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (filed Nov. 12, 2014) ("Title II forbearance should be implemented in such a way so as to encourage continued deployment and investment in networks by for example preserving pole attachment rights.").

[54] 47 U.S.C. § 224(f)(1).

[55] The first sentence of section 254(d) authorizes the Commission to impose universal service contributions requirements on telecommunications carriers—and, indeed, goes even further to require "[e]very telecommunications carrier that provides interstate telecommunications services" to contribute. 47 U.S.C. § 254(d).

59. Below, we first adopt three bright-line rules banning blocking, throttling, and paid prioritization, and make clear the no-unreasonable interference/disadvantage standard by which the Commission will evaluate other practices, according to their facts. These rules are grounded in multiple sources of statutory authority, including section 706 and Titles II and III of the Communications Act. Second, based on a current factual record, we reclassify broadband Internet access service as a telecommunications service under Title II. And, third, guided by our goals of more, better, and open broadband, we exercise our forbearance authority to put in place a "light touch" Title II regulatory framework that protects consumers and innovators, without deterring investment.

III. REPORT AND ORDER ON REMAND: PROTECTING AND PROMOTING THE OPEN INTERNET

A. History of Openness Regulation

60. These rules are the latest in a long line of actions by the Commission to ensure that American communications networks develop in ways that foster economic competition, technological innovation, and free expression. Ever since the landmark 1968 *Carterfone* decision,[56] the Commission has recognized that communications networks are most vibrant, and best able to serve the public interest, when consumers are empowered to make their own decisions about how networks are to be accessed and utilized. Openness regulation aimed at safeguarding consumer choice has therefore been a hallmark of Commission policy for over forty years.

61. In *Carterfone*, the Commission confronted AT&T's practice of preventing consumers from attaching any equipment not supplied by AT&T to their home telephones, even if the attachment did not put the underlying network at risk.[57] Finding AT&T's "foreign attachment" provisions unreasonable and unlawful, the Commission ruled that AT&T customers had the right to connect useful devices of their choosing to their home telephones, provided these devices did not adversely affect the telephone network.[58]

62. *Carterfone* and subsequent regulatory actions by the Commission severed the market for customer premises equipment (CPE) from that for telephone service.[59] In doing so, the Commission allowed new participants and new ideas into the market, setting the stage for a wave of innovation that

[56] *Carterfone*, 13 FCC 2d 420.

[57] *Carterfone*, 13 FCC 2d at 421, 427. These "foreign attachment" provisions effectively allowed the company to extend its monopoly over phone service to the telephone equipment market as well. After AT&T prohibited use of the Carterfone, the product's manufacturer brought an antitrust action against AT&T and certain other telephone companies. The district court, applying the doctrine of primary jurisdiction, asked the Commission to determine the reasonableness and validity of the tariff and telephone companies' practices. The manufacturer also filed a formal complaint against certain of the telephone companies, and the Commission consolidated the two proceedings. *Id*. at 421-22.

[58] *Carterfone*, 13 FCC 2d at 423-424 ("[O]ur conclusion here is that a customer desiring to use an interconnecting device . . . should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others.").

[59] As the Commission implicitly recognized, allowing AT&T to preclude adoption of even non-harmful third-party devices forestalled the development of a competitive telephone technology market, harming innovators and consumers alike. *See id*. at 424 ("No one entity need provide all interconnection equipment for our telephone system any more than a single source is needed to supply the parts for a space probe."); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 439 para. 141 (1980) (*Computer II*).

produced technologies such as the answering machine, fax machine, and modem—thereby removing a barrier to the development of the packet switched network that would eventually become the Internet.[60]

63. Commitment to robust competition and open networks defined Commission policy at the outset of the digital revolution as well. In a series of influential decisions, known collectively as the *Computer Inquiries*,[61] the Commission established a flexible regulatory framework to support development of the nascent information economy. The *Computer Inquiries* decisions separated the market for information services from the underlying network infrastructure, and imposed firm non-discrimination rules for network access.[62] This system prevented network owners from engaging in anti-competitive behavior and spurred the development and adoption of new technologies.[63]

64. The principles of open access, competition, and consumer choice embodied in *Carterfone* and the *Computer Inquires* have continued to guide Commission policy in the Internet era. As former Chairman Michael Powell noted in 2004, "ensuring that consumers can obtain and use the content, applications and devices they want . . . is critical to unlocking the vast potential of the broadband Internet."[64] In recognition of this fact, in 2005, the Commission unanimously approved the *Internet Policy Statement*, which laid out four guiding principles designed to encourage broadband deployment and "preserve and promote the open and interconnected nature of the Internet."[65] These principles sought to ensure that consumers had the right to access and use the lawful content, applications, and devices of their choice online, and to do so in an Internet ecosystem defined by competitive markets.[66]

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[60] Michael T. Hoeker, Comment, *From Carterfone to the iPhone: Consumer Choice in the Wireless Telecommunications Marketplace*, 17 CommLaw Conspectus 187, 190-91 (2008); Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. Rev. 1, 20-21 (2005) (*The Federal Computer Commission*).

[61] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I*); *Computer II*, 77 FCC 2d 384; *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Computer III*).

[62] *The Federal Computer Commission* at 22-26; James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 264-67 (2002).

[63] Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 Fed. Comm. L.J. 167, 169, 204-205 (2003) (arguing that the rules established in the *Computer Inquiries* "have been wildly successful" and were "a necessary precondition for the success of the Internet").

[64] Michael K. Powell, Chairman, Federal Communications Commission, Preserving Internet Freedom: Guiding Principles for the Industry 3, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

[65] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986, 14987-88, para. 4 (2005) (*Internet Policy Statement*).

[66] Subject to "reasonable network management," the principles were intended to ensure consumers had the right to (1) "access the lawful Internet content of their choice;" (2) "run applications and use services of their choice;" (3) "connect their choice of legal devices that do not harm the network;" and (4) enjoy "competition among network providers, application and service providers, and content providers." *Internet Policy Statement*, 20 FCC Rcd at 14987-88, para. 4.

65. From 2005 to 2011, the principles embodied in the *Internet Policy Statement* were incorporated as conditions by the Commission into several merger orders and a key 700 MHz license, including the SBC/AT&T, Verizon/MCI, and Comcast/NBCU mergers and the Upper 700 MHz C block open platform requirements.[67] Commission approval of these transactions was expressly conditioned on compliance with the *Internet Policy Statement*.[68] During this time, open Internet principles were also applied to particular enforcement proceedings aimed at addressing anti-competitive behavior by service providers.[69]

66. In June 2010, following a D.C. Circuit decision invalidating the Commission's exercise of ancillary authority to provide consumers basic protections in using broadband Internet services, the Commission initiated a *Notice of Inquiry* to "seek comment on our legal framework for broadband Internet service."[70] The *Notice of Inquiry* recognized that "the current legal classification of broadband Internet service is based on a record that was gathered a decade ago."[71] It sought comment on three

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[67] *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18392, para. 211 & Appx. F (2005) (*SBC/AT&T Merger Order*); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18537, para. 221 (2005) (*Verizon/MCI Merger Order*); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4239, 4275, para. 94 & n.213 (2011) (*Comcast/NBCU Merger Order*);*700 MHz Second Report and Order*, 22 FCC Rcd at 15364, paras. 203-204; 47 C.F.R. § 27.16.

[68] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18392, para. 211 & Appx. F; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18537, para. 221; *Comcast/NBCU Merger Order*, 26 FCC Rcd at 4275, para. 94 & n.213; *700 MHz Second Report and Order*, 22 FCC Rcd at 15364, paras. 203-204; 47 C.F.R. § 27.16. Additionally, the Commission used the *Internet Policy Statement* principles as a yardstick to evaluate other large-scale transactions, such as an Adelphia/Time Warner/Comcast licensing agreement, and the AT&T/BellSouth merger. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees, Comcast Corporation, Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8299, para. 223 (2006); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5727-28, para. 119 (2007) (*AT&T/BellSouth Merger Order*).

[69] These actions resulted in a 2005 consent decree by DSL service provider Madison River requiring it to discontinue its practice of blocking Voice over Internet Protocol (VoIP) telephone calls, and a 2008 Order against Comcast for interfering with peer-to-peer file sharing, which the Commission found "contravened federal policy" by "significantly imped[ing] consumers' ability to access the content and use the applications of their choice." *Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enforcement Bur. 2005) (*Madison River Order*); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13054, 13057, paras. 44, 49 (2008) (*Comcast Order*).

[70] *Framework for Broadband Internet Service,* GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866, 7867, para. 2 (2010) (*Broadband Framework NOI*), *citing Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). The D.C. Circuit held that the Commission could not rely solely on ancillary authority in taking enforcement action against Comcast. *Id.* at 652. Further, the court held that another potential source of authority, section 706 of the Telecommunications Act of 1996, likewise could not support the Commission's action because the Commission was bound in *Comcast* by a prior determination that section 706 did not constitute such a grant of authority. *Id.* at 658-59.

[71] *Broadband Framework NOI*, 25 FCC Rcd at 7867, para. 1.

separate alternative legal frameworks for classifying and regulating broadband Internet service: (1) as an information service, (2) as a telecommunications service "to which all the requirements of Title II of the Communications Act would apply," and (3) solely as to the "Internet connectivity service," as a telecommunications service with forbearance from most Title II obligations.[72] The *Notice of Inquiry* sought comment on both wired and wireless broadband Internet services, "as well as on other factual and legal issues specific to . . . wireless services that bear on their appropriate classification."[73]

67. In December 2010, the Commission adopted the *Open Internet Order*,[74] a codification of the policy principles contained in the *Internet Policy Statement*. The *Open Internet Order* was based on broadly accepted Internet norms and the Commission's long regulatory experience in preserving open and dynamic communications networks.[75] The *Order* adopted three fundamental rules governing Internet service providers: (1) no blocking; (2) no unreasonable discrimination; and (3) transparency.[76] The no-blocking rule and no-unreasonable discrimination rules prevented broadband service providers from deliberately interfering with consumers' access to lawful content, applications, and services, while the transparency rule promoted informed consumer choice by requiring disclosure by service providers of critical information relating to network management practices, performance, and terms of service.[77]

68. The antidiscrimination rule contained in the *Open Internet Order* operated on a case-by-case basis, with the Commission evaluating the conduct of fixed broadband service providers based on a number of factors, including conformity with industry best practices, harm to competing services or end users, and impairment of free expression.[78] This no unreasonable discrimination framework applied to commercial agreements between fixed broadband service providers and third parties to prioritize transmission of certain traffic to their subscribers.[79] The *Open Internet Order* also specifically addressed paid prioritization arrangements.[80] It did not entirely rule out the possibility of such agreements, but made clear that such "pay for priority" deals and the associated "paid prioritization" network practices were likely to be problematic in a number of respects. Paid prioritization "represented a significant departure from historical and current practice" that threatened "great harm to innovation" online, particularly in connection with the market for new services by edge providers.[81] Paid priority agreements were also viewed as a threat to non-commercial end users, "including individual bloggers, libraries, schools, advocacy organizations, and other speakers" who would be less able to pay for priority service.[82] Finally, paid prioritization was seen giving fixed broadband providers "an incentive to limit the quality of service provided to non-prioritized traffic."[83] As a result of these concerns, the Commission explicitly stated in the *Open Internet Order* that it was "unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard."[84]

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[72] *Id.* at 7867, para. 2.

[73] *Id.*

[74] *2010 Open Internet Order*, 25 FCC Rcd 17905.

[75] *Id.* at 17906, para. 1; *2014 Open Internet NPRM*, 29 FCC Rcd at 5568, para. 21.

[76] *2010 Open Internet Order*, 25 FCC Rcd at 17906, para. 1.

[77] *Id.*

[78] *Id.* at 17946, paras. 74-75.

[79] *Id.* at 17947, para. 76.

[80] *See infra* Section III.C.1.c.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

69. In order to maintain flexibility, the Commission tailored the rules contained in the *Open Internet Order* to fit the technical and economic realities of the broadband ecosystem. To this end, the restrictions on blocking and discrimination were made subject to an exception for "reasonable network management," allowing service providers the freedom to address legitimate needs such as avoiding network congestion and combating harmful or illegal content.[85] Additionally, in order to account for then-perceived differences between the fixed and mobile broadband markets, the *Open Internet Order* exempted mobile service providers from the anti-discrimination rule, and only barred mobile providers from blocking "consumers from accessing lawful websites" or "applications that compete with the provider's voice or video telephony services."[86] Lastly, the *Open Internet Order* made clear that the rules did not prohibit broadband providers from offering specialized services such as VoIP; instead, the Commission announced that it would continue to monitor such arrangements to ensure that they did not pose a threat to Internet openness.[87]

70. Verizon subsequently challenged the *Open Internet Order* in the U.S. Court of Appeals for the D.C. Circuit, arguing, among other things, that the *Open Internet Order* exceeded the Commission's regulatory authority and violated the Act.[88] In January 2014, the D.C. Circuit upheld the Commission's determination that section 706 of the Telecommunications Act of 1996 granted the Commission authority to regulate broadband Internet service providers,[89] and that the Commission had demonstrated a sound policy justification for the *Open Internet Order*. Specifically, the court sustained the Commission's findings that "absent rules such as those set forth in the *Open Internet Order*, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[90]

71. Despite upholding the Commission's authority and the basic rationale supporting the *Open Internet Order*, the court struck down the no-blocking and antidiscrimination rules as at odds with section 3(51) of the Communications Act, holding that it prohibits the Commission from exercising its section 706 authority to impose common carrier regulation on a service not classified as a "telecommunications service," and section 332(c)(2), which prohibits common carrier treatment of "private mobile services."[91] The D.C. Circuit vacated the no-blocking and antidiscrimination rules because it found that they impermissibly regulated fixed broadband providers as common carriers,[92] which conflicted with the Commission's prior classification of fixed broadband Internet access service as an "information service" rather than a telecommunications service.[93] Likewise, the court found that the

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[85] 47 C.F.R. § 8.5.

[86] *Id.*

[87] *2010 Open Internet Order*, 25 FCC Rcd at 17928, para. 30, 17966, para. 114.

[88] *Verizon*, 740 F.3d 623.

[89] *Id.* at 635-42.

[90] *Id.* at 645.

[91] *Id.* at 656-59. Common carriage, which applies to certain entities like telephone service providers, imposes restrictions on the degree to which a service provider can enter into individualized agreements with similarly-situated customers. *Id.* at 651-52.

[92] *Verizon*, 740 F.3d at 655-58 (vacating the Commission's rule prohibiting "unreasonable discrimination" by fixed broadband providers on the theory that it "so limited broadband providers' control over edge providers' transmissions that [it] constitute[d] common carriage *per se*" and finding that the no-blocking rules "would appear on their face" to impose common carrier obligations on fixed and mobile broadband providers); *see also 2014 Open Internet NPRM*, 29 FCC Rcd at 5600-01, para. 114.

[93] *Verizon*, 740 F.3d at 650; *see also United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (*BPL-Enabled Broadband Order*); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of*

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no-blocking rule as applied to mobile broadband conflicted with the Commission's earlier classification of mobile broadband service as a private mobile service rather than a "commercial mobile service."[94] The *Verizon* court held that the "no unreasonable discrimination" standard adopted in the *Open Internet Order* was insufficiently distinguishable from the "nondiscrimination" standard applicable to common carriers.[95] Central to the court's rationale was its finding that, as formulated in the *Open Internet Order*, both rules improperly limited fixed broadband Internet access providers' ability to engage in "individualized bargaining."[96]

72. Following the D.C. Circuit's ruling, on May 15, 2014 the Commission issued a Notice of Proposed Rulemaking (*2014 Open Internet NPRM*) to respond to the lack of conduct-based rules to protect and promote an open Internet following the D.C. Circuit's opinion in *Verizon v. FCC*.[97] The Commission began the NPRM with a fundamental question: "What is the right public policy to ensure that the Internet remains open?"[98] While the NPRM put forth various proposals, it sought broad comment on alternative paths to the right public policy solution—including areas such as the proper scope of the rules; the best ways to define, prevent, and treat violations of practices that may threaten an open Internet (including paid prioritization); enhancements to the transparency rule; and the appropriate source of legal authority to support new open Internet rules.[99]

73. The Commission took many steps to facilitate public engagement in response to the *2014 Open Internet NPRM*—including the establishment of a dedicated email address to receive comments, a mechanism for submitting large numbers of comments in bulk via a Comma Separated Values (CSV) file,

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Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14855, para. 1 (2005) (*Wireline Broadband Classification Order*); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-785, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4801, para. 4 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[94] *Verizon*, 740 F.3d at 650; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Classification Order*).

[95] *Verizon*, 740 F.3d at 656.

[96] In making its determination, the *Verizon* court relied on a previous decision in which it upheld the Commission's data roaming requirements against a common carrier challenge. *Cellco P'ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012). The *Verizon* court emphasized that, unlike the data roaming rules at issue in *Cellco*, which explicitly left room for individualized negotiations, the *Open Internet Order* did not attempt to "ensure that [the] reasonableness standard remains flexible." *Cellco*, 700 F.3d at 548; *Verizon*, 740 F.3d at 657.

[97] *See generally 2014 Open Internet NPRM*, 29 FCC Rcd 5561.

[98] *Id.* at 5563, para. 2.

[99] *Id.* at 5563, para 4. The Commission proposed to "retain the definitions and scope of the 2010 rules," adopting the text of the 2010 no-blocking rule under a revised rationale, and enhancing the transparency rule that remained in place after *Verizon*. *Id*. at 5564-65, para. 10. The *2014 Open Internet NPRM* also proposed to add a separate layer of protection against anti-competitive conduct by service providers that would otherwise be permissible under the no-blocking rule. This new rule would require that service providers "adhere to an enforceable legal standard of commercially reasonable practices" in the provision of broadband Internet access service. *Id*.

and the release of the entire record of comments and reply comments as Open Data in a machine-readable format, so that researchers, journalists, and other parties could analyze and create visualizations of the record.[100] In addition, Commission staff hosted a series of roundtables covering a variety of topics related to the open Internet proceeding, including events focused on different policy approaches to protecting the open Internet,[101] mobile broadband,[102] enforcement issues,[103] technology,[104] broadband economics,[105] and the legal issues surrounding the Commission's proposals.[106]

74. The public seized on these opportunities to comment, submitting an unprecedented 3.7 million comments by the close of the reply comment period on September 15, 2014, with more submissions arriving after that date.[107] This record-setting level of public engagement reflects the vital nature of Internet openness and the importance of our getting the answer right in this proceeding. Quantitative analysis of the comment pool reveals a number of key insights. For example, by some estimates, nearly half of all comments received by the Commission were unique.[108] While there has been some public dispute as to the percentage of comments taking one position or another, it is clear that the

[100] Dr. David A. Bray, FCC Chief Information Officer, Official FCC Blog, *An Update on the Volume of Open Internet Comments Submitted to the FCC* (Sept. 17, 2014), http://www.fcc.gov/blog/update-volume-open-internet-comments-submitted-fcc; Dr. David A. Bray, FCC Chief Information Officer, Official FCC Blog, *An Additional Option for Filing Open Internet Comments* (Sept. 11, 2014), http://www.fcc.gov/blog/additional-option-filing-open-internet-comments; Gigi B. Sohn, Special Counsel for External Affairs, Office of the Chairman, Official FCC Blog, *FCC Makes Open Internet Comments More Accessible to Public* (August 5, 2014), http://www.fcc.gov/blog/fcc-makes-open-internet-comments-more-accessible-public.

[101] Open Internet Roundtable, *Policy Approaches to Ensure an Open Internet*, Sept. 16, 2014 (recording *available at* http://www.fcc.gov/events/open-internet-roundtable-policy-approaches).

[102] Open Internet Roundtable, *Mobile Broadband and the Open Internet*, Sept. 16, 2014 (recording *available at* http://www.fcc.gov/events/open-internet-roundtable-mobile-broadband).

[103] Open Internet Roundtable, *Effective Enforcement of Open Internet Requirements*, Sept. 19, 2014 (recording *available at* http://www.fcc.gov/events/open-internet-roundtable-technological-aspects).

[104] Open Internet Roundtable, *Technological Aspects of an Open Internet*, Sept. 19, 2014 (recording *available at* http://www.fcc.gov/events/open-internet-roundtable-technological-aspects).

[105] Open Internet Roundtable, *Economics of Broadband: Market Successes and Market Failures*, Oct.2, 2014 (recording *available at* http://www.fcc.gov/events/open-internet-roundtable-economics).

[106] Open Internet Roundtable, *Internet Openness and the Law*, Oct. 7, 2014 (recording *available at* http://www.fcc.gov/events/open-internet-roundtable-law).

[107] Gigi B. Sohn, Special Counsel for External Affairs, Office of the Chairman, Official FCC Blog, *FCC Releases Open Internet Reply Comments to the Public* (Oct. 22, 2014, updated Dec. 23, 2014), http://www.fcc.gov/blog/fcc-releases-open-internet-reply-comments-public. In order to accommodate this unprecedented level of public involvement, both the comment and reply comment periods were extended via public notice. *See Wireline Competition Bureau Will Treat as Timely Filed Any Comments Filed in Response to the Open Internet Notice of Proposed Rulemaking and the Framework for Broadband Internet Access Service Refreshing the Record Public Notice if Filed by July 18, 2014*, GN Docket Nos. 10-127, 14-28, Public Notice, 29 FCC Rcd 8335 (Wireline Comp. Bur. 2014); *Wireline Competition Bureau Extends Deadline for Filing Reply Comments in the Open Internet and Framework for Broadband Internet Service Proceedings*, GN Docket Nos. 14-28, 10-127, Public Notice, 29 FCC Rcd 9714 (Wireline Comp. Bur. 2014).

[108] Knight Foundation, Decoding the Net Neutrality Debate at 14 (2014), http://www.knightfoundation.org/features/netneutrality/ (Knight Foundation, Decoding the Net Neutrality Debate); *see also* Bob Lannon & Andrew Pendleton, *What Can We Learn From 800,000 Public Comments on the FCC's Net Neutrality Plan?* (Sept. 2, 2014), http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/.

majority of comments support Commission action to protect the open Internet.[109] Comments regarding the continuing need for open Internet rules, their legal basis, and their substance formed the core of the overall body of comments. In particular, support for the reclassification of broadband Internet access under Title II, opposition to fast lanes and paid prioritization, and unease regarding the market power of broadband Internet access service providers were themes frequently addressed by commenters.[110] In offering this summary, we do not mean to overlook the diversity of views reflected in the impressively large record in this proceeding. Most of all, we are grateful to the public for using the power of the open Internet to guide us in determining how best to protect it.

B. The Continuing Need for Open Internet Protections

75. In its remand of the Commission's *Open Internet Order*, the D.C. Circuit affirmed the underlying basis for the Commission's open Internet rules, holding that "the Commission [had] more than adequately supported and explained its conclusion that edge provider innovation leads to the expansion and improvement of broadband infrastructure."[111] The court also found "reasonable and grounded in substantial evidence" the Commission's finding that Internet openness fosters the edge provider innovation that drives the virtuous cycle.[112] The record on remand continues to convince us that broadband providers—including mobile broadband providers—have the incentives and ability to engage in practices that pose a threat to Internet openness, and as such, rules to protect the open nature of the Internet remain necessary. Today we take steps to ensure that the substantial benefits of Internet openness continue to be realized.

1. An Open Internet Promotes Innovation, Competition, Free Expression, and Infrastructure Deployment

76. In the *2014 Open Internet NPRM*, we sought comment on and expressed our continued commitment to an important principle underlying the Commission's prior policies—that the Internet's openness promotes innovation, investment, competition, free expression, and other national broadband goals.[113] The record before us convinces us that these findings, made by the Commission in 2010 and upheld by the D.C. Circuit, remain valid. If anything, the remarkable increases in investment and innovation seen in recent years—while the rules were in place—bear out the Commission's view.[114] For

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[109] An initial analysis of 800,000 comments performed by the Sunlight Foundation estimated that "less than 1 percent of comments were clearly opposed to net neutrality." Bob Lannon & Andrew Pendleton, *What Can We Learn From 800,000 Public Comments on the FCC's Net Neutrality Plan?* (Sept. 2, 2014), http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/. A subsequent study of reply comments found that "[n]on-form-letter submissions had a similar sentiment distribution as comments in the first round, at less than 1% opposed to net neutrality." Andrew Pendleton & Bob Lannon, *One Group Dominates the Second Round of Net Neutrality Comments* (Dec. 16, 2014), http://sunlightfoundation.com/blog/2014/12/16/one-group-dominates-the-second-round-of-net-neutrality-comments/.

[110] Knight Foundation, Decoding the Net Neutrality Debate at 15.

[111] *Verizon*, 740 F.3d at 644.

[112] *Id.*

[113] *2014 Open Internet NPRM*, 29 FCC Rcd at 5570, para. 25.

[114] *See, e.g.*, AARP Comments at 9 (explaining that pro-innovation and pro-competition regulatory certainty is needed to protect the exponential economic growth and economic benefits enabled by the Internet); Bright House Networks (Bright House) Comments at 1-2 (discussing the positive trend in investment and enhancement of Internet access services and competitive choices that took place under the prior open Internet rules); Communications Workers of America & National Association for the Advancement of Colored People (CWA & NAACP) Comments at 4 ("The 'virtuous circle'. . . has led to nearly $230 billion in capital expenditures by the leading network and edge providers over the three-year period since the *Open Internet Order* took effect (2011 to 2013). Network providers were responsible for a full 84 percent of these capital expenditures, or $193 billion."); Internet Innovation Alliance

(continued….)

example, in addition to broadband infrastructure investment,[115] there has been substantial growth in the digital app economy, video over broadband, and VoIP, as well as a rise in mobile e-commerce.[116] Overall Internet adoption has also increased since 2010.[117] Both within the network and at its edges, investment and innovation have flourished while the open Internet rules were in force.

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Reply at 7 (explaining that private capital investment in broadband networks has also grown under the open Internet rules); Online Publishers Association Comments at 3-4 ("For content innovation to continue flourishing online . . . the Commission should, consistent with the *2010 Open Internet Order*, adopt open Internet principles that continue to encourage investment and innovation in content creation. . . .").

[115] In the *2015 Broadband Progress Report*, the Commission explained that "[b]roadband networks continue to grow due to significant investments by private industry. Some reports indicate that broadband providers invest tens of billions of dollars each year to further extend the reach of their networks, with providers spending a total $1.3 trillion since 1996 and $75 billion in 2013 alone." *2015 Broadband Progress Report* at para. 139. Additionally, the Commission noted that "[f]rom December 2011 to December 2013, Americans without access to a fixed 25 Mbps/3 Mbps broadband service or higher declined approximately 11 percentage points for the United States as a whole, declined 12 percentage points in rural areas, and declined 11 percentage points in urban areas." *Id.* at para. 84. *See also, e.g.*, AT&T Comments at 9 ("U.S. investment in broadband networks shows no signs of slowing: USTelecom reports that broadband capital expenditures rose from $64 billion in 2009 to $68 billion in 2012. AT&T has [devoted] more than $20 billion annually to capital investment."); CenturyLink Comments at 4-5 (stating that "AT&T, Verizon, and CenturyLink, alone, report annual capital investment (of which the vast majority is for broadband network build-out) over the last three years in the approximate average amounts of $20 billion, $16 billion, and $3 billion, respectively. On the cable side, Comcast, Time Warner and Charter report annual broadband network investment of approximate average amounts of $5 billion, $3 billion, and $2 billion, respectively, over this same time period . . . . Moreover, a University of Pennsylvania report shows that per capita network investment in the United States is more than twice that of Europe."); NCTA Comments at 7-8 ("Broadband providers in the U.S. have invested an astounding $1.2 trillion in private capital since 1996 to develop and deploy advanced broadband networks. Over the past two decades, the broadband industry has invested an average of $70 billion a year in our nation's wired and wireless broadband networks. And this investment is only accelerating; in fact, since 2012, broadband providers in the United States have laid more high-speed fiber cables than in any similar period since 2000."); Public Knowledge Comments at 25 ("[I]n June 2013, the number of [wireless] connections with downstream speeds of at least 10 Mbps increased by 118% over June 2012, to 103 million connections, including 45 million mobile connections. The most recent FCC data on Internet access service shows that the number of mobile Internet subscription connections with speeds over 200 kbps in at least one direction increased by 18% year over year to 181 million.").

[116] *See, e.g.*, Internet Innovation Alliance Reply at 7; Iridescent Networks Comments at 5 (explaining that "[t]he spread of mobile broadband and the extensive usage on the mobile networks is increasing at incredibly accelerating rates"); Massachusetts Department of Telecommunications and Cable (MDTC) Comments at 2 (noting that according to the Census Bureau of the U.S. Department of Commerce, "there was an estimated $71.2 billion dollars in retail e-commerce sales in the first quarter of 2014"); Roku Comments at iv, 3 & n.3 (stating that "Internet video traffic [was] estimated at 66 percent of all traffic in 2013 and expected to rise to nearly 79 percent in just four years" and that "the number of Americans that most often stream shows is up three percent since 2012, and that nearly a quarter of Americans say that they watch more streaming television than they did a year ago"); Telecommunications Industry Association (TIA) Comments at 8 (Regarding VoIP, "the number of residential VoIP subscribers through cable [rose] 10.1 percent in 2013 to 25 million. The non-cable VoIP market more than doubled between 2009 and 2012. The overall residential VoIP market will increase from 35.9 million subscribers in 2013 to 46.8 million in 2017."); Writers Guild of America, West (WGAW) Comments at 6 ("The number of online videos viewed each month by Americans has increased from 7.2 billion in January of 2007 to 52.4 billion in December of 2013. Meanwhile, the segment of Americans who watch or download videos has grown from 69% of adult internet users in 2009 to 78% in 2013.").

[117] *See, e.g.*, Internet Innovation Alliance Reply at 7 ("In January, the well-respected Pew Center noted that 87 percent of Americans now use the Internet, up 8 percent from 2010, marking another 'explosive adoption' of Internet usage.") (citing Susannah Fox and Lee Rainie, *The Web at 25 in the U.S.* 4, Pew Research Internet Project (2014)); *see also 2015 Broadband Progress Report* at para. 92 (explaining that from December 31, 2011 to December 31, 2013 "[a]doption grew 23 percentage points for fixed 25 Mbps/3 Mbps broadband service or higher
(continued….)

77. The record before us also overwhelmingly supports the proposition that the Internet's openness is critical to its ability to serve as a platform for speech and civic engagement,[118] and that it can help close the digital divide by facilitating the development of diverse content, applications, and services.[119] The record also supports the proposition that the Internet's openness continues to enable a "virtuous [cycle] of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses."[120] End users experienced the benefits of Internet openness that stemmed from the Commission's 2010 open Internet rules—increased consumer choice, freedom of expression, and innovation.[121]

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(7 percent to 30 percent), 20 percentage points for fixed 3 Mbps/768 kbps service or higher (45 percent to 65 percent) and 6 percentage points for fixed 768 kbps/200 kbps service or higher (68 percent to 74 percent)").

[118] *See, e.g.*, Asian Americans Advancing Justice (AAJC) Comments at 1-2 (explaining that a free and open Internet is critical for a variety of reasons including: "level[ing] the playing field for free speech, including for small and marginalized communities [and] empower[ing] our community to organize politically and promote civic engagement"); American Civil Liberties Union (ACLU) Comments at 2 (arguing that "[t]he equitable provision of high quality access to a free and open Internet, and especially the closing of the digital divide, represents one of the most important free speech challenges of the information age. As information technology advances apace, the meaningful exercise of our constitutional rights – including the freedoms of speech, assembly, press and the right to petition government – has become literally dependent on broadband internet access"); Open Media and Information Companies Initiative (Open MIC) Comments at 3 (noting that "Open Internet principles also promote free speech, civic participation, democratic engagement and marketplace competition, as well as robust broadband adoption and participation in the Internet community by minorities and other socially and economically disadvantaged groups").

[119] *See, e.g.*, AOL Comments at 2 (explaining that "[t]he Internet's openness has fostered innovation and investment—both in advancements in network deployment and the services that ride upon them—creating . . . a virtuous circle, where richer and more diverse content on the 'edge' jump-starts demand, which brings about infrastructure investment, which brings about even richer and more diverse content"); CWA and NAACP Comments at 1 ("Preserving an open and free Internet consistent with the need to promote job-creating investment and closing the digital divide in our nation's high speed networks is critical to safeguard our nation's economic, social, and democratic fabric and future."); European Digital Rights Comments at 2 (warning that "[a]n end to net neutrality in the USA will come at severe costs to innovation and competition, privacy and freedom of communication"); Online Publishers Association Comments at 3-4 ("For content innovation to continue flourishing online . . . and for broadband to serve more social objective[s], the Commission should adopt open Internet principles that continue to encourage investment and innovation in content creation, and ensure that the Internet is an open platform that supports consumer choice and the open exchange of ideas and information.").

[120] *See 2010 Open Internet Order*, 25 FCC Rcd at 17910-11, para. 14. *See also, e.g.*, Common Cause Comments at 2 (noting that "[i]ncreased broadband adoption and new service offerings demonstrate that Open Internet protections foster the 'virtuous circle' of innovation, generating both consumption and new discourse, driving additional investment and yet more creative applications"); Comcast Comments at 2 (explaining that substantial benefits such as economic growth, innovation, competition, free expression, and broadband investment and deployment are "closely tied to the Internet's openness, which enables a 'virtuous circle' of innovation"); Higher Education and Libraries Comments at 5 (explaining that Internet openness is an essential driver of the "virtuous circle," and "[t]he unimpeded flow of knowledge, information, and interaction across the Internet enables the circle of innovation, user demand, and subsequent broadband expansion that have generated the dramatic social, cultural, and economic benefits acknowledged by the Commission, the courts, and the nation as a whole"); Online Publishers Association Comments at 1 ("An open Internet enables innovators to create and offer new content, applications and services, and it allows development and distribution of new technologies by a broad range of sources, including broadband providers that operate the network."); WTA – Advocates for Rural Broadband (WTA) Comments at 1 (arguing that "Internet openness will be promoted and enhanced as service providers are encouraged and enabled to invest in the deployment of higher and higher broadband capacities that enable their customers to obtain faster and more affordable access to new content, applications and services").

[121] *2014 Open Internet NPRM*, 29 FCC Rcd at 5570, para. 25; *see also, e.g.*, ACLU Comments at 2 ("The equitable provision of high quality access to a free and open internet, and especially the closing of the digital divide,

(continued….)

2. Broadband Providers Have the Incentive and Ability to Limit Openness

78. Broadband providers function as gatekeepers for both their end user customers who access the Internet, and for various transit providers, CDNs, and edge providers attempting to reach the broadband provider's end-user subscribers.[122] As discussed in more detail below, broadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users.

a. Economic Incentives and Ability

79. In the *2014 Open Internet NPRM*, we sought to update the record with information about new and continuing incentives for broadband providers to limit Internet openness. As explained in detail in the *Open Internet Order*, broadband providers not only have the incentive and ability to limit openness, but they had done so in the past.[123] The D.C. Circuit found that the Commission "adequately supported and explained" that, absent open Internet rules, "broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[124] The record generated in this proceeding convinces us that the Commission's conclusion in the *Open Internet Order*—that providers of broadband have a variety of strong incentives to limit Internet openness—remains valid today.

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represents one of the most important free speech challenges of the information age. As information technology advances apace, the meaningful exercise of our constitutional rights- including the freedoms of speech, assembly, press and the right to petition government – has become literally dependent on broadband internet access."); Al Franken, Edward J. Markey, Bernie Sanders, Ben Cardin, Sheldon Whitehouse, Cory Booker, Kirsten Gillibrand, Charles E. Schumer, Richard Blumenthal, Elizabeth Warren, and Ron Wyden (US Senators) Comments at 1 ("An open Internet has become the world's most successful platform for innovation, job-creation and entrepreneurialism. An open Internet enables freedom of expression and the sharing of ideas around the world. An open Internet is driving economic growth throughout the United States."); Comcast Comments at 2 (explaining that substantial benefits such as economic growth, innovation, competition, free expression, and broadband investment and deployment are "closely tied to the Internet's openness, which enables a 'virtuous circle' of innovation"); Electronic Frontier Foundation (EFF) Comments at 1 ("An open, neutral, and fast Internet has helped spark an explosion of free expression, innovation, and political change.").

[122] *See*, *e.g.*, COMPTEL Comments at 2-3 (explaining that broadband providers serve as gatekeepers to transit providers and CDNs that deliver content to the broadband providers' end users); Open Technology Institute at the New America Foundation and Benton Foundation (OTI) Comments at 11 ("[V]ertical integration, which provides greater incentive to block competitors, and . . . increasing horizontal consolidation, . . . increases the power of large ISPs and their resulting leverage as gatekeepers."); Smithwick & Belendiuk Comments at 2 ("A handful of gatekeepers, the Internet Service Providers ('ISPs'), control access to broadband customers."); Vonage Comments at 16 (stating that "concentration in the broadband market exacerbates broadband providers' ability to act as gatekeepers and their natural incentive to favor their own services over competitive edge services").

[123] *See 2010 Open Internet Order*, 25 FCC Rcd at 17915-26, paras. 20-37. As the Commission explained in the *Open Internet Order*, examples such as the Madison River case, the Comcast-Bit Torrent case, and various mobile wireless Internet providers restricting customers' use of competitive payment applications, competitive voice applications, and remote video applications, indicate that broadband providers have the technical ability to act on incentives to harm the open Internet. *Id.* at 17925, para. 35 & n.107. The D.C. Circuit also found that these examples buttressed the Commission's conclusion that broadband providers' incentives and ability to restrict Internet traffic could interfere with the Internet's openness. *Verizon*, 740 F.3d at 648-49. *See also, e.g.*, EFF Comments at 23 (noting that AT&T blocked Apple's FaceTime iPhone and iPad applications over AT&T's mobile data network in 2012); WGAW Comments at 14 (describing the situation where Comcast exempted its own online video service from data caps when streamed to an Xbox). It is not surprising that, during a decade in which the Commission vowed to keep the Internet open, that Commission policy served as a deterrent to additional bad acts.

[124] *Verizon*, 740 F.3d at 645.

80. Broadband providers' networks serve as platforms for Internet ecosystem participants to communicate, enabling broadband providers to impose barriers to end-user access to the Internet on one hand, and to edge provider access to broadband subscribers on the other. This applies to both fixed and mobile broadband providers. Although there is some disagreement among commenters, the record provides substantial evidence that broadband providers have significant bargaining power in negotiations with edge providers and intermediaries that depend on access to their networks because of their ability to control the flow of traffic into and on their networks.[125] Another way to describe this significant bargaining power is in terms of a broadband provider's position as gatekeeper—that is, regardless of the competition in the local market for broadband Internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber.[126] Many parties demonstrated that both mobile and fixed broadband providers are in a position to function as a gatekeeper with respect to edge providers.[127] Once the broadband provider is the sole provider of access to an end user, this can influence that network's interactions with edge providers, end users, and others. As the Commission and the court have recognized, broadband providers are in a position to act as a "gatekeeper" between end users' access to edge providers' applications, services, and devices and reciprocally for edge providers' access to end users. Broadband providers can exploit this role by acting in ways that may harm the open Internet, such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users.[128] Without multiple, substitutable paths to the consumer,

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[125] *See, e.g.*, Internet Association Comments at 13 ("Broadband Internet access providers have long had the ability to engineer choke points into their networks in order to slow traffic from certain sources. Advances in network technologies, however, have provided them with an unprecedented ability to discriminate among sources and types of Internet traffic in real time and with little cost."); Roku Comments at 14 (explaining that market power of broadband providers allows them to favor certain content with faster delivery or higher performance); AARP Comments at 47 ("The market power possessed by broadband providers in retail markets for broadband Internet access also translates into market power with regard to edge providers who need to reach their subscribers/users."); Consumer Federation of America (CFA) Comments at 3 ("Competition is much weaker in the network segment of the digital platform than in the edge segments, which means network owners face less pressure to innovate; have the ability to influence industrial structure to favor their interests at the expense of the public interest; can use vertical leverage (where they are integrated) to gain competitive advantage over independent edge entrepreneurs; and have the ability to extract rents, where they possess market power or where switching costs are high."). We are not persuaded by arguments to the contrary, as explained *infra*. *But see* AT&T Comments at 18 ("[T]he Commission appears to misunderstand the technical capabilities of broadband Internet access providers. In particular, the Commission's assumption that providers have the ability to engage in end-to-end prioritization of Internet traffic is incorrect in the vast majority of cases."); CenturyLink Comments at 11 ("[B]roadband providers are not able to sustain broadband price increases above competitive levels. If they did so, customers would simply choose another option.").

[126] *See, e.g.*, *2014 Open Internet NPRM*, 29 FCC Rcd at 5576, para. 42 (citing the *2010 Open Internet Order*, 25 FCC Rcd at 17924-25, para. 34); Ad Hoc Telecommunications Users Committee (Ad Hoc) Comments at 7; Public Knowledge Comments at 18-19 (arguing that mobile broadband is not a substitute for fixed broadband services, so its increased adoption does not "change the essential points" about broadband providers' position as gatekeepers).

[127] *See, e.g.*, Mozilla Comments at 25; COMPTEL Comments at 23; Free Press Comments at 44. *But see* Letter from Kathleen Grillo, Senior Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. at 18-23 (filed Jan. 15, 2015) (Verizon Jan.15, 2015 *Ex Parte* Letter) (arguing that the [gatekeeper] theory does not apply to mobile broadband); Letter from Jonathan Banks, Senior Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2-3 (filed Feb. 18, 2015) (USTelecom Feb. 18, 2015 *Ex Parte* Letter) (arguing that the gatekeeper theory is inapplicable to broadband in general because the Commission made its original arguments on this theory in the context of voice services subject to a calling party network pays regime, and reliance on switching costs as a justification was irrelevant to those original findings).

[128] *See, e.g.*, Ad Hoc Comments at 8-9 (discussing the incentive of broadband providers to demand paid prioritization fees); Bauer, Clark & Claffy Reply at 4 ("Access ISPs presumptively have market power as a [gatekeeper], and can impose both technical and economic harms as part of a business negotiation, or favor their own higher-level services."); Microsoft Comments at 10 (explaining that broadband providers can use their power as

(continued….)

and the ability to select the most cost-effective route, edge providers will be subject to the broadband provider's gatekeeper position.[129] The D.C. Circuit noted that the Commission "convincingly detailed" broadband providers' market position, which gives them "the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers," and further stated that the Commission reasonably explained that "this ability to act as a 'gatekeeper' distinguishes broadband providers from other participants in the Internet marketplace who have no similar 'control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers.'"[130] The ability of broadband providers to exploit this gatekeeper role could be mitigated if consumers multi-homed (i.e., bought broadband service from multiple networks). However, multi-homing is not widely practiced and imposes significant additional costs on consumers.[131] The gatekeeper role could also be mitigated if a consumer

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gatekeepers "to pressure edge providers into entering such arrangements and demand increasingly higher rates and greater concessions from edge providers over time"); Netflix Comments at 12 (stating that its dispute with Comcast shows how a broadband provider can use its position as gatekeeper "to harm edge providers, its own customers, and the virtuous circle by discriminating at interconnection and peering points"); Roku Comments at 8 (noting that preferences for affiliated content pose imminent threats to consumer choice and competition); *see also infra* Section III.C.1.c; para. 81 (discussing the relationship between switching costs and broadband providers' gatekeeper position).

[129] *See, e.g.*, Ad Hoc Comments at 13; Bauer, Clark & Claffy Comments at 4 (arguing that one way to limit broadband providers' gatekeeper power is "to require ISPs to provide adequate means for edge providers and off-net users to reach their customers over interconnection and transit links").

[130] *See Verizon*,740 F.3d at 646 (quoting *2010 Open Internet Order*, 25 FCC Rcd at 17919, 17935, paras. 24, 50). We find, for example, that even though edge providers may possess bargaining power, they do not have the same ability as broadband providers to control the flow of traffic or block access to the Internet. *See, e.g.*, *2010 Open Internet Order*, 25 FCC Rcd at 17918, para. 24 & n.66 (explaining that a broadband provider can act as a gatekeeper even if some edge providers would have bargaining power in negotiations with broadband providers over access or prioritization fees). *See also infra* Section III.F.1-2. We note that Judge Silberman expressed concern over relying on the terminating monopoly and gatekeeper concepts because terminating monopolies are not largely discussed outside of Commission jurisprudence, and "[t]he gatekeeper effect is a tool that facilitates the exercise of market power over sellers; it is not market power itself." *Verizon*, 740 F.3d at 663 & n.7 (Silberman, J., concurring in part and dissenting in part). However, our reliance on these terms for our determinations today focuses on how this unique "gatekeeper" position of broadband providers in combination with other realities about broadband availability and access affects broadband providers' incentives and abilities to harm the open nature of the Internet. As explained further below, the Commission's discussion of these terms is especially important in combination with switching costs and limited retail broadband competition for fixed broadband. With respect to mobile, the presence of some additional retail competition is not enough to alter our conclusion here. *See infra* Section III.B.3.

[131] *See, e.g.*, Ad Hoc Comments at 12 (noting that "[a]t this point in time, there is no evidence to suggest that a sizable number of consumers actually procure Internet access service from multiple ISPs simultaneously or that they would be able to switch seamlessly from one ISP to another in order to receive content from a provider imposing restrictions or burdensome charges on edge providers"); Level 3 Comments at 3 ("[T]he largest mass-market retail ISPs stand in a uniquely favorable place in the Internet ecosystem: they control access to several million users who cannot be reached through alternate routing. In Internet terms, these mass-market customers are 'single-homed,' meaning they draw service from a single ISP. This contrasts with enterprise users, who are frequently 'multi-homed,' meaning that they can access the Internet through more than one ISP."). *But see* Layton Reply at 20-21 (arguing that pre-paid mobile services may be purchased in exchange for, or in supplement to, a family broadband plan, which is a form of multi-homing); Verizon Jan. 15, 2015 *Ex Parte* Letter Attach. at 29 (arguing that customers multi-home when purchasing both mobile wireless and fixed service, allowing consumers to "substitute across those providers"). However, many customers view fixed and mobile broadband services as distinct product offerings. *See supra* para. 9; *2015 Broadband Progress Report* at para. 120 ("We recognize that many households subscribe to both fixed and mobile services because they use fixed and mobile services in fundamentally different ways and, as such, view fixed and mobile services as distinct product offerings.") *and* Public Knowledge Comments at 18-19 (arguing that mobile broadband is not a substitute for fixed broadband services, so its increased adoption does not "change the essential points" about broadband providers' position as gatekeepers).

could easily switch broadband providers. But, as discussed further below, the evidence suggests otherwise.

81. The broadband provider's position as gatekeeper is strengthened by the high switching costs consumers face when seeking a new service. Among the costs that consumers may experience are: high upfront device installation fees; long-term contracts and early termination fees; the activation fee when changing service providers; and compatibility costs of owned equipment not working with the new service.[132] Bundled pricing can also play a role, as "single-product subscribers are four times more likely to churn than triple-play subscribers."[133] These costs may limit consumers' willingness and ability to switch carriers, if such a choice is indeed available.[134] Commenters also point to an information problem, whereby consumers are unsure about the causes of problems or limitations with their services—for example, whether a slow speed on an application is caused by the broadband provider or the edge provider—and as such consumers may not feel that switching providers will resolve their Internet access issues.[135] Additionally, consumers on unlimited data plans may be confused by slowed data speeds because broadband providers have not adequately communicated contractually-imposed data management practices and usage thresholds.[136] Switching costs are also a critical factor that negatively impacts mobile broadband consumers, in particular due to the informational uncertainties mentioned below, among other reasons.[137] Ultimately, when consumers face this kind of friction in switching to meaningful competitive

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[132] *See, e.g.*, Access Comments at 15; Consumers Union Comments at 14; People of the State of Illinois and People of the State of New York (Illinois and New York) Comments at 11; Public Knowledge Comments at 17.

[133] *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Katz Decl. at 28, n.57 (filed June 11, 2014) (quoting AT&T internal report).

[134] *See, e.g.*, Consumers Union Comments at 14 (referring to a January 2014 Consumer Reports article that reported that "high switching costs continue to serve as barriers to customers freely changing carriers"); *see also, e.g.*, ACLU Comments at 4 (explaining that although they present problems in both the mobile and fixed contexts, "concentration and consumer lock-in are particularly acute in the fixed broadband market"); EFF Comments at 1 (warning that "switching costs and consumer lock-in further undermine the ability of marketplace forces to prevent non-neutral practices"). In the *2015 Broadband Progress Report*, the Commission noted that approximately 55 million Americans live in areas unserved by terrestrial-fixed broadband meeting the 25 Mbps/3 Mbps benchmark. In addition, people living in rural and on Tribal lands are disproportionately lacking access to broadband at this increased benchmark speed. Data show that 25 Mbps/3 Mbps is available to 92 percent of Americans living in urban areas, 47 percent of Americans in rural areas, and 37 percent of Americans on Tribal lands. *2015 Broadband Progress Report* at 79. This data suggests that meaningful alternative broadband options may be largely unavailable to many Americans, further limiting the ability to switch providers. Based on the submissions from various commenters, it appears that between 65% and 70% of households have at most two options for high speed Internet access. *See, e.g.*, Common Cause Comments at 2; Access Comments at 14. When we look to the new standard articulated in the *2015 Broadband Progress Report*, the data suggest that only 12 percent of households have 3 or more options for 25 Mbps/3 Mbps broadband service; 27 percent of households have two provider options for this service; and 45 percent of households have only single provider option for these services. Approximately 16 percent of households reside in areas without a single provider of fixed broadband services. *See 2015 Broadband Progress Report* at 83.

[135] *See, e.g.*, Cogent Reply at 24-26 (advocating for enhanced disclosure requirements that would provide customers with information such as performance data for speeds of popular edge-provider content); Utilities Telecom Council Reply at 13 (explaining that "the unstructured and open nature of the Internet provides tremendous opportunities for innovation and growth, yet it also prevents end users from fully understanding the current or potential limitations of any particular service offering").

[136] *See, e.g.*, COMPTEL Comments at 18 (explaining that some carriers offering unlimited data plans may need to limit speeds of customers using more than 5GB of data per month); iClick2Media Comments at 2 (describing a concern that an end user may pay "for one thing and is given something else that is suppose[d] to be comparable but is not i.e. paying for an unlimited plan but throttling the End user['s] speed down if they reach a certain point").

[137] *See infra* paras. 97-99.

alternatives, it decreases broadband provider' responsiveness to consumer demands and limits the provider's incentives to improve their networks.[138] Additionally, 45 percent of households have only a single provider option for 25 Mbps/3 Mbps broadband service, indicating that 45 percent of households do not have any choices to switch to at this critical level of service.[139]

82. Broadband providers may seek to gain economic advantages by favoring their own or affiliated content over other third-party sources.[140] Technological advances have given broadband providers the ability to block content in real time, which allows them to act on their financial incentives to do so in order to cut costs or prefer certain types of content.[141] Data caps or allowances, which limit the amount and type of content users access online, can have a role in providing consumers options and differentiating services in the marketplace, but they also can negatively influence customer behavior and the development of new applications.[142] Similarly, broadband providers have incentives to charge for prioritized access to end users or degrade the level of service provided to non-prioritized content. When bandwidth is limited during peak hours, its scarcity can cause reliability and quality concerns, which increases broadband providers' ability to charge for prioritization.[143] Such practices could result in so-called "tolls" for edge providers seeking to reach a broadband provider's subscribers, leading to reduced innovation at the edge, as well as increased rates for end users, reducing consumer demand, and further disrupting the virtuous cycle.[144] Commenters expressed considerable concern regarding the harmful

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[138] *See, e.g.*, Consumers Union Comments at 13; *see also, e.g.*, ACLU Comments at 5 (arguing that the "logical corollary to this incentive and ability is the potential for broadband providers' to engage in content-based regulation of edge providers' applications, services, devices or programming").

[139] *2015 Broadband Progress Report* at para. 83.

[140] *See, e.g.*, Internet Association Comments at 15; Consumers Union Comments at 3 (agreeing that "vertically integrated providers can restrict access to affiliated content or block, degrade, or otherwise act contrary to open Internet principles with respect to delivery of unaffiliated online video to their broadband subscribers"); Roku Comments at 8 (noting that such preference for affiliated content poses imminent threats to consumer choice and competition); Vermont Public Service Board and Vermont Public Service Department (Vermont) Reply at 5 (warning that paid prioritization arrangements, for example, can allow broadband providers to "to skew the playing field in favor of their own preferred services, products, information, and partners"); OTI Comments at 28-29 (explaining that mobile carriers have demonstrated that they have the incentives and inclination to block or throttle to favor their own services).

[141] *See, e.g.*, Internet Association Comments at 3.

[142] *See* Public Knowledge Comments at 48; *see also* Consumers Union Reply at 2 (explaining that "even if providers do not block content outright, providers can still utilize their market power to harm consumers in more subtle ways, such as by lowering data caps or exempting their own services from such caps"); Roku Comments at 1-2 ("[T]hrottling is only the most transparent of a long list of discriminatory actions that an ISP with market power can undertake. To promote and protect an open Internet, the FCC's rules and policies must guard against a broader list of discriminatory conduct that has the effect of restricting, degrading, or otherwise interfering with consumer access to lawfully available content or services."). For a more comprehensive discussion, *see infra* Section III.C.2.

[143] *See* Fiber to the Home Council Americas (FTTH) Comments at 4.

[144] *See, e.g.*, Microsoft Comments at 10 ("Preferential transmission arrangements are particularly concerning because broadband access providers can use their [gatekeeper position] to pressure edge providers into entering such arrangements and demand increasingly higher rates and greater concessions from edge providers over time."); Access Comments at 8 (commenting that with regard to prioritization, broadband providers have incentives that could lead to "invest[ing] in infrastructure to disproportionately improve the priority option, cease investment in infrastructure that helps the network as a whole, create artificial scarcity, or even degrade the quality of the current non-priority infrastructure to make prioritized options seem more attractive."); EFF Comments at 1 (noting that broadband providers "have economic incentives to leverage their ownership of the transmission infrastructure at the expense of the open and neutral Internet"); Media Alliance Comments at 2 (agreeing that there are "short-term incentives for network providers to block or disadvantage particular providers or classes of providers, charge for prioritized access to end users, or degrade or decline the level of service provided to non-prioritized content").

effects of paid prioritization on Internet openness.[145] Further, as discussed above, a broadband provider's incentive to favor affiliated content or the content of unaffiliated firms that pay for it to do so, to block or degrade traffic, to charge edge providers for access to end users, and to disadvantage non-prioritized transmission all increase when end users are less able to respond by switching to rival broadband providers.

83. In addition to the harms outlined above, broadband providers' behavior has the potential to cause a variety of other negative externalities that hurt the open nature of the Internet. Broadband providers have incentives to engage in practices that will provide them short term gains but will not adequately take into account the effects on the virtuous cycle. In the *Open Internet Order*, the Commission found that the unaccounted-for harms to innovation are negative externalities, and are likely to be particularly large because of the rapid pace of Internet innovation, and wide-ranging because of the role of the Internet as a general purpose technology.[146] Further, the Commission noted that a broadband provider may hesitate to impose costs on its own subscribers, but it will typically not take into account the effect that reduced edge provider investment and innovation has on the attractiveness of the Internet to end users that rely on other broadband providers—and will therefore ignore a significant fraction of the cost of forgone innovation.[147] The record supports our view that these negative externality problems have not disappeared, and in some cases, may be more prevalent.[148] In order to mitigate these negative results, the Commission needs to act to promote Internet openness.

84. A final point on this question of economic incentives and ability is worth noting. Broadband providers have the ability to act as gatekeepers even in the absence of "the sort of market concentration that would enable them to impose substantial price increases on end users."[149] We therefore need not consider whether market concentration gives broadband providers the ability to raise prices. The Commission came to this conclusion in the *Open Internet Order*, and we conclude the same here.[150] As the Commission noted in the *Open Internet Order*, threats to Internet-enabled innovation, growth, and competition do not depend on broadband providers having market power with respect to their end users. In *Verizon,* the court agreed, explaining that "broadband providers' ability to impose restrictions on edge providers simply depends on end users not being fully responsive to the imposition of such restrictions."[151] As we have concluded in this section, this remains true today.[152]

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[145] *See infra* Section III.C.1.c.

[146] *2010 Open Internet Order* 25 FCC Rcd at 17919-20, para. 25.

[147] *Id.* at 17920, para. 25, n.68.

[148] *See, e.g.*, Senator Ron Wyden Comments at 6 ("The risks identified by the Commission in 2010 have not gone away; if anything, the Internet is even more important to social and economic interactions and the market conditions are even more threatening."); *see also* ACLU Comments at 7 (discussing the Commission's explanation of negative externalities in the *Open Internet Order*, and explaining that "[i]deally, competitive pressures would encourage demand growth at all points in the broadband market. Unfortunately, given the oligopolistic nature of the local broadband market, many providers can collect the overcharge represented by a paid prioritization or similar agreement while not taking the hit from lowered demand flowing from poorer or more expensive internet service."); Mozilla Comments at 21 (arguing that "[p]aid prioritization has a distinct degrading effect on other access service traffic, an effect that creates complex incentives for network operators. It also represents a visceral deviation from the end-to-end, best efforts history of the Internet, meaning that as a practical matter, it's impossible to understand ex ante the full effects and potential negative externalities that could arise.").

[149] *See Verizon*, 740 F.3d at 648 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17923, para. 32).

[150] *See 2010 Open Internet Order*, 25 FCC Rcd at 17923, para. 32, n.87.

[151] *Verizon*, 740 F.3d at 648. We note further that, of course, our reclassification of broadband Internet access service as a "telecommunications service" subject to Title II below likewise does not rely on such a test or any measure of market power. Indeed, our reclassification decision is based on whether BIAS meets the statutory definition of a "telecommunications service," and not any additional economic circumstances.

b. Technical Ability

85. As the Commission explained in the *Open Internet Order*, past instances of abuse indicate that broadband providers have the technical ability to act on incentives to harm the open Internet.[153] Broadband providers have a variety of tools at their disposal that can be used to monitor and regulate the flow of traffic over their networks—giving them the ability to discriminate should they choose to do so. Techniques used by broadband providers to identify and select traffic may include approaches based on packet payloads (using deep packet inspection), network or transport layer headers (e.g., port numbers or priority markings), or heuristics (e.g., the size, sequencing, and/or timing of packets).[154] Using these techniques, broadband providers may apply network practices to traffic that has a particular source or destination, that is generated by a particular application or by an application that belongs to a particular class of applications, that uses a particular application- or transport-layer protocol, or that is classified for special treatment by the user, application, or application provider.[155] Application-specific network practices depend on the broadband provider's ability to identify the traffic associated with particular uses of the network. Some of these application-specific practices may be reasonable network management, e.g., tailored network security practices. However, some of these techniques may also be abused.[156] Deep packet inspection, for example, may be used in a manner that may harm the open Internet, e.g., to limit access to certain Internet applications, to engage in paid prioritization, and even to block certain content.[157] Similarly, traffic control algorithms can be abused, e.g., to give certain packets favorable placement in queues or to send packets along less congested routes in a manner contrary to end user preferences.[158] Use of these techniques may ultimately affect the quality of service that users receive, which could effectively force edge providers to enter into paid prioritization agreements to prevent poor quality of content to end users.

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[152] We note, however, that in areas where there are limited competitive alternatives, this may exacerbate other problems such as the ability to switch from one provider to another. *See 2015 Broadband Progress Report* at para. 83 (indicating that data show that only 12 percent of households have 3 or more options for 25 Mbps/3 Mbps broadband service; 27 percent of households have two provider options for this service; and 45 percent of households have only a single provider option for these services).

[153] *See supra* Section III.B.2.a.

[154] *See* Broadband Internet Technical Advisory Group, Real-Time Network Management of Internet Congestion at 19 (2013), http://www.bitag.org/documents/BITAG_-_Congestion_Management_Report.pdf (BITAG Congestion Report) (discussing which traffic is subject to congestion management).

[155] *Id.* at 19 (discussing application-based congestion management).

[156] *See* Jon Peha Comments at 3; NetAccess Futures Comments at 13-14 (noting that these mechanisms are "indispensable for network function or reasonable network management, [but all] of these mechanisms can also be abused, to the detriment of Open Internet principles").

[157] *See* Internet Association Comments at 14; *see also* Tumblr Reply at 6-7 (warning that "[w]hether broadband providers engage in blocking, discrimination, or access fees through deep packet inspection, or engage in functionally equivalent practices through underinvestment at points of interconnection, consumers and edge providers will still be harmed, and innovation and free expression will still be stifled"). *But see* NCTA Comments at 15 (claiming that "[e]ven if broadband providers had an incentive to degrade their customers' online experience in some circumstances, they have no practical ability to act on such an incentive").

[158] *See* NetAccess Futures Comments at 16; Jon Peha Comments at 3 (filed July 15, 2014) (explaining that "[m]ethods to discriminate among traffic classes once traffic has been categorized include separation of traffic into *separate real or virtual channels*, and use of *traffic control algorithms* for functions such as packet scheduling, packet dropping, or routing that discriminate") (emphasis in original); OTI Comments at 18 (arguing that "[i]t does not matter either to consumers or to applications providers if the carriers abuse their power through interference that takes advantage of deep packet inspection in routers in their network or through interconnection abuse—the resulting harms are the same").

3. Mobile Broadband Services

86. We have discussed above the incentives and ability of broadband providers to act in ways that limit Internet openness, regardless of the specific technology platform used by the provider. A significant subject of discussion in the record, however, concerned mobile broadband providers specifically, and we therefore believe it is appropriate to address here the incentive and ability that these providers have to limit Internet openness. As the Commission noted in the *Open Internet Order*, "[c]onsumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission are as important when end users are accessing the Internet via mobile broadband as via fixed."[159] The Commission noted that "there have been instances of mobile providers blocking certain third-party applications, particularly applications that compete with the provider's own offerings . . . ."[160] However, the Commission also noted the nascency of the mobile broadband industry,[161] citing the recent development of "app" stores,[162] and what it characterized at the time as "new business models for mobile broadband providers, including usage-based pricing."[163] Furthermore, the Commission at that time found that "[m]obile broadband speeds, capacity, and penetration [were] typically much lower than for fixed broadband" and noted that carriers had only begun to offer 4G service.[164]

87. Citing these factors, as well as greater consumer choice, "meaningful recent moves toward openness in and on mobile broadband networks," and the operational constraints faced by mobile broadband providers,[165] the Commission applied its open Internet rules to mobile broadband, but distinguished between fixed and mobile broadband in some regards: while it applied the same transparency rule to both fixed and mobile network providers, it adopted a different no-blocking standard for mobile broadband Internet access service, and excluded mobile broadband from the unreasonable discrimination rule. In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should maintain the same approach going forward, but recognized that there have been significant changes since 2010 in the mobile marketplace.[166] The Commission sought comment on whether those changes should lead it to revisit the treatment of mobile broadband services.[167]

88. Today, we find that changes in the mobile broadband marketplace warrant a revised approach. We find that the mobile broadband marketplace has evolved, and continues to evolve, but is no longer in a nascent stage. As discussed below, mobile broadband networks are faster, more broadly deployed, more widely used, and more technologically advanced than they were in 2010. We conclude that it would benefit the millions of consumers who access the Internet on mobile devices to apply the same set of Internet openness protections to both fixed and mobile networks.[168]

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[159] *2010 Open Internet Order*, 25 FCC Rcd 17956, para. 93.

[160] *Id*.

[161] *Id*. at 17956-57, para. 94.

[162] *Id*.

[163] *Id*.

[164] *Id.* at 17957, para. 95

[165] *Id*.

[166] *2014 Open Internet NPRM*, 29 FCC Rcd at 5583, para. 62.

[167] *Id*.

[168] Although we adopt the same rules for both fixed and mobile services, we recognize that with respect to the reasonable network management exception, the rule may apply differently to fixed and mobile broadband providers. *See infra* Section III.D.4.

89. Network connection speed and data consumption have exploded. For 2010, Cisco reported an average mobile network connection speed of 709 kbps.[169] Since that time there has been massive expansion of mobile broadband networks, providing vastly increased download speeds. For 2013, Cisco reported an average mobile connection speed of 2,058 kbps.[170] This increase in speed is partially due to the deployment of faster network technologies. Currently, mobile broadband networks provide coverage and services using a variety of 3G and 4G technologies, including, most importantly, LTE.[171] As a consequence of the growing deployment of next generation networks, there has been an increase of more than 200,000 percent in the number of LTE subscribers, from approximately 70,000 in 2010[172] to over 140 million in 2014.[173] Concurrent with these substantial changes in mobile broadband deployment and download speeds, mobile data traffic has exploded, increasing from 388 billion MB in 2010 to 3.23 trillion MB in 2013.[174] AT&T reports that its wireless data traffic has grown 100,000 percent between 2007 and 2014 and 20,000 percent over the past five years.[175] T-Mobile states that "data usage continues to expand exponentially, with year-to-year increases of roughly 120 percent."[176]

90. As consumers use smartphones and tablets more, they increasingly rely on mobile broadband as a pathway to the Internet. The Internet Association argues that mobile Internet access is essential, since many Americans "are wholly reliant on mobile wireless for Internet access."[177] In addition, evidence shows that consumers in certain demographic groups, including low income and rural consumers and communities of color, are more likely to rely on mobile as their only access to the Internet.[178] Citing data from the Pew Research Center's Internet & American Life Project, OTI states that "[t]he share of Americans relying exclusively on their smartphone[s] to access the Internet is far higher

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[169] Cisco, Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update 2010-2015 at 13 (2011).

[170] Cisco, *Cisco Visual Networking Index: Forecast Highlights* (2014), http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html. These connection speeds are inclusive of all types of devices, while speeds for smartphones may be higher. Cisco reported an average connection speed of 9,942 kbps for smartphones in 2013. *Id.*

[171] Long-Term Evolution (LTE) is a high-speed packet switched mobile broadband network technology. Starting in 2014, some operators introduced LTE-Advanced, mainly by using carrier aggregation and more capable devices.

[172] Telegeography, *US Remains at Forefront of LTE Service Adoption* (Mar. 15, 2012), https://www.telegeography.com/products/commsupdate/articles/2012/03/15/us-remains-at-forefront-of-lte-service-adoption/ (last visited Feb. 10, 2015).

[173] CTIA Blog, *Mobile Broadband: A Story of Dynamism and Transformation* (Jan. 9, 2015), http://blog.ctia.org/2015/01/09/dynamism/ (last visited Feb. 10, 2015).

[174] *Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311 (Wireless Tel. Bur. 2014) (*17th Mobile Wireless Report*); Robert F. Roche & Liz Dale, *Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry* (June 2014).

[175] *Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993;Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 11-186, Sixteenth Report, 28 FCC Rcd 3700, 3910-11, para. 334 (Wireless Tel. Bur. 2013) (*16th Mobile Wireless Report*). *See* AT&T, *AT&T Adds High-Quality Spectrum to Support Customers' Growing Demand for Mobile Video and High-Speed Internet* (Jan. 30, 2015), http://about.att.com/story/att_adds_high_quality_spectrum_to_support_growing_demand_for_mobile_video_and_high_speed_internet.html.

[176] T-Mobile Reply at 5.

[177] Letter from Abigail Slater, Vice President Legal and Regulatory Policy, Internet Association to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Oct. 13, 2014).

[178] OTI Comments at 33-34.

among Hispanics, Blacks, and adults aged 18-29, and households earning less than $30,000 a year."[179] According to data from the National Health Interview Survey, 44 percent of households were "wireless-only" during January-June 2014, compared to 31.6 percent during January-June 2011.[180] These data also show that 59.1 percent of adults living in poverty reside in wireless-only households, relative to 40.8 percent of higher income adults.[181] Additionally, rural consumers and businesses often have access to fewer options for Internet service, meaning that these customers may have limited alternatives when faced with restrictions to Internet openness imposed by their mobile provider.[182] Furthermore, just as consumer reliance on mobile broadband has grown, edge providers increasingly rely on mobile broadband to reach their customers. Microsoft states, for example, that, "with 'the pressure . . . only increasing to either go mobile or go home,' edge providers frequently introduce new edge services on mobile platforms first, and the success or failure of these edge providers' businesses often depends in large part on their mobile offerings."[183]

91. Furthermore, the technology underlying today's mobile broadband networks, as compared to those deployed in 2010, not only provides operators with a greater ability to manage their networks consistent with the rules we adopt today,[184] but also gives those operators a greater ability to engage in conduct harmful to the virtuous cycle in the absence of open Internet rules.[185] As discussed above, certain behaviors by broadband providers may impose negative externalities on the Internet ecosystem, resulting in less innovation from edge providers.[186] We find that the same is true today for mobile wireless broadband providers, particularly as mobile broadband technology has become more widespread and mobile broadband services have become more integrated into the economy.

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[179] *Id.* at 33.

[180] Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2014* at 5, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (Dec. 2014), http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf.

[181] *Id.* at 2. Living in poverty is defined as being below the U.S. Census Bureau's household income poverty thresholds. Higher income is defined as having an income of 200 percent of the poverty threshold or greater. *Id.* at 7.

[182] *See 17th Mobile Wireless Report*, 29 FCC Rcd at 15338, para. 55 (presenting data that, as of January 2014, 92.0 percent of non-rural U.S. POPs lived in a census block covered by 4 or more mobile broadband providers, while the figure was 39.6 percent for rural U.S. POPs). One should note however, that the number of providers in a census block represent network coverage, which does not necessarily reflect the number of choices available to a particular individual or household. Coverage calculations based on Mosaik data, while useful for measuring developments in mobile wireless coverage, have certain limitations that likely overstate the extent of mobile wireless coverage. *See id.* at 15333, para. 45 n.69.

[183] Microsoft Comments at 21.

[184] *See, e.g.*, OTI Comments at 57-59 (arguing that "[t]here is nothing about the technology of today's increasingly prevalent 4G wireless data networks that should preclude compliance with open Internet protections, including the extension of basic *Carterfone* protections to mobile broadband Internet access networks. Although mobile 4G/LTE technologies have advanced considerably since 2010, they have evolved in a manner that make open platforms and a non-discrimination rule far more feasible to implement than the Commission anticipated four years ago.").

[185] *See, e.g.*, OTI Reply at 23-24; Cisco, *Integrated DPI and Cisco In-Line Services: Optimize the Flow of Traffic and Monetize Your Network*, www.cisco.com/c/en/us/solutions/collateral/wireless/network-traffic-optimization/white_paper_c11-607164-00.html (last visited Feb. 10, 2015) ("Industry experts agree that DPI and its complementary applications are the best way to increase network efficiency and a mobile operator's revenue."); *see also* Sandvine, *Deep Packet Inspection (DPI)*, https://www.sandvine.com/platform/deep-packet-inspection.html (last visited Feb. 10, 2015).

[186] *See supra* paras. 82-83.

92. In view of the evidence showing the evolution of the mobile broadband marketplace, we conclude that it would best serve the public interest to revise our approach for mobile broadband services and apply the same openness requirements as those applied to providers of fixed broadband services. The Commission has long recognized that the Internet should remain open for consumers and innovators alike, regardless of the different technologies and services through which it may be accessed.[187] Although the Commission found in 2010 that conditions at that time warranted a more limited application of open Internet rules to mobile broadband services, it nevertheless recognized the importance of freedom and openness for users of mobile broadband networks, finding that "consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission are as important when end users are accessing the Internet via mobile broadband as via fixed."[188] In contrast to the state of the mobile broadband marketplace when the Commission adopted the 2010 open Internet rules, the evidence in the record today shows how mobile broadband services have evolved to become essential, critical means of access to the Internet for millions of consumers every day. Because of this evolution and the widespread use of mobile broadband services, maintaining a regime under which fewer protections apply in a mobile environment risks creating a substantively different Internet experience for mobile broadband users as compared to fixed broadband users. Broadband users should be able to expect that they will be entitled to the same Internet openness protections no matter what technology they use to access the Internet. We agree with arguments made by a large number of commenters that applying a consistent set of requirements will help ensure that all consumers can benefit from full access to an open and robust Internet.[189] We note that evidence in the record indicates that mobile broadband providers themselves have recognized the importance of open Internet practices for mobile broadband consumers.[190]

93. Despite their support of open Internet principles, several of the nationwide mobile providers oppose broader openness requirements for mobile broadband, arguing that additional rules are unnecessary in the mobile broadband market. T-Mobile, for example, argues that "robust retail competition in the mobile broadband market already constrains mobile provider behavior."[191] Verizon comments that "consumer choice and competition also have ensured a differentiated marketplace in which providers routinely develop innovative offerings designed to outcompete competitors' offerings."[192] AT&T contends that additional rules are unnecessary as mobile broadband providers are already investing in the networks, innovating, reducing prices, and thriving.[193] CTIA contends that "the robust competitive conditions in the mobile broadband marketplace are a defining differentiator" and that "any new open Internet framework should account for the competitive mobile dynamic."[194]

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[187] *2010 Open Internet Order*, 25 FCC Rcd at 17956, para. 93.

[188] *Id*.

[189] *See, e.g.*, CDT Comments at 28; Consumers Union Comments at 11-14; Cox Comments at 8-11; Frontier Comments at 8-10; Internet Association Reply at 5-7; Microsoft Comments at 19-27; Mozilla Reply at 20-21; NCTA Comments at 69-70; OTI Comments at 27-28; Public Knowledge Comments at 23-24; Time Warner Cable (TWC) Comments at 27-28; Vonage Comments at 30-33.

[190] CTIA Comments at 11-13.

[191] T-Mobile Reply at 2.

[192] Verizon Reply at 27; *see also* Verizon Jan. 15, 2015 *Ex Parte* Letter Attach. at 6-8.

[193] AT&T Reply at 60-79.

[194] Letter from Scott K. Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Nov. 6, 2014); *see also* Letter from Scott K. Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (CTIA Feb. 10, 2015 *Ex Parte* Letter) ("Today, the mobile broadband market is even more competitive than it was in 2010: Data from the Commission's just-released *Seventeenth Report* shows that 82% of Americans can choose among *four* or more mobile broadband providers.") However, we note that this data cited from the *17th Mobile Wireless Report* represent network coverage, which does not necessarily reflect the number of choices available for purchase by a particular individual

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94. Based upon the significant changes in mobile broadband since 2010 discussed above, including the increased use of mobile broadband and the greater ability of mobile broadband providers to engage in conduct harmful to the virtuous cycle, we are not persuaded that maintaining fewer open Internet protections for consumers of mobile broadband services would serve the public interest. Contrary to provider arguments that applying a broader set of openness requirements will stifle innovation and chill investment, we find that the rules we adopt today for all providers of services will promote innovation, investment, and competition. As we discuss above, an open Internet enables a virtuous cycle where new uses of the network drive consumer demand, which drives network improvements, which result in further innovative uses. We agree with commenters that "mobile is a key component" of the virtuous cycle.[195] OTI comments that "a variety of economic analyses suggest that the Internet's openness is a key driver of its value . . . . Other economic studies have found that non-neutral conditions in the broadband market might maximize profits for broadband providers but would ultimately minimize consumer welfare . . . . There is significant evidence that a vibrant and neutral online economy is critical for a healthy technology industry, which is a significant creator of jobs in the U.S."[196] We find that these arguments apply to mobile broadband providers as well as to fixed, and apply even though there may be more competition among mobile broadband providers.

95. We note that the Commission's experience with applying open platform rules to Upper 700 MHz C Block licensees,[197] including Verizon Wireless, has shown that openness principles can be applied to mobile services without inhibiting a mobile provider's ability to compete and be successful in the marketplace. We find that it is reasonable to conclude that, even with broader application of Internet openness requirements, mobile broadband providers will similarly continue to compete and develop innovative products and services. We also expect that the force of consumer demand that led mobile broadband providers to invest in their networks over the past four years will likely continue to drive substantial investments in mobile broadband networks under the open Internet regime we adopt today.[198]

96. Although mobile providers generally argue that additional rules are not necessary to deter practices that would limit Internet openness, concerns related to the openness practices of mobile broadband providers have arisen. As we noted in the *2014 Open Internet NPRM*, in 2012, the Commission reached a $1.25 million settlement with Verizon for restricting tethering apps on Verizon smartphones, based on openness requirements attached to Verizon's Upper 700 MHz C Block licenses.[199] Also in 2012, consumers complained when they encountered problems accessing Apple's FaceTime application on AT&T's network.[200] More recently, significant concern has arisen when mobile providers'

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household. Coverage calculations are based on Mosaik data, which have certain limitations that likely overstate the extent of mobile wireless coverage. Furthermore, as discussed above, the ability of broadband providers to threaten the open Internet does not depend on them having market power over their end users. *See also infra* para. 98 (citing some recent examples of consolidation in the wireless industry); *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd. 6133, 6156-57, para. 46 (2014) (describing past consolidation of the wireless industry, including in terms of factors beyond only the number of competitors, such as market shares and spectrum holdings).

[195] Mozilla Reply at 22.

[196] OTI Comments at 4-5.

[197] *700 MHz Second Report and Order*, 22 FCC Rcd at 15359, para. 60; 47 C.F.R. § 27.16.

[198] *See* Microsoft Comments at 6.

[199] *See generally Cellco Partnership d/b/a Verizon Wireless*, File No. EB-11-IH-1351, Acct. No. 201232080028, FRN 0003290673, Order and Consent Decree, 27 FCC Rcd 8932 (2012).

[200] AT&T initially restricted use of Apple's FaceTime and iPad application to times when the end user was connected to Wi-Fi and thus to another broadband provider. The Commission did not conclude whether such a practice violated open Internet principles. *See* David Kravets, *AT&T Holding FaceTime Hostage is No Net-Neutrality Breach*, Wired.com (Aug. 22, 2012) http://www.wired.com/threatlevel/2012/08/facetime-net-

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have attempted to justify certain practices as reasonable network management practices, such as applying speed reductions to customers using "unlimited data plans" in ways that effectively force them to switch to price plans with less generous data allowances.[201] As Consumers Union observes, many mobile broadband provider practices are non-transparent, because customers receive "no warning or explanation of when their speeds will be slowed down."[202] Other commenters such as OTI also cite mobile providers' blocking of the Google Wallet e-payment application.[203] Although providers claimed that the blocking was justified based on security concerns, OTI notes that "this carrier behavior raised anticompetitive concerns when AT&T, Verizon and T-Mobile later unveiled their own mobile payment application, a competitor to Google Wallet . . . ."[204] Microsoft also describes further potential for abuse based on its experience in other countries without open Internet protections, claiming, for example, that "several broadband access providers around the world have interfered or degraded Skype traffic on their networks."[205] A recent survey of European Internet users found that respondents reported experiencing problems with "blocking of internet content."[206] Mobile services notably accounted for a significant percentage of negative experiences reported in the survey.[207] OTI argues that, even with competition, mobile providers have an interest in seeking rents from edge providers and "in securing a competitive advantage for their own competing apps, content and services."[208] We agree, and find that the rules we adopt today for mobile network providers will help guard against future incidents that have the potential to affect Internet openness and undermine a mobile broadband consumer's right to access a free and open Internet.

97. In addition, we agree with those commenters that argue that mobile broadband providers have the incentives and ability to engage in practices that would threaten the open nature of the Internet, in part due to consumer switching costs. Switching costs are a significant factor in enabling the ability of mobile broadband providers to act as gatekeepers. Microsoft states that "for the large number of applications that are available only in the mobile context, mobile broadband access providers today can be an edge provider's only option for reaching a particular end user," and argues that, because of high switching costs, few mobile broadband consumers routinely switch providers.[209] Therefore, Microsoft argues, "even if there is more than one mobile broadband access provider in a specific market, there may not be effective competitive alternatives (for edge providers or consumers) and these mobile broadband access providers retain the ability to act in a manner that undermines the competitive neutrality of the online marketplace."[210]

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neutrality0flap/ (last visited Feb. 10, 2015); *see also* Open Internet Advisory Committee, 2013 Annual Report (Aug. 20, 2013), at 39-46, http://transition.fcc.gov/cgb/oiac/oiac-2013-annual-report.pdf (2013 OIAC Annual Report).

[201] *See* Prepared remarks of FCC Chairman Tom Wheeler, 2014 CTIA Show, Las Vegas, NV (Sept. 9, 2014).

[202] Consumers Union Reply at 9.

[203] WGAW Comments at 15. *But see* CTIA Reply at 17.

[204] OTI Comments at 29-30.

[205] Microsoft Comments at 25.

[206] European Commission, *1 in 4 European Internet Users Still Experience Blocking of Internet Content, Study Shows* (Feb. 27, 2014), http://europa.eu/rapid/press-release_MEMO-14-136_en.htm.

[207] *Id*.

[208] OTI Reply at 25; *see also* Letter from Michael Calabrese, Director, Wireless Future Project, New America Open Technology Institute and Delara Derakhshani, Policy Counsel, Consumers Union, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 5 (filed January 28, 2015) (OTI/Consumers Union *Ex Parte* Letter).

[209] Microsoft Comments at 23-24.

[210] *Id*.

98. The level of wireless churn, when viewed in conjunction with data on consumer satisfaction, is consistent with the existence of important switching costs for customers. Based on results from surveys, OTI and Consumers Union argue that switching costs have depressed mobile wireless churn rates,[211] meaning that customers may remain with their service providers even when they are dissatisfied.[212] Consumers Union cites a February 2015 *Consumer Reports* survey showing that "27 percent of mobile broadband consumer[s] who are dissatisfied with their mobile broadband service provider are reluctant to switch carriers" due to several factors.[213] That many customers stay with their mobile wireless providers, despite expressing dissatisfaction with their current provider and despite the availability of alternate plans from other providers, suggests the presence of significant barriers to switching.[214] Furthermore, this has been a period of market and spectrum consolidation, which has decreased the choices available to consumers in many parts of the country. For example, Vonage argues that "recent mergers between AT&T and Leap, and T-Mobile and MetroPCS have reduced the ability of wireless end users to switch to competing providers in the event of potential discrimination against the edge services they may want to access."[215] Choices may be particularly limited in rural areas, both

[211] *See* OTI/Consumers Union *Ex Parte* Letter at 3-4 ("Despite recent increased price competition from T-Mobile and Sprint, the two dominant carriers (AT&T and Verizon) continue to enjoy industry-low customer churn rates. In 2014 AT&T realized both its lowest churn rate for a quarter (0.86 percent among postpaid subscribers) and for a full year (1.035 percent)."). Average monthly churn across AT&T, Sprint, T-Mobile, and Verizon Wireless was 1.56 percent in the first three quarters of 2014, compared to 1.83 percent in all of 2007. *See 16th Mobile Wireless Report*, 28 FCC Rcd at 3865, Chart 18; *17th Mobile Wireless Report*, 29 FCC Rcd at 15325, Chart II.B.6.

[212] *See* OTI/Consumers Union *Ex Parte* Letter at 4 ("The American Customer Satisfaction Index found that wireless service 'remains among the lower-scoring categories' of industries they review. Among the 43 major U.S. industries rated, the consumer satisfaction ranking of mobile carriers are tied for 38th worst with the U.S. Postal Service and just one spot above the satisfaction score of airlines (wireline ISPs are dead last). The OTI representative stated that it would be completely implausible to attribute historically low churn rates to consumer satisfaction when, in fact, consumer satisfaction is among the lowest five industries among America's 43 largest consumer-facing industries."); *see also* Consumers Union Comments at 14 ("A January 2014 Consumer Reports article reported that high switching costs continue to serve as barriers to customers freely changing carriers. Thirty-one percent of survey respondents said that they are seriously considering switching providers, but one in six of that group said that they cannot switch because long-term contracts and early termination fees handcuff them to carriers."). *But see* CTIA Feb. 10, 2015 *Ex Parte* Letter at 3-4 (disagreeing with New America and Consumers Union by arguing that surveys show high levels of customer satisfaction); Verizon Jan. 15, 2015 *Ex Parte* Letter Attach. at 10-11 (arguing that recent levels of churn show that many consumers can switch). Although a number of consumers may well be satisfied with their mobile broadband service, the surveys cited by OTI and Consumers Union also suggest that there are significant numbers of dissatisfied customers who feel they cannot switch. These consumers are likely to have difficulty responding to broadband provider polices that disrupt the open Internet.

[213] OTI/Consumers Union *Ex Parte* Letter at 4.

[214] Paul de Sa, Ian Chun, and Julia Zhen present an analysis of the price plans available from AT&T, Sprint, T-Mobile, and Verizon Wireless during the summer of 2014, concluding that "it *almost always* makes economic sense for 'perfectly rational' subscribers to change carriers, as there are generally cheaper plans available from rival carriers to attract switchers." The authors argue that the low observed switching rates, despite the availability of these plans, "suggest[] that many other factors aside from price are relevant drivers of churn, consistent with [the authors'] view of substantial demand inertia." Paul de Sa, Ian Chun, and Julia Zheng, Bernstein Research, *A Different Way to Compare Mobile Pricing (Or Does Discounting Matter?)* at 5 (August 21, 2014) (*Aug. 2014 de Sa Pricing Report*) (emphasis in original).

[215] Vonage Comments at 17-18; *see also Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Report and Order, 29 FCC Rcd 6133, 6146-47, paras. 24-25 (2014); OTI/Consumers Union *Ex Parte* Letter at 5-6.

because fewer service providers tend to operate in these regions and because consumers may encounter difficulties in porting their numbers from national to local service providers.[216]

99. Switching costs may arise due to a number of factors that affect mobile consumers. For example, consumers may face costs due to informational uncertainty, particularly in the context of concerns over open Internet restrictions. The provision of wireless service involves the interaction between the wireless network operator, the various edge providers, the customer's handset or other equipment, and the conditions present in the specific location the customer wishes to use the service. In this environment, it can be very difficult for customers to ascertain the source of a service disruption, and hence whether switching wireless providers would solve the problem.[217] Additionally, product differentiation can make it difficult for consumers to compare plans, which may also increase switching costs.[218] Finally, customers may face a variety of hassle-related and financial switching costs.[219] Disconnecting an existing service and activating a new one may involve early termination fees (ETFs), coordinating with multiple members of a family plan, billing set-up, transferring personal files, and porting phone numbers, each of which may create delays or difficulties for customers.[220] As part of this process, some customers may need to replace their equipment, which may not be compatible with their

[216] *See supra* note 182; OTI/Consumers Union *Ex Parte* Letter at 2 ("Phone number portability is administered so that it works well only for national carriers, since consumers often don't have the option to keep their number when moving from a national to non-national carrier.").

[217] *See* Public Knowledge Comments at 18 ("Switching providers incurs uncertainty costs because it is very difficult for consumers to assess the quality of a new service in advance. However, allowing paid prioritization and other blocking systems can create additional sources of uncertainty that magnify access networks' market power. In particular, customers may not be able to ascertain the sources of internet access problems, and therefore may attribute quality of service issues to edge providers instead of network operators. Regardless of what party might be responsible for the situation, '[t]he fact that the quality of the network services is opaque to consumers under discrimination, confers additional market power to access networks.'").

[218] New America OTI/Consumers Union *Ex Parte* Letter at 4. Wireless service providers are differentiated in terms of their network performance, coverage, device lineups, and plan features, among other things. *See 17th Mobile Wireless Report*, para 168. *See also* CTIA Feb. 10, 2015 *Ex Parte* Letter Attach. at 19 ("In 2013 alone, the four major carriers offered nearly 700 combinations of smartphone plans, and a family of five had in excess of 250 choices to select from.").

[219] OTI/Consumers Union *Ex Parte* Letter at 2 ("Of course, subscribers *can* switch carriers, but relatively few do primarily because of the multiple strategies that carriers use to create both the perception and the reality of substantial financial penalties, loss of time and uncertainties about retaining your data or even, in some cases, your phone number.") (emphasis in original).

[220] *See, e.g.*, Microsoft Comments at 24 (In the U.S., "[p]art of the reason churn is so low is because customers sign two-year contracts with high early termination fees. Another is that many customers are on family or enterprise plans, which are often more 'sticky' and make it more difficult for customers to switch carriers."). *But see* AT&T Reply at 60-65 (noting that "many innovative service plans provide the option of eliminating early termination fees" and that "this recent shift in the industry away from ETFs has significantly reduced the cost of switching providers and enabled customers to act immediately when a competitor introduces a more attractive service offering"). However, although there have been recent promotions by some providers regarding ETFs and some developments in secondary markets for contracts and devices, ETFs continue to affect a large proportion of customers who do not elect to purchase their phones up front, and switching costs remain due to the other factors discussed above. A majority of nationwide mobile broadband providers charge ETFs, which currently range from approximately $350 to $650, based on the type of plan and the number of members in the plan. Typically, the ETFs are pro-rated based on an average 2-year contract plus the cost of an associated handset (which can amount to as much as $650 for a high end phone such as an iPhone 6). Furthermore, it is not clear that ETF promotions will continue to always be available. *See 17th Mobile Wireless Report*, 29 FCC Rcd at 15382, para. 145; OTI/Consumers Union *Ex Parte* Letter at 2 (arguing that T-Mobile's ETF offer is "a temporary marketing strategy"); *see infra* note 222.

new mobile service provider's network.[221] OTI and Consumers Union argue that moving multiple members of a shared or family plan may be particularly expensive, since "[n]ot only do groups face the cost of multiple ETFs, but frequently the contract termination dates become nonsynchronous due to the addition of new lines and individuals upgrading their devices at different points in time."[222] Furthermore, OTI and Consumers Union argue that these costs affect an increasingly large proportion of consumers, since the penetration of shared plans has increased such that the majority of AT&T and Verizon Wireless customers now have shared plans.[223]

100. AT&T, T-Mobile, and Verizon argue that the factors that led the Commission to adopt a more limited set of openness rules for mobile in 2010 remain valid today. They argue that mobile broadband networks should not be viewed as mature as mobile technologies continue to develop and evolve.[224] They also contend that the extraordinary growth in use of mobile broadband services requires that providers have more flexibility to be able to handle the increased traffic and ensure quality of service for subscribers. T-Mobile, for example, asserts that "while mobile networks are more robust and offer greater speeds and capacity than they did when the 2010 rules were enacted, they also face greater demands; their need for agile and dynamic network management tools has actually increased."[225]

101. We recognize that mobile service providers must take into account factors such as mobility and reliance on spectrum. As discussed more fully below in the context of each of the rules, however, we find that the requirements we adopt today are sufficiently tailored to provide carriers with the flexibility they need to accommodate these conditions. Moreover, as described further below, we conclude that retaining an exception to the no-blocking rule, the no-throttling rule, and the no-unreasonable interference/disadvantage standard we adopt today for reasonable network management will allow sufficient flexibility for mobile service providers.

4. The Commission Must Act to Preserve Internet Openness

102. Given that broadband providers—both fixed and mobile—have both the incentives and ability to harm the open Internet, we again conclude that the relatively small incremental burdens imposed by our rules are outweighed by the benefits of preserving the open nature of the Internet, including the

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[221] *See, e.g.*, Free Press Comments at 31-32, n.47 (arguing that differences in network technologies and frequency bands can lead to handset incompatibilities, meaning customers must purchase new equipment); *Aug. 2014 de Sa Pricing Report* at 2 ("In general, other carriers' phones (at least for iPhones) cannot easily be ported to Verizon or Sprint, and Sprint phones cannot be brought to other carriers."). Should customers require that their devices be unlocked, they may be subject to ETFs, per CTIA's Consumer Code. CTIA, *Consumer Code for Wireless Service*, http://www.ctia.org/policy-initiatives/voluntary-guidelines/consumer-code-for-wireless-service (last visited Feb. 12, 2015).

[222] OTI/Consumers Union *Ex Parte* Letter at 3. *But see* CTIA Feb.10, 2015 *Ex Parte* Letter at 3 (disagreeing with New America and Consumers Union's assertions about high switching costs and the effects of family plans, citing to ETF buyout offers). We discuss some caveats to ETF buyout promotions above. Furthermore, because ETF rebates can take months to process, they may not be adequate switching incentives for credit- and liquidity-constrained customers. This may be particularly true when dealing with multiple ETFs at once, as in a family or shared plan. T-Mobile, *ETF Reimbursement FAQs*, https://www.switch2t-mobile.com/ (last visited Feb. 12, 2015); Sprint, *It's a T-Mobile Triple Threat*, http://www.sprint.com/landings/tmobile-buyback/index.html (last visited Feb. 12, 2015); Verizon, *Switch and Save*. http://www.verizonwireless.com/landingpages/switch-and-save/ (last visited Feb. 12, 2015). *See also* Simon Flannery and Jon Mark Warren, *AT&T and Verizon, US Wireless: The Trouble with Churn* at 3 (Aug. 7, 2013) ("Family/Shared plans promote lower churn because of the lower per-line cost, the networking effect (friends and family on the same network), and the difficulty of coordinating a carrier change.").

[223] *Id* at 3. OTI and Consumers Union report that nearly 70 percent of AT&T's and 61 percent of Verizon Wireless's postpaid subscribers had shared plans as of the fourth quarter of 2014, compared to 33 percent and 46 percent, respectively, in the fourth quarter of 2013. *Id.*

[224] Verizon Reply at 28; CTIA Comments at 7, 25; Mobile Future Comments at 11-12; AT&T Reply at 84-86.

[225] T-Mobile Reply at 2.

continued growth of the virtuous cycle of innovation, consumer demand, and investment.[226] We note, for example, that the disclosure requirements adopted in this order are widely understood, have industry-based definitions, and are commonly used in commercial Service Level Agreements by many broadband providers.[227] Open Internet rules benefit investors, innovators, and end users by providing more certainty to each regarding broadband providers' behavior, and helping to ensure the market is conducive to optimal use of the Internet. Open Internet rules are also critical for ensuring that people living and working in rural areas can take advantage of the substantial benefits that the open Internet has to offer.[228] In minority communities where many individuals' only Internet connection may be through a mobile device, robust open Internet rules help make sure these communities are not negatively impacted by harmful broadband provider conduct.[229] Such rules additionally provide essential safeguards to ensure that the Internet flourishes as a platform for education and research.[230]

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[226] *2010 Open Internet Order*, 25 FCC Rcd at 17928, para. 39 (noting that there are some costs to implementing open Internet rules, such as additional disclosures about broadband provider practices, but these costs are not overly burdensome, and they are outweighed by the substantial benefits provided by the rules). Below, we further discuss the costs associated with enhanced transparency. *See infra* Section III.C.3.b(i). *See also, e.g.*, AOL Comments at 2 (explaining that "[t]he Internet's openness has fostered innovation and investment—both in advancements in network deployment and the services that ride upon them—creating . . . a virtuous circle, where richer and more diverse content on the 'edge' jump-starts demand, which brings about infrastructure investment, which brings about even richer and more diverse content"); Open MIC Comments at 3 (noting that "[o]pen Internet principles also promote free speech, civic participation, democratic engagement and marketplace competition, as well as robust broadband adoption and participation in the Internet community by minorities and other socially and economically disadvantaged groups").

[227] *See infra* Section III.C.3.b.i.; *see also infra* para. 112 (supporting the idea that the burdens should not be overwhelming because many broadband providers still voluntarily continue to abide by the 2010 no-blocking rule, even though they are no longer legally required to do so).

[228] *See, e.g.*, Center for Rural Strategies Reply at 1 (arguing that "entrepreneurs, artists, educators, activists, healthcare providers, and devoted community members . . . deserve a fair playing field. The Open Internet has given us the opportunity to revitalize Rural America's local economies, share our culture with global audiences, and amplify rural voices in debates shaping our society. But we are at risk of losing this valuable tool, even when 14.5 million of us cannot yet access it."); Letter from Edyael Casaperalta, Rural Broadband Policy Group Coordinator, National Rural Assembly to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1 (filed Oct. 20, 2014) (explaining that "[i]t is the neutrality of the Open Internet that has given rural people an opportunity to launch businesses from our hometowns, revitalize our regional economies, share rural culture with global audiences, and amplify rural voices in debates shaping our society. Simply put, rural communities depend on Network Neutrality to get a fair shake online").

[229] *See, e.g.*, Public Knowledge Comments at 27 ("Many traditionally disadvantaged communities rely on wireless as their only internet connection and thus have the most to lose from discrimination over wireless."); *see also, e.g.*, Independent Filmmaker Organizations Reply at 11 (explaining that they "are especially concerned that limiting the extent to which Open Internet rules apply to mobile broadband providers allows providers to maintain too much control over the quality and kind of content consumers can access. This presents the real danger of creating a second class of Internet access service for those who can only access the Internet through mobile broadband. These individuals are often underrepresented individuals in low income or minority groups who are already on the wrong side of the digital divide and are most in need of the Commission's attention and support."); National Minority Organizations (MMTC) Comments at 6 (noting that "nearly 75 percent of African American and 68 percent of Hispanic cell phone owners use their devices to access the Internet, and these numbers are increasing").

[230] *See, e.g.*, Letter from Emily Sheketoff, Executive Director, Washington Office, American Library Association (ALA), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-28, at 1-2 (filed Nov. 6, 2014) ("The Internet has become a vitally important platform for libraries and higher education in a wide variety of ways, such as for multi-media instruction and distance learning, educational collaboration through document-sharing websites and applications, storage and retrieval of digital archives, tele-health information, public access to Internet information, and many other educational services. Ensuring the Internet remain an open platform is absolutely essential for libraries to serve their communities."); *see also, e.g.*, AAJC Comments at 2-3 ("A free and open Internet ecosystem

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103. The Commission's historical open Internet policies and rules have blunted the incentives, discussed above, to engage in behavior harmful to the open Internet.[231] Commenters who argue that rules are not necessary overlook the role that the Commission's rules and policies have played in fostering that result.[232] Without rules in place to protect the open Internet, the overwhelming incentives broadband providers have to act in ways that are harmful to investment and innovation threaten both broadband networks and edge content.[233] Paid prioritization agreements, for example, have the potential to distort the market by causing prices not to reflect efficient cost recovery and by altering consumer choices for content and edge providers.[234] The record reflects the view that paid arrangements for priority treatment, such as broadband providers discriminating among content providers or prioritizing one provider's or its own content over others, likely damage the open Internet, harming competition and consumer choice.[235] Additionally, blocking and throttling harm a consumer's right to access lawful content, applications, and services, and to use non-harmful devices.[236]

C. Strong Rules That Protect Consumers from Practices That Can Threaten the Open Internet

104. We are keenly aware that in the wake of the *Verizon* decision, there are no rules in place to prevent broadband providers from engaging in conduct harmful to Internet openness, such as blocking a consumer from accessing a requested website or degrading the performance of an innovative Internet application.[237] While many providers have indicated that, at this time, they do not intend to depart from

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is critically important to the Asian American community for a number reasons including . . . creat[ing] opportunities for online education, especially for English language learners."); American Association of State Colleges and Universities et al. Comments 2 ("Our nation's libraries and institutions of higher education are leaders in creating, fostering, using, extending and maximizing the potential of the Internet for research, education and the public good. Libraries and institutions of higher education depend upon an open Internet to fulfill their missions and serve their communities.").

[231] *See, e.g.*, CWA & NAACP Comments at 4 (noting that CWA and NAACP agree with the Commission's assertion that one of the primary reasons there have been limited violations of Internet openness is because the Commission has had policies in place to address misconduct).

[232] *See supra* Section III.A.; *see also, e.g.*, Layton Comments at 19.

[233] *See, e.g.*, Greenlining Institute et al. Comments at 3 ("By rejecting the Commission's anti-blocking and anti-discrimination rules, the Verizon court has opened up the possibility that without the Commission's intervention, carriers will determine the winners and losers of the digital world."); *see also Verizon,* 740 F.3d at 645 (finding that the Commission "adequately supported and explained" that absent open Internet rules, "broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment").

[234] *See, e.g.*, Ad Hoc Comments at 19-20 (discussing potential market distortions caused by paid prioritization agreements).

[235] *See, e.g.*, Access Comments at 8 (commenting that broadband providers have incentives that could lead to "invest[ing] in infrastructure to disproportionately improve the priority option, cease investment in infrastructure that helps the network as a whole, create artificial scarcity, or even degrade the quality of the current non-priority infrastructure to make prioritized options seem more attractive"); MDTC Comments at 3-4; *see also* AARP Comments at 17 (stating that individualized bargaining "will institutionalize pay-for priority schemes and undermine innovation and investment"); Illinois and New York Comments at 11-12 (arguing that individualized prioritization agreements could complicate meaningful disclosures by making them overly difficult for consumers to understand).

[236] *See infra* Sections III.C.1.a-b.

[237] *See supra* Section IV.B. We acknowledge other laws address behavior similar to that which our rules are designed to prevent; however, as discussed below, we do not find existing laws sufficient to adequately protect consumers' access to the open Internet. For example, some parties have suggested that existing antitrust laws would address discriminatory conduct of an anticompetitive nature. *See* ICLE Comments at 39; Citizens Against Government Waste Comments at 2; Hurwitz Comments at 7-8; *see also infra* Section III.G. We also note that
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the previous rules, an open Internet is too important to consumers and innovators to leave unprotected. Therefore, we today reinstate strong, enforceable open Internet rules.[238] As in 2010, we believe that conduct-based rules targeting specific practices are necessary.

105. *No-Blocking.* First, we adopt a bright-line rule prohibiting broadband providers from blocking lawful content, applications, services, or non-harmful devices. This "no-blocking" principle has long been a cornerstone of the Commission's policies.[239] While first applied in the Internet context as part of the Commission's *Internet Policy Statement*, the no-blocking concept dates back to the Commission's protection of end users' rights to attach lawful, non-harmful devices to communications networks.[240]

106. *No-Throttling.* Second, we adopt a separate bright-line rule prohibiting broadband providers from impairing or degrading lawful Internet traffic on the basis of content, application, service, or use of non-harmful device. This conduct was prohibited under the commentary to the no-blocking rule adopted in the *2010 Open Internet Order*.[241] However, to emphasize the importance of this concept we delineate under a separate rule a ban on impairment or degradation, to prevent broadband providers from engaging in behavior other than blocking that negatively impacts consumers' use of content, applications, services, and devices.

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certain "no blocking" obligations continue to apply to the use of Upper 700 MHz C Block licenses. *See* 47 C.F.R. § 27.16.

[238] *See, e.g.*, Comcast Comments at 15 ("As reflected in the existing disclosures of all major broadband providers, including Comcast, there is widespread support and a public commitment from broadband providers to maintain open Internet policies and practices."); Letter from Forty-Three Municipal Broadband Internet Providers to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 at 1 (filed Feb. 10, 2015) ("Accordingly, we follow the Commission's 2005 Open Internet principles and do not block, throttle, or discriminate among types of Internet traffic; nor do we charge Internet edge providers for priority delivery on our networks. We also comply with the requirement in the Commission's 2010 transparency rule for a unitary set of disclosures covering our service characteristics and network management practices."); *see also AT&T Statement on the U.S. Court of Appeals D.C. Circuit Open Internet Decision*, AT&T Public Policy Blog (Jan. 14, 2014) http://www.attpublicpolicy.com/fcc/att-statement-on-the-u-s-court-of-appeals-d-c-circuit-open-internet-decision/("As the FCC assesses the impact of today's court decision, AT&T can assure all of our customers and stakeholders that our commitment to protect and maintain an open Internet will not change."); *Time Warner Cable Issues Statement on Today's Decision by the U.S. Court of Appeals for the D.C. Circuit*, Business Wire (Jan. 14, 2014), http://www.businesswire.com/news/home/20140114006474/en/Time-Warner-Cable-Issues-Statement-Today%E2%80%99s-Decision#.VOZuW4vF98H ("Time Warner Cable has been committed to providing its customers the best service possible, including unfettered access to the web content and services of their choice. This commitment, which long precedes the FCC rules, will not be affected by today's court decision.").

[239] *Internet Policy Statement*, 20 FCC Rcd at 14987-88, para. 4. *See also, e.g.*, *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17903, para. 734 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom. In re FCC 11-161*, 753F.3d 1015 (10th Cir. 2014) (reiterating that call blocking is impermissible in intercarrier compensation disputes); *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11629, 31, paras. 1, 6 (Wireline Comp. Bur. 2007) (*2007 Declaratory Ruling*) (reiterating that call blocking is impermissible as a self-help measure to address intercarrier compensation dispute); *Blocking Interstate Traffic in Iowa*, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987) (denying application for review of Bureau order, which required petitioners to interconnect their facilities with those of an interexchange carrier in order to permit the completion of interstate calls over certain facilities).

[240] *See, e.g.*, *Carterfone*, 13 FCC 2d at 424; *Computer II*, 77 FCC 2d at 388.

[241] *2010 Open Internet Order*, 25 FCC Rcd at 17943, para. 66 ("We make clear that the no-blocking rule bars broadband providers from impairing or degrading particular content, applications, services, or non-harmful devices.").

107. *No Paid Prioritization.* Third, we respond to the deluge of public comment expressing deep concern about paid prioritization.[242] Under the rule we adopt today, the Commission will ban all paid prioritization subject to a narrow waiver process.

108. *No-Unreasonable Interference/Disadvantage Standard.* In addition to these three bright-line rules, we also set forth a no-unreasonable interference/disadvantage standard, under which the Commission can prohibit practices that unreasonably interfere with the ability of consumers or edge providers to select, access, and use broadband Internet access service to reach one another, thus causing harm to the open Internet. This no-unreasonable interference/disadvantage standard will operate on a case-by-case basis and is designed to evaluate other current or future broadband Internet access provider policies or practices—not covered by the bright-line rules— and prohibit those that harm the open Internet.

109. *Transparency Requirements.* We also adopt enhancements to the existing transparency rule to more effectively serve end-user consumers, edge providers of broadband products and services, and the Internet community. These enhanced transparency requirements are modest in nature, and we decline to adopt requirements proposed in the NPRM that raised concern for smaller broadband providers in particular, such as disclosures as to the source of congestion.

1. Clear, Bright Line Rules

110. The record in this proceeding reveals that three practices in particular demonstrably harm the open Internet: blocking, throttling, and paid prioritization. For the reasons described below, we find each of these practices is inherently unjust and unreasonable, in violation of section 201(b) of the Act, and that these practices threaten the virtuous cycle of innovation and investment that the Commission intends to protect under its obligation and authority to take steps to promote broadband deployment under section 706 of the 1996 Act. We accordingly adopt bright-line rules banning blocking, throttling, and paid prioritization by providers of both fixed and mobile broadband Internet access service.[243]

a. Preventing Blocking of Lawful Content, Applications, Services, and Non-harmful Devices

111. We continue to find, for the same reasons the Commission found in the *2010 Open Internet Order* and reiterated in the *2014 Open Internet NPRM*, that "the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness."[244] Because of broadband providers' incentives to block competitors' content, the need to protect a consumer's right to access lawful content, applications, services, and to use non-harmful

[242] Consumers and small entities generally expressed concern that these arrangements are harmful and should be prevented by the Commission. *See, e.g.*, Anita Barfield Comments at 1 ("Net neutrality is important to me because I do not want my ISP to be able to prioritize the content I see, [and] I am concerned about having my access to information blocked and other content prioritized."); David Galzerano Comments at 1 ("In ending net neutrality and allowing companies to purchase priority rights when it comes to data transmission, you would not only be eliminating choice and freedom of information for all - which was the pioneering spirit behind the founding of the Internet - you would be relegating ALL data from Independent and rural operators to a second-class state, as these operators would NEVER be able to purchase priority status for any of their data."); Derek Bass Comments at 1 ("Our long-term economy depends on the free, open access to the internet that we currently have. Allowing privileged corporations fast-track priority will impede innovation and stifle the free exchange of ideas needed to sustain our economy"); Doug Cottrill Comments at 1 ("Companies that are willing and able to pay more should NOT be able to get higher priority for their content, nor should information be slowed down or blocked because of different pricing structures controlled by telecommunications companies.").

[243] *See infra* Section III.C.1.

[244] *2014 Open Internet NPRM*, 29 FCC Rcd at 5593, para. 89; *2010 Open Internet Order*, 25 FCC Rcd at 17941-42, para. 62.

devices is as important today as it was when the Commission adopted the first no-blocking rule in 2010.[245]

112. In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should re-adopt the text of the vacated no-blocking rule.[246] The record overwhelmingly supports the notion of a no-blocking principle and re-adopting the text of the original rule.[247] Further, we note that many broadband providers still voluntarily continue to abide by the 2010 no-blocking rule, even though they have not been legally required to do so by a rule of general applicability since the *Verizon* decision.[248] After consideration of the record and guidance from the D.C. Circuit, we adopt the following no-blocking rule applicable to both fixed and mobile broadband providers of broadband Internet access service:

> *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.*

113. Similar to the 2010 no-blocking rule, the phrase "content, applications, and services" again refers to all traffic transmitted to or from end users of a broadband Internet access service, including

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[245] *See supra* Section III.B. *See also* Broadband Internet Technical Advisory Group, *Port Blocking* at 2 (2013) http://www.bitag.org/documents/Port-Blocking.pdf, ("Because Port blocking can affect how particular Internet applications function, its use has the potential to be anti-competitive, discriminatory, otherwise motivated by non-technical factors, or construed as such."); Body of European Regulators for Electronic Communications, *A View of Traffic Management and Other Practices Resulting in Restrictions to the Open Internet in Europe* at 8-9 (May 29, 2012), http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Traffic%20Management%20Investigation%20BEREC_2.pdf ("Among the restrictions related to specific types of traffic, the most frequently reported restrictions are the blocking and/or throttling of peer-to-peer (P2P) traffic, on both fixed and mobile networks, and the blocking of Voice over IP (VoIP) traffic, mostly on mobile networks."). *But see* WISPA Comments at 22 ("[T]here is no evidence that small businesses are blocking lawful content, applications, services or non-harmful devices, or that their existing network management practices are unreasonable. Small businesses have no business incentive to block content; their main objective is to provide rural Americans with full access to all lawful broadband content and at reasonable and very competitive costs.").

[246] *2014 Open Internet NPRM*, 29 FCC Rcd at 5593, para. 89.

[247] A broad cross-section of broadband providers, edge providers, public interest organizations, and individuals support this approach. *See, e.g.*, COMPTEL Reply at 4 (stating that "the record reflects broad agreement that the Commission should adopt a no-blocking rule"); IFTA Comments at 10 (supporting the re-adoption of a stand-alone no-blocking rule); Engine Advocacy Comments at 2 (supporting efforts to adopt "strict no-blocking and non-discrimination rules"); OTI Comments at 11 (noting that as the broadband market becomes more consolidated, "[t]here is therefore an even greater need for explicit protections against the blocking of lawful content online"); Cogent Comments at 13 ("an ISP blocking access to lawful Internet content is the antithesis of an open Internet"); Cox Comments at 5; MMTC Comments at 11; Letter from Barbara van Schewick to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191, 14-28, Attach. at 7 (filed Sept. 19, 2014) (van Schewick Sept. 19, 2014 *Ex Parte* Letter) (stating a rule to protect against blocking "is part of all network neutrality proposals; this is the one rule on which all network neutrality proponents agree"). *But see* TechFreedom Comments at 15-16 ("If [broadband providers] are truly nefarious . . . then public outcry by the affected subscribers should likely be sufficient to convince the ISP to change its practices.").

[248] *See, e.g.*, CenturyLink, *High Speed Internet Service Management*, http://www.centurylink.com/Pages/AboutUs/Legal/InternetServiceManagement/ (last visited Jan. 29, 2015) ("CenturyLink does not block, prioritize, or degrade any Internet sourced or destined traffic based on application, source, destination, protocol, or port unless it does so in connection with a security practice described in the security policy section below"); RCN, *FCC Network Management Disclosure*, http://www.rcn.com/images/pdfs/rcn-net-management-disclosure.pdf (last visited Jan. 29, 2015) ("We do not block any lawful content, applications, services, or your use of non-harmful devices."); Verizon, *Terms and Conditions Network Management Guide*, https://www.verizon.com/about/terms/networkmanagementguide/ (last visited Jan. 29, 2015) ("Verizon Online does not affirmatively manage congestion on the network through mechanisms such as real-time throttling, blocking, or dropping of specific end user traffic.").

traffic that may not fit clearly into any of these categories.[249] Further, the no-blocking rule adopted today again applies to transmissions of lawful content and does not prevent or restrict a broadband provider from refusing to transmit unlawful material, such as child pornography or copyright-infringing materials.[250] Today's no-blocking rule also entitles end users to connect, access, and use any lawful device of their choice, provided that the device does not harm the network.[251] The no-blocking rule prohibits network practices that block a specific application or service, or any particular class of applications or services, unless it is found to be reasonable network management. Finally, as with the 2010 no-blocking rule, today's no-blocking rule prohibits broadband providers from charging edge providers a fee to avoid having the edge providers' content, service, or application blocked from reaching the broadband provider's end-user customer.[252]

114. *Rejection of the Minimum Level of Access Standard.* The *2014 Open Internet NPRM* proposed that the no-blocking rule would prohibit broadband providers from depriving edge providers of a minimum level of access to the broadband provider's subscribers and sought comment on how to define that minimum level of service.[253] After consideration of the record, we reject the minimum level of access standard. Broadband providers, edge providers, public interest organizations, and other parties note the practical and technical difficulties associated with setting any such minimum level of access.[254] For example, some parties note the uncertainty created by an indefinite standard.[255] Other parties observe that in creating any such standard of service for no-blocking, the Commission risks jeopardizing innovation.[256] We agree with these arguments and many others in the record expressing concern with the proposed minimum level of access standard.

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[249] *2010 Open Internet Order*, 25 FCC Rcd at 17942, para. 64.

[250] *See id*. Similar to the 2010 no-blocking rule, this obligation does not impose any independent legal obligation on broadband providers to be the arbiter of what is lawful. *Id.* at n.201.

[251] *Id.* at 17942-43, para. 65 & n.202 (noting that a "broadband provider may require that devices conform to widely accepted and publicly-available standards applicable to its services" and that this rule is not intended to alter existing rules giving end users the right to attach devices to an MVPD system).

[252] *Id.* at 17943-44, para. 67; *see also id.* at 17919-20, paras. 25, 26. We note that during oral argument in the *Verizon* case, Verizon told the court that "in paragraph 64 of the Order the Agency also sets forth the no charging of edge providers rule as a corollary to the no blocking rule, and that's a large part of what is causing us our harm here." In response, Judge Silberman stated, "if you were allowed to charge, which are you assuming you're allowed to charge because of the anti-common carrier point of view, if somebody refused to pay then just like in the dispute between C[B]S and Warner, Time Warner . . . you could refuse to carry." Verizon's counsel responded: "[r]ight." Verizon Oral Arg. Tr. at 28.

[253] *2014 Open Internet NPRM*, 29 FCC Rcd at 5596-98, paras. 97-104.

[254] *See, e.g.*, Mozilla Comments at 15 (warning that defining a no-blocking rule in terms of establishing a minimum level of service is not likely "to prove effective and workable in practice"); USTelecom Comments at 50 ("the Commission should not impose a minimum level of service for free obligation"); Letter from Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, 10-127, Attach. at 14 (filed Oct. 14, 2014) (Sandoval *Ex Parte* Letter) ("[A]ny of the minimum level of access standards the FCC proposes would be insufficient to support the needs of a diversity of Internet users including Critical Infrastructure.").

[255] *See, e.g.*, Microsoft Comments at 19 ("[A] clear no blocking rule—rather than some vague, loosely defined standard for measuring a prescribed 'minimum level of service'—is critical to maintaining a vibrant and open Internet."); National Public Radio, Inc. (NPR) Comments at 9 ("Given the rapid evolution of technology, defining a 'minimum level of service' by regulatory fiat would likely become an ongoing undertaking rife with disputes, invariably resulting in repeated judicial intervention.").

[256] Information Technology & Innovation Foundation (ITIF) Comments at 22 (stating that the Commission "does not need to define and enforce a 'minimum level of service'" because it "would be a difficult exercise and may well stifle beneficial practices" such as the use of "latency-insensitive 'scavenger class' of traffic"); IL and NY

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115. The no-blocking rule we adopt today prohibits broadband providers from blocking access to lawful Internet content, applications, services, and non-harmful devices.[257] We believe that this approach will allow broadband providers to honor their service commitments to their subscribers without relying upon the concept of a specified level of service to those subscribers or edge providers under the no-blocking rule. We further believe that the separate no-throttling rule discussed below provides appropriate protections against harmful conduct that degrades traffic but does not constitute outright blocking.[258]

116. *Application of the No-Blocking Rule to Mobile.* In 2010, the Commission limited the no-blocking rule for mobile to lawful websites and applications that competed with a provider's voice or video telephony services, subject to reasonable network management.[259] The *2014 Open Internet NPRM*, citing "the operational constraints that affect mobile broadband services, the rapidly evolving nature of the mobile broadband technologies, and the generally greater amount of consumer choice for mobile broadband services than for fixed,"[260] proposed to retain the 2010 no-blocking rule. The Commission sought comment on this proposal.[261]

117. For the reasons set forth above,[262] including consumer expectations, the Commission's experience with open Internet regulations in the 700 MHz C Block, and the advances in the mobile broadband industry since 2010, we conclude instead that the same no-blocking rule should apply to both fixed and mobile broadband Internet access services.[263] Accordingly, as with fixed service, a consumer's mobile broadband provider cannot block a consumer from accessing lawful content, applications, services, or non-harmful devices, regardless of whether the content, applications, services, or devices[264] compete with a provider's own offerings, subject to reasonable network management.

118. All national mobile broadband providers, among others, opposed the application of the broader no-blocking rule to mobile broadband, arguing, for example, that mobile broadband providers

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Comments at 9 ("A 'minimum level of access' necessarily implies that a higher or preferential level of service will become available, creating the very two-tiers of service that the Proposed Rules are intended to prevent.").

[257] *2014 Open Internet NPRM*, 29 FCC Rcd at 5597, para. 101 (asking if the Commission should "define the minimum level of access from the perspective of end users, edge providers, or both").

[258] *See infra* Section III.C.1.b; Access Comments at 6 (drawing a distinction between outright blocking and slowing or throttling end-user access to certain content, services, or applications).

[259] *2010 Open Internet Order*, 25 FCC Rcd at 17956-57, 17959-60, paras. 94-95, 99.

[260] *2014 Open Internet NPRM*, 29 FCC Rcd at 5594, para. 91.

[261] *Id.* at 5598, para. 105.

[262] *See supra* Section III.B.3.

[263] *See* American Association of Law Libraries (AALL) Comments at 3; ADT Comments at 9; NMR Comments at 30; Voices for Internet Freedom Comments at 6; EFF Comments at 24 ("Mobile device owners should enjoy the same levels of control and choice for networked applications on their mobile devices as they do on their laptops and desktops."); Higher Education and Libraries Comments at 18-19; OTI Comments at 62; Sandvine Comments at 9 (arguing that reasonable network management permits mobile operators to treat traffic differently than fixed networks do); i2Coalition Comments at 41; TIA Comments at 20-21; *but see* AT&T Comments at 19; Cisco Comments at 22; CTIA Comments at 17 (citing capacity constraints); Mobile Future Reply at 2-3; Verizon Comments at 43-44; Sprint Reply at 23; T-Mobile Comments at 11.

[264] In evaluating the reasonable network management exception to the no-blocking rule, the Commission will drawing upon its experience with the no-blocking rule in the 700 MHz C Block. *See 700 MHz Second Report and Order*, 22 FCC Rcd at 15370-72, paras. 222-26; *see also Verizon Wireless to Pay $1.25 Million to Settle Investigation into Blocking of Consumers' Access to Certain Mobile Broadband Applications*, News Release, July 31, 2012, http://www.fcc.gov/document/verizon-wireless-pay-125-million-settle-investigation (regarding tethering applications for C Block network customers).

need the ability to block unwanted traffic[265] and spam.[266] They also argue that the particular challenges of managing a mobile broadband network, for example the unknown effects of apps,[267] require additional flexibility to block traffic.[268] As discussed below,[269] we recognize that additional flexibility may be required in mobile network management practices, but find that the reasonable network management exception we adopt today allows sufficient flexibility: the blocking of harmful or unwanted traffic remains a legitimate network management purpose, and is permissible when pursued through reasonable network management practices.

b. Preventing Throttling of Lawful Content, Applications, Services, and Non-harmful Devices

119. In the *2014 Open Internet NPRM*, the Commission proposed that degradation of lawful content or services below a specified level of service would violate a no-blocking rule.[270] While certain broadband Internet access provider conduct may result in degradation of an end user's Internet experience that is tantamount to blocking, we believe that this conduct requires delineation in an explicit rule rather than through commentary as part of the no-blocking rule.[271] Thus, we adopt a separate no-throttling rule applicable to both fixed and mobile providers of broadband Internet access service:

> *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.*

120. With the no-throttling rule, we ban conduct that is not outright blocking, but inhibits the delivery of particular content, applications, or services, or particular classes of content, applications, or services.[272] Likewise, we prohibit conduct that impairs or degrades lawful traffic to a non-harmful device or class of devices. We interpret this prohibition to include, for example, any conduct by a broadband Internet access service provider that impairs, degrades, slows down, or renders effectively unusable

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[265] AT&T Reply at 34-35; Sprint Reply at 22-23; T-Mobile Comments at 11, 13 (arguing that "[w]ireless broadband providers need flexibility to address network security and reliability risks, as well as other threats to public safety and the consumer experience"); Verizon Comments at 43-44;CTIA Comments at 17-18.

[266] *See, e.g.*, Verizon Comments at 4; Interisle Consulting Group Comments 27 ("[I]f blocking were banned, then spammers would be able to dramatically increase the volume of traffic they send. Other security problems could also be worsened.").

[267] *See, e.g.*, Verizon Comments at 44 ("The *Open Internet Order* appropriately recognized that the download and use of a mobile application presents unique network management issues.").

[268] *See* CTIA Comments at 27-28.

[269] *See infra* Section III.D.4.

[270] *2014 Open Internet NPRM*, 29 FCC Rcd at 5593, para. 89 ("So long as broadband providers do not degrade lawful content or service to below a minimum level of access, they would not run afoul of the proposed rule.").

[271] *See, e.g.*, Letter from the Honorable Henry A. Waxman to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, (filed Oct. 3, 2014) (Waxman Oct. 3, 2014 *Ex Parte* Letter) (proposing separate no blocking and no-throttling rules); WGAW Comments at 22 (noting that throttling may in some cases constitute a "more subtle practice[] that achieve[s] the goal of blocking"); Mozilla Reply at 3 ("There is general agreement that these rules should include a rule that prevents access network operators from blocking ordinary, lawful traffic, and some form of a nondiscrimination rule on limiting, throttling, or prioritizing traffic.").

[272] *See, e.g.*, Letter from Barbara van Schewick, Professor of Law and (by courtesy) Electrical Engineering, Stanford Law School, *et al*., to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 Attach. at 4 (filed Feb. 18, 2015) (van Schewick Feb. 18, 2015 *Ex Parte* Letter) ("[T]he no-throttling rule should explicitly ban discrimination against applications AND classes of applications (so-called 'application-specific' discrimination).").

particular content, services, applications, or devices, that is not reasonable network management.[273] For purposes of this rule, the meaning of "content, applications, and services" has the same as the meaning given to this phrase in the no-blocking rule.[274] Like the no-blocking rule, broadband providers may not impose a fee on edge providers to avoid having the edge providers' content, service, or application throttled.[275] Further, transfers of unlawful content or unlawful transfers of content are not protected by the no-throttling rule.[276] We will consider potential violations of the no-throttling rule under the enforcement provisions outlined below.

121. We find that a prohibition on throttling is as necessary as a rule prohibiting blocking. Without an equally strong no-throttling rule, parties note that the no-blocking rule will not be as effective because broadband providers might otherwise engage in conduct that harms the open Internet but falls short of outright blocking. For example, the record notes the existence of numerous practices that broadband providers can engage in to degrade an end user's experience.[277]

122. Because our no-throttling rule addresses instances in which a broadband provider targets particular content, applications, services, or non-harmful devices, it does not address a practice of slowing down an end user's connection to the Internet based on a choice made by the end user. For instance, a broadband provider may offer a data plan in which a subscriber receives a set amount of data at one speed tier and any remaining data at a lower tier.[278] If the Commission were concerned about the particulars of a data plan, it could review it under the no-unreasonable interference/disadvantage standard.[279] In contrast, if a broadband provider degraded the delivery of a particular application (e.g., a disfavored VoIP service) or class of application (e.g., all VoIP applications), it would violate the bright-line no-throttling rule. We note that user-selected data plans with reduced speeds must comply with our transparency rule, such that the limitations of the plan are clearly and accurately communicated to the subscriber.

123. The no-throttling rule also addresses conduct that impairs or degrades content, applications, or services that might compete with a broadband provider's affiliated content. For example, if a broadband provider and an unaffiliated entity both offered over-the-top applications, the no-throttling rule would prohibit broadband providers from constraining bandwidth for the competing over-the-top offering to prevent it from reaching the broadband provider's end user in the same manner as the affiliated application.[280]

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[273] *See infra* Section III.D.3; *see also* Waxman Oct. 3, 2014 *Ex Parte* Letter at 10, n.32 ("The term 'throttling' is not limited to the technique of slowing down or delaying Internet packets, but more broadly refers to methods that can be used to differentiate, or 'shape' Internet traffic.").

[274] *See supra* Section III.C.1.a.

[275] *See supra* para. 113.

[276] *Id.*; *see also 2010 Open Internet Order*, 25 FCC Rcd at 17943-44, para. 67; *see also id.* at 17919-20, paras. 25, 26.

[277] *See, e.g.*, Cogent Comments at 17 ("There are numerous practices a last-mile broadband ISP can undertake short of outright blocking an edge provider that can degrade an end user's experience with—and thus likelihood to seek out in the future—services offered by a particular edge provider."); NARUC Comments at 6 ("[L]imiting, or otherwise degrading broadband access for users . . . is an unfair practice that 'may reduce the Internet's value to consumers.'"); *see also supra* Section III.B.

[278] *See, e.g.*, T-Mobile, *Simple Choice Plan*, http://www.t-mobile.com/cell-phone-plans/individual.html (last visited Feb. 5, 2015) (offering 1GB, 3GB, and 5GB plans with lower data speeds after the threshold is reached).

[279] *See infra* Sections III.C.2; III.D.4.

[280] Vimeo Comments at 11 (citing a 2011 study noting that "A rebuffering rate of 1% (i.e., a video pauses for 1 out of every 100 seconds) results in 5% less video watched overall. There is a '2-second rule' for video watching: People are willing to wait 2 seconds for a video to load, but the rate of abandonment increases significantly thereafter if the video doesn't load. Viewer patience is influenced by the expectation of speed from the viewing

(continued….)

124. As in the *2010 Open Internet Order*, we continue to recognize that in order to optimize the end-user experience, broadband providers must be permitted to engage in reasonable network management practices. We emphasize, however, that to be eligible for consideration under the reasonable network management exception, a network management practice that would otherwise violate the no-throttling rule must be used reasonably and primarily for network management purposes, and not for business purposes.[281]

c. No Paid Prioritization

125. In the *2014 Open Internet NPRM*, the Commission sought comment on suggestions to impose a flat ban on paid prioritization services, including whether all paid prioritization practices, or some of them, could be treated as *per se* violations of the commercially-reasonable standard or any other standard based on any source of legal authority.[282] For reasons explained below, we conclude that paid prioritization network practices harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment and, as such, adopt a bright-line rule against such practices. Accordingly, today we ban arrangements in which the broadband service provider accepts consideration (monetary or otherwise) from a third party to manage the network in a manner that benefits particular content, applications, services, or devices. We also ban arrangements where a provider manages its network in a manner that favors the content, applications, services or devices of an affiliated entity.[283] Any broadband provider that engages in such practices will be subject to enforcement action, including forfeitures and other penalties.[284] We adopt the following rule banning paid prioritization arrangements:

> *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.*
>
> *"Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.*

126. The paid prioritization ban we adopt today is based on the record that has developed in this proceeding. The record is rife with commenter concerns regarding preferential treatment arrangements, with many advocating a flat ban on paid prioritization.[285] Commenters assert that permitting paid prioritization will result in the bifurcating of the Internet into a "fast" lane for those

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platform and the perceived value of the content. Bad viewing experiences lead not just to abandonment of a particular video, but also to a lower rate of watching other videos."); Golden Frog Comments at 5-6 (discussing allegations of anti-competitive behavior by broadband service providers, including those involving blocking and throttling).

[281] *See infra* Section III.D.3. While not within the definition of "throttling" for purposes of our no-throttling rule, the slowing of subscribers' content on an application agnostic basis, including as an element of subscribers' purchased service plans, will be evaluated under the transparency rule and the no-unreasonable interference/disadvantage standard.

[282] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5609, para. 138.

[283] We consider arrangements of this kind to be paid prioritization, even when there is no exchange of payment or other consideration between the broadband Internet access service provider and the affiliated entity.

[284] Other forms of traffic prioritization, including practices that serve a public safety purpose, may be acceptable under our rules as reasonable network management. *See infra* Section III.D.3.

[285] *See, e.g.*, Internet Association Comments at 16; Y Combinator Comments at 3; Reddit Comments at 11; Ben Holt Comments at 1; Consumers Union Comments at 5; AALL Comments at 3; AAPD Comments at 4.

willing and able to pay and a "slow" lane for everyone else.[286] As several commenters observe, allowing for the purchase of priority treatment can lead to degraded performance—in the form of higher latency, increased risk of packet loss, or, in aggregate, lower bandwidth—for traffic that is not covered by such an arrangement.[287] Commenters further argue that paid prioritization will introduce artificial barriers to entry, distort the market, harm competition,[288] harm consumers,[289] discourage innovation,[290] undermine

[286] *See, e.g.*, Higher Education and Libraries Comments at 12 ("Many institutions that serve the public interest, such as libraries, colleges and universities, may not be able to afford to pay extra fees simply for the transmission of their content and could find their Internet traffic relegated to chokepoints."); Rural Broadband Policy Group Comments at 9 ("Allowing Internet service providers to sell fast lanes to those who can afford them would permit the redlining of rural towns and customers who cannot pay for the fast lanes."); Vimeo Comments at 9-10 (stating that "[i]f broadband providers can make marginal revenue from priority access fees, they will have little incentive to maintain a high-quality 'standard lane' experience for edge providers unwilling or unable to pay"); Public Knowledge Comments at 37 ("Because the fast lane will produce premium revenue for ISPs, ISPs have every incentive to construct a slow lane that performs poorly enough to justify extra payments from those edge services who can afford to do so."); Engine Advocacy Reply at 5 ("[P]aid prioritization schemes, once implemented, will result in Internet fast lanes for well-heeled incumbents, relegating startups and the economic growth they create to the slow lane.").

[287] *See* Mozilla Comments at 20 ("Prioritization is inherently a zero-sum practice, and inherently creates fast and slow lanes and prevents a level playing field."); Mozilla Reply at 15; Sandvine Comments at 9 ("At a moment in time, there is a fixed amount of bandwidth available to all applications, content, etc. on a given network. If one application has paid for more of that bandwidth (and this is how the priority is achieved) then there is less 'best efforts' bandwidth remaining for all other applications and content."). *But see* ADTRAN Reply at ii, 6, 16 (arguing that the zero-sum game theory is incorrect because it ignores the fact that broadband providers' capacity is not static); Letter from Justin (Gus) Hurwitz, Assistant Professor, University of Nebraska College of Law, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Nov. 3, 2014) (asserting that prioritization is not "zero sum").

[288] *See, e.g.*, Ad Hoc Comments at 19-20; Mozilla Reply at 16 (arguing that paid prioritization creates perverse incentives because "underinvestment in infrastructure is more appealing if the result is increased sales of a prioritized offering balancing out any loss in direct subscribers"); CDT Comments at 6 ("By degrading some traffic or prioritizing other traffic, broadband providers could effectively play favorites in the online marketplace, distorting competition among online content and applications."); Letter from Edyael Casaperalta, Rural Broadband Policy Group Coordinator, National Rural Assembly, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127, at 3 (filed Oct. 20, 2014) (expressing concern that permitting paid prioritization and a "fast lane" will place rural companies at a competitive disadvantage); Letter from Austin C. Schlick, Director, Communications Law, Google, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Nov. 5, 2014) (asserting that paid prioritization "could create incentives for providers to maintain scarcity and congestion on their networks, in order to sell services that avoid these artificial conditions"); Vonage Reply at 5-6.

[289] *See, e.g.*, CCIA Reply at 17-18 (asserting that paid prioritization will harm consumers because these fees will be passed through to consumers); COMPTEL Comments at 10; Higher Education and Libraries Comments at 12 (asserting that "it is likely that those who *are* able to pay for preferential treatment will pass along their costs to their consumers and/or subscribers. In some cases, libraries and other public institutions may be among these subscribers who would then be forced to pay more for services they may broker on behalf of their patrons"); Internet Association Comments at 17; AOL Comments at 6-7; Free Press Comments at 25; Vermont Reply at 8; Letter from Erin P. Fitzgerald, Rural Wireless Association to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Nov. 14, 2014) (noting that "widespread paid prioritization arrangements could further adversely impact competition and harm consumers"). *But see* Hance Haney Comments at 9 ("Scholars have observed that as states have reduced in-state long-distance access fees, 'the market induces carriers to pass-through most of the reduction in access rates.' There appears to be no reason to believe that a similar dynamic wouldn't occur in the context of a two-sided broadband market.").

[290] *See, e.g.*, Internet Association Comments at 17; Engine Advocacy Comments at 5 (explaining that if a startup's site does not load as quickly or its application is not as reliable, it will be harmed because "[u]sers will switch to competitors whose services receive better treatment, [u]sers will spend less money on e-commerce sites or view fewer pages on sites that garner advertising revenue through the number of page-views, and chill initial capital investment"); Linear Air Reply at 3-4; National Venture Capital Association Comments at 2.

public safety and universal service,[291] and harm free expression.[292] Vimeo, for instance, argues that paid prioritization "would disadvantage user-generated video and independent filmmakers" that lack the resources of major film studios to pay priority rates for dissemination of content.[293] Engine Advocacy meanwhile asserts that "[s]ome unfunded early startups may not be able to afford [to pay for priority treatment] (particularly if the product would be data-intensive) and will not start a company," resulting in "reduce[d] entrepreneurship."[294] Commenters assert that if paid prioritization became widespread, it would make reliance on consumers' ordinary, non-prioritized access to the Internet an increasingly unattractive and competitively nonviable option.[295] The Commission's conclusion is supported by a well-established body of economic literature,[296] including Commission staff working papers.[297]

127. It is well-established that broadband providers have both the incentive and ability to engage in paid prioritization.[298] In its *Verizon* opinion, the D.C. Circuit noted that providers "have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users."[299] Indeed, at oral argument Verizon's counsel

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[291] *See, e.g.*, Sandoval *Ex Parte* Letter at 2 (asserting that paid prioritization undermines public safety and universal service, and increases barriers to adopting Internet-based applications such as Internet-enabled demand response communications electric and gas utilities use to prevent power blackouts, forestall the need to build fossil-fueled power plants, promote environmental sustainability, and manage energy resources).

[292] *See, e.g.*, Illinois and NY Comments at 6 (asserting that "[i]f broadband providers can discriminate among content, they can effectively pick winners and losers, interfering with the public's ability to freely educate itself about political, cultural, and social issues – education that is critical to our democracy"); Ad Hoc Comments at 20 (asserting that paid prioritization would distort consumers' choices among content and edge providers); Church World Service *et al.* Reply at 1; Independent Filmmaker Organizations Reply at 3-6; City of Los Angeles Comments at 5.

[293] Vimeo Comments at 12 (capitalization omitted).

[294] Engine Advocacy Comments at 7.

[295] *See, e.g.*, CDT Comments at 18; Reddit Comments at 7; Y Combinator Comments at 2-3; Tumblr Reply at 8 ("[E]ven if a 'slow' lane remains reasonably fast, marginal differences in upload and streaming speeds moving forward would deter people from using slower services, and severely punish companies that cannot pay for prime access."); Vimeo Comments at 11 ("[M]erely having a 'fast-lane' for paid traffic will alter consumers' perception of the standard for speed, [because w]hen consumers become accustomed to receiving video at a certain delivery rate, that rate will become the *de facto* standard and everything else will be perceived as substandard. Consumers are unlikely to know (or care) about why a particular video takes two seconds to load or is constantly rebuffering, and will abandon those edge providers that they perceive as providing a slower and thus less enjoyable experience."); Kickstarter Comments at 3-4 ("Users will not accept slow load times and choppy videos.").

[296] The access provided by the core network is an intermediate input into the myriad of final products produced by edge providers. While it is granted that for a firm selling final goods, price discrimination can be both profitable and enhance welfare, it has been argued that the reverse is also true when intermediate goods are considered. *See* Michael L. Katz, *Price Discrimination and Monopolistic Competition* , 52 Econometrica 1453, 1453-71 (1984); Michael L. Katz, *Non-Uniform Pricing, Output and Welfare under Monopoly*, 50 Rev. of Economic Studies 37, 37-56 (1983); Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 American Economic Rev. 154, 154-167 (1987); and Yoshihiro Yoshida*, Third Degree Price Discrimination in Input Markets: Output and Welfare*, 90 American Economic Rev. 240, 240-246 (2000).

[297] Gerald W. Brock, *Telephone Pricing to Promote Universal Service and Economic Freedom*, OPP Working Paper Series No. 18 (1986); Jay M. Atkinson and Christopher C. Barnekov, *A Competitively Neutral Approach to Network Interconnection*, OPP Working Paper Series, No. 34 (2000).

[298] *See supra* Section III.B.2.a.

[299] *Verizon*, 740 F.3d at 645-46 (holding that the Commission has adequately supported and explained its conclusions that absent open Internet protections, broadband providers "represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment").

announced that "but for [the *2010 Open Internet Order*] rules we would be exploring [such] commercial arrangements."[300] While we appreciate that several broadband providers have claimed that they do not engage in paid prioritization[301] or that they have no plans to do so,[302] such statements do not have the force of a legal rule that prevents them from doing so in the future. The future openness of the Internet should not turn on the decision of a particular company. We are concerned that if paid prioritization practices were to become widespread, the damage to Internet openness could be difficult to reverse. We agree that "[u]nraveling a web of discriminatory deals after significant investments have been made, business plans have been built, and technologies have been deployed would be a complicated undertaking both logistically and politically."[303] Further, documenting the harms could prove challenging, as it is impossible to identify small businesses and new applications that are stifled before they become commercially viable.[304] Prioritizing some traffic over others based on payment or other consideration from an edge provider could fundamentally alter the Internet as a whole by creating artificial motivations and constraints on its use, damaging the web of relationships and interactions that define the value of the Internet for both end users and edge providers, and posing a risk of harm to consumers, competition, and innovation.[305] Thus, because of the very real concerns about the chilling effects that preferential treatment arrangements could have on the virtuous cycle of innovation, consumer demand, and investment, we adopt a bright-line rule banning paid prioritization arrangements.[306]

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[300] *Verizon* Oral Arg. Tr. at 31 ("I'm authorized to state by my client [Verizon] today that but for these rules we would be exploring those commercial arrangements, but this order prohibits those, and in fact would shrink the types of services that will be available on the Internet.").

[301] *See, e.g.*, AT&T Comments at 30-31; Verizon Comments at 37; Sandvine Comments at 3 ("[T]o the best of our knowledge, none of the innovative service plans that Sandvine has helped implement across our customer base have involved payments between operators and edge providers for traffic priority—so-called Pay for Priority."); Letter from Randal S. Milch, Executive Vice President, Public Policy and General Counsel, Verizon, to Chairman Patrick J. Leahy, Committee on the Judiciary, U.S. Senate (Oct. 29, 2014) (Verizon Letter to Leahy). Further, these broadband providers argue that they have no incentive to engage in paid prioritization arrangements, as their own business plans depend upon an open Internet. *See, e.g.*, Verizon Comments at 5-10; Comcast Comments at 5-6; AT&T Comments at 21; Cox Comments at i; TWC Comments at 2; Charter Comments at 9; Cequel Reply at 3 (explaining that it "could not block an edge-based content provider without diminishing the value of its Internet service and losing customers to the formidable competitors it faces").

[302] For example, we note that in Verizon's letter to Chairman Leahy, the company states "[a]s we have said before, and affirm again here, Verizon has no plans to engage in paid prioritization of Internet traffic." Verizon Letter to Leahy at 1. However, in contrast to this statement, at oral argument in the *Verizon* case, counsel for Verizon explained that the company would pursue such arrangements if not for the 2010 Open Internet rules which prevented them. *See supra* note 300.

[303] CDT Comments at 5.

[304] *See, e.g.*, CDT Comments at 5; Etsy Comments at 8 ("[Under the proposed rules] many new startups that would have been founded will die in their infancy or never be created. How do you account for all the innovations that would never come to market because of these new rules?"); Reddit Comments at 9-10 ("If the Chairman's proposal had been law in 2005, reddit might not have gotten off the ground."); CodeCombat Comments at 5-7; Heyzap Comments at 2-3.

[305] *See, e.g.*, ACLU Comments at 7 ("Were paid prioritization or other differential treatment permitted, edge providers with a first mover advantage would be able to entrench their market position *on the edge*, and then to pass along any overcharge imposed by broadband providers to consumers in their fees. The big content, application or device providers would be able to afford greater, faster or better access to broadband consumers while newer competitors would be put at an ever-growing disadvantage.").

[306] Some commenters argue that consumer disclosures about such practices are sufficient. *See, e.g.*, Bright House Comments at 29. However, the average consumer does not have the time or specialized knowledge to sort through the implications, and regardless, in many areas of the country, consumers simply do not have multiple, equivalent

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128. In arguing against such a ban, ADTRAN asserts that it would "cement the advantages enjoyed by the largest edge providers that presently obtain the functional equivalent of priority access by constructing their own extensive networks that interconnect directly with the ISPs."[307] We reject this argument. CDT correctly observes that "[e]stablished entities with substantial resources will always have a variety of advantages" over less established ones,[308] notwithstanding any rules we adopt. We do not seek to disrupt the legitimate benefits that may accrue to edge providers that have invested in enhancing the delivery of their services to end users. On the contrary, such investments may contribute to the virtuous cycle by stimulating further competition and innovation among edge providers, to the ultimate benefit of consumers. We also clarify that the ban on paid prioritization does not restrict the ability of a broadband provider and CDN to interconnect.[309]

129. We find that a flat ban on paid prioritization has advantages over alternative approaches identified in the record.[310] Prohibiting this practice outright will help to foster broadband network investment by setting clear boundaries of acceptable and unacceptable behavior. It will also protect consumers against a harmful practice that may be difficult to understand, even if disclosed. In addition, this approach relieves small edge providers, innovators, and consumers of the burden of detecting and challenging instances of harmful paid prioritization.[311] Given the potential harms to the virtuous cycle,

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choices. *See* Illinois and NY Comments at 11-12. Further, as discussed above, switching costs can be a substantial deterrent. *See supra* Section III.B.2.

[307] ADTRAN Reply at 18.

[308] CDT Comments at 5; *see also* Intel Reply at 10 ("Absent persuasive evidence of anti-competitive conduct, companies that are disadvantaged by such innovation deserve no special assistance or protection. To do otherwise would frustrate competition and innovation, harming American consumers and business.").

[309] Letter from Scott Blake Harris, Counsel to Akamai, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Feb. 9, 2015) (requesting that "the final Open Internet Order should expressly state that CDN services do not constitute 'prioritization' as that term has been used in this proceeding").

[310] For example, AOL proposes to permit individual negotiations for priority services, but would prohibit them where the broadband provider is affiliated with an upstream edge provider; has market power; and also charges end users (i.e., no double-charging). AOL Comments at 5-8. AT&T proposes, as one option for addressing paid prioritization, the imposition of "additional transparency, no-blocking, and nondiscrimination rules on fixed broadband Internet access providers that do not agree voluntarily to refrain from entering into paid prioritization arrangements." AT&T Comments at 37-38; *see also* American Cable Association (ACA) Reply at 18 (stating that AT&T's proposal "appears to offer both adequate protections to edge providers and end users, while giving broadband ISPs the needed flexibility to manage their networks and create innovative service offerings"). Comcast proposes a rebuttable presumption against "paid prioritization" arrangements that would entirely preclude "exclusive arrangements and arrangements that prioritize a broadband provider's own affiliated Internet content vis-à-vis unaffiliated content" and place a heavy burden on the broadband provider to justify any other "paid prioritization" arrangement. Comcast Comments at 24.

[311] *See, e.g.*, eBay Comments at 4-5; CCIA Comments 31-32; CCIA Reply at 15-16 (expressing concern that the commercially reasonable standard will necessarily increase the costs of seeking relief from unlawful conduct, and will thus contravene the Commission's stated goal of providing meaningful enforcement measures to small businesses); Kickstarter Comments at 3 ("We would have no real recourse if we were offered an unfair price. Using our small legal team or hiring outside counsel to prove that an offered deal was 'commercially unreasonable' . . . would take far too long and cost far too much to be a feasible option."); CCIA Reply at 13-14 ("Putting the onus on edge providers, most of whom lack regulatory and legal experience anywhere comparable to that of [broadband providers], to show anticompetitive conduct through individual administrative proceedings will almost certainly lead to a situation where edge providers (particularly startups and smaller companies) cannot avail themselves of the protections provided in this rulemaking."); Netflix Comments at 10 ("Weighing the cost of an administrative proceeding and the uncertainty of success, many edge providers likely will choose to forego engagement with the Commission."); Y Combinator Comments at 3 ("No startup has the funds and lawyers and economists to take on billion-dollar ISPs in an FCC action based on the vague legal standards in the proposal. Indeed, the startup ecosystem needs a bright-line, per se rule against discrimination."); Free Press Comments at 136 ("This regime
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we believe it is more appropriate to impose an *ex ante* ban on such practices, while entertaining waiver requests under exceptional circumstances.

130. Under our longstanding waiver rule, the Commission may waive any rule "in whole or in part, for good cause shown."[312] General waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[313] In some cases, however, the Commission adopts specific rules concerning the factors that will be used to examine a waiver or exemption request.[314] We believe that such guidance is appropriate here to make clear the very limited circumstances in which the Commission would be willing to allow paid prioritization. Accordingly, we adopt a rule concerning waiver of the paid prioritization ban that establishes a balancing test, as follows:

> *The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.*

131. In support of any waiver request, the applicant therefore must make two related showings. First, the applicant must demonstrate that the practice will have some significant public interest benefit, such as providing evidence that the practice furthers competition, innovation, consumer demand, or investment. Second, the applicant must demonstrate that the practice does not harm the nature of the open Internet, including, but not limited to, providing evidence that the practice:

- does not materially degrade or threaten to materially degrade the broadband Internet access service of the general public;
- does not hinder consumer choice;
- does not impair competition, innovation, consumer demand, or investment; and
- does not impede any forms of expressions, types of service, or points of view.

132. An applicant seeking waiver relief under this rule faces a high bar. We anticipate granting such relief only in exceptional cases.[315]

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would shift the burden to prove such practices commercially unreasonable onto Internet users and edge providers who can least afford to bear that burden."); MobileWorks Reply at 6.

[312] 47 C.F.R. § 1.3.

[313] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[314] *See, e.g.*, 47 C.F.R. § 79.1(f) ("Procedures for exemptions [from closed captioning requirements] based on economically burdensome standard.").

[315] For instance, several commenters argue that paid prioritization arrangements could improve the provision of telemedicine services. *See, e.g.*, California Telehealth Network (CTN) Reply at 7, 9 (explaining that as full motion synchronous video conferencing becomes more necessary for digital diagnosis and treatment, as required by many telehealth services, the total bandwidth consumption in the Internet ecosystem for telehealth will grow, encouraging investment and deployment); AALL Comments at 2 ("Health sciences libraries also provide Internet access to images that support telemedicine, particularly in remote areas where Internet service can be disproportional or uneven and to reach the underserved."); MMTC Comments at 11 (arguing that the Commission should employ a "rebuttable presumption against paid prioritization . . . while ensuring that such presumption can be overcome by business models that sufficiently protect consumers and have the potential to benefit consumer welfare," such as telemedicine applications). We note that telemedicine services might alternatively be structured as "non-BIAS data services," which are beyond the reach of the open Internet rules. *See infra* Section III.D.3.

2. No Unreasonable Interference or Unreasonable Disadvantage Standard for Internet Conduct

133. In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should adopt a rule requiring broadband providers to use "commercially reasonable" practices in the provision of broadband Internet access service, and sought comment on this approach.[316] The Commission also sought comment on whether there were alternative legal standards that the Commission should consider,[317] or whether it should adopt a rule that prohibits unreasonable discrimination and, if so, what legal authority and theories it should rely upon to do so.[318] In addition, the Commission sought comment on how it can ensure that the rule it adopts sufficiently protects against harms to the open Internet, including broadband providers' incentives to disadvantage edge providers or classes of edge providers in ways that would harm Internet openness.[319]

134. The Commission sought comment on what factors it should adopt to ensure commercially reasonable practices that will protect and promote Internet openness, and tentatively concluded that a review of the totality of the circumstances should be preserved to ensure that rules can be applied evenly and fairly in response to changing circumstances.[320] The Commission also recognized that there have been significant changes in the mobile marketplace since 2010, and sought comment on whether and, if so, how these changes should affect the Commission's treatment of mobile services under the rules.[321]

135. *Preventing Unreasonable Interference or Unreasonable Disadvantage that Harms Consumers and Edge Providers.* The three bright-line rules that we adopt today prohibit specific conduct that harms the open Internet. The open nature of the Internet has allowed new products and services to flourish and has broken down geographic barriers to communication, allowing information to flow freely. We believe the rules we adopt today will alleviate many of the concerns identified in the record regarding broadband provider practices that could upset these positive outcomes. However, while these three bright-line rules comprise a critical cornerstone in protecting and promoting the open Internet, we believe that there may exist other current or future practices that cause the type of harms our rules are intended to address. For that reason, we adopt a rule setting forth a no-unreasonable interference/disadvantage standard, under which the Commission can prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet.

136. It is critical that access to a robust, open Internet remains a core feature of the communications landscape, but also that there remains leeway for experimentation with innovative offerings. Based on our findings that broadband providers have the incentive and ability to discriminate in their handling of network traffic in ways that can harm the virtuous cycle of innovation, increased end-user demand for broadband access, and increased investment in broadband network infrastructure and

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[316] *2014 Open Internet NPRM*, 29 FCC Rcd at 5602, para. 116. The Commission also tentatively concluded that it should operate separately from the proposed no-blocking rule, i.e., conduct acceptable under the no-blocking rule would still be subject to independent examination under the "commercially reasonable" standard, and sought comment on this approach. *Id.* at 5602, para. 117.

[317] *Id.* at 5603, para. 119.

[318] *Id.* at 5604, para. 121.

[319] *Id.*

[320] *Id.* at 5604-05, paras. 122-23.

[321] *Id.* at 5583-84, para. 62. Specifically, the Commission sought comment on whether, under the commercially reasonable rule, mobile networks should be subject to the same totality-of-the circumstances test as fixed broadband, and whether the Commission should apply the commercially reasonable legal standard to mobile broadband. *Id.* at 5609, para. 140.

technologies,[322] we conclude that a no-unreasonable interference/disadvantage standard to protect the open nature of the Internet is necessary. We adopt this standard to prohibit practices in the broadband Internet access provider's network that harm Internet openness, similar to the approach proposed by the Higher Education coalition and the Center for Democracy and Technology.[323] Specifically, we require that

> *Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.*[324]

137. This "no-unreasonable interference/disadvantage" standard will be applied to carefully balance the benefits of innovation against harm to end users and edge providers. It also protects free expression, thus fulfilling the congressional policy that the Internet "offer[s] a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[325] As the Commission found in 2010, and the *Verizon* court upheld, "[r]estricting edge providers' ability to reach end users, and limiting end users' ability to choose which edge providers to patronize, would reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure. Similarly, restricting the ability of broadband providers to put the network to innovative uses may reduce the rate of improvements to network infrastructure."[326] Under the standard that we adopt today, the Commission can protect against harm to end users' or edge providers' ability to use broadband Internet access service to reach one another.[327] Compared to the no unreasonable discrimination standard adopted by the Commission in 2010, the standard we adopt today is specifically designed to protect against harms to the open nature of the Internet. We note that the standard we adopt today represents our interpretation of sections 201 and 202 in the broadband Internet access context and, independently, our interpretation—upheld by the *Verizon* court—that rules to protect Internet openness promote broadband deployment via the virtuous cycle under section 706 of the 1996 Act.[328]

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[322] *See supra* Section III.B.2.

[323] *See, e.g.*, Higher Education and Libraries Comments at 23-24 (proposing a standard more directly related to the "unique and open character of the Internet," what they termed "Internet reasonable"); CDT Comments at 19; CDT Reply at 3.

[324] As in the no throttling rule, we include classes of content, applications, services, or devices.

[325] 47 U.S.C. § 230(a)(3).

[326] *2010 Open Internet Order*, 25 FCC Rcd at 17911, para. 14; *see also* Higher Education and Libraries Comments at 23 (stating that "the Internet itself is fundamentally an ecosystem that supports a myriad of personal, institutional, community, and commercial relationships and interests," and, as with any other ecosystem, "if the conditions that foster those relationships and interests are negatively impacted, the system as a whole is subject to collapse").

[327] *See, e.g.*, Akamai Comments at 11 ("[T]he Commission should take only those actions that are necessary and narrowly tailored to promote competition, innovation, and the growth of broadband networks that inure to benefit the public.").

[328] *See* 47 U.S.C. §§ 201, 202, 208; *see also* Section IV; *AT&T Corp. v. Business Telecom, Inc.; Sprint Comms. Company, L.P. v. Business Telecom, Inc.*, EB-01-MD-001, EB-01-MD-002, Memorandum Opinion and Order, 16 FCC Rcd 12312 (2001) (granting in part a complaint filed under section 208 that a telecommunications service provider's access rates were and are unjust and unreasonable under section 201(b) of the Act).

a. Factors to Guide Application of the Rule

138. We adopt our tentative conclusion to follow a case-by-case approach, considering the totality of the circumstances, when analyzing whether conduct satisfies the no-unreasonable interference/disadvantage standard to protect the open Internet.[329] Below we discuss a non-exhaustive list of factors we will use to assess such practices. In adopting this standard, we enable flexibility in business arrangements and ensure that innovation in broadband and edge provider business models is not unduly curtailed.[330] We are mindful that vague or unclear regulatory requirements could stymie rather than encourage innovation,[331] and find that this approach combined with the factors set out below will provide sufficient certainty and guidance to consumers, broadband providers, and edge providers—particularly smaller entities that might lack experience dealing with broadband providers—while also allowing parties flexibility in developing new services.[332] We note that in addition to the following list, there may be other considerations relevant to determining whether a particular practice violates the no-unreasonable interference/disadvantage standard. This approach of adopting a rule of general conduct, followed by guidance as to how to apply it on a case-by-case basis, is not novel. The Commission took a similar approach in 2010 when it adopted the "no unreasonable discrimination" rule, which was followed by a discussion of four factors (end-user control, use-agnostic discrimination, standard practices, and transparency).[333] Indeed, for this new rule, we are providing at least as much guidance, if not more, as we did in 2010 for the application of the no unreasonable discrimination rule.

139. *End-User Control.* A practice that allows end-user control and is consistent with promoting consumer choice is less likely to unreasonably interfere with or cause an unreasonable disadvantage affecting the end user's ability to use the Internet as he or she sees fit.[334] The Commission has long recognized that enabling consumer choice is the best path toward ensuring competitive markets, economic growth, and technical innovation.[335] It is therefore critical that consumers' decisions, rather

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[329] *2014 Open Internet NPRM*, 29 FCC Rcd at 5608, para. 136; CDT and ALA Reply at 2.

[330] This is in contrast to the inflexibility that the *Verizon* court found was a flaw in the 2010 unreasonable discrimination standard. *See supra* note 96. We also note that this approach addresses concerns in the record that "[a] 'general conduct rule,' applied on a case-by-case basis with the only touchstone being whether a given practice 'harms' consumers or edge providers, may lead to years of expensive litigation to determine the meaning of 'harm' (for those who can afford to engage in it)." Letter from Corynne McSherry, Intellectual Property Director, EFF, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Feb. 19, 2015) (EFF Feb. 19, 2015 *Ex Parte* Letter). Understanding that such an unfocused approach could harm the results of our rule, we "spell out, in advance, the contours and limits of [the] rule," as was suggested in the record. *See, e.g.*, *id.*

[331] *See, e.g.*, Akamai Comments at 10; CALinnovates Reply at 19 (stating that "regulatory clarity may significantly affect the calculus of current and potential investors"); Higher Education and Libraries Reply at 11-14 (asserting that a clearly articulated standard focused on preserving the existing Internet would set expectations and provide guidance to the market, but would avoid hard and fast rules that might be too rigid for a rapidly changing broadband ecosystem); CDT and ALA Reply at 2.

[332] CDT and ALA Reply at 2. We also note that this Order permits parties to seek advisory opinions regarding application of the Commission's open Internet rules. We view these processes as complementary methods by which parties can seek guidance as to how the open Internet rules apply to particular conduct. *See infra* Section III.E.

[333] *2010 Open Internet Order*, 25 FCC Rcd at 17944-46, paras. 68-74.

[334] *Id.* at 17944, para. 71; *see also* EFF Feb. 19, 2015 *Ex Parte* Letter at 2 (suggesting that the Commission should take into consideration "whether the practice preserves user choice").

[335] *See supra* Section III.A; *see also, e.g.*, Verizon Comments at 16-17; Syntonic Reply at 5-6; van Schewick Feb. 18, 2015 *Ex Parte* Letter, Attach. at 14 ("Letting users, not network providers, choose which applications will be successful is an important part of the mechanism that produces innovation under uncertainty. At the same time, letting users choose how they want to use the network enables them to use the Internet in a way that creates more value for them (and for society) than if network providers made this choice for them.").

than those of service providers, remain the driving force behind the development of the Internet.[336] To this end, practices that favor end-user control and empower meaningful consumer choice are more likely to satisfy the no-unreasonable interference/disadvantage standard than those that do not. However, as was true in 2010, we are cognizant that user control and network control are not mutually exclusive, and that many practices will fall somewhere on a spectrum from more end-user-controlled to more broadband provider-controlled.[337] Further, there may be practices controlled entirely by broadband providers that nonetheless satisfy the no-unreasonable interference/disadvantage standard. In all events, however, we emphasize that such practices should be fully transparent to the end user and effectively reflect end users' choices.

140. *Competitive Effects*. As the Commission has found previously, broadband providers have incentives to interfere with and disadvantage the operation of third-party Internet-based services that compete with the providers' own services.[338] Practices that have anti-competitive effects in the market for applications, services, content, or devices would likely unreasonably interfere with or unreasonably disadvantage edge providers' ability to reach consumers in ways that would have a dampening effect on innovation, interrupting the virtuous cycle. As such, these anticompetitive practices are likely to harm consumers' and edge providers' ability to use broadband Internet access service to reach one another. Conversely, enhanced competition leads to greater options for consumers in services, applications, content, and devices, and as such, practices that would enhance competition would weigh in favor of promoting consumers' and edge providers' ability to use broadband Internet access service to reach one another.[339] In examining the effect on competition of a given practice, we will also review the extent of an entity's vertical integration as well as its relationships with affiliated entities.

141. *Consumer Protection*. The no-unreasonable interference/disadvantage standard is intended to serve as a strong consumer protection standard. It prohibits broadband providers from employing any deceptive or unfair practice that will unreasonably interfere with or disadvantage end-user consumers' ability to select, access, or use broadband services, applications, or content, so long as the services are lawful, subject to the exception for reasonable network management. For example, unfair or deceptive billing practices, as well as practices that fail to protect the confidentiality of end users' proprietary information, will be unlawful if they unreasonably interfere with or disadvantage end-user consumers' ability to select, access, or use broadband services, applications, or content, so long as the services are lawful, subject to the exception for reasonable network management. While each individual case will be evaluated on its own merits, this rule is intended to include protection against fraudulent practices such as "cramming" and "slamming" that have long been viewed as unfair and disadvantageous to consumers.

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[336] *See* Netflix Comments at 5 ("Through an open Internet, the consumer, not the ISP or the edge provider, picks the winners and the losers."); Vonage Comments at 13 ("Allowing ISPs to select winners and losers will certainly chill investment and innovation in startups because they will lack the ability to develop a following among users without getting past the ISP gatekeeper."); AT&T Comments at 27-30 (distinguishing beneficial user-directed prioritization agreements from harmful paid-prioritization agreements initiated by service providers); Ad Hoc Comments at 22-23. Notably, under section 230(b) of the Communications Act, increased user control is an express objective of modern telecommunications policy. 47 U.S.C. § 230(b)(3) (directing policymakers "to encourage the development of technologies which maximize user control over what information is received by individuals . . . who use the Internet and other interactive computer services").

[337] *2010 Open Internet Order*, 25 FCC Rcd at 17944-45, para 71.

[338] *See supra* Section III.B.2.a; *2010 Open Internet Order*, 25 FCC Rcd at 17916, para. 22. The Commission adopted a similar restriction to address harms raised by the Comcast-NBCU transaction. *See Comcast/NBCU Merger Order*, 26 FCC Rcd at 4275, para. 94 ("[N]either Comcast nor Comcast-NBCU shall prioritize affiliated Internet content over unaffiliated Internet content.").

[339] *See, e.g.*, Verizon Comments at 35; Free State Reply at 3 ("The welfare of consumers should be the focus and deciding criterion for Commission broadband policy."); Free State Reply at 12.

142. *Effect on Innovation, Investment, or Broadband Deployment*. As the *Verizon* court recognized, Internet openness drives a "virtuous cycle" in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.[340] As such, practices that stifle innovation, investment, or broadband deployment would likely unreasonably interfere with or unreasonably disadvantage end users' or edge providers' use of the Internet under the legal standard we set forth today.[341]

143. *Free Expression*. As Congress has recognized, the Internet "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[342] Practices that threaten the use of the Internet as a platform for free expression would likely unreasonably interfere with or unreasonably disadvantage consumers' and edge providers' ability to use BIAS to communicate with each other, thereby causing harm to that ability. Further, such practices would dampen consumer demand for broadband services, disrupting the virtuous cycle, and harming end user and edge provider use of the Internet under the legal standard we set forth today.[343]

144. *Application Agnostic.* Application-agnostic (sometimes referred to as use-agnostic) practices likely do not cause an unreasonable interference or an unreasonable disadvantage to end users' or edge providers' ability to use BIAS to communicate with each other.[344] Application-agnostic practices do not interfere with end users' choices about which content, applications, services, or devices to use, nor

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[340] *Verizon*, 740 F.3d at 659.

[341] *See, e.g.*, EFF Feb. 19, 2015 *Ex Parte* Letter at 2 (suggesting that the Commission should take into consideration "whether and how the practice impacts the cost of …innovation"); Letter from Vimeo, LLC, et al. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Feb. 19, 2014) (asking that the general conduct rule take into consideration whether a challenged practice "keeps application development and innovation costs low"); *see also* Akamai Reply at 2 ("Innovative traffic platforms and networks have thus been key in facilitating the virtuous circle through which increased broadband Internet usage drives increased investment by service and content providers, which in turn drives further usage."); Nokia Reply at 5 ("It is important that the Commission recognize that operators and infrastructure providers are a critical element of this virtuous cycle of innovation."); Nokia Reply at 8 ("Value creation in all segments of the broadband marketplace is a critical component of maintaining the level of innovation seen in the last decade.").

[342] 47 U.S.C.§ 230(a)(3); *see also Reno v. ACLU*, 521 U.S. 844, 853 (1997) ("No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.") (internal citation omitted).

[343] *See, e.g.*, AAJC Comments at 2; ACLU Comments at 2 ("As information technology advances apace, the meaningful exercise of our constitutional rights—including the freedoms of speech, assembly, press and the right to petition government—has become literally dependent on broadband Internet access."); American Public Media Group Comments at 3; CDT Comments at 5; OTI Comments at 3; *see also* EFF Feb. 19, 2015 *Ex Parte* Letter at 2 (suggesting that the Commission should take into consideration "whether and how the practice impacts the cost of free speech"). We also note that the no-unreasonable interference/disadvantage standard does not unconstitutionally burden any of the First Amendment rights held by broadband providers because broadband providers are conduits, not speakers, with respect to broadband Internet access services. *See infra* Section VI.A.

[344] A network practice is application-agnostic if it does not differentiate in treatment of traffic, or if it differentiates in treatment of traffic without reference to the content, application, or device. A practice is application-specific if it is not application-agnostic. Application-specific network practices include, for example, those applied to traffic that has a particular source or destination, that is generated by a particular application or by an application that belongs to a particular class of applications, that uses a particular application- or transport- layer protocol, or that has particular characteristics (e.g., the size, sequencing, and/or timing of packets). *See 2010 Open Internet Order*, 25 FCC Rcd at 17938, para. 56 (application-specific); *id.* at 17945, para. 73 (application-agnostic); BITAG Congestion Report at 19 (discussing which traffic is subject to congestion management); *see also, e.g.*, van Schewick Sept. 19, 2014 *Ex Parte* Letter, Attach. at 24; Mozilla Reply at 22; i2 Coalition Comments at 43; OTI Comments at iv. We note, however, that there do exist circumstances where application-agnostic practices raise competitive concerns, and as such may violate our standard to protect the open Internet. *See infra* para. 153.

do they distort competition and unreasonably disadvantage certain edge providers.[345] As such, they likely would not cause harm by unreasonably interfering with or disadvantaging end users or edge providers' ability to communicate using BIAS.

145. *Standard Practices.* In evaluating whether a practice violates our no-unreasonable interference/disadvantage standard to protect Internet openness, we will consider whether a practice conforms to best practices and technical standards adopted by open, broadly representative, and independent Internet engineering, governance initiatives, or standards-setting organization.[346] Consideration of input from technical advisory groups accounts for the important role these organizations have to play in developing communications policy.[347] We make clear, however, that we are not delegating authority to interpret or implement our rules to outside bodies.

b. Application to Mobile

146. As discussed earlier, because of changes that have occurred in the mobile marketplace since 2010, including the widespread deployment of 4G LTE networks and the significant increase in use of mobile broadband Internet access services, we find that it is appropriate to revise our approach for mobile broadband and apply the same openness protections to both fixed and mobile broadband Internet access services, including prohibiting mobile broadband providers from engaging in practices that harm Internet openness.[348] We find that applying the no-unreasonable interference/disadvantage standard to mobile broadband services will help ensure that consumers using mobile broadband services are protected against provider practices that would unreasonably restrict their ability to access a free and open Internet.

147. AT&T, T-Mobile, and Verizon oppose application of a "commercially reasonable practices" rule to mobile broadband networks. They argue that competition in the mobile broadband market already ensures that service providers have no incentive to discriminate.[349] CTIA argues that applying a commercial reasonableness standard would deter innovation and limit the ability of providers to differentiate themselves in the marketplace because providers would have to factor in the risk of complaints and investigations.[350] Nokia argues that the Commission should ensure that its rules allow a range of service options.[351] Free State recommends that if the Commission adopts a legally enforceable standard, it should establish a presumption that mobile network management practices benefit consumer welfare and that presumption could only be overcome "by actual evidence of anticompetitive conduct."[352]

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[345] *See 2010 Open Internet Order*, 25 FCC Rcd at 17945-46, para. 73; van Schewick Sept. 19, 2014 *Ex Parte* Letter; Van Schewick April 17 *Ex Parte* Letter, Attach. at 3-4; OTI Comments at iv (asserting that the Commission should allow application-agnostic discrimination); *see also* CDT Comments at 7; Common Cause Comments at 8-9; EFF Feb. 19, 2015 *Ex Parte* Letter at 2 (suggesting that the Commission should take into consideration "whether the practice is application agnostic"); *but see* ITIF Comments at 17, n.36 ("While Comcast's current transparent, application agnostic network management practices are likely preferable over application specific congestion management, in some cases application specific management may be necessary.").

[346] *See 2010 Open Internet Order*, 25 FCC Rcd at 17946, para. 74.

[347] *See* Comcast Comments at 70 (noting the benefits of government-industry collaboration in telecommunications policymaking); ITIF Comments at 20; Verizon Comments at 17; WISPA Comments at 35; Mozilla Reply at 22; MDTC Comments at 5-6; *see also 2010 Open Internet Order*, 25 FCC Rcd at 17946, para. 74.

[348] *See infra* Section III.D.

[349] AT&T Reply at 74-75; T-Mobile Reply at 7; Verizon Reply at 32-33.

[350] CTIA Reply at 27-30; Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 3 (filed Oct. 3, 2014).

[351] Nokia Reply at 8.

[352] Free State Reply at 3.

148. We find that even if the mobile market were sufficiently competitive, competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness. As noted above, there have been incidents where mobile providers have acted in a manner inconsistent with open Internet principles and we find that there is a risk that providers will continue to have the incentive to take actions that would favor their own content or services.[353] We also agree with commenters that mobile providers' need for flexibility to manage their network can be accommodated through the reasonable network management exception.[354]

149. In addition, we find that applying the no-unreasonable interference/disadvantage standard to mobile broadband will not affect providers' ability to differentiate themselves in the marketplace. We have crafted the standard we adopt today to prohibit these practices that harm Internet openness while still permitting innovation and experimentation. Nothing in the standard restricts carriers from developing new services or implementing new business models.

c. Rejection of the "Commercially Reasonable" Standard

150. Based on the record before us, we are persuaded that adopting a legal standard prohibiting commercially unreasonable practices is not the most effective or appropriate approach for protecting and promoting an open Internet.[355] Internet openness involves many relationships that are not business-to-business and serves many purposes that are noncommercial.[356] Commenters also expressed concerns that the commercially reasonable standard would involve a multifactor framework that was not focused on the goals of this open Internet proceeding.[357] In addition, some commenters expressed concern that the legal standard would require permission before innovation, thus creating higher barriers to entry and attendant transaction costs.[358] Smaller edge providers expressed concern that they do not have the resources to fight against commercially unreasonable practices, which could result in an unfair playing field before the Commission.[359] Still others argued that the standard would permit paid

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[353] *See supra* Section III.B.2.

[354] CDT Comments at 28.

[355] *See, e.g.*, CDT Comments at 19; Free Press Comments at 8-9; Public Knowledge Comments at 31; MLB Advanced Media Comments at 2-3; Microsoft Comments at 13-14; Internet Association Comments at 16; Sandoval *Ex Parte* Letter at 2 (asserting that the commercial reasonableness rule would deter investment and Internet applications, such as Internet-enabled "Smart beds," which read a patient's vital signs and send aggregated data on available beds to mass casualty and disaster planners who use this information to determine which hospital has an available bed in a burn unit).

[356] CDT Comments at 18-19; *see also* Higher Education and Libraries Reply at 9-10; CDT and ALA Comments at 1. In the data roaming context, two commercial entities deal directly with one another to negotiate a fee-for-service agreement, and there is a direct business relationship with contractual privity and a purely commercial purpose on both sides of the transaction. Open Internet protections, by contrast, apply to a context where there may be no direct negotiation and no direct agreement between key parties. Moreover, while broadband providers are commercial entities with commercial purposes, many of the parties seeking to route traffic to broadband subscribers are not. CDT Comments at 18-19; *see also* AARP Comments at 37 (noting the difficulty of analyzing broadband providers' relationships with millions of different edge providers under a data roaming-style "commercially reasonable" rubric).

[357] *See, e.g.*, AARP Comments at 35-38; ADTRAN Comments at 26-28; Internet Association Comments at 16.

[358] *See, e.g.*, Ad Hoc Comments at 21-22 (a commercially reasonable standard "will necessarily be complex, inexact, and massively fact-driven"); Consumers Union Reply at 2-3 (commercially reasonable standard is vague and unenforceable, and allows individualized negotiations to be left to private parties with motivations that may not necessarily be in the interest of consumers); eBay Comments at 4-5.

[359] *See, e.g.*, Tumblr Reply at 10 ("Tumblr cannot afford to engage in what would likely be multi-year challenges against the biggest broadband providers, with large legal teams experienced in telecommunications law, simply to secure access for its users equal to that of its current, and future, competitors with deeper resources."); Etsy Comments at 7 (arguing that a prohibition on commercially unreasonable transactions "creates an unacceptable level

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prioritization, which could disadvantage smaller entities and individuals.[360] Given these concerns, we decline to adopt our proposed rule to prohibit practices that are not commercially reasonable. Instead, as discussed above, we adopt a governing standard that looks to whether consumers or edge providers face unreasonable interference or unreasonable disadvantages, and makes clear that the standard is not limited to whether a practice is agreeable to commercial parties.

d. Sponsored Data and Usage Allowances

151. While our bright-line rule to treat paid prioritization arrangements as unlawful addresses technical prioritization, the record reflects mixed views about other practices, including usage allowances and sponsored data plans. Sponsored data plans (sometimes called zero-rating) enable broadband providers to exclude edge provider content from end users' usage allowances. On the one hand, evidence in the record suggests that these business models may in some instances provide benefits to consumers, with particular reference to their use in the provision of mobile services. Service providers contend that these business models increase choice and lower costs for consumers.[361] Commenters also assert that sophisticated approaches to pricing also benefit edge providers by helping them distinguish themselves in the marketplace and tailor their services to consumer demands.[362] Commenters assert that such sponsored

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of uncertainty for small companies and will be too costly to enforce"); Reddit Comments at 8; Engine Advocacy Comments at 15; CodeCombat Comments at 7.

[360] *See, e.g.*, Illinois and NY Comments at 5-84; CCIA Reply at 17; i2Coaltion Comments at 10 ("Start-ups that require priority service may not be able to bring their product to market without significant outside investment and investors will be affected by the increased equity needs of entrepreneurs."); AAJC Comments at 5 ("A commercially reasonable standard where certain forms of prioritization are allowed benefits those with financial resources. Such prioritization would negatively impact many minority entrepreneurs who come from historically disadvantaged communities with lower incomes and educational opportunities . . . .").

[361] *See, e.g.*, T-Mobile Reply at 17 (asserting that its Music Freedom program, which allows consumers to stream music without it counting against their data plan, is "innovative" and "pro-consumer" and that "Music Freedom does not discriminate among streaming music services"); Verizon Reply at 27-28 (contending that T-Mobile's Music Freedom, along with other similar initiatives, are evidence that consumer choice and competition "have ensured a differentiated marketplace"); CTIA Reply at 36; Sandvine Comments at 3-4, 7 (arguing that zero-rated applications have helped some people who otherwise could not afford access to some of their favorite services); Telefonica Reply at 7; Cequel Reply at 2, 6-7 ("Usage-based billing is not only a fair method of pricing, it is necessary for Suddenlink to bring broadband services to the often-remote communities that it serves. . . . If the FCC were to restrict usage-based billing, it would be restricting the future of broadband services in the very rural areas where it is trying to extend service."); Verizon Reply at 22 (asserting that usage-based pricing provides a way for consumers who are not heavy users to keep their costs down); ITIF Reply at 16 (arguing that zero rating arrangements "are likely welfare-enhancing, offering a service that meets consumer demand at a lower price point" and noting that they may be structured in an "application neutral" manner that "allow[s] consumers to continue to access new innovations at the edge"); Verizon Comments at 30-31, 34 (asserting that arrangements that address only pricing could make service cheaper for end users, enabling them to access more content when and where they want it, and could provide a way for interested content providers to promote and encourage use of their services"); Free State Reply at 3-4, 13; Syntonic Wireless Reply at 9; GAO Report at 26 (explaining that participants in all eight groups agreed that they would be more likely to access content that does not count toward their data limits than content that does).

[362] *See, e.g.*, USTelecom Reply at 46-47; Verizon Comments at 29-36; Ericsson Comments at 6-8, 14; ICLE & TechFreedom Comments at 16-41; ITIF Comments at 13-15; ARRIS Comments at 7-10; ADTRAN Reply at 5-13; Qualcomm Comments at 8-9; Sandvine Comments at 6-8; Free State Reply at 14-15 ("[T]he reality is that in order for the 'next Google' or the 'next Facebook' to compete against those well-entrenched giants, the putative new entrant might well be looking to negotiate some arrangement with a service provider that will give it a fighting chance of competing with the entrenched giants by differentiating itself."); Syntonic Wireless Reply at 9-10 (explaining that sponsored content is a way to differentiate one's product from the competition, and thus adds an additional plane of competition within edge provider markets); AT&T Reply at 77-78; CTIA Reply at 34-35 ("As the CEO of music streaming site Grooveshark remarked when T-Mobile added the company to the list of supported
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data arrangements also support continued investment in broadband infrastructure and promote the virtuous cycle,[363] and that there exist spillover benefits from sponsored data practices that should be considered.[364] On the other hand, some commenters strongly oppose sponsored data plans, arguing that "the power to exempt selective services from data caps seriously distorts competition, favors companies with the deepest pockets, and prevents consumers from exercising control over what they are able to access on the Internet," again with specific reference to mobile services.[365] In addition, some commenters argue that sponsored data plans are a harmful form of discrimination.[366] The record also reflects concerns that such arrangements may hamper innovation and monetize artificial scarcity.[367]

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services, Music Freedom helps make little-known offerings available to a wider customer base[.]"); Telefonica Reply at 7; Letter from Susie Kim Riley, CEO, Aquto, Harjot Saluja, CEO, DataMi, Scott Schill, Producer, BBA Studios, Sam Gadodia, CEO LotusFlare, Gary Greenbaum, CEO, Syntonic, and Mike Nasco, CEO, Wazco, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 et al., at 1 (filed Jan. 22, 2015) ("Sponsored data and zero-rating arrangements hold great promise for content and edge providers, whether they are new entrants or incumbents, who can use them to promote innovative offerings, attract new customers, and grow a robust subscriber base.").

[363] *See, e.g.*, Verizon Comments at 31; Alcatel-Lucent Comments at 23-24 (asserting that sponsored data plans give consumers the opportunity to experience better service at no personal cost, which could facilitate a consumer experiencing the value of higher-tier service and adopting that higher-tier going forward" and that "[t]his increased consumer adoption would benefit the entire broadband ecosystem"); AT&T Reply at 77-79 (sponsored data plans can promote Internet openness by encouraging consumers to explore mobile online applications and content that they might otherwise not use); Verizon Reply at 22 (explaining that usage-based pricing promotes broadband adoption by "enabling customers to pay only for the services they wish to use, without having to subsidize higher-end users"); CWA/NAACP Comments at 16-18; National Minority Organization Comments at 9; Free State Reply at 4, 13; CenturyLink Comments at 5-7 ("A two-sided market approach ensures that the costs of content and applications causing greater bandwidth consumption are ultimately passed on to the subscribers who use those services, ensures that adequate pricing signals are communicated to edge providers and, overall, produces the optimal economic outcome.").

[364] *See* Sandvine Comments at 6-7; Roslyn Layton Reply at 4 ("[A] content provider may want to subsidize the delivery of its content so that it can maximize viewing and viewers. We see this in the case of a health provider which wants to ensure that low-income pregnant women watch a series of pre-natal videos, a preventative form of health care that improves infant and mother outcomes. Similarly a health care provider would be willing to subsidize a mobile subscription of its members to encourage adoption of preventative health care and monitoring tools. The cost of avoiding an adverse health event is well worth the price of a broadband subscription. The health care member benefits with better health outcome and the health care provider reduces costs.").

[365] Consumers Union Reply at 5; NPR Comments at 11 (arguing that such sponsored services and data caps discourage "consumers from using their mobile devices to access the vital content provided by public radio via websites and apps"); Letter from John Bergmayer, Public Knowledge to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-57, 14-90, GN Docket Nos. 14-28, 10-127, 09-191, 13-5, 12-353, 09-51, WC Docket Nos. 07-52, 10-90, 96-45, 06-122, at 3 (filed Nov. 13, 2014) ("Mobile users' behavior is shaped in part by billing practices and pricing structures. As Horrigan finds, 'among the 55% of smartphone users with a data cap, more than half – 52% – have altered their online behavior because of the cap – either by not doing some online activities out of concern for hitting the limit or by waiting until they were in Wi-Fi range.'").

[366] *See, e.g.*, CFA Comments at 39 (describing AT&T's sponsored data plan on its mobile network as a form of discrimination); Consumers Union Comments at 13 (explaining that "[e]xempting certain affiliated services from data caps does not provide consumers with a meaningful choice. Instead, it pushes them to watch affiliated content out of fear that doing otherwise will count against their monthly caps and result in either overage charges or slower speeds").

[367] *See, e.g.*, Public Knowledge Comments at 21 (recounting concerns about harming innovation in relation to AT&T's "sponsored data" plan and T-Mobile's recently announced "Music Freedom" service); *id*. at 53 (arguing that "AT&T's Sponsored Data program allows it to monetize artificial scarcity and creates a disincentive to increase caps over time"); WGAW Reply at 36-37 (explaining that sponsored data services require "content providers and
(continued….)

152. We are mindful of the concerns raised in the record that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on different service plans.[368] At the same time, new service offerings, depending on how they are structured, could benefit consumers and competition. Accordingly, we will look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary.

153. The record also reflects differing views over some broadband providers' practices with respect to usage allowances (also called "data caps").[369] Usage allowances place limits on the volume of data downloaded by the end user during a fixed period. Once a cap has been reached, the speed at which the end user can access the Internet may be reduced to a slower speed, or the end user may be charged for excess data.[370] Usage allowances may benefit consumers by offering them more choices over a greater range of service options, and, for mobile broadband networks, such plans are the industry norm today, in part reflecting the different capacity issues on mobile networks.[371] Conversely, some commenters have expressed concern that such practices can potentially be used by broadband providers to disadvantage competing over-the-top providers.[372] Given the unresolved debate concerning the benefits and drawbacks of data allowances and usage-based pricing plans,[373] we decline to make blanket findings about these

(Continued from previous page)
applications to pay for the data usage, but does nothing to address the capacity constraints so widely touted as problematic by wireless carriers"); Letter from Ademir Antonio Pereira, Jr. to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 09-191, Attach. at 7-8 (filed Feb. 19, 2015).

[368] *See supra* para. 151; *see also* Public Knowledge Comments at 21, 53-54.

[369] *See, e.g.*, CWA/NAACP Comments at 18-19; CFA Comments at 39 (expressing concern regarding Comcast's exemption of Xfinity online video app on Xbox and TiVo from data caps in 2012); Consumers Union Comments at 8; NPR Comments at 11; Nokia Comments at 8-10 (stating that "[t]he existence of data caps impacts content and OTT companies because these entities see a decline in traffic to their websites, applications, and other service platforms as the month progresses due to rationing by the consumer"); Public Knowledge Comments at 48-60 (asserting that usage-based billing could enable broadband providers to create metered and unmetered lanes, supposedly no different than the fast and slow lanes feared with paid prioritization); Roku Comments at 8; Telecommunications for the Deaf and Hard of Hearing et al Comments at iii, 15 (urging the Commission "to consider the disproportionate impact of data caps on people who are deaf or hard of hearing, who depend on data-intensive applications for basic communications"); T-Mobile Reply at 14-16 (describing consumer benefits of its "Simple Choice" plan); Writers Guild of America East and AFL-CIO Comments at 25; Tumblr Reply at 2.

[370] *See, e.g.*, U.S. Government Accountability Office, Report, Broadband Internet: FCC Should Track the Application of Fixed Internet Usage-Based Pricing and Help Improve Consumer Education, GAO-15-108, at 8 (Nov. 2014) (GAO Report).

[371] *See, e.g.*, T-Mobile Reply at 14-16 (noting that customers on T-Mobile's Simple Choice plan "can choose plans with unlimited high-speed data, or an allotment of high-speed data with unlimited data at 2G speeds after their allotment is used" and arguing that such plans are designed to "allow subscribers to decide what price they want to pay for what service, and still use as much mobile data as they want without incurring overage charges . . .").

[372] *See, e.g.*, Public Knowledge Comments at 51-52; Consumer's Union Reply at 5 ("If the largest mobile carriers exempt certain uses from their data caps, the effect is to push consumers to watch affiliated content out of fear that doing otherwise will count against their monthly caps.").

[373] Regarding usage-based pricing plans, there is similar disagreement over whether these practices are beneficial or harmful for promoting an open Internet. *Compare* Bright House Comments at 20 ("Variable pricing can serve as a useful technique for reducing prices for low usage (as Time Warner Cable has done) as well as for fairly apportioning greater costs to the highest users.") *with* Public Knowledge Comments at 58 ("Pricing connectivity according to data consumption is like a return to the use of time. Once again, it requires consumers keep meticulous track of what they are doing online. With every new web page, new video, or new app a consumer must consider how close they are to their monthly cap. . . . Inevitably, this type of meter-watching freezes innovation."), *and* ICLE & TechFreedom Policy Comments at 32 ("The fact of the matter is that, depending on background conditions, either usage-based pricing or flat-rate pricing could be discriminatory.").

practices and will address concerns under the no-unreasonable interference/disadvantage on a case-by-case basis.

3. Transparency Requirements to Protect and Promote Internet Openness

154. In this section, we adopt enhancements to the existing transparency rule, which covers both content and format of disclosures by providers of broadband Internet access service. As the Commission has previously noted, disclosure requirements are among the least intrusive and most effective regulatory measures at its disposal.[374] We find that the enhanced transparency requirements adopted in the present Order serve the same purposes as those required under the *2010 Open Internet Order*: providing critical information to serve end-user consumers, edge providers of broadband products and services, and the Internet community. The transparency rule, including the enhancements adopted today, also will aid the Commission in enforcing the other open Internet rules and in ensuring that no service provider can evade them through exploitation of narrowly-drawn exceptions for reasonable network management or through evasion of the scope of our rules.

155. In the *2014 Open Internet NPRM*, we tentatively concluded that we should enhance the existing transparency rule for end users, edge providers, the Internet community, and the Commission to have the information they need to understand the services they receive and to monitor practices that could undermine the open Internet.[375] The NPRM sought comment on a variety of possible enhancements, including whether to require tailored disclosures for specific constituencies (end users, edge providers, the Internet community); ways to make the content and format of disclosures more accessible and understandable to end users; specific changes to disclosures for network practices that would benefit edge providers; whether there are more effective or more comprehensive ways to measure network performance; whether to require providers to disclose meaningful information regarding source, location, speed, packet loss, and duration of congestion; and whether and how any enhancements should apply to mobile broadband providers in a manner different from their application to fixed broadband providers.[376]

156. Based on the record compiled in response to those proposals, below we set forth targeted, incremental enhancements to the existing transparency rule. We first recap the existing transparency rule, which forms the baseline off of which we build today. Having established that baseline, we describe specific enhancements—including refinements and expansions in the required disclosures of commercial terms, performance characteristics, and network practices; adoption of a requirement that broadband providers notify end users directly if their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion, that is likely to have a significant impact on the use of the service. We then address a request to exempt small providers from enhancements to the transparency rule, discuss the relationship of the enhancements to the existing transparency rule, and note the role that we anticipate further guidance from Commission staff will continue to play in applying the transparency rule in practice. Lastly, we adopt a voluntary safe harbor (but not a requirement) for a

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[374] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5585, para. 66; *see also, e.g.*, Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J. L. & Econ. 491 at 513 (1981); Howard Beales, Richard Craswell & Steven C. Salop, *Information Remedies for Consumer Protection*, 71 Am. Econ. Rev. 410 at 411 (Papers & Proceedings, May 1981); Alissa Cooper, How Regulation and Competition Influence Discrimination in Broadband Traffic Management: A Comparative Study of Net Neutrality in the United States and United Kingdom, at Section 2.4.3 (Sept. 2013), http://www.alissacooper.com/phd-thesis/ ("A policy of requiring ISPs to publicly disclose the details of their traffic management practices, whether combined with additional regulation or not, has enjoyed widespread support.") (Cooper Thesis); *see also* Letter from Kathleen Grillo, Senior Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 12-269, 14-28, at 1 (filed Mar. 24, 2014) (arguing that "the Commission should rely primarily on consumer choice, competition, and *transparency* to guide Commission policy") (emphasis added).

[375] *2014 Open Internet NPRM*, 29 FCC Rcd at 5586, para. 67.

[376] *Id.* at 5586-92, paras. 68, 72, 76, 80, 83, 84-85.

standalone disclosure format that broadband providers may use in meeting the existing requirement to disclose information that meets the needs of end users.

a. The Existing Transparency Rule

157. The D.C. Circuit in *Verizon* upheld the transparency rule, which remains in full force, applicable to both fixed and mobile providers.[377] In enhancing this rule, we build off of the solid foundation established by the *Open Internet Order*. In that Order, the Commission concluded that effective disclosure of broadband providers' network management practices, performance, and commercial terms of service promotes competition, innovation, investment, end-user choice, and broadband adoption.[378] As a result, the Commission adopted a transparency rule requiring both fixed and mobile providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms" of their broadband Internet access service.[379] The rule specifies that such disclosures be "sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[380]

158. The *2010 Open Internet Order* went on to provide guidance on both the information to be disclosed and the method of disclosure.[381] Within each category of required disclosure (network management practices, performance characteristics, and commercial terms), the *Open Internet Order* described the type of information to be disclosed. For example, under performance characteristics, the Commission specified, among other things, disclosure of "expected and actual access speed and latency" as well as the "impact of specialized services."[382] All disclosures were required to be made "timely and prominently[,] in plain language accessible to current and prospective end users and edge providers, the Commission, and third parties who wish to monitor network management practices for potential violations of open Internet principles."[383]

159. In 2011 and 2014, Commission staff provided guidance on interpreting the transparency rule. For example, in addition to other points, the 2011 guidance issued by the Enforcement Bureau and Office of General Counsel (*2011 Advisory Guidance*) described the means by which fixed and mobile broadband providers should meet the requirement to disclose actual performance of the broadband Internet access services they offer and to disclose network management practices, performance, characteristics, and commercial terms "at the point of sale."[384] The *2011 Advisory Guidance* also clarified the statement in the *Open Internet Order* that effective disclosures "will likely include some or all of the"

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[377] *See Verizon*, 740 F.3d at 659. In the *2014 Open Internet NPRM*, we concluded that "we have ample authority not only for our existing transparency rules, but also for the enhanced transparency rules we propose today, whether the Commission ultimately relies on section 706, Title II, or another source of legal authority." *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5585, para. 65.

[378] *See 2010 Open Internet Order*, 25 FCC Rcd at 17938-39, para. 56 (concluding that effective disclosures will include information concerning: (1) network practices, including, for example, congestion management and security measures; (2) performance characteristics, including a general description of system performance (such as speed and latency); and (3) commercial terms, including pricing, privacy policies, and redress options).

[379] *Id.* at 17937, para. 54; *see also* 47 C.F.R. § 8.3.

[380] 47 C.F.R. § 8.3.

[381] *See 2010 Open Internet Order*, 25 FCC Rcd at 17938-40, 17959, paras. 56-57, 98.

[382] *Id.* at 17939, para. 56.

[383] *Id.*

[384] *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, GN Docket No. 09-191, WC Docket No. 07-52, Public Notice, 26 FCC Rcd 9411 (2011) (*2011 Advisory Guidance*).

information listed in paragraphs 56 and 98, but also that the list was "not necessarily exhaustive, nor is it a safe harbor," and that "there may be additional information, not included [in paragraphs 56 and 98], that should be disclosed for a particular broadband service to comply with the rule in light of relevant circumstances."[385] Acknowledging the concern of some providers that "they could be liable for failing to disclose additional types of information that they may not be aware are subject to disclosure," the 2011 Advisory Guidance stated that disclosure of the information described in those paragraphs "will suffice for compliance with the transparency rule at this time."[386]

160. In an advisory issued in July 2014 (*2014 Advisory Guidance*), the Enforcement Bureau explained that the transparency rule "prevents a broadband Internet access provider from making assertions about its service that contain errors, are inconsistent with the provider's disclosure statement, or are misleading or deceptive."[387] Accurate disclosures "ensure that consumers—as well as the Commission and the public as a whole—are informed about a broadband Internet access provider's network management practices, performance, and commercial terms."[388] As the *2014 Advisory Guidance* recognized, the transparency rule "can achieve its purpose of sufficiently informing consumers only if advertisements and other public statements that broadband Internet access providers make about their services are accurate and consistent with any official disclosures that providers post on their websites or make available in stores or over the phone."[389] Thus, "a provider making an inaccurate assertion about its service performance in an advertisement, where the description is most likely to be seen by consumers, could not defend itself against a Transparency Rule violation by pointing to an 'accurate' official disclosure in some other public place."[390] Allowing such defenses would undermine the core purpose of the transparency rule.

161. Today, we build off of this baseline: the transparency rule requirements established in 2010, and interpreted by the *2011* and *2014 Advisory Guidance*. We also take this opportunity to make two clarifications to the existing rule. First, all of the pieces of information described in paragraphs 56 and 98 of the *Open Internet Order* have been required as part of the current transparency rule, and we will continue to require the information as part of our enhanced rule. The only exception is the requirement to disclose "typical frequency of congestion," which we no longer require since it is superseded by more precise disclosures already required by the rule, such as actual performance.[391] Second, the requirement that *all* disclosures made by a broadband provider be accurate includes the need to maintain the accuracy of these disclosures. Thus, whenever there is a material change in a provider's disclosure of commercial terms, network practices, or performance characteristics, the provider has a duty to update the disclosure in a manner that is "timely and prominently disclosed in plain language accessible to current and prospective end users and edge providers, the Commission, and third parties who wish to monitor network management practices for potential violations of open Internet principles."[392] For these purposes,

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[385] *Id.*; *see also 2010 Open Internet Order*, 25 FCC Rcd at 17939, para. 56.

[386] *2011 Enforcement Advisory Guidance*, 26 FCC Rcd at 9416.

[387] *FCC Enforcement Advisory, Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606, 8607 (2014) (*2014 Advisory Guidance*).

[388] *Id.*

[389] *Id.*

[390] *Id.*

[391] *2010 Open Internet Order*, 25 FCC Rcd at 17938-39, para. 56.

[392] *Id.* We decline, however, to adopt a specific timeframe concerning the updating of disclosures following a material change (e.g., 24 hours). *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5593, para. 88 ("In what timeframe should the Commission require providers to report . . . changes in their traffic management policies to the Commission?").

a "material" change is any change that a reasonable consumer or edge provider would consider important to their decisions on their choice of provider, service, or application.

b. Enhancing the Transparency Rule

162. We adopt the tentative conclusion in the *2014 Open Internet NPRM* to enhance the existing transparency rule in certain respects. We conclude that enhancing the existing transparency rule as described below will better enable end-user consumers to make informed choices about broadband services by providing them with timely information tailored more specifically to their needs, and will similarly provide edge providers with the information necessary to develop new content, applications, services, and devices that promote the virtuous cycle of investment and innovation.[393]

(i) Enhancements to Content of Required Disclosures

163. As noted above, the existing transparency rule requires specific disclosures with respect to network practices, performance characteristics, and commercial terms.[394] As we noted in the *2014 Open Internet NPRM*, the Commission has continued to receive numerous complaints from consumers suggesting that broadband providers are not providing information that end users and edge providers need to receive.[395] We noted that consumers continue to express concern that the speed of their service falls short of advertised speeds, that billed amounts are greater than advertised rates, and that consumers are unable to determine the source of slow or congested service.[396] In addition, we noted that end users are often surprised that broadband providers slow or terminate service based on "excessive use" or based on other practices, and that consumers report confusion regarding data thresholds or caps.[397] Further, the need for enhanced transparency is bolstered by the needs of certain user groups who rely on broadband as their primary avenue for communications, such as people with disabilities.[398] These enhancements will also serve edge providers. The record supports our conclusions that more specific and detailed disclosures are necessary to ensure that edge providers can "develop, market, and maintain Internet offerings."[399] Such disclosures will also help the wider Internet community monitor provider practices to ensure compliance with our Open Internet rules and providers' own policies.

164. *Commercial Terms*. The existing transparency rule defines the required disclosure of "commercial terms" to include pricing, privacy policies, and redress options. While we do not take additional action concerning the requirement to disclose privacy policies and redress options, the record demonstrates need for specific required disclosures about price and related terms. In particular, we

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[393] *See, e.g.*, Organization for Economic Co-operation and Development, Enhancing Competition in Telecommunications: Protecting and Empowering Consumers, Directorate for Science, Technology and Industry, Committee for Information, Computer and Communications Policy at 4 (2008), http://www.oecd.org/dataoecd/25/2/40679279.pdf (stating that informed consumers "are necessary to stimulate firms to innovate, improve quality and compete in terms of price. In making well-informed choices between suppliers, consumers not only benefit from competition, but they initiate and sustain it."); Comcast Comments at 15-16 (noting that some of the transparency enhancements suggested in the NPRM could support the "virtuous circle"); EFF Comments at 26 (discussing the importance of information from broadband providers in order to develop new applications and protocols); iClick2Media Comments at 19 (noting that greater communication with end users would allow end users to become active in the virtuous circle); Koning Comments at 18 (noting that without transparency, forms of Internet encryption widely used today "would not be possible").

[394] *2010 Open Internet Order*, 25 FCC Rcd at 17938-39, para. 56.

[395] *2014 Open Internet NPRM*, 29 FCC Rcd at 5586-87, para. 69.

[396] *Id.*

[397] *Id.*

[398] *See, e.g.*, TDI Comments at 2-4.

[399] *See, e.g.*, EFF Comments at 26; Microsoft Comments at 31; Telecommunications for the Deaf and Hard of Hearing Comments at 3; Vonage Comments at 28.

specify the disclosures of commercial terms for prices, other fees, and data caps and allowances as follows:

- **Price** – the full monthly service charge. Any promotional rates should be clearly noted as such, specify the duration of the promotional period, and note the full monthly service charge the consumer will incur after the expiration of the promotional period.[400]
- **Other Fees** – all additional one time and/or recurring fees and/or surcharges the consumer may incur either to initiate, maintain, or discontinue service, including the name, definition, and cost of each additional fee.[401] These may include modem rental fees, installation fees, service charges, and early termination fees, among others.
- **Data Caps and Allowances –** any data caps or allowances that are a part of the plan the consumer is purchasing, as well as the consequences of exceeding the cap or allowance (e.g., additional charges, loss of service for the remainder of the billing cycle).

To be clear, these disclosures may have been required in certain circumstances under the existing transparency rule in order to provide information "sufficient for consumers to make informed choices." Here, we now require that this information always be disclosed. In addition, per the current rule, disclosures of commercial terms shall also include the provider's privacy policies ("[f]or example, whether network management practices entail inspection of network traffic, and whether traffic information is stored, provided to third parties, or used by the carrier for non-network management purposes") and redress options ("practices for resolving end-user and edge provider complaints and questions").[402]

165. *Performance Characteristics*. The existing transparency rule requires broadband providers to disclose accurate information regarding network performance for each broadband service they offer.[403] This category includes a service description ("[a] general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications") and the impact of specialized services ("[i]f applicable, what specialized services, if any, are offered to end users, and whether and how any specialized services may affect the last-mile capacity available for, and the performance, or broadband Internet access service").[404]

166. With respect to network performance, we adopt the following enhancements:

- The existing transparency rule requires disclosure of actual network performance.[405] In adopting that requirement, the Commission mentioned speed and latency as two key

[400] *See* Charter Comments at 23 (noting that Charter's website "explains when promotional rates will revert to standard rates").

[401] *See* IL and NY Comments at 11-12 ("[T]he transaction costs [to the consumer] of changing service in order to avoid pay-for-priority or individualized agreements can be substantial. They include early-termination fees, installation fees, finding an alternative broadband Internet service provider and comparing speeds . . . ."). The Commission agrees that the magnitude of these fees bears on consumer decision-making when choosing or switching providers. As a result, the provision of explicit information regarding these fees by providers both promotes competition and assists in consumer decision making.

[402] *2010 Open Internet Order*, 25 FCC Rcd at 17939, para. 56.

[403] *Id.*; *2011 Advisory Guidance*, 26 FCC Rcd 9411.

[404] *2010 Open Internet Order*, 25 FCC Rcd at 17939, para. 56.

[405] *See Id.* at 17939, para. 56; *2011 Advisory Guidance*, 26 FCC Rcd at 9414.

measures.[406] Today we include packet loss as a necessary part of the network performance disclosure.[407]

- We expect that disclosures to consumers of actual network performance data should be reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing service.[408]
- We also expect that network performance will be measured in terms of average performance over a reasonable period of time and during times of peak usage.[409]
- We clarify that, for mobile broadband providers, the obligation in the existing transparency rule to disclose network performance information for "each broadband service" refers to separate disclosures for services with each technology (e.g., 3G and 4G). Furthermore, with the exception of small providers, mobile broadband providers today can be expected to have access to reliable actual data on performance of their networks representative of the geographic area in which the consumer is purchasing service—through their own or third-party testing—that would be the source of the disclosure.[410] Commission staff also continue to refine the mobile MBA program, which could at the appropriate time be declared a safe harbor for mobile broadband providers.[411]

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[406] *2010 Open Internet Order*, 25 FCC Rcd at 17939, para. 56.

[407] *See, e.g.*, AARP Comments at 49 (stating that information regarding packet loss could be useful to consumers if accessible); EFF Comments at 29 (calling for inclusion of packet loss in disclosures); Online Publishers Association Comments at 8-9 (supporting the inclusion of packet loss in disclosures); TechAmerica Comments at 5-6 (supporting the inclusion of packet loss); *see also* BITAG Congestion Report at 12 (discussing delay intolerant applications).

[408] *See, e.g.*, Cogent Remand PN Comments at 13 ("Without more localized data, consumers will not have meaningful information on which to base choices concerning local broadband service, and broadband providers will not be incentivized to offer higher quality serves in all areas."); *See* Letter from Dr. Jeremy Gillula, Electronic Frontier Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Oct. 30, 2014) ("We also suggested that if a national ISP has significantly different performance in different metropolitan or other geographical areas, then the ISP should be required to report its metrics separately for each of those areas."); *id.* at 3 ("[I]t would be useful if mobile broadband ISPs provided additional disclosures (particularly metrics like throughput and packet loss) broken down by geographical area . . . .").

[409] We recognize that parties have expressed concern about providing disclosures about network performance on a real-time basis. *See* Letter from Scott K. Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Jan. 15, 2015). The enhancements to the transparency rule we adopt today do not include such a requirement. *See, e.g.*, WGAW Comments at 18 (calling for disclosure of actual speeds at peak times); *see also* FCC's Office of Engineering and Technology and Consumer & Governmental Affairs Bureau, 2014 Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the US at 5 (2014), http://data.fcc.gov/download/measuring-broadband-america/2014/2014-Fixed-Measuring-Broadband-America-Report.pdf (stating that download and upload speeds are measured by average throughput over a 5 second time window, and defining the peak usage period for fixed broadband as between 7:00 p.m. and 11:00 p.m. local time). Given that the performance of mobile broadband networks is subject to a greater array of factors than fixed networks, we note that disclosure of a range of speeds may be more appropriate for mobile broadband consumers.

[410] Per the *2011 Advisory Guidance*, those mobile broadband providers that "lack reasonable access" to reliable information on their network performance metrics may disclose a "Typical Speed Range (TSR)" to meet the requirement to disclose actual performance. *See 2011 Advisory Guidance*, 26 FCC Rcd at 9415-16. In any event, we expect that mobile broadband providers' disclosure of actual performance data will be based on accepted industry practices and principles of statistical validity.

[411] Participation in the Measuring Broadband America (MBA) program continues to be a safe harbor for fixed broadband providers in meeting the requirement to disclose actual network performance. The *2011 Advisory*

(continued….)

We decline to otherwise codify specific methodologies for measuring the "actual performance" required by the existing transparency rule. We find that, as in 2010, there is benefit in permitting measurement methodologies to evolve and improve over time, with further guidance from Bureaus and Offices—like in 2011—as to acceptable methodologies.[412] We delegate authority to our Chief Technologist to lead this effort.

167. In addition, the existing rule concerning performance characteristics requires disclosure of the "impact" of specialized services, including "what specialized services, if any, are offered to end users, and "whether and how any specialized services may affect the last-mile capacity available for, and the performance of, broadband Internet access service."[413] As discussed below, today we more properly refer to these services as "non-BIAS data services." Given that the Commission will closely scrutinize offerings of non-BIAS data services and their impact on competition, we clarify that in addition to the requirements of the existing rule concerning what was formerly referred to as "specialized services," disclosure of the impact of non-BIAS data services includes a description of whether the service relies on particular network practices and whether similar functionality is available to applications and services offered over broadband Internet access service.[414]

168. The *2014 Open Internet NPRM* tentatively concluded that we should require that broadband providers disclose meaningful information regarding the source, location, timing, speed, packet loss, and duration of network congestion.[415] As discussed above, we continue to require disclosure of actual network speed and latency (as in 2010), and also require disclosure of packet loss. We decline at this time to require disclosure of the source, location, timing, or duration of network congestion, noting that congestion may originate beyond the broadband provider's network and the limitations of a broadband provider's knowledge of some of these performance characteristics.[416] We also asked whether

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Guidance further stated that fixed providers that choose not to participate in MBA may measure and disclose performance of their broadband offerings using the MBA's methodology, internal testing, consumer speed data, or other data, including reliable, relevant data from third-party sources. *See 2011 Advisory Guidance*, 26 FCC Rcd at 9415. Various software-based broadband performance tests are available as potential tools for end users and companies to estimate actual broadband performance. *See, e.g.*, FCC, Speed Test App, http://www.fcc.gov/measuring-broadband-america/mobile (last visited Feb. 24, 2015); Ookla, Speedtest.net http://www.speedtest.net (last visited Feb. 24, 2015); MLab, Internet Measurement Tools, http://www.measurementlab.net/tests (last visited Feb. 24, 2015); Assia, CloudCheck, http://forum.cloudcheck.net (last visited Feb. 24, 2015). *See also* Letter from Gerard J. Waldron, counsel to Adaptive Spectrum and Signal Alignment, Inc. (ASSIA), to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Jan. 28, 2015) (discussing a particular application, CloudCheck, which ASSIA reports "measures and monitors broadband speeds and throughout, and . . . can report to consumers and other interested parties information about the performance of consumers' internet connectivity"). As noted above, we anticipate that the measurement methodology used for the MBA project will continue to be refined, which in turn will enhance the effectiveness of network performance disclosures generally. *See, e.g.*, ACA Comments at 36 (stating that the MBA program is achieving its aims); CenturyLink Comments at 25-27 (noting the significant transparency through MBA participation); Frontier Comments at 7 (suggesting making greater use of the MBA program).

[412] We expect that acceptable methodologies will be grounded in commonly accepted principles of scientific research, good engineering practices, and transparency. *See* FCC's Office of Engineering and Technology and Consumer & Governmental Affairs Bureau, *Measuring Broadband America Policy on Openness and Transparency*, http://www.fcc.gov/measuring-broadband-america/openness-transparency-policy (last visited Feb. 21, 2015).

[413] *2010 Open Internet Order*, 25 FCC Rcd at 17939, para. 56.

[414] *See infra* Section III.D.3.; *see also* BITAG Congestion Report at 43 (discussing transparency).

[415] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5591, para. 83.

[416] Short-term congestion occurs whenever instantaneous demand exceeds capacity. *See* BITAG Congestion Report at 4-5. Since demand often consists of the aggregation of a large number of users' traffic, it is technologically difficult to determine the sources of each component of the aggregate traffic. *See, e.g.*, ACA Comments at 40; AT&T Comments at 88; Charter Comments at 27 (noting that ISPs can monitor only a portion of the transmission

(continued….)

the Commission should expand its transparency efforts to include measurement of other aspects of service.[417] We decline at this time to require disclosure of packet corruption or jitter, noting that commenters expressed concerns regarding the difficulty of defining metrics for such performance characteristics.[418]

169. *Network Practices*. The existing transparency rule requires disclosure of network practices, including specific disclosures related to congestion management, application-specific behavior, device attachment rules, and security.[419] Today, in recognition of significant consumer concerns presented in the record, we further clarify that disclosure of network practices shall include practices that are applied to traffic associated with a particular user or user group, including any application-agnostic degradation of service to a particular end user.[420] We also clarify that disclosures of user-based or application-based practices should include the purpose of the practice , which users or data plans may be

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path); Letter from Steven F. Morris, Vice Pres. and Gen. Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Jan. 21 2015) ("As the Commission has acknowledged, the performance experienced by a consumer is affected by many factors beyond the control of an ISP."); Cox Comments at 20-21; WISPA Comments at 16 ("In addition, the source of congestion at a given time may not be clear to the broadband provider, especially if the congestion results from events occurring outside the local broadband network. As a result, broadband providers will simply default to general language listing all of the possible sources of congestion, which solves no purpose other than to make disclosure requirements confusing and meaningless.").

[417] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5588, para. 73.

[418] *See, e.g.*, AT&T Comments at 89 ("[R]equiring more technical disclosures would not yield meaningful benefits to edge providers or device manufacturers, because there is no single industry-accepted meaning or method of measurement for broadband metrics like corruption and jitter."). Furthermore, corrupted packets may be included in the packet loss performance characteristic.

[419] *2010 Open Internet Order*, 25 FCC Rcd at 17938-39, para. 56 (elaborating upon each of these subcategories as follows: (1) congestion management ("If applicable, descriptions of congestion management practices; types of traffic subject to practices; purposes served by practices; practices' effects on end users' experience; criteria used in practices, such as indicators of congestion that trigger a practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate"); (2) application-specific behavior ("If applicable, whether and why the provider blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications"); (3) device attachment rules ("If applicable, any restrictions on the types of devices and any approval procedures for devices to connect to the network"); and (4) security ("If applicable, practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked (but excluding information that could reasonably be used to circumvent network security)"); *see id.* at 17959, para. 98 (specifying certain application-approval and device-attachment disclosures by mobile broadband providers, explaining that the transparency rule requires them: "to disclose their third-party device and application certification procedures, if any; to clearly explain their criteria for any restrictions on use of their network; and to expeditiously inform device and application providers of any decisions to deny access to the network or of a failure to approve their particular devices or applications"). Additionally, "mobile broadband providers should follow the guidance the Commission provided to licensees of the upper 700 MHz C Block spectrum regarding compliance with their disclosure obligations, particularly regarding disclosure to third-party application developers and device manufacturers of criteria and approval procedures (to the extent applicable). For example, these disclosures include, to the extent applicable, establishing a transparent and efficient approval process for third parties, as set forth in Rule 27.16(d)." *Id.* As discussed above, this information remains part of the transparency rule, with the exception of the requirement to disclose the "typical frequency of congestion."

[420] For example, a broadband Internet access service provider may define user groups based on the service plan to which users are subscribed, the volume of data that users send or receive over a specified time period of time or under specific network conditions, or the location of users. *See infra* Sections III.C.1.b; III.D.4. *See also* BITAG Congestion Report at 18 (discussing user-based congestion management); Microsoft Comments at 31 (discussing the need to disclose congestion thresholds that trigger traffic shaping and the consequences of traffic shaping).

affected, the triggers that activate the use of the practice, the types of traffic that are subject to the practice, and the practice's likely effects on end users' experiences.[421] While some of these disclosures may have been required in certain circumstances under the existing transparency rule, here we clarify that this information should always be disclosed. These disclosures with respect to network practices are necessary: for the public and the Commission to know about the existence of network practices that may be evaluated under the rules, for users to understand when and how practices may affect them, and for edge providers to develop Internet offerings.

170. The *2014 Open Internet NPRM* asked whether we should require disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage.[422] We decline at this time to require such disclosures, noting that collection of application-specific usage by a broadband provider may require use of deep packet inspection practices that may pose privacy concerns for consumers.[423]

(ii) Enhancements to the Means of Disclosure

171. The existing transparency rule requires, at a minimum, the prominent display of disclosures on a publicly available website and disclosure of relevant information at the point of sale.[424] We enhance the rule to require a mechanism for directly notifying end users if their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion, that is likely to have a significant impact on the end user's use of the service. The purpose of such notification is to provide the affected end users with sufficient information and time to consider adjusting their usage to avoid application of the practice.

(iii) Small Businesses

172. The record reflects the concerns of some commenters that enhanced transparency requirements will be particularly burdensome for smaller providers.[425] ACA, for example, suggests that

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[421] *See infra* Section III.D.4. *See also* BITAG Congestion Report at 43 (discussing what should be required in disclosures of congestion management policies); Broadband Internet Technical Advisory Group, Port Blocking at 22-23 (2013) http://www.bitag.org/documents/Port-Blocking.pdf (discussing recommendations for disclosure of ISP port blocking policies); Microsoft Comments at 31 (recommending disclosure of "types of edge services or protocols (if any) the broadband access provider filters, prioritizes, or otherwise treats in a non-neutral manner, relative to other types of traffic"); EFF Comments at 29 (requesting "clear warnings about any fast lanes, premium services, blocking or filtering that the user will not have a simple and practical way to avoid"); Kentucky Public Library Association Comments at 1 ("Consumers should be aware of the ISP's guidelines on what kind of content qualifies as spam and what level of congestion would necessitate limiting certain customer's bandwidth."); Online Publishers Association Comments at 9 (noting importance of information "about any network management practices that may impede [consumers'] ability to access to content or services); Roku Comments at iii (noting that any practices or policies that exempt traffic from data caps should be specifically disclosed); TechAmerica Comments at 5 (supporting the disclosure of any blocking); Vonage Comments at 27-28 (requesting disclosure of all network management practice that degrade service capacity); WGAW Comments at 18 (asking for details on congestion management policies).

[422] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5588, para. 73.

[423] *See, e.g.*, NCTA Comments at 50 ("Such a requirement likely would necessitate significant use of deep packet inspection in an attempt to determine the user or device responsible for originating or receiving particular Internet traffic."); EFF Comments at 32 (expressing privacy concerns about disclosure of application-specific information).

[424] *2010 Open Internet Order*, 25 FCC Rcd at 17939-40, para. 57. Broadband providers must actually disclose information required for consumers to make an "informed choice" regarding the purchase or use of broadband services at the point of sale. It is not sufficient for broadband providers simply to provide a link to their disclosures. *See supra* Section III.C.3.a.

[425] *See, e.g.*, ACA Comments at 32-39; Competitive Carrier Association (CCA) Comments at 8-9 ("Expanding the current disclosure requirements would also be particularly burdensome on smaller carriers); WISPA Comments at 15-16; WTA Comments at 8 ("WTA is very concerned about the increased costs and uncertain benefits of the

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smaller providers be exempted from the provision of such disclosures.[426] ACA states that its member companies are complying with the current transparency requirements, which "strike the right balance between edge provider and consumer needs for pertinent information and the need to provide ISPs with some flexibility in how they disclose pertinent information."[427] We believe that the transparency enhancements adopted today are modest in nature. For example, we have declined to require certain disclosures proposed in the *2014 Open Internet NPRM* such as the source of congestion, packet corruption, and jitter in recognition of commenter concerns with the benefits and difficulty of making these particular disclosures. We also do not require "real-time" disclosures. These proposed disclosures appear to form the bulk of ACA's concerns.[428] Nevertheless, we take seriously the concerns that ACA raises and those of smaller broadband providers generally.

173. Out of an abundance of caution, we grant a temporary exemption for these providers, with the potential for that exemption to become permanent. It is unclear, however, how best to delineate the boundaries of this exception. Clearly, it should include those providers likely to be most disproportionately affected by new disclosure requirements. ACA "acknowledge[s] that Congress and the Commission have defined 'small' in various ways."[429] One metric to which ACA points is the approach that the Commission used in its *2013 Rural Call Completion Order*, which excepted providers with 100,000 or fewer subscriber lines, aggregated across all affiliates, from certain recordkeeping, retention, and reporting rules.[430] We adopt this definition for purposes of the temporary exemption that we adopt today. Accordingly, we hereby adopt a temporary exemption from the enhancements to the transparency rule for those providers of broadband Internet access service (whether fixed or mobile) with 100,000 or fewer broadband subscribers as per their most recent Form 477, aggregated over all the providers' affiliates.[431]

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proposed enhanced transparency requirements for smaller carriers and their customers."); Letter from Erin P. Fitzgerald, Assistant Regulatory Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 at 1 (filed Nov. 14, 2014) (RWA Nov. 14, 2014 *Ex Parte* Letter) ("While RWA members have developed procedures to comply with the Commission's 2010 transparency and disclosure rules,[footnote omitted] engaging in a similar endeavor to comply with new and/or more stringent rules would be costly and further strain rural carriers' limited resources."); Letter from Stephen E. Coran, Counsel to the Wireless Internet Service Providers Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 at 8 (filed Feb. 3, 2015) ("To avoid the significant effects that would result from the Commission's proposed rules, the Commission should exempt small businesses from any new transparency and reporting obligations.").

[426] *See* ACA Comments at 39-40 ("any enhanced disclosure rule regarding network congestion . . . should exclude 'small providers'").

[427] Letter from Barbara Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 6 (filed Feb. 2, 2015) (ACA Feb. 2, 2015 *Ex Parte* Letter).

[428] *Id.* at 5-6 ("ACA also discussed the lack of record support for the imposition of any enhanced transparency requirements for small ISPs, particularly proposals to maintain a separate set of Open Internet disclosures tailored to the needs of edge providers and to disclose, on a real-time basis, information about network congestion and the lack of demonstrable benefits that would accrue from such reporting"). *See also id.* at 6 (reporting on an *ex parte* meeting in which a representative of an ACA member "confirmed that realtime network congestion disclosures would be highly burdensome for a small ISP").

[429] *Id*. at 5.

[430] *See Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154 (2013) (*Rural Call Completion Order*). We also note that one of the entities requesting relief from enhanced transparency rules – RWA – is comprised of member companies serving fewer than 100,000 mobile subscribers. RWA Nov. 14, 2014 *Ex Parte* Letter at 1.

[431] *Cf. Rural Call Completion Order*, 28 FCC Rcd at 16164, para. 19.

174. Yet we believe that both the appropriateness of the exemption and the threshold require further deliberation. Accordingly, the exemption we adopt is only temporary. We delegate to the Consumer & Governmental Affairs Bureau (CGB) the authority to determine whether to maintain the exemption and, if so, the appropriate threshold for it. We direct CGB to seek comment on the question and to adopt an Order announcing whether it is maintaining an exemption and at what level by no later than December 15, 2015. Until such time, notwithstanding any approval received by the Office of Management & Budget for the enhancements adopted today, such enhancements will not apply to providers of broadband Internet access service with 100,000 or fewer subscribers.

175. To be clear, all providers of broadband Internet access service, including small providers, remain subject to the existing transparency rule adopted in 2010. The temporary exemption adopted today, and any permanent exemption adopted by CGB, applies only to the enhanced disclosures described above. As ACA states in its request for an exemption for small providers, "[i]rrespective of which definition of small that is chosen by the Commission, exempt ISPs would still be required to comply with the transparency requirements contained in Section 8.3 of the Commission's rules today."[432]

(iv) Safe Harbor for Form of Disclosure to Consumers

176. The existing transparency rule requires disclosures sufficient *both* to enable "consumers to make informed choices regarding use of [broadband] services" *and* "content, application, service, and device providers to develop, market, and maintain Internet offerings."[433] As in 2010, a central purpose of the transparency rule remains to provide information useful to both constituencies. As we noted in the *2014 Open Internet NPRM*, we are concerned that disclosures are not consistently provided in a manner that adequately satisfies the divergent informational needs of all affected parties. For example, disclosures at times are ill-defined; do not consistently measure service offerings, making comparisons difficult; or are not easily found on provider websites.[434] In the *2014 Open Internet NPRM*, we therefore proposed requiring separate disclosure statements to meet both the basic informational needs of consumers and the more technical needs of edge providers.[435]

177. The record reflects concerns, however, as to a requirement to offer tailored disclosures. For example, ACA states that disclosures tailored to edge providers "would require small ISPs, who manage their own networks and may only have a handful of network operators, engineers, and head end staff to make onerous expenditures of both personnel hours and financial resources."[436] Bright House "question[s] the feasibility of creating disclosures tailored to the varied and potentially unique needs of the hundreds of such providers, particularly with no reciprocal obligation."[437] Similarly, Tech Freedom and the International Center for Law and Economics assert that "requiring ISPs to tailor their disclosures to the various parties the ISPs deal with (i.e., consumers, edge providers, the Internet community, and the FCC) greatly increases the burden of complying with these disclosures, especially as such disclosures must be periodically updated to reflect changes to ISPs' network management practices."[438] In light of these concerns, we decline to require separate disclosures at this time.

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[432] RWA Nov. 14, 2014 *Ex Parte* Letter at 6.

[433] *2010 Open Internet Order*, 25 FCC Rcd at 17937, para. 54.

[434] *See, e.g.*, Mayor de Blasio et al. Comments at 1 ("Currently, the lack of clear, accurate information results in confusion with respect to key service features like download and upload speeds, pricing and usage restrictions.").

[435] *2014 Open Internet NPRM,* 29 FCC Rcd at 5586, para. 68.

[436] Letter from Barbara S. Esbin, Counsel for American Cable Association to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 4 (filed Jan. 28, 2015).

[437] Bright House Comments at 14.

[438] Tech Freedom Comments at 12.

178. In declining to mandate separate disclosures, however, we do not intend to diminish the existing requirement for disclosure of information sufficient for both end users *and* edge providers. The Commission has not established that a single disclosure would always satisfy the rule; rather, it merely stated broadband providers "may be able" to satisfy the transparency rule through a single disclosure. We are especially concerned that in some cases a single disclosure statement may be too detailed and technical to meet the needs of consumers, rather than a separate consumer-focused disclosure. As noted in the *2014 Open Internet NPRM*, both academic research and the Commission's experience with consumer issues have demonstrated that the manner in which providers display information to consumers can have as much impact on consumer decisions as the information itself.[439] A stand-alone format has proven effective in conveying useful information in other contexts.[440] We also note that the OIAC and OTI have proposed the use of a label to disclose the most important information to users of broadband service.[441] In addition, the United Kingdom's largest Internet service providers agreed to produce a comparable table of traffic management information called a Key Facts Indicator.[442]

179. Therefore, we are establishing a voluntary safe harbor for the format and nature of the required disclosure to consumers. To take advantage of the safe harbor, a broadband provider must provide a consumer-focused, standalone disclosure. We decline, however, to mandate the exact format for such disclosures at this time.[443] Rather, we seek the advice of our Consumer Advisory Committee, which is composed of both industry and consumer interests, including those representing people with disabilities.[444] We find that the Committee's experience with consumer disclosure issues[445] makes it an ideal body to recommend a disclosure format that should be clear and easy to read—similar to a nutrition label—to allow consumers to easily compare the services of different providers. We believe the CAC is uniquely able to recommend a disclosure format that both anticipates and addresses provider compliance burdens while ensuring the utility of the disclosures for consumers.[446]

180. We direct the CAC to formulate and submit to the Commission a proposed disclosure format, based on input from a broad range of stakeholders, within six months of the time that its new membership is reconstituted, but, in any event, no later than October 31, 2015. The disclosure format must be accessible to persons with disabilities. We expect that the CAC will consider whether to propose the same or different formats for fixed and mobile broadband providers. In addition, we expect that the

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[439] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5587-88, para. 72.

[440] *See id*. at 5588 n.171.

[441] *See* Open Internet Advisory Committee, Open Internet Label Study (Aug. 20, 2013), at http://transition.fcc.gov/cgb/oiac/Transparency-Label-Study.pdf (OIAC Label Study); *see also* New America Foundation Broadband Truth-in-Labeling proposal: http://newamerica.net/sites/newamerica.net/files/policydocs/NAF_OTI_Broadband_Truth_in_Labeling-09-2009.pdf.

[442] *See* Ofcom, *Improving traffic management transparency: Ofcom sets out steps for ISPs to take* (Nov. 2011), http://media.ofcom.org.uk/news/2011/improving-traffic-management-transparency/.

[443] We note that although we have sought comment on what format would be most effective, the record is lacking on specific details as to how such a disclosure should be formatted.

[444] The Committee's purpose is to make recommendations to the Commission regarding consumer issues within Commission's jurisdiction and to facilitate the participation of consumers (including people with disabilities and underserved populations, such as Native Americans and persons living in rural areas) in proceedings before the Commission.

[445] For example, the Committee has studied the value of standardized disclosures and their contents. *See, e.g.*, FCC Consumer Advisory Committee, Recommendations Regarding Pre-Sale Consumer Disclosures (Aug. 4, 2010), at https://apps.fcc.gov/edocs_public/attachmatch/DOC-300826A1.pdf.

[446] *See, e.g.*, NCTA Comments at 51 ("If the Commission decides to pursue standardized disclosures, NCTA would welcome the opportunity to participate in the development of a voluntary program.").

CAC will consider whether and how a standard format for mobile broadband providers will allow providers to continue to differentiate their services competitively, as well as how mobile broadband providers can effectively disclose commercial terms to consumers regarding myriad plans in a manner that is not administratively burdensome. The Commission delegates authority to the Wireline Competition Bureau, Wireless Telecommunications Bureau, and Consumer & Governmental Affairs Bureau to issue a Public Notice announcing whether the proposed format or formats meet its expectations for the safe harbor for making consumer-facing disclosures. If the format or formats do not meet such expectations, the Bureaus may ask the CAC to consider changes and submit a revised proposal for the Bureaus' review within 90 days of the Bureaus' request.

181. Broadband providers that voluntarily adopt this format will be presumed to be in compliance with the requirement to make transparency disclosures in a format that meets the needs of consumers. Providers that choose instead to maintain their own format—for example, a unitary disclosure intended both for consumers and edge providers—will bear the burden, if challenged, of explaining how a single disclosure statement meets the needs of both consumers and edge providers. To be clear, use of the consumer disclosure format is a safe harbor with respect to the format of the required disclosure to consumers. A broadband provider meeting the safe harbor could still be found to be in violation of the rule, for example, if the content of that disclosure (e.g., prices) is misleading or inaccurate, or the provider makes misleading or inaccurate statements in another context, such as advertisements or other statements to consumers. Moreover, broadband providers using the safe harbor should continue to provide the more detailed disclosure statement for the benefit of edge providers.

c. Enforcement and Relationship to the Existing Transparency Rule

182. Despite these enhancements to the existing transparency rule, we clarify that we are being specific in order to provide additional guidance. The transparency rule has always required broadband providers to disclose information "sufficient for consumers to make informed choices"[447] and that test could, in particular circumstances, include the enhancements that we expressly adopt today. We also reiterate that under both the existing transparency rule and the enhancements adopted in this Order, all disclosures that broadband providers make about their network practices, performance, and commercial terms of broadband services must be accurate and not misleading.[448]

183. In the *2014 Open Internet NPRM* we also requested comment on how the Commission could best enforce the transparency rule.[449] In particular, we noted that a key objective of the transparency rule is to enable the Commission to collect information necessary to access, report, and enforce the open Internet rules.[450] For example, we sought comment on whether to require broadband providers to certify that they are in compliance with the required disclosures and/or submit reports containing descriptions of current disclosure practices, particularly if the existing flexible approach is amended to require more specific disclosures.[451] Some commenters caution against measures that are unnecessary, susceptible to abuse, or burdensome.[452] Others express support for stronger or more

[447] *See* 47 C.F.R. § 8.3. Even where a particular category of information discussed above was not specified in the *2010 Open Internet Order* that does not mean that disclosure of that information has not consistently been required under the transparency rule. If such information is necessary for a consumer to make an "informed choice" regarding the purchase or use of broadband service, disclosure of that information is a fundamental requirement of the transparency rule.

[448] *See 2014 Advisory Guidance*, 29 FCC Rcd at 8607.

[449] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5592-93, para. 87.

[450] *Id.*

[451] *Id.*

[452] *See, e.g.*, ACA Comments at v ("The Commission should, rather than adopt enhancements, continue to rely upon its complaints and enforcement procedures to address any material concerns about individual providers' disclosures

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efficient enforcement mechanisms.[453] At this time we decline to require certification by broadband providers. Should evidence be provided, however, that certification is necessary, we will revisit this issue at a later date.

184. We also remind providers that if their disclosure statements fail to meet the requirements established in 2010 and enhanced today, they may be subject to investigation and forfeiture. The Enforcement Bureau will closely scrutinize failure by providers to meet their obligations in fulfilling the transparency rule.

d. Role of Further Advisory Guidance

185. The *2011* and *2014 Advisory Guidance* documents illustrate the role of further guidance from Commission staff in interpreting and applying the general requirements of the transparency rule. We anticipate that as technology, the marketplace, and the needs of consumers, edge providers, and other stakeholders evolve, further such guidance may be appropriate concerning the transparency rule, including with respect to the enhancements adopted today. The most immediate example concerns ongoing improvements and evolutions in the methodologies for measuring broadband providers' actual performance, as discussed in further detail above. We also point out that broadband providers are able to seek advisory opinions from the Enforcement Bureau concerning any of the open Internet regulations, including the transparency rule.[454]

D. Scope of the Rules

186. The open Internet rules we adopt today apply to fixed and mobile broadband Internet access service. We make clear, however, that while the definition of broadband Internet access service encompasses arrangements for the exchange of Internet traffic, the open Internet rules we adopt today do not apply to that portion of the broadband Internet access service.[455]

1. Broadband Internet Access Service

187. As discussed below, we continue to define "broadband Internet access service" (BIAS) as:

> *A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.*[456]

188. "Broadband Internet access service" continues to include services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile

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that may arise."); Charter Comments at 34-35 (arguing that the proposed enhanced enforcement mechanisms are unnecessary and susceptible to abuse).

[453] *See, e.g.*, EFF Comments at 26-27; Microsoft Comments at 32-33.

[454] *See infra* Section III.E.2.a(i).

[455] *See infra* Section III.D.4.

[456] 47 C.F.R. § 8.11(a); *2010 Open Internet Order*, 25 FCC Rcd at 17932, para. 44; *id.* at 17935, para. 51 (finding that the market and regulatory landscape for dial-up Internet access service differed from broadband Internet access service); *2014 Open Internet NPRM*, 29 FCC Rcd at 5581, para. 54. The *Verizon* decision upheld the Commission's regulation of broadband Internet access service pursuant to section 706 and the definition of "broadband Internet access service" has remained part of the Commission's regulations since adopted in 2010.

wireless services using licensed or unlicensed spectrum), and satellite.[457] "Broadband Internet access service" encompasses all providers of broadband Internet access service, as we delineate them here, regardless of whether they lease or own the facilities used to provide the service.[458] "Fixed" broadband Internet access service refers to a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network.[459] The term encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband services (e.g., cable, DSL, fiber), fixed wireless broadband services (including fixed services using unlicensed spectrum), and fixed satellite broadband services. "Mobile" broadband Internet access service refers to a broadband Internet access service that serves end users primarily using mobile stations.[460] It also includes services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet,[461] as well as mobile satellite broadband services.[462]

189. We continue to define "mass market" as "a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries."[463] To be clear, "mass market" includes broadband Internet access services purchased with support of the E-rate and Rural Healthcare programs, as well as any broadband Internet access service offered using networks supported by the Connect America Fund (CAF).[464] To the extent that institutions

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[457] *2010 Open Internet Order*, 25 FCC Rcd at 17932, para. 44.

[458] The Commission has consistently determined that resellers of telecommunications services are telecommunications carriers, even if they do not own any facilities. *See, e.g.*, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7293-94, 7312, paras. 10, 65 (2006), *vacated in part on other grounds sub nom. Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); *NOS Communications, Inc., Affinity Network Inc. and NOSVA Limited Partnership*, EB Docket No. 03-96, Order to Show Cause and Notice of Opportunity for Hearing, 18 FCC Rcd 6952, 6953-54, para. 3 (2003); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 265 para. 8 (1976) ("[A]n entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II."), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978). Further, as the Supreme Court observed in *Brand X*, "the relevant definitions do not distinguish facilities-based and non-facilities-based carriers." *Brand X*, 545 U.S. at 997. We note that the rules apply not only to facilities-based providers of broadband service but also to resellers of that service. In applying these obligations to resellers, we recognize, as the Commission has in other contexts, that consumers will expect the protections and benefits afforded by providers' compliance with the rules, regardless of whether the consumer purchase service from a facilities-based provider or a reseller. *See, e.g.*, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems et al.*, CC Docket No. 94-102, IB Docket No. 99-67, Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 25340, 25380, para. 96 (2003). We note that a reseller's obligation under the rules is independent from the obligation of the facilities-based provider that supplies the underlying service to the reseller, though the extent of compliance by the underlying facilities-based provider will be a factor in assessing compliance by the reseller.

[459] *2010 Open Internet Order*, 25 FCC Rcd at 17934, para. 49 & n.153.

[460] *See* 47 U.S.C. § 153(34) ("The term 'mobile station' means a radio-communication station capable of being moved and which ordinarily does move."); *Open Internet Order*, 25 FCC Rcd at 17934, para. 49.

[461] We note that "public safety services," as defined in section 337 of the Act, are excluded from the definition of mobile broadband Internet access service. *See* 47 U.S.C. § 337(f)(1).

[462] We provide these definitions of "fixed" and "mobile" for illustrative purposes. In contrast to the Commission's *2010 Open Internet Order*, here we are applying the same regulations to both fixed and mobile broadband Internet access services.

[463] *2010 Open Internet Order*, 25 FCC Rcd at 17932, para. 45.

[464] In the *2010 Open Internet Order*, the Commission found that "mass market" included broadband Internet access services purchased with support of the E-rate program. *See 2010 Open Internet Order*, 25 FCC Rcd at 17932, para. 45. Since that time, the Commission has extended universal service support for broadband services through the

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of higher learning purchase mass market services, those institutions would be included within the scope of the schools and libraries portion of our definition.[465] The term "mass market" does not include enterprise service offerings, which are typically offered to larger organizations through customized or individually-negotiated arrangements,[466] or special access services.[467]

190. We adopt our tentative conclusion in the *2014 Open Internet NPRM* that broadband Internet access service does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services (to the extent those services are separate from broadband Internet access service).[468] The Commission has historically distinguished these services from "mass market" services and, as explained in the *2014 Open Internet NPRM*, they "do not

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Lifeline and Rural Health Care programs. *See Lifeline and Link Up Reform and Modernization; Lifeline and Link Up; Federal-State Joint Board on Universal Service; Advancing Broadband Availability Through Digital Literacy Training*, WC Docket Nos. 11-42, 03-109, 12-23, CC Docket No. 96-45, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6795, para. 323 (2012) (adopting "a Low-Income Broadband Pilot Program . . . that will focus on testing the necessary amount of subsidies for broadband and the length of support"); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678 (2012). Thus, for the same reasons the Commission defined mass market services to include BIAS purchased with the support of the E-rate program in 2010, we now find that mass market also includes BIAS purchased with the support of Lifeline and Rural Health Care programs.

[465] *See* Higher Education and Libraries Comments at 11 (noting that institutions of higher education are not "residential customers" or "small businesses" and uncertainty about whether institutions of higher education (and their libraries) are included in the term "schools" because the term is sometimes interpreted as applying only to K-12 schools).

[466] *See 2010 Open Internet Order*, 25 FCC Rcd at 17932, para. 45; *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5709-10, para. 85 ("[E]nterprise customers tend to be sophisticated and knowledgeable (often with the assistance of consultants), . . . contracts are typically the result of RFPs and are individually-negotiated (and frequently subject to non-disclosure clauses), . . . contracts are generally for customized service packages, and . . . the contracts usually remain in effect for a number of years.").

[467] The Commission has a separate, ongoing proceeding examining special access. *See Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (*Special Access Data Collection Order* or *Special Access Data Collection NPRM*) (initiating special access data collection and seeking comment on a proposal to use the data to evaluate competition in the special access services market); *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557 (2012) (*Pricing Flexibility Suspension Order*) (suspending, on an interim basis, the Commission's rules allowing the grant of pricing flexibility for special access services in areas subject to price cap regulation and, to identify a replacement framework, detailing a plan to collect data and information for a robust market analysis to gauge actual and potential competition for special access services); *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*) (initiating a broad examination of the regulatory framework to apply to price cap local exchange carrier's interstate special access services); *see also Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order on Reconsideration, 29 FCC Rcd 10899 (Wireline Comp. Bur. 2014) (finalizing the special access data collection pursuant to delegated authority).

[468] *2010 Open Internet Order*, 25 FCC Rcd at 17933, para. 47; *2014 Open Internet NPRM*, 29 FCC Rcd at 5581, para. 58; *see also, e.g.*, Cox Comments at 8, 14; Nokia Comments at 11.

provide the capability to receive data from all or substantially all Internet endpoints."[469] We do not disturb that finding here. Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, he or she is not providing a broadband Internet access service under our definition.[470]

191. We again decline to apply the open Internet rules to premises operators —such as coffee shops, bookstores, airlines, private end-user networks (e.g. libraries and universities), and other businesses that acquire broadband Internet access service from a broadband provider to enable patrons to access the Internet from their respective establishments—to the extent they may be offering broadband Internet access service as we define it today.[471] We find, as we did in 2010, that a premises operator that purchases BIAS is an end user and that these services "are typically offered by the premise operator as an ancillary benefit to patrons."[472] Further, applying the open Internet rules to the provision of broadband service by premises operators would have a dampening effect on these entities' ability and incentive to offer these services. As such, we do not apply the open Internet rules adopted today to premises operators.[473] The record evinces no significant disagreement with this analysis.[474]

192. Our definition of broadband Internet access service includes services "by wire or radio," which encompasses mobile broadband service. Thus, our definition of broadband Internet access service also extends to the same services provided by mobile providers. As discussed above, the record demonstrates the pressing need to apply open Internet rules to fixed and mobile broadband services alike, and changes in the mobile marketplace no longer counsel in favor of treating mobile differently under the rules.[475] Thus, we apply the open Internet rules adopted today to both fixed and mobile networks.[476]

193. As we discuss more fully below, broadband Internet access service encompasses the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider's network.[477] Below, we find that broadband Internet access service is a telecommunications service,

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[469] *2014 Open Internet NPRM*, 29 FCC Rcd 5581-82, para. 58; *2010 Open Internet Order*, 25 FCC Rcd at 17933, para. 47 ("These services typically are not mass market services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints."); *see also* Verizon Comments at 77-78.

[470] *2010 Open Internet Order*, 25 FCC Rcd at 17936, para. 52, n.164 ("We also do not include within the rules free access to individuals' wireless networks, even if those networks are intentionally made available to others.").

[471] *See id*. at 17935, para. 52. While we decline to apply open Internet rules to premises operators to the extent they may offer broadband Internet access service, that decision does not affect other obligations that may apply to premises operators under the Act. *See, e .g.*, 47 U.S.C. § 333; *Warning: Wi-Fi Blocking is Prohibited*, Public Notice, DA 15-113 (Enforcement Bur. Jan. 27, 2015); *Marriott Int'l, Inc.; Marriott Hotel Servs, Inc.*, EB-IHD-13-00011303, Order and Consent Decree, 29 FCC Rcd 11760 (Enforcement Bur. 2014).

[472] *2010 Open Internet Order*, 25 FCC Rcd at 17935-36, para. 52, n.163.

[473] We reiterate the guidance in the *2010 Open Internet Order* that although not bound by our rules, we encourage premises operators to disclose relevant restrictions on broadband service they make available to their patrons. *See id.*

[474] CDT Comments at 26 n.61; Higher Education and Libraries Reply at 14-15. We note, however, that this exception does not affect other obligations that a premise operator may have independent of our open Internet rules. *See* TDI Comments at 14-15 (arguing that the enterprise or premise operator exception should not apply to blocking or prioritization undertaken in violation of disability law).

[475] *See supra* Section III.B.3.

[476] Although we adopt the same rules for both fixed and mobile services, we recognize that with respect to the reasonable network management exception, the rule may apply differently to fixed and mobile broadband providers. *See infra* Section III.D.4.

[477] *See infra* Section III.D.2.

subject to sections 201, 202, and 208 (along with key enforcement provisions).[478] As a result, the Commission will be available to hear disputes regarding arrangements for the exchange of traffic with a broadband Internet access provider raised under sections 201 and 202 on a case-by-case basis: an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and CDNs, that act on behalf of smaller edge providers. However, for reasons discussed more fully below,[479] we exclude this portion of broadband Internet access service—interconnection with a broadband Internet access service provider's network—from application of our open Internet rules. We note that this exclusion also extends to interconnection with CDNs.[480]

2. Internet Traffic Exchange

194. In the *2010 Open Internet Order*, the Commission applied its open Internet rules "only as far as the limits of a broadband provider's control over the transmission of data to or from its broadband customers," and excluded the exchange of traffic between networks from the scope of the rules.[481] In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should maintain this approach, but explicitly sought comment on suggestions that the Commission should expand the scope of the open Internet rules to cover issues related to Internet traffic exchange.[482]

195. As discussed below, we classify fixed and mobile broadband Internet access service as telecommunications services.[483] The definition for broadband Internet access service includes the exchange of Internet traffic by an edge provider or an intermediary with the broadband provider's network. We note that anticompetitive and discriminatory practices in this portion of broadband Internet access service can have a deleterious effect on the open Internet,[484] and therefore retain targeted authority to protect against such practices through sections 201, 202, and 208 of the Act (and related enforcement

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[478] *See infra* Sections IV-V. We note that broadband Internet access services are also subject to sections 222, 224, 225, 254, and 255.

[479] *See infra* paras. 202-206.

[480] Letter from Scott Blake Harris, Counsel to Akamai Technologies, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Feb. 9, 2015) ("Akamai agrees with [the tentative conclusion not to apply the open Internet rules to CDNs] and submits that it should be adopted in the final order.").

[481] *2010 Open Internet Order*, 25 FCC Rcd at 17993, para. 47 n.150, 17944, para. 67 n.209; *see also id.* at para. 47 (excluding content delivery network services and Internet backbone services (if those services are separate from broadband Internet access) from the definition of "broadband Internet access service").

[482] *2014 Open Internet NPRM*, 29 FCC Rcd at 5582, 5614-15, paras. 59, 151-52. As a general matter, Internet traffic exchange involves the exchange of IP traffic between networks. An Internet traffic exchange arrangement determines which networks exchange traffic and the destinations to which those networks will deliver that traffic. In aggregate, Internet traffic exchange arrangements allow an end user of the Internet to interact with other end users on other Internet networks, including content or services that make themselves available by having a public IP address, similar to how the global public switched telephone network consists of networks that route calls based on telephone numbers. When we adopted the *2014 Open Internet NPRM*, the Chairman issued a separate, written statement suggesting that "the question of interconnection ('peering') between the consumer's network provider and the various networks that deliver to that ISP . . . is a different matter that is better addressed separately." *2014 Open Internet NPRM*, 29 FCC Rcd at 5647. While this statement reflected the Notice's tentative conclusion concerning Internet traffic exchange, it in no way detracts from the fact that the Notice also sought comment on "whether we should change our conclusion," whether to adopt proposals to "expand the scope of the open Internet rules to cover issues related to traffic exchange," and how to "ensure that a broadband provider would not be able to evade our open Internet rules by engaging in traffic exchange practices that would be outside the scope of the rules as proposed." *Id.* at 5582, para. 59.

[483] *See infra* Section IV.

[484] *See infra* para. 205.

provisions), but will forbear from a majority of the other provisions of the Act.[485] Thus, we conclude that, at this time, application of the no-unreasonable interference/disadvantage standard and the prohibitions on blocking, throttling, and paid prioritization to the Internet traffic exchange arrangements is not warranted.

196. *Trends in Internet Traffic Exchange*. Internet traffic exchange is typically based on commercial negotiations.[486] Changes in consumer behavior, traffic volume, and traffic composition have resulted in new business models for interconnection. Since broadband Internet access service providers cannot, on their own, connect to every end point on the Internet in order to provide full Internet access to their customers, they historically paid third-party backbone service providers for transit. Backbone service providers interconnected upstream until traffic reached Tier 1 backbone service providers, which peered with each other and thereby provided their customer networks with access to the full Internet.[487] In this hierarchical arrangement of networks, broadband Internet access providers negotiated with backbone service providers; broadband Internet access providers generally did not negotiate with edge providers to gain access to content.[488] However, in recent years, new business models of Internet traffic exchange have emerged, premised on changes in traffic flows and in broadband Internet access provider networks.[489] A number of factors drive these trends in Internet traffic exchange.

197. Critically, the growth of online streaming video services has sparked further evolution of the Internet.[490] Content providers have come to rely on the services of commercial and private CDNs, which cache content close to end users, providing increased quality of service and avoiding transit

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[485] *See infra* Section V.

[486] *See, e.g.*, Verizon Reply at 57; CenturyLink Reply at 11.

[487] William Norton, *The Evolution of the U.S. Internet Peering Ecosystem*, Dr. Peering, http://drpeering.net/white-papers/Ecosystems/Evolution-of-the-U.S.-Peering-Ecosystem.html (last visited Feb. 5, 2015).

[488] *Id.*

[489] *See, e.g.*, Verizon Reply at 58 (explaining that "new arrangements [are] emerging on a regular basis to provide for efficient network planning and traffic delivery, as well as improved service for customers as their demands for Internet services continues to grow"); AT&T Reply at 96 ("For more than two decades, such interconnection has taken the form of 'transit' and 'peering' agreements, and in recent years, 'on-net-only' agreements have arisen in response to growing demands for video and other forms of media-rich content."); *see also* Werbach, Kevin D., The Centripetal Network: How the Internet Holds Itself Together, and the Forces Tearing it Apart (2009), 42 U.C. Davis L. Rev. , 343, 371 (2009), http://ssrn.com/abstract=1118435 (anticipating the evolving interconnection ecosystem).

[490] *See 2015 Broadband Progress Report* at para. 32 ("Consumers increasingly are choosing higher quality video services that demand increased bandwidth, and projections show new video service options and substantial growth in this area."). Currently, video is the dominant form of traffic on the Internet, with estimates that traffic from Netflix and YouTube constitutes approximately 50 percent of peak Internet download traffic. Sandvine Report: Netflix and Youtube Account for 50% of All North American Fixed Network Data, Sandvine (Nov. 11, 2013), https://www.sandvine.com/pr/2013/11/11/sandvine-report-netflix-and-youtube-account-for-50-of-all-north-american-fixed-network-data.html (stating also that video is very asymmetric and requires significant bandwidth). For instance, Netflix recommends a connection speed of at least 5 Mbps to watch its content in HD, while Google has reported that at least 2.5 Mbps is needed to sustain an average YouTube HD video playback at 720p resolution. Netflix, Internet Connection Speed Recommendations, https://support.netflix.com/en/node/306 (last visited Mar. 3, 2015); *see also* Google Apps Administrator, Bandwidth Limits, https://support.google.com/a/answer/1071518?hl=en (last visited Jan. 5, 2015). Many project continued growth of online streaming video services on both fixed and mobile platforms. *See*, *e.g.*, Letter from Jared Carlson, Director, Government Affairs and Public Policy, Ericsson, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 12-354 (filed Oct. 16, 2014), Attach. Ericsson Mobility Report (June 2014) at 13 (stating that in 2013, video accounted for approximately 40% of mobile data traffic, and is projected to account for more than 50% of mobile data traffic by 2019); Cisco Visual Networking Index (June 2014), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html (finding that globally, IP video traffic will be 79 percent of all consumer Internet traffic in 2018, up from 66 percent in 2013).

costs.[491] While CDNs rely on transit to feed the array of CDN cache servers, they deliver traffic to broadband Internet access service providers via transit service or by entering into peering arrangements, directly interconnecting with broadband Internet access service providers.[492]

198. In addition, several large broadband Internet access service providers, such as AT&T, Comcast, Time Warner Cable, and Verizon, have built or purchased their own backbones, giving them the ability to directly interconnect with other networks and edge providers and thereby lowering and eliminating payments to third-party transit providers. These interconnection arrangements are "peering," involving the exchange of traffic only between the two networks and their customers, rather than paid transit, which provides access to the full Internet over a single interconnection.[493] Peering gives the participants greater control over their traffic[494] and any issues arising with the traffic exchange are limited to those parties, and not other parties over other interconnection links. Historically, broadband Internet access service providers paid for transit and therefore had an incentive to agree to settlement-free peering with a CDN to reduce transit costs;[495] however, where large broadband Internet access service providers have their own national backbones and have settlement-free peering with other backbones, they may no longer have an incentive to agree to settlement-free peering with CDNs in order to avoid transit costs. As shown below in Chart 1, the evolution from reliance on transit to peering arrangements also means an evolution from a traffic exchange arrangement that provides access to the full Internet to a traffic exchange arrangement that only provides for the exchange of traffic from a specific network provider and its customers.[496]

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[491] *See, e.g.*, Akamai Comments at 4 ("At any given time Akamai delivers between 15-30% of all web traffic, resulting in over two trillion interactions delivered daily.").

[492] *See, e.g.*, Netflix, *Netflix Open Connect*, https://openconnect.itp.netflix.com/index.html (last visited Jan. 5, 2015); Google Peering & Content Delivery, *Google Caching Overview*, https://peering.google.com/about/ggc.html (last visited Jan. 5, 2015).

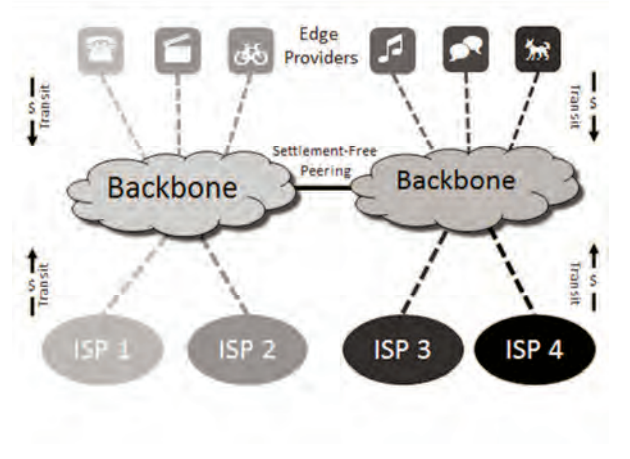
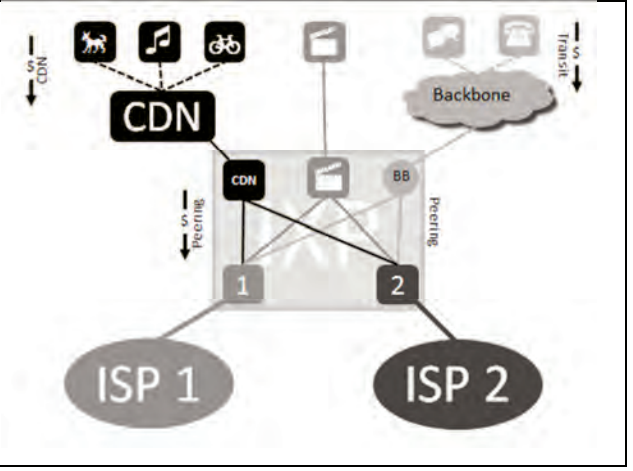
[493] *Joint Application of Time Warner Cable and Comcast Corp.*, MB Docket 14-57, at 36 (filed April 8, 2014) ("Comcast and TWC have independently developed their own national core backbone infrastructure."); *Verizon/MCI Merger Order*, 20 FCC Rcd at 18495, para. 116 ("Based on the record evidence, we find that there likely are between six and eight Tier 1 Internet backbone providers based on the definition of Tier 1 backbones that has been used in the past: AT&T, MCI, Sprint, Level 3, Qwest, Global Crossing, and likely SAVVIS and Cogent.").

[494] *See* William Norton, *The Evolution of the U.S. Internet Peering Ecosystem*, Dr. Peering, http://drpeering.net/white-papers/Ecosystems/Evolution-of-the-U.S.-Peering-Ecosystem.html ("Peering has the benefit of lower latency, better control over routing, and may therefore lead to lower packet loss.").

[495] *See, e.g.*, Verizon Reply at 58 ("In fact, today the majority of traffic destined for our end-user subscribers is delivered to Verizon over paid, direct connections with CDNs and large content providers, not over connections with our traditional, settlement-free peering partners."); Body of European Regulators for Electronic Communications, *An Assessment of IP Interconnection in the Context of Net Neutrality* at 47 (Dec. 6, 2012), http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1130-an-assessment-of-ip-interconnection-in-t_0.pdf (BEREC Report); Netflix Petition to Deny, MB Docket No.14-57, Attach. A at 3 (Ken Florance states, "CDNs also can reduce the transit costs paid by terminating access networks (where such networks pay for transit), because more content is stored within or near the terminating access network and so does not need to be retrieved remotely.").

[496] J. Scott Marcus, *The Economic Impact of Internet Traffic Growth on Network Operators* at 4, WIK-Consult (Oct. 24, 2014), http://dx.doi.org/10.2139/ssrn.2531782 ("Very few ISPs are able, however, to use peering to reach *all* Internet destinations. Even well-connected ISPs typically purchase transit from one or two other ISPs in order to reach destinations that are not covered by their own peering arrangements.") (emphasis in original).

Chart 1: Evolution in Transit Market

Transit in the 1990s	Paid Peering and CDNs Today
	

199. *Recent Disputes*. Recently, Internet traffic exchange disputes have reportedly involved not de-peering, as was more frequently the case in the last decade, but rather degraded experiences caused by congested ports between providers. In addition, these disputes have evolved from conflicts that may last a few days,[497] to disputes that have been sustained for well over a year,[498] and have gone from disputes between backbone service networks, to disputes between providers of broadband Internet access service and transit service providers, CDNs, or edge providers. The typical dispute has involved, on one side, a large broadband provider, and on the other side, a commercial transit provider (such as Cogent or Level 3) and/or a large CDN.[499] Multiple parties point out, however, that interconnection problems can

[497] *See, e.g.*, *Level 3 Issues Statement Concerning Internet Peering and Cogent Communications*, PR Newswire, (Oct. 7, 2005), http://www.prnewswire.com/news-releases/level-3-issues-statement-concerning-internet-peering-and-cogent-communications-55014572.html (indicating the dispute lasted several days); Martin A Brown, Clint Hepner, Alin Popescu, *Internet Captivity and the De-Peering Menace: Peering Wars: Episode 1239.174*, at 15 (Jan. 2009), http://research.dyn.com/wp-content/uploads/2014/07/nanog-45-Internet-Peering.pdf (stating that the outage lasted 3 days); Press Release, *Sprint and Cogent Reach Agreement on Exchange of Internet Traffic*, (Dec. 22, 2008), http://www.cogentco.com/news/press-releases/149-sprint-and-cogent-reach-agreement-on-exchange-of-internet-traffic (indicating the dispute lasted several days).

[498] *See* MLab ISP Interconnection Report at 4 (observing sustained performance degradation experienced by customers of AT&T, Comcast, CenturyLink, Time Warner Cable, and Verizon when their traffic passed over interconnections with transit providers Cogent, Level 3, and XO Communications); *Measuring Internet Congestion: A Preliminary Report*, MIT Information Policy Project (June 2014); Matthew Luckie, Amogh Dhamdhere, Bradley Huffaker, Young Hyun, Steve Bauer, *Internet Interdomain Congestion* at 10 (Feb. 2014), http://www.caida.org/publications/presentations/2014/bitag-congestion/bitag-congestion.pdf.

[499] *See, e.g.*, Netflix, *The Case Against ISP Tolls* (Apr. 24, 2014), http://blog.netflix.com/2014/04/the-case-against-isp-tolls.html; Comcast, *Comcast Response to Netflix* (Apr. 24, 2014), http://corporate.comcast.com/comcast-voices/comcast-response-to-netflix; Paresh Dave, Netflix, *Time Warner Cable reach deal on streaming quality*, L.A. Times (Aug. 20, 2014), http://www.latimes.com/business/technology/la-fi-tn-netflix-time-warner-cable-20140820-story.html; AT&T Public Policy Blog, *Who Should Pay for Netflix?* (Mar. 21, 2014), http://www.attpublicpolicy.com/consumers-2/who-should-pay-for-netflix/; Verizon Policy Blog, *Level 3's Selective Amnesia on Peering* (July 21, 2014), http://publicpolicy.verizon.com/blog/entry/level-3s-selective-amnesia-on-peering; Level 3 Communications Blog, *Verizon's Accidental Mea Culpa* (July 17, 2014), http://blog.level3.com/open-internet/verizons-accidental-mea-culpa/.

harm more than just the parties in a dispute.[500] When links are congested and capacity is not augmented, the networks—and applications, large and small, running over the congested links into and out of those networks—experience degraded quality of service due to reduced throughput, increased packet loss, increased delay, and increased jitter.[501] At the end of the day, consumers bear the harm when they experience degraded access to the applications and services of their choosing due to a dispute between a large broadband provider and an interconnecting party.[502] Parties also assert that these disputes raise concerns about public safety and network reliability.[503] To address these growing concerns, a number of parties have called for extending the rules proposed in the *2014 Open Internet NPRM* to Internet traffic exchange practices.

200. The record reflects competing narratives. Some edge and transit providers assert that large broadband Internet access service providers are creating artificial congestion by refusing to upgrade interconnection capacity at their network entrance points for settlement-free peers or CDNs, thus forcing edge providers and CDNs to agree to paid peering arrangements.[504] These parties suggest that paid arrangements resulting from artificially congested interconnection ports at the broadband Internet access service provider network edge could create the same consumer harms as paid arrangements in the last-mile, and lead to paid prioritization, fast lanes, degradation of consumer connections, and ultimately, stifling of innovation by edge providers.[505] Further, edge providers argue that they are covering the costs

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[500] Letter from Sarah J. Morris, Senior Policy Counsel, Open Technology Institute, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, MB Docket No. 14-57 (filed Nov. 18, 2014), Attach. Open Technology Institute, "Beyond Frustrated": The Sweeping Consumer Harms As a Result of ISP Disputes, at 2 (Nov. 2014) (OTI Consumer Harms Policy Paper).

[501] *Id.* ; Letter from Michael J. Mooney, Senior Vice President and General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, GN Docket Nos. 14-28, 09-191, at 2 (filed Nov. 19, 2014) (Level 3 Nov. 19, 2014 *Ex Parte* Letter) (explaining that congested interconnection points result in "dropped packets and a degraded consumer experience"); Sandoval *Ex Parte* Letter, Attach. at 22-24 (reporting slow connection speeds during the Comcast-Cogent traffic exchange dispute, and explaining that other applications that were affected included gaming, VPN, and VoIP (including compliance with 911 standards)).

[502] OTI Consumer Harms Policy Paper at 1-5.

[503] *See, e.g.*, Sandoval *Ex Parte* Letter, Attach. at 24 (asserting, for example, that difficulties in using interconnected VoIP service amidst a broadband provider dispute with a server host or content provider raise grave concerns about public safety and network reliability).

[504] *See, e.g.*, Letter from Markham C. Erickson, Counsel to Netflix, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. at 2 (filed Aug. 1, 2014) (Netflix Aug. 1, 2014 *Ex Parte* Letter) (asserting that "[i]n the case of Comcast, Netflix purchased all available transit to reach Comcast's network. Every single one of those transit links to Comcast was congested (even though the transit providers requested extra capacity). The only other available routes into Comcast's network were those where Comcast required an access fee."); Letter from Robert M. Cooper, Counsel to Cogent, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Mar. 19, 2014) (Cogent Mar. 19, 2014 *Ex Parte* Letter); Letter from Joseph C. Cavender, Level 3, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed May 13, 2014) (Level 3 May 13, 2014 *Ex Parte* Letter) (asserting that "some of the biggest consumer broadband ISPs have allowed the interconnections between their networks and backbone providers like Level 3 to congest, causing packets to be dropped and harming their own users' Internet experiences"); Netflix Comments at 14-15. *But see* Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Nov. 10, 2014) (Comcast Nov. 10, 2014 *Ex Parte* Letter) ("Certainly Netflix would not have entered into direct agreements with Comcast, Verizon, Time Warner Cable, and AT&T unless doing so provided economic advantages over paying middlemen to reach these same companies—and of course, these arrangements have in turn reduced Netflix's need for Cogent's and other transit providers' services, not only reducing Netflix's costs but freeing up transit capacity for other entities.").

[505] *See* Internet Association Comments at 22; COMPTEL Comments at 25; Netflix Comments at 12 (arguing that its dispute with Comcast shows how a broadband provider "can use its terminating access monopoly to harm edge providers, its own customers, and the virtuous circle by discriminating at interconnection and peering points");

(continued….)

of carrying this traffic through the network, bringing it to the gateway of the Internet access service, unlike in the past where both parties covered their own costs to reach the Tier 1 backbones where traffic would then be exchanged on a settlement-free basis.[506] Edge and transit providers argue that the costs of adding interconnection capacity or directly connecting with edge providers are *de minimis*.[507] Further, they assert that traffic ratios "are arbitrarily set and enforced and are not reflective of how [broadband providers] sell broadband connections and how consumers use them."[508] Thus, these edge and transit providers assert that a focus on only the last-mile portion of the Internet traffic path will fail to adequately constrain the potential for anticompetitive behavior on the part of broadband Internet access service providers that serve as gatekeepers to the edge providers, transit providers, and CDNs seeking to deliver Internet traffic to the broadband providers' end users.[509]

201. In contrast, large broadband Internet access service providers assert that edge providers such as Netflix are imposing a cost on broadband Internet access service providers who must constantly upgrade infrastructure to keep up with the demand.[510] Large broadband Internet access service providers explain that when an edge provider sends extremely large volumes of traffic to a broadband Internet access service provider— e.g., through a CDN or a third-party transit service provider—the broadband provider must invest in additional interconnection capacity (e.g., new routers or ports on existing routers)

(Continued from previous page)
Netflix Reply at 6 ("From a consumer's perspective, whether degradation occurs on the last mile or at the interconnection point to the last mile is a distinction without a difference. Both impede a consumer's access to the online content she has requested."); OTI Reply at 11-12; Cogent Mar. 19, 2014 *Ex Parte* Letter at 1 ("While some large edge providers may be able to pay a toll to create a way around such congestions, smaller firms will not, thereby driving consumers to use better performing, vertically integrated content and stifling the investment and innovation that has been the hallmark of the Internet since its inception."); Netflix Aug. 1, 2014 *Ex Parte* Letter, Attach. at 1.

[506] *See, e.g.*, OTI Consumer Harms Policy Paper at 3 ("Cogent and Netflix argued that they paid their fair share by bringing the data to Comcast's front door.").

[507] *See, e.g.*, Cogent Mar. 19, 2014 *Ex Parte* Letter at 1 (stating that "capital expenditures required to remedy congestion at interconnection points are extremely modest"); Level 3 Comments at 12 ("Adding and maintaining cross-connects in these locations is not a significant cost. Moreover, the cost of adding additional ports, if ones are needed, is quite modest. The costs of physical interconnection facilities do not come near to accounting for the amount of tolls sought by the large mass-market retail ISPs.").

[508] Netflix Aug. 1, 2014 *Ex Parte* Letter, Attach. at 2.

[509] *See, e.g.*, ARC Comments at 15; AARP Comments at 18; Access Comments at 19; eBay Comments at 5; Letter from Michael A. Forscey, Counsel for WGAW, Inc. to Marlene H. Dortch, WC Docket No. 14-28, at 2 (filed July 31, 2014) (WGAW July 31, 2014 *Ex Parte* Letter); Jon Peha Comments at 11-12 (urging the Commission to consider greater transparency in interconnection); Level 3 Comments at 2 (stating that "establishing rules addressing 'direct' charges imposed by [broadband providers] on edge providers but not for 'indirect' charges levied on the edge providers' [broadband providers] through interconnection is a roadmap for evasion of new Open Internet rules"); Cogent Comments at 7 ("Without addressing traffic exchanges between last-mile broadband [providers] and other networks, the Commission would perpetuate a loophole that would swallow the rule."); Netflix Comments at 2-3 (asserting that "[f]ailing to address interconnection abuse by terminating [broadband providers] will undermine the efficacy of any open Internet or consumer protection rule that the Commission adopts"); *id.* at 11, 17-18; Netflix Reply at 9; Writers Guild of America, East Comments at 5 (stating that "as long as there are only one or two viable ISPs in any given market, and as long as those ISPs are free to make anti-competitive arrangements with edge providers and others that are positioned farther up the road and not on the 'last mile,' the bedrock principles of openness and nondiscrimination will be unenforceable"); COMPTEL Comments at 26 ("The same economic forces that threaten the openness of [a] consumer's last-mile broadband connection are present at the point of interconnection."); *id.* at 26-30; WISPA Comments at 26; Level 3 Nov. 19, 2014 *Ex Parte* Letter at 1-2.

[510] *See, e.g.*, Verizon Reply at 63; Letter from Robert C. Barber, AT&T to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, CC Docket No. 01-92, GN Docket No. 14-28, Attach. at 15-19 (filed July 30, 2014) (AT&T July 30, 2014 *Ex Parte* Letter).

and middle-mile transport capacity in order to accommodate that traffic, exclusive of "last-mile" costs from the broadband Internet access provider's central offices, head ends, or cell sites to end-user locations.[511] Commenters assert that if the broadband Internet access service provider absorbs these interconnection and transport costs, *all* of the broadband provider's subscribers will see their bills rise.[512] They argue that this is unfair to subscribers who do not use the services, like Netflix, that are driving the need for additional capacity. Broadband Internet access service providers explain that settlement-free peering fundamentally is a barter arrangement in which each side receives something of value.[513] These parties contend that if the other party is only sending traffic, it is not contributing something of value to the broadband Internet access service provider.

202. *Mechanism to Resolve Traffic Exchange Disputes*. As discussed, Internet traffic exchange agreements have historically been and will continue to be commercially negotiated. We do not believe that it is appropriate or necessary to subject arrangements for Internet traffic exchange (which are subsumed within broadband Internet access service) to the rules we adopt today. We conclude that it would be premature to adopt prescriptive rules to address any problems that have arisen or may arise.[514] It is also premature to draw policy conclusions concerning new paid Internet traffic exchange arrangements between broadband Internet access service providers and edge providers, CDNs, or backbone services.[515] While the substantial experience the Commission has had over the last decade with

[511] *See, e.g.*, Letter from Craig A. Gilley, Counsel for Mediacom Communications Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, GN Docket No. 14-28, at 2 (filed Jun. 12, 2014) (Mediacom Jun. 12, 2014 *Ex Parte* Letter) (stating that "if the large edge providers that benefit the most from the investment that Mediacom and other ISPs make in their broadband networks, then there should be nothing wrong with requiring them to bear their fair share of the burden of such upgrades"). *But see* Netflix Aug. 1 *Ex Parte* Letter, Attach. at 2 (stating that Netflix "incurs the cost of moving Netflix content long distances, closer to the consumer, not the broadband Internet access provider").

[512] *See, e.g.*, AT&T Reply at 105-106; Comcast Reply at 37; Mediacom Jun. 12, 2014 *Ex Parte* Letter at 2 ("ISPs and consumers should not be the sole parties bearing the costs for network improvements required for consumers to access large edge provider services."); Verizon Reply at 63 ("Instead of Netflix—and ultimately its users—bearing the costs of the capacity needed to accommodate the increased traffic caused by Netflix's streaming video service, all of an ISP's customers would have to pay more, even if they never use Netflix or stream movies at all.").

[513] *See* AT&T July 30, 2014 *Ex Parte* Letter, Attach. at 3 (explaining that peering is a "commercially negotiated barter transaction" where "parties' perceived value of arrangement is equal"); AT&T Reply at 95, n.343.

[514] *See, e.g.*, Verizon Reply at 59-60 ("The breadth and variety of the voluntary Internet interconnection agreements . . . reflect that the market for Internet interconnection has been and continues to be a resounding success. Although there are occasionally bumps in the road as content providers and networks grapple with the effects of newer business models, new services, shifting traffic flows, or growing volume—such as the introduction of Netflix's streaming video service in 2007 and the rapid growth of that traffic in subsequent years—the players in the Internet ecosystem have been able to resolve issues through negotiations for new types of interconnection arrangements rather than in contentious, drawn-out proceedings before the Commission."); AT&T Reply at 98-99; TWC Comments at 23, 30; Verizon Comments at 70-73; CEA Comments at 11. *But see, e.g.*, Level 3 Comments at 15 (stating the Commission should adopt an interconnection rule where "large mass-market retail ISPs must interconnect with content companies and backbone providers without charging them a toll, but those content and backboned companies must also do their fair share of the work to deliver content to the ISP"); Netflix Comments at 17 (stating the Commission should adopt a rule that "terminating ISPs cannot charge data sources for interconnection and must provide adequate no-fee interconnection to wholesalers and Internet services so consumers experience the broadband speeds for which they have paid"); Letter from Joshua Stager, Counsel for Open Technology Institute to Marlene H. Dortch, WC Docket No. 14-28, at 2 (filed Dec. 22, 2014) (OTI Dec. 22, 2014 *Ex Parte* Letter) (stating that the Commission should "create a measurement regime to analyze congestion along critical interconnection points. . . . [and] ban fees for access to last-mile networks"). We decline to adopt these and similar types of proposals for the same reasons we decline to apply the open Internet rules to traffic exchange.

[515] For instance, Akamai expresses concern that adoption of rules governing interconnection could be used as a justification by some broadband providers to refuse direct interconnection to CDNs and other content providers generally, on the theory that connecting with *any* CDN necessitates connecting with *all* CDNs, regardless of

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"last-mile" conduct gives us the understanding necessary to craft specific rules based on assessments of potential harms, we lack that background in practices addressing Internet traffic exchange.[516] For this reason, we adopt a case-by-case approach, which will provide the Commission with greater experience. Thus, we will continue to monitor traffic exchange and developments in this market.[517]

203. At this time, we believe that a case-by-case approach is appropriate regarding Internet traffic exchange arrangements between broadband Internet access service providers and edge providers or intermediaries—an area that historically has functioned without significant Commission oversight.[518] Given the constantly evolving market for Internet traffic exchange, we conclude that at this time it would be difficult to predict what new arrangements will arise to serve consumers' and edge providers' needs going forward, as usage patterns, content offerings, and capacity requirements continue to evolve.[519] Thus, we will rely on the regulatory backstop prohibiting common carriers from engaging in unjust and unreasonable practices. Our "light touch" approach does not directly regulate interconnection practices. Of course, this regulatory backstop is not a substitute for robust competition. The Commission's regulatory and enforcement oversight, including over common carriers, is complementary to vigorous antitrust enforcement.[520] Indeed, mobile voice services have long been subject to Title II's just and reasonable standard and both the Commission and the Antitrust Division of the Department of Justice have repeatedly reviewed mergers in the wireless industry. Thus, it will remain essential for the Commission, as well as the Department of Justice, to continue to carefully monitor, review, and where appropriate, take action against any anti-competitive mergers, acquisitions, agreements or conduct, including where broadband Internet access services are concerned.

204. Broadband Internet access service involves the exchange of traffic between a last-mile broadband provider and connecting networks.[521] The representation to retail customers that they will be

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technical feasibility. We do not intend such a result by our decision today to assert authority over interconnection. *See* Letter from Scott Blake Harris, Counsel to Akamai, to Marlene H. Dortch, Secretary, FCC, GN Docket No.14-28, at 1 (filed Feb. 20, 2015) ("If the Order is unclear, ISPs may believe they must provide access to all. This is not technically feasible and the result could be access for none, which would decrease the performance, scalability, reliability and security of the Internet.").

[516] *See, e.g.*, Cox Comments at 16 ("Internet traffic-exchange arrangements . . . present a distinct and significantly more complex set of issues than the delivery of Internet content and services over a single network operator's last-mile facilities.").

[517] *See, e.g.*, Letter from New America Foundation, Media Access Project, Free Press, to Dep't of Justice and FCC, GN Docket Nos. 10-127, 09-191, MB Docket No. 10-56, WC Docket No. 07-52, at 2 (filed Dec. 8, 2010) ("The Recent Dispute Between Comcast and Level 3 Illustrates Emerging Concerns Regarding Interconnection Practices and Highlights the Need for Federal Oversight of Interconnection."); ARCEP, French Regulator for Telecommunications, *Public Administrations' Approach to IP-Interconnection*, (June 20, 2012) (seeking to "better understand the market and monitor its evolutions").

[518] We note, however, that the Commission has looked at traffic exchange in the context of mergers and, sometimes imposed conditions on traffic exchange. *See, e.g.*, *Comcast/NBCU Merger Order*, 26 FCC Rcd 4238; *Verizon/MCI Merger Order*, 20 FCC Rcd 18433.

[519] *See, e.g.*, Akamai Comments at 7 (stating that "the projected exponential growth of Internet traffic" will make the ability of market participants to develop innovative traffic exchange solutions "increasingly important to the robust functioning of the Internet"); Cox Reply at 21-22; NCTA Comments at 81 ("[T]he constantly evolving and technically complicated nature of these agreements is all the more reason for the Commission to allow market forces to determine their terms.").

[520] *See generally* 47 U.S.C § 152(b) ("nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws").

[521] We disagree with commenters who argue that arrangements for Internet traffic exchange are private carriage arrangements, and thus not subject to Title II. *See, e.g.*, Letter from William H. Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 7-8 (filed Dec. 17, 2014) (Verizon Dec. 17, 2014 *Ex*
(continued….)

able to reach "all or substantially all Internet endpoints" necessarily includes the promise to make the interconnection arrangements necessary to allow that access. As a telecommunications service, broadband Internet access service implicitly includes an assertion that the broadband provider will make just and reasonable efforts to transmit and deliver its customers' traffic to and from "all or substantially all Internet endpoints" under sections 201 and 202 of the Act. In any event, BIAS provider practices with respect to such arrangements are plainly "for and in connection with" the BIAS service.[522] Thus, disputes involving a provider of broadband Internet access service regarding Internet traffic exchange arrangements that interfere with the delivery of a broadband Internet access service end user's traffic are subject to our authority under Title II of the Act.[523]

205. We conclude that our actions regarding Internet traffic exchange arrangements are reasonable based on the record before us, which demonstrates that broadband Internet access providers have the ability to use terms of interconnection to disadvantage edge providers and that consumers' ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs.[524] These findings are limited to the broadband Internet access services we address today.[525] When Internet traffic exchange breaks down—regardless of the cause—it risks preventing consumers from reaching the services and applications of their choosing, disrupting the virtuous cycle. We recognize the importance of timely review in the midst of commercial disputes. The Commission will be available to hear disputes raised under sections 201 and 202 on a case-by-case basis. We believe this is an appropriate vehicle for enforcement where disputes are primarily between sophisticated entities over commercial terms and that include companies, like transit providers and CDNs, that act on behalf of smaller edge providers. We also observe that section 706 provides the Commission with an additional, complementary source of authority to ensure that Internet traffic exchange practices do not harm the open Internet. As

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Parte Letter); Letter from Matt Wood, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Feb. 11, 2015). As we explain below in today's Declaratory Ruling, Internet traffic exchange is a component of broadband Internet access service, which meets the definition of "telecommunications service." *See infra* para. 338.

[522] *See* 47 U.S.C. §§ 201(b), 202(a). *See* Letter from Austin C. Schlick, Director, Communications Law, Google, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 at 3 (filed Feb. 20, 2015) (Google Feb. 20, 2015 *Ex Parte* Letter).

[523] We note that the Commission has forborne from application of many of the requirements of Title II to broadband Internet access service. *See infra* Section V.

[524] *See supra* Sections III.B.2.a, III.C.

[525] We observe that should a complaint arise regarding BIAS provider Internet traffic exchange practices, practices by edge providers (and their intermediaries) would be considered as part of the Commission's evaluation as to whether BIAS provider practices were "just and reasonable" under the Act. *See* Letter from Robert M. Cooper, Counsel for Cogent, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Feb. 11, 2015) ("Cogent takes no issue with having its interconnection practices subject to the same standards as mass market broadband Internet access providers."); Verizon Dec. 17, 2014 *Ex Parte* Letter at 3 (asserting that "Netflix, Cogent, and numerous other Internet players make decisions on their own networks that affect the speeds or performance that end users experience"); Letter from Kathryn A. Zachem, Senior Vice President, Comcast to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 at 5 (filed Jan. 23, 2015) (Comcast Jan. 23, 2015 *Ex Parte* Letter) ("[W]here the Commission has sought to regulate only one party to an interconnection arrangement, the result has been ineffective and an invitation to arbitrage. Indeed, recent efforts to regulate interconnection in the voice arena—including both the Commission's adoption of rules governing non-access traffic exchanged between LECs and CMRS carriers and pending proposals regarding IP-to-IP interconnection—recognize that the public interest typically is best served by the imposition of at least certain reciprocal obligations on both parties to an interconnection arrangement."); Letter from Samuel L. Feder, on behalf of Charter, GN Docket Nos. 14-28, 10-127, 07-245, at 1-2 (filed Feb. 4, 2015) ("[T]he Commission [should] not regulate Internet interconnection, but if it does so (whether via rules or on a case-by-case basis), it should make clear that it will police the actions of edge providers and others in the Internet ecosystem equally to those of ISPs.").

explained above, we have decided not to adopt specific regulations that would detail the practices that would constitute circumvention of the open Internet regulations we adopt today. Instead, and in a manner similar to our treatment of non-BIAS services,[526] we will continue to monitor Internet traffic exchange arrangements and have the authority to intervene to ensure that they are not harming or threatening to harm the open nature of the Internet.

206. The record also reflects a concern that our decision to adopt this regulatory backstop violates the Administrative Procedure Act.[527] We disagree. To be clear, consistent with the NPRM's proposal, we are not applying the open Internet rules we adopt today to Internet traffic exchange. Rather, certain regulatory consequences flow from the Commission's classification of BIAS, including the traffic exchange component, as falling within the "telecommunications services" definition in the Act.[528] In all events, the *2014 Open Internet NPRM* provided clear notice about the possibility of expanding the scope of the open Internet rules to cover issues related to traffic exchange.[529] It also made clear that the Commission was considering whether to reclassify retail broadband services.[530] In addition, the *2014 Open Internet NPRM* asked: "how can we ensure that a broadband provider would not be able to evade our open Internet rules by engaging in traffic exchange practices that would be outside the scope of the rules as proposed?"[531] As discussed above, our assertion of authority over Internet traffic exchange practices addresses that question by providing us with the necessary case-by-case enforcement tools to identify practices that may constitute such evasion and address them. Further, to the extent that any doubts remain about whether the *2014 Open Internet NPRM* provided sufficient notice, the approach adopted today is also a logical outgrowth of the original proposal included in the *2014 Open Internet*

[526] *See infra* paras. 210-212.

[527] Verizon claims that "in light of the Commission's past statements on interconnection, to suddenly regulate [interconnection] agreements for the first time in a final rule in this proceeding would violate the notice and comment requirements of the Administrative Procedure Act" and that even issuing a Further Notice of Proposed Rulemaking would not allow the Commission to impose Title II regulations on interconnection services. Verizon Dec. 17, 2014 *Ex Parte* Letter at 3; Letter from Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 8 (filed Jan. 14, 2015) (NCTA Jan. 14, 2015 *Ex Parte* Letter) ("[T]he NPRM does not provide notice of any proposal to adopt any new Internet traffic-exchange regulations pursuant to Title II . . . . Nowhere did the Commission remotely indicate that it was considering classifying the distinct wholesale Internet traffic-exchange services that ISPs provide to other network owners as Title II telecommunications services. The Administrative Procedure Act therefore bars the Commission from subjecting such arrangements to regulation under Title II."). The dissenting statements likewise assert that the *2014 Open Internet NPRM* did not provide notice of the possibility that the Commission would assert authority over interconnection. *See, e.g.*, O'Rielly Dissent at 10.

[528] *See Syncor Int'l v. Shalala*, 27 F.3d 90, 94 (D.C. Cir. 1997) (distinguishing that a change in interpretative rule depends on whether interpretation is of a rule or a statute, since in the latter case agency does not claim to be exercising authority to make positive law).

[529] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5582, para. 59; *id.* at 5615, paras. 151-152. Section 553 provides that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register," and that "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making" through submission of comments. 5 U.S.C. § 553(b), (c). The Commission published the *NPRM* in the Federal Register on July 1, 2014. 79 Fed. Reg. 37448 (July 1, 2014).

[530] *2014 Open Internet NPRM*, 29 FCC Rcd at 5615, para. 151 ("We seek comment on whether and, if so how, the Commission should separately identify and classify a broadband service that is furnished by broadband providers' to edge providers in order to protect and promote Internet openness.") *id.* at para. 149 ("We now seek further and updated comment on whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service (or components thereof.").

[531] *2014 Open Internet NPRM*, 29 FCC Rcd at 5582, para. 59.

NPRM.[532] The numerous submissions in the record at every stage of the proceeding seeking to influence the Commission in its decision to adopt policies regulating Internet traffic exchange[533] illustrate that the Commission not only gave interested parties adequate notice of the possibility of a rule, but that parties considered Commission action on that proposal a real possibility.[534]

3. Non-BIAS Data Services

207. In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should not apply its conduct-based rules to services offered by broadband providers that share capacity with broadband Internet access service over providers' last-mile facilities, while closely monitoring the development of these services to ensure that broadband providers are not circumventing the open Internet rules.[535] After reviewing the record, we believe the best approach is to adopt this tentative conclusion to permit broadband providers to offer these types of services while continuing to closely monitor their development and use.[536] While the *2010 Open Internet Order* and the *2014 Open Internet NPRM* used the term "specialized services" to refer to these types of services, the term "non-BIAS data services" is a more accurate description for this class of services. While the services discussed below are not broadband Internet access service, and thus the rules we adopt do not apply to these services, we emphasize that we will act decisively in the event that a broadband provider attempts to evade open Internet protections (e.g., by claiming that a service that is the equivalent of Internet access is a non-BIAS data service not subject to the rules we adopt today).

208. We provide the following examples of services and characteristics of those services that, at this time, likely fit within the category of services that are not subject to our conduct-based rules. As indicated in the *2010 Open Internet Order*, some broadband providers' existing facilities-based VoIP and

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[532] *Public Service Comm'n of D.C. v. FCC*, 906 F.2d 713, 718 (D.C. Cir. 1990). *Contra* NCTA Jan. 14, 2015 *Ex Parte* Letter at 8, n.28 ("[T]he NPRM explained that the Commission understood the latter proposals to 'include the flow of Internet traffic *on the broadband providers' own network*, and *not* how it gets *to* the broadband providers' networks.' . . . The Commission cannot now assert that regulating the exchange of Internet traffic *between* two networks is a logical outgrowth of the NPRM, given that it expressly disclaimed any such intent.") (emphasis included in original).

[533] *See, e.g.*, COMPTEL Comments at 9-10; eBay Comments 5; Level 3 Comments at 12-14; Netflix Comments at 11-12; Writers Guild of America, West Comments at 17; AT&T Reply at 93; CenturyLink Reply at 10; Comcast Reply at 38; Cox Reply at 20; Verizon Reply at 57; NCTA Dec. 23, 2014 *Ex Parte* Letter at 22-25; Cox Feb. 4 *Ex Parte* Letter at 1-2.

[534] *See, e.g.*, *N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (rejecting a notice challenge when the record revealed that multiple parties had in fact anticipated the possibility of the agency's action); *Alto Dairy v. Veneman*, 336 F.3d 560, 570 (7th Cir. 2003) (notice adequate where industry insiders would have understood proposals under consideration even though they were "gobbledygook to an outsider"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547-48 (D.C. Cir. 1983); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 644 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980); *Rybachek v. EPA*, 904 F.2d 1276, 1287-88 (9th Cir. 1990) (imposing mandatory requirement based on strong recommendations in public comments was "logical outgrowth" of case-by-case requirement originally proposed); *see also* Letter from Markham C. Erickson, Counsel for COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 8-10 (filed Feb. 19, 2015).

[535] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5582, para. 60; *see also 2010 Open Internet Order*, 25 FCC Rcd at 17966, para. 114. ("We would also be concerned by any marketing, advertising, or other messaging by broadband providers suggesting that one or more specialized services, taken alone or together, and not provided in accordance with our open Internet rules, is 'Internet' service or a substitute for broadband Internet access service.").

[536] *See, e.g.*, Bright House Comments at 19 ("The Commission should certainly be free to continue monitoring specialized services, but there is no basis for expanding the scope of the rule to cover specialized services."); Utilities Telecom Council Reply at 3 ("UTC encourages the Commission to clarify that specialized services are outside of the scope of the Commission's Open Internet rules and that broadband Internet service providers may provide priority access via specialized services and during emergencies.").

Internet Protocol-video offerings would be considered non-BIAS data services under our rules.[537] Further, the *2010 Open Internet Order* also noted that connectivity bundled with e-readers, heart monitors, or energy consumption sensors would also be considered other data services to the extent these services are provided by broadband providers over last-mile capacity shared with broadband Internet access service.[538] Additional examples of non-BIAS data services may include limited-purpose devices such as automobile telematics, and services that provide schools with curriculum-approved applications and content.[539]

209. These services may generally share the following characteristics identified by the Open Internet Advisory Committee.[540] First, these services are not used to reach large parts of the Internet. Second, these services are not a generic platform—but rather a specific "application level" service. And third, these services use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services.

210. We note, however, that non-BIAS data services may still be subject to enforcement action. Similar to the Commission's approach in 2010, if the Commission determines that a particular service is "providing a functional equivalent of broadband Internet access service, or . . . is [being] used to evade the protections set forth in these rules," we will take appropriate enforcement action.[541] Further, if the Commission determines that these types of service offerings are undermining investment, innovation, competition, and end-user benefits, we will similarly take appropriate action. We are especially concerned that over-the-top services offered over the Internet are not impeded in their ability to compete with other data services.[542]

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[537] *2010 Open Internet Order*, 25 FCC Rcd at 17965, para. 112 ("These 'specialized services,' such as some broadband providers' existing facilities-based VoIP and Internet Protocol-video offerings, differ from broadband Internet access service and may drive additional private investment in broadband networks and provide end users valued services, supplementing the benefits of the open Internet."); *see also, e.g.*, CenturyLink Comments at 22-23 ("[S]pecialized services such as IPTV and facilities-based VoIP rightly fall outside the scope of the Commission's Open Internet rules. These services should continue to be excluded from the rules."); Letter from Christopher S. Yoo to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 09-191, 10-127, at 1 (Sept. 22, 2014) ("[S]pecialized services are essential to many commonplace services such as IP video and voice over LTE.").

[538] *2010 Open Internet Order*, 25 FCC Rcd at 17933, para. 47 n.149.

[539] *See, e.g.*, Sandvine Comments at 8; Syntonic Reply at 11; Letter from Brian Hendricks, Head of Technology Policy and Government Relations, Nokia to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 et al, at 1 (filed Dec. 12, 2014) ("[T]he ability to create specialized classes of services is critical to the development of technologies requiring very low latency, large throughput, and minimal packet loss including autonomous driving and streaming of live broadcast events."); Letter from William Johnson, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (filed Oct. 17, 2014) ("As technology evolves, future specialized services could include things like telehealth, connected car, Smart Grid, and a wide range of machine-to-machine services that are distinct from mass market Internet access."). *See also* General Motors, *OnStar: Safe & Connected, Innovation: Design & Technology*, http://www.gm.com/vision/design_technology/onstar_safe_connected.html (last visited Feb. 1, 2015); Amazon, *Kindle*, https://www.amazon.com/gp/digital/fiona/kcp-landing-page?ie=UTF8&ref_=klp_f_win (last visited Feb. 1, 2015); WikimediaFoundation, *Wikipedia Zero*, http://wikimediafoundation.org/wiki/Wikipedia_Zero (last visited Feb. 1, 2015).

[540] Open Internet Advisory Committee, 2013 Annual Report (Aug. 20, 2013), at 69, http://transition.fcc.gov/cgb/oiac/oiac-2013-annual-report.pdf (2013 OIAC Annual Report).

[541] *2010 Open Internet Order*, 25 FCC Rcd at 17966, para. 113.

[542] Further, we anticipate that consumers of competing over-the-top services will not be disadvantaged in their ability to access 911 service.

211. The record overwhelmingly supports our decision to continue treating non-BIAS data services differently than broadband Internet access service under the open Internet rules.[543] This approach will continue to drive additional investment in broadband networks and provide end users with valued services without otherwise constraining innovation.[544] Further, as noted by numerous commenters, since other data services were permitted in the *2010 Open Internet Order*, we have seen little resulting evidence of broadband providers using these services to undermine the 2010 rules.[545]

212. Nevertheless, non-BIAS data services still could be used to evade the open Internet rules.[546] Due to these concerns, we will continue to monitor the market for non-BIAS data services to ensure that these services are not causing or threatening to cause harm to the open nature of the Internet.[547] Since the *2010 Open Internet Order*, broadband Internet access providers have been required to disclose the impact of non-BIAS data services on the performance of and the capacity available for

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[543] *See, e.g.*, Verizon Comments at 76 ("Specialized services are by definition distinct from the customer's broadband Internet access service – they merely supplement such service, increasing the range of options available to the consumer and expanding consumer welfare . . . As technology advances and turns concepts such as remote surgery, distance-learning, and the Internet of Things into realities, the ability to offer specialized services could be critical to promoting consumer interests and national policy priorities."); ITIC Comments at 7 ("Specialized services should also be permitted so long as they do not adversely affect the provision of a robust and evolving basic Internet access tier to consumers or harm competition."); TIA Reply at 12 ("[W]ith new cloud storage and services hosting capabilities and increased security and privacy features, the processing and transmission components of these services are increasingly intertwined, which would make the application of such rules [to specialized services] complex.").

[544] *2010 Open Internet Order*, 25 FCC Rcd at 17965, para. 112; Letter from Maggie McCready, Vice President Federal Regulatory Affairs, Verizon to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Dec. 5, 2014) (Verizon Dec. 5, 2014 *Ex Parte* Letter) ("These services are rapidly evolving and offer the promise of more choice for consumers."); Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1 (filed Jan. 29, 2014) ("Without the opportunity to offer services like IP video, broadband providers would invest less and consumer would pay more for broadband Internet access."); TIA Comments at 3 ("[T]here is no need for the FCC to change course away from simply monitoring the development of specialized services. These offerings, which may share the same last-mile connections as broadband Internet access service, can help spur investment in broadband facilities."); MIT Media Lab Comments at 2-3 ("As long as non-discriminatory Internet access is available, we see no reason to prevent the addition of other specialized, for-fee services. Nor do we see the need to restrict a vibrant market in developing and implementing them."); Comcast Reply at 8, n.17 ("[E]xtending open Internet rules to any services that do not meet the definition of mass market broadband Internet access could produce harmful results.").

[545] *See, e.g.*, CEA Comments at 11-12 ("There has been no evidence that the specialized services exemption was used to circumvent the open Internet rules when they were in effect, and there is no basis to diverge from the approach the Commission took in 2010."); CenturyLink Comments at 22-23 ("[T]here is no evidence of problems in implementing this exclusion."); AT&T Reply at 110-11.

[546] *See, e.g.*, Jon Peha Comments at 9-10 (stating that without defining "specialized services," the non-BIAS data service exemption can create a loophole that can threaten the open Internet); European Digital Rights Comments at 4 ("Any definition of 'specialised services' must be robust enough to prevent a 'back-door' undermining of net neutrality."); Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 at 24 (filed Dec. 19, 2014) (Public Knowledge Dec. 19, 2014 *Ex Parte* Letter) ("As new services evolve, the Commission must prevent ISPs from using specialized services as an excuse to delay upgrades and extract rents from new innovations."); *see also* Open Internet Advisory Committee, Specialized Services Working Group, Video Set Top Box Case Study Summary, at 6 (2013), http://transition.fcc.gov/cgb/events/Specialized-Services-Set-Top-Box-5-7-13.pdf (noting how particular attributes of a service might characterize it as a non-BIAS data service or a Title VI IP-based cable service depending on the circumstances).

[547] *See, e.g.*, Microsoft Comments at 28 ("[M]onitoring will allow the Commission to respond to any concerns that arise in connection with specific practices without unduly hampering providers' ability to innovate in the provision of specialized services generally.").

broadband Internet access services.[548] As discussed in detail above, we will continue to monitor the existence and effects of non-BIAS data services under the broadband providers' transparency obligations.[549]

213. We disagree with commenters who argue that the Commission should adopt a more-detailed definition for non-BIAS data services to safeguard against any such circumvention of the rules.[550] Several commenters provided definitions of what they believe should constitute non-BIAS data services.[551] Others, however, expressed concerns that a formal definition of non-BIAS data services risks potentially limiting future innovation and investment, ultimately negatively impacting consumer welfare.[552] We share these concerns and thus decline to further define what constitutes "non-BIAS data services" or adopt additional policies specific to such services at this time. Again, however, we will closely monitor the development and use of non-BIAS data services and have authority to intervene if these services are utilized in a manner that harms the open Internet.

4. Reasonable Network Management

214. The *2014 Open Internet NPRM* proposed to retain a reasonable network management exception to the conduct-based open Internet rules,[553] following the approach adopted in the *2010 Open Internet Order* that permitted exceptions for "reasonable network management" practices to the no-blocking and no unreasonable discrimination rules.[554] The *2014 Open Internet NPRM* also tentatively concluded that the Commission should retain the definition of reasonable network management adopted as part of the 2010 rules that "[a] network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service."[555]

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[548] *2010 Open Internet Order*, 25 FCC Rcd at 17938-39, para. 56.

[549] *See supra* Section III.C.3.

[550] *See, e.g.*, Access Comments at 10 ("[A] strict definition of specialized services can mitigate the risks."); Future of Music Coalition Reply at 5 ("Without narrow and clear definitions of 'specialized services,' development would slow and artists and the public would be deprived of potentially rewarding technologies."). *But see* CCIA Reply at 18 ("[T]he so-called 'Specialized Services' exemption is cause for concern. CCIA has stated that no reasonable definition of 'Specialized Services' is possible, and that the Commission's resources would be better devoted to locking down the 'reasonable network management' standard as the means by which BIAPs can justify any challenged conduct.").

[551] *See, e.g.*, CDT Comments at 23 ("First, there should be a requirement that the service be truly specialized, in the sense of serving a specific and limited purpose. Second, there should be a technical requirement of logical separation – that is, wholly or significantly separate capacity – between the specialized traffic and the Internet traffic."); Nokia Comments at 12 ("'Specialised services' are designed for specific content, applications, or services, or a combination thereof. Such services rely on traffic management or other networking techniques to ensure the desired or necessary level of network resources that determine subscriber experience (such as capacity, quality) with the aim to securing enhanced quality characteristics. They are delivered from end-to-end and are not marketed as or widely used as a substitute for Internet access service.").

[552] *See*, *e.g.*, ETNO Comments at 4 ("We believe that the FCC chooses a future-proof path by not formally defining 'specialized services.'"); MIT Media Lab Comments at 2-3 ("As long as non-discriminatory Internet access is available, we see no reason to prevent the addition of other specialized, for-fee services. Nor do we see the need to restrict a vibrant market in developing and implementing them."); TIA Comments at 30 ("[S]pecialized services can help to spur investment in broadband facilities," and "[r]egulatory intervention in this nascent area would suppress these innovative enhancements to consumer welfare.").

[553] *2014 Open Internet NPRM*, 29 FCC Rcd at 5583, para. 61.

[554] 47 C.F.R. § 8.5.

[555] 47 C.F.R. § 8.11(d); *2010 Open Internet Order*, 25 FCC Rcd at 17952, para. 82.

215. The record broadly supports maintaining an exception for reasonable network management.[556] We agree that a network management exception to the no-blocking rule, the no-throttling rule, and the no-unreasonable interference/disadvantage standard is necessary for broadband providers to optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks.[557] Therefore, the no-blocking rule, the no-throttling rule, and the no-unreasonable interference/disadvantage standard will be subject to reasonable network management for both fixed and mobile providers of broadband Internet access service. In addition to retaining the exception, we retain the definition of reasonable network management with slight modifications:

> *A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.*

216. For a practice to even be considered under this exception, a broadband Internet access service provider must first show that the practice is primarily motivated by a technical network management justification rather than other business justifications. If a practice is primarily motivated by such an other justification, such as a practice that permits different levels of network access for similarly situated users based solely on the particular plan to which the user has subscribed,[558] then that practice will not be considered under this exception. The term "particular network architecture and technology" refers to the differences across broadband access platforms of any kind, including cable, fiber, DSL, satellite, unlicensed Wi-Fi, fixed wireless, and mobile wireless.[559]

217. As noted above, reasonable network management is an exception to the no-blocking rule, no-throttling rule, and no-unreasonable interference/disadvantage standard, but not to the rule against paid prioritization.[560] This is because unlike conduct implicating the no-blocking, no-throttling, or no-unreasonable interference/disadvantage standard, paid prioritization is not a network management practice because it does not primarily have a technical network management purpose.[561] When considering whether a practice violates the no-blocking rule, no-throttling rule, or no-unreasonable interference/disadvantage standard, the Commission may first evaluate whether a practice falls within the exception for reasonable network management.

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[556] *See, e.g.*, OTI Comments at 57 ("[R]egardless of its source of statutory authority, the Commission should apply its open Internet protections 'subject to reasonable network management.'"); CenturyLink Comments at 23 ("There is also no evidence of a problem with implementing this exception following the Commission's *2010 Open Internet Order*."); CDT Comments at 7.

[557] As discussed above, the transparency rule does not include an exception for reasonable network management. We clarify, however, that the transparency rule "does not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices." *See 2014 Open Internet NPRM*, 29 FCC Rcd 5583, para. 61; *2010 Open Internet Order*, 25 FCC Rcd at 17937-38, para. 55.

[558] *See* Prepared remarks of FCC Chairman Tom Wheeler, 2014 CTIA Show, Las Vegas, NV (Sept. 9, 2014).

[559] *See 2010 Open Internet Order*, 25 FCC Rcd at 17952, para. 82 (defining "particular network architecture and technology" as referring to "the differences across access platforms such as cable, DSL, satellite, and fixed wireless").

[560] Paid prioritization would be evaluated under the standards set forth in Section II.C.1.c *supra.*

[561] For purposes of the open Internet rules, prioritization of affiliated content, applications, or services is also considered a form of paid prioritization. *See supra* Section III.C.1.c.

218. *Evaluating Network Management Practices*. The *2014 Open Internet NPRM* proposed that the Commission adopt the same approach for determining the scope of network management practices considered to be reasonable as adopted in the *2010 Open Internet Order*.[562] We recognize the need to ensure that the reasonable network management exception will not be used to circumvent the open Internet rules while still allowing broadband providers flexibility to experiment and innovate as they reasonably manage their networks.[563] We therefore elect to maintain a case-by-case approach. The case-by-case review also allows sufficient flexibility to address mobile-specific management practices because, by the terms of our rule, a determination of whether a network management practice is reasonable takes into account the particular network architecture and technology. We also note that our transparency rule requires disclosures that provide an important mechanism for monitoring whether providers are inappropriately exploiting the exception for reasonable network management.[564]

219. To provide greater clarity and further inform the Commission's case-by-case analysis, we offer the following guidance regarding legitimate network management purposes. We also note that, similar to the 2010 reasonable network management exception, broadband providers may request a declaratory ruling or an advisory opinion from the Commission before deploying a network management practice, but are not required to do so.[565]

220. As with the network management exception in the *2010 Open Internet Order*, broadband providers may implement network management practices that are primarily used for, and tailored to, ensuring network security and integrity, including by addressing traffic that is harmful to the network, such as traffic that constitutes a denial-of-service attack on specific network infrastructure elements.[566] Likewise, broadband providers may also implement network management practices that are primarily

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[562] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5583, para. 61. The Commission decided to determine the scope of reasonable network management on a case-by-case basis in the *Open Internet Order* and we maintain those same factors today. *See 2010 Open Internet Order*, 25 FCC Rcd at 17952-56, paras. 84-92.

[563] *See, e.g.*, CDT Comments at 9 ("[R]ules in this area should not be rigid. They should not attempt to specify in advance which particular technical practices should be prohibited or allowed. Detailed technical choices are best left to network operators, since they are in the best position to understand the technical consequences and tradeoffs associated with different choices. Network operators also need appropriate flexibility to devise new tactics and respond to new threats."); CenturyLink Comments at 23 ("The *NPRM* also correctly concludes that the Commission should retain the existing reasonable network management practices exception to its Open Internet rules and continue to develop the scope of that exception on a case-by-case basis. This exception is critical to ensuring that broadband providers have the flexibility to manage their networks in a way that maintains network security and integrity, addresses harmful traffic, and mitigates against the effects of congestion."); ITIF Reply at 14 ("Applying strict neutrality rules, dictating traffic management in the lower layers of a wireless network, is largely unworkable."); TIA Comments at 3 (advocating for "an expansive definition of 'reasonable network management' that reflects the nature and needs of contemporary broadband Networks"); Alcatel-Lucent Comments at 17 ("[T]he Commission should continue to allow reasonable network management practices coupled with disclosure policies that provide consumers with the appropriate level of transparency into these practices."). *But see* CTIA Reply at 26 (noting that it would not be "sufficient to rely on a 'reasonable network management' exception to warrant application of [the no-blocking rule] – as described below, that approach would necessarily chill innovation and harm, not help, consumers").

[564] *See supra* Section III.C.3.

[565] *See 2010 Open Internet Order*, 25 FCC Rcd at 17952-53, para. 84, n.262 (citing 47 C.F.R. §1.2 which provides for "a declaratory ruling terminating a controversy or removing uncertainty"); *see also infra* Section III.E.2.a.ii.

[566] *See 2010 Open Internet Order*, 25 FCC Rcd at 17954, para. 88; *see also, e.g.*, Financial Service Roundtable Reply at 3 (stating that the open Internet rules should "allow ISPs to block cyber attacks or similar threats to information systems or networks that are transiting their systems, regardless of the traffic stream's ultimate destination"); EFF Reply at 12 (stating that broadband providers' "blocking content that would actually harm their network (e.g. DDOS attacks) . . . would obviously fall into the category of reasonable network management").

used for, and tailored to, addressing traffic that is unwanted by end users.[567] Further, we reiterate the guidance of the *2010 Open Internet Order* that network management practices that alleviate congestion without regard to the source, destination, content, application, or service are also more likely to be considered reasonable network management practices in the context of this exception.[568] In evaluating congestion management practices, a subset of network management practices, we will also consider whether the practice is triggered only during times of congestion and whether it is based on a user's demand during the period of congestion.[569]

221. We also recognize that some network management practices may have a legitimate network management purpose, but also may be exploited by a broadband provider. We maintain the guidance underlying the *2010 Open Internet Order*'s case-by-case analysis that a network management practice is more likely to be found reasonable if it is transparent, and either allows the end user to control it or is application-agnostic.[570]

222. As in 2010, we decline to adopt a more detailed definition of reasonable network management.[571] For example, one proposal suggests that the Commission limit the circumstances in which network management techniques can be used so they would only be reasonable if they were used temporarily, for exceptional circumstances, and have a proportionate impact to solve a targeted problem.[572] We acknowledge the advantages a more detailed definition of network management can have on long-term network investment and transparency, but at this point, there is not a need to place such proscriptive limits on broadband providers.[573] Furthermore, a more detailed definition of reasonable

[567] *See 2010 Open Internet Order*, 25 FCC Rcd at 17954-55, paras. 88-90.

[568] *See id.* at 17954, para. 87 (stating that the principles guiding case-by-case evaluations of network management practices include "transparency, end user control, and use- (or application-) agnostic treatment"); *id.* at 17945, para. 73 (elaborating upon the concept of "use-agnostic" discrimination); *see also* Mozilla Reply at 22 (stating that the Commission's conception of reasonable network management could "separate application-specific from application-agnostic discrimination"). As in the no throttling rule and the no unreasonable interference or unreasonable disadvantage standard, we include classes of content, applications, services, or devices.

[569] *See* BITAG Congestion Report at 2, 14.

[570] *2010 Open Internet Order*, 25 FCC Rcd at 17954, para. 87. *See* BITAG Congestion Report at 45 ("User- and application- agnostic congestion management practices are useful in a wide variety of situations, and may be sufficient to accommodate the congestion management needs of network operators in the majority of situations. . . . [and i]f application-based congestion management practices are used, those based on a user's expressed preferences are preferred over those that are not."); David D. Clark, John Wroclawski, Karen R. Sollins, and Robert Braden, *Tussle in Cyberspace: Defining Tomorrow's Internet*, IEEE/ACM Transactions on Networking, vol. 13 no. 3 (2005) ("One of the most respected and cited of the Internet design principles is the end-to-end arguments, which state that mechanism should not be placed in the network if it can be placed at the end node, and that the core of the network should provide a general service, not one that is tailored to a specific application.").

[571] *2010 Open Internet Order*, 25 FCC Rcd at 17953, para. 85.

[572] Access Comments at 18 ("Traffic management techniques are 'reasonable' when deployed for the purpose of technical maintenance of the network, namely to block spam, viruses, or denial of service attacks, or to minimize the effects of congestion, whereby equal types of traffic should be treated equally . . . [and] should only be used on a temporary basis, during exceptional moments, and their impact must be necessary, proportionate and targeted to solve the particular problem [and] . . . have transparent and comprehensible disclosure for users . . . .").

[573] MIT Media Lab Comments at 13 ("[A] more stringent view of the limitation of network management . . . insure[s] that there are no artificial or industrially created synthetic control points placed between an application and the flow of bits associated with it."). While some commenters note that there have not been any major technological changes in how broadband providers manage traffic since 2010, others indicate that broadband providers have acquired additional techniques that allow them to manage traffic in real-time. *Compare* Sandvine Comments at 12 (stating that there have not been any big technological changes in how service providers can manage traffic since 2010) *with* Internet Association Comments at 3 ("New technologies have granted broadband Internet access providers an unprecedented ability to discriminate and block content in real time.").

network management risks quickly becoming outdated as technology evolves.[574] Case-by-case analysis will allow the Commission to use the conduct-based rules adopted today to take action against practices that are known to harm consumers without interfering with broadband providers' beneficial network management practices.[575]

223. We believe that the reasonable network management exception provides both fixed and mobile broadband providers sufficient flexibility to manage their networks. We recognize, consistent with the consensus in the record, that the additional challenges involved in mobile broadband network management mean that mobile broadband providers may have a greater need to apply network management practices, including mobile-specific network management practices, and to do so more often to balance supply and demand while accommodating mobility.[576] As the Commission observed in 2010, mobile network management practices must address dynamic conditions that fixed, wired networks typically do not,[577] such as the changing location of users[578] as well as other factors affecting signal quality.[579] The ability to address these dynamic conditions in mobile network management is especially important given capacity constraints many mobile broadband providers face.[580] Moreover,

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[574] Verizon Dec. 5, 2014 *Ex Parte* Letter at 2.

[575] Beneficial practices include protecting their Internet access services against malicious content or offering a service limited to offering "family friendly" materials to end users who desire only such content. *2010 Open Internet Order*, 25 FCC Rcd at 17954-55, paras. 88-89.

[576] *See, e.g.*, AT&T Reply at 82 ("The unique challenges presented by mobile users and the unpredictable demands placed on mobile networks due to the inherent mobility of their users require a robust set of tools that can be used to mitigate the impact of potential congestion on consumers' experience with a network."); *id.* at 80-83; OTI Comments at 57 ("A flexible approach to defining reasonable network management can accommodate exceptions appropriate to different technologies and platforms …without creating an arbitrary distinction and preference for mobile networks.") (internal quotation marks omitted); T-Mobile Reply at 11 ("These important distinctions between fixed and mobile networks show that it would be inadvisable to impose new net neutrality rules, especially those designed for fixed networks, on mobile broadband networks."); CDT Comments at 20 ("The allowance for reasonable network management provides ample flexibility for carriers to address any network management challenges that are specific to mobile wireless networks, so no broad exemption is warranted."); Microsoft Comments at 27 ("[A]ny technical or operational differences between mobile and fixed networks can be accommodated by recognizing the meaning of 'reasonable network management' might vary depending on the particular type of network."); Public Knowledge Comments at 24 ("[T]o the extent that a technical difference between wireless and wireline exist, reasonable network management policies can accommodate it."); Mozilla Comments at 21 ("There remain technical distinctions between mobile and fixed networks, some of which—such as management of upload congestion—are inherent in the nature of the technologies."); Vonage Comments at 32 ("Rather than adopt less protection, the Commission can instead distinguish between wireline and wireless under the principle of reasonable network management.") TIA Comments at 11-15 (stating that the Commission must consider "the engineering realities of the distinctly different types of broadband platforms [wireline, cable, mobile]" when considering regulations, especially on network management").

[577] *2010 Open Internet Order*, 25 FCC Rcd at 17956, para. 94.

[578] Letter from Scott Bergmann, Vice President—Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, (filed Oct. 6, 2014), Attach., Dr. Jeffrey H. Reed and Dr. Nishith D. Tripathi, *Net Neutrality and Technical Challenges of Mobile Broadband Networks* at 14 (CTIA Oct. 6, 2014 *Ex Parte* Letter) (arguing that as channel conditions degrade (such as when a mobile user moves toward the periphery of a cell site) "[e]ven to preserve a given data rate, the user may need 36 times more radio resources").

[579] *See, e.g.*, TIA Reply at 8 ("The allocation [of radio resources] must factor in the number of active user devices, capabilities of these devices, capabilities of the base station in the area, prevailing channel conditions of different devices on the network, distance from the serving cell, and target QoS of different services to determine the amount of radio resources for individual users."); Nokia Reply at 5 ("Mobile networks can be affected by physical obstructions, solar activity, electromagnetic disturbances, and distance to a much greater degree than wireline broadband networks."); T-Mobile Comments at 5-7.

[580] T-Mobile Comments at 6.

notwithstanding any limitations on mobile network management practices necessary to protect the open Internet, we anticipate that mobile broadband providers will continue to be able to use a multitude of tools to manage their networks,[581] including an increased number of network management tools available in 4G LTE networks.

224. We note in a similar vein that providers relying on unlicensed Wi-Fi networks have specific network management needs. For example, these providers can "face spectrum constraints and congestion issues that can pose particular network-management challenges" and also "must accept and manage interference from other users in the unlicensed bands."[582] Again, the Commission will take into account when and how network management measures are applied as well as the particular network architecture and technology of the broadband Internet access service in question, in determining if a network management practice is reasonable. For these reasons, we reject the argument that rules with exceptions only for *reasonable* network management practices would "tie the hands of operators and make it more challenging to meet consumers' needs"[583] or that "the mere threat of *post hoc* regulatory review . . . would disrupt and could chill optimal network management practices."[584] In recognizing the unique challenges, network architecture, and network management of mobile broadband networks (and others, such as unlicensed Wi-Fi networks), we conclude that the reasonable network management exception addresses this concern and strikes an appropriate balance between the need for flexibility and ensuring the Commission has the tools necessary to maintain Internet openness.

E. Enforcement of the Open Internet Rules

1. Background

225. Timely and effective enforcement of the rules we adopt in this Order is crucial to preserving an open Internet, enhancing competition and innovation, and providing clear guidance to consumers and other stakeholders. As has been the case since we adopted our original open Internet rules in 2010, we anticipate that many disputes that will arise can and should be resolved by the parties without Commission involvement. We encourage parties to resolve disputes through informal discussions and private negotiations whenever possible.[585] To the extent disputes are not resolved, the Commission will continue to provide backstop mechanisms to address them. We also will proactively monitor compliance and take strong enforcement action against parties who violate the open Internet rules.

226. In the *2010 Open Internet Order*, the Commission established a two-tiered framework for enforcing open Internet rules. The Commission allowed parties to file informal complaints pursuant to section 1.41 of our rules[586] and promulgated new procedures to govern formal complaints alleging

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[581] Such tools have been referenced in various *ex parte* filings. *See, e.g.*, Letter from Jonathan Spalter, Chair, Mobile Future, to Marlene H. Dortch, Secretary, FCC, (filed Sept. 12, 2014), Attach., Rysavy Research, How Is Mobile Different: Considerations for the Open Internet Rulemaking at 11-12 (citing the need for adjustments to transmitted power and sustainable data rates); Letter from Scott Bergmann, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, Attach., Dr. Jeffrey H. Reed and Dr. Nishith D. Tripathi, *Net Neutrality and Technical Challenges of Mobile Broadband Networks* at 16, 20-21 (filed Sept. 4, 2014) (citing the need for scheduling user access to the network based upon dynamic measurements of signal quality).

[582] NCTA Dec. 23, 2014 *Ex Parte* Letter at 25; *see also* Letter from Samuel L. Feder, counsel to Cablevision, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Jan. 12, 2015) (urging that the Commission recognize Wi-Fi networks' "specific capacity and congestion constraints" in applying any reasonable network management standard).

[583] Verizon Reply at 33.

[584] AT&T Reply at 89 (emphasis in original).

[585] *2014 Open Internet NPRM*, 29 FCC Rcd at 5618, para. 161; *2010 Open Internet Order*, 25 FCC Rcd at 17986, para. 151.

[586] 47 C.F.R. § 1.41.

violations of the open Internet rules.[587] This framework was not affected by the D.C. Circuit's decision in *Verizon.* It therefore remains in effect and will apply to complaints regarding the rules we adopt in this Order. Informal complaints provide end users, edge providers, and others with a simple and efficient vehicle for bringing potential open Internet violations to the attention of the Commission.[588] The formal complaint rules permit any person to file a complaint with the Commission alleging an open Internet rule violation and to participate in an adjudicatory proceeding to resolve the complaint.[589] In addition to these mechanisms for resolving open Internet complaints, the Commission continuously monitors press reports and other public information, which may lead the Enforcement Bureau to initiate an investigation of potential open Internet rule violations.

227. In the *2014 Open Internet NPRM*, the Commission sought comment on the efficiency and functionality of the complaint processes adopted in the *2010 Open Internet Order* and on mechanisms we should consider to improve enforcement and dispute resolution.[590] We tentatively concluded that our open Internet rules should include at least three fundamental elements: (1) legal certainty, so that broadband providers, edge providers, and end users can plan their activities based on clear Commission guidance; (2) flexibility to consider the totality of the facts in an environment of dynamic innovation; and (3) effective access to dispute resolution.[591] We affirm the importance of these principles below and discuss several enhancements to our existing open Internet complaint rules to advance them. In addition, we adopt changes to our complaint processes to ensure that they are accessible and user-friendly to consumers, small businesses, and other interested parties, as well as changes to ensure that that our review of complaints is inclusive and informed by groups with relevant technical or other expertise.

2. Designing an Effective Enforcement Process

a. Legal Certainty

228. We sought comment in the *2014 Open Internet NPRM* on ways to design an effective enforcement process that provides legal certainty and predictability to the marketplace.[592] In addition to our current complaint resolution framework, we requested input on what other forms of guidance would be helpful.[593] We solicited feedback on whether the Commission should: (1) establish an advisory opinion process, akin to "business review letters" issued by the Department of Justice (DOJ), and/or non-binding staff opinions, through which parties could ask the Commission for a statement of its current enforcement intentions with respect to certain practices under the new rules;[594] and (2) publish

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[587] 47 C.F.R. §§ 8.12-8.17.

[588] *2010 Open Internet Order*, 25 FCC Rcd at 17986, para. 153. In the *2010 Open Internet Order*, the Commission established that parties could submit informal complaints pursuant to section 1.41 of the Commission's rules\ and recommended that consumers, end users, and edge providers submit such complaints through the Commission's website: http://esupport.fcc.gov/complaints.html. *Id*.

[589] *See 2010 Open Internet Order*, 25 FCC Rcd at 17987-89, paras. 154-59; 47 C.F.R. §§ 8.12-8.17.

[590] *2014 Open Internet NPRM*, 29 FCC Rcd at 5618-23, paras. 161-76.

[591] *Id.* at 5619, para. 163. In addition, the Commission asked whether other elements should be considered and what forms of dispute resolution would be the best strategy to implement "data-driven decision-making." *Id*.

[592] *Id.* at 5619, paras. 163, 165.

[593] *Id.* at 5619, para. 165.

[594] *Id.* at 5619-20, paras. 165-66. The Antitrust Division of the Department of Justice has procedures under which entities concerned about the legality under the antitrust laws of proposed business conduct may seek a statement from the Division regarding its current enforcement intentions with respect to that conduct. *See* 28 C.F.R. § 50.6; Dep't of Justice, *Pilot Program Announced to Expedite Business Review Process* (1992), http://justice.gov/atr/public/busreview/201659a.pdf (Dep't of Justice Business Reviews). Other federal agencies have similar advisory opinion processes. For example, the Rules of Practice of the Federal Trade Commission provide that the Commission or its staff, in appropriate circumstances, may offer industry guidance in the form of an

(continued….)

enforcement advisories that provide additional insight into the application of the rules.[595] Many commenters recognized the benefits of clear rules and greater predictability regarding open Internet protections.[596]

(i) Advisory Opinions

229. We conclude that use of advisory opinions similar to those issued by DOJ's Antitrust Division is in the public interest and would advance the Commission's goal of providing legal certainty.[597] Although the Commission historically has not used advisory opinions to promote compliance with our rules, we conclude that they have the potential to serve as useful tools to provide clarity, guidance, and predictability concerning the open Internet rules.[598] Advisory opinions will enable companies to seek guidance on the propriety of certain open Internet practices before implementing them, enabling them to be proactive about compliance and avoid enforcement actions later.[599] The Commission may use advisory opinions to explain how it will evaluate certain types of behavior and the factors that will be considered in determining whether open Internet violations have occurred. Because these opinions will be publicly available, we believe that they will reduce the number of disputes by providing guidance to the industry.

230. In this Order, we adopt rules promulgating basic requirements for obtaining advisory opinions, as well as limitations on their issuance. Any entity that is subject to the Commission's jurisdiction may request an advisory opinion regarding its own proposed conduct that may implicate the rules we adopt in this Order, the rules that remain in effect from the *2010 Open Internet Order*, or any other rules or policies related to the open Internet that may be adopted in the future.[600]

231. Requests for advisory opinions may be filed via the Commission's website or with the Office of the Secretary and must be copied to the Commission staff specified in the rules.[601] We delegate

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advisory opinion. *See* 16 C.F.R. §§ 1.1-1.4; Fed. Trade Comm'n, *Guidance From Staff of the Bureau of Competition's Health Care Division on Requesting and Obtaining an Advisory Opinion* (2010), http://www.ftc.gov/sites/default/files/attachments/competition-advisory-opinions/advop-health.pdf.

[595] *2014 Open Internet NPRM*, 29 FCC Rcd at 5620, para. 167.

[596] *See, e.g.*, Comcast Comments at 67 ("Comcast agrees with the Commission that any new enforcement procedures must 'provide legal certainty . . . .'"); NCTA Comments at 67 ("The Commission . . . should continue to explore other ways of streamlining its enforcement procedures in a manner that provides 'legal certainty' to regulated entities."); EFF Comments at 2 (The Commission "should enact clear and simple prescriptive rules . . . ."); Independent Film & Television Alliance Comments at 12 ("[T]he Commission must take the most effective actions available to it to ensure that the regulations it adopts . . . provide certainty to the public."); Cox Comments at ii-iii ("In relying on traditional complaint-driven and agency-initiated enforcement mechanisms, the Commission's rules also should maximize certainty and ensure options for streamlined dispute resolution.").

[597] We decline to adopt non-binding staff opinions in light of our decision to establish an advisory opinion process similar to the DOJ Antitrust Division's business review letter approach, as well as existing voluntary mediation processes to resolve open Internet disputes that are available through the Enforcement Bureau's Market Disputes and Resolutions Division. *See infra* Section III.E.2.a.i.

[598] Parties also have the option to file a petition for declaratory ruling under section 1.2 of the Commission's rules, 47 C.F.R. § 1.2. In contrast to declaratory rulings, advisory opinions may only relate to prospective conduct, and the Enforcement Bureau will not seek comment on advisory opinions via public notice. *See id*.

[599] *See*, *e.g.*, Dep't of Justice, *Introduction to Antitrust Division Business Reviews* at 1 (last visited Oct. 29, 2014), http://www.justice.gov/atr/public/busreview/276833.pdf ("The business review procedure benefits both the Division and the business community because the Division can analyze and comment on the possible competitive impact of proposed business conduct, possibly avoiding lawsuits or other actions.").

[600] *See, e.g.*, 28 C.F.R. § 50.6(2) ("The [DOJ's Antitrust] Division will consider only requests with respect to proposed business conduct, which may involve either domestic or foreign commerce.").

[601] *See infra* Appx. A (§ 8.18).

authority to issue advisory opinions to the Enforcement Bureau, which will coordinate with other Bureaus and Offices on the issuance of opinions. The Enforcement Bureau will have discretion to choose whether it will respond to the request. If the Bureau declines to respond to a request, it will inform the requesting party in writing. As a general matter, the Bureau will be more likely to respond to requests where the proposed conduct involves a substantial question of fact or law and there is no clear Commission or court precedent, or the subject matter of the request and consequent publication of Commission advice is of significant public interest.[602] In addition, the Bureau will decline to respond to requests if the same conduct is the subject of a current government investigation or proceeding, including any ongoing litigation or open rulemaking.[603]

232. Requests for advisory opinions must relate to *prospective* or proposed conduct that the requesting party intends to pursue.[604] The Enforcement Bureau will not respond to hypothetical questions or inquiries about proposals that are mere possibilities. The Bureau also will not respond to requests for opinions that relate to ongoing or prior conduct, and the Bureau may initiate an enforcement investigation to determine whether such conduct violates the open Internet rules.

233. Requests for advisory opinions should include all material information sufficient for Commission staff to make a determination on the proposed conduct;[605] however, staff will have discretion to ask parties requesting opinions, as well as other parties that may have information relevant to the request or that may be impacted by the proposed conduct, for additional information that the staff deems necessary to respond to the request.[606] Because advisory opinions will rely on full and truthful disclosures by the requesting entities, requesters must certify that factual representations made to the Enforcement Bureau are truthful and accurate, and that they have not intentionally omitted any material information from the request.[607] Advisory opinions will expressly state that they rely on the representations made by the requesting party, and that they are premised on the specific facts and representations in the request and any supplemental submissions.

234. Although the Enforcement Bureau will attempt to respond to requests for advisory opinions expeditiously, we decline to establish any firm deadlines to rule on them or issue response

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[602] As noted above, in addition to DOJ, other federal agencies also have an advisory opinion process. *See supra* note 594. The FTC specifies that it will consider requests for advisory opinions, where practicable, under the following circumstances: "(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or (2) The subject matter of the request and consequent publication of Commission advice is of significant public interest." 16 C.F.R. § 1.1(a).

[603] *See, e.g.*, 16 C.F.R. § 1.1(b)(1) (the FTC will ordinarily consider requests for advisory opinions inappropriate where "[t]he same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency . . . .").

[604] *See, e.g.*, 28 C.F.R. § 50.6(2) ("The [DOJ's Antitrust] Division will consider only requests with respect to *proposed* business conduct . . . .") (emphasis added); 16 C.F.R. § 1.1(a) ("Any person, partnership, or corporation may request advice from the [Federal Trade] Commission with respect to a course of action which the requesting party proposes to pursue.").

[605] *See, e.g.*, 28 C.F.R. § 50.6(5) (under the DOJ's business review procedures, "[e]ach request must be accompanied by all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any").

[606] *See, e.g.*, *id.* ("All parties requesting the review letter must provide the [DOJ Antitrust] Division with whatever additional information or documents the Division may thereafter request in order to review the matter. . . . In connection with any request for review, the Division will also conduct whatever independent investigation it believes is appropriate.").

[607] *See* 18 U.S.C. § 1001; *see also* 47 C.F.R. § 1.17.

letters.[608] The Commission appreciates that if the advisory opinion process is not timely, it will be less valuable to interested parties. However, response times will likely vary based on numerous factors, including the nature and complexity of the issues, the magnitude and sufficiency of the request and the supporting information, and the time it takes for the requester to respond to staff requests for additional information. An advisory opinion will provide the Enforcement Bureau's conclusion regarding whether or not the proposed conduct will comply with the open Internet rules. The Bureau will have discretion to indicate in an advisory opinion that it does not intend to take enforcement action based on the facts, representations, and warranties made by the requesting party. The requesting party may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary for the opinion and the situation conforms to the situation described in the request for opinion. The Enforcement Bureau will not bring an enforcement action against a requesting party with respect to any action taken in good faith reliance upon an advisory opinion if all of the relevant facts were fully, completely, and accurately presented to the Bureau, and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's or the Bureau's approval.[609]

235. Advisory opinions will be issued without prejudice to the Enforcement Bureau's ability to reconsider the questions involved, or to rescind or revoke the opinion.[610] Similarly, because advisory opinions issued at the staff level are not formally approved by the full Commission, they will be issued without prejudice to the Commission's right to later rescind the findings in the opinion. Because advisory opinions will address proposed future conduct, they necessarily will not concern any case or controversy that is ripe for appeal.[611]

236. The Enforcement Bureau will make advisory opinions available to the public. In order to provide meaningful guidance to other stakeholders, the Bureau will also publish the initial request for guidance and any associated materials. Thus, the rules that we adopt establish procedures for entities soliciting advisory opinions to request confidential treatment of certain information.[612]

237. Many commenters support the use of advisory opinions as a means for the Commission to provide authoritative guidance to parties about the application of open Internet rules and the

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[608] For example, the Department of Justice's Antitrust Division states that it will "make its best effort" to resolve business review requests within 60 to 90 days after receiving all relevant information and documents sought by the Division. *See* Dep't of Justice Business Reviews at 1-2.

[609] *See* 16 C.F.R. § 1.3(b); *see also* 28 C.F.R. § 50.6(9) ("A business review letter states only the enforcement intention of the [DOJ Antitrust] Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest. As to a stated present intention not to bring an action, however, the Division has never exercised its right to bring a criminal action where there has been full and true disclosure at the time of presenting the request.").

[610] *See, e.g.*, 28 C.F.R. § 50.6(9) ("A business review letter states only the enforcement intention of the [DOJ's Antitrust] Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest."); 16 C.F.R. § 1.3(b) ("Any advice given by the [Federal Trade] Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action.").

[611] *See, e.g.*, *American Exp. Co. v. U.S. Dep't of Justice*, 453 F. Supp. 47, 50 (S.D.N.Y. 1978) ("[28 C.F.R. § 50.6], by committing the Justice Department to state a position with respect to future enforcement plans, necessarily implies that the matter under review is not the subject of any currently pending enforcement proceedings. Rather, the opinion of the Justice Department is an 'advisory opinion,' a familiar term used in the legal lexicon to denote an opinion concerning a matter not yet ripe for judicial action and thus not yet before any court.").

[612] For example, trade secrets or commercial and financial information may merit confidential treatment. *See* 47 C.F.R. §§ 0.457, 0.459.

Commission's enforcement intentions.[613] In addition, some commenters suggest that review letters and staff opinions should be voluntary.[614] We agree that solicitation of advisory opinions should be purely voluntary, and that failure to seek such an opinion will not be used as evidence that an entity's practices are inconsistent with our rules.

238. The Wireless Internet Service Providers Association (WISPA) opposes the adoption of an advisory opinion process "because it assumes an inherent uncertainty in the rules and creates a 'mother may I' regime —essentially creating a system where a broadband provider must ask the Commission for permission when making business decisions."[615] According to WISPA, "[t]his system would increase regulatory uncertainty and stifle broadband providers from innovating new technologies or business methods. It also would be expensive for a small provider to implement, requiring legal and professional expertise."[616]

239. We find that WISPA's concerns are misguided. Because requests for advisory opinions will be entirely voluntary, we disagree with the contention that their use would force broadband providers to seek permission before implementing new policies or technologies and thereby stifle innovation.[617] In addition, we agree with other commenters that advisory opinions would provide more, not less, certainty regarding the legality of proposed business practices.[618]

(ii) Enforcement Advisories

240. We conclude that the periodic publication of enforcement advisories will advance the Commission's goal of promoting legal certainty regarding the open Internet rules.[619] In the *2014 Open*

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[613] *See, e.g.*, Comcast Comments at 69 ("Comcast . . . remains open to other potential mechanisms for providing guidance—such as a business-review-letter process, nonbinding staff opinions, or enforcement advisories."); NCTA Comments at 67 (Less formal mechanisms of providing clarity on the Commission's view of the law, including business review letters, non-binding staff opinions, or enforcement advisories "may well prove useful to regulated entities as they endeavor to comply with any new rules . . . ."); CDT Comments at 34 ("To facilitate the development of helpful guidance in the interpretation of the rules, the Commission should proceed with its suggestion in the NPRM to establish a business-review-letter approach similar to that of the Antitrust Division of the Department of Justice. Such a process would provide a way for individual companies to resolve uncertainty they may face under the rules, while accelerating the growth of a body of precedent to which other industry participants might look. It could also foster useful discussions between broadband providers and Commission staff and a more regular and informed consideration of open-Internet policy issues.") (internal citations omitted); Cox Comments at 29 ("Cox . . . supports the NPRM's proposal to adopt additional dispute resolution mechanisms, such as expedited, non-binding staff review informed by input from the Broadband Internet Technical Advisory Group ('BITAG') and/or resolution by technical advisory groups like OIAC and BITAG.").

[614] *See, e.g.*, CDT Comments at 33-34 ("[U]se of the business-review-letter process should be purely voluntary. There should be no expectation that broadband providers must seek permission from the Commission before changing or instituting new network management practices, and the decision by a broadband provider not to seek a business review letter should not result in any negative inference regarding the provider or its practices.").

[615] WISPA Comments at 33; *see also* ADTRAN Comments at ii ("[T]he proposed enforcement processes will exacerbate the uncertainty, delay deployment of new services and further deter investment. The use of case-by-case formal complaint procedures to develop a 'common law' of Internet regulation under the vague rules proposed in the NPRM will not timely provide any measure of certainty or guidance. And the alternative proposals present concerns about timeliness, protection of proprietary information, no real measure of certainty and inconsistency with the current limits on delegated authority."); *id*. at 33-41.

[616] WISPA Comments at 33.

[617] *Id.* at 33-34.

[618] *See supra* note 613.

[619] Since January 2010, the Enforcement Bureau has periodically published enforcement advisories "designed to educate businesses about and alert consumers to what's required by FCC rules, the purpose of those rules and why they're important to consumers, as well as the consequences of failures to comply." *Statement of P. Michele*

(continued….)

Internet NPRM, we inquired whether the Commission should issue guidance in the form of enforcement advisories that provide insight into the application of Commission rules.[620] Enforcement advisories are a tool that the Commission has used in numerous contexts, including the current open Internet rules.[621] We asked whether continued use of such advisories would be helpful where issues of potential general application come to the Commission's attention, and whether these advisories should be considered binding policy of the Commission or merely a recitation of staff views.[622]

241. Numerous commenters maintain that the Commission should continue to use enforcement advisories to offer clarity, guidance, and predictability concerning the open Internet rules.[623] We agree. Enforcement advisories do not create new policies, but rather are recitations and reminders of existing legal standards and the Commission's current enforcement intentions.[624] We see no need to deviate from our current practice of issuing such advisories to periodically remind parties about legal standards regarding the open Internet rules.

b. Flexibility

(i) Means of enforcement and general enforcement mechanisms

242. We will preserve the Commission's existing avenues for enforcement of open Internet rules—self-initiated investigation by the Enforcement Bureau, informal complaints, and formal complaints. Commenters agree with the value of retaining these three main mechanisms for commencing enforcement of potential open Internet violations, as this combination ensures multiple entry points to the Commission's processes and gives both complainants and the Commission enforcement flexibility.[625]

243. In addition, the Commission will continue to honor requests for informal complaints to remain anonymous, and will also continue to maintain flexible channels for reporting suspected violations, like confidential calls to the Enforcement Bureau. Although some commenters raise concerns about anonymous complaint filings,[626] others stress the importance of having the option to request anonymity when filing an informal complaint.[627] We note, however, that complainants who are not anonymous frequently have better success getting their concerns addressed because the service provider can then troubleshoot their specific concerns.[628]

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Ellison, Chief, Enforcement Bureau on Issuance of the Bureau's First Enforcement Advisories, News Release (January 15, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-295749A1.pdf.

[620] *2014 Open Internet NPRM*, 29 FCC Rcd at 5620, para. 167.

[621] *See 2014 Advisory Guidance*, 29 FCC Rcd 8606; *2011 Advisory Guidance*, 26 FCC Rcd 9411.

[622] *2014 Open Internet NPRM*, 29 FCC Rcd at 5620, para. 167.

[623] *See, e.g.*, Comcast Comments at 69; NCTA Comments at 67.

[624] WISPA maintains that "any enforcement advisories should not be created in a vacuum and must be based on a public record following an opportunity for interested consumers and industry parties to submit comments." WISPA Comments at 34. We disagree with the contention that public notice and comment should be a prerequisite for the Commission to issue an enforcement advisory. The Commission uses its rulemaking procedures when we are adopting rule changes that require notice and comment. Conversely, enforcement advisories are used to remind parties of existing legal standards.

[625] *See, e.g.*, ADT Comments at 10-11; CenturyLink Comments at 36; Comcast Comments at 67; Hochhalter Comments at 34 ("Informal and formal complaint processes alike should be utilized. Both end users and edge providers can further enforcement efforts th[r]ough this process, and substantially lighten the FCC's enforcement burden.").

[626] *See, e.g.*, Charter Comments at 34–35; NCTA Comments at 68.

[627] *See, e.g.*, Hochhalter Comments at 34–35.

[628] *See, e.g.*, Comcast Comments at 68.

244. We also adopt our tentative conclusion in the *2014 Open Internet NPRM* that enforcement of the transparency rule should proceed under the same dispute mechanisms that apply to other rules contained in this Order.[629] We believe that providing both complainants and the Commission with flexibility to address violations of the transparency rule will continue to be important and that the best means to ensure compliance with both the transparency rule and the other rules we adopt today is to apply a uniform and consistent enforcement approach.

245. Finally, we conclude that violations of the open Internet rules will be subject to any and all penalties authorized under the Communications Act and rules,[630] including but not limited to admonishments, citations,[631] notices of violation,[632] notices of apparent liability,[633] monetary forfeitures and refunds,[634] cease and desist orders,[635] revocations,[636] and referrals for criminal prosecution.[637] Moreover, negotiated Consent Decrees can contain damages, restitution, compliance requirements, attorneys' fees, declaratory relief, and equitable remedies like injunctions, equitable rescissions, reformations, and specific performance.[638]

(ii) Case-by-Case Analysis

246. The *2014 Open Internet NPRM* emphasized that the process for providing and promoting an open Internet must be flexible enough to accommodate the ongoing evolution of Internet technology. We therefore tentatively concluded that the Commission should continue to use a case-by-case approach, taking into account the totality of the circumstances, in considering alleged violations of the open Internet rules.

247. We affirm our proposal to continue to analyze open Internet complaints on a case-by-case basis.[639] We agree with commenters that flexible rules, administered through case-by-case analysis, will

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[629] Commenters generally agree with this approach and have not offered any basis for the Commission to pursue a different enforcement regime with respect to the transparency rule. *See, e.g.*, ADT Comments at 11.

[630] Section 706 was enacted as part of the 1996 Telecommunications Act, and it is therefore subject to any and all penalties under the Act and our rules. *See Verizon*, 740 F.3d at 650 ("Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act of 1934.") (quoting *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 377 (1999)).

[631] 47 U.S.C. § 503(b)(5).

[632] 47 C.F.R. § 1.89.

[633] 47 U.S.C. § 503(b)(4).

[634] 47 U.S.C. § 503(b).

[635] 47 U.S.C. § 312(b).

[636] 47 C.F.R. § 1.91.

[637] 47 U.S.C. § 501.

[638] We are aware of concerns expressed by some commenters that penalties need to be predictable and fair. *See, e.g.*, WISPA Comments at 37 ("The existing rules lack any recitation of the range of sanctions or financial penalties that the Commission is authorized to impose upon a finding of a rule violation."). The Commission views its processes as ensuring predictable and fair enforcement. All forfeiture orders over $25,000 are reviewed by the full Commission for disposition, and all past enforcement actions are publicly available for guidance.

[639] A number of commenters support this approach. *See, e.g.*, TIA Comments at 3, 21; CenturyLink Comments at 35-36; CWA & NAACP Comments at 19-20; Verizon Comments, Attach. Katz Declaration at 24 ("Because no one has the ability to predict what will be the best network management practices and pricing and service models in the future, it is important that the Commission's rule be flexible" and a "case-by-case (or rule-of-reason) approach can offer that flexibility."); Comcast Comments at 67. One commenter argues that the Commission should promulgate general rules of conduct rather than relying on case-by-case adjudications. PA PUC Comments at Appx. B, 11. Other commenters expressed concerns about the cost of case-by-case adjudication. *See, e.g.*, Future of Music

(continued….)

enable us to pursue meaningful enforcement, consider consumers' individual concerns, and account for rapidly changing technology.[640]

(iii) Fact-finding processes

248. In the *2014 Open Internet NPRM*, we sought comment about how to most effectively structure a flexible fact finding process in analyzing open Internet complaints. We asked what level of evidence should be required in order to bring a claim. With regard to formal complaint proceedings, we also asked what showing should be required for the burden of production to shift from the party bringing the claim to the defendant, as well as whether parties could seek expedited treatment.[641]

249. *Informal Complaints*. Our current rules permitting the filing of informal complaints include a simple and straightforward evidentiary standard. Under section 1.41 of our rules, "[r]equests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request."[642] Although our rules do not establish any specific pleading requirements for informal complaints, parties filing them should attempt to provide the Commission with sufficient information and specific facts that, if proven true, would constitute a violation of the open Internet rules.

250. We find that our existing informal complaint rule offers an accessible and effective mechanism for parties—including consumers and small businesses with limited resources—to report possible noncompliance with our open Internet rules without being subject to burdensome evidentiary or pleading requirements. We conclude that there is no basis in the record for modifying the existing standard and decline to do so.

251. *Formal Complaints*. Our current open Internet formal complaint rules provide broad flexibility to adapt to the myriad potential factual situations that might arise. For example, as noted in the *2010 Open Internet Order*, some cases can be resolved based on the pleadings if the complaint and answer contain sufficient factual material to decide the case. A simple case could thus be adjudicated in an efficient, streamlined manner. For more complex matters, the existing rules give the Commission discretion to require other procedures, including discovery, briefing, a status conference, oral argument, an evidentiary hearing, or referral to an administrative law judge (ALJ).[643] Similarly, the rules provide the Commission discretion to grant temporary relief where appropriate.[644]

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Coalition Comments at 3; Meetup Comments at 7. We reject the suggestion that the Commission promulgate additional rules of conduct because it is unrealistic to expect that in this varied and rapidly evolving technological environment the agency will be able to anticipate the specific conduct that will give rise to future disputes. As for concerns about the cost of adjudications, as discussed below, we stress that our procedures will allow the Commission to simplify and streamline the complaint process, and to shift the burden of production, where appropriate, in order to minimize the time and expense of complaint proceedings.

[640] TIA Comments at 3, 21. *See also* CenturyLink Comments at 36 ("[T]he 'commercially reasonable' nondiscrimination framework proposed in the *NPRM* ultimately relies heavily on the backstop of a rigorous *ex post* process for reviewing and evaluating challenges to given practices on a case-by-case basis. A strong reliance on such a backstop, as opposed to overly prescriptive rules, is the better policy approach.") (internal citations omitted).

[641] *2014 Open Internet NPRM*, 29 FCC Rcd at 5621, para. 169.

[642] 47 C.F.R. § 1.41.

[643] 47 C.F.R. § 8.14(e)-(g*); see also 2010 Open Internet Order*, 25 FCC Rcd at 17987–88, para. 156 & n.490.

[644] *See* 47 C.F.R. § 8.14(e)(1).

252. In addition, our open Internet formal complaint process already contemplates burden shifting.[645] Generally, complainants bear the burden of proof and must demonstrate by a preponderance of the evidence that an alleged violation has occurred. A complainant must plead with specificity the basis of its claim and provide facts and documentation, when possible, to establish a *prima facie* rule violation.[646] Defendants must answer each claim with particularity and furnish facts, supported by documentation or affidavit, demonstrating that the challenged practice complies with our rules. Defendants do not have the option of merely pointing out that the complainant has failed to meet his or her burden; they must show that they are in compliance with the rules. The complainant then has an opportunity to respond to the defendant's submission.[647] We retain our authority to shift the burden of production when, for example, the evidence necessary to assess the alleged unlawful practice is predominately in the possession of the broadband provider.[648] If a complaining party believes the burden of production should shift, it should explain why in the complaint. Complainants also must clearly state the relief requested.[649] We conclude that we should retain our existing open Internet procedural rules and that all formal complaints that relate to open Internet disputes, including Internet traffic exchange disputes, will be subject to those rules.[650] Although comparable to the section 208 formal complaint rules,[651] the open Internet rules are less burdensome on complainants, who in this context are likely to be consumers or small edge providers with limited resources.[652] Moreover, as described above, the open Internet procedural rules allow the Commission broader flexibility in tailoring proceedings to fit particular cases.[653]

253. Several commenters stress the need for speedy resolution of complaints, given the rapid pace of Internet commerce and the potential consumer harms and market chilling effects deriving from slow resolution.[654] While we share these concerns, we decline to adopt fixed, short deadlines for resolving formal complaints but pledge to move expeditiously. As noted in the *2010 Open Internet Order*, the Commission may shorten deadlines or otherwise revise procedures to expedite the adjudication

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[645] As we noted in the *2010 Open Internet Order*, our current processes permit the Commission to shift the burden of production where appropriate. *See 2010 Open Internet Order*, 25 FCC Rcd at 17988, para. 157.

[646] *Id.* at 17988, para. 157 & n.491.

[647] *Id.* at 17988, para. 157.

[648] *See id.*; *see also* Consumers Union Comments at 8 (arguing that users and edge providers "may not always be aware of all of the circumstances surrounding a particular practice or negotiation").

[649] 47 C.F.R. § 8.14(a)(2)(i).

[650] *See* 47 C.F.R. §§ 8.12-17.

[651] *See* 47 C.F.R. §§ 1.720-1.736.

[652] The section 208 rules, for example, require complainants to submit information designations, proposed findings of fact and conclusions of law, and affidavits demonstrating the basis for complainant's belief for unsupported allegations and why complainant could not ascertain facts from any source. *See, e.g.*, 47 C.F.R. §§ 1.721(a) (5), (6), (10). The open Internet formal complaint rules do not contain similar requirements.

[653] *See supra* Section III.E.2.b. For example, under the open Internet rules, the Commission may order an evidentiary hearing before an administrative law judge (ALJ) or Commission staff. *See* 47 C.F.R. §§ 8.14(e)(1), (g). The section 208 rules contain no such provision. In addition, unlike the section 208 rules, the open Internet rules do not contain numerical limits on discovery requests. *Compare id.* § 8.14(f) *with id.* § 1.729(a).

[654] *See, e.g.*, CFA Comments at 5; Cox Comments at 29; MMTC Comments at 12; WISPA comments at 37 ("[U]nless further information is required, the Commission should render a decision on any complaint within 60 days of the filing of the answer or any required supplemental information"); *cf.* COMPTEL Comments at 33-34 (proposing an expedited review process for informal complaints alleging violations of the Commission's open Internet rules requiring complaints to be resolved in 90 days to "provide the necessary legal certainty for broadband providers, end users and edge providers to better plan their activities in light of clear Commission guidance").

of complaints.[655] Additionally, the Commission will determine, on the basis of the evidence before it, whether temporary relief should be afforded any party pending final resolution of a complaint and, if so, the nature of any such temporary relief.[656] As noted above, some open Internet cases may be straightforward and suitable for decision in a 60 to 90-day timeframe. Other cases may be more factually and technologically complex, requiring more time for the parties to pursue discovery and build an adequate record, and sufficient time for the Commission to make a reasoned decision. Therefore, we find that the existing process—allowing parties to request expedited treatment—best fits the needs of potential open Internet formal complaints.

c. Effective Access to Dispute Resolution

254. In this section, we adopt the proposal from the *2014 Open Internet NPRM* to establish an ombudsperson to assist consumers, businesses, and organizations with open Internet complaints and questions by ensuring these parties have effective access to the Commission's processes that protect their interests.[657] The record filed supports our conclusion that these parties would benefit from having an ombudsperson as a point of contact within the Commission for questions and complaints.[658]

255. Comments in support of the establishment of an ombudsperson clearly demonstrate the range of groups a dedicated ombudsperson can serve. For example, the American Association of People with Disabilities expressed particular interest in the potential of the ombudsperson to monitor concerns regarding accessibility and the open Internet.[659] In addition, the comments of Higher Education Libraries asked that libraries be amongst the groups served by the ombudsperson[660] and those of the Alaska Rural Coalition expressed interest in the ombudsperson also being accessible to small carriers with concerns.[661] In contrast, some commenters expressed concerns about the creation of a dedicated ombudsperson.[662] However, as described below, the ombudsperson will work as a point of contact and a source of

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[655] *2010 Open Internet Order*, 25 FCC Rcd at 17988, para. 158, n.494. Further, the rules permit parties to formal complaint proceedings to request expedited treatment under the Enforcement Bureau's Accelerated Docket procedures. *See* 47 C.F.R. § 8.13(a)(7).

[656] *See* 47 C.F.R. § 8.14(e)(1). The Supreme Court has affirmed the Commission's authority to impose interim injunctive relief pursuant to section 4(i) of the Act. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 180–181 (1968); *see also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22566, para. 159 & n.464 (1997) (stating that the Commission has authority under section 4(i) of the Act to award injunctive relief).

[657] *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5621, at para. 171.

[658] *See, e.g.*, American Association of People with Disabilities Comments at 5 (noting that an ombudsperson would allow the commission to better serve the needs of people with disabilities); COMPTEL Comments at 34 (stating support for the creation of an ombudsperson); Higher Education Libraries Comments at 20 (advocating for the inclusion of libraries in the list of groups the ombudsperson would serve); Hurwitz Comments at 4 ("The NPRM considers the creation of an ombudsperson; this proposal should be firmly embraced."); MMTC Comments at 12 (asking that the ombudsperson serve consumers, including individuals from vulnerable populations).

[659] American Association of People with Disabilities Comments at 5.

[660] Higher Education Libraries Comments at 20.

[661] Alaska Rural Coalition Comments at 17; *see also* WISPA Comments at 34 (supporting the creation of an ombudsman only if they are authorized to act on behalf of small carriers as well as consumers and edge providers).

[662] *See, e.g.*, Common Cause Comments at 11 (expressing concerns about the necessity of receiving pre-clearance by an ombudsperson); Kickstarter Comments at 2 (stating that working with an ombudsperson would be onerous); T-Mobile Comments at 26 (stating that there has been no showing of need to create an ombudsperson).

assistance as needed, not as an advocate or as an officer who must be approached for approval, addressing many of these concerns.

256. The Open Internet Ombudsperson will serve as a point of contact to provide assistance to individuals and organizations with questions or complaints regarding the open Internet to ensure that small and often unrepresented groups reach the appropriate bureaus and offices to address specific issues of concern. For example, the ombudsperson will be able to provide initial assistance with the Commission's dispute resolution procedures by directing such parties to the appropriate templates for formal and informal complaints. We expect the ombudsperson will assist interested parties in less direct but equally important ways. These could include conducting trend analysis of open Internet complaints and, more broadly, market conditions, that could be summarized in reports to the Commission regarding how the market is functioning for various stakeholders. The ombudsperson may investigate and bring attention to open Internet concerns, and refer matters to the Enforcement Bureau for potential further investigation. The ombudsperson will be housed in the Consumer & Governmental Affairs Bureau, which will remain the initial informal complaint intake point, and will coordinate with other bureaus and offices, as appropriate, to facilitate review of inquiries and complaints regarding broadband services.

3. Complaint Processes and Forms of Dispute Resolution

a. Complaint Filing Procedures

257. In the *2014 Open Internet NPRM*, we sought comment on how open Internet complaints should be received, processed, and enforced. We asked if there were ways to improve access to our existing informal and formal complaint processes, especially for consumers, small businesses, and other entities with limited resources and knowledge of how our complaint processes work. We also asked whether the current enforcement and dispute resolution tools at the Commission's disposal are sufficient for resolving violations of open Internet rules.

258. *Informal Complaints*. First, we will implement processes to make it easier to lodge informal open Internet complaints, including a new, more intuitive online complaint interface.[663] The Commission recently launched a new Consumer Help Center, which provides a user-friendly, streamlined means to access educational materials on consumer issues and to file complaints. Consumers who seek to file an open Internet complaint should visit the Consumer Help Center portal and click the Internet icon for the materials or the online intake system for complaints. The complaint intake system is designed to guide the consumer efficiently through the questions that need to be answered in order to file a complaint. The Consumer Help Center will make available aggregate data about complaints received, including those pertaining to open Internet issues. Some data is currently available, with additional and more granular data to be provided over time.[664] We believe these efforts will improve access to the Commission's open Internet complaint processes.[665]

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[663] *See* MMTC Comments at 14 ("As a general matter, the Commission's primary focus should be to create a user-friendly form that easily can be completed and submitted by a consumer without the need for an attorney.").

[664] The Open Internet Ombudsperson will also be available to assist parties in filing informal complaints. *See supra* Section III.E.2.c.

[665] The MMTC proposed applying, in the open Internet context, the Equal Employment Opportunity Commission (EEOC) complaint process set out in Title VII of the Civil Rights Act of 1964, as a way to "provide an excellent consumer-friendly means of resolving open Internet complaints rapidly, efficiently, and affordably." Letter from David Honig, MMTC to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51, 14-28, 09-191, MB Docket Nos. 14-109, 14-50, 09-182, 07-294, 04-256, Attach. at 6 (filed Dec. 12, 2014) (MMTC *Ex Parte* Letter); *see also* MMTC Comments at 13. Under that process, complainants, prior to seeking formal relief against a party, must submit their complaint to the EEOC, which reviews and attempts informal resolution, with subsequent formal complaints only authorized (by a "Right to Sue letter") if informal resolution is not reached. We agree that the Title VII complaint process has benefits, including free-to-the-complainant complaint review and mediation and sequencing that encourages informal dispute resolution prior to formal lawsuits, among others. MMTC *Ex Parte*

(continued….)

259. *Formal Complaints*. With respect to formal complaints, we amend the Commission's Part 8 open Internet rules[666] to require electronic filing of all pleadings in open Internet formal complaint proceedings. Currently, parties to such proceedings must file hard copies of pleadings with the Office of the Secretary. This process is time-consuming for the parties and makes it difficult for the public to track case developments. Although members of the public may obtain copies of the pleadings from the Commission's Reference Information Center, there is no way to search for or view pleadings electronically. Today's actions modernize and reform these existing procedures.[667]

260. In 2011, the Commission released a Report and Order revising Part 1 and Part 0 of its rules.[668] One aspect of the *Part 1 Order* was a requirement that docketing and electronic filing begin to be utilized in proceedings involving "[n]ewly filed Section 208 formal common carrier complaints and newly filed Section 224 pole attachment complaints before the Enforcement Bureau."[669] On November 12, 2014, the Commission released an order that amended its procedural rules governing formal complaints under section 208 and pole attachment complaints under section 224 to require electronic filing.[670] We established within ECFS a "Submit a Non-Docketed Filing" module where all such complaints must be filed because staff must review a complaint for conformance with the Commission's rules before the matter can receive its own unique ECFS proceeding number.[671]

261. We now extend those rule changes to open Internet formal complaints.[672] When filing such a complaint, as of the effective date of this Order, the complainant will be required to select "Open Internet Complaint: Restricted Proceeding" from the "Submit a Non-Docketed Filing" module in ECFS. The filing must include the complaint, as well as all attachments to the complaint.[673] When using ECFS

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Letter Attach. at 2. We believe the Commission's existing multimodal open Internet complaint processes contain these benefits as well, as they enable informal resolution of complaints and free mediation by the Enforcement Bureau's Market Disputes Resolution Division.

[666] 47 C.F.R. Part 8.

[667] The rule changes described in this section do not apply to open Internet *informal* complaints. Consumers will continue to have the ability to file informal complaints electronically with the Consumer & Governmental Affairs Bureau. The form for filing an informal complaint is available at https://consumercomplaints.fcc.gov/hc/en-us.

[668] *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44, Report and Order, 26 FCC Rcd 1594 (2011) (*Part 1 Order*).

[669] *Id*. at 1599-1600, para. 15; *see also* 47 U.S.C. §§ 208, 224.

[670] *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure Relating to the Filing of Formal Complaints Under Section 208 of the Communications Act and Pole Attachment Complaints Under Section 224 of the Communications Act*, GC Docket No. 10-44, Order, 29 FCC Rcd 14078 (2014).

[671] *Id.* at 14079-80, para. 7. In this order, the Commission also modified the rules for filing requests for confidential treatment of proprietary information to ensure that the two sets of rules were uniform and consistent with the Commission's e-filing practices. *Id.* at 14080, para. 12 & n.22.

[672] We hereby amend the caption for the ECFS docket to "*Section 208 and 224 and Open Internet Complaint Inbox, Restricted Proceedings*." We also amend rule 8.16, which governs confidentiality of proprietary information, to conform to the changes we made regarding confidentiality in the section 208 and section 224 complaint rules. *See infra* Appendix (detailing revisions to 47 C.F.R. § 8.16).

[673] All electronic filings must be machine-readable, and files containing text must be formatted to allow electronic searching and/or copying (e.g., in Microsoft Word or PDF format). Non-text filings (e.g., Microsoft Excel) must be submitted in native format. Be certain that filings submitted in .pdf or comparable format are not locked or password-protected. If those restrictions are present (e.g., a document is locked), the ECFS system may reject the filing, and a party will need to resubmit its document within the filing deadline. The Commission will consider granting waivers to this electronic filing requirement only in exceptional circumstances. *See Part 1 Order*, 26 FCC Rcd at 1602, para. 20 & n.61 (citing *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*,
(continued….)

to initiate new proceedings, a complainant no longer will have to file its complaint with the Office of the Secretary unless the complaint includes confidential information.[674]

262. Enforcement Bureau staff will review new open Internet formal complaints for conformance with procedural rules (including fee payment).[675] As of the effective date of this Order, complainants no longer will submit a hard copy of the complaint with the fee payment as described in rule 1.1106.[676] Instead, complainants must first transmit the complaint filing fee to the designated payment center and then file the complaint electronically using ECFS.[677]

263. Assuming a complaint satisfies this initial procedural review, Enforcement Bureau staff then will assign an EB file number to the complaint (EB Identification Number), give the complaint its own case-specific ECFS proceeding number, and enter both the EB Identification Number and ECFS proceeding number into ECFS. At that time, Enforcement Bureau staff will post a Notice of Complaint Letter in the case-specific ECFS proceeding and transmit the letter (and the complaint) via e-mail to the defendant. On the other hand, if a filed complaint does not comply with the Commission's procedural rules, Enforcement Bureau staff will serve a rejection letter on the complainant and post the rejection letter and related correspondence in ECFS. Importantly, the rejection letter will not preclude the complainant from curing the procedural infirmities and refiling the complaint.[678]

264. As of the effective date of this Order, all pleadings, attachments, exhibits, and other documents in open Internet formal complaint proceedings must be filed using ECFS, both in cases where the complaint was initially filed in ECFS and in pending cases filed under the old rules.[679] With respect to complaints filed prior to the effective date of this Order, Enforcement Bureau staff will assign an individual ECFS proceeding number to each existing proceeding and notify existing parties by email of this new ECFS number. This ECFS proceeding number will be in addition to the previously-assigned number. The first step in using ECFS is to input the individual case's ECFS proceeding number or EB Identification Number. The new rules allow parties to serve post-complaint submissions on opposing parties via email without following up by regular U.S. mail.[680] Parties must provide hard copies of submissions to staff in the Market Disputes Resolution Division of the Enforcement Bureau upon request.[681]

265. Consistent with existing Commission electronic filing guidelines,[682] any party asserting that materials filed in an open Internet formal complaint proceeding are proprietary must file with the

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Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4517, 4531-32, para. 55 (2011) (*Ex Parte Reform Order*)).

[674] *See infra* Appx (detailing revisions to 47 C.F.R. §§ 8.13(b), 8.16).

[675] Complainants must remit filing fees for complaints in accordance with 47 C.F.R. § 1.1106.

[676] *See infra* Appx. A (revisions to § 8.13(b)).

[677] Complainants may transmit the complaint filing fee via check, wire transfer, or electronically using the Commission's Fee Filer System (Fee Filer).

[678] Enforcement Bureau staff will not assign an EB file number or a separate ECFS docket number to a rejected complaint, but interested persons can locate the rejected complaint by searching for party names, dates, rule citation, or other relevant ECFS search criteria.

[679] *See infra* Appx. A (revisions to §§ 8.13, 8.16).

[680] *See infra* Appx. A (revisions to § 8.13). Parties using email service should be mindful that the Commission's or the opposing party's computer server may reject email attachments that are too large.

[681] *See infra* Appx. A (revisions to § 8.13).

[682] *See* 47 C.F.R. § 0.459(a)(2).

Commission, using ECFS, a public version of the materials with any proprietary information redacted.[683] The party also must file with the Secretary's Office an unredacted hard copy version that contains the proprietary information and clearly marks each page, or portion thereof, using bolded brackets, highlighting, or other distinct markings that identify the sections of the filing for which a proprietary designation is claimed.[684] Each page of the redacted and unredacted versions must be clearly identified as the "Public Version" or the "Confidential Version," respectively.[685] Both versions must be served on the same day.[686]

b. Alternative Dispute Resolution

266. The Commission sought comment on various modes of alternative dispute resolution for resolving open Internet disputes. Currently, parties with disputes before the Commission are free to voluntarily engage in mediation, which is offered by the Market Disputes Resolution Division (MDRD) at no charge to the parties. This process has worked well and has led to the effective resolution of numerous complaints. We will take steps to improve awareness of this approach. In the *2014 Open Internet NPRM*, we asked whether other approaches, such as arbitration, should be considered, in order to ensure access to dispute resolution by smaller edge providers and other entities without resources to engage in the Commission's formal complaint process.

267. We decline to adopt arbitration procedures or to mandate arbitration for parties to open Internet complaint proceedings. Under the rules adopted today, parties are still free to engage in mediation and outside arbitration to settle their open Internet disputes, but alternative dispute resolution will not be required.[687] Commenters generally do not favor arbitration in this context and recommend that the Commission not adopt it as the default method for resolving complaints.[688] Commenters suggest that mandatory arbitration, in particular, may more frequently benefit the party with more resources and more understanding of dispute procedure, and therefore should not be adopted.[689] We agree with these concerns and conclude that adoption of arbitration rules is not necessary or appropriate in this context.

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[683] *See infra* Appx. A (revisions to § 8.16).

[684] *Id.* Filers must ensure that proprietary information has been properly redacted and thus is not viewable. If a filer inadvertently discloses proprietary information, the Commission will not be responsible for that disclosure. *Part 1 Order*, 26 FCC Rcd at 1600-01, para. 17, n.49.

[685] *See infra* Appx. A (revisions to § 8.16).

[686] *Id.*

[687] As a general matter, the Commission lacks the ability to subdelegate its authority over these disputes to a private entity, like a third-party arbitrator, *see U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) ("[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities–private or sovereign–absent affirmative evidence of authority to do so"), and "may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit." 5 U.S.C. § 575(a)(3). As noted in the *2014 Open Internet NPRM*, however, mandatory third-party arbitration may be allowed so long as it is subject to *de novo* review by the Commission. *See 2014 Open Internet NPRM*, 29 FCC Rcd at 5622 n.354 (citing *Comcast Corp., Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, File No. CSR-7108, Order, 22 FCC Rcd 17938, 17948, para. 4, n.13 (2007)); *see also* AAJC Comments at 4.

[688] *See, e.g.*, AAJC Comments at 2; Public Citizen and NACA Comments at 1; NASUCA Comments at 17 ("consumers should not be required to submit to arbitration to resolve disputes with broadband providers").

[689] *See, e.g.*, AAJC Comments at 1 (noting that "[i]n most cases, consumers must pay filing fees and the arbitrator's costs, which can amount to thousands of dollars," and the provider can select the arbitration location, making the process even costlier; further noting that arbitrated decisions are not reviewable and often not public, precluding consumers from uncovering potential biases in the process); Public Citizen and NACA Comments at 1-2.

c. Multistakeholder Processes and Technical Advisory Groups

268. In the *2014 Open Internet NPRM*, the Commission sought comment on whether enforcement of open Internet rules—including resolution of open Internet disputes—could be supported by multistakeholder processes that enable the development of independent standards to guide the Commission in compliance determinations. The Commission also asked whether it should incorporate the expertise of technical advisory groups into these determinations.[690]

269. We conclude that incorporating groups with technical expertise into our consideration of formal complaints has the potential to inform the Commission's judgment and improve our understanding of complex and rapidly evolving technical issues. By requiring electronic filing of all pleadings in open Internet formal complaint proceedings,[691] we will enable interested parties to more easily track developments in the proceedings and participate as appropriate. Although formal complaint proceedings are generally restricted for purposes of the Commission's *ex parte* rules,[692] interested parties may seek permission to file an amicus brief. The Commission "consider[s] on a case-by-case basis motions by non-parties wishing to submit amicus-type filings addressing the legal issues raised in [a] proceeding,"[693] and grants such requests when warranted.[694] Thus, for example, the Commission granted a motion for leave to file an amicus brief in a section 224 pole attachment complaint proceeding "in light of the broad policy issues at stake.[695]

270. To further advance the values underlying multistakeholder processes—inclusivity, transparency, and expertise—we also amend our Part 8 formal complaint rules by delegating authority to the Enforcement Bureau, in its discretion, to request a written opinion from an outside technical organization. As reviewing courts have established, "[a] federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself."[696]

271. In this instance, given the potential complexity of the issues in open Internet formal complaint proceedings, it may be particularly useful to obtain objective advice from industry standard-

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[690] Commenters generally support the idea of having greater input from associations and technical advisory groups in the Commission's open Internet regulation. *See, e.g.*, CFA Comments at 5; Layton Comments at 18; Mozilla Comments at 25-26; TechFreedom Comments at 99-100; WISPA Comments at 35. *But see* CCIA Comments at 32. They point out that such input can improve inclusivity and transparency, *see, e.g.*, Layton Comments at 18; Mozilla Comments at 26; WISPA Comments at 35, and ensures that the Commission's enforcement is sufficiently informed by the most up-to-date technical insights regarding network management and other features of Internet engineering. *See, e.g.*, Comcast Comments at 70; Cox Comments at 29; ITIF Comments at 20; Layton Comments at 19 ("A multi-stakeholder model is also preferable when evidence is limited and technological change is swift."); MDTC Comments at 1; NetAccess Futures Comments at 29.

[691] *See supra* Section III.E.3.a.

[692] *See* 47 C.F.R. §§ 1.1202(d)(2), 1.1208; *see also North County Communications Corp., Complainant v. MetroPCS California, LLC, Defendant*, EB-06-MD-007, Memorandum Opinion and Order, 24 FCC Rcd 3807, 3818 n.85 (2009).

[693] *AT&T Corp. v. Business Telecom, Inc.*, EB-01-MD-001, Order on Reconsideration, 16 FCC Rcd 21750, 21754, n.21 (2001) (quoting *Pleading Schedule Established for AT&T Corp. v. Ameritech Corp.*, Public Notice, 13 FCC Rcd 12057, 12058 (Com. Car. Bur. 1998)).

[694] If a party to the proceeding is a member of or is otherwise represented by an entity that requests leave to file an amicus brief, the entity must disclose that affiliation in its request.

[695] *In the matter of Heritage Cablevision Assoc. of Dallas, L.P. v. Texas Util. Elec. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 7099, 7101, para. 10, n.13 (1991), *review denied sub nom. Texas Utilities Elec. Co. v. F.C.C.*, 997 F.2d 925 (D.C. Cir. 1993).

[696] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004).

setting bodies or other similar organizations.[697] Providing Commission staff with this flexibility also will enable more informed determinations of technical Internet issues that reflect current industry standards and permit staff to keep pace with rapidly changing technology.[698] Expert organizations will not be required to respond to requests from the Enforcement Bureau for opinions; however, any organization that elects to do so must provide the opinion within 30 days of the request—unless otherwise specified by the staff—in order to facilitate timely dispute resolution. We find that this approach will allow for the inclusivity the multistakeholder process offers, while also providing the predictability and legal certainty of the Commission's formal dispute resolution process.[699]

272. For informal complaints and investigations, the Enforcement Bureau's efforts will continue to be informed by resolutions of formal complaints, and will also continue to be informed by the standards developed by existing multistakeholder, industry, and consumer groups.[700] The Enforcement Bureau will also work with interested parties on an informal basis to identify ways to promote compliance with the open Internet rules.

F. Legal Authority

273. We ground the open Internet rules we adopt today in multiple sources of legal authority—section 706, Title II, and Title III of the Communications Act. We marshal all of these sources of authority toward a common statutorily-supported goal: to protect and promote Internet openness as platform for competition, free expression and innovation; a driver of economic growth; and an engine of the virtuous cycle of broadband deployment.

274. We therefore invoke multiple, complementary sources of legal authority.[701] As a number of parties point out, our authority under section 706 is not mutually exclusive with our authority under

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[697] *See* Charter Comments at 35-36 (recommending that the Commission "take full advantage of the multi-stakeholder forums that have helped to define the Internet and enable it to flourish."); Cox Comments at 29 (supporting the NPRM's proposal to adopt additional dispute resolution mechanisms that are informed by input from technical advisory groups); Mozilla Comments at 25-26 (recommending that technical bodies like the Open Internet Advisory Committee (OIAC) and the Broadband Internet Technical Advisory Group (BITAG) be consulted on technical issues like reasonable network management); NetAccess Futures Comments at 29.

[698] Whenever possible, the Enforcement Bureau should request advisory opinions from expert organizations whose members do not include any of the parties to the proceeding. If no such organization exists, the Enforcement Bureau may refer issues to an expert organization with instructions that representatives of the parties to the complaint proceeding may not participate in the organization's consideration of the issues referred or the drafting of its advisory opinion.

[699] Moreover, we note that the Commission cannot as a matter of law delegate its dispute resolution processes to outside organizations. *See supra* note 687. Accordingly, while we support the goals of Mozilla's "three-phase" dispute resolution model, the Commission cannot go so far as to delegate leadership over open Internet disputes to outside multistakeholder groups. *See* Mozilla Comments at 26.

[700] *See, e.g.*, Comcast Comments at 70; ITIF Comments at 20; MDTC Comments at 1.

[701] CDT Reply at 3 (suggesting the Commission consider an approach that "builds upon the recent D.C. Circuit decision and some of the strengths of Title II and Section 706."); CFA Comments at 66 ("[T]he authorities overlap—a service can fall under more than one authority simultaneously—and are complementary (in the sense that they trigger different tools for different purposes). Therefore, there is no conflict between asserting the authority and developing the power under each of the Titles and sections of the Act. In fact . . . it would be imprudent for the Commission not to pursue all of the authorities it has available."); iClick2Media Comments at 10 ("By combining the power of 706, Title II and Title III the FCC is afforded the reasoning and the power granted to it to protect the Openness of the Internet for years to come."); AARP Comments at 40 ("Title II and Section 706 are highly complementary.").

Titles II and III of the Act.[702] Rather, we read our statute to provide several, alternative sources of authority that work in concert toward common ends. As described below, under section 706, the Commission has the authority to adopt these open Internet rules to encourage and accelerate the deployment of broadband to all Americans. In the Declaratory Ruling and Order below, we find, based on the current factual record, that BIAS is a telecommunications service subject to Title II and exercise our forbearance authority to establish a "light-touch" regulatory regime, which includes the application of sections 201 and 202. This finding both removes the common carrier limitation from the exercise of our affirmative section 706 authority and also allows us to exercise authority directly under sections 201 and 202 of the Communications Act in adopting today's rules. Finally, these rules are also supported by our Title III authority to protect the public interest through spectrum licensing. In this section, we discuss the basis and scope of each of these sources of authority and then explain their application to the open Internet rules we adopt today.

1. Section 706 Provides Affirmative Legal Authority for Our Open Internet Rules.

275. Section 706 affords the Commission affirmative legal authority to adopt all of today's open Internet rules. Section 706(a) directs the Commission to take actions that "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[703] To do so, the Commission may utilize "in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[704] Section 706(b), in turn, directs that the Commission "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market," if it finds after inquiry that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.[705] "Advanced telecommunications capability" is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[706] Sections 706(a) and (b) each provide an express, affirmative grant of authority to the Commission and the rules we adopt today fall well within their scope.

276. *Section 706(a) and (b) Are Express Grants of Authority.* In *Verizon*, the D.C. Circuit squarely upheld as reasonable the Commission's reading of section 706(a) as an affirmative grant of authority.[707] Finding that provision ambiguous, the court upheld the Commission's interpretation as

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[702] CFA Comments at 68 (explaining that "recent court cases have made it clear that 706 and other authorities can be invoked simultaneously (although they need not be)"); AOL Comments at 9 ("Section 706 and Title II need not be mutually exclusive.").

[703] 47 U.S.C. § 1302(a). Section 706(a) provides in full:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

[704] *Id.*

[705] 47 U.S.C. § 1302(b).

[706] *Id.* § 1302(d)(1).

[707] *Verizon*, 740 F.3d at 637 ("The question, then, is this: Does the Commission's current understanding of section 706(a) as a grant of regulatory authority represent a reasonable interpretation of an ambiguous statute? We believe

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consistent with the statutory text,[708] legislative history,[709] and the Commission's lengthy history of regulating Internet access.[710]

277. Separately addressing section 706(b), the D.C. Circuit held, citing similar reasons, that the "Commission has reasonably interpreted section 706(b) to empower it to take steps to accelerate broadband deployment if and when it determines that such deployment is not "reasonable and timely."[711] The 10th Circuit, in upholding the Commission's reform of our universal service and inter-carrier compensation regulatory regime, likewise concluded that the Commission reasonably construed section 706(b) as an additional source of authority for those regulations.[712]

278. In January, the Commission adopted the *2015 Broadband Progress Report*, which determined that advanced telecommunications capability is not being deployed in a reasonable and timely manner to all Americans.[713] That determination triggered our authority under section 706(b) to take immediate action, including the adoption of today's open Internet rules, to accelerate broadband deployment to all Americans.

279. We interpret sections 706(a) and 706(b) as independent, complementary sources of affirmative Commission authority for today's rules. Our interpretation of section 706(a) as a grant of express authority is in no way dependent upon our findings in the section 706(b) inquiry. Thus, even if the Commission's inquiry were to have resulted in a positive conclusion such that our section 706(b) authority were not triggered this would not eliminate the Commission's authority to take actions to encourage broadband deployment under section 706(a).[714]

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it does.") A few commenters argue that the court incorrectly concluded that section 706(a) and (b) are express grants of authority. *See, e.g.*, TechFreedom Comments at 62-70 (arguing that section 706 is not an independent grant of authority and that the court erred in its *Chevron* analysis); CenturyLink Comments at 53 ("Section 706(a) contains no grant of independent regulatory authority of any kind . . . ."). For the reasons discussed in the text, by the Commission in the *2010 Open Internet Order*, and the court in *Verizon* and *In re FCC,* we disagree.

[708] *Verizon*, 740 F.3d at 637-38. As the *Verizon* court explained, for example, "Section 706(a)'s reference to state commissions does not foreclose such a reading" of section 706(a) as an express grant of authority. *Id.* at 638. Nor, as one of the dissents suggests, (*see* Pai Dissent at 55), is the statute's reference to "[s]tate commission" rendered meaningless by the Commission's reaffirmation that BIAS is an interstate service for regulatory purposes. *See infra* para 431. The Commission's interpretation does not preclude all state commission action in this area, just that which is inconsistent with the federal regulatory regime we adopt today. *See NARUC Broadband Data Order*, 25 FCC Rcd at 5054-55.

[709] *Id.* at 638-39.

[710] *Id.* (distinguishing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)) ("[W]hen Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet.").

[711] *Verizon*, 740 F.3d at 640-43.

[712] *In re FCC 11-161*, 753 F.3d 1015, 1053 (10th Cir. 2014).

[713] *See 2015 Broadband Progress Report* at para. 4.

[714] *See, e.g.*, Letter from Lawrence J. Spiwak, President, Phoenix Center for Advanced Legal & Economic Public Policy Studies, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. A, Phoenix Center Policy Bulletin No. 35, *What are the Bounds of the FCC's Authority over Broadband Service Providers? A Review of the Recent Case Law* at 23 (filed Oct. 31, 2014) (Phoenix Center Oct. 31, 2014 *Ex Parte* Letter) (concluding that the *Verizon* court took the view that "706(a) is independent from 706(b), because the court seemed to say that the defined trigger of 706(b) is irrelevant to the Commission's on-going (and independent) effort to promote broadband deployment under 706(a) under foreseeable market conditions"). Contrary to one of the dissenting statements, (*see* Pai Dissent at 56), Commission actions adopted pursuant to a negative section 706(b) determination would not simply be swept away by a future positive section 706(b) finding. The Commission takes such measures precisely to achieve section 706(b)'s goal of accelerating deployment. That they may succeed in achieving that goal so as to
(continued….)

280. We reject arguments that we lack rulemaking authority to implement section 706 of the 1996 Act.[715] In *Verizon*, the D.C. Circuit suggested that section 706 was part of the Communications Act of 1934.[716] Under such a reading, the Commission would have all its standard rulemaking authority under sections 4(i), 201(b) and 303(r) to adopt rules implementing that provision.[717] Even if this were not the case, by its terms our section 4(i) rulemaking authority is not limited just to the adoption of rules pursuant to substantive jurisdiction under the Communications Act,[718] and the *Verizon* court cited as reasonable the Commission's view that Congress, in placing upon the Commission the obligation to carry out the purposes of section 706, "necessarily invested the Commission with the statutory authority to carry out those acts."[719]

281. *The Open Internet Rules Fall Well Within the Scope of Our Section 706 Authority.* In *Verizon*, the D.C. Circuit agreed with the Commission that while authority under section 706 may be broad, it is not unbounded.[720] Both the Commission and the court have articulated its limits. First, section 706 regulations must be within the scope of the Commission's subject matter jurisdiction over "interstate and foreign communications by wire and radio."[721] And second, any such regulations must be

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contribute to a positive section 706(b) finding does not subsequently render them unnecessary or unauthorized without any further Commission process. Throwing away such measures because they are working would be like "throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby v. Holder*, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting). Even if that were not the case, independent section 706(a) authority would remain. We mention, however, two legal requirements that appear relevant. First, section 408 of the Act mandates that "all" FCC orders (other than orders for the payment of money) "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order." 47 U.S.C. § 408. Second, the Commission has a "continuing obligation to practice reasoned decisionmaking" that includes revisiting prior decisions to the extent warranted. *Aeronautical Radio v. FCC*, 928 F.2d 428 (D.C. Cir. 1991). We are aware of no reason why these requirements would not apply in this context.

[715] *See, e.g.*, Earl Comstock Reply at 18-33 (arguing that section 706 contained no affirmative authority for rulemaking).

[716] *See Verizon*, 740 F.3d at 650 (stating that "Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act of 1934") (citation omitted).

[717] 47 U.S.C. § 154(i) ("The Commission may . . . make such rules and regulations . . . not inconsistent with this chapter, as may be necessary in the execution of its functions."); 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); 47 U.S.C. § 303(r) ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter").

[718] *See* 47 U.S.C. § 154(i).

[719] *Verizon*, 740 F.3d at 638 (quoting *2010 Open Internet Order*, 25 FCC Rcd at 17969, para. 120).

[720] *Verizon*, 740 F.3d at 639-40.

[721] *Id.* at 640 (citing 47 U.S.C. §152(a)). Some have read this to require that regulations under section 706 must be ancillary to existing Commission authority in Title II, III or VI of the Act. *See* Phoenix Center Oct. 31, 2014 *Ex Parte* Letter, Attach. A at 25 ("Section 706 is really another form of the Commission's ancillary authority—that is, like any use of its traditional ancillary authority . . . *Verizon* requires the Commission to tie its use of Section 706 to a specific delegation of authority in Title II, Title III, or Title VI."). We disagree. To be sure, with the Commission's exercise of both section 706 and ancillary authority, regulations must be within the Commission's subject matter jurisdiction. Indeed, this is the first prong of the test for ancillary jurisdiction. *American Library Ass'n v. FCC*, 406 F.3d 689, 703–04 (D.C. Cir. 2005). But we do not read the *Verizon* decision as applying the second prong—which requires that the regulation be sufficiently linked to another provision of the Act—to our exercise of section 706 authority. Section 706 "does not limit the Commission to using other regulatory authority already at its disposal, but instead grants it the power necessary to fulfill the statute's mandate." *See Verizon*, 740 F.3d at 641 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17972, para. 123).

designed to achieve the purpose of section 706(a)—to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[722]

282. In *Verizon*, the court firmly concluded that the Commission's *2010 Open Internet Order* regulations fell within the scope of section 706. It explained that the rules "not only apply directly to broadband providers, the precise entities to which section 706 authority to encourage broadband deployment presumably extends, but also seek to promote the very goal that Congress explicitly sought to promote."[723] Further, the court credited "the Commission's prediction that the *Open Internet Order* regulations will encourage broadband deployment."[724] The same is true of the open Internet rules we adopt today. Our regulations again only apply to last-mile providers of broadband services—services that are not only within our subject matter jurisdiction, but also expressly within the terms of section 706.[725] And, again, each of our rules is designed to remove barriers in order to achieve the express purposes of section 706. We also find that our rules will provide additional benefits by promoting competition in telecommunications markets, for example, by fostering competitive provision of VoIP and video services and informing consumers' choices.

2. Authority for the Open Internet Rules Under Title II with Forbearance

283. In light of our Declaratory Ruling below, the rules we adopt today are also supported by our legal authority under Title II to regulate telecommunications services. For the reasons set forth below, we have found that BIAS is a telecommunications service and, for mobile broadband, commercial mobile services or its functional equivalent. While we forbear from applying many of the Title II regulations to this service,[726] we have applied sections 201, 202, and 208 (along with related enforcement authorities). These provisions provide an alternative source of legal authority for today's rules.

284. Section 201(a) places a duty on common carriers to furnish communications services subject to Title II "upon reasonable request" and "establish physical connections with other carriers" where the Commission finds it to be in the public interest.[727] Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[728] It also gives the Commission the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[729] Section 202(a) makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or

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[722] *Verizon*, 740 F.3d at 640 (citing 47 U.S.C. § 1302(a)).

[723] *Id.* at 643.

[724] *Id.* at 644.

[725] In response to parties expressing concerns that section 706 could be read to impose regulations on edge providers or others in the Internet ecosystem, *see, e.g.*, Disney et al. Reply at 2; ITIF Comments at 9-10, we emphasize that today's rules apply only to last-mile broadband providers. We reject calls from other commenters to exercise our section 706 authority to adopt open Internet regulations for edge providers. *See, e.g.*, ACA Comments at 47-48; Cox Comments at 13 ("[F]rom the Commission's perspective, it should not make any difference whether the entity engaging in blocking or other discrimination is a broadband provider or an edge provider that hosts its content online."). Today's rules are specifically designed to address broadband providers' incentives and ability to erect barriers that harm the virtuous cycle. We see no basis for applying these rules to any other providers. *See supra* Section III.D.

[726] *See infra* Section V.

[727] 47 U.S.C. § 201(a).

[728] 47 U.S.C. § 201(b).

[729] *Id.*

in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[730] As described below, these provisions provide additional independent authority for the rules we adopt today.

3. Title III Provides Additional Authority for Mobile Broadband Services

285. With respect to mobile broadband Internet access services, today's open Internet rules are further supported by our authority under Title III of the Act to protect the public interest through spectrum licensing.[731] While this authority is not unbounded, we exercise it here in reliance upon particular Title III delegations of authority.

286. Section 303(b) directs the Commission, consistent with the public interest, to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class."[732] Today's conduct regulations do precisely this. They lay down rules about "the nature of the service to be rendered" by licensed entities providing mobile broadband Internet access service, making clear that this service may not be offered in ways that harm the virtuous cycle. Today's rules specify the form this service must take for those who seek licenses to offer it. In providing such licensed service, broadband providers must adhere to the rules we adopt today.

287. This authority is bolstered by at least two additional provisions. First, as the D.C. Circuit has explained, section 303(r) supplements the Commission's ability to carry out its mandates via rulemaking.[733] Second, section 316 authorizes the Commission to adopt new conditions on existing licenses if it determines that such action "will promote the public interest, convenience, and necessity."[734] Nor do today's rules work any fundamental change to those licenses.[735] Rather we understand our rules to be largely consistent with the current operation of the Internet and the current practices of mobile broadband service providers.[736]

4. Applying these Legal Authorities to Our Open Internet Rules

288. *Bright line rules.* Applying these statutory sources of authority, we have ample legal bases on which to adopt the three bright-line rules against blocking, throttling, and paid prioritization. To begin, we have found that broadband providers have the incentive and ability to engage in such practices—which disrupt the unity of interests between end users and edge providers and thus threaten the virtuous cycle of broadband deployment. As the D.C. Circuit found with respect to the 2010 conduct

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[730] 47 U.S.C. § 202(a).

[731] *See Cellco*, 700 F.3d at 541-42 (citing *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411, 5440, para. 62 (2011)); 47 U.S.C. §§ 301, 304, 307, 309.

[732] 47 U.S.C. § 303(b).

[733] *Cellco*, 700 F.3d at 543 (citing *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002)).

[734] 47 U.S.C. § 316. The Commission also has ample authority to impose conditions to serve the public interest in awarding licenses in the first instance. *See* 47 U.S.C. §§ 309(a); 307(a). Indeed, the Commission has required 700 MHz C Block spectrum licensees to comply with open Internet conditions to advance the public interest in innovation and consumer choice. *See 700 MHz Second Report and Order*, 22 FCC Rcd at 15363, para. 201.

[735] *See Cellco*, 700 F.3d at 543-44.

[736] *See, e.g.*, Verizon Comments at 3 ("Verizon has been clear with our customers that we will not block their access to any content, applications, services, or devices based on their source."); Charter Comments at 1 ("Like other Internet Service Providers (ISPs), Charter does not block lawful content or engage in pay-for-prioritization."); AT&T Comments at 3 ("AT&T has no intention of creating fast lanes and slow lanes or of using prioritization arrangements for discriminatory or anti-competitive ends, as some net neutrality proponents fear.").

rules, such broadband provider practices fall squarely within our section 706 authority. The court struck down the 2010 conduct rules after finding that the Commission failed to provide a legal justification that would take the rules out of the realm of impermissibly mandating common carriage, but did not find anything impermissible about the need for such rules to protect the virtuous cycle.[737] Given our classification of broadband Internet access service as a telecommunications service, the court's rationale for vacating our 2010 conduct rules no longer applies and, for the reasons discussed above, we have legal justification to support our bright-line rules under section 706.[738]

289. Our bright-line rules are also well grounded in our Title II authority. In Title II contexts, the Commission has made clear that blocking traffic generally is unjust and unreasonable under section 201.[739] The Commission has likewise found it unjust and unreasonable for a carrier to refuse to allow non-harmful devices to attach to the network.[740] And with respect to throttling, Commission precedent has likewise held that "no carriers . . . may block, choke, reduce or restrict traffic in any way."[741] We see no basis for departing from such precedents in the case of broadband Internet access services.[742] As discussed above, the record here demonstrates that blocking and throttling broadband Internet access services harm consumers and edge providers, threaten the virtuous cycle, and deter broadband deployment.[743] Consistent with our prior Title II precedents, we conclude that blocking and throttling of broadband Internet access services is an unjust and unreasonable practice under section 201(b).

290. Some parties have suggested that the Commission cannot adopt a rule banning paid prioritization under Title II.[744] We disagree and conclude that paid prioritization is an unjust and

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[737] *Verizon*, 740 F.3d at 655-58.

[738] The record generally affirms our authority to adopt bright-line rules under Section 706, absent a contrary statutory prohibition. *See, e.g.*, Comcast Dec. 24, 2014 *Ex Parte* Letter at 1-3; Waxman Oct. 3, 2014 *Ex Parte* Letter at 9 ("Once broadband Internet access is reclassified, I believe the FCC can use its authorities under section 706 to adopt three bright-line rules: a 'no blocking' rule, a 'no throttling' rule, and a 'no paid prioritization' rule.").

[739] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17903 ("Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way."); *id.* at 17903, para. 734 (reiterating that call blocking is impermissible in intercarrier compensation disputes); *Developing an Unified Intercarrier Compensation Regime*; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, CC Docket No. 01-92, Declaratory Ruling, 27 FCC Rcd 1351, 1354, para. 9 (Wireline Comp. Bur. 2012) (*2012 Declaratory Ruling*) (discussing call blocking in rural call completion context); *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11629-31, paras. 1, 6 (Wireline Comp. Bur. 2007) (*2007 Declaratory Ruling*) (reiterating that call blocking is impermissible as a self-help measure to address intercarrier compensation dispute); *see also Blocking Interstate Traffic in Iowa*, Memorandum Opinion and Order, 2 FCC Rcd 2692 (1987) (denying application for review of Bureau order, which required petitioners to interconnect their facilities with those of an interexchange carrier in order to permit the completion of interstate calls over certain facilities).

[740] *See Carterfone*, 13 FCC 2d at 424.

[741] *USF/ICC Transformation Order*, 26 FCC Rcd at 17903, para. 734; *2007 Declaratory Ruling*, 22 FCC Rcd at 11631, para 6; *see also Rural Call Completion Order*, 28 FCC Rcd at 16155-56, para. 29.

[742] Commenters agree that the Commission should apply these precedents here. *See, e.g.*, Free Press Comments at 44.; Public Knowledge Nov. 7, 2014 *Ex Parte* Letter at 1; Waxman Oct. 3, 2014 *Ex Parte* Letter at 9-10.

[743] *See supra* Section III.C.1.

[744] *See, e.g.*, TWC Comments at 15 ("Against this backdrop, it is highly unlikely that Title II would support a flat ban on an entire category of potential business arrangements, such as paid prioritization."); NCTA Comments at 28-29 ("Thus, far from supporting an outright ban on an entire class of prioritization arrangements between ISPs and edge providers, Section 202(a) would at most authorize the Commission to undertake a fact-specific, case-by-case analysis of the reasonableness of any particular prioritization arrangement . . ."); Alcatel-Lucent Comments at 10 ("Because Title II has never been interpreted to prohibit all forms of preferential treatment, the Commission could

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unreasonable practice under section 201(b). The unjust and unreasonable standards in sections 201 and 202 afford the Commission significant discretion to distinguish acceptable behavior from behavior that violates the Act. Indeed, the very terms "unjust" and "unreasonable" are broad, inviting the Commission to undertake the kind of line-drawing that is necessary to differentiate just and reasonable behavior on the one hand from unjust and unreasonable behavior on the other.[745]

291. Acting within this discretion, the Commission has exercised its authority, both through adjudication and rulemaking, under section 201(b) to ban unjust and unreasonable carrier practices as unlawful under the Act.[746] Although the particular circumstances have varied, in reviewing these precedents, we find that the Commission generally takes this step where necessary to protect competition and consumers against carrier practices for which there was either no cognizable justification for the action or where the public interest in banning the practice outweighed any countervailing policy concerns.[747] Based on the record here, we find that paid prioritization presents just such a case, threatening harms to consumers, competition, innovation, and deployment that outweigh any possible countervailing justification of public interest benefit.[748] Our interpretation and application of section

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not rely upon its Title II authority to declare all forms of paid prioritization inherently unreasonable."); CenturyLink Comments at 51.

[745] As the D.C. Circuit has stated, for example, "the generality of these terms . . . opens a rather large area for the free play of agency discretion, limited of course by the familiar 'arbitrary' and 'capricious' standard in the Administrative Procedure Act." *Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996). Stated differently, because both sections "set out broad standards of conduct," it is up to the "Commission [to] give[] the standards meaning by defining practices that run afoul of carriers' obligation, either by rulemaking or by case-by-case adjudication." *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance et al.*, WT Docket No. 98-100, GN Docket No. 94-33, MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, para. 15 (1998).

[746] We disagree with TWC's suggestion that applying "Section 201(b) requires a contextual, case-specific analysis." TWC Comments at 16. The Commission need not proceed through adjudication in announcing a broad ban on a particular practice. *See, e.g.*, *Rural Call Completion Order*, 28 FCC Rcd at 16155-56, para. 29; *Truth in Billing Rules*, CC Docket No. 98-17, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (1999) (relying, in part, on section 201(b) in adopting truth-in-billing requirements). Indeed, the text of section 201(b) itself gives the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." 47 U.S.C. 201(b).

[747] *See Long Distance Direct, Inc., Apparent Liability for Forfeiture*, File No. ENF-99-01, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3302, para. 14 (2000) (*LDDI MO&O*) (finding that the company's practice of cramming membership and other unauthorized fees on consumer telephone bills was an unjust and unreasonable practice in connection with communication services); *Central Telecom Long Distance, Inc., Apparent Liability for Forfeiture*, File No. EB-TCD-13-00011651, Notice of Apparent Liability For Forfeiture, 29 FCC Rcd 5517, 5523-27, paras. 14-21 (2014) (*Central NAL*); *U.S. Telecom Long Distance, Inc. Apparent Liability for Forfeiture*, File No. EB-TCD-13-00008959, Notice of Apparent Liability For Forfeiture, 29 FCC Rcd 823, 829-834, paras. 14–20 (2014) (*USTLD NAL*); *Central Telecom Long Distance, Inc., Apparent Liability for Forfeiture*, File No. EB-TCD-13-00006333, Notice of Apparent Liability For Forfeiture, 28 FCC Rcd at 17202-06, paras. 15-22 (2013). *See also NobelTel LLC, Apparent Liability for Forfeiture*, File No. EB-TCD-12-0000412, Notice of Apparent Liability For Forfeiture, 27 FCC Rcd 11760, at 11762-63, para. 6 (2012) (finding that "unfair and deceptive marketing practices by interstate common carriers constitute unjust and unreasonable practices under Section 201(b)").

[748] *See supra* paras. 126-128. NCTA contends that we cannot apply section 201(b) to ban paid prioritization because "no broadband providers have entered into such arrangements or even have plans to do so." NCTA Comments at 29. Our open Internet rules, however, cannot take the *status quo* for granted, particularly where one provider has told the D. C. Circuit that but for our 2010 rules, it would be pursuing such arrangements. *See Verizon* Oral Arg. Tr. at 31 ("I'm authorized to state by my client [Verizon] today that but for these rules we would be exploring those commercial arrangements, but this order prohibits those, and in fact would shrink the types of services that will be available on the Internet."). Rather, we put in place rules that in our judgment will best protect consumers and promote competition into the future. Further, as explained above, if a provider can—in the rare case—demonstrate

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201(b) in this case to ban paid prioritization is further bolstered by the directive in section 706 to take actions that will further broadband deployment.

292. Several commenters argue that we cannot ban paid prioritization under section 202(a), pointing to Commission precedents allowing carriers to engage in discrimination so long as it is reasonable.[749] As discussed above, however, we adopt this rule pursuant to sections 201(b) and 706, not 202(a). And nothing about section 202(a) prevents us from doing so. We recognize that the Commission has historically interpreted section 202(a) to allow carriers to engage in reasonable discrimination, including by charging some customers more for better, faster, or more service.[750] But those precedents stand for the proposition that such discrimination is *permitted*, not that it must be allowed in all cases.[751] None of those cases of discrimination presented the kinds of harms demonstrated in the record here—harms that form the basis of our decision to ban the practice as unjust and unreasonable under section 201(b), not 202(a). Furthermore, none of those precedents involved practices that the Commission has twice found threaten to create barriers to broadband deployment that should be removed under section 706. In light of our discretion in interpreting and applying sections 201 and 202 and insofar as section 706(a) is "a 'fail-safe' that 'ensures' the Commission's ability to promote advanced services,"[752] we decline to interpret section 202(a) as preventing the Commission from exercising its authority under sections 201(b) and 706 to ban paid prioritization practices that harm Internet openness and deployment.[753]

293. With respect to mobile broadband Internet access services, our bright-line rules are also grounded in the Commission's Title III authority to ensure that spectrum licensees are providing service in a manner consistent with the public interest.[754]

294. *No-Unreasonable Interference/Disadvantage Standard*. As with our bright-line rules, the no-unreasonable interference/disadvantage standard we adopt today is supported by our section 706

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that a particular paid prioritization arrangement would have a cognizable public interest benefit and inflict no harm to the open nature of the Internet, it may be eligible for a waiver.

[749] *See, e.g.*, NCTA Comments 27-29; TWC Comments 14-16; Letter from William L. Kovacks, Chamber of Commerce to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, at 3, n.13 (filed July 15, 2014); ITIF Comments at 9.

[750] *See, e.g.*, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, WT Docket No. 96-86, Second Report & Order, 15 FCC Rcd 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, "prima facie lawful" under section 202); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221 (1999) (granting dominant carriers pricing flexibility for special access services, allowing both higher charges for faster connections as well as individualized pricing and customers discounts). *See also Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (upholding carriers' ability to offer differential discounts to retail customers); *Ameritech Operating Cos. Revisions to Tariff FCC No. 2*, Order, DA 94-1121 (Common Carrier Bur. 1994) (upholding reasonableness of rate differentials based on cost considerations).

[751] To be sure, section 202(a) prohibits "unreasonable discrimination" for "like" communications services. But this provision does not, on its face, deprive the Commission of the authority to take actions under other provisions of the Act against discrimination that may not constitute "unreasonable discrimination" under section 202(a).

[752] *Verizon*, 740 F.3d at 639 (quoting *2010 Open Internet Order*, 25 FCC Rcd at 17969, para. 120).

[753] To the extent our prior precedents suggest otherwise, for the reasons discussed in the text, we disavow such an interpretation as applied to the open Internet context.

[754] *See supra* Section III.F.3.

authority. Beyond the practices addressed by our bright-line rules, we recognize that broadband providers may implement unknown practices or engage in new types of practices in the future that could threaten harm by unreasonably interfering with the ability of end users and edge providers to use broadband Internet access services to reach one another. Such unreasonable interference creates a barrier that impedes the virtuous cycle, threatening the open nature of the Internet to the detriment of consumers, competition, and deployment. For conduct outside the three bright-line rules, we adopt the no-unreasonable interference/disadvantage standard to ensure that broadband providers do not engage in practices that threaten the open nature of the Internet in other or novel ways. This standard is tailored to the open Internet harms we wish to prevent, including harms to consumers, competition, innovation, and free expression—all of which could impair the virtuous cycle and thus deter broadband deployment, undermining the goals of section 706.[755]

295. The no-unreasonable interference/disadvantage standard is also supported by section 201 and 202 of the Act, which require broadband providers to engage in practices that are just and reasonable, and not unreasonably discriminatory.[756] The prohibition on no-unreasonable interference/disadvantage represents our interpretation of these 201 and 202 obligations in the open Internet context—an interpretation that is informed by section 706's goals of promoting broadband deployment.[757] In other words, for BIAS, we will evaluate whether a practice is unjust, unreasonable, or unreasonably discriminatory using this no-unreasonable interference/disadvantage standard. We note, however, that this rule—on its own—does not constitute common carriage *per se*.[758] The no-unreasonable interference/disadvantage standard, *standing alone*, contains no obligation to provide broadband service to any consumer or edge provider and would not, in its isolated application, necessarily preclude individualized negotiations so long as they do not otherwise unreasonably interfere with the ability of end users and edge providers to use broadband Internet access services to reach one another.[759] Rather, particular practices or arrangements that are not barred by our rules against blocking, throttling, and paid prioritization will be evaluated based on the facts and circumstances they present using a series of factors specifically designed to protect the virtuous cycle of innovation and deployment.[760] Thus, this is a rule

[755] Such tailoring is critical to preserving the "unique and open character of the Internet." Higher Education and Libraries Comments at 23-24; *see also* CDT Comments at 19; CDT Reply at 3 ("An innovative approach would be to articulate a new standard that is tailored to the particular aims of this proceeding and is based upon the compelling public policy and societal need underpinning an open Internet.").

[756] 47 U.S.C. §§ 201, 202 (2012).

[757] Given the generality of the terms in sections 201 and 202, the Commission has significant discretion when interpreting how those sections apply to the different services subject to Title II. *See Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) ("With respect to the Commission's interpretation of § 202 as applied to CMRS, the 'generality of these terms'—unjust, unreasonable—'opens a rather large area for the free play of agency discretion . . .'") (quoting *Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996)).

[758] Not all requirements which apply to common carriers need impose common carriage *per se*. *See Verizon*, 740 F.3d at 652 (citing *Cellco*, 700 F.3d at 547 ("[C]ommon carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*. It is in this realm—the space between *per se* common carriage and *per se* private carriage—that the Commission's determination that a regulation does or does not confer common carrier status warrants deference.")); *Id.* at 653 (citing *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II*) ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one may be a common carrier with regard to some activities but not others.")).

[759] *See Nat'l Assoc. of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (*NARUC I*), *cert den.* 425 U.S. 992 (1976) ("But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.") (citing *Semon v. Royal Indemnity Co.*, 279 F.2d 737, 739-40 (5th Cir. 1960).

[760] *See supra* paras. 138-145.

tied to particular harms. Broadband providers, having chosen to provide BIAS, may not do so in a way that harms the virtuous cycle.

296. For mobile broadband providers, the no-unreasonable interference/disadvantage standard finds additional support in the Commission's Title III authority as discussed above.[761] The Commission has authority to ensure that broadband providers, having obtained a spectrum license to provide mobile broadband service, must provide that service in a manner consistent with the public interest.[762] This standard provides guidance on how the Commission will evaluate particular broadband practices, not otherwise barred by our bright-line rules, to ensure that they are consistent with the public interest.

297. *Transparency Rule.* The D.C. Circuit severed and upheld the Commission's 2010 transparency rule in *Verizon*. While the majority did not expressly opine on the legal authority for the Commission's prior transparency rule, we feel confident that like the 2010 transparency rule, the enhanced transparency rule we adopt today falls well within multiple, independent sources of the Commission's authority. Beginning with section 706, the transparency rule ensures that consumers have sufficient information to make informed choices thereby facilitating competition in the local telecommunications market (to the extent competitive choices are available).[763] Furthermore, these disclosures remove potential information barriers by ensuring that edge providers have the necessary information to develop innovative products and services that rely on the broadband networks to reach consumers, a crucial arc of the virtuous cycle of broadband deployment. Our transparency rule is also supported by Title II. The Commission has relied on section 201(b) in related billing contexts to ensure that carriers convey accurate and sufficient information about the services they provide to consumers.[764] We do so here as well.[765]

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[761] *See supra* Section III.F.3.

[762] The Commission has broad authority to prescribe the nature of services to be rendered by licensed stations, consistent with the public interest. 47 U.S.C. § 303(b); *Cellco Partnership v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012) ("Although Title III does not 'confer an unlimited power,' the Supreme Court has emphasized that it does endow the Commission with 'expansive powers' and a 'comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.'") (internal citations omitted) (quoting *NBC v. United States*, 319 U.S. 190, 216, 219 (1943)).

[763] To encourage deployment of "advanced telecommunications capability," section 706(a) authorizes the Commission to engage in measures that "promote competition in the local telecommunications market." 47 U.S.C. § 1302(a). And section 706(b) references "promoting competition in the telecommunications market" as among the immediate actions that Commission shall take to accelerate deployment of "advanced telecommunications capability" upon a determination that it is not being reasonably and timely deployed. 47 U.S.C. § 1302(b). We interpret these references to the "telecommunications market" to include the market for "advanced telecommunications capability." In any event, having classified broadband Internet access services as "telecommunications services," the Commission actions to promote competition among broadband Internet access services clearly promote competition in the "telecommunications market."

[764] *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7503-04, para. 21 (1999); *see generally Truth-in Billing and Billing Format*, CC Docket No. 98-170, CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448 (2005); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), Consumer Information and Disclosure, Truth-in-Billing and Billing and Billing Format*, CG Docket Nos. 11-116, 09-158, CC Docket No. 98-170, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4476-4479, paras. 114-122 (2011); *NobelTel LLC*, 27 FCC Rcd at 11762-63, para. 6 (finding that "unfair and deceptive marketing practices by interstate common carriers constitute unjust and unreasonable practices under Section 201(b).").

[765] For the reasons discussed above, we likewise rely on Title III to ensure that spectrum licensees provide mobile broadband Internet access service consistent with the public interest.

298. *Enforcement.* We also make clear that we have ample authority to enforce the rules we adopt today. Our rules today carry out the provisions of the Communications Act[766] and are thus are covered by our Title IV and V authorities to investigate and enforce violations of these rules.[767] With specific respect to section 706, as noted above, in *Verizon*, the D.C. Circuit suggested that section 706 was part of the Communications Act of 1934.[768] Under such a reading, rules adopted pursuant to section 706 fall within our Title IV and V authorities. But even if this were not the case, we believe it reasonable to interpret section 706 itself as a grant of authority to investigate and enforce our rules.[769] Our enforcement authority was not explicitly discussed in either the *2010 Open Internet Order* or the *Verizon* case. As noted above, the court did cite as reasonable, however, the Commission's view that Congress, in placing upon the Commission the obligation to carry out the purposes of section 706, "necessarily invested the Commission with the statutory authority to carry out those acts."[770] We believe it likewise reasonable to conclude that, having provided the Commission with affirmative legal authority to take regulatory measures to further section 706's goals, Congress invested the Commission with the authority to enforce those measures as needed to ensure those goals are achieved. Indeed, some have suggested that the Commission could take enforcement action pursuant to section 706 itself, without adopting rules.[771]

G. Other Laws and Considerations

299. In the *2014 Open Internet NPRM*, the Commission tentatively concluded that it should retain provisions which make clear that the open Internet rules do not alter broadband providers' rights or obligations with respect to other laws, safety and security considerations, or the ability of broadband providers to make reasonable efforts to address transfers of unlawful content and unlawful transfers of content.[772] We affirm this tentative conclusion and reiterate today that our rules are not intended to expand or contract broadband providers' rights or obligations with respect to other laws or safety and security considerations—including the needs of emergency communications and law enforcement, public safety, and national security authorities. Similarly, open Internet rules protect only *lawful* content, and are not intended to inhibit efforts by broadband providers to address unlawful transfers of content or transfers of unlawful content.

1. Emergency Communications and Safety and Security Authorities

300. In the *2010 Open Internet Order* we adopted a rule that acknowledges the ability of broadband providers to serve the needs of law enforcement and the needs of emergency communications and public safety, national, and homeland security authorities.[773] This rule remains in effect today.[774] To

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[766] *See, e.g.*, 47 U.S.C. §§ 201, 202, 303, 316. We discuss section 706 more specifically below.

[767] 47 U.S.C. §§ 403, 501, 503.

[768] *See Verizon*, 740 F.3d at 650 (stating that "Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act of 1934") (citation omitted).

[769] Moreover, as discussed above, to the extent that section 706 was not viewed as part of the Communications Act, we have authority under section 4(i) of the Communications Act to adopt rules implementing section 706. *See supra* Section III.F.1. Thus, even then the Commission's rules, insofar as they are based on our substantive jurisdiction under section 706, nonetheless would be issued under the Communications Act.

[770] *Verizon*, 740 F.3d at 638 (quoting *2010 Open Internet Order*, 25 FCC Rcd at 17969, para. 120).

[771] *See* Hurwitz Comments at 12 (arguing that the best path forward would be to adopt general policy guidelines that would be directly enforceable under the terms of section 706 through case-by-case adjudication). Thus, for all the reasons described above, we reject claims that we lack authority to enforce rules implementing section 706. *See, e.g.*, Earl Comstock Reply at 18-33 (arguing that section 706 contained no affirmative authority for enforcement).

[772] *2014 Open Internet NPRM*, 29 FCC Rcd at 5578, para. 160.

[773] *2010 Open Internet Order*, 25 FCC Rcd at 17963, para. 107.

make clear that open Internet protections coexist with other legal frameworks governing the needs of safety and security authorities, we retain this rule, which reads as follows:

> *Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.*

301. In retaining this rule, we reiterate that the purpose of the safety and security provision is first to ensure that open Internet rules do not restrict broadband providers in addressing the needs of law enforcement authorities, and second to ensure that broadband providers do not use the safety and security provision without the imprimatur of a law enforcement authority, as a loophole to the rules.[775] Application of the safety and security rule should be tied to invocation by relevant authorities rather than to a broadband provider's independent notion of the needs of law enforcement.

302. The record is generally supportive of our proposal to reiterate that open Internet rules do not supersede any obligation a broadband provider may have—or limit its ability—to address the needs of emergency communications or law enforcement, public safety, or homeland or national security authorities (together, "safety and security authorities").[776] Broadband providers have obligations under statutes such as the Communications Assistance for Law Enforcement Act,[777] the Foreign Intelligence Surveillance Act,[778] and the Electronic Communications Privacy Act[779] that could in some circumstances intersect with open Internet protections. Likewise, in connection with an emergency, there may be federal, state, tribal, and local public safety entities, homeland security personnel, and other authorities that need guaranteed or prioritized access to the Internet in order to coordinate disaster relief and other emergency response efforts, or for other emergency communications. Most commenters recognize the benefits of clarifying that these obligations are not inconsistent with open Internet rules.

303. Some commenters have proposed revisions to the existing rule which would expand its application to public utilities and other critical infrastructure operators.[780] Because we make sufficient accommodation for these concerns elsewhere, we choose not to modify this provision to include critical infrastructure.[781]

2. Transfers of Unlawful Content and Unlawful Transfers of Content

304. In the *NPRM*, we tentatively concluded that we should retain the definition of reasonable network management we previously adopted, which does not include preventing transfer of unlawful content or the unlawful transfer of content as a reasonable practice.[782] We affirm this tentative conclusion and re-state that open Internet rules do not prohibit broadband providers from making reasonable efforts to address the transfer of unlawful content or unlawful transfers of content to ensure that open Internet rules are not used as a shield to enable unlawful activity or to deter prompt action against such activity.

(Continued from previous page)

[774] 47 C.F.R. § 8.9. *See Verizon*, 740 F.3d at 659 (vacating only the "anti-discrimination and anti-blocking rules"). Today, we recodify this rule as 47 C.F.R. § 8.19. *See infra* Appx. A

[775] *See 2010 Open Internet Order*, 25 FCC Rcd at 17964, paras. 108–110.

[776] *See, e.g.*, Higher Education and Libraries Comments at 33.

[777] *See* 47 U.S.C. § 1002(a).

[778] *See* 50 U.S.C. §§ 1802(a)(4), 1804, 1805(c)(2).

[779] *See* 18 U.S.C. §§ 2518, 2705.

[780] Southern Company Services Comments at 5; Utilities Telecom Council Reply at 3–7.

[781] *See supra* Section III.C.2.

[782] *2014 Open Internet NPRM*, 29 FCC Rcd at 5578, para. 61.

For example, the no-blocking rule should not be invoked to protect copyright infringement, which has adverse consequences for the economy, nor should it protect child pornography. We reiterate that our rules do not alter the copyright laws and are not intended to prohibit or discourage voluntary practices undertaken to address or mitigate the occurrence of copyright infringement.[783] After consideration of the record, we retain this rule, which is applicable to both fixed and mobile broadband providers engaged in broadband Internet access service and reads as follows:

> *Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.*

305. Some commenters contend that this rule promotes the widespread use of intrusive packet inspection technologies by broadband providers to filter objectionable content and that such monitoring poses a threat to customers' privacy rights.[784] Certainly, many broadband providers have the technical tools to conduct deep packet inspection of unencrypted traffic on their networks,[785] and consumer privacy is a paramount concern in the Internet age. Nevertheless, we believe that broadband monitoring concerns are adequately addressed by the rules we adopt today, so we decline to alter this provision. This rule is limited to protecting "*reasonable* efforts . . . to address copyright infringement or other unlawful activity."[786] We retain the discretion to evaluate the reasonableness of broadband providers' practices under this rule on a case-by-case basis. Consumers also have many tools at their disposal to protect their privacy against deep packet inspection—including SSL encryption, virtual private networks, and routing methods like TOR.[787] Further, the complaint processes we adopt today add to these technical methods and advance consumer interests in this area.[788]

IV. DECLARATORY RULING: CLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICES

306. The *Verizon* court upheld the Commission's use of section 706 as a substantive source of legal authority to adopt open Internet protections. But it held that, "[g]iven the Commission's still-binding decision to classify broadband providers . . . as providers of 'information services,'" open Internet protections that regulated broadband providers as common carriers would violate the Act.[789] Rejecting the Commission's argument that broadband providers only served retail consumers, the *Verizon* court went on to explain that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers,'" and held that the 2010 no-blocking and no-unreasonable discrimination rules impermissibly "obligated [broadband providers] to act as common carriers."[790]

307. The *Verizon* decision thus made clear that section 706 affords the Commission with substantive authority and that open Internet protections are within the scope of that authority. And this Order relies on section 706 for the open Internet rules. But, in light of *Verizon*, absent a classification of broadband providers as providing a "telecommunications service," the Commission may only rely on

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[783] *2010 Open Internet Order*, 25 FCC Rcd at 17964-65, para. 111.

[784] i2Coalition Comments at 38; Access Comments at 7.

[785] *See* Internet Association Comments at 14; Tumblr Reply at 6-7; *Verizon*, 740 F.3d at 646 ("[B]roadband providers have the technological ability to distinguish and discriminate against certain types of traffic."); *but see* NCTA Comments at 15; ADTRAN Reply at 14.

[786] *See supra* para. 304 (emphasis added).

[787] i2Coalition Comments at 38.

[788] *See supra* Section III.E.3.

[789] *Verizon*, 740 F.3d at 650.

[790] *Id.* at 653.

section 706 to put in place open Internet protections that steer clear of what the court described as common carriage *per se* regulation.

308. Taking the *Verizon* decision's implicit invitation, we revisit the Commission's classification of the retail broadband Internet access service as an information service[791] and clarify that this service encompasses the so-called "edge service." Based on the updated record, we conclude that retail broadband Internet access service is best understood today as an offering of a "telecommunications service."[792]

309. Below we discuss the history of the classification of broadband Internet access service, describe our rationale for revisiting that classification, and provide a detailed explanation of our reclassification of broadband Internet access service.

A. History of Broadband Internet Classification

310. Congress created the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication."[793] Section 2 of the Communications Act grants the Commission jurisdiction over "all interstate and foreign communication by wire or radio."[794] As the Supreme Court explained in the radio context, Congress charged the Commission with "regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding" and therefore intended to give the Commission sufficiently "broad" authority to address new issues that arise with respect to "fluid and dynamic" communications

[791] The Commission has previously classified cable modem Internet access service, wireline broadband Internet access service, and Broadband over Power Line (BPL)-enabled Internet access service as information services. The Commission has referred to these services as "wired" broadband Internet access services. *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13281-82, paras. 1-2 (2006) (*BPL-Enabled Broadband Order*); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14863-65, 14909-12 paras. 14-17, 103-06 (2005) (*Wireline Broadband Classification Order* and *Broadband Consumer Protection Notice*), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007) (*Time Warner*); *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4819-39, paras. 33-69 (2002) (*Cable Modem Declaratory Ruling*), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 978 (2005). The Commission has also previously classified "wireless" broadband Internet access, which it defined as a service that "uses spectrum, wireless facilities and wireless technologies to provide subscribers with high-speed (broadband) Internet access capabilities, . . . whether offered using mobile, portable, or fixed technologies," as information services. *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5909-10, para. 22 (2007) (*Wireless Broadband Classification Order*).

[792] As discussed in greater detail below, our classification decision arises from our reconsideration of past interpretations and applications of the Act. We thus conclude that the classification decisions in this Order appropriately apply only on a prospective basis. *See, e.g.*, *Verizon v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001) ("In a case in which there is a substitution of new law for old law that was reasonably clear, a decision to deny retroactive effect is uncontroversial.") (internal quotations omitted).

[793] 47 U.S.C. § 151.

[794] *Id.* § 152(a).

technologies.[795] No one disputes that Internet access services are within the Commission's subject-matter jurisdiction and historically have been supervised by the Commission.[796]

311. *The Computer Inquiries.* In 1966, the Commission initiated its *Computer Inquiries* "to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated communications requirements of computer users."[797] In the decision known as *Computer I*, the Commission required "maximum separation" between large carriers that offered data transmission services subject to common carrier requirements and their affiliates that sold data processing services.[798] Refining this approach, in *Computer II* and *Computer III* the Commission required telephone companies that provided "enhanced services" over their own transmission facilities to separate out and offer on a common carrier basis the transmission component underlying their enhanced services.[799]

312. Commenters disagree about the significance of the *Computer Inquiries*.[800] We believe the *Computer Inquiries* are relevant in at least two important respects. First, in *Computer II* the Commission distinguished "basic" from "enhanced" services, a distinction that Congress embraced when it adopted the Telecommunications Act of 1996. Basic services offered on a common carrier basis were subject to Title II; enhanced services were not.[801] When Congress enacted the definitions of

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[795] *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 219-20 (1943). The Court added that "[i]n the context of the developing problems to which it was directed, the Act gave the Commission . . . expansive powers . . . [and] a comprehensive mandate." *Id*.

[796] *See Comcast*, 600 F.3d at 646-47.

[797] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11, 11-12, para. 2 (1966) (*Computer I Notice of Inquiry*) (subsequent history omitted).

[798] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267, 270, 275, paras. 12, 24 (1971) (*Computer I Final Decision*), *aff'd sub nom. GTE Servs. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1972).

[799] *Amendment of Section 64.702 of the Comm'n's Rules & Regs, Second Computer Inquiry*, Final Decision, 77 FCC 2d 384, 417-35, 461-75, paras. 86-132, 201-31 (1980) (*Computer II Final Decision*), *aff'd sub nom. Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm'n's Rules & Regs.* (*Third Computer Inquiry*), CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958, para. 4 (1986) (*Computer III Phase I Order*), *recon*., 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon*., 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated*, *California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon*., 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*).

[800] *Compare* AT&T Comments at 46-47 *with* i2coalition Comments at 17-18; Public Knowledge Comments at 77.

[801] *Computer II Final Decision*, 77 FCC 2d at 428-32, paras. 115-23.

"telecommunications service" and "information service" in the Telecommunications Act of 1996,[802] it substantially incorporated the "basic" and "enhanced" service classifications.[803] Because the statutory definitions substantially incorporated the Commission's terminology under the *Computer Inquiries*, Commission decisions regarding the distinction between basic and enhanced services—in particular, decisions regarding features that are "adjunct to basic" services—are relevant in this proceeding.[804]

313. Second, the *Computer Inquiries* disprove the claim that the Commission has never before mandatorily applied Title II to the transmission component of Internet access service.[805] From 1980 to 2005, facilities-based telephone companies were obligated to offer the transmission component of their enhanced service offerings—including broadband Internet access service offered via digital subscriber line (DSL)—to unaffiliated enhanced service providers on nondiscriminatory terms and conditions pursuant to tariffs or contracts governed by Title II.[806] There is no disputing that until 2005, Title II applied to the transmission component of DSL service.[807]

314. *Prior Classification Decisions*. Several commenters, as well as the dissenting statements, claim that an unbroken line of Commission and court precedent, dating back to the *Stevens Report* in 1998, [808] supports the classification of Internet access service as an information service, and that this classification is effectively etched in stone.[809] These commenters ignore not only the Supreme Court but our precedent demonstrating that the relevant statutory definitions are ambiguous, and that classifying broadband Internet access service as a telecommunications service is a permissible interpretation of the Act. Indeed, several of the most vocal opponents of reclassification previously argued that the Commission not only may, but should, classify the transmission component of broadband Internet access service as a telecommunications service.[810]

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[802] Telecommunications Act of 1996, Pub. L. No. 104-104, § 3(a)(2), 110 Stat. 56, 58-60 (1996), *codified at* 47 U.S.C. §§ 153(24), 153(50), 153(53).

[803] *Brand X*, 545 U.S. at 977; *Wireline Broadband Classification Order*, 20 FCC Rcd at 14871, para. 29.

[804] The Commission's definition of "adjunct to basic" services has been instrumental in determining which functions fall within the "telecommunications systems management" exception to the "information service" definition. *See infra* paras. 366-367.

[805] As discussed below, a large number of rural local exchange carriers (LECs) have also chosen to offer broadband transmission service as a telecommunications service subject to the provisions of Title II. *See infra* para. 425.

[806] *See Computer II Final Decision*, 77 FCC 2d at 475, para. 231; *see also Wireline Broadband Classification Order*, 20 FCC Rcd at 14866-68, para. 24.

[807] *See, e.g.*, *Wireline Broadband Classification Order*, 20 FCC Rcd at 14858, para. 5 ("Facilities-based wireline broadband Internet access service providers are no longer required to separate out and offer the wireline broadband transmission component . . . of wireline broadband Internet access services as a stand-alone telecommunications service under Title II. . . .").

[808] *Federal-State Joint Board on Universal Servic*e, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*).

[809] *See, e.g.*, ACA Comments at 55-56 (citing the *Stevens Report*); AT&T Comments at 41-44.

[810] *See, e.g.*, Verizon Comments, GN Docket No. 00-185 at 2 (Dec. 1, 2000) ("The Act defines residential broadband access—whether provided by a local telephone company or a cable operator—as a telecommunications service subject to 'common carrier' regulation."); Verizon Reply, GN Docket No. 00-185 at 18 (Jan. 10, 2001) (explaining that cable operators are "providing a telecommunications service by making available to the public a transparent, unenhanced transmission path that customers can use to reach any Internet service provider or destination on the Internet from their homes"); Qwest Comments, GN Docket No. 00-185 at 2-3 (Dec. 1, 2000) ("[T]he transport portion of cable modem service is a telecommunications service under the 1996 Act."). Contemporaneously, Verizon and the United States Telecom Association argued in the *Gulf Power* litigation before the Supreme Court that cable modem service includes a telecommunications service. *See* Amicus Brief of United States Telecom Ass'n and Verizon in *National Cable Television Ass'n v. Gulf Power Co.*, Nos. 00-832, 00-833, 2001 WL 345191, *22

(continued….)

315. To begin with, these commenters misconstrue the scope of the *Stevens Report*, which was a report to Congress concerning the implementation of universal service mandates, and not a binding Commission Order classifying Internet access services. Moreover, when the Commission issued that report, in 1998, broadband Internet access service was at "an early stage of deployment to residential customers" and constituted a tiny fraction of all Internet connections.[811] Virtually all households with Internet connections used traditional telephone service to dial-up their Internet Service Provider (ISP), which was typically a separate entity from their telephone company.[812] In the *Stevens Report*, the Commission stated that Internet access service as it was then typically being provided was an "information service."[813] The *Stevens Report* reserved judgment on whether entities that provided Internet access over their own network facilities were offering a separate telecommunications service.[814] The Commission further noted that "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service."[815] A few months after sending the *Stevens Report* to Congress, the Commission concluded that "[a]n end-user may utilize a telecommunications service together with an information service, as in the case of Internet access."[816] In a follow-up order, the Commission affirmed its conclusion that "xDSL-based advanced services constitute telecommunications services as defined by section 3(46) of the Act."[817]

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(2001) ("[C]able-delivered high-speed Internet access does not fall within the Communications Act's definition of an 'information service' . . . . Cable operators, of course, like DSL-providing telephone companies, may offer customers an ISP service, which is an 'information service.' . . . But they provide that service *along with* their telecommunications service, and, as the Commission's orders establish, the two services are statutorily distinct and cannot be conflated.") (emphasis in original) (citations omitted).

[811] *See Inquiry Concerning the Deployment of Advanced Telecommunications Services 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*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2446, para. 91 (1999); Ind. Anal. & Tech. Div., Wireline Comp. Bur., *Trends in Telephone Service*, 2-12, chart 2.10, 16-3, Tbl. 16.1 (Aug. 2008).

[812] *See Stevens Report*, 13 FCC Rcd at 11540, para. 81 ("Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers.").

[813] *See id.* at 11536, para. 73; *see also Brand X*, 545 U.S. at 978 ("The [*Stevens*] *Report* classified 'non-facilities-based' ISPs—those that do not own the transmission facilities they use to connect the end user to the Internet—solely as information service providers."); *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287, 19297 para. 23 & n.45 (2000) (*Cable Modem Notice of Inquiry*) ("We note that the Commission has classified the end user services commonly provided by dial-up ISPs as information services.") (citing the *Stevens Report*).

[814] *Stevens Report*, 13 FCC Rcd at 11530, para. 60 ("[T]he matter is more complicated when it comes to offerings by facilities-based providers."), 11535 n.140 ("We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service."); *see also Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4824, para. 41 ("The [*Stevens Report*] did not decide the statutory classification issue in those cases where an ISP provides an information service over its own transmission facilities."); *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3027-28, para. 14 (2002) (*Wireline Broadband NPRM*) (explaining that the *Stevens Report* recognized "that its analysis focused on ISPs as entities procuring inputs from telecommunications service providers").

[815] *Stevens Report*, 13 FCC Rcd at 11530, para. 60.

[816] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24030, para. 36 (1998)
(continued….)

316. The courts addressed the statutory classification of broadband Internet access service in June 2000, when the United States Court of Appeals for the Ninth Circuit held in *AT&T Corp. v. City of Portland* that cable modem service is a telecommunications service to the extent that the cable operator "provides its subscribers Internet transmission over its cable broadband facility," and an information service to the extent the operator acts as a "conventional" ISP.[818] The Ninth Circuit's decision thus put cable companies' broadband transmission service on a regulatory par with DSL transmission service.[819]

317. Three months later, the Commission issued the *Cable Modem Notice of Inquiry*, which sought comment on whether cable modem service should be treated as a telecommunications service under Title II or an information service subject to Title I.[820] In response, the Bell Operating Companies (BOCs) unanimously argued that the Commission lawfully could determine that cable modem service includes a telecommunications service. Verizon and Qwest argued that the transmission component of cable modem service is a telecommunications service.[821] SBC Communications and BellSouth (both now part of AT&T) argued that the Commission should classify cable modem service as an integrated information service subject to Title I, but acknowledged that the Commission could lawfully find that cable modem service includes both a telecommunications service and an information service.[822] Verizon,

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(*Advanced Services Order*). The *Advanced Services Order* was subject to a voluntary remand requested by the Commission.

[817] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385, 388 para. 9 (1999) (*Advanced Services Remand Order*). The definition of telecommunications service is now in section 3(53) of the Act, 47 U.S.C. § 153(53). The *Advanced Services Remand Order* was vacated in part by the D.C. Circuit in *WorldCom v. FCC*, 246 F.3d 690 (D.C. Cir. 2001). Specifically, the D.C. Circuit vacated the remand of the Commission's classification of DSL-based advanced services as "telephone exchange service" or "exchange access." "Telephone exchange service" and "exchange access" are relevant in determining whether a provider is a "local exchange carrier." *See* 47 U.S.C. §§ 153(32) (defining "local exchange carrier"), (20) (defining "exchange access"), (54) (defining "telephone exchange service"). It has no bearing on the classification of a particular service offering as a telecommunications or information service under the Act. As such, the further history of the *Advanced Services Remand Order* is inapposite to the Commission's discussion of telecommunications and information services in that Order.

[818] *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-79 (9th Cir. 2000) (*City of Portland*). *But see Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000) (holding that Internet access service is neither a cable service nor a telecommunications service), *rev'd on other grounds sub nom. Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002); *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000) (concluding that cable modem service is a cable service), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

[819] In 2001, SBC Communications and BellSouth acknowledged the significance of the *Computer Inquiries*, the *Advanced Services Order*, and the Ninth Circuit's decision in *City of Portland*: "The Commission currently views the DSL-enabled transmission path underlying incumbent LEC broadband Internet services as a 'telecommunications service' under the Act. As the Ninth Circuit recognized, the exact same logic applies to cable broadband: 'to the extent that [a cable ISP] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.'" SBC and BellSouth Reply, GN Docket No. 00-185, at 19 (filed Jan. 10, 2001) (quoting *City of Portland*, 216 F.3d at 878) (footnote omitted); *see also id.* at 19-20 & n.68 (arguing that "cable broadband (like DSL)" is "one type of telecommunications service") (citing the *Advanced Services Order*). SBC subsequently acquired AT&T and BellSouth to form what is now AT&T.

[820] 15 FCC Rcd at 19293, para. 15.

[821] *See supra* note 810.

[822] *See* SBC and BellSouth Comments, GN Docket No. 00-185, at 12 (filed Dec. 1, 2000) (arguing that classifying "the underlying broadband data transmission" as a Title II service "will survive review in courts"); *id.*at 26 ("The Commission has statutory authority to impose Title II regulations on cable modem providers."); SBC and BellSouth Reply, GN Docket No. 00-185, at 13 (filed Jan. 10, 2001) ("[T]he Commission *may* resolve this question by concluding that cable Internet service providers do in fact offer both an 'information service' subject to Title I and a
(continued….)

SBC, and BellSouth also agreed that the Commission could adopt a "middle ground" legal framework by finding that cable modem service is, in part, a telecommunications service, but grant relief from pricing and tariffing obligations by either declaring all providers of broadband Internet access service to be nondominant or by forbearing from enforcing those obligations.[823]

318. In March 2002, the Commission exercised its authority to interpret ambiguous language in the Act and addressed the classification of cable modem service in the *Cable Modem Declaratory Ruling*. The Commission stated that "[t]he Communications Act does not clearly indicate how cable modem service should be classified or regulated."[824] Based on a factual record that had been compiled at that time, the Commission described cable modem service as "typically includ[ing] many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet."[825] The Commission noted that cable modem providers often consolidated these functions "so that subscribers usually do not need to contract separately with another Internet access provider to obtain discrete services or applications."[826]

319. The Commission identified a portion of cable modem service as "Internet connectivity," which it described as establishing a physical connection to the Internet and operating or interconnecting with the Internet backbone, and sometimes including protocol conversion, Internet Protocol (IP) address number assignment, DNS, network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting.[827] The *Ruling* also noted that "[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that . . . serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet."[828] The Commission distinguished these functions from "Internet applications provided through cable modem services," including "e-mail, access to online newsgroups, and creating or obtaining and aggregating content," "home pages," and "the ability to create a personal web page."[829]

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'telecommunications service' subject to Title II.") (emphasis in original); *id.* at 20 ("[T]he plain fact is that cable broadband service can be—and often is—used as a pure transport service, whatever other incidents may be bundled with it. A cable-modem subscriber is free to use the connection for nothing but noncable e-mail, for example, or for downloading content from non-cable (e.g., Disney or MSN) sites.").

[823] *See* Verizon Comments, GN Docket No. 00-185, at 26 (filed Dec. 1, 2000) ("[T]he Commission could maintain a nondiscrimination obligation on *both* cable operators and ILECs but eliminate pricing and tariffing regulation for broadband access services.") (emphasis in original); SBC and BellSouth Comments, GN Docket No. 00-185, at 38-42 (arguing that the Commission "can opt for a middle-ground of less burdensome regulation under Title II" by declaring "all broadband Internet providers to be nondominant carriers, subject to minimal tariff and notice requirements" and by granting forbearance). Cable operators generally argued that the Commission should classify cable modem service as either a cable service or an information service, but not as a telecommunications service. *See, e.g.*, Comcast Comments, GN Docket No. 00-185, at 11-18 (filed Dec. 1, 2000); AT&T Comments, GN Docket No. 00-185, at 6-20 (filed Dec. 1, 2000); Cox Comments, GN Docket No. 00-185, at 26-40 (filed Dec. 1, 2000).

[824] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4819, para. 32.

[825] *Id.* at 4804, para. 10 (footnotes omitted).

[826] *Id.* at 4806, para. 11 (footnotes omitted). The Commission defined cable modem service as "a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access." *Id.* at 4818-19, para. 31.

[827] *Id.* at 4809-11, paras. 16-17 (citations omitted).

[828] *Id.* at 4810-11, para. 17 (citations omitted).

[829] *Id.* at 4811, para. 18 (citation omitted).

320. The Commission found that cable modem service was "an offering . . . which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications."[830] The Commission further concluded that, "as it [was] currently offered,"[831] cable modem service as a whole met the statutory definition of "information service" because its components were best viewed as a "single, integrated service that enables the subscriber to utilize Internet access service," with a telecommunications component that was "not . . . separable from the data processing capabilities of the service."[832] Significantly, the Commission did not address whether DNS or any other features of cable modem service fell within the telecommunications systems management exception to the definition of "information service"[833] as there was no reason to do so. The *Cable Modem Declaratory Ruling* also included a notice of proposed rulemaking seeking comment on, among other things, whether the Commission should require cable operators to give unaffiliated broadband Internet access service providers access to cable broadband networks.[834]

321. In October 2003, the United States Court of Appeals for the Ninth Circuit vacated the Commission's finding that cable modem service is an integrated information service.[835] The court concluded that it was bound by the prior decision in *City of Portland* that "the transmission element of cable broadband service constitutes telecommunications service under the terms of the Communications Act."[836]

322. In 2005, the Supreme Court reversed the Ninth Circuit's decision and upheld the *Cable Modem Declaratory Ruling* in *Brand X*.[837] The Court held that the word "offering" in the Communications Act's definitions of "telecommunications service" and "information service" is ambiguous, and that the Commission's finding that cable modem service is a functionally integrated information service was a permissible, though perhaps not the best, interpretation of the Act.[838]

323. Following *Brand X*, the Commission issued the *Wireline Broadband Classification Order*, which applied the "information services" classification at issue in the *Cable Modem Declaratory Ruling* to facilities-based wireline broadband Internet access services as well and eliminated the resulting regulatory asymmetry between cable companies and telephone companies offering wired Internet access service via DSL and other facilities.[839] The *Wireline Broadband Classification Order* based this decision on a finding that "providers of wireline broadband Internet access service offer subscribers the ability to run a variety of applications" that fit the definition of information services, including those that enable access to email and the ability to establish home pages.[840] The Commission therefore concluded that "[w]ireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."[841] The Commission also eliminated the

[830] *Id.* at 4822, para. 38.

[831] *Id.* at 4802, para. 7.

[832] *Id.* at 4823, paras. 38-39.

[833] *See* 47 U.S.C. § 153(24).

[834] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4839-41, paras. 72-74.

[835] *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003).

[836] *Brand X*, 545 U.S. at 1129.

[837] *See Brand X*, 545 U.S. 967.

[838] *Id*. at 986-1000.

[839] *See Wireline Broadband Classification Order*, 20 FCC Rcd at 14863-65, paras. 14-17, 14909-12, paras. 103-06.

[840] *Id.* at 14860, para. 9.

[841] *Id.*

Computer Inquiry requirements for wireline Internet access service.[842] In 2006, the Commission issued the *BPL-Enabled Broadband Order*, which extended the information service classification to Internet access service provided over power lines.[843]

324. Subsequently, in 2007 the Commission released the *Wireless Broadband Classification Order*, which determined that wireless broadband Internet access service was likewise an information service under the Communications Act.[844] The *Wireless Broadband Classification Order* also found that although "the transmission component of wireless broadband Internet access service is 'telecommunications' . . . the offering of the telecommunications transmission component as part of a functionally integrated Internet access service offering is not 'telecommunications service' under section 3 of the [Communications] Act."[845]

325. The *Wireless Broadband Classification Order* also considered the application of section 332 of Title III to wireless broadband Internet access service and concluded that "mobile wireless broadband Internet access service does not meet the definition of 'commercial mobile service' within the meaning of section 332 of the Act as implemented by the Commission's CMRS rules because such broadband service is not an 'interconnected service,' as defined in the Act and the Commission's rules."[846]

326. In 2010, the D.C. Circuit rejected the Commission's attempt to enforce open Internet principles based on the Commission's Title I ancillary authority in *Comcast v. FCC*.[847] Following *Comcast*, the Commission issued a Notice of Inquiry (*Broadband Classification NOI*) that sought comment on the appropriate approach to broadband policy in light of the D.C. Circuit's decision.[848] Shortly thereafter, the Commission released the *2010 Open Internet Order*. The 2010 *Order* was based in part on a revised understanding of the Commission's Title I authority—as well as a variety of other statutory provisions including section 706—and was again challenged before the D.C. Circuit in *Verizon v. FCC*.[849] Although the *Verizon* court accepted the Commission's reinterpretation of section 706 as an independent grant of legislative authority over broadband services, the court nonetheless vacated the no-blocking and antidiscrimination provisions of the *Order* as imposing *de facto* common carrier status on providers of broadband Internet access service in violation of the Commission's classification of those services as information services.[850]

327. In response to the *Verizon* decision, the Commission released a *Notice of Proposed Rulemaking* (*NPRM*) seeking public input on the "best approach to protecting and promoting Internet openness."[851] Among other things, the *2014 Open Internet NPRM* asked for discussion of the proper legal

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[842] *Id.* at 14875-98, paras. 41-85.

[843] *See BPL-Enabled Broadband Order*, 21 FCC Rcd at 13281-82, paras. 1-2.

[844] *Wireless Broadband Classification Order*, 22 FCC Rcd at 5901-02, para. 1.

[845] *Id*.

[846] *Id*. at 5916, para. 42.

[847] *Comcast*, 600 F.3d at 661.

[848] *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866 (2010) (*Broadband Classification NOI*).

[849] *Verizon*, 740 F.3d at 635-42.

[850] *Id.* at 635-42, 656-59. The Court also found that that authority did not allow the Commission to subject information services or providers of private mobile services to treatment as common carriers. *Id.* at 650 (citing 47 U.S.C. § 153(51) and 47 U.S.C. § 332(c)(2)).

[851] *2014 Open Internet NPRM*, 29 FCC Rcd at 5563, para. 4.

authority on which to base open Internet rules.[852] The Commission proposed to rely on section 706 of the Telecommunications Act of 1996, but at the same time stated that it would "seriously consider the use of Title II of the Communications Act as the basis for legal authority."[853] The *NPRM* sought comment on the benefits of both section 706 and Title II, and emphasized its recognition that "both section 706 and Title II are viable solutions."[854]

B. Rationale for Revisiting the Commission's Classification of Broadband Internet Access Services

328. We now find it appropriate to revisit the classification of broadband Internet access service as an information service. The Commission has steadily and consistently worked to protect the open Internet for the last decade, starting with the adoption of the *Internet Policy Statement* up through its recent *2014 Open Internet NPRM* following the D.C. Circuit's *Verizon* decision.[855] Although the *Verizon* court accepted the Commission's interpretation of section 706 as an independent grant of authority over broadband services, it nonetheless vacated the no-blocking and antidiscrimination provisions of the *Open Internet Order*.[856] As the *Verizon* decision explained, to the extent that conduct-based rules remove broadband service providers' ability to enter into individualized negotiations with edge providers, they impose *per se* common carrier status on broadband Internet access service providers, and therefore conflict with the Commission's prior designation of broadband Internet access services as information services.[857] Thus, absent a finding that broadband providers were providing a "telecommunications service," the D.C. Circuit's *Verizon* decision defined the bounds of the Commission's authority to adopt open Internet protections to those that do not amount to common carriage.

329. The *Brand X* Court emphasized that the Commission has an obligation to consider the wisdom of its classification decision on a continuing basis.[858] An agency's evaluation of its prior determinations naturally includes consideration of the law affecting its ability to carry out statutory policy objectives.[859] As discussed above, the record in the *Open Internet* proceeding demonstrates that broadband providers continue to have the incentives and ability to engage in practices that pose a threat to Internet openness, and as such, rules to protect the open nature of the Internet remain necessary.[860] To protect the open Internet, and to end legal uncertainty, we must use multiple sources of legal authority to protect and promote Internet openness, to ensure that the Internet continues to grow as a platform for competition, free expression, and innovation; a driver of economic growth; and an engine of the virtuous cycle of broadband deployment, innovation, and consumer demand. Thus, we now find it appropriate to examine how broadband Internet access services are provided today.

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[852] *Id*.

[853] *Id.*

[854] *Id.*

[855] *See Internet Policy Statement*, 20 FCC Rcd 14986; *2014 Open Internet NPRM*, 29 FCC Rcd 5561; *Verizon*, 740 F.3d 623.

[856] *Verizon*, 740 F.3d at 635-42, 655-59.

[857] *Id.* at 650-59.

[858] *Brand X*, 545 U.S. at 981-82.

[859] *See Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 741 (1996) (rejecting argument that deference should be withheld because regulation was prompted by litigation); *Mayo Foundation for Medical Educ. and Research v. U.S.*, 562 U.S. 44, 131 S. Ct 704, 712-13 (2011) (explaining that in *United Dominion Industries, Inc. v. U.S.*, 532 U.S. 822, 838 (2001), the Supreme Court "expressly invited the Treasury Department to 'amend its regulations' if troubled by the consequences of our resolution of the case").

[860] *See supra* Section III.B.

330. Changed factual circumstances cause us to revise our earlier classification of broadband Internet access service based on the voluminous record developed in response to the *2014 Open Internet NPRM*. In the 2002 *Cable Modem Declaratory Ruling*, the Commission observed that "the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear. Business relationships among cable operators and their service offerings are evolving."[861] However, despite the rapidly changing market for broadband Internet access services, the Commission's decisions classifying broadband Internet access service are based largely on a factual record compiled over a decade ago, during this early evolutionary period.[862] The premises underlying that decision have changed. As the record demonstrates and we discuss in more detail below, we are unable to maintain our prior finding that broadband providers are offering a service in which transmission capabilities are "inextricably intertwined" with various proprietary applications and services. Rather, it is more reasonable to assert that the "indispensable function" of broadband Internet access service is "the connection link that in turn enables access to the essentially unlimited range of Internet-based services."[863] This is evident, as discussed below, from: (1) consumer conduct, which shows that subscribers today rely heavily on third-party services, such as email and social networking sites, even when such services are included as add-ons in the broadband Internet access provider's service; (2) broadband providers' marketing and pricing strategies, which emphasize speed and reliability of transmission separately from and over the extra features of the service packages they offer; and (3) the technical characteristics of broadband Internet access service. We also note that the predictive judgments on which the Commission relied in the *Cable Modem Declaratory Ruling* anticipating vibrant intermodal competition for fixed broadband cannot be reconciled with current marketplace realities.[864]

C. Classification of Broadband Internet Access Service

331. In this section, we reconsider the Commission's prior decisions that classified wired and wireless broadband Internet access service as information services,[865] and conclude that broadband Internet access service is a telecommunications service subject to our regulatory authority under Title II

[861] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4843-44, para. 83.

[862] *See Wireline Broadband Classification Order*, 20 FCC Rcd at 14863, para. 14 ("[L]ike cable modem service . . . wireline broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (e.g., e-mail, web pages, and newsgroups).") (citing the *Cable Modem Declaratory Ruling* and the *Stevens Report*); *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13286, para. 9 (referencing prior classification of cable modem service and wireline broadband Internet access service); *Wireless Broadband Classification Order*, 22 FCC Rcd at 5911, para. 26 (stating that applications run by wireless broadband Internet access users are "identical to those provided by cable modem service, wireline broadband Internet access, or BPL-enabled Internet access" and therefore finding that wireless broadband Internet access service meets the definition of an information service).

[863] CDT Comments at 11; *see also* Vonage Comments at 39 ("The pipe is the essential broadband experience and speed and capacity drive buying decisions."); AARP Comments at v ("When a broadband subscriber uploads video to YouTube, updates their Facebook page, posts on their blog, or shares files, all that is needed from the broadband provider is pure transmission."); Free Press Comments at 68 ("A broadband access provider performs one main function: transmitting Internet Protocol (IP) packets between the addresses of the user's choosing.").

[864] *See, e.g.*, *Wireline Broadband Classification Order*, 20 FCC Rcd at 14880-81, para. 50 (finding that "a wide variety of competitive and potentially competitive providers and offerings are emerging" in the broadband Internet access services market, and that "an emerging market, like the one for broadband Internet access, is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve").

[865] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, para. 7; *Wireline Broadband Classification Order*, 20 FCC Rcd at 14862-65, 14909-12, paras. 12-17, 102-06; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13281-82, paras. 1-2; *Wireless Broadband Classification Order*, 22 FCC Rcd at 5909-10, para. 22.

of the Communications Act regardless of the technological platform over which the service is offered.[866] We both revise our prior classifications of wired broadband Internet access service and wireless broadband Internet access service, and classify broadband Internet access service provided over other technology platforms. In doing so, we exercise the well-established power of federal agencies to interpret ambiguous provisions in the statutes they administer. The Supreme Court summed up this principle in *Brand X*:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. If a statute is ambiguous, and the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.[867]

332. The Court's application of this *Chevron* test in *Brand X* makes clear our delegated authority to revisit our prior interpretation of ambiguous statutory terms and reclassify broadband Internet access service as a telecommunications service. The Court upheld the Commission's prior information services classification because "the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission . . . ."[868] Where a term in the Act "admit[s] of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference."[869] The Court concluded, given the "technical, complex, and dynamic" questions that the Commission resolved in the *Cable Modem Declaratory Ruling*, "[t]he Commission is in a far better position to address these questions than we are."[870]

333. Furthermore, reading the *Brand X* majority, concurring, and dissenting opinions together, it is apparent that most, and perhaps all, of the nine Justices believed that it would have been at least permissible under the Act to have classified the transmission service included with wired Internet access service as a telecommunications service. Justice Thomas, writing for the majority, noted that "our conclusion that it is *reasonable* to read the Communications Act to classify cable modem service solely as an 'information service' leaves untouched *Portland's* holding that the Commission's interpretation is not the *best* reading of the statute."[871] Justice Breyer concurred with Justice Thomas, stating that he "believe[d] that the Federal Communications Commission's decision f[e]ll[] within the scope of its statutorily delegated authority," although "perhaps just barely."[872] And in dissent, Justice Scalia, joined

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[866] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50).

[867] *Brand X*, 545 U.S. at 980 (citations omitted); *see also id.* at 989 ("[W]here a statute's plain terms admit of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference.").

[868] *Id.* at 992; *see also id.* at 991 ("[T]he term 'offer' can sometimes refer to a single, finished product and sometimes to the 'individual components in a package being offered' . . . ."); *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002) ("telecommunications carrier" is an ambiguous statutory term); *Virgin Islands Tel. Comp. v. FCC*, 198 F.3d 921, 925-26 (D.C. Cir. 1999) ("telecommunications service" is an ambiguous term).

[869] *Id.* at 989.

[870] *Id.* at 1002-03 (internal citation and quotation marks omitted).

[871] *Id.* at 985-86.

[872] *Id.* at 1003 (Breyer, J., concurring).

by Justices Souter and Ginsburg, found that the Commission had adopted "an implausible reading of the statute"[873] and that "the telecommunications component of cable-modem service retains such ample independent identity" that it could only reasonably be classified as a separate telecommunications service.[874]

334. It is also well settled that we may reconsider, on reasonable grounds, the Commission's earlier application of the ambiguous statutory definitions of "telecommunications service" and "information service."[875] Indeed, in *Brand X*, the Supreme Court, in the specific context of classifying cable modem service, instructed the Commission to reexamine its application of the Communications Act to this service "on a continuing basis":

> [I]f the agency adequately explains the reasons for a reversal of policy, "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis," for example, in response to changed factual circumstances, or a change in administrations . . . .[876]

335. More recently, in *FCC v. Fox Television Stations, Inc.,* the Supreme Court emphasized that, although an agency must acknowledge that it is changing course when it adopts a new construction of an ambiguous statutory provision, "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one . . . ."[877] Rather, it is sufficient 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."[878] We discuss in detail below why our conclusion that broadband Internet access service is a telecommunications service is well within our authority. Having determined that Congress gave the Commission authority to determine the appropriate classification of broadband Internet access service—and having provided sufficient justification of changed factual circumstances to warrant a reexamination of the Commission's prior classification—we find, upon interpreting the relevant statutory terms, that broadband Internet access service, as offered today, includes "telecommunications," and falls within the definition of a "telecommunications service."

1. Scope

336. As discussed below, we conclude that broadband Internet access service is a telecommunications service. We define "broadband Internet access service" as a mass-market[879] retail

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[873] *Id*. at 1005 (Scalia, J., dissenting).

[874] *Id.* at 1008 (Scalia, J., dissenting).

[875] *Id.* at 981; *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone."). *Accord Mary V. Harris Foundation v. FCC*, 776 F.3d 21, 24 (D.C. Cir. 2015) ("What the Commission did in the past is of no moment, however, if its current approach reflects a permissible interpretation of the statute.").

[876] *Brand X*, 545 U.S. at 981 (citations omitted).

[877] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (interpreting statutory ban on indecent broadcasts).

[878] *Id.*; *see also Verizon*, 740 F.3d at 636-37 ("In the *Open Internet Order*, however, the Commission has offered a reasoned explanation for its changed understanding of section 706(a). . . . In these circumstances . . . we have no basis for saying that the Commission 'casually ignored prior policies and interpretations or otherwise failed to provide a reasoned explanation' for its changed interpretation.").

[879] By mass market, we mean services marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries. "Schools" would include institutions of higher education to the extent that they purchase these standardized retail services. *See* Higher Education and Libraries Comments at 11 (noting that institutions of higher education are not "residential customers" or "small

(continued….)

service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.[880] This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence.[881]

337. The term "broadband Internet access service" includes services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite.[882] For purposes of our discussion, we divide the various forms of broadband Internet access service into the two categories of "fixed" and "mobile," rather than between "wired" and "wireless" service. With these two categories of services—fixed and mobile—we intend to cover the entire universe of Internet access services at issue in the Commission's prior broadband classification decisions[883] as well as all other broadband Internet access

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businesses" and uncertainty about whether institutions of higher education (and their libraries) are included in the term "schools" because the term is sometimes interpreted as applying only to K-12 schools). For purposes of this definition, "mass market" also includes broadband Internet access service purchased with the support of the E-rate, and Rural Healthcare programs, as well as any broadband Internet access service offered using networks supported by the Connect America Fund (CAF), but does not include enterprise service offerings or special access services, which are typically offered to larger organizations through customized or individually negotiated arrangements. *See Open Internet Order*, 25 FCC Rcd at 17932, para. 45; *supra* para. 189 & n.464.

[880] As explained above, *see supra* note 27 , our use of the term "broadband" in this Order includes but is not limited to services meeting the threshold for "advanced telecommunications capability."

[881] 47 C.F.R. § 8.11(a); *Open Internet Order*, 25 FCC Rcd at 17932, para. 44; *id.* at 17935, para. 51 (finding that the market and regulatory landscape for dial-up Internet access service differed from broadband Internet access service); *2014 Open Internet NPRM*, 29 FCC Rcd at 5581, para. 54. The *Verizon* decision upheld the Commission's regulation of broadband Internet access service pursuant to section 706 and the definition of "broadband Internet access service" has remained part of the Commission's regulations since adopted in 2010. Certain parties have raised issues in the record regarding the regulatory status of mobile messaging services, e.g., SMS/MMS. *See, e.g.*, Twilio Comments at 7-8. We note that the rules we adopt today prohibit broadband providers from, for example, blocking messaging services that are delivered over a broadband Internet access service. We decline to further address here arguments regarding the status of messaging within our regulatory framework, but instead plan to address these issues in the context of the pending proceeding considering a petition to clarify the regulatory status of text messaging services. *See Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messaging and Short Codes are Title II Services or Title I Service Subject to Section 202 Non-Discrimination Rule*, WT Docket No. 08-7, Public Notice, 23 FCC Rcd 262 (WTB 2008).

[882] In classifying wireless broadband Internet access as an information service, the Commission excluded broadband provided via satellite from classification. *See Wireless Broadband Classification Order*, 22 FCC Rcd at 5901, n.1. Thus, our action here expressly classifies the service for the first time. We observe that while our classification includes broadband Internet access services provided using capacity over fixed or mobile satellite or submarine cable landing facilities, our classification of these services as telecommunications services or CMRS does not require changes to the authorizations for satellite earth stations, satellite space stations, or submarine cable landing facilities.

[883] *See Wireless Broadband Classification Order*, 22 FCC Rcd at 5909-10, paras. 19, 22 (defining wireless broadband Internet access service as "a service that uses spectrum, wireless facilities and wireless technologies to provide subscribers with high-speed (broadband) Internet access capabilities" and classifying such service—"whether offered using mobile, portable, or fixed technologies"—as an information service); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4818-19, para. 31 (stating that cable modem service is a "service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access"); *Wireline Broadband Classification Order*, 20 FCC Rcd at 14860, para. 9 (defining wireline broadband Internet access service as "a service that uses existing or future wireline facilities of the telephone network to provide subscribers with [broadband] Internet access capabilities"); *BPL-Enabled Broadband Order*, 21 FCC Rcd 13281.

services offered over other technology platforms that were not addressed by prior classification orders. We also make clear that our classification finding applies to all providers of broadband Internet access service, as we delineate them here, regardless of whether they lease or own the facilities used to provide the service.[884] "Fixed" broadband Internet access service refers to a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network.[885] The term encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband services (e.g., cable, DSL, fiber), fixed wireless broadband services (including fixed services using unlicensed spectrum), and fixed satellite broadband services. "Mobile" broadband Internet access service refers to a broadband Internet access service that serves end users primarily using mobile stations.[886] Mobile broadband Internet access includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet.[887] The term also encompasses mobile satellite broadband services.

338. In the *Verizon* opinion, the D.C. Circuit concluded that, in addition to the retail service provided to consumers, "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers 'carriers.'"[888] It was because the court concluded that the Commission had treated this distinct service as common carriage, that it "remand[ed] the case to the Commission for further proceedings consistent with this opinion." [889] We conclude now that the failure of the Commission's analysis was a failure to explain that the "service to edge providers" is subsumed within the promise made to the retail customer of the BIAS service. For the reasons we review herein, the reclassification of BIAS necessarily resolves the edge-provider question as well. In other words, the Commission agrees that a two-sided market exists and that the beneficiaries of the non-consumer side either are or potentially could be all edge providers.[890] Because our reclassification decision treats BIAS

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[884] The Commission has consistently determined that resellers of telecommunications services are telecommunications carriers, even if they do not own any facilities. *See, e.g.*, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7293-94, 7312, paras. 10, 65 (2006), *vacated in part on other grounds sub nom. Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007); *NOS Communications, Inc., Affinity Network Inc. and NOSVA Limited Partnership*, EB Docket No. 03-96, Order to Show Cause and Notice of Opportunity for Hearing, 18 FCC Rcd 6952, 6953-54, para. 3 (2003); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 265 para. 8 (1976) ("[A]n entity engaged in the resale of communications service is a common carrier, and is fully subject to the provisions of Title II of the Communications Act."), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978). Further, as the Supreme Court observed in *Brand X*, "the relevant definitions do not distinguish facilities-based and non-facilities-based carriers." *Brand X*, 545 U.S. at 997.

[885] *2010 Open Internet Order*, 25 FCC Rcd at 17934, para. 49.

[886] *See* 47 U.S.C. § 153(34) ("The term 'mobile station' means a radio-communication station capable of being moved and which ordinarily does move."); *2010 Open Internet Order*, 25 FCC Rcd at 17934, para. 49.

[887] We note that section 337(f)(1) of the Act excludes public safety services from the definition of mobile broadband Internet access service. 47 U.S.C.§ 337(f)(1).

[888] *Verizon*, 740 F.3d at 653.

[889] *Id.* at 659.

[890] *Verizon*, 740 F.3d at 653; Technology Policy Institute Comments at 11 (recognizing a two-sided market); CenturyLink Comments at 6 ("A two-sided market approach ensures that the costs of content and applications causing greater bandwidth consumption are ultimately passed on to the subscribers who use those services, ensures that adequate pricing signals are communicated to edge providers and, overall, produces the optimal economic outcome."); *id*. at 5-7; Hance Haney Comments at 9 (recognizing a two-sided broadband market); Cox Comments at 5 (discussing emerging two-sided market arrangements); ACLU Comments at 7 (acknowledging the broadband market as a two-sided market); Bright House Comments at 27-28 (explaining that two-sided markets have long existed under Title II in the provision of long-distance service).

as a Title II service, Title II applies, as well, to the second side of the market, which is always a part of, and subsidiary to, the BIAS service. The *Verizon* court implicitly followed that analysis when it treated the classification of the retail end user service as controlling with respect to its analysis of the edge service; its conclusion that an edge service could be not be treated as common carriage turned entirely on its understanding that the provision of retail broadband Internet access services had been classified as "information services."[891] The reclassification of BIAS as a Title II service thus addresses the court's conclusion that "the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[892]

339. Many commenters, while holding vastly different views on our reclassification of BIAS, are united in the view we need not reach the regulatory classification of the service that the *Verizon* court identified as being furnished to the edge.[893] We agree. Our reclassification of the broadband Internet access service means that we can regulate, consistent with the Communications Act, broadband providers to the extent they are "engaged" in providing the broadband Internet access service.[894] As discussed above, a broadband Internet access service provider's representation to its end-user customer that it will transport and deliver traffic to and from all or substantially all Internet endpoints necessarily includes the promise to transmit traffic to and from those Internet end points back to the user.[895] Thus, the so-called "edge service" is secondary, and in support of, the promise made to the end user, and broadband provider practices with respect to edge providers—including terms and conditions for the transfer and delivery of traffic to (and from) the BIAS subscriber—impact the broadband provider's provision of the Title II broadband Internet access service.[896] For example, where an edge provider attempts to purchase favorable treatment for its traffic (such as through zero rating), that treatment would be experienced by the BIAS

[891] *Verizon*, 740 F.3d at 650.

[892] *Id*.

[893] *See, e.g.*, Letter from Matthew Wood, Policy Director, Free Press to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 3 (filed Feb. 20, 2015) ("Recognition of [an] edge-facing service as a telecom service is decidedly not commanded by the D.C. Circuit's decision in the *Verizon* case."); Letter from Sarah Morris, Open Technology Institute, New America Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 2 (filed Feb. 20, 2015); Letter from Austin C. Schlick, Director, Communications Law, Google, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 1 (filed Feb. 20, 2015); Letter from Henry G. Hultquist, Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 7-9 (filed Feb. 18, 2015); Letter from William H. Johnson, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 2-3 (filed Oct. 17, 2014) (stating that "the fact that payment for [broadband] service may be split in some fashion between the edge provider and end user does not magically convert the service into two separate offerings"). We thus decline to adopt proposals identifying and classifying a separate service provided to edge providers that were presented in the record, and on which we sought comment, including those by Mozilla, the Center for Democracy and Technology, and Professors Wu and Narechania. *See, e.g.*, *Mozilla's Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services Under Title II of the Communications Act*, WC Docket No. 14-28, at 12 (filed May 5, 2014); Tejas Narechania and Tim Wu, *Sender Side Transmission Rules for the Internet*, Fed. Comm. L.J. (forthcoming 2014); Narechania/Wu Apr. 14, 2014 *Ex Parte* Letter. We believe that our actions here adequately address the concerns raised by these proposals, consistent with both law and fact.

[894] 47 U.S.C. § 153(51) (defining "telecommunications carrier").

[895] *See supra* para. 204.

[896] This is not a novel arrangement. Under traditional contract principles, Party A (a broadband provider) can contract with Party B (a consumer) to provide services to Party C (an edge provider). That the service is being provided to Party C does not, in any way, conflict with the legal conclusion that the terms and conditions under which that service is being provided are governed by the agreement—and here the regulatory framework— between Parties A and B. Most content that flows across the broadband provider's "last-mile" network to the retail consumer does not involve a direct agreement between Parties B and C but, as the *Verizon* court observed, an edge provider, like Amazon, could enter into an agreement with a broadband provider, like Comcast. *See Verizon*, 740 F.3d at 653.

subscriber (such as through an exemption of the edge-provider's data from a usage limit) and the impact on the BIAS subscriber, if any, would be assessed under Title II. That is, the legal question before the Commission turns on whether the provision of that service to the edge provider would be inconsistent with the provision of the retail service under Title II. That is because the same data is flowing between end user and edge consumer.[897] In other words, to the extent that it is necessary to examine a separate edge service, that service is simply derivative of BIAS, constitutes the same traffic, and, in any event, fits comfortably within the command that practices provided "in connection with" a Title II service that must themselves be just and reasonable.[898]

340. Broadband Internet access service does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services.[899] The Commission has historically distinguished these services from "mass market" services and, as explained in the *2014 Open Internet NPRM*, they "do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints."[900] We do not disturb that finding here. Finally, we observe that to the extent that coffee shops, bookstores, airlines, private end-user networks such as libraries and universities, and other businesses acquire broadband Internet access service from a broadband provider to enable patrons to access the Internet from their respective establishments, provision of such service by the premise operator would not itself be considered a broadband Internet access service unless it was offered to patrons as a retail mass market service, as we define it here.[901] Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, he or she is not offering a broadband Internet access service, under our definition, because the user is not marketing and selling such service to residential customers, small business, and other end-user customers such as schools and libraries.

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[897] This conclusion does not contradict the economic view that a broadband provider is operating in a two-sided market. *See, e.g.*, *supra* note 893. A newspaper looks the same whether viewed by an advertiser or a subscriber, even though their economic relationship with the newspaper publisher is different. Here the operation of the broadband Internet access service is so intertwined with the edge service so as to compel the conclusion that the BIAS reclassification controls any service that is being provided to an edge provider.

[898] *See* 47 U.S.C. 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable"); *see also Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7503-06, para. 21-24 (1999) (finding that a carrier's provision of misleading or deceptive billing information "in connection with" a telecommunications service is unjust and unreasonable in violation of section 201(b)); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing and Billing Format*, CG Docket Nos. 11-116, 09-158, CC Docket No. 98-170, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4476-4479, paras. 114-122 (2011) (finding that the placement of third-party charges on bills for their own telecommunications services such that they are "often described to look like they are associated with a telecommunications service provided by the carrier" are subject to section 201(b)); *NobelTel LLC, Apparent Liability for Forfeiture*, File No. EB-TCD-12-0000412, Notice of Apparent Liability For Forfeiture, 27 FCC Rcd 11760, 11762-63, para. 6 (2012) (finding that "unfair and deceptive marketing practices by interstate common carriers constitute unjust and unreasonable practices under Section 201(b)").

[899] *2010 Open Internet Order*, 25 FCC Rcd at 17933, para. 47; *2014 Open Internet NPRM*, 29 FCC Rcd at 5581, para. 58; *see also, e.g.*, Cox Comments at 8, 13-14; Nokia Comments at 11; Verizon Comments at 77-78.

[900] *2014 Open Internet NPRM*, 29 FCC Rcd at 5581-82, para. 58. In classifying broadband Internet access service as a telecommunications service today, the Commission does not, and need not, reach the question of whether and how these services are classified under the Communications Act.

[901] *See 2010 Open Internet Order*, 25 FCC Rcd at 17935, para. 52.

2. The Market Today: Current Offerings of Broadband Internet Access Service

341. We begin our analysis by examining how broadband Internet access service was and currently is offered. In the 2002 *Cable Modem Declaratory Ruling*, the Commission observed that "the cable modem service business is still nascent, and the shape of broadband deployment is not yet clear. Business relationships among cable operators and their service offerings are evolving."[902] Despite the rapidly changing market for broadband Internet access services, the Commission's decisions classifying broadband Internet access service are based largely on a factual record compiled over a decade ago, during this early evolutionary period. The record in this proceeding leads us to the conclusion that providers today market and offer consumers separate services that are best characterized as (1) a broadband Internet access service that is a telecommunications service; and (2) "add-on" applications, content, and services that are generally information services.

342. In the past, the Commission has identified a number of ways to determine what broadband providers "offer" consumers. In the *Cable Modem Declaratory Ruling*, for example, the Commission concluded that "the classification of cable modem service turns on the *nature of the functions* that the end user is offered."[903] In the *Wireline Broadband Classification Order*, the Commission noted that "whether a telecommunications service is being provided turns on *what* the entity is 'offering . . . to the public,' and *customers' understanding* of that service."[904] In the *Wireless Broadband Classification Order*, the Commission stated that "[a]s with both cable and wireline Internet access, [the] definition appropriately focuses on the end user's experience, factoring in both the functional characteristics and speed of transmission associated with the service."[905] Similarly, in *Brand X*, both the majority and dissenting opinions examined how consumers perceive and use cable modem service,[906] technical characteristics of the services and how it is provided,[907] and analogies to other services.[908]

a. Broadband Internet Access Services at Time of Classification

343. *"Wired" Broadband Services.* The Commission's *Cable Modem Declaratory Ruling* described cable modem service as "typically includ[ing] many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web."[909] The Commission also identified functions provided with cable modem service that it called "Internet connectivity functions."[910] These included establishing a

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[902] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4843-44, para. 83.

[903] *Id.* at 4822, para. 38 (emphasis added).

[904] *Wireline Broadband Classification Order*, 20 FCC Rcd at 14910, para. 104 (quoting 47 U.S.C. § 153(46)) (citing *Brand X*, 545 U.S. at 989-90) (emphasis added).

[905] *Wireless Broadband Classification Order*, 22 FCC Rcd at 5909, para. 21.

[906] *Brand X*, 545 U.S. at 989-990, 993; *see also id*. at 1005, 1008 (Scalia, J., dissenting).

[907] *Id.* at 990 ("We think that [the transmission component of cable modem service and the finished service] are sufficiently integrated, because '[a] consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access.'"), 991 ("[The entire] question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance."), 991-92, 998-99; *see also id*. at 1006-07, 1010 (Scalia, J., dissenting).

[908] *Id.* at 990-91; *see also id.* at 1008 (Scalia, J., dissenting).

[909] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4804, para. 10 (footnotes omitted).

[910] *Id.* at 4809-11, para. 17. Earlier, in its 2001 AOL/Time Warner merger order describing the emerging high speed Internet access services offered through cable modems, the Commission found that "Internet access services consist principally of connectivity to the Internet provided to end users." *Applications for Consent to the Transfer of*

(continued….)

physical connection to the Internet and interconnecting with the Internet backbone, protocol conversion, Internet Protocol address number assignment, domain name resolution through DNS, network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting.[911] In addition, the Commission noted that "[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that . . . serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet."[912] The *Ruling* noted that "[c]omplementing the Internet access functions are *Internet applications* provided *through* cable modem service. These applications include traditional ISP services such as e-mail, access to online newsgroups, and creating or obtaining and aggregating content. The cable modem service provider will also typically offer subscribers a 'first screen' or 'home page' and the ability to create a personal web page."[913] The Commission explained that "[e]-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and DNS are *applications* that are commonly associated with Internet access service," and that "[t]aken together, they constitute an information service."[914] In the *Wireline Broadband Classification Order*, the Commission found that end users subscribing to wireline broadband Internet access service "*expect to receive* (and pay for) a finished, functionally integrated service that provides access to the Internet."[915]

344. The Commission's subsequent wired broadband classification decisions did not describe wired broadband Internet access services with any greater detail.[916]

345. *Wireless Broadband Services.* In 2007, the Commission described wireless broadband Internet access service as a service "that uses spectrum, wireless facilities and wireless technologies to provide subscribers with high-speed (broadband) Internet access capabilities."[917] The Commission noted that "many of the mobile telephone carriers that provide mobile wireless broadband service for mobile handsets offer a range of IP-based multimedia content and services—including ring tones, music, games, video clips and video streaming—that are specially designed to work with the small screens and limited keypads of mobile handsets. This content is typically sold through a carrier-branded, carrier-controlled portal."[918]

b. The Growth of Consumer Demand and Market Supply

346. The record in this proceeding reveals that, since we collected information to address the classification of cable modem service over a decade ago, the market for both fixed and mobile broadband

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Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6572-73, paras. 62, 64 (2001) (describing contracts by cable operators with Road Runner, Excite@Home, and High-Speed Access Corp. to provide such connectivity).

[911] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4809-11, paras. 16-17.

[912] *Id.* at 4810-11, para. 17 (citations omitted).

[913] *Id.* at 4811, para. 18 (emphasis added) (citations omitted).

[914] *Id.* at 4822, para. 38 (emphasis added).

[915] *Wireline Broadband Classification Order*, 20 FCC Rcd at 14910, para. 104.

[916] *See Wireline Broadband Classification Order*, 20 FCC Rcd at 14860, para. 9 (discussing e-mail, websites, newsgroups, ability to create home pages, and "the ability to run a variety of applications"); *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13286, para. 9 ("[The] characteristics of BPL-enabled Internet access service are similar to the characteristics that the Commission relied upon in classifying cable modem service and wireline broadband Internet access service as 'information services.'").

[917] *Wireless Broadband Classification Order*, 22 FCC Rcd at 5909, para. 21.

[918] *Id*. at 5908, para. 16 (footnotes omitted).

Internet access service has changed dramatically. Between December 2000 and December 2013, the number of residential Internet connections with speeds over 200 kbps in at least one direction increased from 5.2 million to 87.6 million.[919] In 2000, only 5 percent of American households had a fixed Internet access connection with speeds of over 200 kbps in at least one direction,[920] as compared to approximately 72 percent of American households with this same connection today.[921] Indeed, as of December 2013, 60 percent of households have a fixed Internet connection with minimum speeds of at least 3 Mbps/768 kbps.[922] Moreover, between December 2009 and December 2013, the number of mobile handsets with a residential data plan with a speed of at least 200 kbps in one direction increased from 43.7 million to 159.2 million, a 265 percent increase.[923] By November 2014, 73.6 percent of the entire U.S. age 13+ population was communicating with smart phones, a figure which has continued to rise rapidly over the past several years.[924] Cisco forecasts that by 2019, North America will have nearly 90 percent of its installed base converted to smart devices and connections, and smart traffic will grow to 97 percent of the total global mobile traffic.[925] In 2013, the United States and Canada were home to almost 260 million mobile subscriptions for smartphones, mobile PCs, tablets, and mobile routers. In 2014, that number was expected to increase by 20 percent, to 300 million subscriptions; by 2020, to 450 million, or a population penetration rate of almost 124 percent.[926] In addition, the explosion in the deployment of Wi-Fi technology in the past few years has resulted in consumers increasingly using that technology to access third party content, applications, and services on the Internet, in connection with either a fixed broadband service or a mobile broadband service.

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[919] Industry Analysis Division, Common Carrier Bureau, *High Speed Services for Internet Access: Subscribership as of December 31, 2000* (Aug. 2001) at 6, Tbl. 3; Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2013* at 17, Tbl. 3 (Oct. 2014) (noting that the estimate for 2000 overstates residential connections because the residential data include small business connections before 2005); *see also* John B. Horrigan & Lee Rainie, The Broadband Difference: How Online Behavior Changes with High-Speed Internet Connections at Home, Pew Internet & American Life Project, 8 (2002) ("When the Pew Internet and American Life Project in June 2000 first asked Internet users about the type of home connection they had, 6% of Internet users had a high-speed connection at home.") (*The Broadband Difference*).

[920] Industry Analysis Division, Common Carrier Bureau, *High-Speed Services for Internet Access: Subscribership as of December 31, 2000* at 6, Tbl. 3 (Aug. 2001); U.S. Department of Commerce, *Census Brief, Households and Families: 2000* at 1 (Sept. 2001) (reporting 105.5 million households; 5.2 million subscribers/105.5 households equals approximately 5 percent).

[921] Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2013* at 35, Tbl. 14 (Oct. 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1016/DOC-329973A1.pdf.

[922] *See id*. at 34, Tbl. 13.

[923] *See id.* at 17, Tbl. 3; *see also* Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2011* at 82 (June 2012) (explaining the change in mobile reporting and thus our estimates are not directly comparable to estimates reported in earlier reporting periods). In addition, the mobile residential figures may overstate residential handsets because mobile filers report the number of "consumer" handsets that are not billed to a corporate, non-corporate business, government, or institutional customer account, and thus could include handsets for which the subscriber is reimbursed by their employee. *See* FCC Form 477 Filing Instructions at 26, http://transition.fcc.gov/form477/477inst.pdf.

[924] *See* comScore, *comScore Reports November 2014 U.S. Smartphone Subscriber Market Share* (Jan. 8, 2015), http://www.comscore.com/Insights/Market-Rankings/comScore-Reports-November-2014-US-Smartphone-Subscriber-Market-Share.

[925] Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update 2014-2019* at 9-10 (Feb. 3, 2015), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.pdf.

[926] *See* Ericsson, *Ericsson Mobility Report Appendix: North America*, 4 (Nov. 2014), http://www.ericsson.com/res/docs/2014/emr-november2014-regional-appendices-rnam.pdf.

347. This widespread penetration of broadband Internet access service has led to the development of third-party services and devices and has increased the modular way consumers have come to use them. As more American households have gained access to broadband Internet access service, the market for Internet-based services provided by parties other than broadband Internet access providers has flourished. Consumers' appetite for third-party services has also received a boost from the shift from dial-up to broadband, as a high-speed connection makes the Internet much more useful to consumers.[927] The impact of broadband on consumers' demand for third-party services is evident in the explosive growth of online content and application providers. In early 2003, a year after the *Cable Modem Declaratory Ruling*, there were approximately 36 million websites.[928] Today there are an estimated 900 million.[929] When the Commission assessed the cable modem service market in the *Cable Modem Declaratory Ruling*, the service at issue was offered with various online applications, including e-mail, newsgroups, and the ability to create a web page.[930] The Commission observed that subscribers to cable modem services "usually d[id] not need to contract separately" for "discrete services or applications" such as e-mail.[931] Today, broadband service providers still provide various Internet applications, including e-mail, online storage, and customized homepages, in addition to newer services such as music streaming and instant messaging.[932] But consumers are very likely to use their high-speed Internet connections to take advantage of competing services offered by third parties.

348. For example, companies such as Google and Yahoo! offer popular alternatives to the email services provided to subscribers as part of broadband Internet access service packages.[933] According to Experian, Gmail and Yahoo! Mail were among the ten Internet sites most frequently visited during the week of January 17, 2015, with approximately 400 million and 350 million visits respectively.[934] Some parties even advise consumers specifically *not* to use a broadband provider-based email address; because a consumer cannot take that email address with them if he or she switches providers, some assert that using a broadband provider-provided email address results in a disincentive to

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[927] For example, early studies showed that broadband users are far more likely than dial-up users to go online to seek out news, look for travel information, share computer files with others, create content, and download games and videos. *The Broadband Difference* at 2, 12.

[928] Netcraft, *February 2003 Web Server Survey*, http://news.netcraft.com/archives/2003/02/25/february_2003_web_server_survey.html; *see also* Netcraft, *How many active sites are there?*, http://news.netcraft.com/active-sites (last visited Jan. 5, 2015).

[929] Netcraft, *January 2015 Web Server Survey*, http://news.netcraft.com/archives/category/web-server-survey/ (last visited Jan. 22, 2014).

[930] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4811, para. 18.

[931] *Id.* at 4806, para. 11.

[932] *See, e.g.*, Comcast Comments at 57-58; AT&T Comments at 49.

[933] *See* Google, *Gmail*, https://mail.google.com (last visited Feb. 15, 2015); Yahoo!, *Yahoo! Mail*, https://mail.yahoo.com (last visited Feb. 15, 2015); *see also* MailChimp, *What Does Your ISP Say About You?* (Nov. 26, 2013), http://blog.mailchimp.com/what-does-your-isp-say-about-you/ (showing that in 2013, the top domains for email addresses were Gmail, Hotmail, Yahoo, and AOL, and that the only broadband provider-based email service to be in the top five was Comcast, whose usage is not in proportion to its market share).

[934] *See* Experian, *Online Consumer Trends*, http://www.experian.com/marketing-services/online-trends.html (last visited Jan. 25, 2015); *see also* CDT Comments at 11 (citing similar Experian data from June 2014). A 2010 Commission study found that of the time Comcast, AT&T, Time Warner Cable, and Verizon Internet subscribers spend using web-based email, 95 percent is spent using third-party services such as Yahoo! Mail and only 5 percent is spent using ISP-provided services (*e.g.*, webmail.verizon.net). *See* Federal Communications Commission, Omnibus Broadband Initiative, *Broadband Performance: OBI Technical Paper No. 4*, at 28 n. 14 (2010) (citing comScore data).

switch to a competitive provider due to the attendant difficulties in changing an email address.[935] Third-party alternatives are also widely available for other services that may be provided along with broadband Internet access service.[936] For example, firms such as Apple, Dropbox, and Carbonite[937] provide "cloud-based" storage; services like Go Daddy provide website hosting;[938] users rely on companies such as WordPress and Tumblr to provide blog hosting;[939] and firms such as Netvibes and Yahoo! provide personalized homepages.[940] GigaNews and Google provide access to newsgroups, while many broadband providers have themselves ceased offering this service entirely.[941]

349. More generally, both fixed and mobile consumers today largely use their broadband Internet access connections to access content and services that are unaffiliated with their broadband Internet access service provider. In this regard, perhaps the most significant trend is the growing popularity of third-party video streaming services. By one estimate, Netflix and YouTube alone account for 50 percent of peak Internet download traffic in North America.[942] Other sites among the most popular in the United States include the search engines Google and Yahoo!;[943] social networking sites Facebook and LinkedIn; e-commerce sites Amazon, eBay and Craigslist; the user-generated reference site Wikipedia; a diverse array of user-generated media sites including Reddit, Twitter, and Pinterest; and

[935] *See, e.g.*, Chris Williams, WideNet Consulting, *NEVER Use Your ISP's Email Address*, http://www.widenetconsulting.com/blog/never-use-your-isps-email-address/ (last visited Feb. 17, 2015); BBapply, *Using ISP-provided Email Addresses – A Bad Idea*, http://bbapply.com/faq/email-alternatives.html (last visited Feb. 17, 2015); Josh McCarty, *Don't Use Your ISP Email Address* (Jul. 25, 2011), http://joshmccarty.com/2011/07/dont-use-your-isp-email-address/ (last visited Feb. 17, 2015); MacMost, *MacMost now 655: Five Reasons Not to Use Your ISP's Email Service* (Jan. 9, 2012), http://joshmccarty.com/2011/07/dont-use-your-isp-email-address/ (last visited Feb. 17, 2015).

[936] DNS, caching, and other services that enable the efficient transmission of data over broadband connections are considered in Section IV.C.3. below.

[937] *See* Apple, *iCloud*, http://www.apple.com/icloud/ (last visited Dec. 31, 2014); Dropbox, *Dropbox – Home*, https://www.dropbox.com/ (last visited Dec. 31, 2014) ("Your stuff, anywhere"); Carbonite, *Carbonite Cloud Backup Services - Online Backup*, http://www.carbonite.com (last visited Dec. 31, 2014).

[938] GoDaddy.com, *GoDaddy – It's Go Time*, http://www.godaddy.com (last visited Dec. 31, 2014); *see also* AARP Comments at iv ("Web hosting is competitively provided, with U.S. broadband providers not even making the top 25 of U.S. web hosting services.") (citing ICANN data); CDT Comments at 12 (noting that "some major broadband providers have ceased to offer free personal web page hosting to their subscribers").

[939] WordPress, *WordPress.com—Create Your New Website for Free*, http://www.wordpress.com (last visited Jan. 5, 2015); Tumblr, *Tumblr*, http://www.tumblr.com (last Jan. 5, 2014).

[940] Netvibes, *Netvibes – Dashboard Everything*, http://www.netvibes.com/en (last visited Jan. 5, 2015); Yahoo, *My Yahoo!*, http://my.yahoo.com (last visited Jan. 5, 2015).

[941] CDT Comments at 11.

[942] Sandvine, *Sandvine Report: Netflix and YouTube Account for 50% of All North American Fixed Network Data*, (Nov. 11, 2013), https://www.sandvine.com/pr/2013/11/11/sandvine-report-netflix-and-youtube-account-for-50-of-all-north-american-fixed-network-data.html; *see also* Alcatel-Lucent Comments at 5 ("In the United States alone, Internet video consumption is expected to grow at least 12 times in the next 6 years, and managed video on-demand ('VoD') services are expected to grow 28% per year until 2017.").

[943] As previously discussed, Google and Yahoo! also provide the popular email services Gmail and Yahoo! Mail, respectively. *See supra* para. 348.

news sources such as nytimes.com and CNN.com.[944] Overall, broadband providers themselves operate very few of the websites that broadband Internet access services are most commonly used to access.[945]

350. Thus, as a practical matter, broadband Internet access service is useful to consumers today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties. As the Center for Democracy & Technology puts it, "[t]he service that broadband providers offer to the public is widely understood today, by both the providers and their customers, as the ability to connect to anywhere on the Internet—to any of the millions of Internet endpoints—for whatever purposes the user may choose."[946] Indeed, the ability to transmit data to and from Internet endpoints has become the "one indispensable function" that broadband Internet access service uniquely provides.[947]

c. Marketing

351. That broadband Internet access services today are primarily offerings of Internet connectivity and transmission capability is further evident by how these services are marketed and priced. Commenters cite numerous examples of advertisements that emphasize transmission speed as the predominant feature that characterizes broadband Internet access service offerings.[948] For example, Comcast advertises that its XFINITY Internet service offers "the consistently fast speeds you need, even during peak hours,"[949] and RCN markets its high-speed Internet service as providing the ability "to upload and download in a flash."[950] Verizon claims that "[w]hatever your life demands, there's a Verizon FiOS plan with the perfect upload/download speed for you,"[951] while the name of Verizon's DSL-based service is simply "High Speed Internet."[952] Furthermore, fixed broadband providers use transmission speeds to classify tiers of service offerings and to distinguish their offerings from those of competitors. AT&T U-Verse, for instance, offers four "Internet Package[s]" at different price points, differentiated in terms of the "Downstream Speeds" they provide.[953] Verizon meanwhile asserts that "the 100% fiber-optic network that powers FiOS" enables "a level of speed and capacity that cable can't always compete with—

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[944] *See, e.g.*, Alexa, *Top Sites in United States*, http://www.alexa.com/topsites/countries/US (last visited Jan. 22, 2015).

[945] *See id.*; *see also* comScore, *comScore Ranks the Top 50 US Digital Media Properties for August 2014*, http://ir.comscore.com/releasedetail.cfm?ReleaseID=871631 (last visited Jan. 5, 2015).

[946] CDT Comments at 9. CDT contrasts the current state of affairs with an earlier time "when Internet access service providers sought to differentiate themselves by offering 'walled gardens' of proprietary content and users looked to their access provider to serve as a kind of curator of the chaos of the Internet." *Id*. at 9-10.

[947] *See id*. at 11; *see also* AARP Comments at 11 ("[T]he broadband service that consumers rely on primarily today is *pure transmission* between their device and remote computing resources or content of their choice.").

[948] *See, e.g.*, Public Knowledge Comments at Appx. A (compiling "[s]elected examples of [broadband provider] advertisements in July of 2014" to demonstrate that "ISPs advertise their services primarily in terms of the speed and reliability with which they can transmit data to and from third parties"); *see also* AARP Comments at 10-11; CDT Comments at 10-11.

[949] Comcast, *XFINITY*, http://www.comcast.com/internet-service.html (last visited Dec. 31, 2014); *see also* CDT Comments at 9 n.8.

[950] *See* Public Knowledge Comments at Appx. A-3.

[951] *See id.* at Appx. A-6.

[952] *See, e.g.*, Verizon, *Verizon | High Speed Internet*, http://www.verizon.com/home/highspeedinternet (last visited Dec. 31, 2014) ("When you're looking for all value and consistently fast speeds all the time, Verizon High Speed Internet is the answer."); *see also* AT&T, *AT&T DSL High Speed Internet*, http://www.att.com/shop/internet/internet-service.html#fbid=5suMbb0rEF8 (last visited Dec. 31, 2014) ("Make AT&T your Internet provider and take your pick of broadband Internet speeds to suit every need.").

[953] *See* Public Knowledge Comments at Appx. A-1.

especially when it comes to upload speeds."[954] On the mobile side, mobile broadband providers similarly emphasize transmission speed as well as reliability and coverage as factors that characterize their mobile broadband Internet access service offering. AT&T, for example, claims that it has the "[n]ation's most reliable 4G LTE network" and that what 4G LTE means is "speeds up to 10x faster than 3G." [955] Sprint advertises its "Sprint Spark" service as having its "fastest ever data speeds and stronger in-building signal."[956]

352. The advertisements discussed above link higher transmission speeds and service reliability with enhanced access to the Internet at large—to any "points" a user may wish to reach[957]—not only to Internet-based applications or services that are provided in conjunction with broadband access. RCN, for instance, claims that its "110 Mbps High-Speed Internet" offering is "ideal for watching Netflix," a third-party video streaming service.[958] Verizon claims that FiOS's "75/75 Mbps" speed "works well for uploading and sharing videos on YouTube and serious multi-user gaming" presumably by using the FiOS service to access any combination of third-party and Verizon-affiliated content and services the user chooses.[959] AT&T notes that its 4G LTE service "lets you stream clear, crisp video faster than ever before, download songs in a few beats, apps almost instantly, and so much more."[960] Broadband providers also market access to the Internet through Wi-Fi. Comcast, for example, notes that with its XFinity Internet services, subscribers can enjoy "access to millions of hotspots nationwide and stay connected while away from home."[961] T-Mobile advertises the ability to place calls and send messages over Wi-Fi.[962]

353. Fixed and mobile broadband Internet access service providers also price and differentiate their service offerings on the basis of the quality and quantity of data transmission the offering provides. AT&T U-Verse, for instance, offers four "Internet Package[s]" at different price points, differentiated in terms of the "Downstream Speeds" they provide.[963] On the mobile side, monthly data allowances—i.e., caps on the amount of data a user may transmit to and from Internet endpoints—are among the features that factor most heavily in the pricing of service plans.[964]

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[954] *Id*. at A-6; *see also* Comcast, *XFINITY vs. the Competition*, http://www.comcast.com/compare/comcast-xfinity-vs-verizon-fios.html (last visited Jan. 5, 2015).

[955] Public Knowledge Comments at Appx. A-2.

[956] Public Knowledge Comments at Appx. A-4.

[957] *See* 47 U.S.C. § 153(50) (definition of "telecommunications").

[958] *See* RCN, *High Speed Internet in D.C. Metro Plans & Pricing*, http://www.rcn.com/dc-metro/high-speed-internet/services-and-pricing (last visited Feb. 5, 2015); Public Knowledge Comments at Appx. A-3.

[959] *See* Verizon, *FiOS Internet*, http://www.verizon.com/home/fios-fastest-internet/ (last visited Feb. 5, 2015); *see also* Public Knowledge Comments at Appx. A-6.

[960] *See* AT&T, *AT&T is the nation's most reliable LTE network*, http://www.att.com/network/en/index.html (last visited Jan. 25, 2015); Public Knowledge Comments at Appx. A-2.

[961] Comcast, XFINITY, http://www.comcast.com/internet-service.html (last visited Feb. 22, 2015).

[962] T-Mobile, *Now Calling Can Be Done Virtually Everywhere. Every Wi-Fi Connection Works Like a T-Mobile Tower*, http://www.t-mobile.com/offer/wifi-calling-wifi-extenders.html (last visited Feb. 22, 2015).

[963] *See* Public Knowledge Comments at Appx. A-1; *see also id*. at Appx. A-3, A-5 (similar advertisements from RCN and Time Warner Cable, respectively).

[964] *See, e.g.*, CTIA Comments at 8 n.13 (discussing the characteristics of various mobile service offerings); *see also* Verizon Wireless, *Single Line Cell Phone Plans*, http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/single-line-data-plans.html (last visited Jan. 25, 2015); AT&T, *Wireless Plans*, http://www.att.com/shop/wireless/plans/mobileshare.html (last visited Jan. 25, 2015); Sprint, *The Best Value in Wireless*, http://www.sprint.com/landings/datashare/index.html?INTNAV=ATG:HE:DataShare (last visited Jan. 25,

(continued….)

354. In short, broadband Internet access service is marketed today primarily as a conduit for the transmission of data across the Internet.[965] The record suggests that fixed broadband Internet access service providers market distinct service offerings primarily on the basis of the transmission speeds associated with each offering. Similarly, mobile providers market their service offerings primarily on the basis of the speed, reliability, and coverage of their network. Marketing broadband services in this way leaves a reasonable consumer with the impression that a certain level of transmission capability—measured in terms of "speed" or "reliability"—is being offered in exchange for the subscription fee, even if complementary services are also included as part of the offer.

3. Broadband Internet Access Service Is a Telecommunications Service

355. We now turn to applying the statutory terms at issue in light of our updated understanding of how both fixed and mobile broadband Internet access services are offered. Three definitional terms are critical to a determination of the appropriate classification of broadband Internet access service. First, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[966] Second, the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[967] Finally, "information service" is defined in the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . , 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."[968] We observe that the critical distinction between a telecommunications and an information service turns on what the provider is "offering." If the offering meets the statutory definition of telecommunications service, then the service is also necessarily a common carrier service.[969]

356. In reconsidering our prior decisions and reaching a different conclusion, we find that this result best reflects the factual record in this proceeding, and will most effectively permit the implementation of sound policy consistent with statutory objectives. For the reasons discussed above, we find that broadband Internet access service, as offered by both fixed and mobile providers, is best seen, and is in fact most commonly seen, as an offering (in the words of Justice Scalia, dissenting in *Brand X*) "consisting of two separate things": "*both* 'high-speed access to the Internet' *and* other 'applications and functions.'"[970] Although broadband providers in many cases provide broadband Internet access service

(Continued from previous page)
2015); T-Mobile, *Simple Choice Plan*, http://www.t-mobile.com/cell-phone-plans/individual.html (last visited Jan. 25, 2015).

[965] The marketing materials discussed here also indicate that broadband providers hold themselves out indifferently to the public when offering broadband Internet access service. Within particular service areas, broadband providers tend to offer uniform prices and services to potential customers. *See, e.g.*, Public Knowledge Comments at 79; Free Press Comments at 64-65. As discussed above, these offers are widely available through advertisements and marketing materials. *See supra* paras. 351-353.

[966] 47 U.S.C. § 153(50).

[967] *Id.* § 153(53).

[968] *Id.* § 153(24).

[969] *See Universal Service First Report and Order*, 12 FCC Rcd at 9177, para. 785 ("We find that the definition of 'telecommunications services' in which the phrase 'directly to the public' appears is intended to encompass only telecommunications provided on a common carrier basis."); *U.S. Telecom Ass'n v. FCC*, 295 F.3d at 1328-29 (telecommunications carriers limited to common carriers); *Cable & Wireless, PLC*, Order, 12 FCC Rcd 8516, 8521, para. 13 (1997) ("[T]he definition of telecommunications services is intended to clarify that telecommunications services are common carrier services.").

[970] *Brand X*, 545 U.S. at 1008 (quoting *Cable Modem Declaratory Ruling*).

along with information services, such as email and online storage, we find that broadband Internet access service is today sufficiently independent of these information services that it is a separate "offering."[971] We also find that domain name service (DNS)[972] and caching,[973] when provided with broadband Internet access services, fit squarely within the telecommunications systems management exception to the definition of "information service."[974] Thus, when provided with broadband Internet access services, these integrated services do not convert broadband Internet access service into an information service.[975]

357. *The Commission Does Not Bear a Special Burden in This Proceeding.* Opponents of classifying broadband Internet access service as a telecommunications service advocate a narrow reading of the Supreme Court's decision in *Brand X.* They contend that the Court's decision to affirm the classification of cable modem service as an information service was driven by specific factual findings concerning DNS and caching, and argue that the Commission may not revisit its decision unless it can show that the facts have changed.[976] Opponents also cite a passage from the Supreme Court's *Fox* decision suggesting that an agency must provide "a more detailed justification than what would suffice for a new policy on a blank slate" where the agency's "new policy rests upon factual findings that

[971] *See Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting) ("[T]he telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer."); *cf. AT&T Corp.* et al., File Nos. E-98-41, E-98-42, E-98-43, Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998), *aff'd sub nom. U.S. West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999) (analogizing the 1996 Act's terms "offer" and "provide," and finding that BOCs were unlawfully "providing" long distance service from Qwest in part based on evidence of marketing it as their own).

[972] DNS is most commonly used to translate domain names, such as "nytimes.com," into numerical IP addresses that are used by network equipment to locate the desired content. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4810, para. 17 n.74; *see also Brand X*, 545 U.S. at 987, 999.

[973] Caching is the storing of copies of content at locations in a network closer to subscribers than the original source of the content. This enables more rapid retrieval of information from websites that subscribers wish to see most often. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4810, para. 17 n.76.

[974] *See* 47 U.S.C. § 153(24) ("The term 'information service' . . . does not include any use of any such capability for the management, control, or operation of a telecommunications system of the management of a telecommunications service."). Hereinafter, we refer to this exception as the "telecommunications systems management" exception.

[975] One of the dissenting statements asserts that Congress could not have delegated to the Commission the authority to determine whether broadband Internet access service is a telecommunications service because "[h]ad Internet access service been a basic service, dominant carriers could have offered it (and all related computer-processing functionality) outside the parameters of the *Computer Inquiries*," but "I cannot find a single suggestion that anyone in Congress, anyone at the FCC, anyone in the courts, or anyone at all thought this was the law during the passage of the Telecommunications Act" in 1996. *See* Pai Dissent at 37. We disagree with this line of reasoning. First, it contradicts the Supreme Court's 2005 holding in *Brand X*, where the Court explicitly acknowledged that the Commission had previously classified the transmission service, which broadband providers offer, as a telecommunications service and that the Commission could return to that classification if it provided an adequate justification. *See supra* paras. 332-334. Second, and underscoring the ambiguity that the *Brand X* court identified in finding that the Commission had *Chevron* deference in its classification of broadband Internet access service, the dissenting statement fails to identify any compelling evidence that Congress thought broadband Internet access service was an information service.

[976] *See, e.g.*, Comcast Reply at 17-23; CenturyLink Comments at 46-47; USTelecom Comments at 24; NCTA Comments at 30-31; TWC Comments at 9-13; Letter from Michael E. Glover, Senior Vice Pres. and Dep. Gen. Counsel, Verizon to Marlene H. Dortch, Secretary, FCC , GN Docket Nos. 14-28, 10-127, Attach.at 11-12 (filed Oct. 29, 2014) (Verizon Title II White Paper); *see also Brand X*, 545 U.S. at 991 (observing that the question of whether cable modem service includes separate "offers" of telecommunications service and information service "turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided").

contradict those which underlay its prior policy," or "when its prior policy has engendered serious reliance interests that must be taken into account."[977]

358. We disagree with these commenters on both counts. The *Fox* court explained that in these circumstances, "it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[978] As the D.C. Circuit more recently confirmed, "[t]his does not . . . equate to a 'heightened standard' for reasonableness."[979] The Commission need only show "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."[980] Above, we more than adequately explain our changed view of the facts and circumstances in the market for broadband Internet access services—which is evident from consumers' heavy reliance on third-party services and broadband Internet access providers' emphasis on speed and reliability of transmission separately from and over the extra features of the service packages they offer.[981] Furthermore, our understanding of the facts of how the elements of broadband Internet access service work has not changed. No one has ever disputed what DNS is or how it works. The issue is whether it falls within the definition of "information service" or the telecommunications systems management exception.[982] If the latter, as we find below, prior factual findings that DNS was inextricably intertwined with the transmission feature of cable modem service do not provide support for the conclusion that cable modem service is an integrated information service.

359. Moreover, opponents' reading of *Brand X* ignores the reasoning and holding of the Court's opinion overall. As discussed above, the *Brand X* opinion confirms that the Supreme Court viewed the statutory classification of cable modem service as a judgment call for the Commission to make. If the Commission had concluded that the transmission component of cable modem service was a telecommunications service, and provided a reasoned explanation for its decision, it is evident that the Court would have deferred to that finding.[983]

360. In *Fox*, the Supreme Court also suggested that an agency may need to provide "a more detailed justification" for a change in policy when the prior policy "has engendered serious reliance interests."[984] Opponents of reclassification contend that broadband providers have invested billions of dollars to deploy new broadband network facilities in reliance on the Title I classification decisions and it

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[977] *Fox*, 556 U.S. at 515 (emphasis added); *see also, e.g.*, Comcast Comments at 54; Verizon Comments at 58.

[978] *Fox*, 556 U.S. at 515-16.

[979] *Mary V. Harris*, 776 F.3d at 24 (quoting *Fox*, 556 U.S. at 514).

[980] *Fox*, 556 U.S. at 515; *see also Mary V. Harris*, 776 F.3d at 24.

[981] *See supra* Section IV.C.2.

[982] *See infra* paras. 366-367.

[983] *See Brand X*, 545 U.S. at 985-86 ("[O]ur conclusion that it is *reasonable* to read the Communications Act to classify cable modem service solely as an 'information service' leaves untouched *Portland's* holding that the Commission's interpretation is not the *best* reading of the statute."), 989 (explaining that because the term "offering" in section 153(46) admits "of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference"), 992 ("[T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission."), 1002-03 ("The questions the Commission resolved in the order under review involve a subject matter [that] is technical, complex, and dynamic. The Commission is in a far better position to address these questions than we are.") (internal citation and quotation marks omitted). *See also id.* at 1003 (Breyer, J., concurring) ("I join the Court's opinion because I believe that the Federal Communications Commission's decision falls within the scope of its statutorily delegated authority—though perhaps just barely.").

[984] *Fox*, 556 U.S. at 515.

would be unreasonable to change course now.[985] We disagree. As a factual matter, the regulatory status of broadband Internet access service appears to have, at most, an indirect effect (along with many other factors) on investment.[986] Moreover, the regulatory history regarding the classification of broadband Internet access service would not provide a reasonable basis for assuming that the service would receive sustained treatment as an information service in any event. As noted above, the history of the *Computer Inquiries* indicates that, at a minimum the regulatory status of these or similar offerings involved a highly regulated activity for many years.[987] The first formal ruling on the classification of broadband Internet access service came from the Ninth Circuit in 2000, which held that the best reading of the relevant statutory definitions was that cable modem service in fact includes a telecommunications service.[988] The *Cable Modem Declaratory Ruling* was expressly limited to cable modem service "as it [was] currently offered."[989] The lawfulness of the Commission's 2002 *Cable Modem Declaratory Ruling* remained unsettled until the Supreme Court affirmed it in 2005, and the Commission's *Wireline Broadband Classification Order* was not affirmed until two years later, in 2007.[990] In 2010, the Commission sought comment on reclassifying broadband Internet access services, and sought to refresh the record again in 2014.[991] While the Commission did classify wireless broadband Internet access service as an information service in 2007, the *Comcast* and *Verizon* decisions, in 2009 and 2014 respectively, called into doubt the Commission's ability to rely upon its Title I ancillary authority to protect the public interest and carry out its statutory duties to promote broadband investment and deployment. The legal status of the information service classification thus has been called into question too consistently to have engendered such substantial reliance interests that our reclassification decision cannot now be sustained absent

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[985] *See, e.g.*, CenturyLink Comments at 45-46; TWC Comments at 13; NCTA Comments at 33-34; AT&T Comments at 47-48; CTIA Reply at 49-51; Letter from Scott Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, Attach. at 20-21 (filed Dec. 22, 2014) (CTIA Dec. 22, 2014 *Ex Parte* Letter).

[986] *See infra* Section IV.C.5; *see also, e.g.*, Free Press Comments at 116-20 (evaluating stock prices of major broadband provider companies one month, three months, and six months after the *Broadband Classification NOI* and showing that those stocks outperformed the broader market, except for Comcast, which was undergoing a merger); *id.* at 92-93 n.198 ("For example, shortly after former Chairman Genachowski announced his intention to apply common carriage to broadband access services . . . Landell Hobbs, then Time Warner Cable's Chief Operating Officer, stated on an investor call that the Title II classification proposed by the Genachowski FCC 'is a light regulatory touch. . . . [The FCC's] focus is really to put them in a position where they can execute around their [N]ational [B]roadband [P]lan, not to rate regulate or crush investment in our sector. That's not at all what we believe. So . . . *yes, we will continue to invest*[.]' *See* JP Morgan Global Technology, Media and Telecom Conference: Time Warner Cable, Inc. Management Discussion (May 19, 2010) (emphasis added). A week after the former Chairman's announcement, Comcast CEO Brian Roberts (a signatory of the *May 2014 Broadband for America Letter*) responded to questions about the FCC's Third Way proposal before an audience at the 2010 Cable Show. He said that 'the government is not a big worry," and also said that he expected the industry to continue to invest and innovate. *See* Michelle Ow, *Top MSOs Weigh In on Reclassification*, SNL Kagan (May 12, 2010). Also, Lowell McAdam, then-CEO of Verizon Wireless, emphasized that the company had no plans to slow investment in its wireless broadband network as a result of the FCC's move. *See* Niraj Sheth, *Verizon in Talks to License 4G Spectrum to Rural Carriers*, Wall Street Journal (May 13, 2010)."); USTelecom, *Historical Broadband Provider Capex*, http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex (last visited Jan. 5, 2015) (showing U.S. broadband providers' capital expenditures continued to increase yearly after the *Broadband Classification NOI*).

[987] *See supra* paras. 311-313.

[988] *AT&T Corp. v. City of Portland*, 216 F.3d at 877-80.

[989] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, para. 7.

[990] *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[991] *Broadband Classification NOI*, 25 FCC Rcd 7866; *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service*, GN Docket No. 10-127, Public Notice, 29 FCC Rcd 5856 (Wireline Comp. Bur. 2014).

extraordinary justifications.[992] Finally, the forbearance relief we grant in the accompanying order in conjunction with our reclassification decision keeps the scope of our proposed regulatory oversight within the same general boundaries that the Commission earlier anticipated drawing under its Title I authority. We thus reject the claims that our action here unlawfully upsets reasonable reliance interests. In any event, we provide in this ruling a compelling explanation of why changes in the marketing, pricing, and sale of broadband Internet access service, as well as the technical characteristics of how the service is offered, now justify a revised classification of the service.[993]

a. Broadband Internet Access Service Involves Telecommunications

361. *Broadband Internet Access Service Transmits Information of the User's Choosing Between Points Specified by the User.* As discussed above, the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[994] It is clear that broadband Internet access service is providing "telecommunications." Users rely on broadband Internet access service to transmit "information of the user's choosing," "between or among points specified by the user."[995] Time Warner Cable asserts that broadband Internet access service cannot be a telecommunications service because—as end users do not know where online content is stored—Internet communications allegedly do not travel to "points specified by the user" within the statutory definition of "telecommunications."[996] We disagree. We find that the term "points specified by the user" is ambiguous, and conclude that uncertainty concerning the geographic location of an endpoint of communication is irrelevant for the purpose of determining whether a broadband Internet access service is providing "telecommunications." Although Internet users often do not know the geographic location of edge providers or other users, there is no question that users specify the end points of their Internet communications.[997] Consumers would be quite upset if their Internet communications did not make it to

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[992] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 160 (2000) (setting aside FDA decision, in 1996, to assert jurisdiction to regulate tobacco after repeatedly disavowing its authority to do so since its inception in 1914).

[993] In response to arguments raised in the dissenting statements, we clarify that, even assuming, *arguendo*, that the facts regarding how BIAS is offered had not changed, in now applying the Act's definitions to these facts, we find that the provision of BIAS is best understood as a telecommunications service, as discussed below, *see infra* Sections IV.C.3.b., IV.C.3.c., and disavow our prior interpretations to the extent they held otherwise.

[994] 47 U.S.C. § 153(50).

[995] *Id.*; *see* Barbara A. Cherry and Jon M. Peha, The Telecom Act of 1996 *Requires* the FCC to Classify Commercial Internet Access as a Telecommunications Service, GN Docket No. 14-28, at 5 (filed Dec. 22, 2014) (Cherry and Peha Dec. 22, 2014 *Ex Parte*) ("It is clear that IP Packet Transfer means transmission of information that is of the packet sender's choosing, since the sender chooses what information to put in each packet. Moreover, it is the nature of IP Packet Transfer that the 'form and content of the information' is precisely the same when an IP packet is sent by the sender as when that same packet is received by the recipient.").

[996] TWC Comments at 12; *see also* Letter from Christopher S. Yoo to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 09-191, 10-127, at 2-3 (filed Dec. 22, 2014) (Yoo Dec. 22, 2014 *Ex Parte* Letter) (asserting that broadband Internet access transmission does not take place between points specified by the user because physical locations are identified by an Internet Protocol address, and end users and applications generally use domain names and rely on a DNS service to map domain names onto IP addresses).

[997] *See* Cherry and Peha Dec. 22, 2014 *Ex Parte* at 5 ("In each IP packet, the sender places the IP address of the packet's intended recipient. In some cases, the sender knows the recipient's IP address already, and in some cases the sender must first look up the desired IP address. Either way, communications is clearly to a point specified by the user sending the packet."); AT&T Reply at 101 (stating that once traffic is delivered to AT&T via interconnection, "AT&T, just like any other ISP, delivers that traffic to its intended destination"). For example, in transmissions from the user to an edge provider, a user either directly specifies the domain name of the edge provider or utilizes a search engine to determine the domain name. The application that a user chooses then uses DNS to translate the domain name into an IP address associated with the edge provider, which is placed into the

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their intended recipients or the website addresses they entered into their browser would take them to unexpected web pages. Likewise, numerous forms of telephone service qualify as telecommunications even though the consumer typically does not know the geographic location of the called party. These include, for example, cell phone service,[998] toll free 800 service,[999] and call bridging service.[1000] In all of these cases, the user specifies the desired endpoint of the communication by entering the telephone number or, in the case of broadband Internet access service, the name or address of the desired website or application. More generally, we have never understood the definition of "telecommunications" to require that users specify—or even know—information about the routing or handling of their transmissions along the path to the end point, nor do we do so now. Further, that there is not a one-to-one correspondence between IP addresses and domain names, and that DNS often routes the same domain name to different locations based on its inference of which location is most likely to be the one the end user wants, does not alter this analysis.[1001] It is not uncommon in the toll-free arena for a single number to route to multiple locations, and such a circumstance does not transform that service to something other than telecommunications.[1002]

362. *Information is Transmitted Without Change in Form or Content*. Broadband Internet access service may use a variety of protocols to deliver content from one point to another. However, the packet payload (*i.e.*, the content requested or sent by the user) is not altered by the variety of headers that a provider may use to route a given packet. The information that a broadband provider places into a packet header as part of the broadband Internet access service is for the management of the broadband Internet access service and it is removed before the packet is handed over to the application at the destination.[1003] Broadband providers thus move packets from sender to recipient without any change in format or content, and "merely transferring a packet to its intended recipient does not by itself involve generating, acquiring, transforming, processing, retrieving, utilizing, or making available information."[1004]

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packet as its destination. For transmissions from an edge provider to a user, the edge provider places the user's IP address into the packet as the destination IP address.

[998] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9175, para. 780 (1997) (*Universal Service First Report and Order*), *rev'd in part on other grounds Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999); *see also* 47 U.S.C. § 332(c)(1) (providers of commercial mobile radio service shall be treated as common carriers).

[999] *Universal Service First Report and Order*, 12 FCC Rcd at 9175, para. 780; *see also AT&T Corp. v. Winback & Conserve Program, Inc.*, File No. E-97-02, Memorandum Opinion and Order, 16 FCC Rcd 16074, 16075, para. 2 (2001).

[1000] *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731, 10734-35, para. 11 (2008).

[1001] *See* Yoo Dec. 22, 2014 *Ex Parte* Letter at 2.

[1002] *See, e.g.*, *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers; Toll Free Service Access Codes*, WC Docket No. 07-271, CC Docket No. 95-155, Memorandum Opinion and Order and Order on Review, 24 FCC Rcd 13022, 13023, para. 2 (2009) ("The hotlines are routing mechanisms for hundreds of local suicide prevention organizations. When a person calls a hotline, the call is directly routed to a trained crisis counselor in the organization local to the caller who can assess the situation and determine the proper steps to follow to assist the caller.").

[1003] *See* Internet Engineering Task Force, Requirements for Internet Hosts – Communications Layers, RFC 1122 (Oct. 1989), https://tools.ietf.org/html/rfc1122.

[1004] Cherry and Peha Dec. 22, 2014 *Ex Parte* at 8; *see also, e.g.*, NTCA Comments at 10 ("The transport, routing, conveyance, and exchange of data over networks is transparent, and involves no storage, transformation, or other manipulation of data."); CDT Comments at 29 ("Broadband providers are not engaging in their own speech through the provision of Internet access. They are simply communications conduits."); *id*. at 28-30; EFF Comments at 14 ("Many competitive providers offer content and services similar to what the ISPs might bundle with their

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Rather, "it is the nature of [packet delivery] that the 'form and content of the information' is precisely the same when an IP packet is sent by the sender as when that same packet is received by the recipient."[1005]

b. Broadband Internet Access Service is a "Telecommunications Service"

363. Having affirmatively determined that broadband Internet access service involves "telecommunications," we also find that broadband Internet access service is a "telecommunications service." A "telecommunications service" is the "offering of telecommunications for a fee directly to the public, . . . regardless of the facilities used."[1006] We find that broadband Internet access service providers offer broadband Internet access service "directly to the public." As discussed above, the record indicates that broadband providers routinely market broadband Internet access services widely and to the general public.[1007] Because a provider is a common carrier "by virtue of its functions," we find that such offerings are made directly to the public within the Act's definition of telecommunications service.[1008] We draw this conclusion based upon the common circumstances under which providers offer the service, and we reject the suggestion that we must evaluate such offerings on a narrower carrier-by-carrier or geographic basis.[1009] Further, that some broadband providers require potential broadband customers to disclose their

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transmission, *e.g.*, email, web browsers, search engines, etc., but those services do not provide the transmission service itself. Even if a transport provider bundles these other services along with its transmission service, they remain distinct from that transmission component."); Free Press Comments at 63 ("[N]othing in the *offering* of the service suggests that the ISP will be changing the form or content of the information. And the broadband service itself does not in fact change the form or content of the information. For if it did, many of the online services that are widely used would not function properly.") (emphasis in original). A BIAS provider, when utilizing the Internet Protocol, may fragment packets into multiple pieces. However, such fragmentation does not change the form or content, as the pieces are reassembled before the packet is handed over to the application at the destination. *See* Internet Protocol, DARPA Internet Program Protocol Specification, RFC 791 (Sept. 1981), https://tools.ietf.org/html/rfc791.

[1005] Cherry and Peha Dec. 22, 2014 *Ex Parte* at 5; *see also* Internet Protocol, DARPA Internet Program Protocol Specification, RFC 791, para. 1.2 (Sept. 1981), https://tools.ietf.org/html/rfc791 ("The internet protocol is specifically limited in scope to provide the functions necessary to deliver a package of bits (an internet datagram) from a source to a destination over an interconnected system of networks."). For example, when a person sends an email, he or she expects that the content of the email, and any attachments, to be delivered to the recipient unaltered in content or form. We note that a user may choose to use an application, such as email, that is a separate information service offered by the BIAS provider. When this occurs, the provider of the information service may place information into the packet payload that changes the form or content. However, this change in form or content is purely implemented as part of the separable information service. The broadband provider, in transmitting the packet via BIAS, does not alter the form or content of the packet payload.

[1006] 47 U.S.C. § 153(53).

[1007] *See supra* Section IV.C.2. *See, e.g.*, Free Press Comments at 64-65; Public Knowledge Comments at 79.

[1008] *See NARUC I*, 525 F.2d at 644 (citing *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 648 (5th Cir. 1967) (whether an entity is a common carrier "depends not upon its corporate character or declared purposes, but upon what it does") (citations omitted)).

[1009] *See, e.g.*, *Wireline Broadband Classification Order*, 20 FCC Rcd at 14879-81, paras. 48-51 (declining to evaluate the market for broadband Internet access service on a local market basis, and instead finding that the broadband Internet access market is "more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as [the] market continues to evolve"); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4809 n.69 ("We recognize that not all cable operators include all of these functions in their cable modem service offerings."); *id.* at 4822-23, para. 38 (basing cable modem classification on how service was offered generally, "regardless of whether every cable modem service provider offers each function that could be included in the service").

addresses and service locations before viewing such an offer does not change our conclusion.[1010] The Commission has long maintained that offering a service to the public does not necessarily require holding it out to all end users.[1011] Some individualization in pricing or terms is not a barrier to finding that a service is a telecommunications service.[1012]

364. In addition, the implied promise to make arrangements for exchange of Internet traffic as part of the offering of broadband Internet access service does not constitute a private carriage arrangement.[1013] First, in offering broadband Internet access service to its end-user customers, the broadband provider has voluntarily undertaken an obligation to arrange to transfer that traffic on and off its network.[1014] Broadband providers hold themselves out to carry all edge provider traffic to the broadband provider's end user customers regardless of source and regardless of whether the edge provider itself has a specific arrangement with the broadband provider.[1015] Merely asserting that the traffic exchange component of the service may have some individualized negotiation does not alter the nature of the underlying service. Second, the record reflects that broadband providers assert that multiple routes to reach their networks are widely and readily available.[1016] They cannot, at the same time, assert that all arrangements for delivering traffic to their end-user subscribers are individually negotiated with every edge provider.[1017] Third, the record reflects that the majority of arrangements for traffic exchange are

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[1010] *See* Public Knowledge Comments at 79; *but see* Letter from Gary L. Phillips, General Attorney & Assoc. General Counsel, AT&T to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 6-7 (filed Feb. 2, 2015) (AT&T Feb. 2, 2015 *Ex Parte* Letter) (asserting that broadband providers may decide on a case-by-case basis whether to service a particular end user, what connection speeds to offer, and at what price).

[1011] *See Federal-State Joint Bd. On Universal Serv.*, CC Docket No. 96-45, Order on Remand, 16 FCC Rcd 571, 573-74, paras. 7-10 (2000), *aff'd U.S.Telecom Ass'n v. FCC*, 295 F.3d 1326, 1332-33 (D.C. Cir. 2002) ("[A] carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class."); *NARUC I*, 525 F.2d at 641 ("One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted.").

[1012] *See Orloff v. FCC*, 352 F.3d 415, 419-20 (D.C. Cir. 2003). To the extent our prior precedents might suggest otherwise, we disavow such an interpretation in this context.

[1013] *See, e.g.*, AT&T Feb. 2, 2015 *Ex Parte* Letter at 7; Verizon Dec. 17, 2014 *Ex Parte* Letter at 7-9; Letter from Comcast to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3-4 (filed Jan. 23, 2015) (Comcast Jan. 23, 2015 *Ex Parte* Letter). Commission precedent "holds that a carrier will not be a common carrier 'where its practice is to make individualized decisions in particular cases whether and on what terms to serve.'" *Universal Service First Report and Order*, 12 FCC Rcd at 9178, para. 785.

[1014] *See, e.g.*, COMPTEL Feb. 19, 2015 *Ex Parte* Letter at 8.

[1015] *See, e.g.*, Comcast Reply at 38 n. 131 ("Netflix could have chosen from a number or routes, including routes through various transit providers and CDNs, to reach Comcast's network."); Cox Reply at 21 (" ISPs interconnect with a variety of transit and [CDN] providers, ensuring that edge providers have multiple cost effective routes to choose from to reach each ISP's customers."); TWC Reply at 16 ("With countless partners from which to choose, content providers are not faced with a gatekeeper limiting their use of peering, transit, and CDN arrangements."); *id.* at 18 ("TWC (like other ISPs) has substantial interconnection capacity available through a multiplicity of transit routes, and edge providers (rather than ISPs) control which routes their traffic will traverse."); Suddenlink Reply at 7 ("In today's market, there are multiple paths across the backbone and into and out of operator networks."); AT&T Reply at 100-101 (explaining that there are often dozens of different ways to deliver traffic onto the ISP's network).

[1016] *See supra* note 1015.

[1017] *See, e.g.*, NCTA Comments at 80-81; Verizon Dec. 17, 2014 *Ex Parte* Letter at 8-9; Comcast Comments at 36-37; *see also Vitelco v. FCC*, 198 F.3d 921, 925 (1999) ("Noting that the Bureau had found that 'AT&T–SSI would have to engage in negotiations with each of its customers on the price and other terms which would vary depending on the customers' capacity needs, duration of the contract, and technical specifications,' the Commission found that AT&T–SSI 'will not sell capacity in the proposed cable indifferently to the public.'").

informal handshake agreements without formalized terms and conditions that would indicate any kind of individualized negotiations.[1018] We recognize that there are some interconnection agreements that do contain more individualized terms and conditions.[1019] However, this circumstance is not inherently different from similarly individualized commercial agreements for certain enterprise broadband services, which the Commission has long held to be common carriage telecommunications services subject to Title II.[1020] That the individualized terms may be negotiated does not change the underlying fact that a broadband provider holds the *service* out directly to the public. As discussed above, it must necessarily do so, in order to offer and provide its broadband Internet access service. Further, we note that these types of individualized negotiations are analogous to other telecommunications providers whose customer service representatives may offer variable terms and conditions to customers in circumstances where the customer threatens to switch service providers.[1021] We therefore find that the implied representation that broadband Internet access service providers will arrange for transport of traffic on and off their networks as part of the BIAS offering does not constitute private carriage. As such, we find that broadband Internet access service is offered "directly to the public," and falls within the definition of "telecommunications service."[1022]

c. Broadband Internet Access Service is Not an "Information Service"

365. We further find that broadband Internet access service is not an information service. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . 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."[1023] To the extent that broadband Internet access service is offered along with some capabilities that would otherwise fall within the information service definition, they do not turn broadband Internet access service into a functionally integrated information service. To the contrary, we find these capabilities either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband Internet access service, or both.

366. *DNS Falls Within the Telecommunications Systems Management Exception to the Definition of Information Services.* As the Supreme Court spotlighted in *Brand X*, the Commission predicated its prior conclusion that cable modem service was an integrated information service at least in

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[1018] *See* Letter from Chris Hutchins, Liberty Global, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. at 22 (filed Nov. 25, 2014) ("A survey by OECD, published in early 2013, reported that 99.51% of the 142.210 surveyed Peering agreements were 'handshake agreements' in which the parties agreed to commonly understood terms without creating a written document."); Google Feb. 20, 2015 *Ex Parte* Letter at 1-2.

[1019] *See, e.g.*, Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 8 (filed Jan. 30, 2015).

[1020] *See infra* para. 424.

[1021] *Cf. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (allowing individualized negotiation under sections 201 and 202 of the Act).

[1022] If an offering meets the definition of telecommunications service, then the service is also necessarily a common carrier service. *See Universal Service First Report and Order*, 12 FCC Rcd at 9178, para. 785 ("We find that the definition of 'telecommunications services' in which the phrase 'directly to the public' appears is intended to encompass only telecommunications provided on a common carrier basis."); *U.S. Telecom Ass'n v. FCC*, 295 F.3d at 1328-29 (noting that telecommunications carriers are limited to common carriers); *Cable & Wireless, PLC*, Order, 12 FCC Rcd 8516, 8521, para. 13 (1997) ("[T]he definition of telecommunications services is intended to clarify that telecommunications services are common carrier services.").

[1023] 47 U.S.C. § 153(24).

part on the view that it "transmits data *only* in connection with the further processing of information."[1024] That was so, under the theory of the *Cable Modem Declaratory Ruling*, because "[a] user cannot reach a third-party's Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server."[1025] The Commission had assumed without analysis that DNS, when provided with Internet access service, is an information service. The Commission credited record evidence that DNS "enable[s] routing" and that "*[w]ithout this service, Internet access would be impractical for most users*."[1026] In his *Brand X* dissent, however, Justice Scalia correctly observed that DNS "is scarcely more than *routing* information, which is expressly excluded from the definition of 'information service'" by the telecommunications systems management exception set out in the last clause of section 3(24) of the Act.[1027] Thus, in his view, such functions cannot be relied upon to convert what otherwise would be a telecommunications service into an information service. Therefore, consideration of whether DNS service falls within the telecommunications systems management exception could have been determinative in the Court's outcome in *Brand X*, had it considered the question.

367. Although the Commission assumed in the *Cable Modem Declaratory Ruling—sub silentio*—that DNS fell outside the telecommunications systems management exception,[1028] Justice Scalia's assessment finds support both in the language of section 3(24), and in the Commission's consistently held view that "adjunct-to-basic" functions fall within the telecommunications systems management exception to the "information service" definition.[1029] Such functions, the Commission has

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[1024] *Brand X*, 545 U.S. at 998 (emphasis added); *see generally Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821-23, paras. 37-38.

[1025] *Brand X*, 545 U.S. at 999; *see Cable Modem Service Declaratory Ruling*, 17 FCC Rcd at 4822-23, para. 38 n.153 (noting that "[n]early every cable modem subscriber . . . accesses the DNS that is provided as part of the service" in connection with cable modem service communications).

[1026] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821-22, para. 37 n.147 (internal citation omitted) (emphasis in original).

[1027] *Brand X*, 545 U.S. at 1012-13 (Scalia, J., dissenting) (citing 47 U.S.C. § 153(20) (defining "information service")). The definition of "information service" has since been moved from subsection 20 to subsection 24 of section 3 but has not itself been revised. The telecommunications systems management exception in section 3(24) provides that the term "information service" "does not include" the use of any data processing, storage, retrieval or similar capabilities "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(24).

[1028] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822, para. 38 n.150 (containing a passing reference to the telecommunications systems management exception). The Commission's subsequent conclusions that wireline broadband services offered by telephone companies and broadband offered over power lines were unitary information services followed the same theory, also without any analysis of the telecommunications systems management exception. *See Wireline Broadband Classification Order*, 20 FCC Rcd at 14864, para. 15; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13284-87, paras. 5-9.

[1029] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958, para. 107 (1996) (*Non-Accounting Safeguards Order*), *recon.*, 12 FCC Rcd 2297, 2298-99, para. 2 (1997). Throughout the history of computer-based communication, Title II covered more than just the simple transmission of data. Some features and services that met the literal definition of "enhanced service," but did not alter the fundamental character of the associated basic transmission service, were considered "adjunct-to-basic" and treated as basic (*i.e.*, telecommunications) services even though they went beyond mere transmission. *See Computer II Final Decision*, 77 FCC 2d at 421, para. 98; *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4831, para. 16 (2005), *aff'd*, *AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006). Thus, the Commission's definition of "basic services" (the regulatory predecessor to "telecommunications services") includes, among other things, those intelligent features that run the network or improve its usefulness to consumers, such as a carrier's use of "companding [compressing/expanding]

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held: (1) must be "incidental" to an underlying telecommunications service—*i.e.*, "'basic' in purpose and use" in the sense that they facilitate use of the network; and (2) must "not alter the fundamental character of [the telecommunications service]."[1030] By established Commission precedent, they include "speed dialing, call forwarding, [and] computer-provided directory assistance,"[1031] each of which shares with DNS the essential characteristic of using computer processing to convert the number or keystroke that the end user enters into another number capable of routing the communication to the intended recipient. Similarly, traditional voice telephone calls to toll free numbers, pay-per-call numbers, and ported telephone numbers require a database query to translate the dialed telephone number into a different telephone number and/or to otherwise determine how to route the call properly,[1032] and there is no doubt

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techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. that facilitate economical, reliable movement of information does not alter the nature of the basic service." *Computer II Final Decision*, 77 FCC 2d at 420, para. 95; *see also Computer III Phase I Order*, 104 FCC 2d at 968, para. 10 ("Data processing, computer memory or storage, and switching techniques can be components of a basic service if they are used solely to facilitate the movement of information."). Basic service can also include "memory or storage within the network . . . used only to facilitate the transmission of the information from the origination to its destination," *Computer II Final Decision*, 77 FCC 2d. at 420, para. 95, and certain types of protocol processing. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106, *recon.*, 12 FCC Rcd at 2298-99, para. 2. *See generally* CDT Comments at 15; Kendall Koning Comments at 28-29; Vimeo Reply at 10; Vonage Comments at 39.

[1030] *See North American Telecommunications Association Petition for Declaratory Ruling Under §64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 FCC 2d 349, 359-61, paras. 24, 27, 28 (1985) (*NATA/Centrex Order*).

[1031] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, para. 107 n.245. *See also NATA/Centrex Order*, 101 FCC 2d at 360, para. 26 ("In the case of speed dialing and call forwarding, the stored telephone numbers specified by the customer and the customer's interaction with that stored information serve but one purpose: facilitating establishment of a transmission path over which a telephone call may be completed. . . . When a customer uses directory assistance, that customer accesses information stored in a telephone company data base. . . . An offering of access to a data base for the purpose of obtaining telephone numbers may be offered as an adjunct to basic telephone service.").

[1032] *See, e.g.*, *Telephone Number Portability*, CC Docket No. 95-116, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12354, para. 10 (1995) ("[T]elephone numbers with certain NPA codes [such as 800, 900, and 500] are portable between geographic locations because the IXCs are able to 'map', or translate, the dialed, non-geographic number into a geographic number."); *Telephone Number Portability*, CC Docket No. 95-116, Second Report and Order, 12 FCC Rcd 12281, 12287-88, para. 8 (1997) ("Carriers routing telephone calls to customers who have ported their telephone numbers from one carrier to another query the local Service Management System (SMS) database to obtain the location routing number that corresponds to the dialed telephone number. This database query is performed for all calls to switches from which at least one number has been ported. Based on the location routing number, the querying carrier then would route the call to the carrier serving the ported number.") (citations omitted); *Application of Bellsouth Corporation, Bellsouth Telecommunications, Inc., and Bellsouth Long Distance, Inc., for Provision of In-Region, Interlata Services In Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 275 n.858 (1998) (under an initial, interim form of local number portability, "the carrier that originally served the called customer redirects the telephone calls by translating the dialed number to a new transparent number associated with the acquiring carrier's switch, essentially placing a second telephone call to the customer's new location"); *Numbering Resource Optimization*, CC Docket No. 99-200, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7623, para. 118 n.242 (2000) ("[T]o facilitate proper network routing in a thousands-block number pooling environment, every service provider's existing LNP SCP database within the pooling area would store specific LRN routing information for thousand number blocks within the same NXX. In addition, each service provider's LNP mechanism would query its database for calls to pooled numbers allocated to other service providers.").

that the inclusion of that functionality does not somehow convert the basic telecommunications service offering into an information service.[1033]

368. Citing language from a staff decision to the effect that adjunct-to-basic functions do not include functions that are "useful to end users, rather than carriers,"[1034] AT&T argues that DNS must fall outside of the telecommunications systems management exception because "Internet access providers use DNS functionality not merely (or even primarily) to 'manage' their networks more efficiently, but to make the Internet as a whole easily accessible and convenient *for their subscribers*."[1035] We disagree. The particular function at issue in the cited staff decision—the "storage and retrieval of information that emergency service personnel use to respond to E911 calls"—was not instrumental in placing calls or managing the communications network, but simply allowed certain telecommunications consumers (E911 answering centers and first responders) to identify the *physical location* of the distressed caller in order to render assistance, a benefit to be sure, but one unrelated to telecommunications.[1036] By contrast, DNS—like the speed dialing, call forwarding, and computer-provided directory assistance functions that already have been definitively classified as falling within the telecommunications systems management exception to section 3(24)— allows more efficient use of the telecommunications network by facilitating accurate and efficient routing from the end user to the receiving party.[1037]

369. AT&T's other arguments regarding DNS also fail. Contrary to its suggestion,[1038] the fact that the analogous speed dialing, call forwarding, and computer-provided directory assistance functions that the Commission has designated as falling within the telecommunications systems management exception were adjunct to "legacy telephone ('basic') services" rather than to "Internet-based services" provides no basis to discard the logic of that analysis in the broadband context. Nor are we persuaded by AT&T's observation that DNS systems provide additional "reverse look-up" functions (*i.e.*, converting a numeric IP address into a domain name) that are "analogous to (though far more sophisticated than) 'reverse directory assistance'" services that were deemed to be enhanced services in the legacy circuit-

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[1033] Consider also the role that telephone operators traditionally played in routing telephone calls. Traditional telephony required a telephone operator to route and place calls requested by the customer. We do not believe that anyone would argue that such arrangements would turn traditional telephone service into an information service.

[1034] *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2639, para. 18 (Com. Car. Bur. 1998) (*1998 272 Forbearance Order*).

[1035] AT&T Reply at 39-40 (emphasis in original).

[1036] *1998 272 Forbearance Order*, 13 FCC Rcd at 2638-39, para. 18 & n.70.

[1037] *See, e.g.*, Vimeo Reply at 10 ("DNS' analog equivalents—the old-time switchboard, live operator, directory assistance, or a phone book—never made Ma Bell an 'information service.'"); CDT Comments at 14. Notwithstanding the close resemblance between DNS and these features that the Commission previously has found to be within the telecommunications systems management exception, USTelecom contends that "DNS does not manage or control a telecommunications system or a telecommunications service." USTelecom Reply at 32. As with call forwarding, speed dialing, and computer-provided directory assistance, however, DNS manages the network in the sense of facilitating efficient routing and call completion. In any event, even if DNS were not viewed as facilitating network management, it clearly would fall within the exception as a capability used for the "operation of a telecommunications system." 47 U.S.C. § 153(24). Responding to assertions in one of the dissenting statements, (Pai Dissent at 36-37), we expressly find this rationale applies equally to other services that arguably serve the interests of subscribers, such as, for example, caching. While these services do provide a benefit to subscribers in the form of faster, more efficient service, they also serve to manage the network by facilitating efficient retrieval of requested information, reducing a broadband provider's costs in the provision of the service. In addition, caching and other services which provide a benefit to subscribers, like DNS, also serve as a capability used for the operation of a telecommunications system by enabling the efficient retrieval of information.

[1038] AT&T Reply at 38.

switched telephone service environment.[1039] Even assuming, *arguendo*, that such "reverse look-up" functions were analogous, we do not believe that the inclusion of such functionality would convert what was otherwise a telecommunications service into an information service. As the Supreme Court recognized, an entity may not avoid Title II regulation of its telecommunications service simply by packaging that service with an information service.[1040] As the Court explained, "a telephone company that packages voice mail with telephone service offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities provided by voice mail. For instance, when a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability."[1041] Likewise, we find that to the extent a DNS "reverse look-up" functionality is included with the offering of broadband Internet access service, the service itself—the transmission of data to and from all or substantially all Internet endpoints—is only trivially dependent on, if at all, the "reverse look-up" function cited by AT&T. We find that this analysis applies equally to the DNS "assist capabilities" cited by AT&T, in which the provider's DNS functionality may also be used occasionally to guess what a user meant when she mistyped an address.[1042]

370. Although we find that DNS falls within the telecommunications systems management exception, even if did not, DNS functionality is not so inextricably intertwined with broadband Internet access service so as to convert the entire service offering into an information service. First, the record indicates that "IP packet transfer does work just as well without DNS, but is simply less useful, just as a telephone system is less useful without a phone book."[1043] Indeed, "[t]here is little difference between DNS support offered by a broadband Internet access provider and the 411 directory service offered by many providers of telephone service. Both allow a user to discover how to reach another party, but no one argued that telephone companies were not providing a telecommunications service because they offered 411."[1044] Second, the factual assumption that DNS lookup necessarily is provided *by the broadband Internet access provider* is no longer true today, if it ever was. While most users rely on their broadband providers to provide DNS lookup,[1045] the record indicates that third-party-provided-DNS is now widely available,[1046] and the availability of the service from third parties cuts against a finding that

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[1039] *Id.* at 41.

[1040] *Brand X*, 545 U.S. at 997-98 (citing *Federal-State Joint board on Universal Service*, 13 FCC Rcd 11501, 11530, para. 60 (1998)).

[1041] *Brand X*, 545 U.S. at 998.

[1042] *See* AT&T Reply at 40-41. In the context of voice telephone service, the Commission has recognized that the availability of reverse directory capability does not transform that service from a telecommunications service into an information service. *See, e.g.*, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7294-96, paras. 11-17 (2006) (finding that the ability of callers to access functions such as a reverse directory service did not convert calling card services from telecommunications services into information services).

[1043] Cherry and Peha Dec. 22, 2014 *Ex Parte* at 6.

[1044] *Id.* at 7.

[1045] *See* AT&T Comments at 48; Comcast Comments at 58.

[1046] *See, e.g.*, AARP Comments at 11; CDT Comments at 14 ("DNS service, much like e-mail, web-hosting, and the other services discussed above, is available from third-party sources. Google Public DNS processes about 130 billion queries per day. OpenDNS likewise processes over 50 billion daily. Internet users are free to use the DNS provider of their choice, and switching between them does not require altering any aspect of the Internet access service itself. Users need only quickly update a single setting in their operating system's Internet preferences to point DNS requests to another server."); Kendall Koning Comments at 29; Public Knowledge Comments at 78. To be clear, we do not find that DNS is a telecommunications service (or part of one) when provided on a stand-alone basis by entities other than the provider of Internet access service. In such instances, there would be no telecommunications service to which DNS is adjunct, and the storage functions associated with stand-alone DNS

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Internet transmission and DNS are inextricably intertwined, whether or not they were at the time of the Commission's earlier classification decisions.[1047] In any event, the fact that DNS may be offered by a provider of broadband Internet access service does not affect our conclusion that the telecommunications is offered directly to the public.

371. Accordingly, we now reconsider our prior analysis and conclude for two reasons that the bundling of DNS by a provider of broadband Internet access service does not convert the broadband Internet access service offering into an integrated information service.[1048] This is both because DNS falls within the telecommunications systems management exception to the definition of information service and because, regardless of its classification, it does not affect the fundamental nature of broadband Internet access service as a distinct offering of telecommunications.

372. *Caching Falls Within the Telecommunications Systems Management Exception.* Opponents of revisiting the Commission's earlier classification decisions also point to caching as another feature of broadband Internet access service packages that the Commission relied upon to find such packages to be information services.[1049] In the *Cable Modem Declaratory Ruling*, the Commission described caching as "the storing of copies of content at locations in the network closer to subscribers than their original sources."[1050] While the Commission noted the caching function in the *Cable Modem Declaratory Ruling*, it did not rely on the caching function (as opposed to the DNS capability) as a basis for its classification determination.[1051] When offered as part of a broadband Internet access service, caching, like DNS, is simply used to facilitate the transmission of information so that users can access other services, in this case by enabling the user to obtain "more rapid retrieval of information" through the network.[1052] Thus, it falls easily within the telecommunications systems management exception to the

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would likely render it an information service. *See Petition for Declaratory Ruling that Pulver.Com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3315, para. 13 (2004) (when computer processing functions falling within the telecommunications systems management exception are offered on a stand-alone basis, they are not "transformed into telecommunications services").

[1047] *See* Cherry and Peha Dec. 22, 2014 *Ex Parte* at 7.

[1048] *See, e.g.*, CDT Comments at 15 (stating that "the services cited in the *Cable Modem Order* are all either wholly separable and available from third parties; so directed at routing and other critical network functionality as to be considered analogous to adjunct-to-basic services; or, in the case of DNS lookup, both"). We also observe that add-on services to DNS, such as DNS security extensions, do not convert BIAS into an information service. DNS security extensions provide authentication that the messages sent between DNS servers, and between a DNS server and a DNS client, are not altered. As such, DNS security extensions facilitate accurate DNS information, and, like DNS itself, are incidental to BIAS, and do not alter the fundamental character of BIAS. We accordingly disagree with the contrary interpretation of the role of DNS security extensions described in one of the dissenting statements. Pai Dissent at 35-37.

[1049] *See, e.g.*, Bright House Reply at 6-7; AT&T Reply at 54.

[1050] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4810 n.76.

[1051] *Compare Cable Modem Declaratory Ruling*, 17 FCC Rcd at 48909-10, para. 17 & n.76 (identifying caching as part of the Internet connectivity function) *with id.* at 4822, para. 38 (identifying other functionality—but not caching—as a basis for the ultimate information service classification). To the extent that *Brand X* can be read as reaching a different conclusion, we find the Court's characterization of "caching" as enabling "subscribers [to] reach third-party Web sites via the World Wide Web, and browse their contents, [only] because their service provider offers the capability for . . . acquiring, [storing] . . . retrieving [and] utilizing information" to be technically inaccurate. *See Brand X*, 545 U.S. at 999-1000 (internal quotations omitted).

[1052] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4810 n.76. Caching is akin to a "store and forward technology [used] in routing messages through the network as part of a basic service." *See Computer II Final Decision*, 77 FCC 2d at 421, para. 97 n.35 (emphasis omitted). *See, e.g.*, CDT Comments at 14 ("Caching, too,
(continued….)

information service definition. We observe that this caching function provided by broadband providers as part of a broadband Internet service, is distinct from third party caching services provided by parties other than the provider of Internet access service (including content delivery networks, such as Akamai), which are separate information services.[1053]

373. *Other Features Within the Telecommunications Systems Management Exception.* Opponents raise, as well, a variety of new network-oriented, security-related computer processing capabilities that are used to address broader threats to their broadband networks and customers, including the processing of Internet traffic to check for worms and viruses and features that block access to certain websites.[1054] They claim that, as with DNS, a consumer cannot utilize the service without also receiving many of these security mechanisms. Whether or not a consumer necessarily must utilize security-related blocking functions when using a provider's broadband Internet access service, we find that, like DNS and caching, such capabilities provide telecommunications systems management functions that do not transform what otherwise would be a telecommunications service into an information service. Some security functions, e.g., blocking denial of service attacks, fall within the telecommunications systems management exception because they are used exclusively for the management, control, or operation of the telecommunications system. Many such network security functions are analogs of outbound and inbound "call blocking" services, such as those blocking calls to 900 and 976 numbers and those blocking calls from telemarketers, that have always been considered adjunct-to-basic with respect to voice telephony.[1055] Other security functions—firewalls and parental controls, for example—either fall within the telecommunications systems management exception because they are used exclusively for management of the telecommunication service or are separable information services that are offered by providers other than providers of broadband Internet access service. Such security features simply filter out unwanted traffic, and do not alter the fundamental character of the underlying telecommunications service offered to

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meets the criteria for an adjunct-to-basic service that should not turn an otherwise telecommunications service into an information service. This function involves simply re-routing traffic to alternate copies of websites stored closer to the subscriber. Its purpose is to reduce network congestion and improve the perceived speed of users' connections. It does not alter the information or provide access to information other than that requested by subscribers. In short, it is simply a technical tool to speed network performance.").

[1053] Third party "content delivery networks" provide extensive caching services. *See* Akamai Comments at 3 (explaining that it deploys its technologies deep in the networks of last-mile broadband Internet providers and caches content locally, and stating that it has deployed approximately 150,000 servers in thousands of locations inside over 1,200 global networks located in over 650 cities and 92 countries); Akamai, *Facts & Figures*, http://www.akamai.com/html/about/facts_figures.html (last visited Jan. 2, 2015) ("Akamai delivers daily Web traffic reaching more than 15 Terabits per second.").

[1054] *See, e.g.*, AT&T Comments at 48-49 (explaining that it includes, as part of its residential broadband service, "security screening, spam protection, pop-up blockers, parental controls, email with virtually unlimited storage, instant messaging with enhanced voice communication, a streaming music service, access to programing content, on-the-go access to the entire national AT&T Wi-Fi Hot Spot network, and the att.net Toolbar for quick access back to a customer's homepage, email, search, games, videos, music, and AT&T support tools"); Comcast Comments at 57; Verizon Comments at 59-60; NCTA Comments at 34-35; TWC Comments at 12 (stating that TWC also provides "highly valued tools such as security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and file storage, and a customizable home page for each user"); T-Mobile Comments at 20 (arguing that the transition to LTE and, more generally, to IP-based mobile networks exposes mobile networks to new and rapidly evolving security threats, and that "[s]uch threats require the use of network intelligence and visibility into real-time traffic patterns to improve detection of malicious attacks and accidental traffic floods, as well as scalable, distributed, and automated security tools for discovery and remediation of problems. These tools tightly integrate processing and transmission functions"); CenturyLink Comments at 44-45; Charter Comments at 14-15; ACA Comments at 54-60; USTelecom Comments at 26-27; USTelecom Reply at 29.

[1055] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, para. 107 n.245.

users.[1056] All of these functions ensure that users can use other Internet applications and services without worrying about interference from third parties.

374. CTIA contends that the integration between transmission and processing that characterizes mobile broadband Internet access service requires that it be classified as an information service, and notes that such integration is essential "whether a user is browsing a website, engaged in mobile video conferencing, or undertaking any of the myriad other activities made possible by mobile broadband."[1057] We find that that, rather than transforming what otherwise would be a telecommunications service into an information service, the functions CTIA describes fall within the telecommunications management exception because they serve to facilitate the transmission of information and allow mobile subscribers to make use of other Internet applications and services. Other commenters contend that broadband providers' assignment of Internet Protocol (IP) addresses is also an information service that renders broadband Internet access service an information service.[1058] We disagree. IP address assignment is akin to telephone number assignment, making a user's computer locatable by other users on the network.[1059] Thus, this function serves to enable the transmission of information for the use of other services.[1060] The fact that the end user's equipment must periodically obtain an IP address from the broadband provider's server does not change the fundamental purpose of the service. It is analogous to adjunct-to-basic services that the Commission has held fall squarely within the telecommunications systems management exception.[1061]

375. Finally, Comcast asserts that "with the rise of IPv6 as the eventual replacement for IPv4 as the protocol for identifying and routing Internet content, Comcast and other [providers] also now provide the functionality necessary to transform an IPv4 address into an IPv6 address (and vice versa)," a "processing function" it claims is "part and parcel of broadband Internet access service."[1062] We conclude that, as with DNS functions, the IP conversion functionality is akin to traditional adjunct-to-basic services, which fall under the telecommunications systems management exception.[1063] As discussed above, such functions must be "incidental" to an underlying telecommunications service, and must not alter the fundamental character of the telecommunications service. We find that the conversion of IPv4 to IPv6 and vice versa does not alter the information being transmitted, but rather enables the transmission of the information, analogous to traditional voice telephone calls to toll free numbers, pay-per-call numbers, and ported telephone numbers that require a database query to translate the dialed telephone number into a different telephone number and/or to otherwise determine how to route the call properly.[1064] As with these traditional services, the inclusion of this functionality does not somehow convert the basic telecommunications service offering into an information service.

[1056] *See, e.g.*, CDT Comments at 14-15 ("Like caching, [network security, network monitoring, capacity management, and troubleshooting] are intended to preserve a fast, uncongested, working network. They are most often largely invisible to consumers, in the sense that most consumers are unaware of how they relate to their connection; rather, these activities are simply part and parcel of running a network. To the extent that security services are aimed at securing subscribers' computers and not the network itself, they are typically offered as optional services amid a sea of third-party anti-virus and anti-malware competitors.").

[1057] CTIA Reply at 49.

[1058] *See, e.g.*, TWC Comments at 12.

[1059] *See* Cherry and Peha Dec. 22, 2014 *Ex Parte* at 7.

[1060] *See, e.g.*, Independent Documentary Association Reply at 9; Cherry and Peha Dec. 22, 2014 *Ex Parte* at 7.

[1061] *See supra* note 1029.

[1062] Comcast Reply at 22 (internal quotation omitted); *see also* Verizon Comments at 60-61.

[1063] *See supra* note 1029.

[1064] *See supra* note 1032.

376. *Broadband Internet Access Service Is Not Inextricably Intertwined With Add-On Information Services.* Some commenters contend that broadband Internet access service must be a functionally integrated information service because it is offered in conjunction with information services, such as cloud-based storage services, email, and spam protection.[1065] We find that such services are not inextricably intertwined with broadband transmission service, but rather are a "product of the [provider's] marketing decision not to offer the two separately."[1066] The transmission service provided by broadband providers is functionally distinguishable from the Internet application add-ons they provide.[1067] Service providers cannot avoid the scope of Title II merely by bundling broadband Internet access service with information services. As the Supreme Court majority in *Brand X* recognized, citing the *Stevens Report*, "a company 'cannot escape Title II regulation'" of a telecommunications service "'simply by packaging that service with voice mail'" or similar information services.[1068]

377. We find that these services identified in the record—email, cloud-based storage, and spam protection—are separable information services. We conclude that e-mail accounts and cloud-based storage provided along with broadband Internet access services are akin to voicemail services offered along with traditional telephone service. As the Court found, "a telephone company that packages voice mail with telephone service offers a transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities provided by voicemail. . . . [W]hen a person makes a telephone call, his ability to convey and receive information using the call is only trivially affected by the additional voice-mail capability."[1069] Likewise, the broadband Internet access service that consumers purchase is only trivially affected, if at all, by the e-mail and cloud-based storage functionalities that broadband providers may offer with broadband Internet access service.[1070] Finally, security functions such as spam blocking are add-ons to separable information services such as email, and are themselves separable information services.

378. It is also notable that engineers view the Internet in terms of network "layers" that perform distinct functions.[1071] Each network layer provides services to the layer above it.[1072] Thus the

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[1065] *See, e.g.*, Verizon Comments at 59-60 (describing how it now integrates additional features into its broadband offerings, including "cloud-based services" and "caching servers and CDNs that store media content to enable consumers to access that content at faster speeds"); AT&T Comments at 48-49; TWC Comments at 12; NCTA Dec. 23, 2014 *Ex Parte* Letter at 10-11.

[1066] *See Brand X*, 545 U.S. at 1009, n.4 (Scalia, J., dissenting); *see also, e.g.*, Free Press Comments at 66-67; AARP Comments at 11; CDT Comments at 10; Cherry and Peha Dec. 22, 2014 *Ex Parte* at 6, 8.

[1067] *See, e.g.*, WGAW Reply at 33 ("While BIAPs sometimes bundle this telecommunications capability with true information services—such as email services, web-hosting, newsgroups, or anti-virus software—those services are not fundamental to the BIAS service itself. Consumers can and often do obtain those information services from third parties. But more importantly, the BIAS service's functionality would in no way be diminished if a provider failed to provide any of those services, and it is unclear that most subscribers would even notice their absence."); CDT Comments at 11; Free Press Comments at 66-67; AARP Comments at 11.

[1068] *Brand X*, 545 U.S. at 997-98 (quoting *Stevens Report*, 13 FCC Rcd at 11530, para. 60); *see also Independent Data Communications Manuf. Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, paras. 42, 44-45 (Com. Car. Bur. 1995) (rejecting the argument that AT&T's bundling of enhanced protocol conversion with basic frame relay service renders the whole service an enhanced service).

[1069] *Brand X*, 545 U.S. at 998.

[1070] *See supra* Section IV.C.2.

[1071] *See, e.g.*, Douglas Sicker & Joshua Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. Telecomm. & High Tech L. 69, 86-88 (2002); Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 Fed. Comm. L.J. 207 (2003).

[1072] *See, e.g.*, Andrew S. Tanenbaum & David J. Wetherall, Computer Networks, 29 (Prentice-Hall, 5th ed. 2011) ("The purpose of each layer is to offer certain services to the higher layers while shielding those layers from the

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lower layers, including those that provide transmission and routing of packets, do not rely on the services provided by the higher layers. In particular, the transmission of information of a user's choosing (which is a service offered by lower layers) does not depend on add-on information services such as cloud-based storage services, email, or spam protection (which are services offered at the application layer). Also, application layer services that fall within the telecommunications management exception (e.g., DNS, caching, or security services offered as part of broadband Internet access service) similarly do not depend on add-on information services. As such, add-on information services are separated from the functions, like DNS, that facilitate transmission, and are not "inextricably intertwined" with broadband Internet access services.

379. Other recent developments also show that consumers' use of today's Internet to access content and applications is not inextricably intertwined with the underlying transmission component. For instance, consumers are increasingly accessing content and applications on the Internet using Wi-Fi-only devices that take advantage of Wi-Fi hotspots not provided by the consumer's underlying broadband service provider.[1073] Similarly, consumers can sometimes use Wi-Fi-enabled smartphones not only to access the Internet via their service provider's mobile broadband network or Wi-Fi hotspots, but also using Wi-Fi hotspots offered by premises operators. Further, many consumers purchase content that can be accessed over any of a number of different transmission paths and devices over the Internet – for example, video over a fixed broadband connection to a flat-screen television, or over a Wi-Fi router connected to a fixed broadband connection to a tablet, or over a mobile broadband network to a smartphone.

380. In addition, countless third parties are now embedding electronics, software, sensors, and other forms of connectivity into a wide variety of everyday devices, such as wearables, appliances, thermostats, and parking meters that rely on Internet connectivity to provide value to the American consumer,[1074] including through mHealth, Smart Grid, connected education, and other initiatives.[1075] The growth of the Internet of Things is yet another clear indication that devices and services that consumers use with today's Internet are not inextricably intertwined with the underlying transmission component.

381. Finally, we observe that the Commission itself recognized in 2005 that the "link" between the transmission element of broadband Internet access service and the information service was not inextricable. Specifically, the 2005 *Wireline Broadband Classification Order* granted wireline broadband providers the option of offering the transmission component of broadband Internet access as a distinct common carrier service under Title II on a permissive basis,[1076] and a large number of rural carriers have exercised this option for nearly a decade.[1077] As NTCA explains, "[t]he fact that the Commission recognized as far back as 2005 that the transmission component *could* be separated out, and *the fact that it has been separated out* and offered separately on a tariffed basis by a large number of

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details of how the offered services are actually implemented. In a sense, each layer is a kind of virtual machine, offering certain services to the layer above it.").

[1073] *See, e.g.*, OTI Comments at 27-28.

[1074] *See, e.g.*, Consumer Reports, *What Is The Internet of Things, and Why Should You Care?* (Aug. 14,2014), http://www.consumerreports.org/cro/news/2014/08/what-is-the-internet-ofthings/index.htm (describing the Internet of Things and predicting its widespread adoption by consumers in the near future); Cisco, *The Zettabyte Era: Trends and Analysis* at 1 (June 10, 2014), http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/VNI_Hyperconnectivity_WP.html (describing the "tangible growth" of the next wave of the Internet in which people, processes, data, and things connect to the Internet and each other).

[1075] *See, e.g.*, GSMA Connected Life, *Understanding the Internet of Things* (July 2014) (discussing how the Internet of Things has the potential to improve energy efficiency, security, health, education and other aspects of daily life).

[1076] *See Wireline Broadband Classification Order*, 20 FCC Rcd at 14900-903, paras. 89-95.

[1077] *See* Free Press Comments at 46; Free Press Reply at 30; NTCA Comments at 9; NTCA Reply at 7-8.

carriers undercuts any argument" that the transmission service and the services that ride atop that service are inextricably intertwined.[1078] Further, the 2007 *Wireless Broadband Classification Order* permitted providers of mobile broadband Internet access service to offer the "transmission component [of wireless broadband Internet access service] as a telecommunications service.[1079]

d. Opponents' Remaining Challenges Are Insubstantial

382. Some commenters contend that our ruling is contrary to a Congressional intent for keeping the Internet unregulated.[1080] We are not, however, regulating the Internet, *per se*, or any Internet applications or content. Rather, our reclassification of broadband Internet access service involves only the transmission component of Internet access service. As the D.C. Circuit has explained, "Congress did not choose between" competing "market-based" and "common-carrier, equal access" philosophies for broadband regulation; rather, "the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband—a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic."[1081] We recognize that the Commission's previous classification decisions concluded that classifying broadband Internet access service as an information service would "establish a minimal regulatory environment" that would promote the Commission's goal of "ubiquitous availability of broadband to all Americans."[1082] We do not today abandon that goal but instead seek to promote it through a "light-touch" regulatory framework for broadband Internet access services under Title II. As noted earlier, there will be no rate regulation, no unbundling of last-mile facilities, no tariffing, and a carefully tailored application of only those Title II provisions found to directly further the public interest in an open Internet.[1083]

383. Several commenters argue that we should rely exclusively on industry self-regulation to promote the policies discussed above.[1084] While we applaud voluntary industry initiatives, we find the self-regulation option to be lacking in a number of respects. First, for the reasons discussed in our forbearance analysis in Section IV, we find that applying the few provisions in Title II necessary to implement the policy objectives identified above is in the public interest. We conclude that in the absence of credible Commission authority to step in when necessary in the public interest, voluntary measures will prove inadequate. Second, even the best-intentioned voluntary regulation initiatives are more likely to protect consumers when there is an expert agency that can provide a backstop to inadequate industry

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[1078] NTCA Reply at 8; *see also* NTCA Comments at 9-10.

[1079] *Wireless Broadband Classification Order*, 22 FCC Rcd at 5913, para. 32.

[1080] *See, e.g.*, USTelecom Reply at 25-26; Alcatel-Lucent Comments at 8; Free State Comments at 20 ("Congress did not intend for the Commission to subject broadband ISPs to Title II regulations. Nor did Congress intend for the Commission to use its forbearance authority as a loophole to evade Congress' intent to facilitate deregulatory approaches.").

[1081] *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009) (citing 47 U.S.C. § 1302).

[1082] *Wireline Broadband Classification Order*, 20 FCC Rcd at 14855, para. 1; *Wireless Broadband Classification Order*, 22 FCC Rcd at 5902, para. 2.

[1083] *See also infra* Section IV.C.5 (discussing the effects of our classification decision on investment and innovation in the Internet ecosystem).

[1084] *See, e.g.*, CenturyLink Comments at 72 (asserting that because of concerns about the Commission's legal authority in this area, the Commission should "consider seeking first to address issues via referrals to appropriate technical advisory groups"); Roslyn Layton Comments at 18-19 (asserting that the Commission should eschew new rules and pursue a multi-stakeholder governance model backed by the FTC's antitrust authority); Bright House Comments at 26-27; Comcast Comments at 70; Verizon Comments at 17; Telefonica Internacional USA Comments at 6; TechFreedom & ICLE Legal Comments at 99-100.

action that may result from collective action or coordination problems beyond any single firm's control.[1085]

384. Other commenters argue that classifying broadband Internet access service as a telecommunications service would impermissibly compel providers of broadband Internet access service to operate as common carriers.[1086] This argument misconstrues the nature of our ruling. Our decision to classify broadband Internet access service as a telecommunications service subject to the requirements of Title II derives from the characteristics of this service as it exists and is offered today. We do not "require" that any service "be offered on a common carriage basis,"[1087] but rather identify an existing service that is appropriately offered on a common carriage basis "by virtue of its functions,"[1088] as explained in detail above. Our classification decision is easily distinguished from the rules struck down in *Midwest Video II*, as those rules impermissibly attached common carrier obligations to services the Commission plainly lacked statutory authority to regulate in this manner.[1089] Congress has not spoken directly to the regulatory treatment of broadband Internet access services. Our classification of these services as telecommunications services is a permissible exercise of our delegated authority, one which we have adequately justified and defended based on the record before us. Because we have appropriately classified these services as telecommunications services, we do not run afoul of the Act's provision that a "telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."[1090] We thus reject the argument that our ruling impermissibly compels common carriage.

385. Commenters also argue that the classification of broadband Internet access service as a telecommunications service results in this service being classified as both a telecommunications service and an information service, in violation of Congressional intent.[1091] We agree with commenters that these are best construed as mutually exclusive categories, and our classification ruling appropriately keeps them distinct. In classifying broadband Internet access service as a telecommunications service, we conclude that this service is not a functionally integrated information service consisting of a telecommunications component "inextricably intertwined" with information service components. Rather, we conclude, for the reasons explained above, that broadband Internet access service as it is offered and provided today is a distinct offering of telecommunications and that it is not an information service. As further explained above, any functional integration of DNS or caching with broadband Internet access service does not disrupt this classification, as both of those functions fall within the "telecommunications systems management exception" to the definition of an information service.[1092] Nor does the mere "packaging" of information services such as email with broadband Internet access service convert the latter into an information service.[1093] Our classification of broadband Internet access service therefore does not create any definitional inconsistency.

[1085] *See, e.g.*, Mark Cooper/CFA Comments at 3 (arguing that it is "a mistake to believe that [multi-stakeholder, self-regulatory institutions] would have succeeded without the strong action of the FCC to create and preserve the space of freedom for entrepreneurial experimentation").

[1086] *See* Verizon Title II White Paper at 1-5; NCTA Dec. 23, 2014 *Ex Parte* Letter at 11-12; Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127 (filed Feb. 2, 2015).

[1087] Verizon Title II White Paper at 4.

[1088] *See NARUC I*, 525 F.2d at 644.

[1089] *FCC v. Midwest Video Corp*., 440 U.S. 689, 705 (1979) (*Midwest Video II*); *see also Verizon*, 740 F.3d at 651-52 (discussing *Midwest Video II*).

[1090] 47 U.S.C. § 153(51).

[1091] *See* AT&T Comments at 41-44; CenturyLink Comments at 41; Verizon Comments at 61-62.

[1092] *See supra* paras. 366-372.

[1093] *See supra* paras. 376-378; *see also Brand X*, 545 U.S. at 997-98.

386. We also reject the argument[1094] that the classification of broadband Internet access service as an information service is implicit in the definition of "interactive computer service" set forth in section 230 of the Communications Act, a provision focused on the blocking and screening of offensive material.[1095] We find it unlikely that Congress would attempt to settle the regulatory status of broadband Internet access services in such an oblique and indirect manner, especially given the opportunity to do so when it adopted the Telecommunications Act of 1996.[1096] At any rate, the definition does not expressly classify broadband Internet access service, as we define that term herein, as an information service.[1097] We therefore find no basis in section 230 for reconsidering our judgment that this service is properly understood to be a telecommunications service, for the reasons explained above.

387. Finally, we disagree with the suggestion that our decision to "reclassify, to forbear, and to adopt rules grounded in Title II" is not a "logical outgrowth" of the *2014 Open Internet NPRM*.[1098] The approach we adopt today is *more* than a logical outgrowth of the NPRM; it is one that the NPRM *expressly identified* as an alternative course of action.[1099] It is one on which the Commission sought comment in almost every section of the NPRM.[1100] It is one that several broadband Internet access service providers vigorously opposed in their comments in light of their own reading of the NPRM.[1101]

[1094] *See* Pai Dissent at 32.

[1095] 47 U.S.C. § 230(f). (Defining the term to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . ."); *see also id*. § (a)(2) (referring to "the Internet and other interactive computer services").

[1096] *See* Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56, §509.

[1097] For one thing, the phrase "any information service, system or access software provider", *see id*. § (f), may be broader in scope than the term "information service" as defined in section 3 of Act. To read the text otherwise would suggest that Congress intended the liability protections of section 230 to apply narrowly, excluding, for example, local exchange carriers that offered DSL, which as noted above was classified as a telecommunications service until 2005. *See supra* para. 39.

[1098] Pai Dissent at 19.

[1099] *See* Pai Dissent at 20-21 (quoting *2014 Open Internet NPRM,* 29 FCC Rcd at 5613-14, paras. 149-50).

[1100] Thus, at the very outset, in addition to "the [section 706] blueprint offered by the D.C. Circuit" on which the dissent now seeks to focus, Pai Dissent at 16-19, the Commission made clear that in looking for the "best approach to protecting and promoting Internet openness," it "will seriously consider the use of Title II," "seeks comment on the benefits of both . . ., including the benefits of one approach over the other," and "emphasize[s] . . . that the Commission recognizes that both section 706 and Title II are viable solutions and seek[s] comment on their potential use." *See, e.g., NPRM,* 29 FCC Rcd at 5563, para. 4. *See also id.* at 5593, 5595-96, paras. 89, 96 (seeking comment on whether to adopt a no-blocking rule "that does not allow for priority agreements with edge providers" and how to do so consistent, *inter alia,* with Title II), *id.* at 5600, para. 112 (seeking comment on alternative to standard of commercial reasonableness), *id.* at 5604, para. 121 (seeking comment on unreasonable discrimination standard, including application of sections 201 and 202), *id.* at 5612-16, paras. 148-155 (specific questions about applicability of Title II and forbearance approaches, including forbearance as to specific Title II provisions). The *NPRM* in this proceeding is thus nothing like the *NPRM* that was at issue in *Prometheus*. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 445-46, 450-51 (3rd Cir. 2011). We also note that, under the APA, notice-and-comment rulemaking requirements apply only to the extent that we herein adopt legislative rules. 5 U.S.C. §§ 553(b)(A), 553(d)(2).

[1101] *See e.g.*, AT&T Comments at 39-72; Bright House Comments at 20-29; CenturyLink Comments at 36-51; Charter Comments at 13-21; Comcast Comments at 42-67; Cox Comments at 30-31; Frontier Communications Comments at 2-4; Time Warner Comments at 9-23; T-Mobile Comments at 18-24; Verizon Comments at 46-69. And parties on the other side of the issue just as vigorously argued in support of our approach in their comments. *See, e.g.*, Ad Hoc Comments at 2-7; CDT Comments at 8-16; Cogent Comments at 9-12; Common Cause Comments at 13-16; Consumers Union Comments at 10; EFF Comments at 13-17; Etsy Comments at 9; Free Press Comments at 54-90; New America Foundation Comments at 22-27; Public Knowledge Comments at 60-104; WGAW Comments at 28-31. Dissents to the NPRM likewise reflect that this approach was on the table. *See 2014*

(continued….)

4. Mobile Broadband Internet Access Service is Commercial Mobile Service

388. As outlined above, we conclude that broadband Internet access service, whether provided by fixed or mobile providers, is a telecommunications service. We also find that mobile broadband Internet access service is a commercial mobile service. In any event, however, even if that service falls outside the definition of "commercial mobile service," we find that it is the functional equivalent of a commercial mobile service and, thus, not a private mobile service.

389. Congress adopted the commercial mobile service provisions in the Act with the goal of creating regulatory symmetry among similar mobile services.[1102] Section 332(d)(1) of the Communications Act defines "commercial mobile service" as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."[1103] We find that mobile broadband Internet access service meets this definition. First, we find that mobile broadband Internet access service is a "mobile service"[1104] because subscribers access the service through their mobile devices. Next, we find that mobile broadband Internet access service is provided "for profit" because service providers offer it to subscribers with the intent of receiving compensation.[1105] We also conclude the mobile broadband Internet access services are widely available to the public, without restriction on who may receive them.[1106]

390. Finally, we conclude that mobile broadband Internet access service is an interconnected service. Section 332(d)(2) states that the term "interconnected service" means "service that is interconnected with the public switched network (as such terms are defined by regulation by the

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Open Internet NPRM, 29 FCC Rcd at 5653-55 (dissenting Statement of Commissioner Pai) (recognizing "[i]t's not news that people of good faith disagree" on the right approach, stating that "[s]ome would like to regulate broadband providers as utilities under Title II," and discussing the scope of Title II's "unjust or unreasonable discrimination" requirement, the consequences of reclassification under Title II, and the alleged regulatory uncertainties posed under either section 706 "or Title II").

[1102] *Second Report and Order Implementing Sections 3(n) and 332 of the Communications Act, as Amended by Section 6002(b) of the Omnibus Reconciliation Act of 1993*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1413, para. 2 (1994) (*Second CMRS Report and Order*). In describing the background against which Congress enacted the Omnibus Budget and Reconciliation Act of 1993, the Commission noted that it had traditionally classified mobile services into the categories of public mobile services subject to common carrier regulation and private land mobile services, such as taxi dispatch services, developed to provide service tailored to the needs of particular groups, and not subject to common carrier regulation. *Id*. at 1414, paras. 3-4. The Commission noted that the series of its decisions in this context created the prospect of direct competition between private land mobile services and similar common carrier services under disparate regulatory regimes, for example, by permitting the predecessor of Nextel to develop an SMR system "comparable or superior to cellular in quality." *Id*. at 1415, para. 7. The Commission noted that, in revising Section 332, Congress "replaced traditional regulation of mobile service with an approach that brings all mobile service providers under a comprehensive, consistent, regulatory framework." *Id*. at 1417, para. 12.

[1103] 47 U.S.C. § 332(d)(1).

[1104] "Mobile service" is defined under the Commission's rules to mean "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves . . . ." 47 C.F.R. § 20.3.

[1105] The *Second CMRS Report and Order* defined the statutory phrase "for profit" to include: "any mobile service that is provided with the intent of receiving compensation or monetary gain." *See Second CMRS Report and Order*, 9 FCC Rcd at 1427, para. 43.

[1106] In the *Second CMRS Report and Order*, the Commission determined that a service is available "to the public" if it is "offered to the public without restriction in who may receive it." *Id*. at 1439, para. 65.

Commission) . . . ."[1107] The Commission has defined "interconnected service" as a service "that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network."[1108] The Commission has defined the term "public switched network" to mean "[a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan in connection with the provision of switched services."[1109]

391. While mobile broadband Internet access service does not use the North American Numbering Plan, we conclude for the reasons set out below that we should update our definition of public switched network pursuant to the authority granted to the Commission in section 332 so that our definition reflects the current network landscape rather than that existing more than 20 years ago. In its Order defining the terms "interconnected" and "public switched network" the Commission concluded that the term "public switched network" should not be defined in a static way, recognizing that the network is continuously growing and changing because of new technology and increasing demand.[1110] The purpose of the public switched network, the Commission noted, is "to allow the public to send or receive messages to or from anywhere in the nation."[1111] This quality of "ubiquitous access,"[1112] for which the NANP was viewed as a proxy in 1994, was consistent with the key distinction underlying the formulation of the CMRS definition by Congress—differentiating the emerging cellular-based technology for "commercial" SMR service being deployed by Nextel's predecessor as a mass market service from the traditional "private" SMR dispatch services employed by taxi services and other private fleets.[1113] Today, consistent with our authority under the Act,[1114] and with the Commission's previous recognition that the "public switched network" will grow and change over time, we update the definition of public switched network to reflect current technology. Specifically, we revise the definition of "public switched network" to mean "the network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use[s] the North American Numbering Plan, or public IP addresses,[1115] in connection with the provision of switched services." This definition reflects the emergence and growth of packet switched Internet Protocol-based networks. Revising the definition of public switched network to include networks that use standardized addressing identifiers other than NANP numbers for routing of packets recognizes that today's broadband Internet access networks use their own unique addressing identifier, IP addresses, to give users a

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[1107] 47 U.S.C. § 332(d)(2). The commercial mobile service provisions of the Act are implemented under section 20.3 of the Commission's rules, which employs the term "commercial mobile radio service" (CMRS).

[1108] 47 C.F.R. § 20.3.

[1109] *Id.*

[1110] *Second CMRS Report and Order*, 9 FCC Rcd at 1436, para. 59; *see also* Letter from Michael Calabrese, Dir. Wireless Future Project, New America Open Technology Institute, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 8 (filed Jan. 27, 2015) (OTI Jan. 27, 2015 *Ex Parte* Letter) (arguing that "today there is no networked service more open, interconnected and universally offered than broadband Internet access service, whether fixed or mobile").

[1111] *Second CMRS Report and Order*, 9 FCC Rcd at 1436, para. 59.

[1112] *Id.* at 1437, para. 60.

[1113] *See id.* at 1413-17, paras. 1-10.

[1114] Section 332(d)(2) of the Communications Act states that "the term 'interconnected service' means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) . . . ." 47 U.S.C. §332(d)(2).

[1115] Public IP addresses are globally routable unicast IP addresses. *See* Internet Engineering Task Force, The Internet Numbers Registry System, RFC 7020 (Aug. 2013), https://tools.ietf.org/html/rfc7020 (discussing non-reserved globally unique unicast IP addresses assigned through the Internet Numbers Registry System).

universally recognized format for sending and receiving messages across the country and worldwide.[1116] We find that mobile broadband Internet access service is interconnected with the "public switched network" as we define it today and is therefore an interconnected service.[1117]

392. Some commenters contend that the Commission is barred from taking any actions that would change the definition of "public switched network." CTIA, for example, argues that a revision to the definition of "public switched network" is "beyond the scope of this rulemaking" because the *2014 Open Internet NPRM* "only asks whether mobile broadband falls within the definition of CMRS and does not propose any changes to the well-established definitions in section 20.3 of the FCC's rules."[1118] AT&T similarly argues that the Commission has not provided sufficient public notice.[1119] CTIA also argues that, even if there were notice, the Commission could not interpret the definition of "public switched network" to include the Internet, stating that "[w]hile Section 332 directs the Commission to define 'public switched network' by regulation, that definition must be consistent with the statutory text and congressional intent. Here, whatever limited discretion the Commission has as to that definition, it cannot be interpreted broadly enough to cover the broadband Internet."[1120] Verizon agrees that the *NPRM* did not provide notice that the Commission might change its regulations or their interpretation. In addition, Verizon argues that, although the Commission is statutorily authorized to define "public switched network," the definition must still be consistent with the statutory text and congressional intent. Accordingly, Verizon contends, "no matter how the Commission may redefine the 'public switched network' any new definition still would need to be anchored to the public switched telephone networks, which is what Section 332 was designed to address."[1121]

393. Contrary to these arguments, we find that revising the definition of "public switched network" and classifying mobile broadband Internet access service as a commercial mobile service is a logical outgrowth of the proposals in the *2014 Open Internet NPRM*.[1122] As discussed above, in the *NPRM*, the Commission proposed relying on section 706 of the Telecommunications Act of 1996 for legal authority to adopt rules to protect the open Internet but indicated that it would also seriously consider the use of Title II of the Communications Act as a basis for legal authority.[1123] The Commission sought comment on whether, in the event that it decided to reclassify broadband Internet access service under Title II, mobile broadband Internet access service would fit within the definition of "commercial mobile service" under section 332 of the Act and the Commission's rules implementing that section.[1124]

[1116] This definitional change to our regulations in no way asserts Commission jurisdiction over the assignment or management of IP addressing by the Internet Numbers Registry System.

[1117] As discussed further below, we also find that mobile broadband is an interconnected service because it gives its users the capability to send and receive communications from all other users of the Internet.

[1118] CTIA Reply at 44-45; *see also* CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach at 5-9; Letter from Scott K. Bergmann, Vice Pres. Reg. Affairs, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 14 (filed Feb. 10, 2015) (CTIA Feb. 10, 2015 *Ex Parte* Letter).

[1119] Letter from Gary L. Phillips, General Attorney & Assoc. Gen. Counsel, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Jan. 8, 2015) (AT&T Jan. 8, 2015 *Ex Parte* Letter).

[1120] CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 7.

[1121] Verizon Title II White Paper at 15; *id.* at 13-15; *see also* Letter from William H Johnson, Vice Pres. & Assoc. Gen. Counsel, Verizon to Marlene H Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2-3 (filed Dec. 24, 2014) (Verizon Dec. 24, 2014 *Ex Parte* Letter).

[1122] *See Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005) (the rule ultimately adopted may be a "logical outgrowth" of the original proposal).

[1123] *2014 Open Internet NPRM*, 29 FCC Rcd at 5563, para. 4.

[1124] *Id.* at 5614, para. 150.

In addition, the *NPRM* noted that the Commission's *Broadband Classification NOI* also asked whether the Commission should revisit its classification of wireless broadband Internet access services, noted that the NOI docket "remains open," and directed that the record be refreshed in that proceeding "including the inquiries contained herein."[1125] In the *Broadband Classification NOI*, the Commission sought comment on "legal issues specific to . . . wireless services that bear on their appropriate classification."[1126] More specifically, it asked "which of the three legal frameworks" described therein (which included a Title II approach) "would best support the Commission's policy goals for wireless broadband."[1127] In particular, it asked "[t]o what extent should section 332 of the Act affect our classification of wireless broadband Internet services?"[1128] In the *2014 Open Internet NPRM*, the Commission also noted that section 332 requires that wireless services that meet the definition of commercial mobile services be regulated as common carriers under Title II.[1129] The *NPRM* also asked about the extent to which forbearance should apply, if the Commission were to classify mobile broadband Internet access service as a CMRS service subject to Title II, and noted that the *Broadband Classification NOI* also asked whether the Commission could and should apply section 332(c)(1) as well as section 10 in its forbearance analysis for mobile services.[1130] The *2014 Open Internet NPRM* also sought comment on defining mobile broadband Internet access service and on application of Internet openness requirements to mobile broadband services.[1131]

394. We find that our decision today to classify mobile broadband Internet access service as both a telecommunications service under Title II and CMRS is a logical outgrowth of these discussions and requests for comments. The discussion and questions posed in the *2014 Open Internet NPRM* gave clear notice that the Commission was considering whether to reclassify mobile broadband Internet access under Title II as a telecommunications service and whether mobile broadband Internet access service would fit within the definition of "commercial mobile service" under the Act and the Commission's rules, including whether mobile broadband would meet the "interconnected service" component of the commercial mobile service definition. It was "reasonably foreseeable"[1132] that in answering that question the Commission would explore the scope of that component of the definition. Stated another way, "interested parties should have anticipated that the change [in that definition] was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[1133] While we think this proposition is clear from the questions posed by the *2014 Open Internet NPRM*, we further note that in this case mobile broadband providers "themselves had no problem understanding the scope of the issues up for consideration; several . . . submitted comments" on the issue.[1134] And, other

[1125] *Id*. at 5613, para. 149 n.302. *See also* 79 Fed. Reg. 37448-01, 37468 (2014); *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access Service*, GN Docket No. 10-127, Public Notice, 29 FCC Rcd 5856 (Wireline Comp. Bur. 2014).

[1126] *Broadband Classification NOI*, 25 FCC Rcd at 7867, para. 2.

[1127] *Id*. at 7908, para. 102.

[1128] *Id*. at 7909, para. 104.

[1129] *2014 Open Internet NPRM*, 29 FCC Rcd at 5613-14, para. 149.

[1130] *Id.* at 5616, para. 155.

[1131] *Id.* at 5583-84, 5598, paras. 62, 105.

[1132] *Long Island Care at Home, Ltc. v. Coke*, 551 U.S. 158, 175 (2007).

[1133] *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

[1134] *National Ass'n of Mfrs. v. EPA*, 750 F.3d 921, 926 (D.C. Cir. 2014); *see also In re Polar Bear Endangered Species Act Listing*, 720 F.3d 354, 363 (D.C. Cir. 2013) ("Indeed, the [appellant] seems to have understood this [effect of the proposal]: it submitted comments" on the issue); CTIA Reply at 44 (arguing that the Commission "cannot upend the statutory scheme simply by 'updating' the definition of CMRS to determine that the use of IP addresses renders an offering 'interconnected,' as Vonage contends"); Verizon Title II White Paper at 15 (arguing

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parties commented that the Commission should update its definition of the term "public switched network."[1135] Moreover, as referenced above, evidence in the record shows that a number of parties have directly addressed the application of section 332(d) and the Commission's implementing rules to mobile broadband Internet access and thus have been aware that the Commission was considering taking action to update the definition of "public switched network" and reclassify mobile broadband Internet access as commercial mobile service.[1136]

395. We also disagree with arguments that we are barred from updating the definition of public switched network to include networks that use addressing identifiers beyond NANP numbers associated with traditional telephone networks. CTIA, Verizon, and AT&T argue that the history of the legislation that defined "commercial mobile service" indicates that Congress intended the term "public switched network" to mean the "public switched *telephone* network." CTIA, for example, argues that when Congress used the term "public switched network" in 1993, "it did so knowing that the Commission and the courts routinely used that term interchangeably with 'public switched telephone network'" and that "[i]t is axiomatic that, when Congress 'borrows' a term of art that has been given meaning by the courts or the relevant agency, it 'intended [that term] to have its established meaning.'"[1137] It argues also that "the Conference Report accompanying the legislation confirms that, although Congress used the term 'public switched network,' it viewed that term as synonymous with 'the [p]ublic switched telephone network.'"[1138] AT&T notes that Congress "used the term 'the public switched network'" and that "Congress's use of the definite article 'the' and the singular 'network' makes clear that it was referring to a single 'public switched network'"[1139] The parties also argue that the text of the FirstNet public safety legislation supports their argument because it distinguishes between the "public switched network" and the "public Internet.[1140] AT&T contends also that the text of section 230 supports its views.[1141]

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that "no matter how the Commission may redefine the 'public switched network,' any new definition still would need to be anchored to public switched phone networks, which is what Section 332 was designed to address").

[1135] Vonage Comments at 41-44; *see also* Letter from Joshua M. Bobeck, Counsel to Vonage Holdings Group to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Jan. 15, 2015) (noting that the Commission "plainly put interested parties on notice that it was considering rules based in Title II and that it would explore alternative construction of the statutory terms applicable to mobile broadband under section 332"); Letter from Michael Calabrese, Dir., Wireless Future Project, New America, Open Technology Institute to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 5 (filed Nov. 10, 2014) (arguing that "since the statute does not limit the definition of 'public switched network' to one that uses the NANP, an update could add to the rather self-evident notion that in 2014, (unlike 1993) the Internet and its IP addressing system is now the predominant network").

[1136] *See, e.g.*, CTIA Reply at 44-45; CTIA Dec. 22, 2014 *Ex Parte* Letter; CTIA Feb. 10, 2015 *Ex Parte* Letter; Verizon Title II White Paper at 13-15; AT&T Feb. 2, 2015 *Ex Parte* Letter; Letter from Jonathan Spalter, Chairman, Allison Remsen, Exec. Director, Rachael Bender, Policy Director, Mobile Future to Marlene H. Dortch, Secretary, FCC, GN Dockets 14-28, 10-127(filed Dec. 5, 2015); Letter from Matt Wood, Policy Director, Free Press to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Dec. 17, 2014); Letter from Michael Calabrese, Dir, Wireless Future Project, Open Technology Institute, New America Foundation, Erik Stallman, Dir., Open Internet Project, Center for Democracy and Technology, and Harold Feld, Sen. Vice Pres. Public Knowledge, to Marlene H. Dortch, Secretary, FCC GN Docket Nos. 14-28, 10-127 (filed Dec. 11, 2014) (New America, CDT, PK, Dec. 11, 2014 *Ex Parte* Letter).

[1137] CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 7-8.

[1138] CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 8-9; CTIA Feb. 10, 2015 *Ex Parte* Letter at 15 (arguing that Congress demonstrated that "it viewed the terms as interchangeable by describing the legislation as requiring interconnection with the 'public switched telephone network' in the Conference Report"); *see also* AT&T Feb. 2, 2015 *Ex Parte* Letter at 1.

[1139] AT&T Feb. 2, 2015 *Ex Parte* Letter at 2; *see also* CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 8.

[1140] CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 8; Verizon Dec. 24, 2014 *Ex Parte* Letter at 2.

396. We agree with other commenters that these arguments do not give sufficient weight to Congressional intent as reflected in the text of the statute itself.[1142] As noted above, section 332(d)(2) of the Act uses the term "public switched network" rather than "public switched telephone network." Moreover, as CTIA, Verizon, and AT&T acknowledge, the statute expressly delegates authority to the Commission to define the term "public switched network." While we agree with CTIA that the delegation of authority does not provide boundless discretion,[1143] we find that what is clear from the statutory language is not what the definition of "public switched network" was intended to cover but rather that Congress expected the notion to evolve and therefore charged the Commission with the continuing obligation to define it. In short, by defining such terms by reference to the way they "are defined by regulation by the Commission," Congress expressly delegated this policy judgment to the Commission.[1144] As noted above, in defining the terms "interconnected service" and "public switched network," the Commission concluded that the term "public switched network" should not be defined in a static way and recognized that the network is continuously growing and changing because of new technology and increasing demand. The Commission expressly rejected calls in 1994 to define the public switched network as the "public switched telephone network" finding that a broader definition was consistent with Congress's decision to use the term "public switched network," rather "than the more technologically based term 'public switched telephone network.'"[1145] Today, we build upon this analysis

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[1141] *See* 47 U.S.C. §230(b)(2); AT&T Feb. 2, 2015 *Ex Parte* Letter at 2-3.

[1142] *See, e.g.*, Letter from Harold Feld, Senior Vice Pres., Public Knowledge to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 1 (filed Jan. 15, 2015) (arguing that "[i]f the term 'public switched network' was so well understood, why did Congress explicitly require that the *Commission* define it") (emphasis in original); OTI Jan. 27, 2015 *Ex Parte* Letter at 5 (arguing that "Congress could have referred specifically to the 'telephone' network (or at least used the word 'telephone') if it intended to strictly limit the future services that the Commission might designate as CMRS-but instead it cast the provision more broadly").

[1143] *See* CTIA Feb. 10, 2015 *Ex Parte* Letter at 15.

[1144] Thus, the question here is not one of interpreting certain terms used by Congress as one of the dissents states (Pai Dissent at 45-51), but rather of the exercise of the discretion explicitly granted by Congress to the Commission to define these terms.

[1145] *Second CMRS Report and Order*, 9 FCC Rcd at 1436, para. 59. Contrary to one of the dissenting statements, (Pai Dissent at 46-47 & n.337), the Commission made clear it was not limiting the term "public switched network" to the traditional network. First, as noted above, it rejected that view in favor of the position of other commenters that "the network should not be defined in a static way," an interpretation it found more consistent with the determination by Congress not to employ the term "public switched telephone network." Second, it stated that any switched common carrier service that is interconnected with the traditional local or interexchange switched network would be defined "as part of" the public switched network "for purposes of our definition," *id.* at 1436-37. Even as early as 1994, the comments on which the Commission relied for its definition, *id.* at 1437, para. 60, made this very point. Comments of Nextel Communications, Inc. at 11 ("In the not-too-distant future, telephony will consist of 'networks of networks' linking together landline, fiber, wireless, microwave and satellite systems," so that the definition should include "any services – whether landline or wireless – offered on a co-carrier basis to enhance or extend the reach and functionalities of traditional local exchange or interexchange facilities"); Comments of Pacific Bell and Nevada Bell at 5 (current definition is "a vestige of telecommunications history" and "needs to be revised," given "revolution" in the industry in which "new providers and new services appear almost weekly" that are interconnected with the traditional PSN and "are substitutes for components of the PSN"). Comments of other wireless providers, with whom the Commission agreed about avoiding "a static way" of defining the network, *id.* at 1436, para. 59, made the same point. *See, e.g.,* Comments of Bell Atlantic Cos. at 6, 9 & n.9 (citing Commission's "poor experience" in trying to apply definitions, arguing that "[b]road definitions are essential," emphasizing that the Commission "cannot anticipate all such [new PCS] technologies . . . interfacing with the network," and urging it to "discard the use of the anachronistic term 'public switched telephone network' ('PSTN')"); Comments of NYNEX Corp. at 8-9 (definition should not include "only the traditional LEC-provided public switched telephone network ('PSTN')," so as to "reflect today's competitive environment for wireless services" and the "quickly and constantly evolving concept" of the network, in which cable, cellular, and PCS systems and other services could, "for millions of people, make access to the 'old PSTN' unnecessary").

and update our definition of "public switched network" to reflect changes in technology. Reflecting the foregoing changes in technology and telecommunications infrastructure, our definition contemplates a single network comprised of all users of public IP addresses and NANP numbers, and not two separate networks as AT&T argues.[1146] We find that this action is consistent both with the text of the statute and Congressional intent.[1147]

397. We recognize that, in the 2007 *Wireless Broadband Classification Order*, the Commission previously concluded that section 332 —"as implemented by the Commission's CMRS rules"— did not contemplate wireless broadband Internet access service "as provided today,"[1148] citing the *Second CMRS Report and Order*'s finding that "'commercial mobile service' must still be interconnected with the local exchange or interexchange switched network as it evolves."[1149] The Commission also found that mobile broadband Internet access was not an "interconnected service" based on its reading of the Commission's existing rule, because the service did not provide its users with the capability to reach all other users of the public switched network.[1150] In addition, in 2011, in its order adopting data roaming requirements, the Commission defined services subject to the data roaming rule as services that are not interconnected with the public switched network.[1151] However, the 2007 *Wireless Broadband Classification Order* (on which the 2011 *Data Roaming Order* also relied[1152]) was premised both on its view of the service "as provided today"[1153] and on "an internal contradiction"[1154] that a finding that

[1146] *See* AT&T Feb. 2, 2015 *Ex Parte* Letter at 2; *see also* CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 8.

[1147] We are not persuaded by AT&T's arguments that rely, not on the foregoing language or purpose of the 1993 statute at issue, but on subsequent statutes enacted for different purposes in 1996 and 2012. *See, e.g.*, *Gutierrez v. Ada,* 528 U.S. 250, 257-58 (2000). Quite apart from canons of statutory construction, this argument disregards the signal difference in Section 332(d), which delegates the question of the scope of its terms to the Commission in light of its experience and market developments over time. We note, however, that AT&T's reliance on the "policy" of the 1996 Act reflected in Section 230 is similar to one that Verizon made but that was not found by the *Verizon* court to be a bar to its conclusion that "section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers." *Verizon*, 740 F.3d at 649; *see* Verizon Br. At 23, 27-28, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. filed Jan. 18, 2013).

[1148] *Wireless Broadband Classification Order*, 22 FCC Rcd at 5918, para. 45, n.119.

[1149] *Id*.

[1150] *Id.* at 5917-18, para. 45.

[1151] The Commission defined "commercial mobile data service" which is subject to the data roaming rule as "any mobile data service that is not interconnected with the public switched network." *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411, 5412, para. 1 n.1 (2011) (*Data Roaming Order*). We note that if a mobile service is not interconnected to the public switched network (as updated herein) and otherwise meets the definition of "commercial mobile data service" in section 20.3 of the Commission's rules, it will continue to be subject to the data roaming rules. *See* 47 C.F.R. §§ 20.3, 20.12(e); *see also infra* Section V.C.2.i (discussing applicability of roaming requirements to mobile broadband Internet access services). Opponents of reclassifying mobile broadband Internet access services have argued that the D.C. Circuit's decisions on data roaming and on the *2010 Open Internet Order* bar the Commission from reclassifying mobile broadband Internet access as commercial mobile service. *See* CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 4-5 (citing the court's finding that mobile broadband services were "statutorily immune, perhaps twice over," from common carrier treatment (citing *Cellco P'ship v FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012)). First, we note that the issue of revising the Commission's definitions was neither raised nor discussed in the data roaming or open Internet decisions. Moreover, contrary to these arguments, we find that the Court's acceptance of the Commission's previous decisions based on its existing definitions does not preclude the Commission from revisiting and revising its definitions, as expressly permitted by the language of Section 332. *See Brand X*, 545 U.S. at 981 (finding that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework").

[1152] *See Data Roaming Order*, 26 FCC Rcd at 5414, para. 6 n.12.

[1153] *Wireless Broadband Classification Order*, 22 FCC Rcd at 5918, para. 45 n.119.

wireless broadband Internet access was a commercial mobile would have caused with the finding that it was an "information service." Moreover, in neither instance did the Commission consider whether it should revise the definition of "public switched network," on which its conclusion in the 2007 *Wireless Broadband Classification Order* was premised.

398. Today, we update the definition of "public switched network" to reflect current technology and conclude that mobile broadband Internet access is an interconnected service. First, as outlined above, we find that mobile broadband is an "interconnected service" because it interconnects with "public switched network" as we define it today. We find also that mobile broadband is an interconnected service because it gives its users the capability to send and receive communications from all other users of the Internet. In defining the term "interconnected service" in the *Second CMRS Report and Order*, the Commission indicated its belief that, by using the term "interconnected service," Congress intended to focus on whether mobile services "make interconnected service broadly available through their use of the public switched network."[1155] In addition, the Commission noted that Congress's purpose was to "ensure that a mobile service that gives its customers the capability to communicate or to receive communications from other users of the public switched network should be treated as a common carriage offering." This was by contrast with the alternative "private mobile service" classification, which by statute includes services not "effectively available to a substantial portion of the public."[1156] Mobile broadband Internet access service fits the former classification as millions of subscribers use it to send and receive communications on their mobile devices every day. In sharp contrast to 2007 when the Commission characterized mobile broadband Internet access services as being in a nascent stage,[1157] today the mobile broadband marketplace has evolved such that hundreds of millions of consumers now use mobile broadband to access the Internet. For example, as noted earlier, by November 2014, 73.6 percent of the entire U.S. age 13+ population was communicating with smart phones, a figure which has continued to rise rapidly over the past several years.[1158] In addition, the number of mobile connections already exceeds the U.S. population[1159] and Cisco forecasts that by 2019, North America will have nearly 90% of its installed based converted to smart devices and connections, and smart traffic will grow to 97% of the total global mobile traffic.[1160] Mobile broadband subscribers, who use the same devices to receive voice and data communications, can also send or receive communications to or from anywhere in the nation, whether connected with other mobile broadband subscribers, fixed broadband subscribers, or the hundreds of millions of websites available to them over the Internet. This evidence of the extensive

(Continued from previous page)

[1154] *Id.* at 5916, para. 41.

[1155] *Second CMRS Report and Order*, 9 FCC Rcd at 1434, para. 54.

[1156] 47 U.S.C. § 332(d)(1), (d)(3).

[1157] *Wireless Broadband Classification Order*, 22 FCC Rcd at 5921-22, para. 59.

[1158] *See* comScore, *comScore Reports September U.S. Smartphone Subscriber Market Share*, Nov. 6, 2014, http://www.comscore.com/Insights/Market-Rankings/comScore-Reports-September-2014-US-Smartphone-Subscriber-Market-Share (last visited Feb. 4, 2015).

[1159] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311, 15345-46, para. 66 (Wireless Tel. Bur. 2014) (*Seventeenth Annual Wireless Competition Report*). The total U.S. population of all ages, as of the end of 2013 was estimated by the Census Bureau to be 317.2 million. *See* United States Census Bureau, *U.S. and World Population Clock*, http://www.census.gov/popclock/ (last visited Feb. 5, 2015). The total number of mobile connections as of the end of 2013 was 335.7 million. *Seventeenth Annual Wireless Competition Report*, 29 FCC Rcd at 15319-20, Chart II.B.1.

[1160] Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update 2014-2019*, at 9-10, http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.html#Trend_1_Continuing_Shift_to_Smarter (last visited Feb. 4, 2015).

changes that have occurred in the mobile marketplace demonstrates the ubiquity and wide scale use of mobile broadband Internet access service today.

399. Today we update the definition of "public switched network" to reflect current mass market communications network technologies and configurations, and the rapidly growing and virtually universal use of mobile broadband service. It also is more consistent with Congressional intent to recognize as an "interconnected service" today's broadly available mobile broadband Internet access service, which connects with the Internet and provides its users with the ability to send and receive communications from all other users connected to the Internet, (whether fixed or mobile).[1161] As CTIA recognizes,[1162] Congress's intent in enacting section 332 was to create a symmetrical regulatory framework among similar mobile services that were made available "to the public or . . . to such classes of eligible users as to be effectively available to a substantial portion of the public."[1163] Given the universal access provided today and in the foreseeable future by and to mobile broadband and its present and anticipated future penetration rates in the United States, we find that our decision today classifying mobile broadband Internet access as a commercial mobile service is consistent with Congress's objective. As noted above, that is a policy judgment that section 332(d) expressly delegated to the Commission, consistent with its broad spectrum management authority under Title III.[1164]

400. Moreover, we agree with commenters who argue that mobile broadband Internet access service meets the definition of interconnected service for a wholly independent reason:[1165] because— even under our existing definition of "public switched network" adopted in 1994— users have the "capability," as provided in section 20.3 of our rules, to communicate with NANP numbers using their broadband connection through the use of VoIP applications.[1166] Other parties disagree, arguing that, regardless of the attributes of VoIP services that ride over broadband Internet access networks, broadband Internet access service itself does not offer the ability to reach all NANP endpoints. These parties note also that the

[1161] Mobile broadband is an increasingly important pathway to the Internet, and many households subscribe to both fixed and mobile services as distinct product offerings with contrasting advantages in speed, usage limits, and mobility. *See 2015 Broadband Progress Report* at para. 120; *see also* Public Knowledge Comments at 18-19 (arguing that mobile broadband is not a substitute for fixed broadband services, so its increased adoption does not "change the essential points about terminating monopolies").

[1162] *See* CTIA Feb. 10, 2015 *Ex Parte* Letter at 16 (arguing that "Congress's intent was not to maximize the application of common carrier requirements" but rather to "ensure that new offerings that were similar to preexisting cellular offerings be treated alike ").

[1163] 47 U.S.C. § 332(d)(1).

[1164] *See Cellco P'ship v. FCC*, 700 F.3d 534, 541-42 (D.C. Cir. 2012) (citing *NBC v. United States*, 319 U.S. 190 (1943). As the Supreme Court recognized in *NBC* with respect to the Commission's Title III authority, Congress did not "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which" it established the Commission, for the purpose of "regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." 319 U.S. at 219.

[1165] Contrary to the suggestion in the dissent, Pai Dissent at 44, our decision to reclassify mobile broadband Internet access service as CMRS also relies on our section 332(d) authority as described herein, and thus is not based exclusively on our analysis here of VoIP services. *See infra* para. 401.

[1166] *See* New America, CDT, PK, Dec. 11, 2014 *Ex Parte* Letter at 5; Letter from Michael Calabrese, Dir. Wireless Future Project, New America Open Technology Institute, to Marlene H. Dortch, Secretary, FCC GN Docket Nos. 10-127, 14-28, at 8 (filed Jan. 27, 2015); Letter from Sarah Morris, Michael Calabrese, Joshua Stager, Open Technology Institute, New America Foundation to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 2-3 (filed Feb. 2, 2015).

Commission itself has previously concluded that mobile broadband Internet access, in and of itself, does not provide the ability to reach all other users of the public switched network.[1167]

401. We find that the Commission's previous determination about the relationship between mobile broadband Internet access and VoIP applications in the context of section 332 no longer accurately reflects the current technological landscape. Today, users on mobile networks can communicate with users on traditional copper based networks and IP based networks, making more and more networks using different technologies interconnected. In addition, mobile subscribers continue to increase their use of smartphones and tablets and the significant growth in the use of mobile broadband Internet access services has spawned a growing mobile application ecosystem.[1168] The changes in the marketplace have increasingly blurred the distinction between services using NANP numbers and services using public IP addresses and highlight the convergence between mobile voice and data networks that has occurred since the Commission first addressed the classification of mobile broadband Internet access in 2007. Today, mobile VoIP, as well as over-the-top mobile messaging, is among the increasing number of ways in which users communicate indiscriminately between NANP and IP endpoints on the public switched network.[1169] In view of these changes in the nature of mobile broadband service offerings, we find that mobile broadband Internet access service today, through the use of VoIP, messaging, and similar applications, effectively gives subscribers the capability to communicate with all NANP endpoints as well as with all users of the Internet.[1170]

402. We also note that, under the Commission's definition of "interconnected service" in section 20.3 of the rules, a service is interconnected even if ". . . the service provides general access to points on the public switched network but also restricts access in certain limited ways."[1171] Thus, the Commission's definition, while requiring that the interconnected service provide the "capability" for access to all other users of the public switched network, also recognizes that services that restrict access to the public switched network, in certain limited ways, should also be viewed as interconnected.[1172] Accordingly, to the extent that there is an argument that, even with an updated definition of public

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[1167] *See* CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 11-13; Verizon Dec. 24, 2014 *Ex Parte* Letter at 4; *Wireless Broadband Classification Order*, 22 FCC Rcd at 5917-18, para. 45.

[1168] *See* New America, CDT, PK, Dec. 11, 2014 *Ex Parte* Letter at 4-6.

[1169] *See Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications*, Report and Order, 28 FCC Rcd 7556, 7561-62, para. 15 (2013) (". . . the rapid proliferation of smartphones and other advanced mobile devices is providing consumers with numerous new options for IP-based Text applications. In fact, Informa estimates that 'By the end of 2013 . . . 41 billion OTT messages will be sent every day . . . .").

[1170] In support of arguments regarding interconnection, one of the dissents (Pai Dissent at 51 n.362), cites the inapposite *Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3520-21, paras. 15-16 (Wireline Comp. Bur. 2007). Our interpretation here of the Commission's own rule as to what constitutes the "capability" to communicate with NANP endpoints is a completely different question from whether wholesale carriers are entitled to interconnection rights under Section 251 of the Act regardless of the regulatory status of VoIP services provided to end users, which was the issue addressed by the staff in the Time Warner Cable request for a Declaratory Ruling.

[1171] 47 C.F.R. § 20.3.

[1172] In adopting the definition of interconnected service in the *Second CMRS Report and Order*, the Commission recognized that interconnected services could be limited and noted that "[i]n defining interconnected service in terms of transmissions to or from 'anywhere' on the PSN, we note that it is necessary to qualify the scope of the term 'anywhere'; if a service that provides general access to points on the PSN also restricts calling in certain limited ways (*e.g.*, calls attempted to be made by the subscriber to '900' telephone numbers are blocked), then it is our intention still to include such a service within the definition of 'interconnected service' for purposes of our Part 20 rules." *Second CMRS Report and Order*, 9 FCC Rcd at 1434-35, para. 55 n.104.

switched network, mobile broadband Internet access still would not meet the definition of interconnected because it would only enable communications with *some* rather than *all* users of the public switched network, *i.e.*, users with NANP numbers, we disagree and find that the Commission's rules recognize that interconnected services may be limited in certain ways. Our interpretation of the Commission's rules is consistent with their purpose, which is to ascertain whether the interconnected service is "broadly available."[1173] It is also most consistent with, and must be informed by, the key section 332(d) guidepost that Congress provided to the Commission in granting it authority to define these terms. This guidepost refers to a service available to "the public" or to such classes of eligible users as to be effectively available "to a substantial portion of the public."[1174] This focus of the inquiry on availability to the public or a substantial portion of it is also consistent with the specific purpose of the statute, which was to create a symmetrical regulatory framework for similar commercial services then being offered to consumers by cellular licenses and by SMR licensees who were using licenses that traditionally had been used to provide wireless service only to limited groups of users (e.g., taxi fleets).[1175]

403. Lastly, because today we classify mobile broadband Internet access service as a telecommunications service, designating it also as commercial mobile service subject to Title II is most consistent with Congressional intent to apply common carrier treatment to telecommunications services. Specifically, as in 2007, but for different reasons in light of our reclassification of the service as a "telecommunications service," we find that classifying mobile broadband Internet access service as a commercial mobile service is necessary to avoid a statutory contradiction that would result if the Commission were to conclude both that mobile broadband Internet access was a telecommunications service and also that it was not a commercial mobile service. A statutory contradiction would result from such a finding because, while the Act requires that providers of telecommunications services be treated as common carriers,[1176] it prohibits common carrier treatment of mobile services that do not meet the definition of commercial mobile service.[1177] Finding mobile broadband Internet access service to be commercial mobile service avoids this statutory contradiction and is most consistent with the Act's intent to apply common carrier treatment to providers of telecommunication services.[1178]

404. *Mobile Broadband Internet Access Service Is Not a Private Mobile Service.* Our conclusion that mobile broadband Internet access service is a commercial mobile service, through the application of our updated definition of "public switched network," leads unavoidably to the conclusion that it is not a private mobile service.[1179] Indeed, we believe that today's mobile broadband Internet access service, with hundreds of millions of subscribers and the characteristics discussed above, is not

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[1173] *See Second CMRS Report and Order*, 9 FCC Rcd at 1434, para. 54; *Wireless Broadband Classification Order*, 22 FCC Rcd at 5917, para. 44.

[1174] 47 U.S.C. § 332(d)(1).

[1175] *See, e.g.*, CTIA Feb. 10, 2015 *Ex Parte* Letter, at 16 ("Congress intended to ensure that new offerings that were similar to preexisting cellular offerings be treated alike"). To make this point clear, and in the exercise of our authority to "specif[y] by regulation" what services qualify as CMRS services that make interconnected service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public, we have made a conforming change to the definition of Interconnected Service in section 20.3 of the Commission's rules.

[1176] 47 U.S.C. §153(51).

[1177] 47 U.S.C. §332(c)(2).

[1178] We disagree with CTIA's argument that section 332 mandates classification of mobile broadband Internet access service as private mobile service. *See* CTIA Feb. 10, 2015 *Ex Parte* Letter at 16. Section 332 sets forth the definition of commercial mobile service and requires that services meeting the definition of commercial mobile service be treated as common carriers. For the reasons described above, today, we find that mobile broadband Internet access service meets the definition of commercial mobile service.

[1179] *See* 47.U.S.C. §332(d)(3).

akin to the private mobile service of 1994, such as a private taxi dispatch service, services that offered users access to a discrete and limited set of endpoints. Even, however, if that were not so, there is another reason that mobile broadband Internet access service is not a private mobile service: it is the functional equivalent of a commercial mobile service, even under the previous definition of "public switched network." As with the policy judgments reflected in the other two definitional subsections of section 332(d) and described above, Congress expressly delegated authority to the Commission to determine whether a particular mobile service may be the functional equivalent of a commercial mobile service. Specifically, section 332 of the Act defines "private mobile service" as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[1180] We find that mobile broadband Internet access service is functionally equivalent to commercial mobile service because, like commercial mobile service, it is a widely available, for profit mobile service that offers mobile subscribers the capability to send and receive communications on their mobile device to and from the public. Although the services use different addressing identifiers, from an end user's perspective, both are commercial services that allow users to communicate with the vast majority of the public.

405. CTIA, Verizon, and AT&T argue that mobile broadband Internet access service cannot be considered the functional equivalent of commercial mobile service. First, they argue that the Commission failed to provide notice that it might deem mobile broadband the functional equivalent of CMRS.[1181] Next, CTIA argues that "Congress intended the hallmark of CMRS to be the provision of interconnected service through use of the PSTN. No service lacking this essential attribute could amount to a functional equivalent of CMRS."[1182] Verizon argues that "because mobile broadband Internet access service cannot, on its own, be used to place calls to telephone numbers, and CMRS cannot be used to connect with (for example) Google's search engine or Amazon.com or any of the millions of other sources of online content, these two services are not substitutes, and cannot be deemed functionally equivalent."[1183] AT&T and CTIA argue that mobile broadband Internet access is not a substitute for CMRS and therefore is not the functional equivalent of CMRS.[1184] Verizon, CTIA, and AT&T argue that the issue of whether or not mobile VoIP applications or services themselves may be interconnected with the public switched network should have no bearing on the determination of whether mobile broadband Internet access service itself may be viewed as the functional equivalent of commercial mobile service.[1185]

406. We disagree with these arguments. First, for the reasons discussed above, we disagree with the parties' arguments regarding notice. We find that our decision today that mobile broadband Internet access service may be viewed as the functional equivalent of commercial mobile service is a logical outgrowth of the discussions and questions presented in the *2014 Open Internet NPRM*. As noted above, our *2014 Open Internet NPRM* sought comment on the option of revising the classification of mobile broadband Internet access service and on whether it would fit within the definition of commercial mobile service under section 332 of the Act and the Commission's rules implementing that section, including section 20.3.[1186] Section 20.3 of the Commission's rules defines commercial mobile radio service as a mobile service that is: "provided for profit, i.e., with the intent of receiving compensation or monetary gain; an interconnected service; and available to the public or to such classes of eligible users as

[1180] *Id.*

[1181] CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 13-15; Verizon Dec. 24, 2014 *Ex Parte* Letter at 5-6.

[1182] CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 15.

[1183] Verizon Dec. 24, 2014 *Ex Parte* Letter at 6.

[1184] AT&T Jan. 8, 2015 *Ex Parte* Letter at 4-5; CTIA Feb. 10, 2015 *Ex Parte* Letter at 16.

[1185] CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 11-13; AT&T Jan. 8, 2015 *Ex Parte* Letter at 4; Verizon Dec. 24, 2014 *Ex Parte* Letter at 4-5.

[1186] *2014 Open Internet NPRM*, 29 FCC Rcd at 5614, para. 150.

to be effectively available to a substantial portion of the public; or the functional equivalent of such a mobile service . . . ."[1187] Interested parties should have reasonably foreseen and in fact were aware that the Commission would analyze the functional equivalence of mobile broadband Internet access service as part of its consideration of whether it should revise the classification of mobile broadband Internet access and whether mobile broadband Internet access would fit within the definition of commercial mobile service under section 332. Indeed, several parties have submitted comments on this question.[1188]

407. We also disagree with CTIA's contention that, if a mobile service is not an interconnected service through the use of the public switched telephone network, it may not be considered the functional equivalent of commercial mobile service. This argument would render the functional equivalence language in the statute superfluous by essentially requiring a functionally equivalent service to meet the literal definition of commercial mobile service. We find that Congress included the functional equivalence provision in the statute precisely to address such new developments for services that may not meet the literal definition of commercial mobile service. We also disagree with Verizon that, because mobile broadband subscribers may use their service to communicate with a different and broader range of entities, the two services cannot be functionally equivalent. As noted above, both mobile broadband Internet access service and commercial mobile service provide their users with a service that enables ubiquitous access to the vast majority of the public. The fact that the services may *also* enable communications in other ways or with different groups does not make them less useful as substitutes for commercial mobile service. Moreover, regardless of whether providers may offer voice and data services separately,[1189] as discussed above, from both a technical as well as a consumer perspective, there are increasingly fewer distinctions or interoperability issues between these types of services. The marketplace changes that have occurred since the Commission first addressed the classification of mobile broadband Internet access service in 2007 support our finding that mobile broadband Internet access service offered to the mass market must be viewed today as the functional equivalent of commercial mobile service.

408. We recognize that, in the *Second CMRS Report and Order*, the Commission created a petition-based process for parties interested in challenging the classification of a particular service as private mobile service, and indicated that it would consider a variety of factors to determine whether a particular service is the functional equivalent of a CMRS service.[1190] Specifically, as AT&T and CTIA point out, the Commission said it would consider consumer demand for the service in question to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service, would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.[1191] Section 20.9 of the Commission's rules articulates the same standard for parties interested in challenging the classification of a service as a private mobile service.[1192] While we do not amend section 20.9's separate provision for a petition process in other contexts, for the reasons stated above related to today's widespread distribution and use of mobile broadband devices, we are amending section 20.3 to reflect our conclusion that mobile broadband Internet access service is the functional equivalent of CMRS.

[1187] 47 C.F.R. § 20.3.

[1188] *See, e.g.*, Public Knowledge Nov. 7, 2014 *Ex Parte* Letter at 3-5; CTIA Reply Comments at 46; CTIA Dec. 22, 2014 *Ex Parte* Letter, Attach. at 15-18; CTIA Feb. 10, 2015 *Ex Parte* Letter at 16.

[1189] *See* CTIA Feb. 10, 2015 *Ex Parte* Letter at 18 (also noting that providers typically treat voice minutes differently from data usage and allow users to adjust one without changing the other).

[1190] *Second CMRS Report and Order*, 9 FCC Rcd at 1447-48, paras. 79-80.

[1191] *Id.* at 1447-48, para. 80.

[1192] 47 C.F.R. § 20.9(a)(14)(ii)(B).

5. The Reclassification of Broadband Internet Access Service Will Preserve Investment Incentives

409. In this section, we address potential effects of our classification decision on investment and innovation in the Internet ecosystem. Our classification of broadband Internet access service flows from the marketplace realities in how this service is offered.[1193] In reaching these conclusions, we also consider whether the resulting regulatory environment produces beneficial conditions for investment and innovation while also ensuring that we are able to protect consumers and foster competition. We find that classifying broadband Internet access service as a telecommunications service—but forbearing from applying all but a few core provisions of Title II—strikes an appropriate balance by combining minimal regulation with meaningful Commission oversight. This approach is based on the proven model Congress and the Commission have applied to CMRS, under which investment has flourished.

410. Based on our review of the record, the proven application of the CMRS model, and our predictive judgment about the future of the ecosystem under our new legal framework, we conclude that the new framework will not have a negative impact on investment and innovation in the Internet marketplace as a whole. As is often the case when we confront questions about the long-term effects of our regulatory choices, the record in this proceeding presents conflicting viewpoints regarding the likely impact of our decisions on investment. We cannot be certain which viewpoint will prove more accurate, and no party can quantify with any reasonable degree of accuracy how either a Title I or a Title II approach may affect future investment.[1194] Moreover, regulation is just one of many factors affecting investment decisions.[1195] 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.[1196] Industry representatives support this judgment, stating that combined reclassification and forbearance decisions will provide the regulatory predictability needed to spur continued investment and innovation not only in infrastructure but also in content and applications.[1197]

411. *Investment Incentives.* The *2014 Open Internet NPRM* generated spirited debate about the consequences that classifying broadband Internet access service as a telecommunications service would have for investment incentives. Opponents of reclassification assert that Title II requirements will stifle innovation and investment.[1198] Other commenters vigorously support the opposite position, asserting that reliance on section 706 authority to support open Internet rules is a course fraught with

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[1193] *See supra* Sections IV.B., IV.C.2.

[1194] *See infra* paras. 415-416.

[1195] *See, e.g.*, Free Press Nov. 21, 2014 *Ex Parte* Letter at 5.

[1196] *See, e.g.*, Letter from Angie Kronenberg, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket 14-28, at 2 (filed Jan. 13, 2015) (COMPTEL Jan. 13, 2015 *Ex Parte* Letter).

[1197] *See, e.g.*, Sprint Jan. 16, 2015 *Ex Parte* Letter at 1 ("Sprint does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services."); Letter from Andrew W. Guhr, Counsel for AOL, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Dec. 5, 2014); COMPTEL Comments at 21-24; Vonage Reply at 32.

[1198] *See, e.g.*, Charter Comments at 13, 15-16; Comcast Comments at 46-50; Verizon Comments at 57; NCTA Dec. 23, 2014 *Ex Parte* Letter at 3-5; ACA Comments at 60-66; Alcatel-Lucent Comments at 2; AT&T Comments at 51-53; CenturyLink Comments at 5-6; Cisco Comments at 27; CTIA Comments at 46-48; Cox Comments at 34-36; Frontier Comments at 2-4; Qualcomm Comments at 4-7; Letter from Laurence Brett Glass, d/b/a LARIAT to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Jan. 9, 2015).

prolonged uncertainty that will stifle investment and that has already had detrimental economic effects.[1199] These and other commenters claim that a cautious regulatory approach based on Title II will provide much-needed predictability to investors and consumers alike, while ensuring that the Commission has the statutory authority necessary to protect the open Internet, promote competition, and protect consumers.[1200]

412. The key drivers of investment are demand and competition. Internet traffic is expected to grow substantially in the coming years,[1201] and the profits associated with satisfying that growth provide a strong incentive for broadband providers to continue to invest in their networks.[1202] In addition, continuing advances in technology are lowering the cost of providing Internet access service.[1203] The possibility of enhancing profit margins can be expected to induce broadband providers to make the appropriate network investments needed to capture a reduction in costs made possible only through technological advances.

413. Competition not only creates the correct incentives for investment and promotes innovation in the broadband infrastructure needed to support robust and ubiquitous Internet access service, but also spurs innovation and investment at the "edge" of the network, where content and applications are created and deployed.[1204] As one commenter explains, "Title II promotes competitive entry in at least two ways."[1205] First, section 224 (from which we do not forbear in the context of broadband Internet access service, as discussed below) "ensures that telecommunications carriers receive access to the poles of local exchange carriers and other utilities at just, reasonable, and nondiscriminatory rates,"[1206] an "important investment benefit that will enable those deploying fiber-to-the-home or other competitive networks to deploy more expeditiously and efficiently."[1207] Title II also "offers other benefits

[1199] *See, e.g.*, Vonage Comments at 35- 36; AARP Comments at 38-42.

[1200] *See, e.g.*, Common Cause Comments at 13-16; WGAW Comments at 28-31; Public Knowledge Reply at 16-22; OTI Reply at 3-11; EFF Comments at 13-15; NASUCA Comments at 4-6; CDT Comments at 15-16; Cogent Comments at 11.

[1201] *See, e.g.*, Cisco Comments at 4-5 (stating that "[g]lobal IP traffic has increased more than fivefold in the past 5 years and will increase threefold over the next 5 years" and that it "expects traffic to grow from 16,607 petabytes of data in 2013 to 40,545 petabytes of data in 2018"); *see also* AARP Comments at 47-48 & fig. 2 (explaining that "[b]roadband providers have faced nearly exponential year-over-year growth in traffic flows for the entire history of the broadband market," and that trend is expected to continue).

[1202] *See, e.g.*, AARP Comments at 48 (arguing that "[b]ecause of the ongoing growth in traffic, broadband providers have had to continuously upgrade their network's capacity," and "broadband providers benefit from the growth in traffic volume associated with video services as it drives end-user demand for higher-priced, higher-speed offerings"); Access Comments at 13 ("The demand for faster and better access to the internet will grow, generating more value for and a stronger incentive to invest in enhanced network capacity.").

[1203] *See* Free Press Comments at 94-95 n.200 (describing declining costs for cable, LEC, and wireless broadband service providers due to technological and market developments); ACI Reply, Attach., Innovation and National Broadband Policies at 16-32 (discussing technological advancements in cable, wireline, and wireless networks and describing their benefits, including improved capacity and "declining costs and rates").

[1204] *See Verizon*, 740 F.3d at 644-45; COMPTEL Jan. 13, 2015 *Ex Parte* Letter at 2.

[1205] Letter from Marvin Ammori to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (filed Dec. 19, 2014) (Ammori Dec. 19, 2014 *Ex Parte* Letter).

[1206] *Id.* at 3; *see also* 47 U.S.C. § 224.

[1207] Ammori Dec. 19, 2014 *Ex Parte* Letter at 3-4; *see also* Letter from Austin C. Schlick, Director, Communications Law, Google, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (explaining that reclassifying broadband Internet access service as a telecommunications service would extend the statutory right of access to utility infrastructure to all providers of these services, "regardless of what services they otherwise provide"). Conversely, ACA asserts that reclassification would result in increased pole attachment rates for many of its members, which would have the effect of lowering investment incentives both for continued investment in existing facilities and for new deployments. *See* ACA Comments at 62, 64, 66. We do not agree with ACA's

(continued….)

at the state level, including access to public rights of way," which some broadband providers reportedly utilize to deploy networks.[1208]

414. Further, contrary to the assertions of opponents of reclassification, sensible regulation and robust investment are not mutually exclusive.[1209] The investment record of incumbent LECs since passage of the 1996 Act calls into question claims that regulation necessarily stifles investment. Indeed, it appears that AT&T, Verizon, and Qwest (now CenturyLink) increased their capital investments as a percentage of revenues immediately after the Commission expanded Title II requirements pursuant to the Telecommunications Act of 1996,[1210] while investment levels decreased after 2001,[1211] during a period when the Commission relieved providers of many unbundling requirements and other regulatory obligations.[1212] And, of course, wireline DSL was regulated as a common-carrier service until 2005—a

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prediction concerning investment incentives. As we explain further below, we are committed to avoiding an outcome in which entities misinterpret today's decision as an excuse to increase pole attachment rates of cable operators providing broadband Internet access service. It is not the Commission's intent to see any increase in the rates for pole attachments paid by cable operators that also provide broadband Internet access service, and we caution utilities against relying on this decision to that end. *See infra* paras. 482-484. This Order does not itself require any party to increase the pole attachment rates it charges attachers providing broadband Internet access service, and we would consider such outcomes unacceptable as a policy matter. We will be monitoring marketplace developments following this Order and will promptly take further action in that regard if warranted. In any case, such arguments do not persuade us not to reclassify broadband Internet access service, since in reclassifying that service we simply acknowledge the reality of how it is being offered today.

[1208] *See* Ammori Dec. 19, 2014 *Ex Parte* Letter at 4 (citing Jon Brodkin, "Report: Verizon FiOS claimed public utility status to get government perks," Ars Technica, May 28, 2014, http://arstechnica.com/tech-policy/2014/05/report-verizon-fios-gets-perks-from-government-while-avoiding-regulations/; Bruce Kushnick, Public Utility Law Project of New York, Inc., It's All Interconnected: Oversight and Action is Required to Protect Verizon New York Telephone Customers and Expand Broadband Services (May 13, 2014), http://newnetworks.com/wp-content/uploads/PublicNN3.pdf.

[1209] *See* Sprint Jan. 16, 2015 *Ex Parte* Letter at 1 ("Sprint does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services.").

[1210] *See, e.g.*, Free Press Comments at 102 (arguing that "the average annual investment by telecom carriers was *55 percent higher* under the period of Title II's application than it has been in the years since the FCC removed broadband from Title II"). The 1996 Telecom Act imposed a set of new obligations on incumbent local exchange carriers, including, most importantly, the duty to provide competing carriers access to unbundled network elements at cost-based rates. *See* 47 U.S.C. §§ 251(c)(3), 252(d)(1). The Commission adopted rules implementing the unbundling requirements in 1996. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 (1996). *But see Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff'd, WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (granting carriers pricing flexibility).

[1211] *See, e.g.*, USTelecom, *Historical Broadband Provider Capex*, http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex (last visited Jan. 21, 2015) (showing a drop in capex expenditures by broadband providers from a high of $118 billion in 2000 to a low of $57 billion in 2003).

[1212] *See Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007), *aff'd sub nom. Ad Hoc v. FCC*, 572 F.3d 903 (*AT&T Forbearance Order*) (granting AT&T forbearance from rules applicable to enterprise broadband services); *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006) (informing the public of deemed grant of Verizon petition for forbearance with respect to enterprise broadband services); *Wireline Broadband Classification Order*, 20 FCC Rcd 14853 (eliminating *Computer Inquiry* requirements and other rules governing wireline broadband Internet access service); *Unbundled Access to Network Elements, Review of the Section 251*
(continued….)

period in the late '90s and the first five years of this century, which saw the highest levels of wireline broadband infrastructure investment to date.[1213] At a minimum, this evidence demonstrates that robust investment can and does occur even when new regulations are adopted.[1214] Our conclusions are not premised on the assumption that regulation never harms investment, nor do we deny that deregulation often promotes investment; rather, we reject assertions that reclassification will substantially diminish overall broadband investment. This is further supported by examining broadband providers' investment histories since the announcement of the *Broadband Classification NOI* in 2010. While the Commission did not utilize reclassification to support its *2010 Open Internet Order*, it did not close the docket on the *Broadband Classification NOI*, indicating that reclassification remained an open question. The record demonstrates that broadband providers continued to invest, at ever increasing levels, in their networks post-2010, after which broadband providers were clearly on notice that the Commission was considering reclassifying broadband Internet access service as a telecommunications service and imposing certain Title II regulations upon them.[1215]

415. A number of market analysts concur that dire predictions of disastrous effects on investment are overblown.[1216] Although some commenters claim that then-Chairman Genachowski's

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Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-13, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005) (eliminating unbundled switching and significantly scaling back unbundling of other network elements); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, and 98-147, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (subsequent history omitted) (eliminating line-sharing).

[1213] *See* US Telecom Research Brief, *Latest Data Show Broadband Investment Surged in 2013* at 2, Chart 2 (wireline broadband capital expenditures peaked at $79 billion in 2000), http://www.ustelecom.org/sites/default/files/documents/090814%20Latest%20Data%20Show%20Broadband%20Investment%20Surged%20in%202013.pdf.

[1214] *See* Vonage Comments at 13-15 (noting "substantial broadband network investments" by AT&T and Verizon following the release of the *Internet Policy Statement*).

[1215] *See, e.g.*, AT&T Comments at 19 ("[A]nnual investment in U.S. wireless networks grew more than 40 percent between 2009 and 2012, from $21 billion to $30 billion." (citing "Four Years of Broadband Growth," Office of Science and Technology Policy & The National Economic Council (June 2013), http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf) (*Four Years of Broadband Growth*); Free State Comments at 7 n.17 ("The telecommunications and cable sector was responsible for $50.5 billion of investment, comprising more than one-third of total capital investments in the U.S. economy last year."); Verizon Comments, Lerner Declaration at 20 (citing *Four Years of Broadband Growth* at 4-5: "[S]ince President Obama took office in early 2009, nearly $250 billion in private capital has been invested in U.S. wired and wireless broadband networks. In just the last two years, more high-speed fiber cables have been laid in the United States than in any similar period since 2000."); Free Press Comments at 102, 100 fig. 1 ("The data also show that the implementation of the FCC's 2010 *Open Internet Order* was followed by an increase in telco capital investment. From the end of 2011 to the end of 2013 capex by the companies tracked in Figure 1 increased 7 percent (if the cable MSOs are included, the increase is 5 percent). This is noteworthy because the same warnings about the harm Title II would cause to investment were made about the Open Internet rules – predictions that were flat out wrong.").

[1216] *See, e.g.*, Free Press Nov. 21, 2014 *Ex Parte* Letter at 7 n.14 (quoting J.P. Morgan, North American Equity Research, Nov. 11, 2014, Net Neutrality: Prepared for Title II but We Take Less Negative View, "[w]e wouldn't change any of the fundamental assumptions on cable companies under our coverage under Title II, and shares are likely to rebound over time."), *id*. at 7 (quoting Bernstein Research Note, Nov. 17, 2014: "We note that during the three years in which the 2010 rules were in place while Verizon pursued its (unnecessary) litigation there did not appear to be any effect on investment decisions from the resulting litigation uncertainty. Further, the evidence carriers produce to support their argument that Title II classification will reduce investment tends to consist of commentary from analysts and network-equipment suppliers, as well as the results of their own discretionary choices. . . .").

May 6, 2010 announcement that the Commission would consider adopting a Title II approach prompted analysts to downgrade the ratings of Internet access service providers and sent stock prices downward, the effect of this announcement on stock prices, if any, is by no means clear.[1217] Further, there was no appreciable movement in capital markets following substantial public discussion of the potential use of Title II in November.[1218] What is clear from this debate is that stock price fluctuations can be caused by many different factors and are susceptible to various interpretations.[1219] Accordingly, we find unpersuasive the arguments that Title II classification would have a negative impact on stock value.

416. Tellingly, major infrastructure providers have indicated that they will in fact continue to invest under the framework we adopt, despite suggesting otherwise in their filed comments in this proceeding.[1220] For example, Sprint asserts in a letter in this proceeding that "[s]o long as the FCC continues to allow wireless carriers to manage our networks and differentiate our products, Sprint will continue to invest in data networks regardless of whether they are regulated by Title II, Section 706, or some other light touch regulatory regime."[1221] It adds that "Sprint does not believe that a light touch application of Title II, including appropriate forbearance, would harm the continued investment in, and deployment of, mobile broadband services."[1222] Verizon's chief financial officer, Francis Shammo, told investors in a conference call in response to a question about the effect of "this move to Title II," that "I

[1217] Free Press explains that following the announcement of the 2010 *Broadband Classification NOI*, "[m]ost of the ISP stocks barely moved from this announcement. Verizon and AT&T each fell 2 percent. Cable stocks did drop more (on substantially higher volume), but this was primarily due to . . . over-valuation of these stocks following better-than-expected Q1 earnings reports. This was compounded by the broader market concerns stemming from the EU debt crisis." Free Press Comments at 114. In the months following the announcement the "ILECs, Cable and Wireless companies were outperforming the broader market, and vastly outperforming the edge companies' stocks. Comcast was the only ISP in negative territory, yet still outperformed the broader market. And its issues were more related to the merger than the [NOI]." *Id.* at 117-118.

[1218] *See* New York Stock Exchange, https://www.nyse.com/index (last visited Jan. 23, 2015) (detailing stock price information from October 1, 2014 to January 23, 2015 for Verizon (NYSE:VZ), AT&T (NYSE:T), Time Warner Cable (NYSE:TWC), CenturyLink (NYSE:CTL), Sprint (NYSE:S), T-Mobile (NSYE:TMUS), and Cablevision (NYSE:CVC); NASDAQ, http://www.nasdaq.com/ (last visited Jan. 23, 2015) (detailing stock price information from October 1, 2014 to January 23, 2015 for Comcast (NASDAQ:CMCSA) and Charter (NASDAQ:CHTR).

[1219] At any moment in time, the price of a stock reflects the market's valuation of the cash-flow-generating capability of the firm. Because a firm's cash flow is based on a multitude of factors, it is improper to infer that observed stock price changes reflect the market's belief that infrastructure investment will decline.

[1220] *See, e.g.*, Letter from COMPTEL, Engine, CCIA, and Internet Freedom Business Alliance to Chairman Wheeler, GN Docket No. 14-28, at 2 n.4 (filed Dec. 30, 2014) (COMPTEL Dec. 30, 2014 *Ex Parte* Letter); Brian Fung, *Verizon: Actually, strong net neutrality rules won't affect our network investment*, Washington Post, Dec. 10, 2014, *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/10/verizon-actuallystrong-net-neutrality-rules-wont-affect-our-network-investment/?wpisrc=nlswbd& wpmm=1 ; Brian Fung, *Comcast, Charter and Time Warner Cable all say Obama's net neutrality plan shouldn't worry investors*, Washington Post, Dec. 16, 2014, *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/16/comcast-charter-andtime-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much /. *See also* COMPTEL Dec. 11, 2014 *Ex Parte* Letter (urging the Commission "to consider [a Verizon disclosure regarding the impact of regulation on its investment plans] and discount the claims [in the record] that network investment will decline if the Commission reclassifies broadband Internet access services"); *see also* Free Press Comments at 92-93, 97 nn.198 & 205; Alan Breznick, *CenturyLink Eyes More Gig Launches*, LightReading, Feb. 12, 2015, at http://www.lightreading.com/gigabit/gigabit-cities/centurylink-eyes-more-gig-launches/d/d-id/713723 (last visited Feb. 17, 2015).

[1221] Sprint Jan. 16, 2015 *Ex Parte* Letter at 1-2; *see also* Thomas Gryta, *T-Mobile Joins Sprint In Downplaying FCC's Broadband Reclassification*, Wall Street Journal (Feb. 19, 2015), http://blogs.wsj.com/corporate-intelligence/2015/02/19/t-mobile-joins-sprint-in-downplaying-fccs-broadband-reclassification/ (T-Mobile US stating that "the regulatory reclassification of the Internet as a utility would not be an impediment to its business").

[1222] *Id*. at 1.

mean to be real clear, I mean this does not influence the way we invest. I mean we're going to continue to invest in our networks and our platforms, both in Wireless and Wireline FiOS and where we need to. So nothing will influence that. I mean if you think about it, look, I mean we were born out of a highly regulated company, so we know how this operates."[1223]

417. Today's Order addressing forbearance from Title II and accompanying rules for BIAS will resolve concerns about uncertainty regarding the application of Title II to these services, which some argue could chill investment.[1224] By grounding our regulatory authority on firm statutory footing and defining the scope of our intended regulation, our decision establishes the regulatory predictability needed by all sectors of the Internet industry to facilitate prudent business planning, without imposing undue burdens that might interfere with entrepreneurial opportunities.[1225] Moreover, the forbearance we grant we today is broad in scope and extends to obligations that might be viewed as characteristic of "utility-style" regulation. In particular, we forbear from imposing last-mile unbundling requirements, a regulatory obligation that several commenters argue has led to depressed investment in the European broadband marketplace.[1226] As such, we disagree with commenters who assert that classification of BIAS as a telecommunications service would chill investment due to fears that future Commissions will reverse our forbearance decision,[1227] and that forbearance will engender protracted litigation.[1228]

[1223] Brian Fung, *Verizon: Actually, strong net neutrality rules won't affect our network investment*, Washington Post, Dec. 10, 2014, *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/10/verizon-actuallystrong-net-neutrality-rules-wont-affect-our-network-investment/?wpisrc=nlswbd& wpmm=1; *see also* Free Press Nov. 14, 2014 *Ex Parte* Letter at 6 (stating that "when asked if the President's push for Title II reclassification would affect your investment in broadband," Mr. Shammo answered "No"); Thomson Reuters Streetevents, Edited Transcript, VZ – Verizon Communications Inc at UBS Global Media and Communications Conference, at 13 (Dec. 9, 2014), available at http://publicpolicy.verizon.com/assets/images/content/VZ_at_UBS_Conf.pdf. Over one month later, Mr. Shammo stated, in an investor call on Jan. 22, 2015, that his earlier comments had been "misquoted" and asserted that reclassifying broadband as a Title II service will affect "long-term investment in our networks." *See* Brian Fung, *Did Congress, the media and the FCC all misunderstand what Verizon said on net neutrality? Verizon thinks so*, Washington Post, Jan. 23, 2014, *available at* http://www.washingtonpost.com/blogs/the-switch/wp/2015/01/23/did-congress-the-media-and-the-fcc-all-misunderstand-what-verizon-said-on-net-neutrality-verizon-thinks-so/.

[1224] *See infra* Section V.

[1225] *But see* NASUCA Comments at 12 (noting that "litigation is inevitable no matter which direction the Commission chooses" and arguing that "[t]he Commission is far more likely to avoid reversal by the courts if it adopts an open Internet regime based on reclassifying broadband as Title II"); CCIA Nov. 19, 2014 *Ex Parte* Letter ("The group also discussed the inevitable litigation that will ensue no matter what open Internet rules the Commission adopts.").

[1226] *See* Letter from Christopher Yoo to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed June 10, 2014); Comcast Dec. 24, 2014 *Ex Parte* Letter at 5-7 (citing Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, *Europe Can Catch Up with the US: A Contrast of Two Contrary Broadband Models* (June 2013), http://www.copenhageneconomics.com/Website/News.aspx?PID=3058&M=NewsV2&Action=1&NewsId=708; *see also* Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Jan. 26, 2015).

[1227] *See, e.g.*, Ericsson Comments at 12 ("[T]he potential for reversals of forbearance decisions based on shifts in political winds and accompanying Commission leadership changes would deter investment in the short *and* long term."); AT&T Comments at 67-68.

[1228] *See, e.g.*, Verizon Comments at 68; AT&T Comments at 67-68 (arguing that broadband service providers "would be kept in a constant state of regulatory uncertainty" because forbearance decisions "are not irreversible"); Ericsson Comments at 12 ("[T]he potential for reversals of forbearance decisions based on shifts in political winds and accompanying Commission leadership changes would deter investment in the short *and* long term."); Alcatel-Lucent Comments at 13 ("It could take years for the Commission to sort through which Title II requirements should apply to broadband, and the inevitable legal appeals would only prolong a state of regulatory instability."); ARRIS Comments at 11-12; CTIA Oct. 17, 2014 *Ex Parte* Letter at 5. Other commenters also wrongly suggest that we plan

(continued….)

418. Some opponents argue that classifying broadband Internet access services as telecommunications services will necessarily lead to regulation of Internet backbone services, CDNs, and edge services, compounding the suppressive effects on investment and innovation throughout the ecosystem.[1229] Our findings today regarding the changed broadband market and services offered are specific to the manner in which *these particular* broadband Internet access services are offered, marketed, and function.[1230] We do not make findings with regard to the other services, offerings, and entities over which commenters raise concern, and in fact explicitly exclude such services from our definition of broadband Internet access services.[1231]

419. CALinnovates submitted a commissioned White Paper by NERA Economic Consulting, asserting that reclassification will have a strong negative effect on innovation (with associated harms to investment and employment).[1232] The White Paper asserts that small edge providers will be harmed by reclassification, as Title II provisions "will serve to increase the capital costs for innovators both directly and indirectly as well as to foster the sort of regulatory uncertainty that deters investors from ever investing."[1233] We disagree. The White Paper assumes that broadband Internet access services will be subject to the full scope of Title II provisions, and proscribes increased costs to regulatory uncertainty. As discussed below,[1234] we forbear from application of many of Title II's provisions to broadband Internet access services, and in doing so, provide the regulatory certainty necessary to continued investment and innovation. We also reject the argument, set forth by the Phoenix Center, that reclassification would require broadband providers "to create, and then tariff, a termination service for Internet content under Section 203 of the Communications Act."[1235]

420. US Telecom submitted a study finding that under Title II regulation, wireline broadband providers are likely to invest significantly less than they would absent Title II regulation over the next five years, putting at risk much of the large capital investments that will be needed to meet the expected increases in demand for data service.[1236] The study contains several substantial analytical flaws which call its conclusions into question. First, the study inaccurately assumes that no wireless services are Title II services.[1237] In fact, wireless voice service is subject to Title II with forbearance, similar to the

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to apply "old world" common carrier rules to Internet access service, conjuring the specter of pervasive and intrusive cost-of-service rate regulation. *See, e.g.*, Consumer Electronics Association Comments at 13; Yoo Dec. 22, 2014 *Ex Parte* Letter at 6; GSM Comments at 10-11.

[1229] *See, e.g.*, Ericsson Comments at 12; Alcatel-Lucent Comments at 2; AT&T Comments at 4-5; Verizon Comments at 55; NCTA Dec. 23, 2014 *Ex Parte* Letter at 7; CBIT Reply at 27; Cisco Comments at 27; Letter from John Mayo, Exec. Director, Georgetown Center for Business and Public Policy to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Jan. 16, 2015), Attach. Anna-Maria Kovacs, Regulatory Uncertainty: The FCC's Open Internet Docket, at 6-7 (Jan. 2015).

[1230] *See supra* Section IV.C.2.

[1231] *See supra* Section IV.C.1.

[1232] *See* CALinnovates Reply, Attach. NERA Economic Consulting, *Economic Repercussions of Applying Title II to Internet Services* at 2 (NERA White Paper).

[1233] NERA White Paper at 22.

[1234] *See infra* Section V.

[1235] *See* Digital Policy Institute Reply, Attach. at 4 (George S. Ford and Lawrence J. Spiwak, Phoenix Center Policy Bulletin No. 36, Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service (Sept. 2014) (Phoenix Center Policy Bulletin No. 36)) (emphasis omitted).

[1236] *See* Letter from Patrick S. Brogan, USTelecom to Marlene Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Nov. 19, 2014) (attaching Hassett, Kevin A and Shapiro, Robert J., The Impact of Title II Regulation of Internet Providers on Their Capital Investment (USTelecom Study)) (USTelecom Nov. 19, 2014 *Ex Parte* Letter).

[1237] Free Press Nov. 21, 2014 *Ex Parte* Letter at 1.

approach that we adopt here for BIAS. Second, the empirical models in the study incorrectly leave out factors that are important determinants of the dependent variables. For example, the level of the firm's demand for wireline services and its predicted rate of growth are left out as factors that clearly should be considered as determinants of wireline capital expenditures in Table 1.[1238] The statistical models in the paper are thus forced to either over- or under-estimate the role of the variables that are considered in the study, and as a result the predicted level of wireline investment subject to Title II regulation and its predicted rate of growth are not correct. We also agree with Free Press' argument that the study ignores the reality that once last-mile networks are built, the substantial initial investment has already been outlayed. For example, for the authors to observe that there was less investment in wireline networks than in wireless networks following the 2009 recession merely observes that wireline networks were largely constructed prior to 2009, while mobile wireless data networks were not.[1239] Further, as Free Press asserts, the study ignores evidence of massive network investments by incumbent LECs in the Ethernet market, which is regulated under Title II.[1240] The US Telecom study also did not factor in the potential effect of forbearance on investment decisions. We are thus unpersuaded that this study is determinative regarding the effect that reclassification will have on investment.

421. *CMRS, Enterprise Broadband, and Voluntary Title II.* Our conclusions are further borne out in examining the market for those services that are already subject to Title II. The Commission's experience with CMRS, to which Title II explicitly applies, demonstrates that application of Title II is not inconsistent with robust investment in a service.[1241] The sizable investments made by CMRS providers, who operate under a market-based Title II regulatory regime, allow us to predict with ample confidence that our narrowly circumscribed application of Title II to broadband Internet access service will not cripple the regulated industries or deprive consumers of the benefits of continued investment and innovation in network infrastructure and Internet applications.

422. In 1993, Congress established a new regulatory framework for CMRS by giving the Commission the authority to forbear from applying any provision of Title II to CMRS except sections 201, 202, or 208.[1242] Congress prescribed the standard for forbearance in terms nearly identical to the standard it later adopted for common carriage services in the Telecommunications Act of 1996.[1243] In 1994, the Commission implemented its new authority by forbearing from applying sections 203, 204, 205, 211, 212, and portions of 214,[1244] thereby relieving providers of the burdens associated with the filing of tariffs, Commission investigation of new and existing rates, rate prescription and refund orders,

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[1238] *See* USTelecom Study at 13, Tbl. 1.

[1239] Free Press Nov. 21, 2014 *Ex Parte* Letter at 2.

[1240] *Id.* at 2-3. Free Press asserts that Verizon "long ago stopped investing in residential fiber," even while its retail broadband service offerings have been classified as an information service, and AT&T "never bothered to deploy retail fiber-to-the-home services." Free Press Nov. 14, 2014 *Ex Parte* Letter at 4.

[1241] *See, e.g.*, WGAW Reply at 34-35.

[1242] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), *codified at* 47 U.S.C. § 332(c). As discussed above, the Act defines CMRS as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). "Interconnected service" is "service that is interconnected with the public switched network." 47 U.S.C. § 332(d)(2). This statutory framework, set forth in section 332 of the Communications Act, also preempts State or local government regulation of CMRS rates and entry, but permits State or local regulation of other CMRS terms and conditions. 47 U.S.C. § 332(c)(3).

[1243] *Compare* 47 U.S.C. § 332(c)(1)(A), 332(c)(1)(D) *with* 47 U.S.C. § 160(a)–(b).

[1244] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994), *corrected*, 9 FCC Rcd 2156 (*Wireless Forbearance Order*), *order on reconsideration*, 10 FCC Rcd 7824 (1995) (clarifying preemption standard); *see also* 47 U.S.C. §§ 203, 204, 205, 211, 212, 214.

regulations governing interlocking directorates, and regulatory control of market entry and exit.[1245] CMRS providers remain subject to the remaining provisions in Parts I and II of Title II. Recognizing that the "continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry," the Commission sought to ensure that its policies fostered robust investment, and it chose a regulatory path intended to establish "a stable, predictable regulatory environment that facilitates prudent business planning."[1246]

423. Mobile providers have thrived under a market-based Title II regime. During the period between 1993 and the end of 2009, while mobile voice was the primary driver of mobile revenues, wireless subscribership grew over 1600 percent, with more than 285 million subscribers at the end of 2009.[1247] Industry revenues increased from $10.9 billion in 1993 to over $152 billion—a 1300 percent increase.[1248] Further, between 1993 and 2009, the industry invested more than $271 billion in building out their wireless networks, which was in addition to monies spent acquiring spectrum.[1249] Verizon Wireless, in particular, has invested tens of billions of dollars in deploying mobile wireless services since being subject to the 700 MHz C Block open access rules, which overlap in significant parts with the open Internet rules we adopt today.[1250] Similarly, during this period, the wireless industry built nearly 235,000 cell sites across the country—more than an 1800 percent increase over the approximately 13,000 sites at the end of 1993.[1251] Wireless voice service is now available to over 99.9 percent of the U.S. population.[1252] More than 99.4 percent of subscribers are served by at least two providers, and more than 96 percent are served by at least three providers.[1253] Finally, the recent AWS auction, conducted under the specter of Title II regulation, generated bids (net of bidding credits) of more than $41 billion—

[1245] *Wireless Forbearance Order*, 9 FCC Rcd at 1510-11, para. 272.

[1246] *Id.* at 1421, para. 22.

[1247] CTIA Wireless Industry Indices: Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry year-End 2013 Results, 2014 at 25.

[1248] *Id*. at 76.

[1249] *Id.* at 97. We note that Verizon argues that wireless investment began increasing around 2003 due to growth in mobile broadband, and disputes the idea that this investment was driven by CMRS voice services. *See* Letter from William H. Johnson, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28, at 2-4 (filed Feb. 19, 2015); O'Rielly Dissent at 6 & n.17. However, given that mobile broadband was not classified as a Title I information service until 2007, it is not clear the extent to which increases in investment before then can be attributed to a non-CMRS regulatory environment. Furthermore, voice service has continued to account for a significant portion of revenues. *See* CTIA, Annual Wireless Industry Survey (2014) at 84; *see also* Bank of America/Merrill Lynch Global Wireless Matrix 4Q14 at 274 (reporting that data revenues represented only 40.7 percent of total service revenues reported in 2014 in the US). Free Press cites data showing substantial investment growth in the late 1990s (a time of increased demand for voice services) and the late 2000s to present (a period of increased smartphone use). *See* Letter from Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28, at 2-4 (filed Feb. 23, 2015). During the latter years, as discussed above, Verizon's LTE network was subject to openness rules imposed by spectrum licensing conditions. Regardless of which assumptions are made, it is clear that there has been substantial network investment by mobile wireless providers during a significant period of time in which these providers' services have been subject to Title II regulation or openness requirements. Indeed, the data suggest that network investments have been driven more by overall market conditions, including consumer demand, than by the particular regulatory framework in place. *See id.* at 3.

[1250] *See* Verizon Communications Inc., 10K Financial Statements 2008-2014, http://www.verizon.com/about/investors/quarterly-reports/.

[1251] *Id.* at 107.

[1252] *Seventeenth Annual Wireless Competition Report*, 29 FCC Rcd at 15333, para. 47.

[1253] *Id.* at 15334, Chart III.A.1.

demonstrating that robust investment is not inconsistent with a light-touch Title II regime.[1254] Fears that our classification decision will lead to excessive regulation of Internet access service should be dispelled by our record of regulating the wireless voice industry for nearly twenty years under Title II.

424. In addition, the key provisions of Title II apply to certain enterprise broadband services. In a series of forbearance orders in 2007 and 2008, the Commission forbore from application of a number of Title II's provisions to AT&T, Qwest, Embarq, and Frontier.[1255] Since that time, those services have been subject to sections 201, 202, and 208, as well as certain other provisions that the Commission determined were in the public interest. AT&T has recently called this framework an "unqualified regulatory success story," and claimed that these services "represent the epicenter of broadband investment that the Commission's national broadband policies seek to promote."[1256] The record does not evince any evidence that continued "light touch" Title II regulation has hindered investment in these services.

425. We observe that Title II currently applies not just to interconnected mobile voice and data services and to enterprise broadband services, but also the wired broadband offerings of more than 1000 rural local exchange carriers (LECs) that voluntarily offer their DSL and fiber broadband services as common carrier offerings "in order to participate in National Exchange Carrier Association (NECA) tariff pools, which allow small carriers to spread costs and risks amongst themselves," without harmful effects on investment.[1257] As NTCA, which represents many of these entities, explained, "[c]ontrary to the dire, and somewhat hyperbolic, predictions of a few, the application of Title II *only and strictly* to the transport and transmission component underpinning retail broadband service will not cause investment in broadband networks and the services that ride atop them to grind to a halt. To the contrary, a continued lack of clear 'rules of the road' is far more likely to have a deleterious effect on investment nationwide by providers large and small."[1258] Thus, we disagree with assertions by the American Cable Association that

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[1254] *See* FCC, *Auction 97 – Advanced Wireless Services (AWS-3)*, http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=97 (last visited Feb. 4, 2015).

[1255] *See AT&T Enterprise Forbearance Order*, 22 FCC Rcd 18705; *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and* Computer Inquiry *Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (*Qwest Forbearance Order*); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of* Computer Inquiry *& Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and* Computer Inquiry *Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (*Embarq/Frontier Forbearance Order*), *aff'd sub nom. Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

[1256] *See* Marvin Ammori Dec. 19, 2014 *Ex Parte* Letter at 6 (citing AT&T Comments, WC Docket No. 05-25, RM-10593, at 3 (filed Apr. 16, 2013)); *see also* Free Press Reply at 29.

[1257] Free Press Comments at 46; *see also* Free Press Reply at 30; NTCA Comments at 9; *Wireline Broadband Classification Order*, 20 FCC Rcd at 14900-903, paras. 89-95. *See Wireline Broadband Classification Order*, 20 FCC Rcd at 14901, para. 90 ("[P]roviders of wireline broadband Internet access service that offer [broadband Internet access] transmission as a telecommunications service after the effective date of this Order may do so on a permissive detariffing basis."); *id.* at 14901, n.270 ("For example, Qwest has indicated that it may continue offering a common carrier DSL transmission service to end users (*i.e.*, its current retail 'DSL+' transmission service) . . ."). As discussed above, see Section IV.C.1., the broadband Internet access service we define today is itself a transmission service. We disagree with the argument that in classifying BIAS, rather than a transmission "component" of BIAS, we are diverging from prior precedent regarding these DSL services and what the Justices were debating in *Brand X*. *See* Pai Dissent at 40-42. Whether we refer to that function as "access," "connectivity," or "transmission," we have defined BIAS today such that it is the capability to send and receive packets to all or substantially all Internet endpoints. *See supra* Section IV.C.1. Thus, the service we define and classify today *is* the same transmission service as that discussed in prior Commission orders.

[1258] NTCA Reply at 10.

"Title II 'reclassification' or partial 'classification' of broadband Internet access service would have immediate and disastrous economic consequences for small and medium-sized ISPs."[1259]

D. Judicial Estoppel Does Not Apply Here

426. Finally, we reject the argument that we are judicially estopped from finding that broadband Internet access service is a telecommunications service. Judicial estoppel is an equitable doctrine that courts may invoke at their discretion to prevent a party that prevailed on an issue in one case from taking a contrary position in another case.[1260] Several commenters contend that because the Commission successfully argued before the Supreme Court in *Brand X* that cable modem service is an information service, the Commission is judicially estopped from finding that broadband Internet access service is a telecommunications service.[1261]

427. We disagree. Although the Supreme Court has not adopted a blanket rule barring estoppel against the government, if it exists at all it is "hen's teeth rare."[1262] Judicial estoppel may be invoked against the government only when "it conducts what 'appears to be a knowing assault upon the integrity of the judicial system,'"[1263] such as when the inconsistent positions are tantamount to a knowing misrepresentation or even fraud upon the court.[1264] Judicial estoppel will not be applied when the shift in position "is the result of a change in public policy."[1265]

428. In *Brand X*, the Supreme Court confirmed not only that an administrative agency *can* change its interpretation of an ambiguous statute, but that it "'*must* consider varying interpretations and the wisdom of its policy on a continuing basis.'"[1266] Following that directive, we have reexamined the Commission's prior classification decisions and now conclude that broadband Internet access service is a telecommunications service. This Declaratory Ruling is the result of what we believe to be the better reading of the Communications Act under current factual and legal circumstances; it manifestly is not the product of fraud or other egregious misconduct.

429. Moreover, judicial estoppel does not apply unless a party's current position is "clearly inconsistent" with its position in an earlier legal proceeding.[1267] In the *Brand X* litigation and now, the

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[1259] ACA Comments at 44; *see also id*. at 62-66; Letter from Brian Gray, Connectivity Manager, Joink, LLC to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Feb. 2, 2015).

[1260] *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001); *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) (explaining that judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase").

[1261] *See, e.g.*, US Telecom Comments at 28-31; Alcatel-Lucent Comments at 12.

[1262] *Costa v. INS*, 233 F.3d 31, 38 (1st Cir. 2000); s*ee also OPM v. Richmond*, 496 U.S. 414, 422 (1990) (noting that the Supreme Court has reversed every finding of estoppel against the government that it has reviewed); *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant."); *Nagle v. Acton-Boxborough Regional School Dist.*, 576 F.3d 1, 3 (1st Cir. 2009).

[1263] *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) (quoting *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 474 (6th Cir. 1988)).

[1264] *Chao v. Roy's Construction, Inc.*, 517 F.3d 180, 186 n.5 (3d Cir. 2008); s*ee also United States v. Williams*, 612 F.3d 500, 513-14 (6th Cir. 2010); *Morris Communications, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009) (equitable estoppel may be applied only if the government "engaged in affirmative misconduct," such as "misrepresentation or concealment").

[1265] *United States v. Owens*, 54 F.3d at 275; s*ee also New Hampshire v. Maine*, 532 U.S. at 755.

[1266] *Brand X*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-64) (emphasis added); *see also Verizon*, 740 F.3d at 636.

[1267] *New Hampshire v. Maine*, 532 U.S. at 750 (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999).

Commission has consistently maintained the position that the relevant statutory provisions are susceptible to more than one reasonable interpretation. Counsel for the Commission argued in *Brand X* that the Commission reasonably construed ambiguous statutory language in finding that cable modem service is an information service.[1268] The Supreme Court agreed and deferred to the Commission's judgment, but recognized that a contrary interpretation also would be permissible: "[O]ur conclusion that it is *reasonable* to read the Communications Act to classify cable modem service solely as an 'information service' leaves untouched *Portland's* holding that the Commission's interpretation is not the *best* reading of the statute."[1269] Although we respect the Commission's prior classification decisions and the policy considerations underlying them, we believe the better view at this time is that broadband Internet access is a telecommunications service as defined in the Act. Because our decision does not result in "'the perversion of the judicial process,'"[1270] judicial estoppel should not be applied here.

E. State and Local Regulation of Broadband Services

430. We reject the argument that "potential state tax implications" counsel against the classification of broadband Internet access service as a telecommunications service.[1271] Our classification of broadband Internet access service as a telecommunications service appropriately derives from the factual characteristics of these services as they exist and are offered today. At any rate, we observe that the recently reauthorized Internet Tax Freedom Act (ITFA) prohibits states and localities from imposing "[t]axes on Internet access."[1272] This prohibition applies notwithstanding our regulatory classification of broadband Internet access service.[1273] Indeed, the legislative history of ITFA emphasizes that Congress drafted its definition of "Internet access" to be independent of the regulatory classification determination in order to "clarify that all transmission components of Internet access, regardless of the regulatory treatment of the underlying platform, are covered under the ITFA's Internet tax moratorium."[1274]

[1268] *See* Brief for the Federal Petitioners at 26-28, 38-44, *Brand X*, 545 U.S. 967.

[1269] *Brand X*, 545 U.S. at 985-86 (emphasis in original).

[1270] *New Hampshire v. Maine*, 532 U.S. at 750 (quoting *In re Cassidy*, 892 F.2d 627, 641 (7th Cir. 1990)).

[1271] *See* Letter from James Assey, Executive Vice President, NCTA, to Jonathan Sallet, General Counsel, FCC, GN Docket Nos. 14-28 & 10-127, at 1 (filed Dec. 2, 2014) (NCTA Dec. 2, 2014 *Ex Parte* Letter); *see also* Letter from Will Marshall, President, Progressive Policy Institute to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Dec. 16, 2014) (PPI Dec. 16, 2014 *Ex Parte* Letter); MMTC Comments at 9; ACA Comments at 62-64; Letter from James Assey, Exec. Vice President, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127 (filed Nov. 14, 2014) (NCTA Nov. 14, 2014 *Ex Parte* Letter); Letter from James Assey, Exec. Vice President, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 2 (filed Oct. 30, 2014) (NCTA Oct. 30, 2014 *Ex Parte* Letter); TWC Comments at 19.

[1272] Internet Tax Freedom Act § 1101(a)(1), Pub. L. 105–277, 112 Stat. 2681–719 (1998) (codified at 47 U.S.C. § 151 nt.). In December 2014, Congress extended ITFA through September 2015 as part of a continuing resolution and omnibus spending package. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 624, 128 Stat. 2130, 2377 (2014). *See also* Letter from Matthew F. Wood, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 4-5 (filed Dec. 15, 2014) (Free Press Dec. 15, 2014 *Ex Parte* Letter).

[1273] *See id*. § 1105 of the ITFA defines "Internet access" to include "the purchase, use or sale of telecommunications . . . to the extent such telecommunications are purchased, used or sold . . . to provide [a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet]." 47 U.S.C. § 151 nt.

[1274] S. Comm. On Commerce, Sci. & Transp., Internet Tax Nondiscrimination Act of 2003, S. Rep. No. 108-155, at 2 (Sept. 29, 2003), *reprinted in* 2004 U.S.C.C.A.N. 2435, 2437. Moreover, today's decision would not bring broadband providers within the ambit of any state or local laws that impose property taxes on "telephone companies" or "utilities," as those terms are commonly understood. *See, e.g.*, Letter from Samuel L. Feder, counsel to Charter Communications, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Feb. 18, 2015). As noted herein, we are not regulating broadband Internet access service as a utility or telephone company.

431. Today, we reaffirm the Commission's longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes.[1275] As a general matter, mixed-jurisdiction services are typically subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies.[1276] With respect to broadband Internet access services, the Commission has previously found that, "[a]lthough . . . broadband Internet access service traffic may include an intrastate component, . . . broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes."[1277] The Commission thus has evaluated possible state regulations of broadband Internet access service to guard against any conflict with federal law.[1278] Though we adopt some changes to the legal framework regulating broadband, the Commission has consistently applied this jurisdictional conclusion to broadband Internet access services, and we see no basis in the record to deviate from this established precedent.[1279] The "Internet's inherently global and open architecture" enables edge providers to serve content through a multitude of distributed origination points, making end-to-end jurisdictional analysis extremely difficult—if not impossible—when the services at issue involve the Internet.[1280]

432. We also make clear that the states are bound by our forbearance decisions today. Under section 10(e), "[a] State commission may not continue to apply or enforce any provision" from which the Commission has granted forbearance.[1281] With respect to universal service, we conclude that the imposition of state-level contributions on broadband providers that do not presently contribute would be inconsistent with our decision at the present time to forbear from mandatory federal USF contributions, and therefore we preempt any state from imposing any new state USF contributions on broadband—at

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[1275] *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59 (using the end-to-end analysis to determine that cable modem Internet access service is jurisdictionally interstate); *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13288, para. 11; *Wireless Broadband Classification Order*, Memorandum Opinion and Order, 22 FCC Rcd at 5911, para. 28; *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22474-83, paras. 16-32 (1998) (*GTE Order*), *recon*., 17 FCC Rcd 27409, 27411-12, para. 9 (1999). The record generally supports the continued application of this conclusion to broadband Internet access service. *See, e.g.*, Free Press Dec. 15, 2014 *Ex Parte* Letter at 5-6.

[1276] *Vonage Holdings Corp.*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22419, para. 17 (2004) (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1622-23, paras. 18-19 (1992)). Notwithstanding the interstate nature of BIAS, states of course have a role with respect to broadband. As the Commission has stated "finding that this service is jurisdictionally interstate [] does not by itself preclude" all possible state requirements regarding that service. *National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, 25 FCC Rcd 5051, 5054-55, para. 9 (2010) (*NARUC Broadband Data Order*) ("Given the specific federal recognition of a State role in broadband data collection, we anticipate that such State efforts will not necessarily be incompatible with the federal efforts or inevitably stand as an obstacle to the implementation of valid federal "polic[i]es.").

[1277] *NARUC Broadband Data Order*, 25 FCC Rcd at 5054, para. 8 n.24 (citing *GTE Order*, 13 FCC Rcd at 22475, para. 16).

[1278] *See generally, e.g.*, *NARUC Broadband Data Order*, 25 FCC Rcd 5051.

[1279] *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59; *Wireless Broadband Classification Order*, 22 FCC Rcd at 5911, para. 28; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13288, para. 11.

[1280] *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59 (using the end-to-end analysis to determine that cable modem Internet access service is jurisdictionally interstate); *GTE Order*, 13 FCC Rcd 22466 (finding GTE's ADSL service to be properly tariffed as an interstate service).

[1281] 47 U.S.C. § 160(e).

least until the Commission rules on whether to provide for such contributions.[1282] We recognize that section 254 expressly contemplates that states will take action to preserve and advance universal service, but as discussed below, our actions in this regard will benefit from further deliberation.[1283]

433. Finally, we announce our firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.[1284] While we establish a comprehensive regulatory framework governing broadband Internet access services nationwide today, situations may nonetheless arise where federal and state actions regarding broadband conflict.[1285] The Commission has used preemption to protect federal interests when a state regulation conflicts with federal rules or policies, and we intend to exercise this authority to preempt any state regulations which conflict with this comprehensive regulatory scheme or other federal law.[1286] For example, should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of broadband Internet access service through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations. While we necessarily proceed on a case-by-case basis in light of the fact specific nature of particular preemption inquiries, we will act promptly, whenever necessary, to prevent state regulations that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies.

V. ORDER: FORBEARANCE FOR BROADBAND INTERNET ACCESS SERVICES

434. Having classified broadband Internet access service as a telecommunications service, we now consider whether the Commission should grant forbearance as to any of the resulting requirements of the Act or Commission rules. As proposed in the *2014 Open Internet NPRM*, we do not forbear from sections 201, 202, and 208, along with key enforcement authority under the Act, both as a basis of authority for adopting open Internet rules as well as for the additional protections those provisions directly provide. As discussed below, we also do not forbear from certain provisions in the context of

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[1282] 47 U.S.C. § 254(f). Preemptive delay of state and local regulations is appropriate when the Commission determines that such action best serves federal communications policies. *See, e.g.*, *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982) (affirming delay of state regulation to comport with Commission policy) (citing *Brookland Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir.) cert denied, 441 U.S. 904 (1978); *NARUC 1*, 525 F.2d at 646). We note that we are not aware of any current state assessment of broadband providers for state universal service funds, as we understand that those carriers that have chosen voluntarily to offer Internet transmission as a Title II service classify such revenues as 100 percent interstate.

[1283] *See infra* Section V.C.1.d.

[1284] *See infra* Section V.

[1285] We note also that we do not believe that the classification decision made herein would serve as justification for a state or local franchising authority to require a party with a franchise to operate a "cable system" (as defined in Section 602 of the Act) to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services. *See, e.g.*, Letter from Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC at 3 (filed Feb. 4, 2015) ("[I]t would be inappropriate for franchising authorities to require additional franchises, fees, or concessions for the provision of broadband Internet access service by a provider that already has a franchise, either through service regulation or claimed regulation of broadband equipment that adds no appreciable burden to the rights of way.").

[1286] *See*, *e.g.*, *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) ("Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."); *see also, e.g.*, *Minnesota Pub. Utilities Comm'n. v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) ("Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation."); *Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1334 (D.C. Cir. 1989); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1114 (D.C. Cir. 1984).

broadband Internet access service to protect customer privacy, advance access for persons with disabilities, and foster network deployment. Because we believe that those protections and our open Internet rules collectively will strike the right balance at this time of minimizing the burdens on broadband providers while still adequately protecting the public, particularly given the objectives of section 706 of the 1996 Act, we otherwise grant substantial forbearance.

A. Forbearance Framework

435. Section 10 provides that the Commission "shall" forbear from applying any regulation or provision of the Communications Act to telecommunications carriers or telecommunications services if the Commission determines that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[1287]

436. The Commission previously has considered whether a current need exists for a rule in evaluating whether a rule is "necessary" under the first two prongs of the three-part section 10 forbearance test.[1288] In particular, the current need analysis assists in interpreting the word "necessary" in sections 10(a)(1) and 10(a)(2). For those portions of our forbearance analysis that do require us to assess whether a rule is necessary, the D.C. Circuit concluded that "'it is reasonable to construe 'necessary' as referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation.'"[1289] In contrast, section 10(a)(3) requires the Commission to consider whether forbearance is consistent with the public interest, an inquiry that also may include other considerations.[1290]

[1287] 47 U.S.C. § 160(a). "In making the determination under subsection (a)(3) [that forbearance is in the public interest,] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id*. § 160(b). In addition, "[a] State commission may not continue to apply or enforce any provision" from which the Commission has granted forbearance under section 10. 47 U.S.C. § 160(e). For the same reasons set forth herein with respect to the forbearance granted under our section 10(a) analysis, forbearance from those same provisions and regulations in the case of the mobile broadband Internet access services also is consistent with the virtually identical forbearance standards for CMRS set forth in section 332(c)(1)(A). 47 U.S.C. § 332(c)(1)(A).

[1288] *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, Memorandum Opinion and Order, 23 FCC Rcd 7302, 7314, para. 20 (2008) (*AT&T Cost Assignment Forbearance Order*) (concluding that a rule is not "necessary" under section 10(a)(1) where there is not a current need, and citing *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003), which was interpreting the term "necessary" in the context of section 10(a)(2)).

[1289] *AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7314, para. 20 (citing *Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 512 (2003) (evaluating the Commission's interpretation of section 10(a)(2) under *Chevron* step 2)).

[1290] *See AT&T Cost Assignment Forbearance Order*, 23 FCC Rcd at 7321, para. 32 (forbearing "because there is no current, federal need for the [rules in question] in these circumstances, *and the section 10 criteria otherwise are met*") (emphasis added).

437. Also central to our analysis, section 706 of the 1996 Act "explicitly directs the FCC to 'utiliz[e]' forbearance to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'"[1291] In its most recent *Broadband Progress Report*, the Commission found "that broadband is not being deployed to all Americans in a reasonable and timely fashion."[1292] This, in turn, triggers a duty under section 706 for the Commission to "take immediate action to accelerate deployment."[1293] Within the statutory framework that Congress established, the Commission "possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband."[1294]

438. This proceeding is unlike typical forbearance proceedings in that, often, a petitioner files a petition seeking relief pursuant to section 10(c).[1295] In such proceedings, "the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition for forbearance."[1296] However, under section 10, the Commission also may forbear on its own motion.[1297] Because the Commission is forbearing on its own motion, it is not governed by its procedural rules insofar as they apply, by their terms, to section 10(c) petitions for forbearance.[1298] Further, the fact that the Commission may adopt a rule placing the burden on a party filing a section 10(c) petition for forbearance in implementing an ambiguous statutory provision in section 10 of the Act,[1299] does not require the Commission to assume that burden where it forbears on its own motion, and we reject suggestions to the contrary.[1300] Because the Commission is not responding to a petition under section 10(c), we conduct our forbearance analysis under the general reasoned decision making requirements of the Administrative Procedure Act, without the burden of proof requirements that section 10(c) petitioners

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[1291] *EarthLink v. FCC*, 462 F.3d 1, 8-9 (D.C. Cir. 2006) (alteration in original).

[1292] *2015 Broadband Progress Report* at para. 4.

[1293] *Id.* at para. 12.

[1294] *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009).

[1295] 47 U.S.C. § 160(c).

[1296] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, 9554–55, para. 20 (2009) (*Forbearance Procedures Order*). This burden of proof "encompasses both the burden of production and the burden of persuasion." *Id*. at 9556, para. 21. Thus, in addition to stating a prima facie case in support of forbearance, "the petitioner's evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance." *Id*.

[1297] *See* 47 U.S.C. § 160(a).

[1298] 47 C.F.R. §§ 1.53-1.59. We thus also reject criticisms of possible forbearance based on arguments that the *2014 Open Internet NPRM* would not satisfy those rules. *See, e.g.*, Letter from Earl Comstock, et al. Counsel for Full Service Network and TruConnect, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 6-10, 14 (filed Feb. 3, 2015) (Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter). Indeed, while the Commission modeled its forbearance procedural rules on procedures from the notice and comment rulemaking context in certain ways, in other, significant ways it drew upon procedures used outside that context. *Compare, e.g.*, *Forbearance Procedures Order*, 24 FCC Rcd at 9558-59, paras. 19, 29 (filing format and notice requirements modeled on procedures used in the notice and comment rulemaking context) *with, e.g.*, *id*. at 9551, para. 13 & n.51 (requiring that forbearance petitions be complete as filed, drawing from requirements in the section 271, tariffing, and formal complaint contexts and distinguishing the Commission's approach in notice and comment rulemaking proceedings). Thus, the Commission's adoption of these rules neither expressly bound the Commission nor reflected its view of the general standards relevant to a notice and comment rulemaking.

[1299] *See, e.g.*, *Verizon v. FCC*, 770 F.3d 961, 967 (D.C. Cir. 2014); *Qwest v. FCC*, 689 F.3d 1214, 1226 (10th Cir. 2012).

[1300] *See, e.g.*, Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 8 n.23.

face. We conclude that the analysis below readily satisfies both the standards of section 10[1301] and the reasoned decision making requirements of the APA[1302] and thus reject claims that broad forbearance accompanying classification decisions necessarily would be arbitrary and capricious.[1303]

439. We reject arguments suggesting that persuasive evidence of competition is a necessary prerequisite to granting forbearance under section 10 even if the section 10 criteria otherwise are met.[1304] For example, the Commission has in the past granted forbearance from particular provisions of the Act or regulations where it found the application of other requirements (rather than marketplace competition) adequate to satisfy the section 10(a) criteria,[1305] and nothing in the language of section 10 precludes the

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[1301] We conclude that the section 10 analytical framework described above comports with the statutory requirements, and is largely consistent with alternative formulations suggested by others. *See, e.g.*, Letter from Lawrence J. Spiwak, President, Phoenix Center for Advanced Legal and Economic Public Policy Studies, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. 3 at 134-37 (filed Feb. 18, 2015). To the extent that such comments could be read to suggest different analyses in any respects, we reject them as not required by section 10, as we interpret it above.

[1302] As discussed below, we also find that, in proceeding via notice and comment rulemaking here, the Commission provided adequate notice of forbearance. *See infra* Section V.D.

[1303] Letter from Sarah J. Morris, Senior Policy Counsel, Open Technology Institute, New America Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Oct. 22, 2014).

[1304] *See, e.g.*, AT&T Comments at 67; TechFreedom Comments at 37; Time Warner Cable Comments at 18; CBIT Reply at 41-43; Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 16 & n.61.

[1305] *See, e.g.*, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order, 28 FCC Rcd 7627, 7675-76, paras. 107-08 (2013) (*USTelecom Forbearance Long Order*) (granting forbearance from certain cost assignment rules where conditions imposed on the forbearance and other still-applicable rules and requirements were adequate to meet the Commission's needs); *id*. at 7668, paras. 86-87 (granting forbearance from property record requirements where the Commission's needs could be met through compliance plans put in place as conditions of forbearance); *id* at 7672, para. 98 (forbearing from requirements that interexchange carriers keep certain information in hard copy conditioned on that information being available on the carrier's website); *id*. at 7675, para. 104-06 (granting forbearance from certain reporting requirements in light of other still-applicable regulatory requirements and conditions on forbearance); *id*. at 7678-79, paras. 113-15 (forbearing from other reporting requirements where the information at issue still would be filed or otherwise available in light of other still-applicable regulatory requirements and conditions on forbearance); *id*. at 7691-92, paras. 142-48 (forbearing from separate affiliate requirements given other still-applicable regulatory requirements and conditions on forbearance); *id*. at 7705, para. 175 (forbearing from rules governing recording of conversations with the telephone company in light of other, still-applicable legal requirements); *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees*, IB Docket No. 11-133, First Report and Order, 27 FCC Rcd 9832, 9841, para. 20 (2012) (incorporating section 310(b)(4) requirements in order to satisfy section 10(a)(3) forbearance standard for section 310(b)(3) in certain cases); *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a/ Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on The CALLS Order or a Forward Looking Cost Study*, CC Docket No. 01-331, Order, 17 FCC Rcd 24319, 24325-26, paras. 18-19 (2002) (granting forbearance from an interstate switched access rate regulation to allow rates to be re-set at a forward-looking cost level in light of the protections of the forward-looking cost approach to setting the rate and other, still-applicable legal requirements); *Petition for Forbearance from Application of the Communications Act of 1934, as Amended, to Previously Authorized Services*, Memorandum Opinion and Order, 12 FCC Rcd 8408, 8411-12, paras. 9-10 (Common Car. Bur. 1997) (granting forbearance from section 203 for purposes of providing a refund in light of other, still-applicable legal requirements). *See also, e.g.*, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Servs*., GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1479, para. 176 (granting forbearance under section 332(c)(1)(A) from section 205 in light of other, still-applicable enforcement provisions) (*CMRS Title II Forbearance Order*). We reiterate that although the Commission has discretion to grant forbearance where other protections that include conditions on forbearance are adequate, in the case of section 10(c) petitions for forbearance the Commission is "under no statutory obligation to evaluate [a] Petition other than as pled." *Petition of Qwest*

(continued….)

Commission from proceeding on that basis where warranted.[1306] Thus, although, in appropriate circumstances, persuasive evidence of competition can be a sufficient basis to grant forbearance, it is not inherently necessary to a grant of forbearance under section 10. The *Qwest Phoenix Order*, cited by some commenters in this regard, is not to the contrary. Unlike here, the Commission in the *Qwest Phoenix Order* was addressing a petition where the rationale for forbearance was premised on the state of competition.[1307] This proceeding does not involve a similar request for relief, and, indeed, the *Qwest Phoenix Order* itself specifically observed that "a different analysis may apply when the Commission addresses advanced services, like broadband services," where the Commission, among other things, "must take into consideration the direction of section 706."[1308] For similar reasons we reject as inconsistent with the text of section 10 and our associated precedent the argument that forbearance only is appropriate when the grant of forbearance will itself spur conduct that mitigates the need for the forborne-from requirements.[1309]

B. Maintaining the Customer Safeguards Critical to Protecting and Preserving the Open Internet

440. As discussed below, we find sections 201 and 202 of the Act, along with section 208 and certain fundamental Title II enforcement authority, necessary to ensure just and reasonable conduct by broadband providers and necessary to protect consumers under sections 10(a)(1) and (a)(2). We also find that forbearance from these provisions would not be in the public interest under section 10(a)(3), and therefore do not grant forbearance from those provisions and associated enforcement procedural rules with respect to the broadband Internet access service at issue here.

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Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19445, para. 61 n.161 (2005).

[1306] Section 10(b) does direct the Commission to consider whether forbearance will promote competitive market conditions as part of the public interest analysis under section 10(a)(3). 47 U.S.C. § 160(b). However, while a finding that forbearance will promote competitive market conditions may provide sufficient grounds to find forbearance in the public interest under section 10(a)(3), *see id*., nothing in the text of section 10 makes such a finding a necessary prerequisite for forbearance where the Commission can make the required findings under section 10(a) for other reasons. *See generally* 47 U.S.C. § 160. For similar reasons we reject the suggestion that more geographically granular data or information or an otherwise more nuanced analysis are needed with respect to some or all of the forbearance granted in this Order. *See, e.g.*, Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 14-16. The record and our analysis supports forbearance from applying the statutory provisions and Commission regulations to the extent described below based on considerations that we find to be common nationwide, and as discussed in our analysis of the record below, we do not find persuasive evidence or arguments to the contrary in the record as to any narrower geographic area(s) or as to particular provisions or regulations. *See generally infra* Section V.C.

[1307] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8622, para. 1 (2010) (*Qwest Phoenix Order*). Insofar as the Commission likewise was responding to arguments that competition was sufficient to warrant forbearance when acting on other forbearance petitions, this distinguishes those decisions, as well. Likewise, to the extent that the Commission has found competition to be a sufficient basis to grant forbearance on its own motion in the past, that does not dictate that it only can grant forbearance under such circumstances. Rather, the Commission grants forbearance where it finds that the section 10(a) criteria are met.

[1308] *Id*. at 8644-45, para. 39.

[1309] *See, e.g.*, Hurwitz Comments at 11.

1. Authority to Protect Consumers and Promote Competition: Sections 201 and 202

441. The Commission has found that sections 201 and 202 "lie at the heart of consumer protection under the Act,"[1310] and we find here that forbearance from those provisions would not be in the public interest under section 10(a)(3). The Commission has never previously forborne from applying these "bedrock consumer protection obligations,"[1311] and we generally do not find forbearance warranted here. This conclusion is consistent with the views of many commenters that any service classified as a telecommunications service should remain subject to those provisions.[1312] However, particularly in light of the protections the open Internet rules provide and the ability to employ sections 201 and 202 in case-by-case adjudications, we are otherwise persuaded to forbear from applying sections 201 and 202 of the Act in a manner that would enable the adoption of *ex ante* rate regulation of broadband Internet access service in the future, as discussed below.[1313]

442. For one, sections 201 and 202 help enable us to preserve and protect Internet openness broadly, and applying those provisions benefits the public broadly by helping foster innovation and competition at the edge,[1314] thereby promoting broadband infrastructure investment nationwide.[1315] As explained above, the open Internet rules adopted in this Order reflect more specific protections against unjust or unreasonable rates or practices for or in connection with broadband Internet access service.[1316] These benefits—which can extend beyond the specific dealings between a given broadband provider and a given customer—persuade us that forbearance from sections 201 and 202 here is not in the public interest.

443. Retaining these provisions, moreover, is in the public interest because it provides the Commission direct statutory authority to protect Internet openness and promote fair competition while allowing the Commission to adopt a tailored approach and forbear from most other requirements. As discussed below, this includes forbearance from the pre-existing *ex ante* rate regulations and other Commission rules implementing sections 201 and 202.[1317] As another example, this authority supports

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[1310] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services et al.*, WT Docket No. 98-100, GN Docket No. 94-33, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16865, para. 15 (1998) (*PCIA Forbearance Order*).

[1311] *PCIA Forbearance Order*, 13 FCC Rcd at 16865, para. 15.

[1312] *See, e.g.*, AARP Comments at 42; CDT Comments at 15; COMPTEL Comments at 22-23; Consumers Union Comments at 11; Mozilla Comments at 13; Free Press Reply at 26-27; Sidecar Technologies Reply at 6; Letter from Michael Beckerman, President & CEO, The Internet Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 2 (filed Jan. 6, 2015) (Internet Association Jan. 6, 2015 *Ex Parte* Letter); Letter from William B. Wilhelm, Counsel for Vonage, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Jan. 7, 2015) (Vonage Jan. 7, 2015 *Ex Parte* Letter); NTCA Jan. 8, 2015 *Ex Parte* Letter at 2.

[1313] To be clear, this *ex ante* rate regulation forbearance does not extend to inmate calling services and therefore has no effect on our ability to address rates for inmate calling services under section 276. *See infra* para. 521.

[1314] Thus, in this respect, our decision to apply the provisions actually will promote competitive market conditions at the edge. *See* 47 U.S.C. § 160(b) (directing the Commission, in "making the determination under subsection (a)(3) of this section, [to] consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services").

[1315] *See supra* Section III.B.1.

[1316] *See supra* Section III.

[1317] *See infra* Section V.C.3. We thus reject the arguments of some commenters against the application of these provisions insofar as they assume that such additional regulatory requirements also will apply in the first instance. *See, e.g.*, TIA Comments at 16 ("47 C.F.R. is filled with detailed mandates (e.g., Part 64) implementing Section 201

(continued….)

our forbearance from other interconnection requirements in the Act.[1318] Such considerations provide additional grounds for our conclusion that section 10(a)(3) is not satisfied as to forbearance from sections 201 and 202 of the Act with respect to broadband Internet access service.

444. We also conclude that it would not be in the public interest to forbear from applying sections 201 and 202 given concerns that limited competition could, absent the backstop provided by that authority, result in harmful effects. Among other things, broadband providers are in a position to be gatekeepers to the end-user customers of their broadband Internet access service.[1319] In addition, although there is some amount of competition for broadband Internet access service, it is limited in key respects. While harmful practices by broadband providers—whether in general or as to particular customers—conceivably could motivate an end user to select a different provider of broadband Internet access service, the record does not provide convincing evidence of the nature or extent of such effects in particular.[1320] To the contrary, for example, data show that the majority of Americans face a choice of only two providers of fixed broadband for service at speeds of 3 Mbps/768 kbps to 10 Mbps/768 kbps, and no choice at all (zero or one service provider) for service at 25/3 Mbps.[1321] We also find significant costs associated with switching service that further limit the potential benefits of any competition that would otherwise exist.[1322] These collectively persuade us that we cannot simply conclude, as a general matter, that there is extensive competition sufficient to constrain providers' conduct here. Moreover, as the Commission found in the CMRS context, competition would "not necessarily protect all consumers from all unfair practices. The market may fail to deter providers from unreasonably denying service to, or discriminating against, customers whom they may view as less desirable."[1323] In addition, and again

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or other statutory provisions from which the Commission would either have to forbear – or not. Imposition of those most basic of all common carrier statutory obligations undoubtedly would lead to protracted debates over the application of specific rules and the lawfulness of existing broadband ISP service rates, terms, and business practices.").

[1318] *See infra* Section V.C.2.e.

[1319] *See supra* Section III.B.

[1320] Commenters citing generalized information about the extent of switching among broadband providers does not address the specific concerns that we identify here about consumers' likelihood and ability to switch broadband providers based on particular practices by those providers, nor on the likelihood that any such switching would deter the harmful conduct. *See, e.g.*, USTelecom Comments at 11-13; Verizon Reply at 45-46.

[1321] *2015 Broadband Progress Report*, Chart 2; *see also, e.g.*, CCIA Reply at 2.

[1322] *See supra* Section III.B.

[1323] *PCIA Forbearance Order*, 13 FCC Rcd at 16868, para. 23*; see also, e.g.*, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12291-92, para. 64 (2008) (*Qwest Enterprise Broadband Forbearance Order*); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry & Certain Title II Common-Carriage Requirements et al.*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19507-08, para. 59 (2007), *aff'd sub nom. Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18737-38, para. 67 (2007) (*AT&T Enterprise Broadband Forbearance Order*), *aff'd sub nom. Ad Hoc v. FCC*, 572 F.3d 903; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance of Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16360, para. 128 (2007); *Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, Memorandum Opinion and Order, 20 FCC Rcd 9361, 9367-68, para. 17 (2005) (*SBC IP Platform Services Forbearance Order*), *pet. for review granted on other grounds sub nom. AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006).

similar to the Commission's conclusion in the CMRS context,[1324] even in a competitive market certain conditions could create incentives and opportunities for service providers to engage in discriminatory and unfair practices.[1325] Furthermore, no matter how many options end users have in selecting a provider of Internet access service, or how readily they could switch providers, an edge provider only can reach a particular end user through his or her broadband provider.[1326] We thus reject suggestions that market forces will be sufficient to ensure that providers of broadband Internet access service do not act in a manner contrary to the public interest.[1327]

445. Against this backdrop we are unpersuaded by arguments seeking forbearance from sections 201 and 202 based on generalized arguments about marketplace developments, such as network investment or changes in performance or price per megabit, in the recent past.[1328] However, counterarguments in the record, longer-term trends, and our experience in the CMRS context where sections 201 and 202 have applied, leave us unpersuaded that the inapplicability of sections 201 and 202 were a prerequisite for any such marketplace developments.[1329] We are similarly unpersuaded by arguments comparing the U.S. broadband marketplace with those in Europe,[1330] given, among other things, the differences between the regulatory approach there and the regulatory framework that results from this Order.[1331] We thus find those arguments for forbearance sufficiently speculative and subject to debate that they do not overcome our public interest analysis above.

[1324] *PCIA Forbearance Order*, 13 FCC Rcd at 16868, para. 23.

[1325] For the same reasons discussed above, we are not persuaded to reach a different forbearance decision based on asserted levels of competition faced by small- or mid-sized broadband providers. *See, e.g.*, Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 10-11 (filed Jan. 12, 2015) (ACA Jan. 12, 2015 *Ex Parte* Letter).

[1326] *See, e.g.*, Ad Hoc Comments at 7 ("Competitive conditions vary, not only geographically but also structurally. Thus, a subscriber selecting its Internet access service provider may have competitive alternatives that make forbearance from regulation of that transaction necessary and beneficial. But businesses trying to communicate with that subscriber after the choice is made to have no competitive alternatives.").

[1327] *See, e.g.*, Americans for Tax Reform and Digital Liberty Comments at 5 ("Title II regulation of the competitive broadband industry would abruptly decelerate the speed of Internet innovation to the speed of government . . . ."); CEA Comments at 13 ("Reclassification would be an excessive 'solution' out of proportion to the perceived problem, especially given that any discriminatory behaviors very likely would be mitigated by a competitive market."); CenturyLink Comments at 48-49 ("[O]ne would expect to find the forces of competition protecting consumer interests, as providers work to capture and retain customers by responding to customer needs."); Ericsson Comments at 11 (arguing that the provision of Internet service is "a vibrant, competitive industry" and arguing further that applying "[s]ections 201 and 202 of the Act to broadband Internet access would stifle investment and innovation").

[1328] *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 10-11; Comcast Dec. 24, 2014 *Ex Parte* Letter at 4-6; NCTA Dec. 23, 2014 *Ex Parte* Letter at 19-20.

[1329] *See, e.g.*, *supra* Section IV.C.5.

[1330] *See, e.g.*, Comcast Dec. 24, 2014 *Ex Parte* Letter at 5-6; NCTA Dec. 24, 2014 *Ex Parte* Letter at 20.

[1331] *See, e.g.*, Charles Acquard, Executive Director, NASUCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. at 5 (filed Sept. 22, 2014) (noting the "distinction between the US and European regulatory treatment of broadband . . . that incumbent providers make access to elements of their broadband infrastructures available on an unbundled basis for use by rival providers"); *see also* Letter from Derek Turner, Research Director, Free Press to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 at 4 (filed Feb. 19, 2015) (Free Press Feb. 19, 2015 *Ex Parte* Letter) ("For 2011–2012, total fixed and mobile capital intensity (capital expenditures as a percentage of revenues) was 12.2 percent in the E.U. countries reporting data, versus 14.1 percent in the U.S. Among the 23 E.U. countries with complete data, 13 reported higher capital intensities than the U.S. did during this two-year period.")(internal citation omitted).

446. For these same reasons, we are not persuaded that application of sections 201 and 202 is not necessary to ensure just, reasonable, and nondiscriminatory conduct by broadband providers and for the protection of consumers under sections 10(a)(1) and (a)(2). As discussed above, applying these provisions enables us to protect customers of broadband Internet access service from potentially harmful conduct by broadband providers both by providing a basis for our open Internet rules and for the important statutory backstop they provide regarding broadband provider practices more generally.

447. We also observe that our forbearance decision as to sections 201 and 202 for broadband Internet access service is informed by the CMRS experience, where Congress specifically recognized the importance of sections 201 and 202 (along with section 208) in excluding those provisions from possible forbearance under section 332(c)(1)(A).[1332] Application of sections 201 and 202 has not frustrated investment in the wireless marketplace, nor has it led to *ex ante* regulation of rates charged to consumers for wireless voice service. Indeed, we find that the successful application of this legal framework in the CMRS context responds to the concerns of some commenters about the potential burdens, or uncertainty, resulting from the application of sections 201 and 202, which they contend could create disincentives for investment even standing alone and apart from *ex ante* rules.[1333] Moreover, within their scope, our open Internet rules reflect our interpretation of how sections 201 and 202 apply, providing further guidance and addressing possible concerns about uncertainty regarding the application of sections 201 and 202.[1334] Beyond that, we are not persuaded that concerns about the burdens or uncertainty associated with sections 201 and 202 counsel in favor of a contrary public interest finding under section 10(a)(3), particularly given the very generalized concerns commenters raised.[1335]

448. Although some have argued that section 706 of the 1996 Act provides sufficient authority to adopt open Internet protections,[1336] and we do, in fact, conclude that section 706 provides additional support here, we nonetheless conclude that the application of sections 201 and 202 is appropriate to remove any ambiguity regarding our authority to enforce strong, clear open Internet rules.[1337] Further, comments focused exclusively on section 706 authority neglect the direct role that sections 201 and 202

[1332] 47 U.S.C. § 332(c)(1)(A) (specifying that although Title II applies to CMRS, the Commission may forbear from enforcing any provision of the title *other* than sections 201, 202, and 208).

[1333] *See, e.g.*, Alcatel-Lucent Comments at 15; ACA Comments at 63-64; AT&T Comments at 64–65; Ericsson Comments at 11; TIA Comments at 16; NCTA Reply at 15; Verizon Reply at 51-52; Comcast Dec. 23, 2014 *Ex Parte* Letter at 18-19; NCTA Dec. 24, 2014 *Ex Parte* Letter at 18; Letter from William H. Johnson, Vice President & Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 3-7 (filed Jan. 26, 2015) (Verizon Jan. 26, 2015 *Ex Parte* Letter); Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 5 (filed Feb. 2, 2015). While Verizon attempts to distinguish the CMRS experience by claiming that, unlike voice service, "broadband has *never* been subject to Title II," Verizon Jan. 26, 2015 *Ex Parte* Letter at 5, this is both factually incorrect for the reasons described above, *see supra* Sections IV.A, IV.C.5, nor does it meaningfully address the fact that the CMRS marketplace has seen substantial growth and investment under the regulatory framework that the Commission did apply.

[1334] *See supra* Section III.F.4.

[1335] In any case, the three prongs of section 10(a) are conjunctive and the Commission could properly deny a petition for failure to meet any one prong. *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003). Here, and as to the enforcement provisions below, we find none of the prongs satisfied.

[1336] *See, e.g.*, AT&T Comments at 3; Comcast Comments at 42-43; Georgetown Center for Business and Public Policy Comments at 4; NCTA Reply at 24-30; WISPA Reply at 27.

[1337] For example, although we find that we have authority under section 706 of the 1996 Act to implement appropriate enforcement mechanisms, our reliance on sections 201 and 202 as additional sources of authority (coupled with the enforcement provisions from which we do not forbear, as discussed below), eliminates possible arguments to the contrary. *See, e.g.*, Comstock Reply at 22 (noting that the Commission's forfeiture "regulations at 47 C.F.R. 1.80 (2013) list the violations of specific Acts to which forfeitures apply and section 706 of the Telecommunications Act is not one of them").

will play in the overall regulatory framework we adopt, with respect to practices for or in connection with broadband Internet access service that are not directly governed by our rules.

449. We are persuaded, in part, by arguments that we should forbear from sections 201 and/or 202 outside the open Internet context,[1338] although we reject calls to entirely forbear from applying sections 201 and 202 outside that context or that we otherwise adopt a more granular decision regarding forbearance from provisions in sections 201 and/or 202.[1339] While open Internet considerations have led the Commission to revisit its prior decisions,[1340] our ultimate classification decision here simply acknowledges the reality of how these services are being offered today.[1341] Having classified BIAS as a telecommunications service, we exercise our forbearance authority to establish a tailored Title II regulatory framework that adequately protects consumers, ensures just and reasonable broadband provider conduct, and furthers the public interest—consistent with our goals of more, better, and open broadband. In addition, insofar as commenters cite the same arguments about past network investment or changes in performance or price per megabit in the recent past that we discussed above,[1342] we again find them sufficiently speculative and subject to debate that they do not overcome our forbearance analysis for sections 201 and 202 above.[1343] Moreover, as we noted above, our decision not to forbear from applying sections 201 and 202 not only enables our open Internet regulatory framework but supports our grant of broad forbearance from other provisions and regulations, as discussed below.[1344] In particular, as discussed below, we find that our sections 201 and 202 authority provides a more flexible framework better suited to this marketplace than many of the alternative regulations that otherwise would apply.[1345]

450. Nor do commenters adequately explain how forbearance could be tailored in these ways, at least in the context of case-by-case adjudication. For broadband providers' interconnection practices, which are not covered by the open Internet rules we adopt today, we expressly rely on the backstop of sections 201 and 202 for case-by-case decision making.[1346] We also rely on both sections 201 and 202 for conduct that is covered by the open Internet rules adopted here. Those rules reflect the Commission's interpretation of how sections 201 and 202 apply in that context, and thus the requirements of section 201 and 202 are coextensive as to broadband Internet access service covered by those rules. Commenters do

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[1338] *See, e.g.*, Letter from Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 4-6 (filed Jan. 14, 2015) (NCTA Jan. 14, 2015 *Ex Parte* Letter).

[1339] *See, e.g.*, NCTA Jan. 14, 2015 *Ex Parte* Letter at 5 (proposing that the Commission forbear from section 201(b) either in its entirety or outside the open Internet context); NCTA Dec. 24, 2014 *Ex Parte* Letter at 18-19 (citing a proposal from Congresswoman Eshoo to forbear from all of Title II other than section 202(a)); Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1-2 (filed Feb. 11, 2015) (seeking forbearance from applying the prohibition on unjust and unreasonable "charges" under section 201(b)).

[1340] While the Commission can proceed incrementally, *see, e.g.*, *NCTA v. Brand X*, 545 U.S. 967, 1002 (2005), the agency also has a "continuing obligation to practice reasoned decisionmaking" that includes revisiting prior decisions to the extent warranted. *Aeronautical Radio v. FCC*, 928 F.2d 428 (D.C. Cir. 1991).

[1341] *See supra* Section IV. We thus reject claims that we somehow are using forbearance to increase regulation. *See, e.g.*, Letter from CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 10-11 (filed Feb. 10, 2015); Letter from Timothy M. Boucher, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3-4 (filed Feb. 4, 2015). Rather, we are using it to tailor the regulatory regime otherwise applicable to these telecommunications services.

[1342] *See, e.g.*, NCTA Jan. 14, 2015 *Ex Parte* Letter at 4.

[1343] *See supra* para.445.

[1344] *See infra* Sections V.C.2, V.C.3.

[1345] *See infra* Section V.C.2.e (relying in part on the applicability of section 201(a), in particular, as part of the justification for forbearance from other interconnection requirements).

[1346] *See supra* Section III.D.2.

not indicate, nor does the record otherwise reveal, an administrable way for the Commission to grant the requested partial forbearance while still pursuing such case-by-case decisions in the future. Further, while section 706 of the 1996 Act would remain, as well, we find that sections 201 and 202 provide a more certain foundation for evaluating providers' conduct and pursuing enforcement if warranted in relevant circumstances arising in the future.[1347] We thus are not persuaded that even these more limited proposals for forbearance from provisions in sections 201 and/or 202 as applied on a case-by-case basis would be in the public interest under section 10(a)(3).

451. Although we conclude that the section 10 criteria are not met with respect to the full scope of forbearance that these commenters seek, because we do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future, we forbear from applying sections 201 and 202 to broadband services to that extent. As described above, our approach here is informed by the success of the CMRS framework, which has not, in practice, involved *ex ante* rate regulation. In addition, as courts have recognized, when exercising its section 10 forbearance authority "[g]uided by section 706," the Commission permissibly may "decide[] to balance the future benefits" of encouraging broadband deployment "against [the] short term impact" from a grant of forbearance.[1348] Under the totality of the circumstances here, including the protections of our open Internet rules—which focus on what we identify and the most significant problems likely to arise regarding these broadband services—and our ability to address issues *ex post* under sections 201 and 202 we do not find *ex ante* rate regulations necessary for purposes of section 10(a)(1) and (a)(2). Further, guided by section 706, and reflecting the tailored regulatory approach we adopt in this item,[1349] we find it in the public interest to forbear from applying sections 201 and 202 insofar as they would support the adoption of *ex ante* rate regulations for broadband Internet access service in the future.

452. To the extent some commenters express concern about future rules that the Commission might adopt based on this section 201 and 202 authority,[1350] we cannot, and do not, envision going beyond our open Internet rules to adopt *ex ante* rate regulations based on that section 201 and 202 authority in this context. Consequently, we forbear from sections 201 and 202 in that respect, as discussed above. In this Order, we decide only that forbearance from sections 201 and 202 of the Act to broadband Internet access service is not warranted under section 10 to the extent described above. Indeed, we find here that the application of sections 201 and 202 of the Act enable us to forbear from other requirements, including pre-existing tariffing requirements and Commission rules governing rate regulation, which we find are not warranted here.[1351] Thus, any pre-existing rate regulations adopted by the Commission under its Title II authority—including any regulations adopted under sections 201 and 202—will not be imposed on broadband Internet access service as a result of this Order. Finally, while other types of rules also potentially could be adopted based on section 201 and 202 authority, any Commission rules adopted in the future would remain subject to judicial review under the APA.[1352]

[1347] *See supra* Section III.F.4.

[1348] *EarthLink*, 462 F.3d at 9.

[1349] Our decision to proceed in a tailored manner is discussed in greater detail below. *See infra* paras. 495-496; Section V.C.2.a.

[1350] *See, e.g.*, Ericsson Comments at 11 (expressing concern about the risks of long-term rate regulation and other uncertainties caused by the application of Sections 201 and 202); NCTA Reply at 15 (citing a "dizzying array" of requirements that the Commission has adopted in the past pursuant to its authority under sections 201 and 202).

[1351] *See infra* Sections V.C.2, V.C.3.

[1352] In this regard, commenters advocating forbearance from sections 201 and 202 to guard against new rules that the Commission might adopt pursuant to that authority do not meaningfully explain what incremental benefit that would achieve given that any future Commission proceeding would be required to adopt such rules in any case. *See, e.g.*, Comcast Dec. 24, 2014 *Ex Parte* Letter at 18; Letter from Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 5-6 (filed Jan. 14, 2015) (NCTA Jan. 15, 2015 *Ex Parte* Letter).

2. Enforcement

453. We also retain certain fundamental Title II enforcement provisions, as well as the Commission's rules governing section 208 complaint proceedings. In particular, we decline to forbear from applying section 208 of the Act and the associated procedural rules, which provide a complaint process for enforcement of applicable provisions of the Act or any Commission rules.[1353] Section 208 permits "[a]ny person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter in contravention of the provisions thereof" to file a complaint with the Commission and seek redress.[1354] We also retain additional statutory provisions that we find necessary to ensuring a meaningful enforcement process. In particular, we decline to forbear from sections 206, 207, and 209 as a necessary adjunct to the section 208 complaint process. As the Commission has held previously, forbearing from sections 206, 207, and 209 "would eviscerate the protections of Section 208" because "[w]ithout the possibility of obtaining redress through collection of damages, the complaint remedy is virtually meaningless."[1355] We similarly do not forbear from sections 216 and 217, which "merely extend the Title II obligations of [carriers] to their trustees, successors in interest, and agents. The sections were intended to ensure that a common carrier could not evade complying with the Act by acting through others over whom it has control or by selling its business."[1356] Thus, we decline to forbear from enforcing these key Title II enforcement provisions with respect to broadband Internet access service.

454. We find that forbearance from these key enforcement provisions and the associated procedural rules does not satisfy any of the section 10(a) criteria. As discussed above, we decline to forbear from enforcement of sections 201 and 202 as they apply to broadband Internet access service.[1357] To make application of these provisions meaningful, the possibility of enforcement needs to be available. Consequently, insofar as we find above that sections 201 and 202 are necessary to guard against unjust, unreasonable, or unjustly or unreasonably discriminatory conduct by broadband providers and to protect consumers, that presumes the viability of enforcement. For these same reasons, forbearance from these key Title II enforcement provisions would not be in the public interest. Thus, our conclusion that section 10(a) is not met as to these key Title II enforcement provisions builds on our prior conclusion to that effect as to sections 201 and 202.[1358]

455. In the event that a carrier violates its common carrier duties, the section 208 complaint process would permit challenges to a carrier's conduct, and many commenters advocate for section 208 to

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[1353] 47 U.S.C. § 208; *see, e.g.*, 47 C.F.R. §§ 1.701-.736 (informal and formal complaints regarding common carriers), 8.12-.17 (rules for formal complaints alleging violation of open Internet rules).

[1354] 47 U.S.C. § 208.

[1355] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Servs*., Second Report and Order, 9 FCC Rcd 1411, 1482, para. 16 (1994) (*CMRS Title II Forbearance Order*). *See also, e.g.*, Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 21 (discussing sections 206 and 207). Allowing for the recovery of damages does not mean that an award of damages necessarily would be appropriate in all, or even most, cases. The Commission has discretion to deny an award of damages and grant only prospective injunctive-type relief where a case raises novel issues on which the Commission has not previously spoken, or where the measurement of damages would be speculative. The Commission also has authority to adopt rules and procedures that are narrowly tailored to address the circumstances under which damages would be available in particular types of cases.

[1356] *Wireless Forbearance Order*, 9 FCC Rcd at 1482, para. 186.

[1357] *See supra* Section V.B.1.

[1358] Consistent with our analysis above, *see supra* para.448, although section 706 of the 1996 Act would remain, these Title II enforcement provisions provide a more certain foundation for pursuing enforcement if warranted in relevant circumstances arising in the future. *See supra* Section III.F.4.

apply.[1359] The Commission's procedural rules establish mechanisms to carry out that enforcement function in a manner that is well-established and clear for all parties involved. The Commission has never previously forborne from section 208.[1360] Indeed, we find it instructive that in the CMRS context Congress specifically precluded the Commission from using section 332 to forbear from section 208.[1361] Commenters also observe the important interrelationship between section 208 and sections 206, 207, 209, 216, and 217,[1362] which the Commission itself has recognized in the past, as discussed above.[1363] In addition, to forbear from sections 216 and 217 would create a loophole in our ability to evenly enforce the Act, which would imperil our ability to protect consumers and to protect against unjust or unreasonable conduct, and would be contrary to the public interest. The prospect that carriers may be forced to defend their practices before the Commission supports the strong public interest in ensuring the reasonableness and non-discriminatory nature of those actions, protecting consumers, and advancing our overall public interest objectives.[1364] While some commenters express fears of "threats of abusive litigation" or other burdens arising from the application of these provision,[1365] other commenters correctly note the speculative nature of those arguments given the lack of evidence of such actions where those provisions historically have applied (including in the CMRS context).[1366] In hearing section 207 claims, courts have historically been careful to consider the Commission's views as a matter of primary jurisdiction on the reasonableness of a practice under section 201(b), both in general and before awarding damages under section 207. In a number of cases, courts have held that there is no entitlement to damages under section 207 for a claim under section 201(b) unless the Commission has already determined that a particular practice is "unreasonable."[1367] We endorse that approach here. At a minimum, we believe that courts

[1359] *See, e.g.*, AARP Comments at 42; CDT Comments at 15; COMPTEL Comments at 22-23; Mozilla Comments at 13; Free Press Reply at 26-27; Sidecar Technologies Reply at 6.

[1360] *2010 Broadband Classification NOI*, 25 FCC Rcd at 7898, para. 75

[1361] 47 U.S.C. § 332(c)(1).

[1362] *See, e.g.*, Public Knowledge et al. Comments at 93.

[1363] Because we conclude that forbearance is not warranted under the section 10(a) criteria, we need not, and do not, reach the question of the scope of our authority to forbear from provisions such as 206 and 207. *Compare, e.g.*, Letter from Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2-4 (filed Feb. 20, 2015) (NCTA Feb. 20, 2015 *Ex Parte* Letter) (arguing that we have authority under section 10 to fully forbear from sections 206 and 207) *with, e.g.*, Public Knowledge Comments at 93 (questioning whether we have authority to forbear from section 207).

[1364] For the reasons discussed above, we thus reject the assertions of some commenters that enforcement is unduly burdensome. *See, e.g.*, ACA Comments at 63-64 (expressing concern about unspecified "[i]ncreased legal expenses and time associated with case-by-case adjudication of rates, terms, conditions of service under Section 208"). In particular, we are not persuaded that such concerns outweigh the overarching interest advanced by the enforceability of sections 201 and 202. Nothing in the record demonstrates that our need for enforcement differs among broadband providers based on their size, and we thus are not persuaded that a different conclusion in our forbearance analysis should be reached in the case of small broadband providers, for example. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; Letter from Gregory A. Friedman, Owner, AireBeam, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 2 (filed Jan. 30, 2015) (AireBeam Jan. 30, 2015 *Ex Parte* Letter).

[1365] *See, e.g.*, NCTA Feb. 20, 2015 *Ex Parte* Letter at 6.

[1366] *See, e.g.*, Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 2-3 (filed Feb. 20, 2015).

[1367] *See, e.g.*, *North Cty. Commc'ns Corp. v. California Catalog & Tech.*, 594 F.3d 1149, 1158 (9th Cir. 2010) (*North County*) ("[G]iven the broad language of" section 201(b), "it is within the Commission's purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation."); *Hoffman v. Rashid*, 388 Fed. Appx. 121, 123 (3d Cir. 2010) (adopting the same position in a *per curiam* opinion that summarily affirmed the district court's judgment); *Iris Wireless LLC v. Syniverse Tech.*, 2014 WL 4436021, *3 (M.D. Fla. Sept. 8, 2014) ("a court should not 'fill in the analytical gap' where the Commission has not made a determination regarding whether a company's action violates section 201(b)") (quoting *North County*, 594 F.3d at

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reviewing BIAS practices under section 207 in the first instance should recognize the Commission's primary jurisdiction in a context such as this.[1368] The doctrine of primary jurisdiction is particularly important here, because the broadband Internet ecosystem is highly dynamic and the Commission has carefully designed a regulatory framework for BIAS to protect Internet openness and other important communications network values without deterring broadband investment and innovation. As a result, for all of the forgoing reasons, we conclude that none of the section 10(a) criteria are met as to forbearance from these fundamental Title II enforcement provisions and the associated Commission procedural rules with respect to the broadband Internet access service.

C. Forbearance Analysis Specific to Broadband Internet Access Service

456. As discussed elsewhere, with respect to broadband Internet access service we find that the standard for forbearance is not met with respect to the following limited provisions:

a) sections 201, 202, and 208, along with the related enforcement provisions of sections 206, 207, 209, 216, and 217, and the associated complaint procedures; and the Commission's implementing regulations (but, to be clear, the Commission forbears from all ratemaking regulations adopted under sections 201 and 202);[1369]

b) section 222, which establishes core customer privacy protections;

c) section 224 and the Commission's implementing regulations, which grant certain benefits that will foster network deployment by providing telecommunications carriers with regulated access to poles, ducts, conduits, and rights-of-way;

d) sections 225, 255, and 251(a)(2), and the Commission's implementing regulations, which collectively advance access for persons with disabilities; except that the Commission forbears from the requirement that providers of broadband Internet access service contribute to the Telecommunications Relay Service (TRS) Fund at this time. These provisions and regulations support the provision of TRS and require providers of broadband Internet access service, as

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1158); *see also id*. ("if the Court were to make a declaratory ruling" on an issue that the Commission had not yet addressed, "it would 'put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission'") (quoting *North County*, 594 F.3d at 1158); *Havens v. Mobex Network Servs., LLC*, 2011 WL 6826104, *9 (D.N.J. Dec. 22, 2011) (in dismissing a claim that "it is a violation of section 201(b) for a party to 'warehouse' toll free numbers without identified subscribers," the court reasoned that because previous Commission orders "do not address the precise type of conduct at issue in this case," the court could not "risk disturbing the delicate regulatory framework that the Commission is tasked with maintaining").

[1368] *In re Long Distance Telecomm. Litigation*, 831 F.2d 627, 631 (6th Cir. 1987) ("claims based on section 201(b) of the Communications Act are within the primary jurisdiction of the FCC," and an assessment of whether "defendants engaged in unreasonable practices . . . is a determination that Congress has placed squarely in the hands of the [FCC]") (internal quotation marks omitted); *Free Conferencing Corp. v. T-Mobile US, Inc*., 2014 WL 7404600, *7 (C.D. Cal. Dec. 30, 2014) (because "re-routing calls to rural LECs is an evolving area of law," and because it "is important to 'protect[ ] the integrity' of the FCC's evolving regulatory scheme," the court decided "not to meddle" in this area until the Commission had ruled on the question) (quoting *United States v. General Dynamics Corp*., 828 F.2d 1356, 1362 (9th Cir. 1987)); *James v. Global Tel*Link Corp*., 2014 WL 4425818, **6-7 (D.N.J. Sept. 8, 2014) ("where the question is whether an act is reasonable" under section 201(b), "primary jurisdiction should be applied"; the reasonableness of defendants' charges and practices in providing inmate calling services "implicates technical and policy questions that the FCC has the special expertise to decide in the first instance") (internal quotation marks omitted); *Demmick v. Cellco P'ship*, 2011 WL 1253733, *6 (D.N.J. March 29, 2011) ("courts have consistently found that reasonableness determinations under [section] 201(b) lie within the primary jurisdiction of the FCC, because they involve policy considerations within the agency's discretion and particular field of expertise").

[1369] *See supra* Section V.B.1.

telecommunications carriers, to ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable; and

e) section 254, the interrelated requirements of section 214(e), and the Commission's implementing regulations to strengthen the Commission's ability to support broadband, supporting the Commission's ongoing efforts to support broadband deployment and adoption; the Commission forbears from immediate contributions requirements, however, in light of the ongoing Commission proceeding.[1370]

457. We naturally also do not forbear from applying open Internet rules[1371] and section 706 of the 1996 Act itself. For convenience, we collectively refer to these provisions and regulations for purposes of this Order as the "core broadband Internet access service requirements."

458. Beyond those core broadband Internet access service requirements we grant extensive forbearance as permitted by our authority under section 10 of the Act. As described in greater detail below, it is our predictive judgment that the statutory and regulatory requirements that remain are sufficient to ensure just, reasonable, and not unjustly or unreasonably discriminatory conduct by providers of broadband Internet access service and to protect consumers with respect to broadband Internet access service. Those same considerations, plus the overlay of section 706 of the 1996 Act and our desire to proceed incrementally when considering what new requirements that should apply here, likewise persuade us that this forbearance is in the public interest.

459. Our forbearance decision in this subsection focuses on addressing consequences arising from the classification decision in this Order regarding broadband Internet access service.[1372] Thus, we do not forbear with respect to requirements to the extent that they already applied prior to this Order without regard to the classification of broadband Internet access service. For example, as discussed in greater detail below, this includes things like certain requirements of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),[1373] as well as things like liability-limitation provisions that do not vary in application based on the classification of broadband Internet access service.[1374] Similarly, to the extent that provisions or regulations apply to an entity by virtue of other services it provides besides broadband Internet access service, the forbearance in this Order does not extend to that context.[1375]

[1370] *See infra* Section V.C.1.

[1371] *See supra* Section III.

[1372] The *2014 Open Internet NPRM* here did not contemplate possible forbearance from the open Internet rules themselves, and thus they are beyond the scope of regulations addressed by this forbearance decision. In any case, the very reasons that persuade us to adopt the rules in the Order likewise demonstrate that forbearance from those rules would not satisfy the section 10(a) criteria here.

[1373] *See infra* Section V.C.1.b.

[1374] *See infra* Section V.C.3.

[1375] This Order does not alter any additional or broader forbearance previously granted that already might encompass broadband Internet access service in certain circumstances, for example, insofar as broadband Internet access service, when provided by mobile providers, is a CMRS service. As one example, the Commission has granted some forbearance from section 310(d) for certain wireless licensees that meet the definition of "telecommunications carrier," *see generally Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act*, Memorandum Opinion and Order, 13 FCC Rcd 6293 (1998) (*FCBA Forbearance Order*), but section 310(d) is not itself framed in terms of "common carriers" or "telecommunications carriers" or providers of "CMRS" or the like, nor is it framed in terms of "common carrier services," "telecommunications services," "CMRS services" or the like. To the extent that such forbearance thus goes beyond the forbearance for wireless providers granted in this Order, this Order does not narrow or otherwise modify that pre-existing grant of forbearance. For clarity, we observe, however, that the broadband Internet access service covered by our open Internet rules is beyond the scope of a petition for forbearance from Verizon regarding certain broadband services that was deemed granted by operation of law on March 19, 2006. *See Verizon Telephone Companies' Petition for*

(continued….)

460. In addition, prior to this Order some incumbent local exchange carriers or other common carriers chose to offer Internet transmission services as telecommunications services subject to the full range of Title II requirements.[1376] Our forbearance with respect to broadband Internet access service does not encompass such services. As a result, such providers remain subject to the rights and obligations that arise under Title II and the Commission's rules by virtue of their elective provision of such services,[1377] along with the rules adopted to preserve and protect the open Internet to the extent that those services fall within the scope of those rules.[1378]

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Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006). While Verizon's initial petition sought broad relief from "all" broadband services, in its February 7, 2006, amendment to its petition, Verizon provided a "List of Broadband Services for Which Verizon Is Seeking Forbearance," which did not encompass a broadband Internet access service of the sort at issue here. Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440, Attach. 1 (filed Feb. 7, 2006) (Verizon Feb. 7, 2006 Forbearance *Ex Parte* Letter). Indeed, the Commission previously has distinguished between the enterprise broadband services for which Verizon was deemed granted relief by operation of law and broadband Internet access service. *Compare Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended (47 U.S.C. § 160(c)), For Forbearance From Certain Dominant Carrier Regulation of Its Interstate Access Services, and For Forbearance From Title II Regulation of Its Broadband Services, In the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16315-16, para. 21 (2007) ("ACS seeks relief 'consistent with that granted to Verizon Telephone Companies on March 19, 2006,' for 'broadband services.' Specifically, ACS seeks relief from regulation as a common carrier or telecommunications service provider for any packetized broadband services it offers or may offer in Anchorage.") *with id*. at 16318, para. 25 (distinct from the request for forbearance comparable to that deemed granted to Verizon, "ACS requests conditional forbearance from dominant carrier regulation of its interstate switched and special access services, and contends that such relief would be consistent with the *Qwest Omaha Order*. To the extent that ACS seeks relief for . . . mass market broadband Internet access transmission services, its request falls within the same category of services for which relief was granted to Qwest."). *See also, e.g.*, *Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect To Its Broadband Services, et al*., WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18714-15, para. 14 n. 59 (2008) ("Verizon restricted its forbearance request to ten of its then-existing telecommunications services offerings. See Verizon WC Docket No. 04-440 Feb. 7 Letter at Attach. 1, at 1 (providing 'List of Broadband Services for Which Verizon Is Seeking Forbearance').").

[1376] We note that the Commission did adopt permissive detariffing for such services. *Wireline Broadband Classification Order*, 20 FCC Rcd at 14900-03, paras. 89-95. *See also, e.g.*, Letter from Michael R. Romano, Senior Vice President—Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Feb. 9, 2015) ("as part of any statements with respect to classification of broadband in the order, NTCA urged the Commission to ensure that small rural telcos such as those within NTCA's membership can continue to avail themselves of the option to tariff broadband-capable transmission services that underpin retail broadband Internet access services.").

[1377] *See, e.g.*, *Wireline Broadband Classification Order*, 20 FCC Rcd at 14927-29, paras. 139-44 (discussing the application of section 254(k) and related cost-allocation rules); *id*. at paras. 126-27 ("Thus, competitive LECs will continue to have the same access to UNEs, including DS0s and DS1s, to which they are otherwise entitled under our rules, regardless of the statutory classification of service the incumbent LECs provide over those facilities. So long as a competitive LEC is offering an 'eligible' telecommunications service – i.e., not exclusively long distance or mobile wireless services – it may obtain that element as a UNE."). For example, if a rate-of-return incumbent LEC (or other provider) voluntarily offers Internet transmission outside the forbearance framework adopted in this Order, it remains subject to the pre-existing Title II rights and obligations, including those from which we forbear in this Order.

[1378] If such a provider wants to change to offer Internet access services pursuant to the construct adopted in this Order, it should notify the Wireline Competition Bureau 60 days prior to implementing such a change.

1. Provisions that Protect Customer Privacy, Advance Access For Persons with Disabilities, and Foster Network Deployment

461. We generally grant extensive forbearance from the provisions and requirements that newly apply by virtue of our classification of broadband Internet access service. However, the record persuades us that we should not forbear with respect to certain key provisions that protect customer privacy, advance access for persons with disabilities, and foster network deployment.

a. Customer Privacy (Section 222)

462. As supported by a number of commenters, we decline to forbear from applying section 222 of the Act in the case of broadband Internet access service.[1379] We do, however, find the section 10(a) criteria met to forbear at this time from applying our implementing rules, pending the adoption of rules to govern broadband Internet access service in a separate rulemaking proceeding. Section 222 of the Act governs telecommunications carriers' protection and use of information obtained from their customers or other carriers, and calibrates the protection of such information based on its sensitivity. Congress provided protections for proprietary information, according the category of customer proprietary network information (CPNI)[1380] the greatest level of protection. Section 222 imposes a duty on every telecommunications carrier to protect the confidentiality of its customers' private information.[1381] Section 222 also imposes restrictions on carriers' ability to use, disclose, or permit access to customers' CPNI without their consent.[1382]

[1379] *See, e.g.*, CDT Comments at 16; NMR Comments at 25; Rural Broadband Policy Group Comments at 8-9; Public Knowledge Dec. 19, 2014 *Ex Parte* Letter at 19; Free Press Nov. 21, 2014 *Ex Parte* Letter at 1; Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 21.

[1380] CPNI is defined as "(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. § 222(h)(1).

[1381] 47 U.S.C. § 222(a); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6959, para. 64 (2007); Declaratory Ruling, 28 FCC Rcd 9609 (2013). We take this mandate seriously. For example, the Commission recently took enforcement action under section 222 (and section 201(b)) against two telecommunications companies that stored customers' personal information, including social security numbers, on unprotected, unencrypted Internet servers publicly accessible using a basic Internet search. This unacceptably exposed these consumers to the risk of identity theft and other harms. *See TerraCom, Inc. and YourTel America, Inc. Apparent Liability for Forfeiture*, File No.: EB-TCD-13-00009175, Notice of Apparent Liability, FCC 14-173, paras. 31-41 (rel. Oct. 24, 2014). *See also, e.g.*, Letter from Erik Stallman, Director, Open Internet Project, CDT, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 3-4 (filed Feb. 4, 2015) (CDT Feb. 4, 2015 *Ex Parte* Letter).

[1382] *See* 47 U.S.C. § 222(c)(1) (permitting a carrier, except as required by law or with the customer's consent, to use, disclose, or permit access to individually identifiable CPNI only "in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."). The Commission has made clear that "to the extent a telecommunications carrier that is a provider of electronic communication services or remote computing services is compelled by 18 U.S.C. § 2258A to disclose CPNI in a report to the CyberTipline, that carrier would not be in violation of its privacy duties under section 222 of the Communications Act." *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use Of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Declaratory Ruling, 25 FCC Rcd 14335, 14336-37, para. 5 (Wireline Comp. Bur. 2010). *See also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Declaratory Ruling, 21 FCC Rcd 9990 (2006) (addressing the predecessor disclosure provision). That interpretation of section 222 remains true as to broadband Internet access service.

463. We find that forbearance from the application of section 222 with respect to broadband Internet access service is not in the public interest under section 10(a)(3), and that section 222 remains necessary for the protection of consumers under section 10(a)(2).[1383] The Commission has long supported protecting the privacy of users of advanced services, and retaining this provision thus is consistent with the general policy approach.[1384] The Commission has emphasized that "[c]onsumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services."[1385] As broadband Internet access service users access and distribute information online, the information is sent through their broadband provider. Broadband providers serve as a necessary conduit for information passing between an Internet user and Internet sites or other Internet users, and are in a position to obtain vast amounts of personal and proprietary information about their customers.[1386] Absent appropriate privacy protections, use or disclosure of that information could be at odds with those customers' interests.

464. We find that if consumers have concerns about the privacy of their personal information, such concerns may restrain them from making full use of broadband Internet access services and the Internet, thereby lowering the likelihood of broadband adoption and decreasing consumer demand.[1387] As the Commission has found previously, the protection of customers' personal information may spur consumer demand for those services, in turn "driving demand for broadband connections, and consequently encouraging more broadband investment and deployment" consistent with the goals of the 1996 Act.[1388] Notably, commenters opposing the application of section 222 to broadband Internet access service make general arguments about the associated burdens, but do not include a meaningful analysis of why the section 10(a) criteria are met (or why relief otherwise should be granted) nor why the concerns they identify—even assuming *arguendo* that they were borne out by evidence beyond that currently in the record—should outweigh the privacy concerns identified here.[1389] We therefore conclude that the

[1383] 47 U.S.C. § 160(a)(2), (3).

[1384] For example, the Commission has noted that "long before Congress enacted section 222 of the Act, the Commission had recognized the need for privacy requirements associated with the provision of enhanced services and had adopted CPNI-related requirements in conjunction with other *Computer Inquiry* obligations." *Wireline Broadband Classification Order*, 20 FCC Rcd at 14931, para. 149 & n.447 (seeking comment on privacy protections).

[1385] *Id*. at 14930, para. 148 ("For example, a consumer may have questions about whether a broadband Internet access service provider will treat his or her account and usage information as confidential, or whether the provider reserves the right to use account information for marketing and other purposes.").

[1386] *See, e.g.*, Access Comments at 7 (stating that broadband providers have the technological capacity to exercise monitoring and control of their customers' use of the Internet using techniques such as deep packet inspection).

[1387] *See, e.g.*, *2015 Broadband Progress Report*, paras. 104-05; National Broadband Plan at 17 (citing John Horrigan, *Broadband Adoption and Use in America* (OBI, Working Paper No. 1, 2010). *See also, e.g.*, Pew Research Center, *Who's not online and why*, at 6 (Sept. 2013), http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_Offline%20adults_092513_PDF.pdf.

[1388] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6957, para. 59 (2007); *see also* National Broadband Plan at 55 (explaining that without privacy protections, new innovation and investment in broadband applications and content may be held back, and these applications and content, in turn, are likely the most effective means to advance many of Congress's goals for broadband).

[1389] *See, e.g.*, MediaFreedom Comments at 2; TIA Comments at 17; ADTRAN Reply at 17-18; Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 5 (filed May 9, 2014). Consequently, we reject those arguments.

application and enforcement of section 222 to broadband Internet access services is in the public interest, and necessary for the protection of consumers.[1390]

465. We also reject arguments that section 706 itself provides adequate protections such that forbearance from section 222 is warranted.[1391] While section 706 of the 1996 Act would continue to apply even if we granted forbearance here, we find that section 222 provides a more certain foundation for evaluating providers' conduct and pursuing enforcement if warranted in relevant circumstances arising in the future.[1392] Among other things, while the concerns discussed in the preceding paragraph have a nexus with the standards of sections 706(a) and (b), as discussed earlier in this section, the public interest in protecting customer privacy is not limited to the universe of concerns encompassed by section 706.

466. We recognize that some commenters, while expressing concern about consumer privacy, nonetheless suggest that the Commission conceivably need not immediately apply section 222 and its implementing rules, pending further proceedings.[1393] We are persuaded by those arguments, but only as to the Commission's rules. With respect to the application of section 222 of the Act itself, as discussed above, with respect to broadband Internet access service the record here persuades us that the section 10(a) forbearance criteria are not met to justify such relief. Indeed, even as to services that historically have been subject to section 222, questions about the application of those privacy requirements can arise and must be dealt with by the Commission as technology evolves,[1394] and the record here does not

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[1390] *See* 47 U.S.C. § 160(a)(2); *see also, e.g.*, Free Press Comments at 83, n.180; Public Knowledge Reply at 20-22. Some commenters contend that the Commission should forbear from all of Title II based on generalized arguments about the marketplace, such as past network investment or changes in performance or price per megabit in the recent past. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 10-11; Comcast Dec. 24, 2014 *Ex Parte* Letter at 4-6; NCTA Dec. 23, 2014 *Ex Parte* Letter at 19-20. We are not persuaded that those arguments justify a different outcome here, both for the reasons discussed previously, *see supra* Section V.B.1, and because commenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need to protect consumer privacy is not self-evidently linked to such marketplace considerations. Nothing in the record suggests that concerns about consumer privacy are limited to broadband providers of a particular size, and we thus are not persuaded that a different conclusion in our forbearance analysis should be reached in the case of small broadband providers, for example. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; AireBeam Jan. 30, 2015 *Ex Parte* Letter at 2.

[1391] *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; NCTA Jan. 14, 2015 *Ex Parte* Letter at 3-4.

[1392] *See, e.g.*, *supra* Section III.F.4. We also note, for example, that this approach obviates the need to determine whether or to what extent section 222 is more specific than section 706 of the 1996 Act in relevant respects, and thus could be seen as exclusively governing over the provisions of section 706 of the 1996 Act as to some set of privacy issues. *Cf. Bloate v. U.S.*, 559 U.S. 196, 208 (2010) ("'[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment'") (citation omitted). The approach we take avoids this potential uncertainty, and we thus need not and do not address this question.

[1393] *See, e.g.*, CDT Comments at 16; Letter from Marvin Ammori and Julie Samuels, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Nov. 12, 2014); Letter from COMPTEL, CCIA, Engine, and IFBA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1-2 n.1 (filed Dec. 30, 2014). While CDT references the questions regarding the application of section 222 and our implementing rules raised in the *2010 Broadband Classification NOI*, CDT Comments at 16 (citing *2010 Broadband Classification NOI*, 25 FCC Rcd at 7900-01, para. 82), that *NOI* cited reasons why the Commission might immediately apply section 222 and the Commission's implementing rules if it reclassified broadband Internet access service as well as reasons why it might defer the application of those requirements. We thus find that the *2010 NOI* does not itself counsel one way or the other, and in light of the record here, we decline to defer the application of section 222 and our implementing rules.

[1394] *See, e.g.*, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Declaratory Ruling, 28 FCC Rcd 9609 (2013) (*Wireless Device Privacy Declaratory Ruling*) ("address[ing] the real privacy and security risks that consumers face when telecommunications carriers use their control of customers' mobile devices to collect information about their customers' use of the network"). We also note in this regard that the Commission

(continued….)

demonstrate specific concerns suggesting that Commission clarification of statutory terms as needed would be inadequate in this context.[1395]

467. We are, however, persuaded that the section 10(a) criteria are met for us to grant forbearance from applying our rules implementing section 222 insofar as they would be triggered by the classification of broadband Internet access service here. Beyond the core broadband Internet access service requirements, we apply section 222 of the Act, which itself directly provides important privacy protections.[1396] Further, on this record, we are not persuaded that the Commission's current rules implementing section 222 necessarily would be well suited to broadband Internet access service. The Commission fundamentally modified these rules in various ways subsequent to decisions classifying broadband Internet access service as an information service, and certain of those rules appear more focused on concerns that have been associated with voice service.[1397] For example, the current rules have requirements with respect to "call detail information," defined as "[a]ny information that pertains to the transmission of specific telephone calls, including, for outbound calls, the number called, and the time, location, or duration of any call and, for inbound calls, the number from which the call was placed, and the time, location, or duration of any call."[1398] More generally, the existing CPNI rules do not address many of the types of sensitive information to which a provider of broadband Internet access service is likely to have access, such as (to cite just one example) customers' web browsing history. Insofar as rules focused on addressing problems in the voice service context are among the central underpinnings of our CPNI rules, we find the better course to be forbearance from applying all of our CPNI rules at this time. As courts have recognized, when exercising its section 10 forbearance authority "[g]uided by section 706," the Commission permissibly may "decide[] to balance the future benefits" of encouraging broadband deployment "against [the] short term impact" from a grant of forbearance.[1399] In light of the record here and given that the core broadband Internet access requirements and section 222 itself will apply, and guided by section 706, we find that applying our current rules implementing sections 222—which, in critical respects, appear to be focused on addressing problems that historically arise regarding voice service—is not necessary to ensure just and reasonable rates and practice or for the protection of consumers under sections 10(a)(1) and (a)(2) and that forbearance is in the public interest under section

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cannot impose a penalty in the absence of "fair notice of what is prohibited." *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012).

[1395] *See, e.g.*, CDT Comments at 17 (asserting, without explanation, that a rulemaking might be needed to "address exactly how Section 222 should apply in the Internet connectivity context, including how to define 'customer proprietary network information' (CPNI) for this purpose"); Verizon Jan. 26, 2015 *Ex Parte* Letter at 7-8 (arguing that it is unclear what certain requirements of section 222 would mean in the context of broadband Internet access service).

[1396] *See, e.g.*, *TerraCom, Inc. and YourTel America, Inc. Apparent Liability for Forfeiture*, File No.: EB-TCD-13-00009175, Notice of Apparent Liability, FCC 14-173, paras. 31-41 (rel. Oct. 24, 2014); *Wireless Device Privacy Declaratory Ruling*, 28 FCC Rcd at 9619-20, paras. 29-32 (discussing statutory restrictions applicable to CPNI).

[1397] The Commission adopted significant reforms to its rules implementing section 222 in 2007. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007). In doing so, the Commission was, in significant part, focused on dealing with problems of "pretexting," which involved "data brokers . . . obtain[ing] private and personal information, including what calls were made to and/or from a particular telephone number and the duration of such calls." *Id*. at 6928-29, para. 2; *see also id*. at 6928, para. 1 n.1 (noting Congress' criminalization of pretexting activity in 18 U.S.C. § 1039, which focuses on "phone" records).

[1398] 47 C.F.R. §§ 64.2003, 64.2010.

[1399] *EarthLink*, 462 F.3d at 9.

10(a)(3).[1400] We emphasize, however, that forbearance from our existing CPNI rules in the context of broadband Internet access services does not in any way diminish the applicability of these rules to services previously found to be within their scope.[1401]

b. Disability Access Provisions (Sections 225, 255, 251(a)(2))

468. We agree with commenters that we should apply section 225 and the Commission's implementing rules—rather than forbear for broadband Internet access service—because of the need to ensure meaningful access to all Americans,[1402] except to the extent provided below with respect to contributions to the Interstate TRS Fund. Section 225 mandates the availability of interstate and intrastate TRS to the extent possible and in the most efficient manner to individuals in the United States who are deaf, hard of hearing, deaf-blind, and who have speech disabilities.[1403] The Act directs that TRS provide the ability for such individuals to engage in communication with other individuals, in a manner that is "functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services."[1404] To achieve this, the Commission has required all interstate service providers (other than one-way paging services) to provide TRS.[1405] People who are blind, hard of hearing, deaf-blind, and who have speech disabilities increasingly rely upon Internet-based video communications, both to communicate directly (point-to-point) with other persons who are deaf or hard of hearing who use sign language and through video relay service (VRS)[1406] with individuals who do not use the same mode of communication that they do.[1407] In doing so, they rely on high definition two-

[1400] Our decision to proceed in a tailored manner is discussed in greater detail below. *See infra* paras. 495-496; Section V.C.2.a.

[1401] *See, e.g.*, *Wireless Device Privacy Declaratory Ruling*, 28 FCC Rcd 9609 (addressing how section 222 of the Act, and the Commission's implementing rules, apply to information relating to telecommunications service and interconnected VoIP service that fits the statutory definition of CPNI when such information is collected by the customer's device, provided the collection is undertaken at the mobile wireless carrier's direction and the carrier or its designee has access to or control over the information).

[1402] *See, e.g.*, Public Knowledge Comments at 95; Rural Broadband Policy Group Comments at 8; Telecommunications for the Deaf and Hard of Hearing Comments at 8-13.

[1403] 47 U.S.C. §§ 225(a)(3), (b)(1) .

[1404] 47 U.S.C. § 225(a)(3).

[1405] *See generally Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90–571, Notice of Proposed Rule Making, 5 FCC Rcd 7187 (1990); Report and Order and Request for Comment, 6 FCC Rcd 4657, 4660, para. 17 (1991) (*TRS Order*); Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 1802 (1993) (*TRS II*); Third Report and Order, 8 FCC Rcd 5300 (1993) (*TRS III*).

[1406] VRS is a form of TRS that allows people who are blind, hard of hearing, deaf-blind, and who have speech disabilities who use sign language to communicate with voice telephone users through a CA using video transmissions over the Internet. *See* 47 C.F.R. § 64.601(a)(40).

[1407] *See generally Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*; *E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591 (2008) (*First Internet-Based TRS Order*); Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791 (2008) (*Second Internet-Based TRS Order*). In addition, these populations rely on other forms of Internet-based TRS (iTRS), including Internet Protocol Relay Service (IP Relay) and Internet Protocol Captioned Telephone Service (IP CTS). IP Relay is a "telecommunications relay service that permits an individual with a hearing or a speech disability to communicate in text using an Internet Protocol-enabled device via the Internet, rather than using a text telephone (TTY) and the public switched telephone network." 47 C.F.R. § 64.601(a)(17). IP CTS is a "telecommunications relay service that permits an individual who can speak but who has difficulty hearing over the telephone to use a telephone and an Internet Protocol-enabled device via the Internet to simultaneously listen to the other party and read captions of what the other party is saying." 47 C.F.R. § 64.601(a)(16).

party or multiple-party video conferencing that necessitates a broadband connection.[1408] As technologies advance, section 225 maintains our ability to ensure that individuals who are deaf, hard of hearing, deaf-blind, and who have speech disabilities can engage in service that is functionally equivalent to the ability of a hearing individuals who do not have speech disabilities to use voice communication services.[1409] Limits imposed on bandwidth use through network management practices that might otherwise appear neutral, could have an adverse effect on iTRS users who use sign language to communicate by degrading the underlying service carrying their video communications. The result could potentially deny these individuals functionally equivalent communications service. Additionally, if VRS and other iTRS users are limited in their ability to use Internet service or have to pay extra for iTRS and point-to-point services, this could cause discrimination against them because for many such individuals, TRS is the only form of communication that affords service that is functionally equivalent to what voice users have over the telephone. Moreover, limiting their bandwidth capacity could compromise their ability to obtain access to emergency services via VRS and other forms of iTRS, which is required by the Commission's rules implementing section 225.[1410]

469. While we base the open Internet rules adopted here solely on section 706 of the 1996 Act and other provisions of the Act besides section 225—and thus do not adopt any new section 225-based rules in this Order—largely preserving this provision is important not only to the extent that it might be used in the future as the basis for new rules adopting additional protections but also to avoid any inadvertent uncertainty regarding Internet-based TRS providers' obligations under existing rules. To be compensated from the federal TRS fund, providers must provide service in compliance with section 225 and the Commission's TRS rules and orders.[1411] As discussed in the prior paragraph, however, a number of TRS services are carried via users' broadband Internet access services. Forbearing from applying section 225 and our TRS service requirements would risk creating loopholes in the protections otherwise afforded users of iTRS services or even just uncertainty that might result in degradation of iTRS. More specifically, if we forbear from applying these provisions, we run the risk of allowing actions taken by Internet access service providers to come into conflict with the overarching goal of section 225, *i.e.*, ensuring that the communication services made available through TRS are functionally equivalent, that is, mirror as closely as possible the voice communication services available to the general public. Enforcement of this functional equivalency mandate will protect against such degradation of service. In sum, with the exception of TRS contribution requirements discussed below, we find that the enforcement of section 225 is necessary for the protection of consumers under section 10(a)(2), and that forbearance would not be in the public interest under section 10(a)(3).

470. Notwithstanding the foregoing, for now we do forbear in part from the application of TRS contribution obligations that otherwise would newly apply to broadband Internet access service. Section 225(d)(3)(B) and our implementing rules require federal TRS contributions for interstate telecommunications services, which now would uniformly include broadband Internet access service by virtue of the classification decision in this order.[1412] Applying new TRS contribution requirements on broadband Internet access potentially could spread the base of contributions to the TRS Fund, having the benefit of adding to the stability of the TRS Fund. Nevertheless, before taking any steps that would depart from the *status quo* in this regard, the Commission would like to assess the need for such additional funding, and the appropriate contribution level, given the totality of concerns implicated in this

[1408] *See, e.g.*, *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, Declaratory Ruling, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 6012, 6014, para. 3 (2010).

[1409] *See* 47 U.S.C. § 225(a)(3).

[1410] *See* 47 C.F.R. § 64.605.

[1411] *See, e.g.*, *Purple Communications, Inc*., File No.: EB-TCD-12-00000376, Notice of Apparent Liability, 29 FCC Rcd 5491, para. 29 & n.71 (2014) (citing and summarizing precedent).

[1412] 47 U.S.C. § 225(d)(3)(B); 47 C.F.R. § 64.604(c)(5)(iii).

context. As courts have recognized, when exercising its section 10 forbearance authority "[g]uided by section 706," the Commission permissibly may "decide[] to balance the future benefits" of encouraging broadband deployment "against [the] short term impact" from a grant of forbearance.[1413] Our decision, guided by section 706, to tailor the regulations applied to broadband Internet access service thus tips the balance in favor of the finding that applying new TRS fund contribution requirements at this time is not necessary to ensure just, reasonable and nondiscriminatory conduct by the provider of broadband Internet access service or for the protection of consumers under sections 10(a)(1) and (a)(2) and that forbearance is in the public interest under section 10(a)(3).[1414] The competing considerations here make this a closer call under our section 10(a) analysis, however, and thus we limit our action only to forbearing from applying section 225(d)(3)(B) and our implementing rules insofar as they would immediately require new TRS contributions from broadband Internet access services but not insofar as they authorize the Commission to require such contributions should the Commission elect to do so in a rulemaking in the future.[1415] In particular, we find it in the public interest to limit our forbearance in this manner to enable us to act even more nimbly in the future should we need to do so based on future developments.[1416]

471. Nothing in our forbearance from TRS Fund contribution requirements for broadband Internet access service is intended to encompass, however, situations where incumbent local exchange carriers or other common carriers voluntarily choose to offer Internet transmission services as telecommunications services subject to the full scope of Title II requirements for such services. As a result, such providers remain subject to the Interstate TRS Fund contribution obligations that arise under section 225 and the Commission's rules by virtue of their elective provision of such services until such time as the Commission further addresses such contributions in the future.

472. Consistent with some commenters' proposals,[1417] with respect to broadband Internet access service we also do not forbear from applying sections 255 and the associated rules, which require telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable.[1418] We also do not find the statutory forbearance test met for related protections afforded under section 251(a)(2) and our implementing rules, which precludes the installation of "network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255."[1419] We therefore do not forbear from this provision and our associated rules. In prior proceedings, the Commission has

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[1413] *EarthLink*, 462 F.3d at 9.

[1414] Our decision to proceed in a tailored manner is discussed in greater detail below. *See infra* paras.495-496; Section V.C.2.a.

[1415] As noted below, we do not forbear from the obligation of carriers that have chosen voluntarily to offer broadband as a Title II service to contribute to the Interstate TRS Fund.

[1416] *Cf. Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilitie*s, CG Docket Nos. 13-24, 03-123, Order and Notice of Proposed Rulemaking, 28 FCC Rcd 703, 707, para. 7 (2013) (describing potential Anti-Deficiency Act issues that could arise if there were insufficient TRS funds available and the impact that would have on all TRS programs) *rev'd Sorenson v. FCC*, 755 F.3d 702 (2014) (finding, in pertinent part, that the Commission had not sufficiently demonstrated the actual imminence of a fiscal calamity to support good cause to forgo notice and comment).

[1417] *See, e.g.*, Public Knowledge Comments at 95; Rural Broadband Policy Group Comments at 8; Telecommunications for the Deaf and Hard of Hearing Comments at 8-13; The Advanced Communications Law & Policy Institute at New York Law School Reply, Attach. 8; Letter from Teresa Favuzzi, Executive Director, California Foundation of Independent Living Centers, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 3 (filed Dec. 17, 2014) (CFILC Dec. 17, 2014 *Ex Parte* Letter).

[1418] 47 U.S.C. § 255.

[1419] 47 U.S.C. § 251(a)(2).

emphasized its commitment to implementing the important policy goals of section 255 in the Internet service context.[1420] Evidence cited in the National Broadband Plan also demonstrated that, while broadband adoption has grown steadily, it "lags considerably" among certain groups, including individuals with disabilities.[1421] Adoption of Internet access services by persons with disabilities can enable these individuals to achieve greater productivity, independence, and integration into society in a variety of ways.[1422] These capabilities, however, are not available to persons with disabilities if they face barriers to Internet service usage, such as inaccessible hardware, software, or services.[1423] We anticipate that increased adoption of services and technologies accessible to individuals with disabilities will, in turn, spur further availability of such capabilities, and of Internet access services more generally.[1424]

473. Our forbearance analysis regarding sections 255, 251(a)(2), and our implementing rules also is informed by the incremental nature of the requirements imposed.[1425] In particular, the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA),[1426] expanding beyond the

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[1420] *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2437-38, paras. 75-77 (1999) (*First Broadband Deployment Report*) ("We caution, however, that the promise of advanced telecommunications capability for people with disabilities will not be realized unless inherent barriers in telecommunications products and services are removed, and accessible equipment and services are widely available through mainstream markets. . . . [W] e are committed to taking advantage of any opportunities to encourage the deployment of advanced telecommunications service to people with disabilities. Plans for the deployment of advanced services should also address the needs of persons with disabilities."); *Wireline Broadband Classification Order*, 20 FCC Rcd at 14919-22, paras. 121-24 ("[T]he Commission will remain vigilant in monitoring the development of wireline broadband Internet access service and its effects on the important policy goals of section 255. As noted above, we will exercise our Title I ancillary jurisdiction to ensure achievement of important policy goals of section 255 and also section 225 of the Act.").

[1421] National Broadband Plan at 21; *id*. at 169 (stating, "Devices often are not designed to be accessible for people with disabilities."). *See also, e.g.*, CFILC Dec. 17, 2014 *Ex Parte* Letter at 1-2.

[1422] *See e.g.*, Elizabeth E. Lyle, *A Giant Leap & A Big Deal: Delivering on the Promise of Equal Access to Broadband for People with Disabilities*, 4 (FCC Omnibus Broadband Initiative, Working Paper No. 2, 2010) (OBI Working Paper No. 2) (noting broadband allows persons with disabilities to telecommute or run a business in their homes); CFILC Dec. 17, 2014 *Ex Parte* Letter at 1-2. Moreover, broadband can make telerehabilitation services possible, by providing long-term health and vocational support within the individual's home. *See, e.g.*, CFILC Dec. 17, 2014 *Ex Parte* Letter at 2; OBI Working Paper No. 2 at 4. Broadband can also provide increased access to online education classes and digital books and will offer real time interoperable voice, video and text capabilities for E911. *See, e.g.*, CFILC Dec. 17, 2014 *Ex Parte* Letter at 2; OBI Working Paper No. 2 at 5. In addition, as commenters note, "society as a whole" can "benefit[] when people with disabilities have access to [broadband Internet access] services in a manner equivalent to the non-disabled population." CFILC Dec. 17, 2014 *Ex Parte* Letter at 1.

[1423] *See, e.g.*, CFILC Dec. 17, 2014 *Ex Parte* Letter at 1-2; OBI Working Paper No. 2 at 4-5.

[1424] *Cf. 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*, GN Docket No. 07-45, 23 FCC Rcd 9615, 9643-44, para. 57 (2008) (*Fifth Broadband Deployment Report*) (through actions to extend the requirements of sections 225 and 255, "the Commission availed broadband offerings to more Americans, which in turn increased broadband deployment demand").

[1425] *See, e.g.*, Ammori Dec. 19, 2014 *Ex Parte* Letter at 5.

[1426] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (codified in various sections of 47 USC) (CVAA), *amended by* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (technical corrections).

then-existing application of section 255,[1427] adopted new section 716 of the Act, which requires that providers of advanced communications services (ACS) and manufacturers of equipment used for ACS make their services and products accessible to people with disabilities, unless it is not achievable to do so. These mandates already apply according to their terms in the context of broadband Internet access service.[1428] The CVAA also adopted a requirement, in section 718, that ensures access to Internet browsers in wireless phones for people who are blind and visually impaired.[1429] In addition, the CVAA directs the Commission to enact regulations to prescribe, among other things, that networks used to provide ACS "may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through . . . networks used to provide [ACS]."[1430] Finally, new section 717 creates new enforcement and recordkeeping requirements applicable to sections 255, 716, and 718.[1431] Thus, a variety of accessibility requirements already have applied in the context of broadband Internet access service under the CVAA.

474. We are persuaded by the record of concerns about accessibility in the context of broadband Internet access service that we should not rest solely on the protections of the CVAA, however. But we do clarify the interplay of those provisions. At the time of section 255's adoption in the 1996 Act, Congress stated its intent to "foster the design, development, and inclusion of new features in communications technologies that permit more ready accessibility of communications technology by individuals with disabilities . . . as preparation for the future given that a growing number of Americans have disabilities."[1432] More recently, Congress adopted the CVAA after recognizing that since it added section 255 to the Communications Act, "Internet-based and digital technologies . . . driven by growth in broadband . . . are now pervasive, offering innovative and exciting ways to communicate and share information."[1433] Congress thus clearly had Internet-based communications technologies in mind when enacting the accessibility provisions of sections section 716 (as well as the related provisions of sections 717-718), and in providing important protections with respect to ACS. Thus, insofar as there is any conflict between the requirements of sections 255, 251(a)(2), and our implementing rules, on the one hand, and sections 716-718 and our implementing rules on the other hand, we interpret the latter requirements as controlling.[1434] On the other hand, insofar as sections 255, 251(a)(2), and our implementing rules impose different requirements that are reconcilable with the CVAA, we find it

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[1427] 47 U.S.C. § 617(f) ("The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 of this title on the day before October 8, 2010. Such services and equipment shall remain subject to the requirements of section 255 of this title.").

[1428] *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al*., CG Docket No. 10-213 *et al*., Second Report and Order, 28 FCC Rcd 5957, 5960-61, para. 7 (2013).

[1429] 47 U.S.C. §§ 617, 619. ACS means: "(A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service." 47 U.S.C. § 153(1).

[1430] 47 U.S.C. § 617(e)(1)(B); *see also* 47 C.F.R. § 14.20(c).

[1431] 47 U.S.C. § 618.

[1432] S. Rep. No. 104-23 at 52 (1996) (discussing what ultimately became section 255 of the Act).

[1433] S. Rep. No. 111–386, at 1 (2010); H.R. Rep. No. 111-563, at 19 (2010).

[1434] A general canon of interpretation is that where two statutory provisions conflict, the specific governs the general—but we need not and do not decide the question of whether the provisions enacted by the CVAA are more specific here because we are persuaded by the legislative history of those provisions that, insofar as there is a conflict, the provisions of the CVAA should be controlling in any case. *See, e.g.*, *Ohio Power Co. v. FERC*, 744 F.2d 162, 167-68 & n.7 (D.C. Cir. 1984) (concluding that "assuming arguendo that section 20 and 23 [of the agreement at issue] are in conflict, it remains unclear which section provides the more specific command," and ultimately finding FERC's "examination of the apparently contradicting sections thorough and its interpretation reconciling their terms entirely reasonable").

appropriate to apply those additional protections in the context of broadband Internet access service for the reasons described above.[1435] Thus, for example, outside the self-described scope of the CVAA, providers of broadband Internet access services must ensure that network services and equipment do not impair or impede accessibility pursuant to the sections 255/251(a)(2) framework.[1436] In particular, we find that these provisions and regulations are necessary for the protection of consumers and forbearance would not be in the public interest.[1437]

475. We reject the cursory or generalized arguments of some commenters that we need not apply these protections, or that we might defer doing so, pending further proceedings. For the reasons discussed above, with respect to broadband Internet access service the record here persuades us that the application of these requirements is necessary for the protection of consumers under section 10(a)(2) and that forbearance is not in the public interest under section 10(a)(3). Nor are we otherwise persuaded to stay or waive our implementing rules based on this record. Commenters opposing the application of these protections with respect to broadband Internet access service either with no limit on time, or specifically in the near term, make general arguments about the associated burdens. However, they do not include a meaningful analysis of why the section 10(a) criteria are met (or why relief otherwise should be granted)

[1435] *See, e.g.*, *Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994) ("'[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (alteration in original). We recognize that the Commission previously has held that "[s]ection 2(a) of the CVAA exempts entities, such as Internet service providers, from liability for violations of Section 716 when they are acting only to transmit covered services or to provide an information location tool. Thus, service providers that merely provide access to an electronic messaging service, such as a broadband platform that provides an end user with access to a web-based e-mail service, are excluded from the accessibility requirements of Section 716." *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al*., CG Docket No. 10-213 *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14576, para. 45 (2011). Our decision here is not at odds with Congress' approach to such services under the CVAA, however, because we also have found that "relative to Section 255, Section 716 requires a higher standard of achievement for covered entities." *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al*., CG Docket No. 10-213 *et al*., Notice of Proposed Rulemaking, 26 FCC Rcd 3133, 3136-37, para. 5 (2011). Thus, under our decision here, broadband Internet access service will remain excluded from the "higher standard of achievement" required by the CVAA to the extent provided by that law, and instead will be subject to the lower standard imposed under section 255 in those cases where the CVAA does not apply.

[1436] *See* 47 C.F.R. § 6.9. Because this section requires pass through of telecommunications in an accessible format, and 47 C.F.R. § 14.20(c) requires pass through of ACS in an accessible format, the two sections work in tandem with each other, and forbearance from sections 255 and 251(a)(2) would therefore result in a diminution of accessibility.

[1437] We recognize that section 716 provides that "[t]he requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 of this title on the day before October 8, 2010. Such services and equipment shall remain subject to the requirements of section 255 of this title." 47 U.S.C. § 617(f). We do not read that as requiring that section 716 must necessarily be mutually exclusive with section 255, however. Had Congress wished to achieve that result, it easily instead could have stated that "the requirements of this section shall not apply to any equipment or services . . . that are subject to the requirements of section 255" (or vice versa) and left it at that. By also including the limiting language "that are subject to the requirements of section 255 of this title *on the day before October 8, 2010*," we believe the statute reasonably is interpreted as leaving open the option that services that become subject to section 255 thereafter also could be subject to both the requirements of section 255 and the requirements of the CVAA. Indeed, although broadband Internet access previously was classified as an information service and thus not subject to section 255 on October 8, 2010, at the time the CVAA was enacted the Commission had initiated the *2010 NOI* to consider whether to reclassify that service as a telecommunications service, which would, at that time, become subject to section 255 as a default matter.

nor why the concerns they identify—even assuming *arguendo* that they were borne out by evidence beyond that currently in the record—should outweigh the disability access concerns identified here.[1438]

476. We also reject arguments that section 706 itself provides adequate protections such that forbearance from the disability access provisions of sections 225, 255 and 251(a)(2) and associated regulations is warranted.[1439] While section 706 of the 1996 Act would continue to apply even if we granted forbearance here, consistent with our conclusions in other sections, we find that these disability access provisions provide a more certain foundation for evaluating providers' conduct and pursuing enforcement if warranted in relevant circumstances arising in the future.[1440] Among other things, while our interest in ensuring disability access often may have a nexus with the standards of sections 706(a) and (b), the record does not reveal that the public interest in ensuring access for persons with disabilities is limited just to the universe of concerns encompassed by section 706.

477. In addition to the provisions discussed above, section 710 of the Act addresses hearing aid compatibility.[1441] Given the important additional protections for persons with disabilities enabled by this provision,[1442] we anticipate addressing the applicability of mobile wireless hearing aid compatibility requirements to mobile broadband Internet access service devices in the pending rulemaking proceeding.[1443]

[1438] *See, e.g.*, MediaFreedom Comments at 2; TIA Comments at 17. *See also, e.g.*, Letter from COMPTEL, CCIA, Engine and IFBA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1-2 n.1 (filed Dec. 30, 2014) (noting the possibility of deferral). Some commenters contend that the Commission should forbear from all of Title II based on generalized arguments about the marketplace, such as past network investment or changes in performance or price per megabit in the recent past. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 10-11; Comcast Dec. 24, 2014 *Ex Parte* Letter at 4-6; NCTA Dec. 23, 2014 *Ex Parte* Letter at 19-20. We are not persuaded that those arguments justify a different outcome as to any of the disability access provisions or requirements at issue in this section, both for the reasons discussed previously, *see supra* Section V.B.1, and because commenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need to protect disability access is not self-evidently linked to such marketplace considerations. Nothing in the record suggests that concerns about disability access are limited to broadband providers of a particular size, and we thus are not persuaded that a different conclusion in our forbearance analysis should be reached in the case of small broadband providers, for example. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; AireBeam Jan. 30, 2015 *Ex Parte* Letter at 2.

[1439] *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; NCTA Jan. 14, 2015 *Ex Parte* Letter at 3-4.

[1440] *See, e.g.*, *supra* Section III.F.4. We also note, for example, that this approach obviates the need to determine whether or to what extent these disability access provisions are more specific than section 706 of the 1996 Act in relevant respects, and thus could be seen as exclusively governing over the provisions of section 706 of the 1996 Act as to some set of disability access issues. *Cf. Bloate v. U.S.*, 559 U.S. 196, 208 (2010) ("'[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment'") (citation omitted). The approach we take avoids this potential uncertainty, and we thus need not and do not address this question.

[1441] *See generally* 47 U.S.C. § 610.

[1442] For reasons similar to those discussed in the text above regarding other disability access provisions, we do not find it in the public interest to grant forbearance from section 710 of the Act, nor do we find such forbearance otherwise warranted under the section 10(a) criteria. 47 U.S.C. § 160(a).

[1443] *See, e.g.*, *Request For Updated Information and Comment On Wireless Hearing Aid Compatibility Regulations*, WT Docket Nos. 07-250, 10-254, Public Notice, 29 FCC Rcd 13969 (Wireless Telecom. Bureau, Consumer & Gov't Affairs Bureau 2014) (discussing pending proceeding and seeking updated comment). We note that the Commission's existing implementing rules do not immediately impose the Commission's hearing aid compatibility requirements implementing section 710 of the Act on mobile wireless broadband providers by virtue of the classification decisions in this Order. We note, however, that certain obligations in the Commission's rules implementing section 255 addressing interference with hearing technologies and the effective wireless coupling to hearing aids, *see e.g.*, 47 C.F.R. §§ 6.3(a)(2)(viii), (ix); 6.5; 7.1(a)(2)(viii), (ix); 7.5, may be appropriately imposed

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c. Access to Poles, Ducts, Conduit and Rights-of-Way (Section 224)

478. Consistent with the recommendations of certain broadband provider commenters, because we find that the section 10(a) criteria are not met, we decline to forbear from applying section 224 and the Commission's associated rules with respect to broadband Internet access service.[1444] Section 224 of the Act governs the Commission's regulation of pole attachments. The Commission has recognized repeatedly the importance of pole attachments to the deployment of communications networks, and we thus conclude that applying these provisions will help ensure just and reasonable rates for broadband Internet access service by continuing pole access and thereby limiting the input costs that broadband providers otherwise would need to incur.[1445] Leveling the pole attachment playing field for new entrants that offer solely broadband services also removes barriers to deployment and fosters additional broadband competition.[1446] For similar reasons we find that applying these provisions will protect consumers and advance the public interest under sections 10(a)(2) and (a)(3).[1447]

479. Further, in significant part, section 224 imposes obligations on utilities, as owners of poles, ducts, conduits, or rights-of-way, to ensure that cable operators and telecommunications carriers obtain access to poles on just, reasonable, and nondiscriminatory rates, terms and conditions.[1448] The definition of a utility, however, includes entities other than telecommunications carriers,[1449] and pole attachments themselves are not "telecommunications services." Section 10 allows the Commission to forbear from statutory requirements and implementing regulations as applied to "a telecommunications

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on such providers by virtue of this Order, given our decision not to forbear from application of section 255 and its implementing regulations.

[1444] *See, e.g.*, Comcast Dec. 24, 2014 *Ex Parte* Letter at 25 n.107; NCTA Dec. 23, 2014 *Ex Parte* Letter at 21. *See also, e.g.*, Letter from Marvin Ammori and Julie Samuels, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1 (filed Nov. 12, 2014) ("Title II forbearance should be implemented in such a way so as to encourage continued deployment and investment in networks by for example preserving pole attachment rights."); Letter from Austin C. Schlick, Director, Communications Law, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 3-4 (filed Dec. 30, 2014) (Google Dec. 30, 2014 *Ex Parte* Letter).

[1445] *See, e.g.*, *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5241-43, paras. 1-6 (2011) (*2011 Pole Attachment Order*). *See also, e.g.*, Google Dec. 30, 2014 *Ex Parte* Letter at 3-4; Vonage Jan. 7, 2015 *Ex Parte* Letter at 1.

[1446] *See, e.g.*, Google Dec. 30, 2014 *Ex Parte* Letter at 3-4; Letter from Stephen E. Coran, Counsel for WISPA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 13-14 (filed Feb. 3, 2015).

[1447] Some commenters contend that the Commission should forbear from all of Title II based on generalized arguments about the marketplace, such as past network investment or changes in performance or price per megabit in the recent past. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 10-11; Comcast Dec. 24, 2014 *Ex Parte* Letter at 4-6; NCTA Dec. 23, 2014 *Ex Parte* Letter at 19-20. We are not persuaded that those arguments justify a different outcome regarding section 224 and our associated rules, both for the reasons discussed previously, *see supra* Section V.B.1, and because commenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need for regulated access to access to poles, ducts, conduit, and rights-of-way is not self-evidently linked to such marketplace considerations. Nor does the record reveal that concerns about adequate access to poles, ducts, conduit and rights-of-way are limited to broadband providers of a particular size, and we thus are not persuaded that these concerns would differ in the case of small broadband providers, for example. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; AireBeam Jan. 30, 2015 *Ex Parte* Letter at 2.

[1448] 47 U.S.C. § 224(a)-(e).

[1449] *See* 47 U.S.C. § 224(a)(1) (defining a utility as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. . . . "); *see also* 47 U.S.C. § 224(a)(5) ("For purposes of this section, the term 'telecommunications carrier' (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.").

carrier or telecommunications service," or class thereof, if the statutory criteria are satisfied.[1450] To the extent that section 224 imposes obligations on entities other than telecommunications carriers, it is not within the Commission's authority to forbear from this provision and our implementing rules under section 10.

480. Moreover, even if the Commission could forbear from the entirety of section 224 notwithstanding the concerns with such forbearance noted above, it is doubtful that this approach would leave us with authority to regulate the rates for attachments used for broadband Internet access service. In particular, such forbearance seemingly would eliminate any requirements governing pole owners' rates for access to poles by telecommunications carriers or cable operators. Such an outcome would not serve the public interest.

481. We also are not persuaded that we could forbear exclusively from the telecom rate formula in section 224(e), and then adopt a lower rate—such as the cable rate—pursuant to section 224(b). In particular, applying the 'specific governs the general' canon of statutory interpretation, the Supreme Court interpreted the rate formulas in sections 224(d) and (e) as controlling, within their self-described scope, over the Commission's general authority to ensure just and reasonable rates for pole attachments under section 224(b).[1451] We question whether forbearing from applying section 224(e) would actually alter the scope of our authority under section 224(b), or if instead rates for carriers' telecommunications service attachments would remain governed by the (now forborne-from) section 224(e), leaving a void as to regulation of rates for such attachments. Further, attempting to use an approach like this to regulate pole rental rates more stringently to achieve lower rates, the Commission seemingly would be using forbearance to *increase* regulation. Given the deregulatory purposes underlying the adoption of section 10, we do not believe that the use of forbearance in that manner would be in the public interest.[1452]

482. Although we are not persuaded that forbearance would be appropriate to address these concerns, we are committed to avoiding an outcome in which entities misinterpret today's decision as an excuse to increase pole attachment rates of cable operators providing broadband Internet access service.[1453] To be clear, it is not the Commission's intent to see any increase in the rates for pole attachments paid by cable operators that also provide broadband Internet access service, and we caution utilities against relying on this decision to that end. This Order does not itself require any party to

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[1450] 47 U.S.C. § 160(a) ("[T]he Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service . . . .").

[1451] *NCTA v. Gulf Power*, 534 U.S. 327, 335-36 (2002).

[1452] *See, e.g.*, *United States Telecom Association Petition For Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Order, 28 FCC Rcd 2605, 2608, para. 3 (2013).

[1453] *See, e.g.*, Letter from Thomas Cohen and Edward A. Yorkgitis, Jr., Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 2-3 (filed Jan. 20, 2015) (ACA Jan. 20, 2015 *Ex Parte* Letter); NCTA Dec. 23, 2014 *Ex Parte* Letter at 21 n.107. By virtue of the 1996 Act revisions, section 224 of the Act now sets forth two separate formulas to determine the maximum rates for pole attachments—one applies to pole attachments used by providers of telecommunications services (the telecom rate formula), and the other to pole attachments used "solely to provide cable service" (the cable rate formula). 47 U.S.C. §§ 224(d), (e). In recognition of these differences, Congress provided that rates under the telecom rate formula would be phased in over a five-year period, 47 U.S.C. § 224(e)(4), although the Commission has sought to minimize the disparity in rates. *See generally 2011 Pole Attachment Order*. To the extent that commenters express concern about possible rate changes following our reclassification of broadband Internet access under that statutory and regulatory framework, *see* ACA Jan. 20, 2015 *Ex Parte* Letter at 2-3; NCTA Dec. 23, 2014 *Ex Parte* Letter at 21 n.107, we are not persuaded on this record that forbearance would be a viable way to address them, for the reasons discussed below. Nor do such arguments persuade us not to reclassify broadband Internet access service, since in reclassifying that service we simply acknowledge the reality of how it is being offered today. *See supra* Section IV.

increase the pole attachment rates it charges attachers providing broadband Internet access service, and we would consider such outcomes unacceptable as a policy matter.

483. We note in this regard that in the *2011 Pole Attachment Order*, the Commission undertook comprehensive reform of pole attachment rules—including by revising the telecommunications rate formula for pole attachments in a way that "generally will recover the same portion of pole costs as the current cable rate."[1454] As NCTA, COMPTEL and tw telecom observed following that *Order*, the Commission's "expressed intent of providing rate parity between telecommunications providers and cable operators by amending the telecommunications formula to produce rates comparable to the cable formula—thereby removing the threat of potential rate increases associated with new services and reducing the incentives for pole owners to dispute the legal classification of communications services—will provide much-needed regulatory certainty that will permit broadband providers to extend their networks to unserved communities while fairly compensating pole owners."[1455] However, these parties also expressed concern that the particular illustration used by the Commission in the rule text could be construed as suggesting that the new formula includes only instances where there are three and five attaching entities, rather than providing the "corresponding cost adjustments scaled to other entity counts."[1456] We are concerned by any potential undermining of the gains the Commission achieved by revising the pole attachment rates paid by telecommunications carriers. We accordingly will be monitoring marketplace developments following this Order and can and will promptly take further action in that regard if warranted.

484. To the extent that there is a potential for an increase in pole attachment rates for cable operators that also provide broadband Internet access service, we are highly concerned about its effect on the positive investment incentives that arise from new providers' access to pole infrastructure. We are encouraged by entry into the marketplace of parties that offer broadband Internet access service, and we believe that providing these new parties with access to pole infrastructure under section 224 would outweigh any hypothetical rise in pole attachment rates for some incumbent cable operators in some circumstances[1457] —particularly in light of our expressed intent to take prompt action if necessary to address the application of the Commission's pole rental rate formulas in a way that removes any doubt concerning the advancement of the goals intended by our 2011 reforms. Moreover, subsumed within our finding that today's decision does not justify any increase in pole attachment rates is an emphatic conclusion that no utility could impose any increase retroactively.[1458]

485. We also reject arguments that section 706 itself provides adequate protections such that forbearance from the pole access provisions of section 224 and related regulations is warranted.[1459] While section 706 of the 1996 Act would continue to apply even if we granted forbearance here, consistent with our conclusions in other sections, we find that section 224 and our implementing regulations provide a more certain foundation for evaluating providers' conduct and pursuing enforcement if warranted in relevant circumstances arising in the future.[1460]

[1454] *2011 Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8.

[1455] *Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association, COMPTEL and tw telecom Inc.*, WC Docket No. 07-245, GN Docket No. 09-51 at 2 (filed June 8, 2011), http://apps.fcc.gov/ecfs/document/view?id=7021686399.

[1456] *Id.* at 6.

[1457] *See, e.g.*, Google Dec. 30, 2014 *Ex Parte* Letter at 2-4.

[1458] Letter from Samuel L. Feder, Counsel to Charter, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, 07-245 (filed Feb. 18, 2015).

[1459] *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; NCTA Jan. 14, 2015 *Ex Parte* Letter at 3-4.

[1460] *See, e.g.*, *supra* Section III.F.4. We also note, for example, that this approach obviates the need to determine whether or to what extent section 224's pole access provisions are more specific than section 706 of the 1996 Act in

(continued….)

d. Universal Service Provisions (Sections 254, 214(e))

486. We find the statutory test is met to grant certain forbearance under section 10(a) from applying sections 254(d), (g), and (k), as discussed below, but we otherwise will apply section 254, section 214(e) and our implementing rules with respect to broadband Internet access service, as recommended by a number of commenters.[1461] Section 254, the statutory foundation of our universal service programs, requires the Commission to promote universal service goals, including "[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation."[1462] Section 214(e) provides the framework for determining which carriers are eligible to participate in universal service programs.[1463] Even prior to the classification of broadband Internet access service adopted here, the Commission already supported broadband services to schools, libraries, and health care providers and supported broadband-capable networks in high-cost areas.[1464] Broadband Internet access service was, and is, a key focus of those universal service policies, and classification today simply provides another statutory justification in support of these policies going forward. Under our broader section 10(a)(3) public interest analysis, the historical focus of our universal service policies on advancing end-users' access to broadband Internet access service persuades us to give much less weight to arguments that we should proceed incrementally in this context. In particular, the Commission already has provided support for deployment of broadband-capable networks and imposed associated public interest obligations requiring the provision of broadband Internet access service. In connection with the Lifeline program, for instance, the Commission has established the goal of "ensuring the availability of broadband service for low-income Americans."[1465] We therefore conclude that these universal service policy-making provisions of section 254, and the interrelated requirements of section 214(e), give us greater flexibility in pursuing those policies, and outweighs any limited incremental effects (if any) on broadband providers in this context.[1466] Because forbearance would not be in the public interest under section 10(a)(3), we apply

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relevant respects, and thus could be seen as exclusively governing over the provisions of section 706 of the 1996 Act as to some set of pole access issues. *Cf. Bloate v. U.S.*, 559 U.S. 196, 208 (2010) ("'[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment'") (citation omitted). The approach we take avoids this potential uncertainty, and we thus need not and do not address this question.

[1461] *See, e.g.*, NMR Comments at 25-26; Public Knowledge et al. Comments at 95; Rural Broadband Policy Group Comments at 8-9; Telecommunications for the Deaf and Hard of Hearing Comments at 13; Ammori Dec. 19, 2014 *Ex Parte* Letter at 5.

[1462] 47 U.S.C. § 254(b)(2).

[1463] 47 U.S.C. § 214(e). More specifically, an entity must be designated an eligible telecommunications carrier (ETC) under section 214(e) in order to get high-cost or Lifeline support, but the same constraint does not apply with respect to receipt of support under the E-rate or Rural Health Care programs. *See* 47 C.F.R. § 54.201(a).

[1464] *See, e.g.*, *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8895-95, paras. 67-75 (2014); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16700-01, 16704, 16715, paras. 49, 59, 79-80 (2012); *USF/ICC Transformation Order*, 26 FCC Rcd at 17683-91, paras. 60-73.

[1465] *Lifeline and Link Up Reform and Modernization; Lifeline and Linkup; Federal-State Joint Board on Universal Service; Advancing Broadband Availability Through Digital Literacy Training*, WC Docket Nos. 12-23, 11-42, 03-109, CC Docket No. 96-45, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6673, para. 33 (2012).

[1466] We note that commenters opposing the application of section 254 as a whole (or those provisions of section 254 from which we do not forbear below) or arguing that such action could be deferred pending future proceedings, appear to make only generalized, non-specific arguments, which we do not find sufficient to overcome our analysis above. *See, e.g.*, TIA Comments at 17; ADTRAN Reply at 17-18. *See also, e.g.*, Letter from COMPTEL, CCIA, Engine and IFBA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1-2 n.1 (filed Dec. 30, 2014) (noting the possibility of deferral). In addition, some commenters contend that the Commission should forbear from

(continued….)

these provisions of section 254 and 214(e) and our implementing rules with respect to broadband Internet access service.

487. We also reject arguments that section 706 itself provides adequate protections such that forbearance from the provisions of sections 254 and 214(e) discussed above is warranted.[1467] While section 706 of the 1996 Act would continue to apply even if we granted forbearance here, we find that these provisions provide a more certain foundation for implementing our universal service policies and enforcing our associated rules, consistent with our conclusions in other sections.[1468] Among other things, while our interest in ensuring universal service often may have a nexus with the standards of sections 706(a) and (b), the record does not reveal that the public interest in ensuring universal access is limited just to the universe of concerns encompassed by section 706.

488. Notwithstanding the foregoing, for now we do forbear in part from the first sentence of section 254(d) and our associated rules insofar as they would immediately require new universal service contributions associated with broadband Internet access service. The first sentence of section 254(d) authorizes the Commission to impose universal service contributions requirements on telecommunications carriers—and, indeed, goes even further to require "[e]very telecommunications carrier that provides interstate telecommunications services" to contribute.[1469] Under that provision and our implementing rules, providers are required to make federal universal service support contributions for interstate telecommunications services, which now would include broadband Internet access service by virtue of the classification decision in this order.[1470]

489. Consistent with our analysis of TRS contributions above, we note that on one hand, newly applying universal service contribution requirements on broadband Internet access service

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all of Title II based on generalized arguments about the marketplace, such as past network investment or changes in performance or price per megabit in the recent past. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 10-11; Comcast Dec. 24, 2014 *Ex Parte* Letter at 4-6; NCTA Dec. 23, 2014 *Ex Parte* Letter at 19-20. We are not persuaded that those arguments justify a different outcome regarding section 254, both for the reasons discussed previously, *see supra* Section V.B.1, and because commenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that, even taken at face value, arguments based on such marketplace considerations do not purport to sufficiently address the policy concerns underlying section 254 and our universal service programs. Nothing in the record suggests that we should tailor our advancement of universal service policies to broadband providers of a particular size, and we thus are not persuaded that a different conclusion in our forbearance analysis should be reached in the case of small broadband providers, for example. *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; AireBeam Jan. 30, 2015 *Ex Parte* Letter at 2.

[1467] *See, e.g.*, ACA Jan. 12, 2015 *Ex Parte* Letter at 11; NCTA Jan. 14, 2015 *Ex Parte* Letter at 3-4.

[1468] *See, e.g.*, *supra* Section III.F.4. *See also, e.g.*, *Connect America Fund et al.*, WC Docket No. 10-90 *et al*., Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4579, para. 67 (2011) (seeking comment on whether a universal service mechanism based exclusively on section 706 of the 1996 Act would raise issues under federal appropriations laws). We also note, for example, that this approach obviates the need to determine whether or to what extent these universal service provisions are more specific than section 706 of the 1996 Act in relevant respects, and thus could be seen as exclusively governing over the provisions of section 706 of the 1996 Act as to some set of universal issues. *Cf. Bloate v. U.S.*, 559 U.S. 196, 208 (2010) ("'[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment'") (citation omitted). The approach we take avoids this potential uncertainty, and we thus need not and do not address this question.

[1469] 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."). In implementing that statutory provision, the Commission concluded that federal contributions would be based on end-user telecommunications revenues. 47 C.F.R. § 54.706(c).

[1470] *Id*.; 47 C.F.R. §§ 54.706-54.713.

potentially could spread the base of contributions to the universal service fund, providing at least some benefit to customers of other services that contribute, and potentially also to the stability of the universal service fund through the broadening of the contribution base. We note, however, that the Commission has sought comment on a wide range of issues regarding how contributions should be assessed, including whether to continue to assess contributions based on revenues or to adopt alternative methodologies for determining contribution obligations.[1471] We therefore conclude that limited forbearance is warranted at the present time in order to allow the Commission to consider the issues presented based on a full record in that docket.[1472]

490. As reiterated in our discussion of TRS contributions above, courts have recognized when exercising its section 10 forbearance authority "[g]uided by section 706," the Commission permissibly may "decide[] to balance the future benefits" of encouraging broadband deployment "against [the] short term impact" from a grant of forbearance.[1473] Our decision, guided by section 706, to tailor the regulations applied to broadband Internet access service thus tips the balance in favor of the finding that applying new universal service fund contribution requirements at this time is not necessary to ensure just and reasonable rates and practices or for the protection of consumers under sections 10(a)(1) and (a)(2), and that forbearance is in the public interest under section 10(a)(3) while the Commission completes its pending rulemaking regarding contributions reform.[1474] The competing considerations here make this a closer call under our section 10(a) analysis, however, and thus as in the TRS contribution context, we limit our action only to forbearing from applying the first sentence of section 254(d) and our implementing rules insofar as they would immediately require new universal service contributions for broadband Internet access services sold to end users but not insofar as they authorize the Commission to require such contributions in a rulemaking in the future.[1475] Thus, while broadband Internet access

[1471] *Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357 (2012). Moreover, the Commission has referred the question of how the Commission should modify the universal service contribution methodology to the Federal-State Joint Board on Universal Service (Joint Board) and requested a recommended decision by April 7, 2015. *Federal State Joint Board on Universal Service; Universal Service Contribution Methodology; A National Broadband Plan For Our Future*, WC Docket Nos. 96-45, 06-122, GN Docket No. 09-51, Order, 29 FCC Rcd 9784 (2014). We recognize that a short extension of that deadline for the Joint Board to make its recommendation to the Commission may be necessary in light of the action we take today. Our action in this Order thus will not "short circuit" the rulemaking concerning contributions issues as some commenters fear. NTCA Jan. 8, 2015 *Ex Parte* Letter at 2; *see also, e.g.*, Letter from Andrew M. Brown, Counsel, Ad Hoc, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (filed Jan. 30, 2015).

[1472] As noted below, we do not forbear from the mandatory obligation of carriers that have chosen voluntarily to offer broadband as a Title II service to contribute to the federal universal service fund. Because we do nothing today to disturb the status quo with respect to current contributions obligations for the reasons explained above, and there will be a future opportunity to consider these issues in the contributions docket, we find that certain arguments raised in the record today are better taken up in that proceeding. *See, e.g.*, Letter from Michael R. Romano, Senior Vice President—Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (filed Jan. 8, 2015) (NTCA Jan. 8, 2015 *Ex Parte* Letter); Letter from Michael R. Romano, Senior Vice President—Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (filed Jan. 13, 2015) (NTCA Jan. 13, 2015 *Ex Parte* Letter);COMPTEL Comments at 22-23.

[1473] *EarthLink*, 462 F.3d at 9.

[1474] While some commenters cite regulatory parity as a reason not to forbear from universal service contribution requirements, they do not explain how such concerns are implicated insofar as every provider's broadband Internet access service is subject to this same forbearance from universal service contribution requirements. *See, e.g.*, COMPTEL Comments at 22-23. In any event, those arguments are better addressed in the contributions rulemaking docket based on the full record developed therein.

[1475] *See supra* para.470. *See also infra* paras.495-496; Section V.C.2.a.

services will not be subject to new universal service contributions at this time,[1476] our action today is not intended to prejudge or limit how the Commission may proceed in the future.[1477]

491. Nothing in our forbearance with respect to the first sentence of section 254(d) for broadband Internet access service is intended to encompass, however, situations where incumbent local exchange carriers or other common carriers voluntarily choose to offer Internet transmission services as telecommunications services subject to the full scope of Title II requirements for such services. As a result, such providers remain subject to the mandatory contribution obligations that arise under section 254(d) and the Commission's rules by virtue of their elective provision of such services until such time as the Commission further addresses contributions reform in the pending proceeding.

492. We also forbear from applying sections 254(g) and (k) and our associated rules. Section 254(g) requires "that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas."[1478] Section 254(k) prohibits the use of revenues from a non-competitive service to subsidize a service that is subject to competition.[1479] Commenters' arguments to apply provisions of section 254 appear focused on the provisions dealt with above—i.e., provisions providing for support of broadband networks or services or addressing universal service contributions—and do not appear to focus at all on why we should not forbear from applying the requirements of sections 254(g) and (k) and our implementing rules. In particular, consistent with the more detailed discussion in our analysis below, we are not persuaded that applying these provisions is necessary for purposes of sections 10(a)(1) and (a)(2), particularly given the availability of the core broadband Internet access service requirements.[1480] Likewise, under the tailored regulatory approach we find warranted here, informed by our responsibilities under section 706, we conclude that forbearance from enforcing sections 254(g) and (k) is in the public interest under section 10(a)(3).[1481] We thus forbear from applying these provisions insofar as they would be newly triggered by the classification of broadband Internet access service in this Order. Nothing in our forbearance with respect to section 254(k) for broadband Internet access service is intended to encompass, however, situations where incumbent local exchange carriers or other common

[1476] While a recent court case, seemingly in dicta, suggested that forbearance is informal rulemaking, the Commission has not expressly resolved that question. *Compare Verizon v. FCC*, 770 F.3d 961, 966-67 (D.C. Cir. 2014) *with, e.g.*, *Petition To Establish Procedural Requirements To Govern Proceedings For Forbearance Under Section 10 Of The Communications Act Of 1934, As Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, 9554, para. 19 n.72, para. 20 (2009). We need not and do not address that broader question here because in this case the Commission has, in fact, proceeded via rulemaking.

[1477] Because our action today precludes for the time being federal universal service contribution assessments on broadband Internet access services that are not currently assessed, we conclude that any state requirements to contribute to state universal service support mechanisms that might be imposed on such broadband Internet access services would be inconsistent with federal policy and therefore are preempted by section 254(f)—at least until such time that the Commission rules on whether to require federal universal service contributions by providers of broadband Internet access service. 47 U.S.C. § 254(f) ("A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."). We note that we are not aware of any current state contribution obligation for broadband Internet access service; our understanding is that broadband providers that voluntarily offer Internet transmission as a Title II service treat 100 percent of those revenues as interstate. We recognize that section 254 expressly contemplates that states will take action to preserve and advance universal service, and our actions in this regard will benefit from further deliberation. *See* 47 U.S.C. §§ 254(b)(5), 254(f); Letter from James Ramsey, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1-2 (filed Jan. 30, 2015).

[1478] 47 U.S.C. § 254(g).

[1479] 47 U.S.C. § 254(k).

[1480] *See infra* paras. 495-496; Section V.C.2.a.

[1481] *See infra* paras. 495-496; Section V.C.2.a.

carriers voluntarily choose to offer Internet transmission services as telecommunications services subject to the full scope of Title II requirements such services. As a result, such providers remain subject to the obligations that arise under section 254(k) and the Commission's rules by virtue of their elective provision of such services.[1482]

2. Broad Forbearance From 27 Title II Provisions For Broadband Internet Access Service

493. Beyond those core broadband Internet access service requirements we grant extensive forbearance as permitted by our authority under section 10 of the Act based on our predictive judgment regarding the adequacy of other protections where needed, coupled with the role of section 706 of the 1996 Act and our desire to tailor the requirements that should apply here, likewise persuade us that this forbearance is in the public interest. The analyses and forbearance decisions regarding broadband Internet access service reflect the broad support in the record for expansive forbearance.[1483] With respect to proposals to retain particular statutory provisions or requirements, we are not persuaded by the record here that forbearance is not justified for the reasons discussed below.

[1482] *See, e.g.*, *Wireline Broadband Classification Order*, 20 FCC Rcd at 14927-29, paras. 139-44 (discussing the application of section 254(k) and related cost-allocation rules). For example, if a rate-of-return incumbent LEC (or other provider) voluntarily offers Internet transmission outside the forbearance framework adopted in this Order, it remains subject to the pre-existing Title II rights and obligations, including those from which we forbear in this Order.

[1483] *See, e.g.*, AARP Comments at 42 ("Other than Sections 201, 202, and 208, the Commission should forbear from other Title II provisions as it reclassifies. The reclassification will resolve the problems identified by the D.C. Circuit, and allow the Commission to reestablish certainty regarding edge providers' ability to access their users and customers, and consumers' ability to access the legal content and services of their choice."); Consumer Watchdog Comments at 5 ("Because the Communications Act was approved before the existence of the Internet, some provisions of Title II are no longer applicable. The Commission can easily 'forbear' from implementing those provisions that are no longer relevant."); Consumers Union Comments at 11 ("The Commission can narrowly target this framework to best suit the particular needs of broadband service using its forbearance power under Section 10 of the Communications Act. . . . [It thus can] maintain[] a light regulatory touch appropriate for broadband."); EFF Comments at 16-17 ("[R]ules regarding such things as 'tariff filing, price regulation, and other features of monopoly telephone regulation could be taken off the table from the start. Ultimately, the end result would most likely be 'Title II light,' not the burdensome regulatory structure carriers decry.'"); WGAW Comments at 31 ("In the case of broadband Internet access providers, the Commission need not impose the whole gamut of Title II authority. Instead, it can employ a light regulatory touch by tailoring rules under Title II to the specific characteristics of Internet distribution."); Sidecar Technologies Reply at 6 ("[T]he FCC should not assert outdated, unneeded authorities found in Title II and should immediately forbear from much of Title II of the Act. Specifically, we encourage the FCC not to forbear from sections 201, 202, and 208 . . . . "); Vonage Reply at 32 ("Rather than debate each individual section of Title II in its forbearance analysis, the Commission could limit its Title II authority to those provisions necessary to adopt and enforce Open Internet rules and forbear from applying all other provisions and rules under Title II that do not bear on the Open Internet rules originally codified in 2010"); Letter from Markham C. Erickson, Counsel for Netflix, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 1-2 (filed Dec. 5, 2014) ("To generate open Internet rules, the Commission can and should forbear from the vast majority of Title II provisions."); Internet Association Jan. 6, 2015 *Ex Parte* Letter at 2 ("Most of the provisions of Title II, including regulating retail rates, do not appear necessary to further any of these [section 10] goals in the Internet context."); Letter from Barbara van Schewick, Professor of Law and (by courtesy) Electrical Engineering, Stanford Law School, *et al*., to Hon. Tom Wheeler, Chairman, FCC, *et al.*, GN Docket No. 14-28, Attach. at 7 (filed Feb. 2, 2015) ("[W]e would expect and encourage the FCC to regulate with a light touch under Title II through application of its forbearance authority."); Letter from Hon. Catherine Sandoval, Commissioner, California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. 4 at 17 (filed Feb. 4, 2015) ("[R]ecommend[ing] that the FCC adopt rules to protect and promote the Open Internet consistent with both Section 706 of the Telecommunications Act and Title II of the Communications Act with forbearance and a light regulatory touch.").

494. As a threshold matter, we reject arguments from certain commenters that include bare assertions that we should not forbear as to particular provisions or regulations without any meaningful supporting analysis or discussion under the section 10(a) framework.[1484] To the extent that these commenters argue for a narrower result than the forbearance we grant here, such conclusory arguments do not undercut our finding that the section 10(a) criteria are met as to the forbearance granted here with respect to broadband Internet access service. For similar reasons we reject arguments that the Commission should "exempt from forbearance… Section 228… provid[ing] customers with protections from abusive practices by pay-per-call service providers" insofar as they do not explain how such a provision meaningfully would apply in the context of broadband Internet access service or why the section 10(a) criteria are not met in that context.[1485] As a result, these arguments do not call into question our section 10(a) findings below in the context of the broadband Internet access service. With respect to proposals to retain other statutory provisions, we conclude that commenters fail to demonstrate at this time that other, applicable requirements or protections are inadequate, for the reasons discussed below.

495. For each of the remaining statutory and regulatory obligations triggered by our classification decision, the realities of the near-term past under the prior "information service" classification inform our section 10(a) analysis. Although that practical baseline is not itself dispositive of the appropriate regulatory treatment of broadband Internet access service, the record reveals numerous concerns about the burdens—or, at a minimum, regulatory uncertainty—that would be fostered by a sudden, substantial expansion of the actual or potential regulatory requirements and obligations relative to the *status quo* from the near-term past.[1486] It is within the agency's discretion to proceed incrementally,[1487] and we find that adopting an incremental approach here—by virtue of the forbearance

[1484] *See, e.g.*, i2 Coalition Comments at 40 (asserting simply that "references to §§ 201, 202, 203, 204, 205, 206, 208, 209, 211, 215, 218, 219, 220, 251 and 252 should be added" to the authority provision of the codified open Internet rules); Tumblr Reply at 9-10 ("We propose, with significant deference to the FCC's expertise in telecommunications law, that the FCC could arguably forbear from all provisions of Title II except for the following fifteen sections: Sections 201, 202, and 208 (guaranteeing net neutrality), 206, 207, 209, and 216 (holding broadband providers accountable for violations), 222 (protecting privacy), 251(a) and 256 (promoting interconnection), and 214(e), 225, 254, 255, and 257 (promoting access to the network). . . . [A] small and limited amount of government regulation is necessary to promote and protect a competitive and lightly regulated marketplace."); Letter from John M. Simpson, Privacy Project Director, Consumer Watchdog, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (filed Jan. 26, 2015) (listing a number of statutory provisions and simply noting the title of the provision).

[1485] Rural Broadband Policy Group Comments at 8-9.

[1486] *See, e.g.*, CTIA Comments at 47 (citing concerns about "prescriptive rate regulation, tariffing requirements, depreciation mandates, expansive entry and exit regulation, resale and interconnection obligations, a host of reporting requirements"); CenturyLink Comments at 37-40 (identifying various provisions that it contends only make sense as applied to voice service); Charter Comments at 13 (arguing that application of Title II could "creat[e] a prolonged period of legal uncertainty"); Technology Policy Institute Comments at 30 (application of Title II "would signify a sharp departure from the status quo"); WISPA Reply at 23-24 (arguing that particular requirements would be burdensome and that application of Title II potentially could lead to "prolonged uncertainty"). We are not persuaded by arguments that a tailored regulatory approach like that adopted here inherently would be inferior to the adoption of a more regulatory approach in this Order. *See, e.g.*, Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 22-29. Rather, we base our decision to adopt such a tailored approach based both on our own analysis of the overall record regarding investment incentives (which can involve multifaceted considerations), *see supra* Section IV.C.5, and the wisdom we see in exercising our discretion to proceed incrementally, as discussed in greater detail below.

[1487] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. . . . They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.") (citations omitted). While we believe that the tailored regulatory framework we adopt today strikes the right balance, we note that the D.C. Circuit has recognized the Commission's authority to revisit its decision should that prove not to be the case. *EarthLink*, 462 F.3d at 12. *See also id*. ("'[A]n agency's predictive judgments about

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granted here—guards against any unanticipated and undesired detrimental effects on broadband deployment that could arise.[1488] We note in this regard that when exercising its section 10 forbearance authority "[g]uided by section 706," the Commission permissibly may "decide[] to balance the future benefits" of encouraging broadband deployment "against [the] short term impact" from a grant of forbearance.[1489] Under the section 10(a) analysis, we are particularly persuaded to give greater weight at this time to the likely benefits of proceeding incrementally given the speculative or otherwise limited nature of the arguments in the current record regarding the possible near-term harms from forbearance of the scope adopted here.[1490]

496. We further conclude that our analytical approach as to all the provisions and regulations from which we forbear in this Order is consistent with section 10(a).[1491] Under section 10(a)(1), we consider here whether particular provisions and regulations are "necessary" to ensure "just and reasonable" conduct by broadband Internet access service providers.[1492] Interpreting those ambiguous terms,[1493] we conclude that we reasonably can account for policy trade-offs that can arise under particular regulatory approaches.[1494] For one, we find it reasonable in the broadband Internet access service context for our interpretation and application of section 10(a)(1) to be informed by section 706 of the 1996 Act.[1495] As discussed above,[1496] section 706 of the 1996 Act "explicitly directs the FCC to 'utiliz[e]'

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areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable,'" but the agency necessarily must have the ability to "reassess[] the situation if its predictions are not borne out.") (citations omitted).

[1488] *See, e.g.*, *FCC v. Fox Television Stations*, 556 U.S. 502, 522 (2009) ("Nothing prohibits federal agencies from moving in an incremental manner."); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("In classifying economic activity, agencies . . . need not deal in one fell swoop with the entire breadth of a novel development; instead, 'reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.'") (citation omitted).

[1489] *EarthLink*, 462 F.3d at 9.

[1490] These are discussed in greater detail in the context of the specific provisions or regulations below.

[1491] We thus reject claims to the contrary. *See generally* Pai Dissent at 57-64; O'Rielly Dissent at 14.

[1492] 47 U.S.C. § 160(a)(1).

[1493] *See, e.g.*, *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004) (in a decision addressing section 11 of the Act, recognizing that the term "necessary" is ambiguous); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 512-13 (D.C. Cir. 2003) (under *Chevron* step two, deferring to the Commission's reasonable interpretation of the term "necessary" in section 10(a)(2)); *Capital Network System, Inc., v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (with respect to section 201(b), holding that "[b]ecause 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them").

[1494] While the specific balancing at issue in *EarthLink v. FCC*, 462 F.3d at 8-9, may have involved trade-offs regarding competition, we nonetheless believe the view expressed in that decision accords with our conclusion here that we permissibly can interpret and apply all the section 10(a) criteria to also reflect the competing policy concerns here. As the D.C. Circuit also has observed, within the statutory framework that Congress established, the Commission "possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband." *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009).

[1495] Given the characteristics specific to broadband Internet access service that we find on the record here—including, among other things, protections from the newly-adopted open Internet rules and the overlay of section 706—we limit our forbearance from the relevant provisions and regulations to the context of broadband Internet access service. Outside that context, they will continue to apply as they have previously, unaffected by this Order. We thus reject claims that the actions or analysis here effectively treat forborne-from provisions or regulations as surplusage or that we are somehow ignoring significant portions of the Act. *See* Pai Dissent at 61, 64; O'Rielly Dissent at 14-15.

forbearance to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,'"[1497] and our recent negative section 706(b) determination triggers a duty under section 706 for the Commission to "take immediate action to accelerate deployment."[1498] As discussed in greater detail below,[1499] a tailored regulatory approach avoids disincentives for broadband deployment, which we weigh in considering what outcomes are just and reasonable—and whether the forborne-from provisions are necessary to ensure just and reasonable conduct—under our section 10(a)(1) analyses in this item. Furthermore, our forbearance in this Order, informed by recent experience and the record in this proceeding, reflects the recognition that, beyond the specific bright-line rules adopted above,[1500] particular conduct by a broadband Internet access service provider can have mixed consequences, rendering case-by-case evaluation superior to bright-line rules.[1501] Consequently, based on those considerations, it is our predictive judgment that, outside the bright line rules applied under this Order, just and reasonable conduct by broadband providers is better ensured under section10(a)(1) by the case-by-case regulatory approach we adopt—which enables us to account for the countervailing policy implications of given conduct—rather than any of the more bright-line requirements that would have flowed from the provisions and regulations from which we forbear.[1502] These same considerations underlie our section 10(a)(2) analyses, as well, since advancing broadband deployment and ensuring appropriately nuanced evaluations of the consequences of broadband provider conduct better protects consumers.[1503] Likewise, these same policy considerations are central to the conclusion that the forbearance granted in this Order, against the backdrop of the protections that remain, best advance the public interest under section 10(a)(3).[1504]

a. Tariffing (Sections 203, 204)

497. We find the section 10(a) criteria met and forbear from applying section 203 of the Act insofar as it newly applies to providers by virtue of our classification of broadband Internet access service. That provision requires common carriers to file a schedule of rates and charges for interstate common carrier services.[1505] As a threshold matter, we find broad support in the record for expansive forbearance, as discussed above.[1506] Moreover, as advocated by some commenters,[1507] it is our predictive

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[1496] *See supra* Section V.A.

[1497] *EarthLink v. FCC*, 462 F.3d at 8-9 (alteration in original).

[1498] *2015 Broadband Progress Report* at para. 12.

[1499] *See infra* Section V.C.2.a.

[1500] *See supra* Section III.C.I; *see also supra* Section III.C.3.

[1501] *See generally supra* Sections III.C.2, III.D.2, III.E.

[1502] As explained above, we conclude that while competition can be a sufficient basis to grant forbearance, it is not inherently necessary in order to find section 10 satisfied. *See supra* Section V.A. Given our assessment of the advantages of the regulatory framework applied under this Order, we also reject suggestions that, where the Commission does not rely on sufficient competition to justify forbearance, alternative *ex ante* regulations would always be necessary to ensure just and reasonable conduct and otherwise provide a basis for finding the section 10(a) criteria to be met. *See* Pai Dissent at 57-65. Further, while the Final Regulatory Flexibility Analysis estimates a large possible universe of broadband Internet access service providers, we do not find a basis to conclude that they all—or a sufficiently significant number of them—are likely to be simultaneously subject to complaints to render the case-by-case approach unworkable or inferior to additional bright line rules, and thus reject concerns to the contrary. *See* Pai Dissent at 63.

[1503] 47 U.S.C. § 160(a)(2).

[1504] 47 U.S.C. § 160(a)(3).

[1505] 47 U.S.C. § 203.

[1506] *See supra* para. 493. *See also, e.g.*, CDT Feb. 4, 2015 *Ex Parte* Letter at 3 ("There is no need to apply the tariffing requirements in Sections 203 and 204 to broadband service providers . . . .").

judgment that other protections that remain in place are adequate to guard against unjust and unreasonable and unjustly and unreasonably discriminatory rates and practices in accordance with section 10(a)(1) and to protect consumers under section 10(a)(2). We likewise conclude that those other protections reflect the appropriate calibration of regulation of broadband Internet access service at this time, such that forbearance is in the public interest under section 10(a)(3).

498. As discussed below, sections 201 and 202 of the Act and our open Internet rules are designed to preserve and protect Internet openness, prohibiting unjust and unreasonable and unjustly or unreasonably discriminatory conduct by providers of broadband Internet access service for or in connection with broadband Internet access service and protecting the retail mass market customers of broadband Internet access service.[1508] In particular, under our open Internet rules and the application of sections 201 and 202, we establish both *ex ante* legal requirements and a framework for case-by-case evaluations governing broadband providers' actions. In calibrating the legal framework in that manner, we consider, among other things, the operation of the marketplace in conjunction with open Internet protections.[1509] It is our predictive judgment that these protections will be adequate to protect the interests of consumers—including the interest in just, reasonable, and nondiscriminatory conduct—that might otherwise be threatened by the actions of broadband providers. Importantly, broadband providers also are subject to complaints and Commission enforcement in the event that they violate sections 201 or 202 of the Act, the open Internet rules, or other elements of the core broadband Internet access requirements.[1510] We thus find on the record here that section 203's requirements are not necessary to ensure just and reasonable and not unjustly or unreasonably discriminatory rates and practices under section 10(a)(1) nor for the protection of consumers under 10(a)(2).

499. The predictive judgment underlying our section 10 analysis is informed by recent experience. Historically, tariffing requirements were not applied to broadband Internet access service under our prior "information service" classification.[1511] This provides us a practical reference point as part of our overall evaluation of the types of concerns that are likely to arise in this context, underlying our predictive judgment regarding the sufficiency of the rules and requirements that remain.[1512] Consequently, providers will not be subject to *ex ante* rate regulation nor any requirement of advanced Commission approval of rates and practices as otherwise would have been imposed under section 203.

500. We also find that the forbearance for broadband Internet access service satisfies sections 10(a)(1) and (a)(2) and is consistent with the public interest under section 10(a)(3) in light of the objectives of section 706. In addition to our specific conclusions above,[1513] we find more broadly that

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[1507] *See, e.g.*, Vonage Reply at 32 ("Other than the lack of meaningful Open Internet protections, the status quo for regulating the provision of broadband internet access remains suitable and need not be disturbed."); AOL July 21, 2014 *Ex Parte* Letter at 2 ("The FCC would have the authority to forbear totally from Title II rules, so long as the continued existence of effective Section 706 rules makes Title II unnecessary to protect consumers.").

[1508] *See supra* Section III.

[1509] *See, e.g.*, *supra* Sections III.B.2.a, III.C.2, III.D.2.

[1510] *See supra* Section III.E. *See also supra* paras. 495-496.

[1511] *See generally Wireless Broadband Classification Order*, 22 FCC Rcd 5901; *BPL-Enabled Broadband Order*, 21 FCC Rcd 13281; *Wireline Broadband Classification Order*, 20 FCC Rcd 14853; *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798.

[1512] *See supra* Section III.B.2. *See also, e.g.*, CDT Comments at 15 ("Broadband providers have not been subject to the provisions of Title II, so there is ample real world experience with how the broadband marketplace functions without, for example, subscriber price regulation and tariff-filing requirements. The Commission could reasonably conclude that actual experience demonstrates that the enforcement of such requirements against broadband providers is 'not necessary' to ensure reasonable charges and practices or to protect consumers.").

[1513] In addition to the analysis of sections 10(a)(1) and (a)(2) factors above, *see also supra* paras. 495-496.

forbearing from section 203 is consistent with the overall approach that we conclude strikes the right regulatory balance for broadband Internet access service at this time. In particular, given the overlay of section 706 of the 1996 Act, we conclude that the better approach at this time is to focus on applying the core broadband Internet access service requirements rather than seeking to apply the additional provisions and regulations triggered by the classification of broadband Internet access service from which we forbear. As explained above, section 706 of the 1996 Act "explicitly directs the FCC to 'utiliz[e]' forbearance to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'"[1514] The D. C. Circuit has further held that the Commission "possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband."[1515] We find that the scope of forbearance adopted in this order strikes the right balance at this time between, on the one hand, providing the regulatory protections clearly required by the evidence and our analysis to, among other things, guard the virtuous cycle of Internet innovation and investment and, on the other hand, avoiding additional regulations that do not appear required at this time and that risk needlessly detracting from providers' broadband investments.

501. Additionally, section 10(b) requires the Commission, as part of its public interest analysis, to analyze the impact forbearance would have on competitive market conditions. Although there is some evidence of competition for broadband Internet access service, it appears to be limited in key respects, and the record also does not provide a strong basis for concluding that the forbearance granted in this Order is likely to directly impact the competitiveness of the marketplace for broadband Internet access services.[1516] We note that the forbearance we grant is part of an overall regulatory approach designed to promote infrastructure investment in significant part by preserving and promoting innovation and competition at the edge of the network.[1517] Thus, even if the grant of forbearance does not directly promote competitive market conditions, it does so indirectly by enabling us to strike the right balance at this time in our overall regulatory approach. Our regulatory approach, viewed broadly, thus does advance competition in important ways. Ultimately, however, while we consider the section 10(b) criteria in our section 10(a)(3) public interest analysis, our public interest determination rests on other grounds. In particular, under the entirety of our section 10(a)(3) analysis, as discussed above, we conclude that the public interest supports the forbearance adopted in this Order.[1518]

502. We thus are not persuaded by other commenters arguing that the Commission's ability to forbear from section 203 depends on findings of sufficient competition.[1519] As explained above, persuasive evidence of competition is not the sole possible grounds for granting forbearance.[1520] As also explained above, we conclude at this time that the Open Internet rules and other elements of the core broadband Internet access service requirements meet our identified needs in this specific context. The Commission also has recognized previously that tariffing imposes administrative costs.[1521] We also

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[1514] *EarthLink v. FCC*, 462 F.3d at 8-9.

[1515] *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009) (*Ad Hoc*).

[1516] *See supra* Section III.B.2.

[1517] *See supra* Section III.B.1.

[1518] These same section 10(b) findings likewise apply in the case of our other section 10(a)(3) public interest evaluations with respect to broadband Internet access service, and should be understood as incorporated there.

[1519] *See, e.g.*, Letter from Lawrence J. Spiwak, President, Phoenix Center for Advanced Legal & Economic Public Policy Studies, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, Attach. 2, Phoenix Center Bulletin No. 36, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as Title II Telecommunications Service* at 14-16 (filed Oct. 31, 2014) (Phoenix Center Oct. 31, 2014 *Ex Parte* Letter).

[1520] *See supra* Section V.A.

[1521] *Wireless Forbearance Order*, 9 FCC Rcd at 1478-79, para. 175.

consider our objective of striking the right balance of a regulatory and deregulatory approach, consistent with section 706 of the 1996 Act.[1522] Collectively, these persuade us not to depart from the section 10(a) analysis above, irrespective of the state of competition.

503. Nor are we persuaded by commenters' specific arguments that tariffs filed under section 203 provide "the necessary information to distinguish between providers" and thus should not be subject to forbearance for broadband Internet access service.[1523] As certain of these commenters themselves note, such objectives might be met in other ways.[1524] To the extent that disclosures regarding relevant broadband provider practices are needed, our Open Internet transparency rule is designed to serve those ends.[1525] Commenters do not meaningfully explain why the transparency rule is inadequate, and thus their arguments do not persuade us to depart from our section 10(a) findings above in the case of section 203.

504. We likewise reject the proposals of other commenters that we structure our forbearance from section 203 to permissively, rather than mandatorily, detariff broadband Internet access service.[1526] As a threshold matter, we note that, as discussed above,[1527] our forbearance with respect to broadband Internet access services does not encompass incumbent local exchange carriers or other common carriers that offer Internet transmission services as telecommunications services subject to the full range of Title II requirements under the pre-existing legal framework, which does provide for permissive detariffing.[1528] Under the framework adopted in this Order, however, we are not persuaded that our open Internet rules provide for readily administrable evaluation of the justness and reasonableness of tariff filings. Nor does the record reveal that we can rely on competitive constraints to help ensure the justness and reasonableness of tariff filings. Furthermore, as the Commission previously has recognized, permitting voluntary tariff filings can raise a number of public interest concerns, and consistent with those findings, we mandatorily detariff broadband Internet access service for purposes of the regulatory framework adopted in this Order.[1529]

[1522] *See supra* para.500. Indeed, even when forbearing from section 203 in the CMRS context, the Commission not only relied in part on the presence of competition, but also that continued application of sections 201, 202, and 208 "provide[s] an important protection in the event there is a market failure," and "tariffing imposes administrative costs and can themselves be a barrier to competition in some circumstances." *Wireless Forbearance Order*, 9 FCC Rcd at 1478-79, para. 175. Those are in accord with key elements of our conclusions here.

[1523] Public Knowledge Comments at 85.

[1524] *See id*. at 94; *see also, e.g.*, Ammori Dec. 19, 2014 *Ex Parte* Letter at 7 ("[Tariffing] is not needed to ensure nondiscrimination or reasonable practices as the open Internet rules and complaints (regarding edge providers) and limited competition (regarding consumers) should cover it.").

[1525] *See, e.g.*, *2010 Open Internet Order*, 25 FCC Rcd at 17936-37, para. 53; *supra* Section III.C.3.

[1526] NTCA Comments at 13 n.29 (citing *Wireline Broadband Classification Order*, 20 FCC Rcd at 14900-03, paras. 89-95); Letter from Michael R. Romano, Senior Vice President-Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2-3 (filed Nov. 19, 2014) (NTCA Nov. 19, 2014 *Ex Parte* Letter).

[1527] *See supra* para. 460.

[1528] *Wireline Broadband Classification Order*, 20 FCC Rcd at 14900-03, paras. 89-95. *Cf.* NTCA Nov. 19, 2014 *Ex Parte* Letter at 3 n.3 (arguing for an approach that would enable "RLECs [to] continue to have the option of offering broadband transmission services under tariff, as they do today").

[1529] *See, e.g.*, *Wireless Forbearance Order*, 9 FCC Rcd at 1479-80, paras. 178-79; *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12291-92, para. 64 (2008) (*Qwest Enterprise Broadband Forbearance Order*); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry & Certain Title II Common-Carriage Requirements et al*., WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19507-08, para. 59 (2007), *aff'd sub nom. Ad Hoc Telecomms. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (*Ad Hoc v. FCC*); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with*

(continued….)

505. Some commenters also advocate that the Commission retain section 204.[1530] Section 204 provides for Commission investigation of a carrier's rates and practices newly filed with the Commission, and to order refunds, if warranted.[1531] For the reasons described above, however, we forbear from sections 203's tariffing requirements for broadband Internet access service, and adopt mandatory detariffing. Given that decision, commenters do not indicate what purpose section 204 still would serve, and we thus do not depart in this context from our overarching section 10(a) forbearance analysis above.

b. Enforcement-Related Provisions (Sections 205, 212)

506. We find forbearance from applying certain enforcement-related provisions of Title II beyond the core Title II enforcement authority discussed above warranted under section 10(a), and we reject arguments to the contrary.[1532] Section 205 provides for Commission investigation of existing rates and practices and to prescribe rates and practices if it determines that the carrier's rates or practices do not comply with the Communications Act.[1533] The Commission previously has forborne from enforcing section 205 where it sought to adopt a tailored, limited regulatory environment and where, notwithstanding that forbearance, given the continued application of sections 201 and 202 and other complaint processes.[1534] For similar reasons here, we find at this time that the core Title II enforcement authority, along with the ability to pursue claims in court, as discussed below, provide adequate enforcement options and the statutory forbearance test is met for section 205. Consistent with our analysis above, it thus is our predictive judgment that these provisions are not necessary to ensure just, reasonable and nondiscriminatory conduct by providers of broadband Internet access service or to protect consumers under sections 10(a)(1) and (a)(2).[1535] In addition, as above, under the tailored regulatory approach we find warranted here, informed by our responsibilities under section 706, we conclude that forbearance is in the public interest under section 10(a)(3).[1536] We thus reject claims that forbearance from section 205, insofar as it is triggered by our classification of broadband Internet access service, is not warranted.[1537]

507. We also forbear from applying section 212 to the extent that it newly applies by virtue of our classification of broadband Internet access service. Section 212 empowers the Commission to monitor interlocking directorates, i.e., the involvement of directors or officers holding such positions in more than one common carrier.[1538] In the CMRS context, the Commission granted forbearance from section 212 on the grounds that forbearance would reduce regulatory burdens without adversely affecting

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Respect to Its Broadband Services et al., WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 18737-38, para. 67 (2007) (*AT&T Enterprise Broadband Forbearance Order*), *aff'd sub nom. Ad Hoc v. FCC*, 572 F.3d 903).

[1530] *See, e.g.*, Public Knowledge Comments at 92-94.

[1531] 47 U.S.C. § 204.

[1532] Public Knowledge Comments at 92-94.

[1533] 47 U.S.C. § 205.

[1534] *Wireless Forbearance Order*, 9 FCC Rcd at 1479, para. 176.

[1535] *See supra* paras. 495-496; Section V.C.2.a.

[1536] *See supra* paras. 495-496; Section V.C.2.a.

[1537] Public Knowledge Comments at 93. Although Public Knowledge et al. cite marketplace differences between CMRS and broadband Internet access service, they do not explain why those differences necessitate a narrower forbearance decision in this context—particularly since we do not rely on the state of competition as a rationale for our forbearance decision—whether as to section 205, or as to the other provisions discussed there (sections 204, 211, 212). *Id*. at 93-94.

[1538] 47 U.S.C. § 212.

rates in the CMRS market.[1539] The Commission noted that section 212 was originally placed in the Communications Act to prevent interlocking officers from engaging in anticompetitive practices, such as price fixing. The Commission found, however, that protections of section 201(b),[1540] 221,[1541] and antitrust laws[1542] were sufficient to protect consumers against the potential harms from interlocking directorates. Forbearance also reduced an unnecessary regulatory cost imposed on carriers. The Commission later extended this forbearance to dominant carriers and carriers not yet found to be non-dominant, repealing part 62 of its rules and granting forbearance from the provisions of section 212.[1543] Commenters have not explained why we should not find the protections of section 201(b) and antitrust law adequate here, as well.[1544] It likewise is our predictive judgment that other protections will adequately ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and protect consumers here, and thus conclude that the application of section 212 is not necessary for purposes of sections 10(a)(1) or (a)(2).[1545] Moreover, as above, under the tailored regulatory approach we find warranted here, informed by our responsibilities under section 706, we conclude that forbearance is in the public interest under section 10(a)(3).[1546]

c. Information Collection and Reporting Provisions (Sections 211, 213, 215, 218-20)

508. In addition, although some commenters advocate that the Commission retain provisions of the Act that provide "discretionary powers to compel production of useful information or the filing of regular reports," we find the section 10(a) factors met and grant forbearance.[1547] However, the cited provisions principally are used by the Commission to implement its traditional rate-making authority over common carriers.[1548] Here, we do not apply tariffing requirements or *ex ante* rate regulation of broadband

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[1539] *See Wireless Forbearance Order*, 9 FCC Rcd at 1485, paras. 195–97.

[1540] *See id.* at 1485, paras. 197 n.389.

[1541] The Commission noted that section 221 provided protections against interlocking directorates, but section 221(a) was repealed in the Telecommunications Act of 1996. This section gave the Commission the power to review proposed consolidations and mergers of telephone companies. While section 221(a) allowed the Commission to bolster its analysis to forbear from section 212 in the *Wireless Forbearance Order*, the protections against interlocking directorates provided by section 201(b) and 15 U.S.C. § 19 provide sufficient protection to forbear from section 212 for broadband Internet access services.

[1542] *See Wireless Forbearance Order*, 9 FCC Rcd at 1485, paras. 197 n.390 (citing the Clayton Act's protections governing interlocking directorates).

[1543] *See generally 1998 Biennial Regulatory Review—Repeal of Part 62 of the Commission's Rules*, CC Docket No. 98-195, Report and Order, 14 FCC Rcd 16530 (1999).

[1544] Public Knowledge asserts that forbearance will not promote competition, Public Knowledge Comments at 93, but that does not resolve the section 10(a) analysis. *See supra* Section V.A (discussing the role of competition in the section 10(a) forbearance analysis).

[1545] *See supra* paras. 495-496; Section V.C.2.a.

[1546] *See supra* paras. 495-496; Section V.C.2.a.

[1547] Public Knowledge Comments at 91-92 (discussing 47 U.S.C. §§ 211, 213, 215, 218-20).

[1548] Specifically, section 211 allows the Commission to require common carriers to file contracts section; 213 authorizes the Commission to make a valuation of all or of any part of the property owned or used by any carrier; section 215 gives the Commission the authority to examine carrier activities and transactions likely to limit the carrier's ability to render adequate service to the public, or to affect rates; section 218 authorizes the Commission to inquire into the management of the business of the carrier; section 219, *inter alia*, authorizes the Commission to require annual financial and other reports from carriers; and section 220 gives the Commission the discretion to prescribe the forms of accounts, records, and memoranda to be kept by carriers and also includes depreciation prescription provisions. 47 U.S.C. §§ 211, 213, 215, 218-20. We note that certain of these requirements might not, by their terms, apply to the broadband subscriber Internet service. For example, aspects of section 215 and 220

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Internet access service of the sort for which these requirements would be needed. Indeed, we cannot and do not envision adopting such requirements in the future. Thus, we do not find it necessary or in the public interest to apply these provisions simply in anticipation of such an exceedingly unlikely scenario. Moreover, as particularly relevant here, section 706 of the 1996 Act, along with other statutory provisions, give the Commission authority to collect necessary information.[1549] We recognize that the Commission generally did not forbear from these requirements in the CMRS context, noting the minimal regulatory burdens they imposed on such providers, and observing that reservation of this Commission authority would allow further consideration of possible information collection requirements, given that "the cellular market is not yet fully competitive."[1550] As explained above, in this context, however, we find forbearance to be the more prudent course, and therefore in the public interest under section 10(a)(3), given both our intention of tailoring the regulations applicable to broadband Internet access service given our responsibility under section 706 to encourage deployment.[1551] Because we also do not find the information collection and reporting provisions raised by commenters to be necessary at this time within the meaning of sections 10(a)(1) and (a)(2), we forbear from applying these provisions insofar as they otherwise newly would apply by virtue of our classification of broadband Internet access service.[1552]

d. Discontinuance, Transfer of Control, and Network Reliability Approval (Section 214)[1553]

509. We also find section 10(a) met for purposes of forbearing from applying section 214 discontinuance approval requirements.[1554] We reject the arguments of some commenters that we should not forbear, which focus in particular on concerns about discontinuances in rural areas or areas with only one provider.[1555] As a threshold matter, our universal service rules are designed to advance the

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appear specific to telephone service. Because we find forbearance warranted under the section 10 criteria, we need not resolve the possible application of these provisions more precisely.

[1549] *See, e.g.*, *Modernizing the Form 477 Data Program*, WC Docket No. 11-10, Report and Order, 28 FCC Rcd 9887, 9925, para. 88 (2013) (citing as authority for the Form 477 data collection, among other things, sections 201 and 403 of the Act and section 706 of the 1996 Act); *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16338-39, para. 50 (2012) (citing as authority for the special access data collection, among other things, sections 201 and 202 of the Act and section 706 of the 1996 Act).

[1550] *Wireless Forbearance Order*, 9 FCC Rcd at 1484-85, paras. 193-94.

[1551] *See supra* paras. 495-496; Section V.C.2.a.

[1552] *See supra* paras. 495-496; Section V.C.2.a.

[1553] Unless otherwise indicated, for convenience, this item uses "discontinuance," to also include reduction or impairment of service under section 214.

[1554] In pertinent part, section 214 requires that certain carriers submit applications to the Commission for the discontinuance, reduction, or impairment of existing services and associated procedural measures. *See* 47 U.S.C. § 214(a)-(c).

[1555] *See, e.g.*, COMPTEL Comments at 22-23 ("Retaining the provisions in [section 214(a)] that require Commission approval prior to discontinuance of service would afford protections for consumers threatened with the loss of Internet access service"); Public Knowledge Comments at 90-91 ("The Commission should not eliminate its jurisdiction over termination of operations in markets where a single provider may be the only point of access to the internet. As recognized by Congress, the Commission's oversight here is necessary to protect consumers from service interruption and termination. Consumers, businesses, public safety entities and government agencies rely on telecommunications services for an ever-increasing number of critical functions."); Rural Broadband Policy Group Comments at 8-9 (encouraging the Commission to "exempt from forbearance . . . Section 214 . . . ensur[ing] that an Internet Service Provider does not discontinue services to rural areas without first obtaining approval from the Commission, a requirement for Universal Service Fund recipients. This is of grave importance to rural communities since USF plays a major role in ensuring telecommunications services reach rural areas.").

deployment of broadband networks, including in rural and high-cost areas.[1556] Notably, this includes certain public interest obligations on the part of high-cost universal service support recipients to offer broadband Internet access service.[1557] Consequently, these provide important protections, especially in rural areas or areas that might only have one provider. Further, the conduct standards in our open Internet rules provide important protections against reduction or impairment of broadband Internet access service short of the complete cessation of providing that service. Thus, while we agree with commenters regarding the importance of broadband Internet access service, including in rural areas or areas served by only one provider, the generalized arguments of those commenters do not explain why the protections described above, in conjunction with the core broadband Internet access service requirements more broadly, are not likely to be sufficient to guard against unjust or unreasonable conduct by providers of broadband Internet access service or to protect consumers.

510. Moreover, the Commission has recognized in the past that section 214 discontinuance requirements impose some costs, although the significance of those costs is greater where (unlike here) the marketplace for the relevant service is competitive.[1558] Further, as discussed above, we find the most prudent regulatory approach at this time is to proceed incrementally when adding regulations beyond what had been the prior *status quo*.[1559] Given those considerations, and against the backdrop of other protections here, as discussed above, commenters have not persuaded us that applying section 214 discontinuance requirements with respect to broadband Internet access service is necessary within the meaning of sections 10(a)(1) and (a)(2) or that forbearance would not be in the public interest under section 10(a)(3).[1560] We thus forbear from applying section 214 discontinuance requirements to the extent that they would be triggered by our classification of broadband Internet access service here.

511. We also reject arguments against forbearance from applying section 214 to enable the Commission to engage in merger review.[1561] As these commenters recognize, prior to this Order the Commission already has commonly reviewed acquisitions of or mergers among entities that provide broadband services.[1562] Although these comments speculate about a future time when communications

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[1556] *See, e.g.*, *Connect America Fund et al*., WC Docket No. 10-90 et al., Report and Order, FCC 14-190, paras. 27-28 (rel. Dec. 18, 2014).

[1557] *See, e.g.*, *id*., FCC 14-190, paras. 13-29; *Modernizing the E-rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, FCC 14-189, paras. 60-76 (rel. Dec. 19, 2014).

[1558] *See, e.g.*, *Wireless Forbearance Order*, 9 FCC Rcd at 1481, para. 182.

[1559] *See supra* paras. 495-496; Section V.C.2.a. The overlay of section 706 of the 1996 Act here, including how it informs our decision to proceed incrementally, distinguishes this from the Commission's prior evaluation of relief from Title II for CMRS. *See infra* Section V.D. Consequently, although we look to the precedent from the CMRS context—as we do other forbearance precedent—to the extent that it is instructive, the mere fact that we declined to forbear from applying a provision in the CMRS context does not demonstrate that we should continue to apply it here as some suggest. *See, e.g.*, Letter from Matthew F. Wood, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 n.1 (filed Nov. 21, 2014) (Free Press Nov. 21, 2014 *Ex Parte* Letter) (citing Free Press Comments, GN Docket No. 10-127, at 72 (filed July 15, 2010) (citing prior decisions in the CMRS voice service context as a reason to reach the same conclusions in the broadband context regarding the application of sections 214, 251, and 256 of the Act)).

[1560] *See supra* paras. 495-496; Section V.C.2.a.

[1561] *See, e.g.*, Free Press Nov. 21, 2014 *Ex Parte* Letter at 1 n.3 (filed Nov. 21, 2014) (citing Free Press Comments, GN Docket No. 10-127, at 70-71 (filed July 15, 2010) (advocating that the Commission not forbear from applying section 214 insofar as it requires Commission approval of transfers of control)).

[1562] *Id*. For example, the Commission reviews all applications for transfer or assignment of a wireless license, including licenses used to provide broadband services, pursuant to Section 310(d) of the Act to determine whether the applicants have demonstrated that the proposed transfer or assignment will serve the public interest,

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services have evolved in such a way that the Commission would lack some other basis for its review, the record here does not demonstrate that it is sufficiently imminent to warrant deviating from our section 10 analysis regarding section 214 above. Notably, today we apply the core broadband Internet access service requirements that provide important constraints on broadband providers' conduct and protections for consumers. Thus, similar to our analysis above, it is our predictive judgment that other protections will be sufficient to ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to protect consumers for purposes of sections 10(a)(1) and (a)(2).[1563] Given our objective to proceed in a tailored manner, we likewise find it in the public interest to forbear from applying section 214 with respect to broadband Internet access service insofar as that provision would require Commission approval of transfers of control involving that service.[1564]

512. We also grant forbearance with respect to section 214(d), under which the Commission may require a common carrier "to provide itself with adequate facilities for the expeditious and efficient performance of its service."[1565] The duty to maintain "adequate facilities" includes "undertak[ing] improvements in facilities and expansion of services to meet public demand."[1566] In practice, we expect that the exercise of this duty here would overlap significantly with the sorts of behaviors we would expect providers to have marketplace incentives to engage in voluntarily as part of the "virtuous cycle."[1567] Beyond that, comments contending that the Commission should not forbear as to that provision do not explain why the core broadband Internet access service requirements do not provide adequate protection at this time. Thus, as under our analysis above, it is our predictive judgment that other protections will be sufficient to ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to protect consumers for purposes of sections 10(a)(1) and (a)(2).[1568] Likewise, informed by section 706 we have an objective of tailoring the regulatory approach here, and thus find forbearance warranted under section 10(a)(3) insofar as section 214(d) would apply by virtue of our classification of broadband Internet access service.[1569]

e. Interconnection and Market-opening Provisions (Sections 251, 252, 256)

513. At this time, we conclude that the availability of other protections adequately address commenters' concerns about forbearance from the interconnection[1570] provisions under the section

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convenience, and necessity. As this review is not triggered by reclassification, nothing in this Order limits or otherwise affects our review under Section 310.

[1563] *See supra* paras. 495-496; Section V.C.2.a.

[1564] *See supra* paras. 495-496; Section V.C.2.a.

[1565] 47 U.S.C. § 214(d). *See* Free Press Nov. 21, 2014 *Ex Parte* Letter at 1 n.3 (citing Free Press Comments, GN Docket No. 10-127at 71-72 (filed July 15, 2010) (advocating that he Commission not forbear from applying section 214(d))).

[1566] *RCA Communications*, Memorandum Opinion and Order, 44 FCC 613, 618 (1956).

[1567] Thus, even if our open Internet rules do not directly address this issue, by helping promote the virtuous cycle more generally, they also will help ensure that broadband providers have marketplace incentives to behave in this manner.

[1568] *See supra* paras. 495-496; Section V.C.2.a.

[1569] *See supra* paras. 495-496; Section V.C.2.a.

[1570] Although commenters appear to use the term "interconnection" to mean a potentially wide range of different things, for purposes of this section we use that term solely in the manner it is used and defined for purpose of these provisions. 47 U.S.C. §§ 251, 252, 256. *See also* 47 C.F.R. § 51.5 (defining "interconnection" for purposes of the Commission's implementation of the section 251/252 framework).

251/252 framework[1571] and under section 256.[1572] We thus forbear from applying those provisions to the extent that they are triggered by the classification of broadband Internet access service in this Order. The Commission retains authority under sections 201, 202 and the open Internet rules to address interconnection issues should they arise, including through evaluating whether broadband providers' conduct is just and reasonable on a case-by-case basis. [1573] We therefore conclude that these remaining legal protections that apply with respect to providers of broadband Internet access service will enable us to act if needed to ensure that a broadband provider does not unreasonably refuse to provide service or interconnect.[1574] Further, we find that applying the legal structure adopted in this Order better enables us

[1571] As discussed above, however, we do not forbear from applying section 251(a)(2) with respect to broadband Internet access service, and that provision thus is outside the scope of the discussion here. *See supra* Section V.C.1.

[1572] *See, e.g.*, COMPTEL Comments at 22-23; Mozilla Comments at 13; Public Knowledge Comments at 85, 88-90; Rural Broadband Policy Group Comments at 8-9; Tumblr Reply at 9-10; Letter from Blake E. Reid, Counsel for TDI, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (filed Nov. 17, 2014); Full Service Network/TrueConnect Feb. 3, 2015 *Ex Parte* Letter at 17. Section 251 of the Act sets forth interconnection obligations (along with other requirements designed to promote competition). 47 U.S.C. § 251. Section 252 establishes certain procedures for negotiating, arbitrating, and approving interconnection agreements implementing the requirements of section 251. 47 U.S.C. § 252. As a result of the forbearance granted from section 251 below, section 252 thus is inapplicable, insofar it is simply a tool for implementing the section 251 obligations. Although we do not forbear from applying section 251(a)(2) with respect to broadband Internet access service, we note that the Commission previously has held that the procedures of section 252 are not applicable in matters simply involving section 251(a). *See, e.g.*, *CoreComm Communications, Inc., and Z-Tel Communications, Inc. v. SBC Communications, Inc. et al.*, File No. EB-01-MD-017, Order on Reconsideration, 19 FCC Rcd 8447, 8454-55, para. 18 (2004) (vacated on other grounds) (asserting that "[n]either the general interconnection obligation of section 251(a) nor the interconnection obligation arising under section 332 is implemented through the negotiation and arbitration scheme of section 252"); *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19341, n.26 (2002) (stating that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed" with the state commission pursuant to section 252(a)(1)"). To the extent that the Commission nonetheless could be seen as newly applying section 252 with respect to broadband Internet access service as a result of our classification decision here, we find the section 10 criteria met to grant forbearance from that provision for the same reasons discussed with respect to section 251 in the text above. Section 256 promotes coordinated public telecommunications network planning and interconnectivity and allows Commission oversight of such activities. 47 U.S.C. § 256.

[1573] 47 U.S.C. § 201; *supra* Sections III.C.2, III.D.2. Indeed, one commenter, while asking that the Commission decline to forbear from sections 251(a) and 256, concedes that other provisions might meet the Commission's needs in this context. Mozilla Comments at 13 (advocating that "the Commission should strongly consider retaining section 251(a) and 256, in order to provide an unassailable legal basis for oversight of interconnection and peering practices, even though these sections may not be strictly necessary so long as sections 201 and 202 are effective"). *See also, e.g.*, CDT Feb. 4, 2015 *Ex Parte* Letter at 5 ("The propriety of forbearance from interconnection obligations in Section 251 turns on whether the Commission can rely on Section 201 and 202 to ensure that interconnection agreements and practices are consistent with an open Internet.").

[1574] *See* 47 U.S.C. § 201; *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9137-38, paras. 59-61 (2004); *People's Telephone Cooperative v. Southwestern Bell Tel. Co.*, *et al.*, Memorandum Opinion and Order, 62 FCC 2d 113, 116, para. 7 (1976); *Bell System Tariff Offerings of Local Distribution Facilities For Use By Other Common Carriers; and Letter of Chief, Common Carrier Bureau, Dated October 19, 1973, to Laurence E. Harris, Vice President, MCI Telecommunications Corp.*, Decision, 46 FCC 2d 413, 418-19, paras. 7-8 (1974); *see also supra* Section III.D.2. Our finding of significant overlap between the authority retained by the Commission under section 201 and the interconnection requirements of section 251 is reinforced by Congress' inclusion of section 251(g) and (i), which, notwithstanding the requirements of section 251, preserve the Commission's pre-1996 Act interconnection requirements as well as its ongoing authority under section 201. *See* 47 U.S.C. § 251(g), (i).

to achieve a tailored framework than requiring compliance with interconnection under section 251, in that the application of that framework leaves more to the Commission's discretion, rather than being subject to mandatory regulation under section 251.[1575] Because we retain our authority to apply and enforce these other protections, we reject commenters' suggestion that the section 10(a) forbearance criteria are not met as to sections 251 and 256.[1576] Rather, consistent with our analysis for other provisions, we find that other protections render application of these provisions unnecessary for purposes of sections 10(a)(1) and (a)(2) and the forbearance reflects our tailored regulatory approach, informed by section 706, and thus is in the public interest under section 10(a)(3).[1577]

514. We also reject arguments suggesting that we should not forbear from applying sections 251(b) and (c) with respect to broadband Internet access service.[1578] For example, sections 251(b)(1), (4), and (5) impose obligations on LECs regarding resale, access to rights-of-way, and reciprocal compensation.[1579] Section 251(c) subjects incumbent LECs to unbundling, resale, collocation, and other competition policy obligations.[1580] While we recognize the important competition policy goals that spurred Congress' adoption of these requirements in the 1996 Act, we are persuaded to forbear from applying these provisions under the circumstances here. In particular, we find the interests of customers of customers of broadband Internet access service, under section 10(a)(1) and (a)(2), and the public interest more generally, under section 10(a)(3) is best served by an overall regulatory framework that

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[1575] 47 U.S.C. 251(c)(2); *see Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15594, para. 184 (1996) (*Local Competition Order*) (finding that section 251(c)(2) requires that an incumbent must provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both). Because we forbear from this requirement, we need not, and do not, resolve whether broadband Internet access service could constitute "telephone exchange service" or "exchange access," nor whether any particular non-broadband provider seeking to interconnect and exchange traffic with the broadband provider is a carrier.

[1576] This is particularly true as to section 256, which does not provide the Commission any additional authority that it does not otherwise have. 47 U.S.C. § 256(c); *Comcast v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010).

[1577] *See, e.g.*, *supra* paras. 495-496; Section V.C.2.a.

[1578] Free Press Nov. 21, 2014 *Ex Parte* Letter at 1 n.1 (citing Free Press Comments, GN Docket No. 10-127, at 72-74 (filed July 15, 2010)); Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 17-19; Letter from Earl Comstock, Counsel for Full Service Network and TruConnect, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1-5 (filed Feb. 10, 2015) (summarizing meeting with Commissioner Clyburn's office).

[1579] 47 U.S.C. §§ 251(b)(1) (resale); 251(b)(4) (access to rights-of-way); 251(b)(5) (reciprocal compensation). In addition, sections 251(b)(2) and (b)(3) deal with telephone numbering issues, but commenters do not explain how the use of telephone numbers bears on the provision of broadband Internet access service. 47 U.S.C. §§ 251(b)(2), (b)(3).

[1580] 47 U.S.C. §§ 251(c)(1) (duty to negotiate in good faith); 251(c)(3) (unbundling); 251(c)(4) (resale); 251(c)(5) (notice of network changes); 251(c)(6) (collocation). We note that the Commission has determined that section 251(c) has been fully implemented throughout the United States. *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19440–42, paras. 53–56 (2005) (*Qwest Omaha Forbearance Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007). We reject claims that section 251(c) has not been fully implemented "[b]ecause the Commission has never applied section 251(c) to the provision of broadband Internet access service" as at odds with that precedent. *See, e.g.*, Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 28-29. The Commission has adopted rules implementing section 251(c), and the fact that the manner in which those rules apply might vary with the classification of a particular service (or changes in that classification) does not alter that fact. *See, e.g.*, *Qwest Corp. v. FCC*, 482 F.3d at 477 (affirming the Commission's interpretation "that § 251(c) had been fully implemented 'because the Commission has issued rules implementing section 251(c) and those rules have gone into effect'") (citation omitted). Therefore, the prohibition in section 10(d) of the Act against forbearing from section 251(c) prior to such a determination is not applicable.

includes forbearance from these provisions, which balances the need for appropriate Commission oversight with the goal of tailoring its regulatory requirements.[1581] The Commission previously has sought to balance the advancement of competition policy with the duty to encourage advanced services deployment pursuant to section 706.[1582] Moreover, to the extent that entities otherwise are LECs or incumbent LECs, the forbearance granted in this decision does eliminate any previously-applicable requirements of sections 251(b) and (c) and our implementing rules.[1583] In addition, the Commission retains authority to address unjust or unreasonable conduct through its section 201 and 202 authority. Thus, we do not find the competition policy requirements of sections 251 and 259 and the implementing rules necessary within the meaning of section 10(a)(1) or (2), and conclude that forbearance would be in the public interest under section 10(a)(3). As a result, we forbear from those requirements in the context of broadband Internet access service to the extent that those provisions newly apply by virtue of our classification of that service here.

f. Subscriber Changes (Section 258)

515. We also are persuaded, under the section 10(a) framework, to forbear from applying section 258's prohibition on unauthorized carrier changes, and we reject suggestions to the contrary by some commenters.[1584] In the voice service context, that provision, and the Commission's implementing

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[1581] *See supra* paras. 495-496; Section V.C.2.a.

[1582] *See, e.g.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-54, paras. 272-97 (2003) (*Triennial Review Order*), *aff'd in part, remanded in part, vacated in part*, *United States Telecom Association v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*) (considering the objectives of section 706, the Commission imposed only limited unbundling obligations on incumbent LECs' mass market next-generation broadband loop architectures); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 15856, 15859-61, paras. 7-9 (2004) (*MDU Reconsideration Order*) (determining that the same section 706 considerations justified extending the *Triennial Review Order*'s FTTH unbundling relief to encompass FTTH loops serving predominantly residential multiple dwelling units (MDUs)); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-303 paras. 9-19 (2004) (*FTTC Reconsideration Order*) (finding that the FTTH analysis applied to FTTC loops, as well, and granting the same unbundling relief to FTTC as applied to FTTH); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21512, para. 34 (2004) (*Broadband 271 Forbearance Order*) (analyzing the public interest of relieving BOCs of unbundling obligations under section 271 under the umbrella of section 706); *Wireline Broadband Classification Order*, 20 FCC Rcd at 14894-98, paras. 77-85 (stating that in assessing the alternate regulatory frameworks for wireline broadband Internet access services, the Commission must ensure that the balance struck provides adequate incentives for infrastructure investment, in accordance with section 706's Congressional objectives). Our overall analysis of the record on investment incentives—including evidence and arguments regarding more extensive or less extensive regulation than the tailored approach adopted here—is discussed in greater detail above. *See supra* Section IV.C.5.

[1583] As discussed below, *see infra* Section V.D., we evaluate forbearance assuming *arguendo* that provisions apply.

[1584] *See, e.g.*, Public Knowledge Comments at 85. We evaluate forbearance from section 258 by assuming *arguendo* that it applies. *See infra* Section V.D. Because we conclude that forbearance is warranted even with that assumption, we need not, and do not, decide whether broadband Internet access service is "telephone exchange service" or "telephone toll service" within the meaning of section 258(a).

rules, provide important protections given the ability of a new provider to effectuate a carrier change not only without the consent of the customer but also without direct involvement of the customer's existing carrier.[1585] While unauthorized carrier change problems theoretically might arise even outside such a context, the record here does not reveal whether or how, in practice, unauthorized changes in broadband Internet access service providers could occur. As a result, on this record we are not persuaded what objective would be served by application of this provision at all, particularly given the protections provided by the core broadband Internet access service requirements. As under our analysis of other provisions, we conclude that application of section 258 is not necessary for purposes of sections 10(a)(1) and (a)(2) and that forbearance is in the public interest.[1586] Therefore, insofar as our classification of broadband Internet access service would newly give rise to the application of section 258, we forbear from applying section 258 to that service.

g. Other Title II Provisions

516. Beyond the provisions already addressed above, we also forbear from applying those additional Title II provisions that could give rise to new requirements by virtue of our classification of broadband Internet access service to the extent of our section 10 authority. We find it notable that no commenters raised significant concerns about forbearing from these requirements, which reinforces our analysis below.[1587]

517. For one, we conclude the three-party statutory test under section 10(a) is met to forbear from applying certain provisions concerning BOCs in sections 271-276 of the Act to the extent that they would impose new requirements arising from the classification of broadband Internet access service in this Order. Sections 271, 272, 274, and 275 establish requirements and safeguards regarding the provision of interLATA services, electronic publishing, and alarm monitoring services by the Bell Operating Companies (BOCs) and their affiliates.[1588] Section 273 addresses the manufacturing, provision, and procurement of telecommunications equipment and customer premises equipment (CPE) by the BOCs and their affiliates, the establishment and implementation of technical standards for telecommunications equipment and CPE, and joint network planning and design, among other matters.[1589] Section 276 addresses the provision of "payphone service," and in particular establishes nondiscrimination standards applicable to BOC provision of payphone service.[1590]

518. With one exception (discussed below), we conclude that the application of any newly-triggered provisions of sections 271 through 276 to broadband Internet access service is not necessary within the meaning of section 10(a)(1) or (2), and that forbearance from these requirements is consistent

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[1585] *See, e.g.*, *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice Of Proposed Rulemaking, 14 FCC Rcd 1508, 1517-18, para. 12 (1998); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, Further Notice Of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674, 10678, para. 4 (1997).

[1586] *See supra* paras. 495-496; Section V.C.2.a.

[1587] *See supra* para. 494.

[1588] 47 U.S.C. §§ 271-72, 274-75. The Commission has determined that section 271 has been fully implemented throughout the United States. *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21503,para. 15 (2004) (*Section 271 Broadband Forbearance Order*), *aff'd sub nom. EarthLink, Inc. v. FCC*, 462 F.3d 1.(D.C. Cir. 2006). Therefore, the prohibition in section 10(d) of the Act against forbearing from section 271 prior to such a determination is not applicable.

[1589] 47 U.S.C. § 273.

[1590] 47 U.S.C. § 276(a).

with the public interest under section 10(a)(3). Many of the provisions in these sections have no current effect.[1591] Other provisions in these sections impose continuing obligations that are at most tangentially related to the provision of broadband Internet access service.[1592] Forbearance from any application of these provisions with respect to broadband Internet access service insofar as they are newly triggered by our classification of that service will not meaningfully affect the charges, practices, classifications, or regulations for or in connection with that service, consumer protection, or the public interest.[1593]

519. Forbearance for certain other provisions not meaningfully addressed by commenters also flows from our analysis of certain provisions that commenters did raise or that are discussed in greater detail elsewhere. First, as described elsewhere, we forbear from all *ex ante* rate regulations, tariffing and related recordkeeping and reporting requirements insofar as they would arise from our classification of broadband Internet access service.[1594] Second, we likewise forbear from unbundling and network access requirements that would newly apply based on the classification decision in this Order.[1595] It is our predictive judgment that other protections—notably the core broadband Internet access service

[1591] *See, e.g.*, 47 U.S.C. § 271(d)(1)-(4) (setting forth procedural requirements regarding BOC applications for authorization to provide in-region, interLATA services); 47 U.S.C. § 274(g)(2) (specifying that the provisions of section 274 shall not apply to conduct occurring more than four years after the enactment of the 1996 Act); 47 U.S.C. § 274(a) (prohibiting BOC entry into the provision of alarm monitoring services for five years from the enactment of the 1996 Act); *compare* 47 U.S.C. § 272(f) (providing for the sunset of the provisions of section 272, other than section 272(e), absent a Commission rule or order extending the period in which those provisions remain in effect) *with Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket Nos. 02-112, 06-120, CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16479-83 , paras. 79–86 (2007) (*Section 272 Sunset Order*) (declining to extend the section 272 safeguards with regard to interLATA telecommunications services); *Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, CC Docket No. 96-149, Order, 15 FCC Rcd 3267 (2000) (*Information Services Sunset Order*) (denying request to extend the section 272 safeguards with regard to interLATA information services).

[1592] *See, e.g.*, 47 U.S.C. § 273(c) (requiring each BOC to "maintain and file with the Commission full and complete information with respect to the protocols and technical requirements for connection with and use of its telephone exchange service facilities"); 47 U.S.C. § 273(d)(3) (setting forth procedures for establishing industry-wide standards for telecommunications equipment and CPE).

[1593] *See also supra* paras. 495-496; Section V.C.2.a. Consistent with our general approach to forbearance here, which seeks to address new requirements that could be triggered by our classification of broadband Internet access service, we do not forbear with respect to provisions to the extent that they already applied prior to this Order. For example, section 271(c) establishes substantive standards that a BOC was required to meet in order to obtain authorization to provide interLATA services in an in-region state, and which it and must continue to meet in order to retain that authorization. 47 U.S.C. § 271(c); *see* 47 U.S.C. § 271(d)(6) (authorizing various Commission actions in the event the Commission determines that a BOC has ceased to meet the conditions for authorization to provide in-region, interLATA services). In addition, section 271(c)(2)(B)(iii), requires that a BOC provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way in accordance with the requirements of section 224 of the Act, does not depend upon the classification of BOCs' broadband Internet access service. In combination with section 271(d)(6), this provision provides the Commission with an additional mechanism to enforce section 224 against the BOCs. We also do not forbear from section 271(d)(6) to the extent that it provides for enforcement of the provisions we do not forbear from here. In addition, while the BOC-specific provisions of section 276 theoretically could be newly implicated insofar as the reclassification of broadband Internet access service might result in some entities newly being treated as a BOC, the bulk of section 276 appears independent of the classification of broadband Internet access service and we thus do not forbear as to those provisions.

[1594] *See supra* Sections V.C.2.a, V.C.2.c., V.C.3.

[1595] *See supra* Section V.C.2.e.

requirements—will be adequate to ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to protect consumers for purposes of sections 10(a)(1) and (a)(2).[1596] Further, informed by our responsibilities under section 706, we adopt an incremental regulatory approach that we find strikes the appropriate public interest balance under section 10(a)(3).[1597] For these same reasons, we forbear from section 221's property records classification and valuation provisions,[1598] which would be used in the sort of *ex ante* rate regulation that we do not find warranted for broadband Internet access service. Likewise, just as we forbear from broader unbundling obligations, that same analysis persuades us to forbear from applying section 259's infrastructure sharing and notification requirements.[1599]

520. We also grant forbearance from other miscellaneous provisions to the extent that they would newly apply as a result of our classification insofar as they do not appear necessary or even relevant for broadband Internet access service of broadband Internet access service. For one, section 226, the Telephone Operator Consumer Services Improvement Act ("TOCSIA"),[1600] protects consumers making interstate operator services calls from pay telephones, and other public telephones, against unreasonably high rates and anti-competitive practices.[1601] Section 227(c)(3) provides for carriers to have certain notification obligations as it relates to the requirements of the Telephone Consumer Protection Act (TCPA),[1602] and section 227(e) restricts the provision of inaccurate caller identification information associated with any telecommunications service.[1603] Section 228 regulates the offering of pay-per-call services and requires carriers, inter alia, to maintain lists of information providers to whom they assign a telephone number, to provide a short description of the services the information providers offer, and a statement of the cost per minute or the total cost for each service.[1604] Section 260 regulates local exchange carrier practices with respect to the provision of telemessaging services.[1605] It is not clear how these provisions would be relevant to broadband Internet access service, and commenters to not provide meaningful arguments in that regard. Thus, for that reason, as well as the continued availability of the core broadband Internet access service requirements, we find enforcement of these provisions, to the extent they would newly apply by virtue of our classification of broadband Internet access service, is not

[1596] *See supra* paras. 495-496; Section V.C.2.a.

[1597] *See supra* paras. 495-496; Section V.C.2.a.

[1598] 47 U.S.C. § 221.

[1599] *See* 47 U.S.C. § 259.

[1600] 47 U.S.C. § 226.

[1601] S. Rep. No. 439, 101st Cong., 2d Sess. at 1 (1990). "Operator services" include collect or person-to-person calls, calls billed to a third number, and calls billed to a calling card or credit card. These services may be provided by an automated device as well as by a live operator. *Id.*

[1602] 47 U.S.C. § 227(c)(3)(B), (C), (L). Because we are forbearing from these substantive requirements, we note that, as a consequence, there will not be a private right of action granted under section 227(c)(5) based on alleged violations of those forborne-from requirements in the context of broadband Internet access service. We note that while the universe of "calls" covered by section 227(b)(1)(A)(iii) is prerecorded or autodialed calls to "a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call" even with the reclassification of mobile BIAS we do not interpret there to be any new or expanded restrictions arising from that provision because the relevant calls also would need to be specifically to a "telephone number" assigned to the relevant service. 47 U.S.C. § 227(b)(1)(A)(iii). As a result, there also would not be any private right of action under section 227(b)(3) that is newly triggered by the decisions in this Order. 47 U.S.C. § 227(b)(3).

[1603] 47 U.S.C. § 227(e).

[1604] 47 U.S.C. § 228.

[1605] 47 U.S.C. § 260.

necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with broadband providers are just and reasonable and are not unjustly or unreasonably discriminatory under section 10(a)(1).[1606] Enforcement also is not necessary for the protection of consumers under section 10(a)(2), and forbearance from applying these provisions is consistent with the public interest under section 10(a)(3), particularly given our conclusion, informed by section 706, that it is appropriate to proceed incrementally here.[1607]

521. We also note that the provisions of section 276 underlying the Commission's regulation of inmate calling services (ICS) and the ICS rules themselves do not appear to vary depending on whether broadband Internet access service is an "information service" or "telecommunications service."[1608] We note, however, that The D.C. Prisoners' Legal Services Project, Inc., *et al.* (the ICS Petitioners) express concern that forbearance under this order could be misconstrued as a limitation on the Commission's authority with respect to any advanced ICS services (such as video visitation) that may replace or supplement traditional ICS telephone calls.[1609] It is not our intent to limit in any way the Commission's ability to address ICS, particularly given the Commission's finding in 2013 that the ICS market "is failing to protect the inmates and families who pay [ICS] charges."[1610] We therefore find that forbearance would fail to meet the statutory test of section 10 of the Act, in that the protections of section 276 remain necessary to protect consumers and serve the public interest. Accordingly, out of an abundance of caution we make clear that we are not forbearing from applying section 276 to the extent applicable to ICS, as well as the ICS rules.

h. Truth-in-Billing Rules

522. We also find the section 10(a) criteria met and forbear from applying our truth-in-billing rules insofar as they are triggered by our classification of broadband Internet access service here.[1611] The core broadband Internet access requirements, including the requirement of just and reasonable conduct under section 201(b), will provide important protections in this context even without specific rules.[1612] Moreover, even advocates of such protections observe that this "may require further examination by the Commission," and do not actually propose that the current truth-in-billing rules immediately apply in practice, instead recommending that the Commission "temporarily stay these rules [and] implement

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[1606] 47 U.S.C. § 10(a)(1). *See supra* paras. 495-496; Section V.C.2.a.

[1607] 47 U.S.C. §§ 10(a)(2), (a)(3). *See supra* paras. 495-496; Section V.C.2.a.

[1608] *See, e.g.*, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14115, para. 14 (2013) (*ICS Order*) ("[S]ection 276 directs the Commission to 'establish a per call compensation plan to ensure that all payphone service providers'—which the statute defines to include providers of ICS—'are fairly compensated for each and every completed intrastate and interstate call.' . . . Section 276 makes no mention of the technology used to provide payphone service and makes no reference to 'common carrier' or 'telecommunications service' definitions.") (internal citations omitted); 47 C.F.R. §§ 64.6000 *et seq*. *pets. for stay granted in part sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014).

[1609] *See generally* Comments from Deborah M. Golden, D.C. Prisoners' Legal Services Project, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Feb. 18, 2015).

[1610] *See ICS Order*, 28 FCC Rcd at 14109-10, para. 3.

[1611] *See, e.g.*, Public Knowledge Dec. 19, 2014 *Ex Parte* Letter at 21 & n.97.

[1612] The Commission has previously noted the availability of section 201(b)'s protections outside the scope of the truth-in-billing rules. *See, e.g.*, *Empowering Consumers To Prevent and Detect Billing For Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116, 09-158; CC Docket No. 98-170, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4455, para. 47 (2012) ("remind[ing] CMRS carriers that," in addition to "those Truth-in-Billing rules that already apply to them" they "remain subject to section 201(b), . . .and to the Commission's enforcement authority").

interim provisions."[1613] They do not explain what such interim provisions should be, however, and as we explain below we are not persuaded that a stay or time-limited forbearance provides advantages relative to the approach we adopt here.[1614] Consequently, as in our analysis above, we are not persuaded that our truth-in-billing rules are necessary for purposes of sections 10(a)(1) and (a)(2), particularly given the availability of the core broadband Internet access service requirements.[1615] Likewise, as above, under the tailored regulatory approach we find warranted here, informed by our responsibilities under section 706, we conclude that forbearance is in the public interest under section 10(a)(3).[1616]

i. Roaming-Related Provisions and Regulations

523. We find section 10(a) met for purposes of granting certain conditional forbearance from roaming regulations. We recognize that the reclassification decisions elsewhere in this Order potentially alter the scope of an MBIAS provider's roaming obligations. The Commission has previously established two different regimes to govern the roaming obligations of commercial mobile providers. The first regime, established in 2007 pursuant to authority under sections 201 and 202 of the Act, imposes obligations to provide automatic roaming on CMRS carriers that "offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility."[1617] Such carriers were required, on reasonable request, to provide automatic roaming on reasonable and not unreasonably discriminatory terms and conditions.[1618]

524. Because this regime did not extend to data services that were not at that time classified as CMRS,[1619] the Commission adopted another roaming regime in 2011 under its Title III authority, applicable to "commercial mobile data services," which were defined to include all those commercial mobile services that are not interconnected with the public switched network, including (under the definition of "public switched network" applicable at that time) MBIAS.[1620] Under this data roaming provision, covered service providers were required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain specified limits.[1621]

525. Our determination herein to reclassify MBIAS as CMRS potentially affects the roaming obligations of MBIAS providers in two ways. First, absent any action by the Commission to preserve data roaming obligations, the determination that MBIAS is an interconnected service would result in providers of MBIAS no longer being subject to the data roaming rule, which as noted above, applies only to non-interconnected services. Second, the determination that MBIAS is CMRS potentially subjects MBIAS providers to the terms of the CMRS roaming rules.

526. We decide to retain for MBIAS, at this time, the roaming obligations that applied prior to reclassification of that service, consistent with our intent to proceed incrementally with regard to

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[1613] Public Knowledge Dec. 19, 2014 *Ex Parte* Letter at 21.

[1614] *See infra* Section V.D.

[1615] *See supra* paras. 495-496; Section V.C.2.a.

[1616] *See supra* paras. 495-496; Section V.C.2.a.

[1617] *See* 47 C.F.R. §§ 20.12(a)(2), (d).

[1618] *See* 47 C.F.R. § 20.12(d).

[1619] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15837-38, para. 56 (2007).

[1620] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411, 5411-12, paras. 1, 2 (2011); 47 C.F.R. §§ 20.3, 20.12(a)(3), 20.12(d).

[1621] *See* 47 C.F.R. § 20.12(e).

regulatory changes for MBIAS, and in the absence of significant comment in the instant record regarding the specific roaming requirements that should apply to MBIAS after reclassification. We therefore forbear from the application of the CMRS roaming rule, section 20.12(d), to MBIAS providers, conditioned on such providers continuing to be subject to the obligations, process, and remedies under the data roaming rule codified in section 20.12(e). That condition, coupled with the core broadband Internet access service requirements that remain, persuade us that the forborne-from rules are not necessary at this time for purposes of sections 10(a)(1) and (a)(2) and that such conditional forbearance is in the public interest under section 10(a)(3).[1622] We commit, however, to commence in the near term a separate proceeding to revisit the data roaming obligations of MBIAS providers in light of our reclassification decisions today. Such a proceeding will permit us to make an informed decision, based on a complete and focused record, on the proper scope of MBIAS providers' roaming obligations after reclassification. Pending the outcome of that reexamination, MBIAS providers covered by our conditional forbearance continue to be subject to the obligations under the data roaming rule, and we will take any action necessary to enforce those obligations. To ensure, however, that providers have certainty regarding their roaming obligations pending the outcome of the roaming proceeding, we further provide that determinations adopted in that proceeding will apply only prospectively, *i.e.* only to conduct occurring after the effective date of any rule changes. The data roaming rule, rather than the automatic roaming rule or Title II, will govern conduct prior to any such changes.

j. Terminal Equipment Rules

527. We also determine under section 10(a) to forbear from applying certain terminal equipment rules to the extent that they would newly apply by virtue of the classification of broadband Internet access service.[1623] Notably, our open Internet rules themselves prevent broadband Internet access service providers from restricting the use of non-harmful devices,[1624] subject to reasonable network management.[1625] Consequently, as in our analysis above, we are not persuaded that the application of terminal equipment rules, insofar as they would newly apply to broadband Internet access service providers by virtue of our classification decision here, are necessary for purposes of sections 10(a)(1) and (a)(2), particularly given the availability of the core broadband Internet access service requirements, and in particular our bright-line rules.[1626] Likewise, as above, under the tailored regulatory approach we find warranted here, informed by our responsibilities under section 706, we conclude that forbearance is in the public interest under section 10(a)(3).[1627]

3. Other Provisions and Regulations

528. Having discussed in detail here and above the analyses that persuade us to grant broad forbearance from Title II provisions to the extent of our section 10 authority, we conclude that the same analysis justifies forbearance from other provisions and regulations insofar as they would be triggered by

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[1622] *See supra* paras. 495-496; Section V.C.2.a.

[1623] Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 21. While Full Service Network/TruConnect refer generally to our "Part 68" rules, that Part also includes our hearing aid compatibility rules, and as described above, the Commission's existing hearing aid compatibility rules do not immediately impose new hearing aid compatibility requirements on mobile wireless broadband providers by virtue of the classification decisions in this Order, and we do not forbear from applying those rules or section 710 of the Act. *See supra* Section V.C.1.b. Section 710 of the Act and our hearing aid compatibility rules thus are not encompassed by the discussion here.

[1624] *See supra* Section III.C.1.

[1625] *See supra* Section III.D.4. Insofar as any Part 68 rules subject to forbearance here also permitted carriers to take steps to protect their networks, we expect that such steps also would constitute reasonable network management under our open Internet rules.

[1626] *See supra* paras. 495-496; Section V.C.2.a.

[1627] *See supra* paras. 495-496; Section V.C.2.a.

the classification of broadband Internet access service in this Order. In particular, beyond the Title II provisions and certain implementing rules discussed above, the classification of broadband Internet access service could give rise to obligations related to broadband providers' provision of that service under Title III, Title VI and Commission rules.

- First, certain provisions of Titles III and VI[1628] and Commission rules[1629] associated with those Titles or the provisions of Title II from which we forbear may apply by their terms to *providers* classified in particular ways.[1630] As to this first category of requirements, and except as to the core broadband Internet access service requirements, we forbear from any such provisions and regulations to the full extent of our authority under section 10, but only insofar as a broadband provider falls within those categories or provider classifications by virtue of its provision of broadband Internet access service, but not insofar as those entities fall within those categories of classifications by virtue of other services they provide.
- Second, certain provisions of Titles III and VI and Commission rules associated with those Titles or the provisions of Title II from which we forbear may apply by their terms to *services* classified in particular ways.[1631] Regarding this second category of requirements (to the extent not already covered by the first category, above), and except as to the core broadband Internet access service requirements, we forbear from any such provisions and regulations to the full extent of our authority under section 10 specifically with respect to broadband Internet access service, but do not forbear from these requirements as to any other services (if any) that broadband providers offer that are subject to these requirements.

[1628] The Commission has forborne from provision of Title II and from Commission rules on many instances in the past. However, nothing in the language of section 10 categorically limits the scope of Commission forbearance only to the provisions of Title II, *see generally* 47 U.S.C. § 160, and although it has been less common for the Commission to forbear from provisions of Title III and VI, it has done so at times. *See, e.g.*, *FCBA Forbearance Order*, 13 FCC Rcd 6293 (granting certain forbearance from section 310(d) under section 10 of the Act); *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance From Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, 27 FCC Rcd 11532 (2012) (granting certain forbearance from section 652 under section 10 of the Act).

[1629] For clarity, we note that by "rules" we mean both codified and uncodified rules. In addition, by "associated" Commission rules, we mean rules implementing requirements or substantive Commission jurisdiction under provisions in Title II, III, and/or VI of the Act from which we forbear.

[1630] The Order's classification of broadband Internet access service could trigger requirements that apply by their terms to "common carriers," "telecommunications carriers," "providers" of common carrier or telecommunications services, or "providers" of CMRS or commercial mobile services. Similarly, other provisions of the Act and Commission rules may impose requirements on entities predicated on the entities' classification as a "common carrier," "telecommunications carrier," "provider" of common carrier or telecommunications service, or "provider" of CMRS or commercial mobile service without being framed in those terms. As illustrative examples, *see, e.g.*, 47 C.F.R. § 61.3(ss) (defining a "tariff" as "[s]chedules of rates and regulations filed by common carriers"); 47 C.F.R. § 64.2101 ("covered provider" defined to include, for example, "a local exchange carrier as defined in § 64.4001(e), an interexchange carrier as defined in § 64.4001(d), a provider of commercial mobile radio service as defined in § 20.3 of this chapter . . .").

[1631] The classification of broadband Internet access service as a telecommunications service and, in the mobile context, also CMRS service under the Communications Act, thus could trigger any requirements that apply by their terms to "common carrier services," "telecommunications services," or "CMRS" or "commercial mobile" services. Similarly, other provisions of the Act and Commission rules may impose requirements on services predicated on a service's classification as a "common carrier service," "telecommunications service," "CMRS" or "commercial mobile" service without being framed in those terms. As an illustrative example, *see, e.g.*, 47 C.F.R. § 64.708(i) ("operator services" are defined as certain interstate telecommunications services).

- Third, while commenters do not appear to have identified such rules, there potentially could be other Commission rules for which our underlying authority derives from provisions of the Act all of which we forbear from under the first two categories of requirements identified above, or under our Title II forbearance discussed above, but which are not already subject to that identified scope of forbearance. To the extent not already identified in the first two categories of requirements above, and except as to the core broadband Internet access service requirements, we forbear to the full extent of our authority under section 10 from rules based entirely on our authority under provisions we forbear from under the first and second categories above (or for which the forborne-from provisions provide essential authority) insofar as the rules newly apply as a result of the classification of broadband Internet access service.
- Fourth, we include within the scope of our broad forbearance for broadband Internet access service any pre-existing rules with the primary focus of implementing the requirements and substantive Commission jurisdiction in sections 201 and/or 202, including forbearing from pre-existing pricing, accounting, billing and recordkeeping rules.[1632] As with the rules identified under the first and second categories above, we do not forbear insofar as a provider is subject to these rules by virtue of some other service it provides.
- Fifth, the classification of broadband Internet access service as a telecommunications service could trigger certain contributions to support mechanisms or fee payment requirements under the Act and Commission rules, including some beyond those encompassed by the categories above.[1633] Insofar as any provisions or regulations not already covered above would immediately require the payment of contributions or fees by virtue of the classification of broadband Internet access service (rather than merely providing Commission authority to assess such contributions or fees) they are included within the scope of our forbearance. As under the first and second categories above, we do not forbear insofar as a provider is subject to these contribution or fee payments by virtue of some other service it provides.

Just as we found in our analysis of Title II provisions,[1634] it is our predictive judgment that other protections—notably the core broadband Internet access service requirements—will be adequate to ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to protect consumers for purposes of sections 10(a)(1) and (a)(2). Further, informed by our responsibilities under section 706, we adopt an incremental regulatory approach that we find strikes the appropriate public interest balance under section 10(a)(3). These collectively persuade us that forbearance for the additional categories of provisions and regulations above is justified to the extent of our section 10 authority.

529. We further make clear that our approach to forbearance in this Order, which excludes certain categories of provisions and regulations, effectively addresses the concerns of a number of commenters regarding the scope of our forbearance.[1635] First, we forbear here only to the extent of our authority under section 10 of the Act. Section 10 provides that "the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or

[1632] This forbearance would not include rules implementing our substantive jurisdiction under provisions of the Act from which we do not forbear that merely cite or rely on sections 201 or 202 in some incidental way, such as by, for example, relying on the rulemaking authority provided in section 201(b). Consistent with our discussions above, this category also does not include our open Internet rules.

[1633] *See, e.g.*, 47 C.F.R. Part 1, Subpart G (filing fees, regulatory fees).

[1634] *See generally supra* Section V.C.2; *see also, e.g.*, *supra* paras. 495-496; Section V.C.2.a.

[1635] To the extent that any questions arise as to specific provisions or regulations in the future, we can address those as needed at that time. We note in this regard that the Commission cannot impose a penalty for conduct in the absence of "fair notice of what is prohibited." *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012).

telecommunications service, or class of telecommunications carriers or telecommunications services" if certain conditions are met.[1636] Certain provisions or regulations do not fall within the categories of provisions of the Act or Commission regulations encompassed by that language because they are not applied to telecommunications carriers or telecommunications services, and we consequently do not forbear as to those provisions or regulations.[1637]

530. Second, we do not forbear from provisions or regulations that are not newly triggered by the classification of broadband Internet access service. The *2014 Open Internet NPRM* sought comment on possible forbearance premised on addressing the consequences that flowed from any classification decisions it might adopt.[1638] Although some commenters include sweeping requests that we forbear from all of Title II or the like, in practice, they, too, appear focused on the consequences of classification decisions.[1639] Nor do we find on the record here that the section 10 criteria met with respect to such forbearance, and in particular do not find it in the public interest, in the context of this item, to forbear with respect to requirements that already applied to broadband Internet access service and providers of that service prior to this Order. Rather, broadband providers remain free to seek relief from such provisions or regulations through appropriate filings with the Commissions.[1640]

531. A number of commenters' arguments are addressed on one or more of these grounds.[1641] For example, as to the first set of exclusions, we note that section 257 imposes certain obligations on the Commission without creating enforceable obligations that the Commission would apply to telecommunications carriers or telecommunications services,[1642] so we do not forbear from applying those provisions.[1643] For the same reasons, we do not forbear with respect to provisions insofar as they merely reserve state authority.[1644]

[1636] 47 U.S.C. § 160.

[1637] *See, e.g.*, *Forbearance from Applying Provisions of the Communications Act To Wireless Telecommunications Carriers*, WT Docket No. 98-100, First Report and Order, 15 FCC Rcd 17414, 17427, para. 28 (2000) (holding that "the three-prong [section 10] forbearance test is inapplicable to UTC's request because the Commission lacks forbearance authority over non-common carriers such as UTC," where UTC had sought modification of Commission rules "to allow private microwave licensees to act as providers to other carriers"); *FCBA Forbearance Order*, 13 FCC Rcd at 6299, para. 9 ("licensees governed by these rule parts who do not meet the definition of 'telecommunications carrier' (e.g., public safety and private microwave licensees) are beyond the scope of our section 10 forbearance authority, and therefore are not subject to the revised procedures established by this *Order*").

[1638] *See, e.g.*, *2014 Open Internet NPRM*, 29 FCC Rcd at 5612-13, 5615-16 paras. 148, 153.

[1639] *See, e.g.*, NCTA Jan. 15, 2015 *Ex Parte* Letter at 3 (arguing against "applying Title II to increase regulatory burdens on broadband providers"); Comcast Dec. 24, 2014 *Ex Parte* Letter at 13 (arguing that if the Commission reclassifies broadband Internet access service, "it should mitigate the associated" effect "as much as possible by coupling Title II reclassification with broad forbearance from all Title II restrictions and obligations").

[1640] *See, e.g.*, 47 C.F.R. §§ 1.3, 1.53-1.59, 1.401.

[1641] In addition to those discussed below, these considerations explain, for example, why we do not grant forbearance with respect to sections 303(b), 303(r) and 316, upon which we rely for authority for our open Internet rules. *See supra* Section III.F.3.

[1642] 47 U.S.C. § 257.

[1643] *See, e.g.*, Public Knowledge Comments at 95.

[1644] *See, e.g.*, NARUC Comments at 14-15 (discussing, for example, state authority to perform ETC designations in section 214(e)(2) and reservations of certain state authority under section 253); Massachusetts DTE Comments at 8 n.4 (incorporating by reference Massachusetts DTE Reply, GN Docket No. 10-127 (filed Apr. 12, 2010) (also discussing, for example, reservation of state pole attachment authority under section 224(c) and the reservation of state authority in section 261)).

532. We further note, for example, that the immunity from liability in section 230(c) applies to providers or users of an "interactive computer service," and its application does not vary based on the classification of broadband Internet access service here.[1645] Consequently, it is not covered by the scope of forbearance in this order.[1646] We also note that the restrictions on obscene and illicit content in sections 223 and 231(to the extent enforced)[1647]—as well as the associated limitations on liability—in many cases, do not vary with the classification decisions in this Order, and thus likewise are not encompassed by the forbearance in this Order.[1648] To the extent that certain of these provisions would benefit broadband providers and could instead be viewed as provisions that are newly applied to broadband providers by virtue of the classification decisions in this Order, it would better promote broadband deployment, and thus better serve the public interest, if we continue to apply those provisions.[1649] We thus find that such forbearance would not be in the public interest under section 10(a)(3).[1650]

533. Some commenters also advocate that the Commission not forbear from applying "the provisions of the Communications Assistan[ce] for Law Enforcement Act under Section 229."[1651]

[1645] 47 U.S.C. § 230(c).

[1646] *See, e.g.*, NCTA Dec. 23, 2014 *Ex Parte* Letter at 21 (arguing that the Commission should not forbear with respect to "immunity from publisher-related liability" under section 230, which "has nothing to do with common-carrier regulation").

[1647] We note that many of the relevant provisions in these sections stem from the Child Online Protection Act (COPA), which federal courts have enjoined from being enforced. COPA amended the Communications Act by adding sections 230(d) and 231 and amending parts of sections 223(h)(2) and 230(d)–(f). *See* Child Online Protection Act, Pub. L. No. 105-277, §§ 1401–05, 112 Stat. 2681-736–2681-741 (1998). After COPA reached the Supreme Court twice, a federal court held that COPA is unconstitutional and placed a permanent injunction against its enforcement. The decision was affirmed on appeal, and petition for writ of certiorari has been denied. *See ACLU v. Reno*, 31 F. Supp.2d 473 (E.D. Pa. 1999) (enjoining the enforcement of the Act), *aff'd*, 217 F.3d 162 (3rd Cir. 2000), *vacated and remanded*, *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (finding that the Act's reference to contemporary community standards on its own does not render it unconstitutional and the 3rd Circuit must consider additional matters), *aff'd*, *ACLU v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003), *aff'd and remanded*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (instructing that the district court should update the factual record and take into account current, applicable technologies); *ACLU v. Gonzales*, 478 F. Supp.2d 775 (E.D. Pa 2007) (entering a permanent injunction against enforcement of the Act after holding that it is facially unconstitutional), *aff'd*, *ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009). The Communications Decency Act (CDA) (Pub. L. No. 104-104, §§ 501–02, 110 Stat. 56, 133–36), which amended section 223 of the Communications Act, has also been overturned in part, by the Supreme Court. *See Reno v. ACLU*, 521 U.S. 844 (1997). However, the constitutionally offensive parts of the CDA were amended by the PROTECT Act, which is still good law. *See* Prosecutorial Remedies and Tools against the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 603, 117 Stat. 650, 687 (2003).

[1648] 47 U.S.C. §§ 223, 231. As a narrow exception to this general conclusion, section 223(c)(1) conceivably could be newly applied to broadband providers by virtue of the classification decisions in this Order. 47 U.S.C. § 223(c)(1). No commenter meaningfully argues that the Commission should apply this provision to broadband providers, and that fact, coupled with the other protections that remain, persuade us that, insofar as the Commission would apply this provision, such application is not necessary for purposes of sections 10(a)(1) and (a)(2). Likewise, consistent with the tailored regulatory approach adopted in this Order, we find it in the public interest under section 10(a)(3) to forbear insofar as the Commission otherwise would newly apply that provision to a broadband provider as a result of this Order.

[1649] As examples of such provisions in Title II, *see, e.g.*, 47 U.S.C. § 223 (provisions limiting or establishing defenses for liability under that section), 47 U.S.C. § 231(provisions limiting or establishing defenses for liability under that section), 47 U.S.C. § 253 (authorizing preemption of state or local requirements restricting the provision of telecommunications services).

[1650] 47 U.S.C. § 160(a)(3).

[1651] COMPTEL Comments at 22-23.

Section 229(a)–(d) direct the Commission to adopt rules implementing the requirements of CALEA and authorize the Commission to investigate and enforce those rules.[1652] Section 229(e) enables providers to recover certain costs of CALEA compliance.[1653] Section 229 is not, by its terms, limited to "telecommunications services" as defined by the Communication Act, and CALEA obligations already apply to broadband Internet access service.[1654] Thus, in carrying out section 229, the Commission's role already extended to broadband Internet service, and all telecommunications carriers subject to CALEA are already required to comply with all Commission rules adopted pursuant to section 229.[1655] Declining to forbear from applying section 229 and our associated rules is consistent with the overall approach, discussed above, of focusing on addressing newly-arising requirements flowing from our classification decision, and thus is in the public interest. Given that CALEA's statutory obligations will apply regardless of any forbearance granted by the Commission under the Communications Act,[1656] and given the lack of any substantial argument in the record in favor of forbearance from section 229, we conclude that maintaining the Commission's existing rulemaking and oversight role as established by section 229 better advances the public interest. As services and technologies evolve over time, CALEA implementation will need to evolve as well. Section 229 establishes a rulemaking and oversight role for the Commission that helps enable those future changes. If we were to forbear from section 229 (assuming *arguendo* that we could find the forbearance standard to be satisfied), we thus would frustrate the ability of CALEA implementation to evolve with technology, an outcome that we find fundamentally inconsistent with the continued applicability of CALEA itself and therefore with the public interest.

534. We also do not forbear from certain rules governing the wireless licensing process. First, our rules require applicants for licenses under our flexible use rules to designate the regulatory status of proposed services (i.e., common carrier, non-common carrier, or both) in the initial license application, and make subsequent amendment to the designation, as necessary.[1657] With regard to these rules, we find that forbearance of the regulatory status designation would result in inaccurate license information and therefore is not warranted. In particular, we conclude that such forbearance would be contrary to the public interest under section 10(a)(3).

535. Second, sections 1.933 and 1.939 of our rules, 47 C.F.R. §§ 1.933, 1.939, implementing sections 309(b) and (d)(1) of the Act, 47 U.S.C. § 309(b), (d)(1), set out processes for license applications for authorization, major modification, major amendment, substantial assignment, or transfer. Applications that involve, in whole or in part, licenses to be used for "Wireless Telecommunications Services," as defined in section 1.907 of our rules, are subject to a public notice process providing opportunity for petitions to deny, but applications that involve only "Private Wireless Services," as defined in section 1.907 of our rules are not subject to that process.

[1652] 47 U.S.C. § 229(a)-(d).

[1653] 47 U.S.C. § 229(e).

[1654] *See generally Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005).

[1655] *See Communications Assistance for Law Enforcement Act*, ET Docket No. 04-295, RM-10865, Second Report and Order and Memorandum Opinion and Order, 21 FCC Rcd 5360, 5394-95, para. 75 (2006) (*2006 CALEA Order*); *see also Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Report and Order, 14 FCC Rcd 4151, 4159, para. 20 (1999) ("[W]e find that the regulations we prescribe herein apply to all telecommunications carriers as that term is defined in section 102(8) of CALEA."). While the Commission previously has suggested that section 229(b) applies only to common carriers under the Communications Act, *see 2006 CALEA Order*, 21 FCC Rcd at 5389, para. 66, the Commission has consistently applied CALEA's definition to all of its CALEA rules.

[1656] Under section 10, the Commission can forbear from applying certain provisions of the Communications Act when the relevant section 10(a) criteria are met, but CALEA is not itself part of the Communications Act.

[1657] *See* 47 C.F.R. §§ 22.1110, 27.10.

536. With regard to these rules, we find that reclassification is unlikely to trigger a different process under these rules, for two reasons. We note that mobile BIAS today is being provided using licenses that are governed under our flexible use rules (*i.e.*, under Parts 20, 22, 24, 26, and 27) and that are being used as well to provide services, such as mobile voice, already provided as CMRS.[1658] Thus, these applications have been subject to these provisions because they have also been used to provide CMRS services. To the extent applicants seek licenses for reclassified service under other parts, such as Part 101, or are otherwise not covered by the above reasoning, we find that forbearance from these procedures is not warranted, as the public notice process requirements are important to ensure that common carrier licensing serves the public interest. Accordingly, we do not find forbearance from applying these rules in the public interest under section 10(a)(3), and thus we do not forbear from application of section 309(b) and (d)(1) of the Act, or from rules 1.931, 1.933, 1.939, 22.1110, and 27.10.

D. Potential Objections to Our General Approach to Forbearance For Broadband Internet Access Service

537. While we address above specific arguments against forbearance as to particular provisions or requirements, we note that we also reject certain overarching concerns about our forbearance decision here. For one, we grant substantial forbearance in this item, rather than deferring such forbearance decisions to future proceedings.[1659] We are able to conclude on this record that the section 10(a) criteria are met with respect to the forbearance we grant, and taking such action here enables us to strike the right regulatory and deregulatory balance regarding broadband Internet access service, as discussed above. Under these circumstances we reject arguments that we should defer forbearance to future proceedings.[1660] Likewise, given our finding that the section 10(a) criteria are met for the forbearance adopted here, we reject generalized arguments that the scope of forbearance here should be the same as that historically granted in the CMRS context.[1661] We conclude that such overarching claims do not address distinguishing factors here, including our decision that it is in the public interest to proceed incrementally given the regulatory experience of the near-term past coupled with the Commission's responsibilities under section 706 of the 1996 Act, as discussed above.[1662] Further, because we grant substantial forbearance in this Order rather than deferring those issues to a future proceeding, we also reject concerns that the process of obtaining forbearance will be burdensome or uncertain, insofar as they are based on a presumption that such relief only would be granted via subsequent proceedings.[1663]

[1658] *See* 47 C.F.R. § 1.907.

[1659] *See, e.g.*, EFF Comments at 16-17 (The Commission's "forbearance analysis should specifically address *all* relevant Title II obligations, so as to avoid an explosion of forbearance petitions.").

[1660] *See, e.g.*, Public Knowledge et al. Comments at 95-97; Vimeo Reply at 15 n.46. Bare assertions that the record here is inadequate to justify forbearance from certain provisions from which we forbear above similarly are too conclusory to warrant deferring a decision to a future proceeding. *See, e.g.*, Letter from Mark Cooper, Director of Research, Consumer Federation of America, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1-2 (filed Jan. 7, 2015).

[1661] *See, e.g.*, Letter from Harold Feld, et al., Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 20-21 (filed Dec. 19, 2014) (Public Knowledge Dec. 19, 2014 *Ex Parte* Letter).

[1662] *See generally supra* paras. 495-496; Section V.C.2.a.

[1663] *See, e.g.*, ITIF Comments at 11; Mercatus Center Reply at 12; NetCompetition Reply at 3. The posture here is distinguishable from the circumstances underlying the *Brand X* case, where a court had classified cable modem service as a telecommunications service without simultaneous forbearance of the sort we adopt here, and thus we reject arguments seeking to rely on court filings there. *See, e.g.*, Cox Reply at 10 & n.36 (quoting Petition for a Writ of Certiorari by U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs*., No. 04-281, at 25-26 (Aug. 27, 2004) (among other things, stating "[f]orbearance proceedings would be time-consuming and hotly contested . . . ").)); Comcast Reply at 14-15 (similar).

538. Nor are we persuaded by arguments that the adoption of interim rules or the stay of all but certain rules should be used in lieu of forbearance, since those arguments do not explain in meaningful detail what specific interim rules would be adopted or the scope of what rules would be excluded from any stay, nor how, absent forbearance, interim rules or a stay by the Commission could address requirements imposed by the Act, rather than merely by Commission regulation.[1664] To the extent that commenters' arguments instead advocate that forbearance should be interim or time-limited,[1665] under today's approach, we retain adequate authority to modify our regulatory approach in the future, should circumstances warrant. We thus are not persuaded that there is any material, incremental advantage or benefit to adopting forbearance on an interim or time-limited basis.

539. We also reject claims that the Commission cannot grant forbearance here because it did not provide adequate notice and an opportunity for comment.[1666] We need not and do not address here whether forbearance is, in all cases, informal rulemaking, because in this instance we have, in fact, proceeded via rulemaking and provided sufficient notice and an opportunity to comment in that regard.[1667] Section 553(b) and (c) of the APA requires agencies to give public notice of a proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and to give interested parties an opportunity to submit comments on the proposal.[1668] The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved."[1669] Moreover, the APA's notice requirements are satisfied where the final rule is a "logical outgrowth" of the actions proposed.[1670] As long as parties should have anticipated that the rule ultimately adopted was possible, it is considered a "logical outgrowth" of the original proposal, and there is no violation of the APA's notice requirements.[1671]

[1664] *See, e.g.*, Public Knowledge Comments at 95-97; Public Knowledge Dec. 19, 2014 *Ex Parte* Letter at 21-22; Letter from Marvin Ammori to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 5 (filed Dec. 19, 2014) (Ammori Dec. 19, 2014 *Ex Parte* Letter).

[1665] *See, e.g.*, Public Knowledge Dec. 19, 2014 *Ex Parte* Letter at 22.

[1666] *See, e.g.*, Letter from Daniel Berninger, founder, VCXC, et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 5 (filed Jan. 22, 2015); Full Service Network/TruConnect Feb. 3, 2015 *Ex Parte* Letter at 6-11. As discussed above, we also reject other asserted APA violations. *See supra* Section V.A.

[1667] As noted above, a recent court case, seemingly in dicta, suggested that forbearance is informal rulemaking, while the Commission has not expressly resolved that question. *Compare Verizon v. FCC*, 770 F.3d 961, 966-67 (D.C. Cir. 2014) *with, e.g.*, *Petition To Establish Procedural Requirements To Govern Proceedings For Forbearance Under Section 10 Of The Communications Act Of 1934, As Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, 9554, para. 19 n.72, para. 20 (2009). We need not and do not address that broader question here.

[1668] 5 U.S.C. §§ 553(b)-(c).

[1669] *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (citing *Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977) (internal quotation marks and citations omitted)).

[1670] *See PSC of DC v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990).

[1671] *See Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004) (discussing APA notice requirements and the "logical outgrowth" test). The Commission has acknowledged this standard in the past, even if using slightly different wording to the same effect. *See, e.g., Rural Call Completion*, WC Docket No. 13-39, Order on Reconsideration, 29 FCC Rcd 14026, 14036, para. 26 (2014) ("As long as parties could have anticipated that the rule ultimately adopted was possible, it is considered a 'logical outgrowth' of the original proposal, and there is no violation of the APA's notice requirements.").

540. Those notice standards are satisfied with respect to the forbearance adopted here. The *2014 Open Internet NPRM* observed:

> If the Commission were to reclassify broadband Internet access service as described above or classify a separate broadband service provided to edge providers as a "telecommunications service," such a service would then be subject to all of the requirements of the Act and Commission rules that would flow from the classification of a service as a telecommunications service or a common carrier service.[1672]

Citing section 10 of the Act, the Commission then sought comment "on the extent to which forbearance from certain provisions of the Act or our rules would be justified" should the Commission adopt such an approach "in order to strike the right balance between minimizing the regulatory burden on providers and ensuring that the public interest is served."[1673] "For mobile broadband services," the Commission also sought "comment on the extent to which forbearance should apply, if the Commission were to classify mobile broadband Internet access service as a CMRS service subject to Title II."[1674] Collectively, the Commission thus provided notice of possible forbearance as to any provision of the Act or Commission rules triggered by the classification of broadband Internet access service of the sort we adopt in this Order.[1675] The forbearance we grant here from applying certain provisions and regulations newly triggered by our classification decisions in order to strike the right regulatory balance for broadband Internet access services consistent with the objective of preserving and protecting Internet openness is squarely within that scope of notice provided by the *2014 Open Internet NPRM*.

541. We also view as misguided complaints about the potential for our forbearance decisions to be challenged in court or reversed in the future by the Commission.[1676] Having concluded that broadband Internet access service is a telecommunications service,[1677] certain legal consequences under the Act flow from that by default. We grant in this order the substantial forbearance from those provision and other Commission regulations to the extent that we find warranted at this time under the section 10

[1672] *2014 Open Internet NPRM*, 29 FCC Rcd at 5615-16, para. 153.

[1673] *Id*. The Commission further sought comment on "which provisions should be exempt from forbearance and which should receive it" based on whether such action would "protect and promote Internet openness." *Id*. at 5616, para. 154. These are the factors that the Commission did, in fact, use in evaluating the section 10(a) criteria and deciding whether and how much forbearance to grant here. *See generally supra* Sections V.A-C. We thus disagree with the dissent's suggestion that the notice provided by the Commission was inadequate in this regard. *See* Pai Dissent at 27-28.

[1674] *Id*. at 5616, para. 155.

[1675] *See also, e.g.*, *id.* at 5612-13, para. 148 ("For either of these [classification] possibilities, we seek comment on whether and how the Commission should exercise its authority under section 10 (or section 332(c)(1) for mobile services) to forbear from specific obligations under the Act and Commission rules that would flow from the classification of a service as telecommunications service."). Within that scope, the Commission also sought more detailed comment on specific aspects of the possible forbearance it might adopt, discussing similar questions raised in the *2010 Broadband Classification NOI*, particular statutory provisions from which the Commission might not forbear, and particular approaches the Commission might use to evaluating forbearance. *Id*. at 5616, para. 154. Moreover, as discussed in the preceding sections above, the *2014 Open Internet NPRM* yielded a robust record regarding forbearance.

[1676] *See, e.g.*, AT&T Comments at 67; Cox Comments at 35-36; Ericsson Comments at 11- 12; Comcast Reply at 14-17; Cox Reply at 10-11.

[1677] *See supra* Section IV.

framework. We thereby provide broadband providers significant regulatory certainty.[1678] We thus are not persuaded to alter our approach to forbearance based on these arguments.

542. We recognize that in our approach to forbearance for broadband Internet access service above, we are not first exhaustively determining provision-by-provision and regulation-by-regulation whether and how particular provisions and rules apply to this service. The Commission has broad discretion whether to issue a declaratory ruling, which is what would be entailed by such an undertaking.[1679] We exercise our discretion not to do so here, except to the limited extent necessary to address arguments in the record regarding specific requirements.[1680] For one, the Commission need not resolve whether or how a provision or regulation applies before evaluating the section 10(a) criteria—rather, it can conduct that evaluation and, if warranted, grant forbearance within the scope of its section 10 authority assuming *arguendo* that the provisions or regulations apply.[1681] In addition, as discussed in greater detail above, the Commission is proceeding incrementally here.[1682] As the D.C. Circuit has recognized, within the statutory framework that Congress established, the Commission "possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband."[1683] Thus, to achieve the balance of regulatory and deregulatory policies adopted here for broadband Internet access service, we need not—and thus do not—first resolve potentially complex and/or disputed interpretations and applications of the Act and Commission rules that could create precedent with unanticipated consequences for other services beyond the scope of this proceeding, and which would not alter the ultimate regulatory outcome in this Order in any event.[1684]

[1678] Perfect regulatory certainty would not be feasible under any classification. For example, even just as to rules adopted under section 706 of the 1996 Act parties theoretically could raise judicial challenges as to the adequacy of the Commission's rules in meeting the objectives of section 706 and a future Commission likewise might elect to modify those rules.

[1679] *See Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973); 5 U.S.C. § 554(e); 47 C.F.R. § 1.2(a).

[1680] *See, e.g.*, Vonage Reply at 32 ("Rather than debate each individual section of Title II in its forbearance analysis, the Commission could limit its Title II authority to those provisions necessary to adopt and enforce Open Internet rules and forbear from applying all other provisions and rules under Title II that do not bear on the Open Internet rules originally codified in 2010.").

[1681] *See, e.g.*, *AT&T v. FCC*, 452 F.3d 830, 836-37 (D.C. Cir. 2006) ("the Commission may not refuse to consider a petition's merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations"); *Broadband Classification NOI*, 25 FCC Rcd at 7896, para. 70 n.187 ("Section 10 allows the Commission to consider forbearance from requirements that do not currently apply or may not apply even in the absence of forbearance."); *Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256, Order on Reconsideration, 25 FCC Rcd 8867, 8874, para. 12 & n.43 (2010) (rejecting arguments that the Commission should have clarified whether certain requirements applied before addressing a forbearance request, and further rejecting the claim that this approach was in consistent with *AT&T v. FCC*, explaining instead that "[i]n *AT&T v. FCC*, the Court of Appeals for the District of Columbia Circuit faulted the Commission for failing to conduct the statutory analysis required by section 10 of the Act," while "[h]ere, by contrast, the Commission conducted the requisite analysis and concluded that the statutory forbearance criteria were not met"); *Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256, Memorandum Opinion and Order, 24 FCC Rcd 1571, 1574, para. 6 (2009) ("For the purposes of conducting our analysis of this petition, we assume, *arguendo*, that the foundation of Feature Group IP's petition is valid. That is, we assume that section 251(g), the exception clause in section 51.701(b)(1), and section 69.5(b) of the Commission's rules apply to voice-embedded Internet communications, with the effect that at least in some circumstances, LECs may receive access charges.").

[1682] *See supra* paras. 495-496; Section V.C.2.a.

[1683] *Ad Hoc*, 572 F.3d at 906-07.

[1684] As noted earlier in this paragraph, we assume *arguendo* that these provisions apply and nonetheless find forbearance warranted as discussed above.

VI. CONSTITUTIONAL CONSIDERATIONS

543. The actions we take today are fully consistent with the Constitution. Some commenters contend that the open Internet rules burden broadband providers' First Amendment rights and effect uncompensated takings of private property under the Fifth Amendment. We examine these arguments below and find them unfounded.

A. First Amendment

1. Free Speech Rights

544. The rules we adopt today do not curtail broadband providers' free speech rights. When engaged in broadband Internet access services, broadband providers are not speakers, but rather serve as conduits for the speech of others. The manner in which broadband providers operate their networks does not rise to the level of speech protected by the First Amendment. As telecommunications services, broadband Internet access services, by definition, involve transmission of network users' speech without change in form or content, so open Internet rules do not implicate providers' free speech rights. And even if broadband providers were considered speakers with respect to these services, the rules we adopt today are tailored to an important government interest—protecting and promoting the open Internet and the virtuous cycle of broadband deployment—so as to ensure they would survive intermediate scrutiny.

545. This is not to say that we are indifferent to matters of free speech on the Internet. To the contrary, our rules serve First Amendment interests of the highest order, promoting "the widest possible dissemination of information from diverse and antagonistic sources" and "assuring that the public has access to a multiplicity of information sources" by preserving an open Internet.[1685] We merely acknowledge that the free speech interests we advance today do not inhere in broadband providers with respect to their provision of broadband Internet access services.

546. Some commenters contend that because broadband providers distribute their own and third-party content to customers, rules that govern the transmission of Internet content over broadband networks violate their free speech rights.[1686] CenturyLink and others compare the operation of broadband Internet access service to "requiring a cable operator to carry all broadcast stations," and contend that the rules adopted today "displace access service providers' editorial control over their networks" which would otherwise constitute protected speech under the First Amendment.[1687] Other commenters respond that broadband providers are not engaged in speech when providing broadband Internet access services, so they are not entitled to First Amendment protections in their operation of these services.[1688] Consistent with our determination in the *2010 Open Internet Order*,[1689] we find that when broadband providers offer broadband Internet access services, they act as conduits for the speech of others, not as speakers themselves.

547. Claiming free speech protections under the First Amendment necessarily involves demonstrating status as a speaker—absent speech, such rights do not attach. In determining the limits of the First Amendment's protections for courses of conduct, the Supreme Court has "extended First

[1685] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*Turner I*).

[1686] CenturyLink Comments at 61–64; Verizon Comments at 67; Free State Reply at 20.

[1687] CenturyLink Comments at 63–64; *see also* Verizon Comments at 67. CenturyLink also argues that broadband Internet access service is comparable to requiring a "parade organizer to admit all applicants on a lottery basis" and "a newspaper to carry replies to its editorials." CenturyLink Comments at 64.

[1688] CDT Comments at 28–30; Barbara Cherry Reply at 21.

[1689] *2010 Open Internet Order*, 25 FCC Rcd at 17982, para. 141.

Amendment protections only to conduct that is inherently expressive."[1690] To determine whether an actor's conduct possesses "sufficient communicative elements to bring the First Amendment into play," the Supreme Court has asked whether "[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it."[1691]

548. Broadband providers' conduct with respect to broadband Internet access services does not satisfy this test, and analogies to other forms of media are unavailing. CenturyLink and others compare their provision of broadband service to the operation of a cable television system, and point out that the Supreme Court has determined that cable programmers and cable operators engage in editorial discretion protected by the First Amendment.[1692] As a factual matter, broadband Internet access services are nothing like the cable service at issue in *Turner I*. In finding that cable programmers and cable operators are entitled to First Amendment protection, the *Turner I* court began with the uncontested assertion that "cable programmers and operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[1693] The court went on to explain that "cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats'" through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire."[1694] Cable operators thus engage in protected speech when they both *engage in* and *transmit* speech with the intent to convey a message either through their own programming directly or through contracting with other programmers for placement in a cable package.

549. Broadband providers, however, display no such intent to convey a message in their provision of broadband Internet access services—they do not engage in speech themselves but serve as a conduit for the speech of others. The record reflects that broadband providers exercise little control over the content which users access on the Internet.[1695] Broadband providers represent that their services allow Internet end users to access all or substantially all content on the Internet, without alteration, blocking, or editorial intervention.[1696] End users, in turn, expect that they can obtain access to all content available on the Internet, without the editorial intervention of their broadband provider.[1697] While these characteristics certainly involve transmission of others' speech, the accessed speech is not edited or controlled by the

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[1690] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

[1691] *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam)).

[1692] CenturyLink Comments at 62–64; Verizon Comments at 67.

[1693] *Turner I*, 512 U.S. at 636.

[1694] *Id.* at 636 (alteration in original) (citation omitted). Likewise, while a newspaper publisher chooses which material to publish, broadband providers facilitate access to all or substantially all Internet endpoints. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, . . . constitute the exercise of editorial control and judgment." (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)). In contrast, broadband Internet access services more closely resemble the "conduit for news, comment, and advertising" from which the Court distinguishes newspaper publishing. *See id.* at 258.

[1695] Verizon Comments at 3; CenturyLink Comments at 15; Charter Comments at 31.

[1696] *See, e.g.*, Verizon Comments at 2 ("Verizon has committed to its customers to provide them Internet access that let them go where they want and do what they want online, using their choice of compatible applications and devices. Other broadband providers have similarly committed to supporting the open Internet.").

[1697] *See, e.g.*, CTIA Comments at 28 ("Mobile broadband customers fully expect access to all lawful content and applications, and providers have strong incentives to meet these expectations. . . .").

broadband provider but is directed by the end user.[1698] In providing these services, then, broadband providers serve as mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections.[1699]

550. Moreover, broadband is not subject to the same limited carriage decisions that characterize cable systems—the Internet was designed as a decentralized "network of networks" which is capable of delivering an unlimited variety of content, as chosen by the end user. In contrast, the *Turner I* court emphasized that the rules under consideration in that case regulated cable speech by "reduc[ing] the number of channels over which cable operators exercise unfettered control" and "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining."[1700] Neither of these deprivations of editorial discretion translates to the Internet as a content platform. The arrival of one speaker to the network does not reduce access to competing speakers; nor are broadband providers limited by our rules in the direct exercise of their free speech rights. Lacking the exercise of editorial control and an intent to convey a particularized message, we find that our rules regulate the unexpressive transmission of others' speech over broadband Internet access services, not the speech of broadband providers. As our rules merely affect what broadband providers "must *do* . . . not what they may or may not *say*," the provision of broadband Internet access services falls outside the protections of the First Amendment outlined by the court in *Turner I*.[1701]

551. Our conclusion that broadband Internet access service providers act as conduits rather than speakers holds true regardless of how they are classified under the Act.[1702] But we think this is particularly evident given our classification of broadband Internet access services as telecommunications services subject to Title II. The Act defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[1703] The Act also provides for common carrier treatment

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[1698] To be sure, broadband providers engage in some reasonable network management designed to protect their networks from malicious content and to relieve congestion, but these practices bear little resemblance to the editorial discretion exercised by cable operators in choosing programming for their systems. In the same way, broadband providers do not operate their networks in ways that are analogous to parade organizers or "modern day printing presses" as Verizon contends. Verizon Comments at 67. Comparisons to the "right of reply" statutes at issue in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) are similarly misplaced. There, Florida's "right of reply" law unconstitutionally burdened the paper's "exercise of editorial control and judgment," made all the more salient by the requirement that political candidates receive "equal space" in a fairly limited medium. *Id.* at 243. Broadband Internet access services are not similarly limited—access to one edge provider does not displace another.

[1699] *See* Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom Of Speech" Encompasses*, 60 Duke L.J. 1673, 1685 (2011) (describing how the transportation of First Amendment-protected materials "from one user to another" does not transform the delivery company into a speaker for First Amendment purposes).

[1700] *Turner I*, 512 U.S. at 637.

[1701] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*. 547 U.S. 47, 64 (2006) (*FAIR)*. We further conclude that broadband providers' conduct is not sufficiently expressive to warrant First Amendment protection, as the provision of broadband Internet access services is not "inherently expressive," but would require significant explanatory speech to acquire any characteristics of speech. *See Id.* at 65-66. We recognize that in two cases, federal district courts have concluded that the provision of broadband service is "speech" protected by the First Amendment. In *Itasca*, the district court reasoned that broadband providers were analogous to cable and satellite television companies, which are protected by the First Amendment. *Ill. Bell Tel. Co. v. Vill. Of Itasca*, 503 F. Supp. 2d 928, 947–49 (N.D. Ill 2007). And in *Broward County*, the district court determined that the transmission function provided by broadband service could not be separated from the content of the speech being transmitted. *Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty.*, 124 F. Supp. 2d 685, 691–92 (S.D. Fla. 2000). For the reasons stated, we disagree with the reasoning of those decisions.

[1702] *See 2010 Open Internet Order*, 25 FCC Rcd at 17982, para. 141.

[1703] 47 U.S.C. § 153(43).

of any provider to the extent it is engaged in providing telecommunications services.[1704] In the communications context, common carriage requires that end users "communicate or transmit intelligence of their own design and choosing."[1705] In Section IV, we have found that broadband Internet access services fall within the definitions of "telecommunications" and "telecommunications services" subject to Title II common carrier regulation.[1706] By definition, then, the provision of telecommunications service does not involve the exercise of editorial control or judgment.[1707]

552. We also take note that, in other contexts, broadband providers have claimed immunity from copyright violations and other liability for material distributed on their networks because they lack control over what end users transmit and receive.[1708] Broadband providers are not subject to subpoena in a copyright infringement case because as a provider it "act[s] as a mere conduit for the transmission of information sent by others."[1709] Acknowledging the unexpressive nature of their transmission function, Congress has also exempted broadband providers from defamation liability arising from content provided by other information content providers on the Internet.[1710] Given the technical characteristics of broadband as a medium and the representations of broadband providers with respect to their services, we find it implausible that broadband providers could be understood to being conveying a particularized message in the provision of broadband Internet access service.

[1704] 47 U.S.C. § 153(44).

[1705] *Midwest Video II*, 440 U.S. at 701 ("A common-carrier service in the communications context is one that 'makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .'") (quoting *Industrial Relocation Service*, 5 FCC 2d 197, 202, para. 19 (1966)); *see also NARUC v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976) (*NARUC II*).

[1706] *See supra* Section IV.

[1707] We also note that the requirement under *Computer II* that facilities-based providers of "enhanced services" separate out and offer on a common carrier basis the "basic service" transmission component underlying their enhanced services, a requirement reflected in the 1996 Act's distinction between "telecommunications services" and "information services" was never held to raise First Amendment concerns. *See Turner I*, 512 U.S. at 684 (assuming that Congress could have imposed common carrier obligations on cable operators without raising First Amendment concerns) (O'Connor, J., dissenting). The Supreme Court has acknowledged the distinction between common carriers and entities with robust First Amendment rights in numerous contexts. *See, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("Unlike common carriers, broadcasters are 'entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties].'"); *Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727, 739 (1996) (plurality opinion) (distinguishing between common carriers' and editors' rights under the First Amendment); *Midwest Video II*, 440 at 709 n.19 (1979) (ruling on other grounds, but acknowledging that First Amendment issues implicated in compelling cable operators to provide common carriage of public-originated transmissions are "not frivolous").

[1708] *See* 17 U.S.C. § 512(a) (a "service provider shall not be liable . . . for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for" material distributed by others on its network); *see also Verizon Online Terms of Service* 12(5), http://www.verizon.com/idc/groups/public/documents/adacct/verizon_internet_tos_121614.pdf ("Verizon assumes no responsibility for the accuracy, integrity, quality completeness, usefulness or value of any Content, advice or opinions contained in any emails, message boards, chat rooms or community services, Verizon Web Sites or in any other public services or social networks, and that Verizon does not endorse any advice or opinion contained therein, whether or not Verizon provides such service(s). Verizon does not monitor or control such services, although we reserve the right to do so.") (last visited Feb. 2, 2015).

[1709] *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003); *see also Charter Communications, Inc.*, 393 F.3d 771, 777 (8th Cir. 2005) (no subpoena because broadband provider is "limited to acting as a conduit").

[1710] 47 U.S.C. § 230(c)(1) ("[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

553. Even if open Internet rules were construed to implicate broadband providers' rights as speakers, our rules would not violate the First Amendment because they would be considered content-neutral regulations which easily satisfy intermediate scrutiny. In determining whether a regulation is content-based or content-neutral, the "principal inquiry . . . is whether the government adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[1711] The open Internet rules adopted today apply independent of content or viewpoint. Instead, they are triggered by a broadband provider offering broadband Internet access services. The rules are structured to operate in such a way that no speaker's message is either favored or disfavored, i.e. content neutral.

554. A content-neutral regulation will survive intermediate scrutiny if "it furthers an important or substantial government interest . . . unrelated to the suppression of free expression," and if "the means chosen" to achieve that interest "do not burden substantially more speech than is necessary."[1712] The government interests underlying this Order are clear and numerous. Congress has expressly tasked the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,"[1713] and has elsewhere explained that it is the policy of the United States to "promote the continued development of the Internet and other interactive computer services and other interactive media."[1714] Additionally, the *Verizon* court accepted the Commission's finding that "Internet openness fosters the edge-provider innovation that drives [the] 'virtuous cycle.'"[1715] As discussed above, this Order pursues these government interests by preserving an open Internet to encourage competition and remove impediments to infrastructure investment, while enabling consumer choice, end-user control, free expression, and the freedom to innovate without permission.

555. Indeed, rather than burdening free speech, the rules we adopt today ensure that the Internet promotes speech by ensuring a level playing field for a wide variety of speakers who might otherwise be disadvantaged. As *Turner I* affirmed "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[1716] Based on clear legislative interest in furthering broadband deployment and the paramount government interest in assuring that the public has access to a multiplicity of information sources, these interests clearly qualify as substantial under intermediate scrutiny.

556. Additionally, the rules here are sufficiently tailored to accomplish these government interests. The effect on speech imposed by these rules is minimal. The rules do not "burden substantially more speech than necessary" because they do not burden any identifiable speech—the rules we adopt today apply only to broadband providers' conduct with regard to their broadband Internet access services. Providers remain free to engage in the full panoply of protected speech afforded to any other speaker. They are free to offer "edited" services and engage in expressive conduct through the provision of other data services, as well.

557. Verizon also contends that the open Internet rules are impermissible under *Citizens United* because they result in differential treatment of providers of broadband service and other connected

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[1711] *Turner I*, 512 U.S. at 642 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[1712] *Id.* at 662 (internal quotation marks omitted).

[1713] 47 U.S.C. § 1302(a).

[1714] 47 U.S.C. § 230(b)(1).

[1715] *Verizon*, 740 F.3d at 644.

[1716] *Turner I*, 512 U.S. at 663. The *Turner I* Court continued: "Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* (internal quotation marks omitted). *See also FCC v. Nat'l Citizens Comm. for Broad.,* 436 U.S. 775, 795 (1978) (*NCCB*) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

IP services.[1717] Our rules governing the practices of broadband providers differ markedly from the statutory restrictions on political speech at issue in *Citizens United*. Our rules do not impact core political speech, where the "First Amendment has its fullest and most urgent application."[1718] By contrast, the open Internet rules apply only to the provision of broadband services in a commercial context, so reliance on the strict scrutiny standards applied in *Citizens United* is inapt.[1719] As described above, intermediate scrutiny under *Turner I* would be the controlling standard of review if broadband providers were found to be speakers.[1720] If a court were to find differential treatment under our rules, though, they would be justified under *Turner I* because speaker-based distinctions can be deemed permissible so long as they are "'justified by some special characteristic of' the particular medium being regulated.'"[1721] The ability and incentive of broadband providers to impose artificial scarcity and pick winners and losers in the provision of their last-mile broadband services is just such a special characteristic justifying differential treatment.[1722]

558. In sum, the rules we adopt today do not unconstitutionally burden any of the First Amendment rights held by broadband providers. Broadband providers are conduits, not speakers, with respect to broadband Internet access services. Even if they were engaged in speech with respect to these services, the rules we adopt today are tailored to the important government interest in maintaining an open Internet as a platform for expression, among other things.

2. Compelled Disclosure

559. The disclosure requirements adopted as a part of our transparency rule also fall well within the confines of the First Amendment. As explained above, these required disclosures serve important government purposes, ensuring that end users and edge providers have accurate and accessible information about broadband providers' services. This information is central both to preventing consumer deception and to the operation of the virtuous cycle of innovation, consumer demand, and broadband deployment.

560. CenturyLink contends that the disclosure requirements under the transparency rule violate the First Amendment by compelling speech without a reasonable basis.[1723] They argue that the Commission has not established a potential problem which these disclosures are necessary to remedy and that this is fatal to the rules under the First Amendment. This argument misapprehends both the factual justification for the transparency rules and the constitutional legal standard against which any disclosure requirements would be evaluated by the courts.

[1717] Verizon Comments at 67.

[1718] *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 339 (2010) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))) (internal quotation marks omitted).

[1719] *See Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 159-60 (2d Cir. 2013) ("In the absence of clearer direction from the Supreme Court, we will not ourselves assume that *Citizens United* implicitly reversed *Turner I* to compel strict scrutiny of all speaker-based preferences, even outside the political speech context.").

[1720] *See supra* para. 548.

[1721] *Turner I*, 512 U.S. at 660–61 (quoting *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983)).

[1722] *See Verizon*, 740 F.3d at 646 (finding that "[t]he Commission also convincingly detailed how broadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers"); *cf. BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (1998) (applying intermediate scrutiny to differential treatment of Bell Operating Companies under 47 U.S.C. § 274 with regard to electronic publishing owing to special characteristics).

[1723] CenturyLink Comments at 59–61.

561. The Supreme Court has made plain in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* that the government has broad discretion in requiring the disclosure of information to prevent consumer deception and ensure complete information in the marketplace.[1724] Under *Zauderer's* rational basis test, mandatory factual disclosures will be sustained "as long as disclosure requirements are reasonably related to the State's interest in preventing deception to consumers."[1725] As the Court observed, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed;"[1726] the speaker's interest is "minimal."[1727] The D.C. Circuit recently reaffirmed these principles in *American Meat Institute v. United States Department of Agriculture*, an *en banc* decision in which the Court joined the First and Second Circuit Courts of Appeals in recognizing that other government interests beyond preventing consumer deception may be invoked to sustain a disclosure mandate under *Zauderer*.[1728]

562. The transparency rule clearly passes muster under these precedents. Preventing consumer deception in the broadband Internet access services market lies at the heart of the transparency rule we adopt today. The Commission has found that broadband providers have the incentive and ability to engage in harmful practices, as discussed above in Section III.B.2.[1729] In the *2010 Open Internet Order*, we found that "disclosure ensures that end users can make informed choices regarding the purchase and use of broadband service."[1730] Since the original transparency rule was promulgated, the Commission has received hundreds of complaints regarding advertised rates, slow or congested services, data caps, and other potentially deceptive practices.[1731] Similarly, the enhancements to the transparency rule which we adopt today are designed to prevent confusion to all consumers of the broadband providers' services—end-users and edge providers alike. Tailored disclosures promise to provide a metric against which these customers can judge whether their broadband connections satisfy the speeds, bandwidth, and other terms advertised by broadband providers.

563. Further buttressing these disclosure requirements are numerous other government interests permitted under *American Meat Institute*. As acknowledged by the D.C. Circuit in *Verizon*, broadband providers have both the economic incentive and the technical ability to interfere with third-party edge providers' services by imposing discriminatory restrictions on access and priority.[1732] The

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[1724] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (*Zauderer*). CenturyLink's reliance on *Riley v. National Federation of the Blind of North Carolina, Inc.* for analyzing the constitutionality of the transparency rule is inapt. That case concerned mandatory disclosure of the percentage of charitable contributions used toward charity, but the transparency rule requires disclosure of purely commercial terms pertaining to the provision of broadband services. *See Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 n.9 (1988) ("Purely commercial speech is more susceptible to compelled disclosure requirements.").

[1725] *Zauderer*, 471 U.S. at 651.

[1726] *Id.* at 652 n.14.

[1727] *Id.* at 651.

[1728] *American Meat Institute v. US Dept. of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014) ("All told, *Zauderer's* characterization of the speaker's interest in opposing forced disclosure of [factual] information as 'minimal' seems inherently applicable beyond the problem of deception, as other circuits have found.") (citing *N.Y. State Rest. Ass'n v. N.Y. City Bd. Of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (Torruella, J.); *id.* at 316 (Boudin, C.J. & Dyk, J.); *id.* at 297–98 (per curiam) (explaining that the opinion of the Chief Judge Boudin and Judge Dyk is controlling on the First Amendment issue); *Nat'l Elec. Mafrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-15 (2d Cir. 2001)).

[1729] *See supra* Section III.B.2.

[1730] *2010 Open Internet Order*, 25 FCC Rcd at 17936, para. 53.

[1731] *2014 Open Internet NPRM*, 29 FCC Rcd at 5586, para. 69.

[1732] *Verizon*, 740 F.3d at 644–45.

disclosures we require under today's transparency rule serve to curb those incentives by shedding light on the business practices of broadband providers.[1733] Accurate information about broadband provider practices encourages the competition, innovation, and high-quality services that drive consumer demand and broadband investment and deployment.[1734] Tailored disclosures further amplify these positive effects by ensuring that edge providers have critical network information necessary to develop innovative new applications and services and that end users have confidence in the broadband providers' network management and business practices.[1735] In sum, the other government interests supporting the rules in addition to preventing consumer deception—preserving an open Internet to encourage competition and remove impediments to infrastructure investment, while enabling consumer choice, end-user control, free expression, and the freedom to innovate without permission—are substantial and justify our transparency requirements.

B. Fifth Amendment Takings

564. The open Internet rules also present no cognizable claims under the Fifth Amendment's Takings Clause. Today's decision simply identifies as common carriage the services that broadband Internet access service providers already offer in a manner that carries with it certain statutory duties. Regulatory enforcement of those duties has never been held to raise takings concerns. Correspondingly, our rules do not rise to the level of a *per* se taking because they do not grant third parties a right to physical occupation of the broadband providers' property. Finally, they do not constitute a regulatory taking because they actually enhance the value of broadband networks by protecting the virtuous cycle that drives innovation, user adoption, and infrastructure investment.

565. As an initial matter, we note that our reclassification of broadband Internet access service does not result from compelling the common carriage offering of those services, contrary to the claims of some broadband providers.[1736] Rather, our decision simply identifies as common carriage the services that broadband Internet access service providers already voluntarily offer in a manner that, under the Communications Act, carries with it certain statutory duties, which have never been held to raise takings concerns. Today's Order recognizes that broadband Internet access service is a telecommunications service under Title II of the Act.[1737] While certain common carriage obligations attach to recognition of this fact, those requirements operate by virtue of the statutory structure we interpret, not in service to a discretionary "policy goal the Commission seeks to advance."[1738] Such statutory obligations have never before posed takings issues, and we conclude that today's Order, likewise, does not violate the Fifth Amendment.

566. Verizon specifically contends that without either a finding of monopoly power or a restriction on government entry, "compelled common carriage would constitute a government taking."[1739] They cite approvingly Judge Wilkey's observation in *NARUC I* that "early common carriage regulations were 'challenged as deprivations of property without due process.'"[1740] However, Judge Wilkey

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[1733] *2014 Open Internet NPRM*, 29 FCC Rcd at 5585, para 66 ("'Sunlight,' as Justice Brandeis has explained, 'is . . . the best of disinfectants.'") (citing L. Brandeis, Other People's Money, Chapter 5 (National Home Library Foundation ed. 1933), http://www.law.louisville.edu/library/collections/brandeis/node/196.

[1734] *2014 Open Internet NPRM*, 29 FCC Rcd at 5585, para. 66.

[1735] *Id.* at 5580, para. 53.

[1736] *See, e.g.*, Verizon Title II White Paper at 1-5.

[1737] *See generally supra* Section IV.

[1738] *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (citing *NARUC I*, 525 F.2d at 644 ("Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve.").

[1739] Verizon Comments at 66; Verizon White Paper at 4 n.3.

[1740] Verizon Comments at 66 n.183 (citing *NARUC v. FCC*, 525 F.2d 630, 640 (1976) (*NARUC I*)).

continues in the next sentence to explain that Congress has regularly imposed common carrier obligations without a showing of monopoly power or entry restrictions.[1741] Verizon's suggestion, when extended to its logical conclusion, would necessitate rendering unconstitutional any common carriage obligations outside of true government-sponsored monopolies. The courts have taken a much narrower view of both the characteristics necessary for common carrier status[1742] and the effect of that status on takings claims when present in a non-monopoly context.[1743] Correspondingly, we conclude that today's classifications, without a showing of monopoly power do not constitute takings under the Fifth Amendment.

1. *Per Se* Takings

567. Some commenters argue that our rules would effect a *per se* taking by granting third parties a perpetual easement onto broadband providers' facilities, a form of physical occupation.[1744] These arguments mischaracterize the nature of the rules we adopt today and misapply Fifth Amendment jurisprudence. To qualify as a *per se* taking, the challenged government action must authorize a permanent physical occupation of private property.[1745] This rule, however, is "very narrow" and it does not "question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property."[1746] The Supreme Court has advised that a *per se* taking is "relatively rare and easily identified"[1747] and "presents relatively few problems of proof."[1748]

568. Under this formulation, today's Order does not impose a *per se* taking on broadband providers. Regulation of the transmissions travelling over a broadband providers' property differs substantially from physical occupations which are the hallmark of *per se* takings, such as the installation of cable equipment at issue in *Loretto v. Teleprompter CATV Corp*.[1749] We do not require the permanent

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[1741] *NARUC I*, 525 F.2d at 641 ("Subsequently, legislation has been upheld imposing stringent regulations of various types on entities found to be affected with a public character, even where nothing approaching monopoly power exists. In such cases as the Motor Carrier Act of 1935, relatively competitive carrying industries have been subjected to entry, rate and equipment regulations on the basis of the quasi-public character of the activities involved.").

[1742] *See Verizon*, 740 F.3d at 651 ("'[T]he primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently.'" (internal quotation marks omitted) (citing *Nat'l Assoc. of Reg. Utility Commissioners v. FCC*, 533 F.2d 601, 608 (1976) (*NARUC II*)).

[1743] *See NARUC I*, 525 F.2d at 641 (citing *American Trucking Ass'ns, Inc. v. United States*, 101 F.Supp. 710 (N.D. Ala. 1951) (upholding Motor Carrier Act of 1935 applying common carriage status to trucking industry against constitutional challenge under the Fifth Amendment, though significant competition existed)); *see also Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928-29 (5th Cir. 1997) (preserving federal cause of action against air carriers as common carriers after deregulation of airline industry).

[1744] CenturyLink Comments at 64–70; TechFreedom Comments at 93–94; Verizon Comments at 66–67; Verizon Reply at 48.

[1745] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that a New York law requiring landlords to permit a cable company to install cables on their leased buildings required just compensation because it effected a "permanent physical occupation" of their private property). The government may also commit a *per se* taking by completely depriving an owner of *all* economically beneficial use of her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). However, the record does not reflect a concern among commenters that our actions today deprive broadband providers of all economically beneficial use of their property—nor do we find one merited—so we limit our discussion to the permanent physical occupation variety of *per se* takings.

[1746] *Loretto*, 458 U.S. at 441.

[1747] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

[1748] *Loretto*, 458 U.S. at 437.

[1749] *See generally id*.

installation of any third-party equipment at broadband providers' network facilities,[1750] or deprive broadband providers of existing property interests in their networks—a broadband provider retains complete control over its property.[1751] Our rules merely regulate the *use* of a broadband Internet access provider's network—they are neither physical nor permanent occupations of private property. Courts have repeatedly declined to extend *per se* takings analysis to rules regulating the transmission of communications traffic over a provider's facilities,[1752] and we believe that these decisions comport with the Supreme Court's perspective that permanent physical occupation of property is a narrow category of takings jurisprudence and is "easily identifiable" when it does occur.[1753]

569. Moreover, to the extent that broadband providers voluntarily open their networks to end users and edge providers, reasonable regulation of the use of their property poses no takings issue. When owners voluntarily invite others onto their property—through contract or otherwise—the courts will not find that a permanent physical occupation has occurred.[1754] So long as property owners remain free to avoid physical incursions on their property by discontinuing the services to which it has been dedicated, reasonable conduct regulations can be imposed on the use of such properties without raising *per se* takings concerns.[1755] In point of fact, broadband providers regularly invite third parties to transmit signals through their physical facilities by contracting with end users to provide broadband Internet access service and promising access to all or substantially all Internet endpoints.[1756] Our rules do not compel broadband providers to offer this service—instead our rules simply regulate broadband providers' conduct with respect to traffic which currently freely flows over their facilities. Thus, to the extent that broadband providers allow any customer to transmit or receive information over its network, the imposition of reasonable conduct rules on the provision of broadband Internet access services does not constitute a *per se* taking. Furthermore, even if the rules did impose a type of physical occupation on the facilities of

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[1750] *Cablevision Systems Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009) (quoting *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252-53 (1987) ("[The] touchstone [of *per se* takings] is 'required acquiescence' to the occupation of the property by an uninvited stranger or an 'interloper with a government license.'")).

[1751] The Supreme Court has further cabined this *per se* takings rule by noting that some permanent incursions onto private property could be acceptable if the property owner owned the installation and retained discretion in how to deploy it. *Loretto*, 458, U.S. at 441, n.19 (hypothesizing that the New York statute in question could have required landlords "to provide cable installation if a tenant so desires" if the landlord owned the installation). Were our rules found to impose a permanent physical occupation on broadband providers' networks, broadband services seem to fall squarely within this exception. Broadband Internet access services are characterized as distinctly user-directed. Further, providers retain discretion in the deployment of their facilities and are free to manage traffic through reasonable network management. *See supra* Section III.D.4.

[1752] *See Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009) (upholding Commission's finding that a must-carry obligation did not constitute a physical occupation because "the transmission of WRNN's signal does not involve a physical occupation of Cablevision's equipment or property"); *Qwest v. United States*, 48 Fed. Cl. 672, 693-94 (Fed. Cl. 2001); *see also Loretto*, 458 U.S. at 435, n.12 ("The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude . . , [which] are subject to a more complex balancing process to determine whether they are a taking.").

[1753] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

[1754] *See Loretto*, 458 U.S. at 440 ("So long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.").

[1755] *See Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985) (non-discrimination requirement with respect to hotel taxi stands held not a taking under *Loretto*); *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992) (noting that because mobile home park petitioners "voluntarily open their property to occupation by others, petitions cannot assert a *per se* right to . . . exclude particular individuals"); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 83-84 (1980); *FCC v. Florida Power Corp.*, 480 U.S. 245, 251–253 (1987).

[1756] *See, e.g.*, Verizon Comments at 2.

broadband providers, such an imposition is not an unconstitutional taking because broadband providers are compensated for the traffic passing over their networks.[1757]

2. Regulatory Takings

570. Nor do the rules we adopt today constitute a regulatory taking.[1758] Outside of *per se* takings cases, courts analyze putative government takings through "essentially ad hoc, factual inquiries" into a variety of unweighted factors such as the "economic impact of the regulation," the degree of interference with "investment-backed expectations," and "the character of the government action."[1759] Directing analysis of these factors is a common touchstone—whether the regulatory actions taken are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[1760] Open Internet rules do not implicate such a deprivation of value or control over the networks of broadband providers, and so pose no regulatory takings issues.

571. The economic impact of the rules we adopt today is limited because, in most circumstances, the Internet operates in an open manner today.[1761] Indeed, rather than reducing the value of broadband provider property, today's rules likely serve to enhance the value of broadband networks by promoting innovation on the edge of the network, thereby driving consumer demand for broadband Internet access and increasing the networks' value.[1762] Further, today's Order does not so burden broadband providers' discretion in managing and deploying their networks to effectively "oust" them from ownership and control of their networks. While we have adopted a set of bright-line rules today for some practices, broadband providers are still afforded a great deal of discretion to enter into individualized arrangements with respect to the provision of broadband Internet access services under the no-unreasonable interference/disadvantage standard. The limited scope of the open Internet rules also injects flexibility into our regulatory framework and provides sufficient property protections to take our rules outside the ambit of the Fifth Amendment.[1763]

572. Likewise, any investment backed expectations of broadband providers in prior regulatory regimes are minimal. As a general matter, property owners cannot expect that existing legal requirements regarding their property will remain entirely unchanged.[1764] The Commission has long regulated Internet access services,[1765] and there is no doubt that broadband Internet "falls comfortably within the

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[1757] With respect to the rules governing the broadband Internet access service, broadband providers are compensated through the imposition of subscription fees on their end users.

[1758] *See* Verizon Comments at 67; CenturyLink Comments at 70–71.

[1759] *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

[1760] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (discussing application of the *Penn Central* factors).

[1761] Charter Comments at 3; BrightHouse Comments at 25-26; Verizon Comments at 3.

[1762] *See Verizon*, 740 F.3d at 649 (affirming the Commission's finding that "the strength of the effect on broadband investment that it anticipated from edge-provider innovation, which would benefit both from the preservation of the 'virtuous circle of innovation' created by the Internet's openness and the increased certainty in that openness engendered by the Commission's rules").

[1763] *See supra* Section III.D (excluding from the scope of the open Internet rules reasonable network management, Internet traffic exchange, and other data services outside the definitions of broadband Internet access services).

[1764] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992); *Gen. Tel. Co. of the Sw. v. United States*, 449 F.2d 846, 864 (5th Cir. 1971). Additionally, persons operating in a regulated environment develop fewer reliance interests in industries subject to comprehensive regulation. *See Concrete Pipe & Prods. of S. Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

[1765] *See Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm. Servs.*, Docket No. 16979, Final Decision and Order, 28 F.C.C. 2d 267, 270, para. 12, 275, para. 24 (1971) (*Computer I Final Decision*), *aff'd sub nom. GTE Servs. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C. 2d

(continued….)

Commission's jurisdiction."[1766] Indeed, with respect to broadband Internet access service, claims by broadband providers that our previous regulatory treatment of broadband engendered reliance interests[1767] runs counter to the plain language of the 2002 *Cable Modem Declaratory Ruling* and the 2005 *Wireline Broadband Classification Order*, both of which contained notices of proposed rulemaking seeking comment on the retention of Title II-like regulation of those services.[1768] Also, because we do not propose to regulate *ex ante* broadband providers' ability to set market rates for the broadband Internet access services they offer, there is no reason to believe that our ruling will deprive broadband providers of the just compensation that is a full answer to any takings claim.

573. In characterizing our proposed rules as a regulatory taking, CenturyLink looks to *Kaiser Aetna*, a case in which the government sought to establish public access rights to a private marina by classifying it as "navigable waters of the United States.[1769] As described above, we think that analogies to real property incursions are inapplicable to the provision of broadband Internet access services. In any event, the facts of *Kaiser* bear little resemblance to the rights and interests implicated by broadband networks. Unlike the small, privately held marina which was not open to the public in *Kaiser Aetna*, broadband Internet access service involves access to substantially all Internet endpoints.[1770] While the marina in *Kaiser Aetna* maintained a small fee-paying membership, broadband Internet access services are offered directly to the public at large, as we recognize in their classification as telecommunications services. In sum, open Internet rules do not so burden broadband provider's control and ownership of their networks as to rise to the level of a regulatory taking in violation of the Fifth Amendment. The economic impact of our rules is minimal and our classifications do not frustrate any significant reliance interests.

VII. SEVERABILITY

574. We consider the actions we take today to be separate and severable such that in the event any particular action or decision is stayed or determined to be invalid, we would find that the resulting regulatory framework continues to fulfill our goal of preserving and protecting the open Internet and that it shall remain in effect to the fullest extent permitted by law. Though complementary, each of the rules, requirements, classifications, definitions, and other provisions that we establish in this Report and Order on Remand, Declaratory Ruling, and Order operate independently to promote the virtuous cycle, encourage the deployment of broadband on a timely basis, and protect the open Internet.

(Continued from previous page)
293 (1972); *Amendment of Section 64.702 of the Comm'n's Rules & Regs, Second Computer Inquiry*, Final Decision, 77 F.C.C. 2d 384, 417-35, 461-75, paras. 86-132, 201-31 (1980) (*Computer II Final Decision*), *aff'd sub nom. Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Comm'n's Rules & Regs.* (*Third Computer Inquiry*), CC Docket No. 85-229, Phase I, Report and Order, 104 F.C.C. 2d 958, para. 4 (1986) (*Computer III Phase I Order*) (subsequent history omitted).

[1766] *Verizon*, 740 F.3d at 629-630 (discussing the historical progression of our regulation of Internet access) (citing *Computer II*, 77 F.C.C.2d 384, 387, paras. 5-7). *See also Comcast*, 600 F.3d at 646-47.

[1767] *See, e.g.*, Letter from Kathryn Zachem, Senior Vice President, Comcast, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 14-28, 10-127, at 7 (filed Nov. 4, 2014); Verizon Title II White Paper at 12.

[1768] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4841-45 (seeking comment on the extent to which the Commission should regulate cable modem service, including whether the Commission should require cable operators to offer "open access'); *Wireline Broadband Classification Order*, 20 FCC Rcd at 14929-14935, paras. 145-159 (seeking comment on, among other things, the need for geographic rate averaging, and consumer protections regarding CPNI, against slamming, against sudden discontinuance of service). *See supra* para. 360 (discussing reliance interests in classification of BIAS).

[1769] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[1770] *See supra* Section III.D.1.

575. *Severability of Open Internet Rules from One Another.* The open Internet rules we adopt today each operate independently to protect the open Internet, promote the virtuous cycle, and encourage the deployment of broadband on a timely basis. The *Verizon* court recognized as much by holding our initial transparency rule severable from the non-discrimination and no blocking rules from the *2010 Open Internet Order*.[1771] We apply that view to today's transparency rule, as well as to the no blocking, no throttling, and no paid prioritization rules and the no-unreasonable interference/disadvantage adopted today. While today's rules put in place a suite of open Internet protections, we find that each of these rules, on its own, serves to protect the open Internet. Each rule protects against different potential harms and thus operates semi-independently from one another. For example, the no-blocking rule protects consumers' right to access lawful content, applications, and services by constraining broadband providers' incentive to block competitors' content.[1772] The no throttling rule serves as an independent supplement to this prohibition on blocking by banning the impairment or degradation of lawful content that does not reach the level of blocking.[1773] Should the no blocking rule be declared invalid, the no throttling rule would still afford consumers and edge providers significant protection, and thus could independently advance the goals of the open Internet, if not as comprehensively were the no blocking rule still in effect. The same reasoning holds true for the ban on paid prioritization, which protects against particular harms independent of the other bright-line rules. Finally, the no-unreasonable interference/disadvantage standard governs broadband provider conduct generally, providing independent protections against those three harmful practices along with other and new practices that could threaten to harm Internet openness. Were any of these individual rules held invalid, the resulting regulations would remain valuable tools for protecting the open Internet.

576. *Severability of Rules Governing Mobile/Fixed Providers.* We have also made clear today our rules apply to both fixed and mobile broadband service.[1774] These are two different services, and thus the application of our rules to either service functions independently. Accordingly, we find that should application of our open Internet rules to either fixed or mobile broadband Internet access services be held invalid, the application of those rules to the remaining mobile or fixed services would still fulfill our regulatory purposes and remain intact.

VIII. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

577. As required by the Regulatory Flexibility Act (RFA),[1775] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *2014 Open Internet NPRM*.[1776] The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Open Internet NPRM*, including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is set forth in Appendix B.

B. Paperwork Reduction Act of 1995 Analysis

578. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief

[1771] *Verizon*, 740 F.3d at 659.

[1772] *See supra* Section III.C.1.a.

[1773] *See supra* Section III.C.1.b.

[1774] *See supra* Section III.D.

[1775] *See* 5 U.S.C. § 603.

[1776] *2014 Open Internet NPRM*, Appx. B.

Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

579. In this present document, we require broadband providers to publicly disclose accurate information regarding the commercial terms, performance, and network management practices of their broadband Internet access services sufficient for end users to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings. We have assessed the effects of this rule and find that any burden on small businesses will be minimal because (1) the rule gives broadband providers flexibility in how to implement the disclosure rule, and (2) the rule gives providers adequate time to develop cost-effective methods of compliance.

C. Congressional Review Act

580. The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

D. Data Quality Act

581. The Commission certifies that it has complied with the Office of Management and Budget Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (2005), and the Data Quality Act, Pub. L. No. 106-554 (2001), codified at 44 U.S.C. § 3516 note, with regard to its reliance on influential scientific information in the Report and Order on Remand, Declaratory Ruling, and Order in GN Docket No. 14-28.[1777]

E. Accessible Formats

582. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CARTS, *etc*.) by e-mail: FCC504@fcc.gov; phone: (202) 418-0530 (voice), (202) 418-0432 (TTY).

IX. ORDERING CLAUSES

583. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 3, 4, 10, 201, 202, 301, 303, 316, 332, 403, 501, and 503, , of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 152, 153, 154, 160, 201, 202, 301, 303, 316, 332, 403, 501, 503, and 1302, this Report and Order on Remand, Declaratory Ruling, and Order IS ADOPTED.

584. IT IS FURTHER ORDERED that parts 1, 8, and 20 of the Commission's rules ARE AMENDED as set forth in Appendix A.

585. IT IS FURTHER ORDERED that this Report and Order on Remand, Declaratory Ruling, and Order SHALL BE effective 60 days after publication in the Federal Register, except that those amendments which contain new or modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act WILL BECOME EFFECTIVE after the Commission publishes a notice in the Federal Register announcing such approval and the relevant effective date. It is our intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the

[1777] *See* Letter from Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed Dec. 13, 2010).

rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law.

586. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of Report and Order on Remand, Declaratory Ruling, and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

587. IT IS FURTHER ORDERED, that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order on Remand, Declaratory Ruling, and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

588. IT IS FURTHER ORDERED that the Mozilla Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends 47 C.F.R. parts 1, 8 and 20 as follows:

PART 1: PRACTICE AND PROCEDURE

1. Section 1.49 is amended by revising paragraph (f)(1)(i) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

* * * * *

(f) * * *

(1) * * *

(i) Formal complaint proceedings under Section 208 of the Act and rules §§ 1.720 through 1.736, pole attachment complaint proceedings under Section 224 of the Act and rules §§ 1.1401 through 1.1424, and formal complaint proceedings under Open Internet rules §§ 8.12 through 8.17, and;

* * * * *

2. The heading of part 8 is amended to read as follows:

PART 8: PROTECTING AND PROMOTING THE OPEN INTERNET

3. The authority citation for part 8 is amended to read as follows:

AUTHORITY: 47 U.S.C. §§ 151, 152, 153, 154, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302.

4. Section 8.1 is amended to read as follows:

§ 8.1 Purpose.

The purpose of this Part is to protect and promote the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment.

5. Section 8.11 is redesignated section 8.2 and is amended to read as follows:

§ 8.2 Definitions.

(a) *Broadband Internet access service*. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

(b) *Edge provider*. Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

(c) *End user*. Any individual or entity that uses a broadband Internet access service.

(d) *Fixed broadband Internet access service*. A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services.

(e) *Mobile broadband Internet access service*. A broadband Internet access service that serves end users primarily using mobile stations.

(f) *Reasonable network management*. A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

6. Section 8.5 is amended to read as follows:

§ 8.5 No blocking.

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

7. Section 8.7 is amended to read as follows:

§ 8.7 No throttling.

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

8. Section 8.9 is redesignated section 8.19.

9. New section 8.9 is added to read as follows:

§ 8.9 No paid prioritization.

(a) A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.

(b) "Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.

(c) The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.

10. New section 8.11 is added to read as follows:

§ 8.11 No unreasonable interference or unreasonable disadvantage standard for Internet conduct.

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

11. Section 8.13 is amended by revising paragraph (a)(4), revising paragraphs (b), (b)(1) and (b)(2), removing paragraph (b)(3), redesignating paragraphs (c) and (d) as paragraphs (d) and (e), and adding new paragraph (c) to read as follows:

§ 8.13 General pleading requirements.

(a) * * *

* * * * *

(4) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address, telephone number, email address, and the date on which the document was signed. Copies should be conformed to the original. Each submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose appropriate sanctions.

* * * * *

(b) *Initial Complaint: Fee remittance; Service; Copies to be filed*. The complainant shall remit separately the correct fee either by check, wire transfer, or electronically, in accordance with part 1, subpart G (see § 1.1106) and:

(1) Shall file an original copy of the complaint, using the Commission's Electronic Comment Filing System, and, on the same day:

(2) Serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents for service of process, if available, on the same date that the complaint is filed with the Commission;

(c) *Subsequent Filings: Service; Copies to be filed*.

(1) All subsequent submissions shall be filed using the Commission's Electronic Comment Filing System. In addition, all submissions shall be served by the filing party on the attorney of record for each party to

the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or by email, together with a proof of such service in accordance with the requirements of § 1.47(g).

Service is deemed effective as follows:

(a) Service by hand delivery that is delivered to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day;

(b) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service; or

(c) Service by email that is fully transmitted to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by email that is fully transmitted to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day.

(2) Parties shall provide hard copies of all submissions to staff in the Market Disputes Resolution Division of the Enforcement Bureau upon request.

* * * * *

12. Section 8.14 is amended by adding new paragraph (g), and redesigning paragraphs (g) through (h) as (h) through (i) to read as follows:

§ 8.14 Formal complaint procedures.

* * * * *

(g) *Request for written opinion from outside technical organization.* (1) After reviewing the pleadings, and at any stage of the proceeding thereafter, the Enforcement Bureau may, in its discretion, request a written opinion from an outside technical organization regarding one or more issues in dispute.

(2) (i) Wherever possible, the opinion shall be requested from an outside technical organization whose members do not include any of the parties to the proceeding.

(ii) If no such outside technical organization exists, or if the Enforcement Bureau in its discretion chooses to request an opinion from an organization that includes among its members a party to the proceeding, the Bureau shall instruct the organization that any representative of a party to the proceeding within the organization may not participate in either the organization's consideration of the issue(s) referred or its drafting of the opinion.

(iii) No outside technical organization shall be required to respond to the Bureau's request.

(3) (i) If an opinion from an outside technical organization is requested and the request is accepted, the Enforcement Bureau shall notify the parties to the dispute of the request within ten (10) days and shall provide them copies of the opinion once it is received.

(ii) The outside technical organization shall provide its opinion within thirty (30) days of the Enforcement Bureau's request, unless otherwise specified by the Bureau.

(iii) Parties shall be given the opportunity to file briefs in reply to the opinion.

* * * * *

13. Section 8.16 is amended by revising paragraph (a), adding new paragraphs (a)(1) through (a)(4), removing paragraph (b), and redesignating paragraphs (c) through (g) as (b) through (f) to read as follows:

§ 8.16 Confidentiality of proprietary information.

(a) Any materials generated in the course of a proceeding under this part may be designated as proprietary by either party to the proceeding or a third party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) (1)–(9). Any party asserting confidentiality for such materials must:

(1) Clearly mark each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as proprietary fall under the standards for nondisclosure enunciated in the FOIA.

(2) File with the Commission, using the Commission's Electronic Comment Filing System, a public version of the materials that redacts any proprietary information and clearly marks each page of the redacted public version with a header stating "Public Version." The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(3) File with the Secretary's Office an unredacted hard copy version of the materials that contain the proprietary information and clearly marks each page of the unredacted confidential version with a header stating "Confidential Version." The unredacted version must be filed on the same day as the redacted version.

(4) Serve one hard copy of the filed unredacted materials and one hard copy of the filed redacted materials on the attorney of record for each party to the proceeding, or where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of §§ 1.47(g) and 8.13(c)(1)(a)–(c);

(b) Except as provided in paragraph (c) of this section, materials marked as proprietary may be disclosed solely to the following persons, only for use in the proceeding, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) The Commission will entertain, subject to a proper showing under § 0.459, a party's request to further restrict access to proprietary information. Pursuant to § 0.459, the other parties will have an opportunity to respond to such requests. Requests and responses to requests may not be submitted by means of the Commission's Electronic Comment Filing System but instead must be filed under seal with the Office of the Secretary.

(d) The individuals designated in paragraphs (b)(1)–(3) shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(e) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (b) and (c) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(f) Upon termination of a complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

14. Section 8.18 is added to read as follows:

§ 8.18 Advisory opinions.

(a) *Procedures*

(1) Any entity that is subject to the Commission's jurisdiction may request an advisory opinion from the Enforcement Bureau regarding its own proposed conduct that may implicate the open Internet rules or any rules or policies related to the open Internet that may be adopted in the future. Requests for advisory opinions may be filed via the Commission's website or with the Office of the Secretary and must be copied to the Chief of the Enforcement Bureau and the Chief of the Investigations and Hearings Division of the Enforcement Bureau.

(2) The Enforcement Bureau may, in its discretion, refuse to consider a request for an advisory opinion. If the Bureau declines to respond to a request, it will inform the requesting party in writing.

(3) Requests for advisory opinions must relate to prospective or proposed conduct that the requesting party intends to pursue. The Enforcement Bureau will not respond to requests for opinions that relate to ongoing or prior conduct, and the Bureau may initiate an enforcement investigation to determine whether such conduct violates the open Internet rules. Additionally, the Bureau will not respond to requests if the same or substantially the same conduct is the subject of a current government investigation or proceeding, including any ongoing litigation or open rulemaking at the Commission.

(4) Requests for advisory opinions must be accompanied by all material information sufficient for Enforcement Bureau staff to make a determination on the proposed conduct for which review is requested. Requesters must certify that factual representations made to the Bureau are truthful and accurate, and that they have not intentionally omitted any information from the request. A request for an

advisory opinion that is submitted by a business entity or an organization must be executed by an individual who is authorized to act on behalf of that entity or organization.

(5) Enforcement Bureau staff will have discretion to ask parties requesting opinions, as well as other parties that may have information relevant to the request or that may be impacted by the proposed conduct, for additional information that the staff deems necessary to respond to the request. Such additional information, if furnished orally or during an in-person conference with Bureau staff, shall be promptly confirmed in writing. Parties are not obligated to respond to staff inquiries related to advisory opinions. If a requesting party fails to respond to a staff inquiry, then the Bureau may dismiss that party's request for an advisory opinion. If a party voluntarily responds to a staff inquiry for additional information, then it must do so by a deadline to be specified by Bureau staff. Advisory opinions will expressly state that they rely on the representations made by the requesting party, and that they are premised on the specific facts and representations in the request and any supplemental submissions.

(b) After review of a request submitted hereunder, the Enforcement Bureau will: (1) issue an advisory opinion that will state the Bureau's present enforcement intention with respect to the proposed open Internet practices; (2) issue a written statement declining to respond to the request; or (3) take such other position or action as it considers appropriate. An advisory opinion states only the enforcement intention of the Enforcement Bureau as of the date of the opinion, and it is not binding on any party. Advisory opinions will be issued without prejudice to the Enforcement Bureau or the Commission to reconsider the questions involved, or to rescind or revoke the opinion. Advisory opinions will not be subject to appeal or further review.

(c) The Enforcement Bureau will have discretion to indicate the Bureau's lack of enforcement intent in an advisory opinion based on the facts, representations, and warranties made by the requesting party. The requesting party may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion. The Bureau will not bring an enforcement action against a requesting party with respect to any action taken in good faith reliance upon an advisory opinion if all of the relevant facts were fully, completely, and accurately presented to the Bureau, and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's or Bureau's approval.

(d) *Public disclosure*. The Enforcement Bureau will make advisory opinions available to the public on the Commission's website. The Bureau will also publish the initial request for guidance and any associated materials. Parties soliciting advisory opinions may request confidential treatment of information submitted in connection with a request for an advisory opinion pursuant to § 0.459.

(e) *Withdrawal of request*. Any requesting party may withdraw a request for review at any time prior to receipt of notice that the Enforcement Bureau intends to issue an adverse opinion, or the issuance of an opinion. The Enforcement Bureau remains free, however, to submit comments to such requesting party as it deems appropriate. Failure to take action after receipt of documents or information, whether submitted pursuant to this procedure or otherwise, does not in any way limit or stop the Bureau from taking such action at such time thereafter as it deems appropriate. The Bureau reserves the right to retain documents submitted to it under this procedure or otherwise and to use them for all governmental purposes.

PART 20: COMMERCIAL MOBILE SERVICES

15. Section 20.3 is amended to read as follows:

§ 20.3 Definitions.

* * * * *

Commercial mobile radio service. * * *

* * * * *

(b) The functional equivalent of such a mobile service described in paragraph (a) of this section, including a mobile broadband Internet access service as defined in Section 8.2.

* * * * *

Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from other users on the public switched network; or

(b) * * *

* * * * *

Public Switched Network. The network that includes any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan, or public IP addresses, in connection with the provision of switched services.

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980 (RFA),[1] as amended, Initial Regulatory Flexibility Analyses (IRFAs) were incorporated in the *Notice of Proposed Rule Making* (*2014 Open Internet NPRM*) for this proceeding.[2] The Commission sought written public comment on the proposals in the *2014 Open Internet NPRM*, including comment on the IRFA. The Commission received comments on the *2014 Open Internet NPRM* IRFA, which are discussed below.[3] This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[4]

A. Need for, and Objectives of, the Proposed Rules

2. In its remand of the Commission's *Open Internet Order*, the D.C. Circuit affirmed the underlying basis for the Commission's open Internet rules, holding that "the Commission [had] more than adequately supported and explained its conclusion that edge provider innovation leads to the expansion and improvement of broadband infrastructure."[5] The court also found "reasonable and grounded in substantial evidence" the Commission's finding that Internet openness fosters the edge provider innovation that drives the virtuous cycle.[6] Open Internet rules benefit investors, innovators, and end users by providing more certainty to each regarding broadband providers' behavior, and helping to ensure the market is conducive to optimal use of the Internet. Further, openness promotes the Internet's ability to act as a platform for speech and civic engagement, and can help close the digital divide by facilitating the development of diverse content, applications, and services. The record on remand convinces us that broadband providers continue to have the incentives and ability to engage in practices that pose a threat to Internet openness, and as such, rules to protect the open nature of the Internet remain necessary.

3. The Commission's historical open Internet policies and rules have blunted broadband providers' incentives to engage in behavior harmful to the open Internet.[7] Commenters who argue that rules are not necessary overlook the role that the Commission's rules and policies have played in fostering that result.[8] Without rules in place to protect the open Internet, the overwhelming incentives broadband

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[1] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612 has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *Protecting & Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*2014 Open Internet NPRM*).

[3] *See, e.g.*, Adtran Comments at 43, 47; ACA Comments at 32; National Cable and Telecommunications Association Regulatory Flexibility Act Comments (NCTA RFA Comments); Wireless Internet Service Providers Association Initial Regulatory Flexibility Analysis Comments (WISPA IRFA Comments); NTCA Reply at 18-20; WISPA Reply; Letter from Stephen E. Coran, Counsel to the Wireless Internet Service Providers Association to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, (filed Dec. 8, 2014) (WISPA Dec. 8, 2014 *Ex Parte* Letter); Letter from Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association, Lisa Shoenthaler, Vice President, Association Affairs, National Cable & Telecommunications Association, and Stephen E. Coran, Washington Counsel, Wireless Internet Service Providers Association to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, (filed Jan. 9, 2015) (Trade Associations Jan. 9, 2015 IRFA *Ex Parte* Letter).

[4] *See* 5 U.S.C. § 604.

[5] *Verizon*, 740 F.3d at 644.

[6] *Id.*

[7] *See, e.g.*, CWA & NAACP Comments at 4 (noting that CWA and NAACP agree with the Commission's assertion that one of the primary reasons there have been limited violations of Internet openness is because the Commission has had policies in place to address misconduct).

[8] *See supra* Section III.A; *see also, e.g.*, Layton Comments at 19.

providers have to act in ways that are harmful to investment and innovation threaten both broadband networks and edge content.[9] Accordingly, in the Order, we set a clear scope for and subsequently adopt a number of rules to address such harmful conduct.

4. First, we note that despite traffic exchange's inclusion in the definition and classification of broadband Internet access service, we do not apply the Commission's conduct-based rules to traffic exchange today. Instead, we utilize the regulatory backstop of sections 201 and 202, as well as related enforcement provisions, to provide oversight over traffic exchange arrangements between a broadband Internet access service provider and other networks. Our definition of broadband Internet access service includes services "by wire or radio," and thus the open Internet rules we adopt apply to both fixed and mobile broadband Internet access services. The record demonstrates the pressing need to apply open Internet rules to fixed and mobile broadband Internet access services alike, and as such, the Commission's prior justifications for treating mobile and fixed services differently under the rules are no longer relevant.

5. We adopt a bright-line rule prohibiting broadband providers from blocking lawful content, applications, services, or non-harmful devices. The no-blocking rule applies to all traffic transmitted to or from end users of a broadband Internet access service, including traffic that may not fit clearly into any of these categories. Further, the no-blocking rule only applies to transmissions of lawful content and does not prevent or restrict a broadband provider from refusing to transmit unlawful material, such as child pornography or copyright-infringing materials. We believe that this approach will allow broadband providers to honor their service commitments to their subscribers without requiring a specified level of service to those subscribers or edge providers under the no-blocking rule. We further believe that the separate no-throttling rule provides appropriate protections against harmful conduct that degrades traffic but does not constitute outright blocking.

6. We also adopt a separate bright-line rule prohibiting broadband providers from impairing or degrading lawful Internet traffic on the basis of content, application, service, or use of a non-harmful device. While certain broadband provider conduct may result in degradation of an end user's Internet experience that is tantamount to blocking, we believe that this conduct requires delineation in an explicit rule rather than through commentary as part of the no-blocking rule. We interpret throttling to mean any conduct by a broadband Internet access service provider that impairs, degrades, slows down, or renders effectively unusable particular content, services, applications, or devices, which is not reasonable network management. We find this prohibition to be as necessary as a rule prohibiting blocking. Without an equally strong no-throttling rule, parties note that the no-blocking rule will not be as effective because broadband providers might otherwise be able to engage in conduct that harms the open Internet but falls short of the outright blocking standard.

7. Under our bright-line rule banning paid prioritization, the Commission will treat all paid prioritization as illegal under our rules except when, in rare circumstances, a broadband provider can convincingly show that its practice would affirmatively benefit the open Internet. Broadband providers may seek a waiver of this rule against paid prioritization, and we provide guidance to make clear the very limited circumstances in which the Commission would be willing to allow paid prioritization. In order to justify waiver, a party would need to demonstrate that a practice would provide some significant public interest benefit and would not harm the open nature of the Internet.

8. In addition to these three bright-line rules, we also set forth a no-unreasonable interference/disadvantage standard, under which the Commission can prohibit practices that unreasonably interfere with or unreasonably disadvantage consumers or edge providers, thus causing harm to the open Internet. This no-unreasonable interference/disadvantage standard will operate on a case-by-case basis and is designed to evaluate other broadband provider policies or practices—not covered by the bright-line

[9] *See, e.g.*, Greenling Institute Comments at 3 ("By rejecting the Commission's anti-blocking and anti-discrimination rules, the Verizon court has opened up the possibility that without the Commission's intervention, carriers will determine the winners and losers of the digital world.").

rules— and prohibit those that could harm the open Internet. Under this rule, any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services or devices available to end users. Reasonable network management shall not be considered a violation of this rule. This standard importantly allows us to prohibit practices that harm Internet openness, while still permitting innovative practices and creations that promote the virtuous cycle.[10]

9. We note that the no-blocking, no-throttling, and no-unreasonable interference/disadvantage standard are all subject to reasonable network management. This network management exception is critical to allow broadband providers to optimize overall network performance and maintain a consistent quality experience for consumers. This exception does not apply to the paid prioritization rule because unlike conduct implicating the no-blocking, no-throttling, or no-unreasonable interference/disadvantage standard, paid prioritization is not a network management practice. We believe that this approach allows broadband providers to optimize overall network performance and maintain a consistent quality experience for consumers while carrying a variety of traffic over their networks.

10. In addition, we adopt our tentative conclusion in the *2014 Open Internet NPRM*, that the Commission should not apply its conduct-based rules to services offered by broadband providers that share capacity with broadband Internet access service over providers' last-mile facilities, while closely monitoring the development of these services to ensure that broadband providers are not circumventing the open Internet rules. While the *2010 Open Internet Order* and the *2014 Open Internet NPRM* used the term "specialized services" to refer to these types of services, the term "non-BIAS data services" is a more accurate description for this class of services. These services may generally share the following characteristics: First, these services are not used to reach large parts of the Internet. Second, these services are not a generic platform—but rather a specific "application level" service. Finally, these services use some form of network management to isolate network capacity from broadband Internet access services: physically, logically, statistically, or otherwise.

11. We also adopt enhancements to the existing transparency rule, which covers both content and format of disclosures by providers of broadband Internet access services. As the Commission has previously noted, disclosure requirements are among the least intrusive and most effective regulatory measures at its disposal. The enhanced transparency requirements adopted in the present Order serve the same purposes as those required under the 2010 Order: providing critical information to serve end-user consumers, edge providers of broadband products and services, and the Internet community. Our enhancements to the existing transparency rule will better enable end-user consumers to make informed choices about broadband services by providing them with timely information tailored more specifically to their needs, and will similarly provide edge providers with the information necessary to develop new content, applications, services, and devices that promote the virtuous cycle of investment and innovation.

12. We anticipate that many disputes that will arise can and should be resolved by the parties without Commission involvement. We encourage parties to resolve disputes through informal discussions and private negotiations, but to the extent these methods are not practical, the Commission will continue to provide backstop mechanisms to address them. We continue to allow parties to file formal and informal complaints, and we will also proactively monitor compliance and take strong enforcement action against parties who violate the open Internet rules. In addition, we institute the use of advisory opinions similar to those issued by DOJ's Antitrust Division to provide clarity, guidance, and predictability concerning the open Internet rules. We also create an ombudsperson position that will serve as a point of contact for open Internet issues at the Commission to help consumers and edge providers

[10] The *Verizon* court specifically touted the virtuous cycle as a worthy goal and within our authority. *Verizon*, 740 F.3d at 644 ("The Commission's finding that Internet openness fosters the edge-provider innovation that drives this 'virtuous cycle' was likewise reasonable and grounded in substantial evidence.").

direct their inquiries and complaints to the appropriate parties.

13. The legal basis for the Open Internet rules we adopt today relies on multiple sources of legal authority, including section 706, Title II, and Title III of the Communications Act. We conclude that the best approach to achieving our open Internet goals is to rely on several, independent, yet complementary sources of legal authority. Our authority under Section 706 is not mutually exclusive with our authority under Titles II and III of the Act. Rather, we read our statute to provide independent sources of authority that work in concert toward common ends. Under section 706, the Commission has the authority to take certain regulatory steps to encourage and accelerate the deployment of broadband to all Americans. Under Title II, the Commission has authority to ensure that common carriers do not engage in unjust and unreasonable practices or preferences. And under Title III, the Commission has authority to protect the public interest through spectrum licensing. Each of these sources of authority provides an alternative ground to independently support our open Internet rules.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

14. In response to the *2014 Open Internet NPRM*, five entities filed comments, reply comments, and/or *ex parte* letters that specifically addressed the IRFA to some degree: ADTRAN, the American Cable Association (ACA), The National Cable & Telecommunications Association (NCTA), NTCA—the Rural Broadband Association (NTCA), and the Wireless Internet Service Providers Association (WISPA). Some of these, as well as other entities filed comments or *ex parte* letters that more generally considered the small business impact of our proposals.[11] The Office of Advocacy of the Small Business Administration (SBA) also filed a letter encouraging the FCC to use the RFA to reach out to small businesses in the course of the proceeding.[12] The SBA particularly encouraged the Commission to "exercise appropriate caution in tailoring its final rules to mitigate any anticompetitive pressure on small broadband providers as well."[13] We considered the proposals and concerns described by the various commenters, including the SBA, when composing the Order and accompanying rules.

15. Some commenters expressed concern that in the IRFA, we had not adequately considered the varying sizes of broadband providers and the effect of our proposals on smaller entities.[14] Contrary to these concerns, when making the determination reflected in the Order, we carefully considered the impact of our actions on small entities. The record also reflects small entities' concern that the rules proposed in the *2014 Open Internet NPRM* did not include sufficient protection for small edge providers and broadband providers.[15] Thus, the rules adopted in the Order reflect a careful consideration of the impact

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[11] *See, e.g.*, Letter from Forty-Three Municipal Broadband Internet Providers to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, (filed Feb 10, 2015) (Forty-Three Providers' Feb 10, 2015 *Ex Parte* Letter); Letter from Barbara S. Esbin, Counsel, American Cable Association to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Feb 13, 2015) (ACA Feb. 13, 2015 *Ex Parte* Letter); Letter from Barbara S. Esbin, Counsel for American Cable Association to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 28, 2015) (ACA Jan. 28, 2015*Ex Parte* Letter); Letter from Stephen E. Coran, Counsel to the Wireless Internet Service Providers Association to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 at 8 (filed Feb. 3, 2015) (WISPA Feb. 3, 2015 *Ex Parte* Letter); WTA Comments.

[12] *See generally* Letter from Winslow L. Sargeant, Ph.D., Chief Counsel for Advocacy, SBA, and Jamie Belcore Saloom, Assistant Chief Counsel for Telecommunications, SBA to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Sep. 25, 2014) (SBA Sep. 25, 2014 *Ex Parte* Letter).

[13] *Id.* at 2.

[14] *See* Adtran Comments at 43; NCTA RFA Comments at 7; WISPA IRFA Comments at 1, 3, 5; NTCA Reply at 20; WISPA Dec. 8, 2014 *Ex Parte* Letter at 3; Trade Associations Jan. 9, 2015 IRFA *Ex Parte* Letter at 2.

[15] *See, e.g.*, John Bernadi Reply at 1 (citing concern that as a farmer and a small business owner the rules proposed in the NPRM were insufficiently robust to protect small business interests); WISPA Reply at iv ("If it is true that large broadband providers have the ability to unfairly discriminate against small edge providers, it follows that large edge providers have the ability to unfairly discriminate against small broadband providers. The Commission must consider these two-sided relationships and marketplace realities instead of focusing only on imposing obligations on

(continued….)

that our rules will have both on small edge providers and on small broadband providers. The record also reflects the concerns of some commenters that enhanced transparency requirements will be particularly burdensome for smaller providers.[16] However, in the *2014 Open Internet NPRM* IRFA, we specifically sought comment on whether there are ways the Commission or industry associations could reduce burdens on broadband providers in complying with the proposed enhanced transparency rule through the use of a voluntary industry standardized glossary, or through the creation of a dashboard that permits easy comparison of the policies, procedures, and prices of various broadband providers throughout the country.[17]

16. NCTA and others also state that the IRFA was insufficiently specific considering the obligations and impact of the classification of broadband Internet access service as a Title II service.[18] We disagree with this contention as well. We believe that the IRFA was adequate and that the opportunity for parties, including small entities, to comment in a publicly accessible docket on the proposals contained within the *2014 Open Internet NPRM* was sufficient. The opportunity for comments, replies, and *ex parte* presentations more than adequately shaped the universe of potential obligations that could stem from our final rules. This was reflected in the overwhelming outpouring of comment on the proposals contained in the NPRM: including many comments by and on behalf of small entities.[19] The IRFA described that the *2014 Open Internet NPRM* sought comment on the best source of authority for protecting Internet openness, whether section 706, Title II of the Communications Act of 1934, as amended, and/or other sources of legal authority such as Title III of the Communications Act for wireless services.[20]

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broadband providers, especially small businesses."); Etsy Comments at 7 (arguing that a prohibition on commercially unreasonable transactions "creates an unacceptable level of uncertainty for small companies and will be too costly to enforce"); Gerald May Comments at 1 ("I am a small business owner in southern Alabama. I depend on the internet for the majority of my communications needs to include my web site, my email, and phone calls. Giving paid priority net service to large corporations or others that have limitless resources will put small companies like mine at a distinct disadvantage…All small and intermediate businesses will suffer.").

[16] *See, e.g.*, Adtran Comments at 43, ACA Comments at 32-39; Competitive Carrier Association (CCA) Comments at 8-9 ("Expanding the current disclosure requirements would also be particularly burdensome on smaller carriers); WISPA Comments at 15-16; WTA Comments at 8 ("WTA is very concerned about the increased costs and uncertain benefits of the proposed enhanced transparency requirements for smaller carriers and their customers."); Trade Associations Jan. 9, 2015 IRFA *Ex Parte* Letter at 4; Letter from Erin P. Fitzgerald, Assistant Regulatory Counsel, Rural Wireless Association, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 at 1 (filed Nov. 14, 2014) (RWA Nov. 14, 2014 *Ex Parte* Letter) ("While RWA members have developed procedures to comply with the Commission's 2010 transparency and disclosure rules, engaging in a similar endeavor to comply with new and/or more stringent rules would be costly and further strain rural carriers' limited resources."); WISPA Feb. 3, 2015 *Ex Parte* Letter at 8 ("To avoid the significant effects that would result from the Commission's proposed rules, the Commission should exempt small businesses from any new transparency and reporting obligations.").

[17] *2014 Open Internet NPRM*, 29 FCC Rcd at 5645, para. 51.

[18] *See* NCTA RFA Comments at 1, 3-4;

[19] *See generally* Etsy Comments; WTA Comments at 7- 9 (detailing concerns with the proposed enhanced transparency requirements); ACA Comments (advocating for the broadband provider businesses of ACA member companies, which total over 800 and represent a diverse mix of cable operators, rural telecommunications companies, and municipalities); CCA Comments; Forty-Three Providers' Feb 10, 2015 *Ex Parte* Letter at 2 (expressing concern over the economic impact Title II regulation will have on small and medium-sized ISPs).

[20] *2014 Open Internet NPRM*, 29 FCC Rcd at 5629, para. 8.

C. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

17. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[21] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[22] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[23] A small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[24]

1. Total Small Entities

18. Our proposed action, if implemented, may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[25] First, nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA.[26] In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[27] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[28] Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[29] Census Bureau data for 2007 indicate that there were 89,476 local governmental jurisdictions in the United States.[30] We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions."[31] Thus, we estimate that most governmental jurisdictions are small.

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[21] *See* 5 U.S.C. § 603(b)(3).

[22] *See* 5 U.S.C. § 601(6).

[23] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[24] *See* 15 U.S.C. § 632.

[25] *See* 5 U.S.C. §§ 601(3)-(6).

[26] *See* SBA, Office of Advocacy, *Frequently Asked Questions*, http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf (last accessed Jan. 25, 2015).

[27] 5 U.S.C. § 601(4).

[28] Indep. Sector, The New Nonprofit Almanac and Desk Reference (2010).

[29] 5 U.S.C. § 601(5).

[30] U.S. Census Bureau, Statistical Abstract of the United States: 2012, Section 8, page 267, tbl. 429, https://www.census.gov/compendia/statab/2012/tables/12s0429.pdf/ (data cited therein are from 2007).

[31] The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 local governmental organizations in 2007. If we assume that county, municipal, township, and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,095. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000. City and Town Totals Vintage: 2011 – U.S. Census Bureau, http://www.census.gov/popest/data/cities/totals/2011/index.html. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. Census Bureau, Statistical Abstract of the United States: 2012, Section 8,

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2. Broadband Internet Access Service Providers

19. The rules adopted in the Order apply to broadband Internet access service providers. The Economic Census places these firms, whose services might include Voice over Internet Protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,[32] which has an SBA small business size standard of 1,500 or fewer employees.[33] These are also labeled "broadband." The latter are within the category of All Other Telecommunications,[34] which has a size standard of annual receipts of $25 million or less.[35] These are labeled non-broadband. According to Census Bureau data for 2007, there were 3,188 firms in the first category, total, that operated for the entire year.[36] Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.[37] For the second category, the data show that 1,274 firms operated for the entire year.[38] Of those, 1,252 had annual receipts below $25 million per year. Consequently, we estimate that the majority of broadband Internet access service provider firms are small entities.

20. The broadband Internet access service provider industry has changed since this definition was introduced in 2007. The data cited above may therefore include entities that no longer provide broadband Internet access service, and may exclude entities that now provide such service. To ensure that this FRFA describes the universe of small entities that our action might affect, we discuss in turn several different types of entities that might be providing broadband Internet access service. We note that, although we have no specific information on the number of small entities that provide broadband Internet access service over unlicensed spectrum, we include these entities in our Final Regulatory Flexibility Analysis.

3. Wireline Providers

21. *Incumbent Local Exchange Carriers* (*Incumbent LECs*). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[39] According to Commission data,[40] 1,307 carriers reported that they were incumbent local exchange service

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page 267, tbl. 429, https://www.census.gov/compendia/statab/2012/tables/12s0429.pdf/ (data cited therein are from 2007).

[32] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012%20NAICS%20Search.

[33] 13 C.F.R. § 121.201, NAICS code 517110.

[34] U.S. Census Bureau, 2012 NAICS Definitions, "517919 All Other Telecommunications,", http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012%20NAICS%20Search.

[35] 13 C.F.R. § 121.201, NAICS code 517919.

[36] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517110" (issued Nov. 2010).

[37] *See id.*

[38] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 5179191 (rel. Nov. 19, 2010) (receipts size).

[39] 13 C.F.R. § 121.201, NAICS code 517110.

[40] Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, tbl. 5.3 (Sept. 2010) (*Trends in Telephone Service*).

providers.[41] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[42] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the Order.

22. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[43] According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[44] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.[45] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[46] In addition, 72 carriers have reported that they are Other Local Service Providers.[47] Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.[48] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and other local service providers are small entities that may be affected by rules adopted pursuant to the Order.

23. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[49] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[50] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

24. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[51] According to Commission data,[52] 359 carriers have

[41] *See Trends in Telephone Service* at tbl. 5.3.

[42] *See id*.

[43] 13 C.F.R. § 121.201, NAICS code 517110.

[44] *See Trends in Telephone Service* at tbl.5.3.

[45] *See id.*

[46] *See id*.

[47] *See id*.

[48] *See id*.

[49] 5 U.S.C. § 601(3).

[50] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, Federal Communications Commission (filed May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

[51] 13 C.F.R. § 121.201, NAICS code 517110.

[52] *Trends in Telephone Service*, tbl. 5.3.

reported that they are engaged in the provision of interexchange service. Of these, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by rules adopted pursuant to the Order.

25. *Operator Service Providers* (*OSPs*). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[53] According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees.[54] Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by rules adopted pursuant to the Order.

4. Wireless Providers – Fixed and Mobile

26. The broadband Internet access service provider category covered by this Order may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband Internet access service, the proposed actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

27. *Wireless Telecommunications Carriers (except Satellite*). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[55] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[56] For the category of Wireless Telecommunications Carriers (except Satellite), census data for 2007 show that there were 1,383 firms that operated for the entire year.[57] Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.[58] Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of wireless firms are small.

28. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross

[53] 13 C.F.R. § 121.201, NAICS code 517110.

[54] *Trends in Telephone Service*, tbl. 5.3.

[55] U.S. Census Bureau, 2012 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2012%20NAICS%20Search.

[56] 13 C.F.R. § 121.201, NAICS code 517210 (2012 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[57] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

[58] *See id.*

revenues of $15 million for each of the three preceding years.[59] The SBA has approved these definitions.[60]

29. *1670–1675 MHz Services*. This service can be used for fixed and mobile uses, except aeronautical mobile.[61] An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

30. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).[62] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[63] According to Commission data, 413 carriers reported that they were engaged in wireless telephony.[64] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[65] Therefore, a little less than one third of these entities can be considered small.

31. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[66] For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[67] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[68] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.[69] On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.[70] Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

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[59] *Amendment of the Commission's Rules to Establish Part 27*, *the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[60] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

[61] 47 C.F.R. § 2.106; *see generally* 47 C.F.R. §§ 27.1-27.70.

[62] 13 C.F.R. § 121.201, NAICS code 517210.

[63] *Id*.

[64] *Trends in Telephone Service*, tbl. 5.3.

[65] *Id.*

[66] *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*; WT Docket No. 96-59, GN Docket No. 90-314, Report and Order, 11 FCC Rcd 7824, 7850-52, paras. 57-60 (1996) (*PCS Report and Order*); *see also* 47 C.F.R. § 24.720(b).

[67] *See PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

[68] *See Alvarez Letter 1998*.

[69] *See Broadband PCS*, *D*, *E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

[70] *See C*, *D*, *E*, *and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F

(continued….)

32. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.[71] Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.[72] On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.[73] Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.[74] On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.[75] Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.[76]

33. *Specialized Mobile Radio Licenses.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[77] The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[78] The SBA has approved these small business size standards for the 900 MHz Service.[79] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[80] A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[81]

(Continued from previous page)
Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Fourth Report and Order, 13 FCC Rcd 15743, 15768, para. 46 (1998).

[71] *See C and F Block Broadband PCS Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 2339 (2001).

[72] *See Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58*, Public Notice, 20 FCC Rcd 3703 (2005).

[73] *See Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71*, Public Notice, 22 FCC Rcd 9247 (2007).

[74] *Id*.

[75] *See Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

[76] *Id.*

[77] 47 C.F.R. § 90.814(b)(1).

[78] *Id*.

[79] *See* Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed Aug. 10, 1999) (*Alvarez Letter 1999*).

[80] *See Correction to Public Notice DA 96-586 "FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,"* Public Notice, 18 FCC Rcd 18367 (WTB 1996).

[81] *See Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

34. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the $15 million size standard.[82] In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.[83] Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

35. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard.[84] We assume, for purposes of this analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

36. *Lower 700 MHz Band Licenses*. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[85] The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[86] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[87] Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—"entrepreneur"—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[88] The SBA approved these small size standards.[89] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.[90] A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.[91] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning

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[82] *See 800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced*, Public Notice, 15 FCC Rcd 17162 (2000).

[83] *See 800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (2000).

[84] *See generally* 13 C.F.R. § 121.201, NAICS code 517210.

[85] *See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, GN Docket No. 01-74, Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52–59 Report and Order*).

[86] *See id.* at 1087-88, para. 172.

[87] *See id*.

[88] *See id.*, at 1088, para. 173.

[89] *See Alvarez Letter 1999*.

[90] *See Lower 700 MHz Band Auction Closes*, Public Notice, 17 FCC Rcd 17272 (WTB 2002).

[91] *See id.*

bidders claimed entrepreneur status and won 154 licenses.[92] On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

37. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.[93] An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included, 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block.[94] Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years) won 49 licenses. Thirty three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) won 325 licenses.

38. *Upper 700 MHz Band Licenses*. In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.[95] On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.[96] The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

39. *700 MHz Guard Band Licensees*. In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[97] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[98] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[99] SBA approval of these definitions is not required.[100] An auction of 52 Major Economic Area licenses commenced on September

[92] *See id.*

[93] *Service Rules for the 698–746, 747–762 and 777–792 MHz Band; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule*, WT Docket Nos. 07-166, 06-169, 06-150, 03-264, 96-86, PS Docket No. 06-229, CC Docket No. 94-102, Second Report and Order, 22 FCC Rcd 15289, 15359 n. 434 (2007) (*700 MHz Second Report and Order*).

[94] *See Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

[95] *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

[96] *See Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

[97] *See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299 (2000) (*746–764 MHz Band Second Report and Order*).

[98] *See id.* at 5343, para. 108.

[99] *See id.*

[100] *See id.* at 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

6, 2000, and closed on September 21, 2000.[101] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[102]

40. *Air-Ground Radiotelephone Service*. The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), i.e., an entity employing no more than 1,500 persons.[103] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million.[104] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[105] These definitions were approved by the SBA.[106] In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

41. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3))*. For the AWS-1 bands,[107] the Commission has defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but proposes to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.[108]

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[101] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (WTB 2000).

[102] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

[103] 13 C.F.R. § 121.201, NAICS codes 517210.

[104] *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services*, *Biennial Regulatory Review—Amendment of Parts 1*, *22*, *and 90 of the Commission's Rules*, *Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service*, WT Docket Nos. 03-103, 05-42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28-42 (2005).

[105] *Id.*

[106] *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Sept. 19, 2005).

[107] The service is defined in section 90.1301 *et seq*. of the Commission's Rules, 47 C.F.R. § 90.1301 *et seq*.

[108] *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, Report and Order, 18 FCC Rcd 25162, Appx. B (2003), *modified by Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, Order on Reconsideration, 20 FCC Rcd 14058, Appx.

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42. *3650–3700 MHz band*. In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz). As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

43. *Fixed Microwave Services.* Microwave services include common carrier,[109] private-operational fixed,[110] and broadcast auxiliary radio services.[111] They also include the Local Multipoint Distribution Service (LMDS),[112] the Digital Electronic Message Service (DEMS),[113] and the 24 GHz Service,[114] where licensees can choose between common carrier and non-common carrier status.[115] At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 135 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the FRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons.[116] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[117] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

44. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel

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C (2005); *Service Rules for Advanced Wireless Services in the 1915–1920 MHz*, *1995–2000 MHz*, *2020–2025 MHz and 2175–2180 MHz Bands; Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket Nos. 04-356, 02-353, Notice of Proposed Rulemaking, 19 FCC Rcd 19263, Appx. B (2005); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, WT Docket No. 07-195, Notice of Proposed Rulemaking, 22 FCC Rcd 17035, Appx. (2007).

[109] *See* 47 C.F.R. Part 101, Subparts C and I.

[110] *See* 47 C.F.R. Part 101, Subparts C and H.

[111] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[112] *See* 47 C.F.R. Part 101, Subpart L.

[113] *See* 47 C.F.R. Part 101, Subpart G.

[114] *See id.*

[115] *See* 47 C.F.R. §§ 101.533, 101.1017.

[116] 13 C.F.R. § 121.201, NAICS code 517210.

[117] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[118] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[119] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[120] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

45. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[121] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[122] Auction 86 concluded in 2009 with the sale of 61 licenses.[123] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

46. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[124] Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired

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[118] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, MM Docket No. 94-131, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[119] 47 C.F.R. § 21.961(b)(1).

[120] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[121] Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, AU Docket No. 09-56, *Public Notice*, 24 FCC Rcd 8277 (2009).

[122] *Id.* at 8296 para. 73.

[123] Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13572 (2009).

[124] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[125] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts.[126] According to Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year.[127] Of this total, 948 firms had annual receipts of under $10 million, and 48 firms had receipts of $10 million or more but less than $25 million.[128] Thus, the majority of these firms can be considered small.

5. Satellite Service Providers

47. *Satellite Telecommunications Providers.* Two economic census categories address the satellite industry. The first category has a small business size standard of $30 million or less in average annual receipts, under SBA rules.[129] The second has a size standard of $30 million or less in annual receipts.[130]

48. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[131] For this category, Census Bureau data for 2007 show that there were a total of 570 firms that operated for the entire year.[132] Of this total, 530 firms had annual receipts of under $30 million, and 40 firms had receipts of over $30 million.[133] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

49. The second category of Other Telecommunications comprises, *inter alia*, "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems."[134] For this category, Census Bureau data for 2007 show that

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[125] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012.

[126] 13 C.F.R. § 121.201, NAICS code 517110.

[127] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Receipts by Enterprise Employment Size for the United States: 2007, NAICS code 517510 (rel. Nov. 19, 2010).

[128] *Id*.

[129] 13 C.F.R. § 121.201, NAICS Code 517410.

[130] 13 C.F.R. § 121.201, NAICS Code 517919.

[131] U.S. Census Bureau, 2012 NAICS Definitions, "517410 Satellite Telecommunications," http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517410&search=2012.

[132] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 517410 (rel. Nov. 19, 2010).

[133] *Id*.

[134] U.S. Census Bureau, 2012 NAICS Definitions, "517919 All Other Telecommunications," http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012.

there were a total of 1,274 firms that operated for the entire year.[135] Of this total, 1,252 had annual receipts below $25 million per year.[136] Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

6. Cable Service Providers

50. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

51. *Cable and Other Program Distributors*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[137] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts.[138] According to Census Bureau data for 2007, there were a total of 2,048 firms in this category that operated for the entire year.[139] Of this total, 1,393 firms had annual receipts of under $10 million, and 655 firms had receipts of $10 million or more.[140] Thus, the majority of these firms can be considered small.

52. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[141] Industry data shows that there were 1,141 cable companies at the end of June 2012.[142] Of this total, all but ten cable operators nationwide are small under this size standard.[143] In addition, under the Commission's rules, a "small

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[135] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 517410 (rel. Nov. 19, 2010).

[136] *Id*.

[137] U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012.

[138] 13 C.F.R. § 121.201, NAICS code 517110.

[139] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, "Establishment and Firm Size," NAICS code 517110 (rel. Nov. 19, 2010).

[140] *Id*.

[141] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[142] NCTA, Industry Data, Number of Cable Operating Companies (June 2012), http://www.ncta.com/Statistics.aspx (visited Sept. 28, 2012). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013) (*15th Annual Competition Report)*.

[143] *See* SNL Kagan, "Top Cable MSOs – 12/12 Q", http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc. We note that, when applied to an MVPD operator, under this size standard (i.e., 400,000 or fewer subscribers) all

(continued….)

system" is a cable system serving 15,000 or fewer subscribers.[144] Current Commission records show 4,945 cable systems nationwide.[145] Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

53. *Cable System Operators*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[146] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[147] Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.[148] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[149] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

7. Electric Power Generators, Transmitters, and Distributors

54. *Electric Power Generators*, *Transmitters*, *and Distributors.* The Census Bureau defines an industry group comprised of "establishments, primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[150] The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."[151] Census Bureau data for 2007 show

(Continued from previous page)
but 14 MVPD operators would be considered small. *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data. The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, para. 37 (2011) (*CALM Act Report and Order*) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[144] 47 C.F.R. § 76.901(c).

[145] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

[146] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn.1-3.

[147] 47 C.F.R. § 76.901(f); *see FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

[148] *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data.

[149] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[150] U.S. Census Bureau, 2002 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution," http://www.census.gov/epcd/naics02/def/NDEF221.HTM (last visited Oct. 21, 2009).

[151] 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, n. 1.

that there were 1,174 firms that operated for the entire year in this category.[152] Of these firms, 50 had 1,000 employees or more, and 1,124 had fewer than 1,000 employees.[153] Based on this data, a majority of these firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

55. The Order clarifies and adopts certain incremental enhancements to the existing transparency rule, which was adopted in 2010, and will continue to require providers of broadband Internet access services to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[154] We summarize below the record keeping and reporting obligations of the accompanying Order. Additional information on each of these requirements can be found in the Order.

56. First, we clarify that all of the pieces of information described in paragraphs 56 and 98 of the 2010 *Open Internet Order* have been required as part of the current transparency rule, and we will continue to require the information as part of our enhanced rule. The only exception is the requirement to disclose "typical frequency of congestion," which we no longer require since it is superseded by more precise disclosures already required by the rule, such as actual performance. Also, the requirement that all disclosures made by a broadband provider be accurate includes the need to maintain the accuracy of these disclosures.

57. Second, we enhance and describe in more specific terms than in 2010 the information to be provided in disclosing commercial terms, network performance characteristics, and network practices. For example, in meeting the existing requirement to disclose "actual performance," providers of broadband Internet access services will be required to report packet loss, in addition to the already required metrics of speed and latency.

58. Third, we require that providers directly notify end users if their particular use of a network will trigger a network practice, based on a user's demand during more than the period of congestion, that is likely to have a significant impact on the end user's use of the service. The purpose of such notification is to provide the affected end users with sufficient information and time to consider adjusting their usage to avoid application of the practice.

59. Fourth, we establish a voluntary safe harbor that providers may use in meeting the existing requirement to make transparency disclosures in a format that meets the needs of end users. The safe harbor consists of the use of a standalone disclosure targeted to end users. Based on concerns raised in the record by smaller providers of broadband Internet access service, however, we do not at this time require use of this standalone format, and instead have submitted this issue to the Consumer Advisory Committee for further consideration.[155]

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[152] *See* U.S. Census Bureau, American FactFinder, Utilities: Subject Series - Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the United States: 2007, NAICS code 221122, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_22SSSZ5&prodType=table (last visited February 4, 2014).

[153] *See id*.

[154] 8 C.F.R. § 8.3.

[155] We note that although we have sought comment on what format would be most effective, the record is lacking on specific details as to how such a disclosure should be formatted.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

60. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[156] We have considered all of these factors subsequent to receiving substantive comments from the public and potentially affected entities. The Commission has considered the economic impact on small entities, as identified in comments filed in response to the *2014 Open Internet NPRM* and its IRFA, in reaching its final conclusions and taking action in this proceeding.

61. We considered, for example, a variety of approaches to deal with paid prioritization, and we determined that a flat ban on paid prioritization has advantages over alternative approaches identified in the record. We note that this approach relieves small edge providers, innovators, and consumers of the burden of detecting and challenging instances of harmful paid prioritization. Related to this issue, smaller edge providers expressed concern that they do not have the resources to fight against commercially unreasonable practices, which could result in an unfair playing field before the Commission.[157] Still others argued that the standard would permit paid prioritization, which could disadvantage smaller entities and individuals.[158] Given these concerns, we declined to adopt our proposed rule to prohibit practices that are not commercially reasonable.[159]

62. With regard to our no-unreasonable interference/disadvantage standard, we were mindful that vague or unclear regulatory requirements could stymie rather than encourage innovation, and found that the approach we adopted provides sufficient certainty and guidance to consumers, broadband providers, and edge providers—particularly smaller entities that might lack experience dealing with broadband providers—while also allowing parties flexibility in developing new services.[160]

63. We found our existing informal complaint rule offers an accessible and effective mechanism for parties—including consumers and small businesses with limited resources—to report possible noncompliance with our open Internet rules without being subject to burdensome evidentiary or

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[156] 5 U.S.C. § 603(c).

[157] *See, e.g.*, Tumblr Reply at 10 ("Tumblr cannot afford to engage in what would likely be multi-year challenges against the biggest broadband providers, with large legal teams experienced in telecommunications law, simply to secure access for its users equal to that of its current, and future, competitors with deeper resources."); Etsy Comments at 7 (arguing that a prohibition on commercially unreasonable transactions "creates an unacceptable level of uncertainty for small companies and will be too costly to enforce"); Reddit Comments at 8; Engine Advocacy Comments at 15; CodeCombat Comments at 7.

[158] *See, e.g.*, Illinois and NY Comments at 5-8; CCIA Reply at 17; i2Coaltion Comments at 10 ("Start-ups that require priority service may not be able to bring their product to market without significant outside investment and investors will be affected by the increased equity needs of entrepreneurs."); AAJC Comments at 5 ("A commercially reasonable standard where certain forms of prioritization are allowed benefits those with financial resources. Such prioritization would negatively impact many minority entrepreneurs who come from historically disadvantaged communities with lower incomes and educational opportunities . . . .").

[159] Based on the record before us, we were persuaded that adopting a legal standard prohibiting commercially unreasonable practices is not the most effective or appropriate approach for protecting and promoting an open Internet. *See supra* Section III.C.2.c

[160] *See supra* Section. III.C.2.a.

pleading requirements.[161] Accordingly we declined to adopt proposals modifying the existing standard.[162]

64. We also decline to adopt arbitration procedures or to mandate arbitration for parties to open Internet complaint proceedings. Under the rules adopted today, parties are still free to engage in mediation and outside arbitration to settle their open Internet disputes, but alternative dispute resolution will not be required. We noted commenters' concerns that mandatory arbitration, in particular, may more frequently benefit the party with more resources and more understanding of dispute procedure, and therefore should not be adopted.[163]

65. In formulating the enhanced disclosure requirements, we crafted rules that strike a balance between compliance burdens to industry and utility for end-user consumers, edge providers, and the Internet community. We considered several additional metrics contemplated in the NPRM, but ultimately declined to require their disclosure in the Order, concluding that the adopted enhancements to transparency were sufficient to protect consumers.[164] We also recognized with respect to the nature of disclosures that there are differences between fixed and mobile broadband networks.

66. The record reflects the concerns of some commenters that enhanced transparency requirements will be particularly burdensome for smaller providers.[165] ACA, for example, suggests that smaller providers be exempted from the provision of such disclosures.[166] ACA states that its member companies are complying with the current transparency requirements, which "strike the right balance between edge provider and consumer needs for pertinent information and the need to provide ISPs with some flexibility in how they disclose pertinent information."[167] We believe that the enhanced requirements adopted herein are incremental in nature, but nevertheless necessary to provide end-user consumers, edge providers, and the Internet community with better information about the critical network

[161] *See, e.g.*, NetAccess Futures Comments at 28 ("'Lightweight' procedures and structures like . . . improved informal complaints processes . . . appear to be preferable to the Commission's existing 'heavyweight' enforcement and dispute resolution processes."); WISPA Comments at 35-37 (advocating for use of the informal complaint process).

[162] *See supra* Section III.E.2.b.

[163] *See, e.g.*, AAJC Comments at 1 (noting that "[i]n most cases, consumers must pay filing fees and the arbitrator's costs, which can amount to thousands of dollars," and the provider can select the arbitration location, making the process even costlier; further noting that arbitrated decisions are not reviewable and often not public, precluding consumers from uncovering potential biases in the process); Public Citizen and NACA Comments at 1-2; *see also supra* Section III.E.3.b.

[164] For example, we do not require disclosure of the source of congestion due to the difficulty in determining the source, and the corresponding additional burden in requiring that information to be disclosed.

[165] *See, e.g.*, ACA Comments at 32-39; Competitive Carrier Association (CCA) Comments at 8-9 ("Expanding the current disclosure requirements would also be particularly burdensome on smaller carriers); WISPA Comments at 15-16; WTA Comments at 8 ("WTA is very concerned about the increased costs and uncertain benefits of the proposed enhanced transparency requirements for smaller carriers and their customers."); Letter from Erin P. Fitzgerald, Assistant Regulatory Counsel, Rural Wireless Association, Inc. to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 at 1 (filed Nov. 14, 2014) (RWA Nov. 14, 2014 *Ex Parte* Letter) ("While RWA members have developed procedures to comply with the Commission's 2010 transparency and disclosure rules,[footnote omitted] engaging in a similar endeavor to comply with new and/or more stringent rules would be costly and further strain rural carriers' limited resources."); Letter from Stephen E. Coran, Counsel to the Wireless Internet Service Providers Association to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 at 8 (filed Feb. 3, 2015) ("To avoid the significant effects that would result from the Commission's proposed rules, the Commission should exempt small businesses from any new transparency and reporting obligations.").

[166] *See* ACA Comments at 39-40 ("any enhanced disclosure rule regarding network congestion . . . should exclude 'small providers'").

[167] Letter from Barbara Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 6 (filed Feb. 2, 2015) (ACA Feb. 2, 2015 *Ex Parte* Letter).

performance metrics, practices, and commercial terms that have a direct impact on their use of the network. Customers of small broadband providers have an equal need for this information. However, out of an abundance of caution, we grant a temporary exemption for small providers, with the potential for that exemption to become permanent.[168] We note that all providers of broadband Internet access service, including small providers, remain subject to the existing transparency rule adopted in 2010.

67. To ensure we have crafted rules that strike a balance between utility for consumers and compliance burdens for industry including smaller providers, we took certain additional important measures. For example, Commission staff continues to refine the mobile MBA program, which could at the appropriate time be declared a safe harbor for mobile broadband providers.[169] In addition, we have declined to require certain disclosures proposed in the *2014 Open Internet NPRM* such as the source of congestion, packet corruption, and jitter in recognition of commenter concerns with the benefits and difficulty of making these particular disclosures.[170] Noting commenter concerns, we also decline to mandate separate tailored disclosures for different audiences (e.g. end users and edge providers) at this time.[171] Lastly, we note that many of the enhanced disclosures specified in the Order may have been required under the current transparency rule. As a result, we believe the enhanced requirements make more explicit many of the existing requirements rather than imposing new regulatory burdens on providers that are in compliance with our current rule.

F. Report to Congress

68. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[172] In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[173]

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[168] The Order adopts a temporary exemption from the enhancements to the transparency rule for those providers of broadband Internet access service (whether fixed or mobile) with 100,000 or fewer broadband subscribers as per their most recent form 477, aggregated over all the providers' affiliates.

[169] At a minimum, this would give small providers and others a way to ensure that they are in compliance with our rules.

[170] *See, e.g.*, Forty-Three Providers' Feb 10, 2015 *Ex Parte* Letter at 2 ("[A]doption of the proposed enhanced transparency requirements, including . . . real-time congestion on our networks, could be significantly burdensome for providers of our size without providing any real benefit to edge providers or consumers."); Charter Comments at 27 ("Because ISPs can monitor only a portion of the transmission path between a consumer and an edge provider, the information that could be collected would be of limited usefulness and inequitably burden the ISP relative to other potential sources of congestion."); WISPA Reply at 9 ("Without question, small broadband providers would be forced to incur increased costs to comply with rules that would require multiple disclosures and detailed statements concerning congestion and reporting obligations."); WTA Comments at 8 ("WTA is very concerned about the increased costs and uncertain benefits of the proposed enhanced transparency requirements for small carriers and their customers. For example, the monitoring and test equipment necessary to measure and report on a frequent or constant basis . . . latency, packet loss, packet corruption and/or jitter on a RLEC or other small provider's network can cost as much as the underlying data transmission equipment deployed to provide the broadband service.").

[171] *See, e.g.*, ACA Feb. 13, 2015 *Ex Parte* Letter at 2 (expressing concern with "proposals to require detailed Open Internet disclosures tailored to the needs of edge providers and the lack of demonstrable benefits that would accrue from such reporting"); ACA Jan. 28, 2015*Ex Parte* Letter at 4 (explaining that disclosures tailored to edge providers "would require small ISPs, who manage their own networks and may only have a handful of network operators, engineers, and head end staff to make onerous expenditures of both personnel hours and financial resources"); Bright House Comments at 14 (questioning "the feasibility of creating disclosures tailored to the varied and potentially unique needs of the hundreds of such providers, particularly with no reciprocal obligation").

[172] 5 U.S.C. § 801(a)(1)(A).

[173] *See id*. § 604(b).

STATEMENT OF
CHAIRMAN TOM WHEELER

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

For over a decade, the Commission has endeavored to protect and promote the open Internet. FCC Chairs and Commissioners, Republican and Democrat alike, have embraced the importance of the open Internet, and the need to protect and promote that openness. Today is the culmination of that effort, as we adopt the strongest possible open Internet protections.

Last May, the Commission proposed a set of open Internet protections and, at the same time, asked an extensive series of questions about that proposal and about alternative approaches for protecting the open Internet. We asked about the benefits and drawbacks of different approaches, different rule formulations, and different legal theories. We asked the public to weigh in, and they responded like never before.

We heard from startups and world-leading tech companies. We heard from ISPs, large and small. We heard from public-interest groups and public-policy think tanks. We heard from Members of Congress, and, yes, the President. Most important, we heard from nearly 4 million Americans who overwhelmingly spoke up in favor of preserving a free and open Internet.

We listened. We learned. And we adjusted our approach based on the public record. In the process we saw a graphic example of why open and unfettered communications are essential to freedom of expression in the 21st century.

I am incredibly proud of the process the Commission has run in developing today's historic open Internet protections. I say that not just as the head of this agency, but as a U.S. citizen. Today's Open Internet Order is a shining example of American democracy at work.

It should not be surprising the public engaged like never before, because the stakes of the debate before the Commission have never been higher.

Broadband networks are the most powerful and pervasive connectivity in history. Broadband is reshaping our economy and recasting the patterns of our lives. Every day, we rely on high-speed connectivity to do our jobs, access entertainment, keep up with the news, express our views, and stay in touch with friends and family.

There are three simple keys to our broadband future. Broadband networks must be fast. Broadband networks must be fair. Broadband networks must be open.

We know from the history of previous networks that both human nature and economic opportunism act to encourage network owners to become gatekeepers that prioritize their interests above the interests of their users. As the D.C. Circuit observed in the Verizon decision and as the public record affirms, broadband providers have both the economic incentive and the technological capability to abuse their gatekeeper position.

Our challenge is to achieve two equally important goals: ensure incentives for private investment in broadband infrastructure so the U.S. has world-leading networks and ensure that those networks are fast, fair, and open for all Americans.

The Open Internet Order achieves those goals, giving consumers, innovators, and entrepreneurs the protections they deserve, while providing certainty for broadband providers and the online marketplace.

The Open Internet Order reclassifies broadband Internet access as a "telecommunications service" under Title II of the Communications Act while simultaneously foregoing utility-style, burdensome regulation that would harm investment. This modernized Title II will ensure the FCC can rely on the strongest legal foundation to preserve and protect an open Internet.

Allow me to emphasize that word "modernized." We have heard endless repetition of the talking point that "Title II is old-style, 1930's monopoly regulation." It's a good sound bite, but it is misleading when used to describe the modernized version of Title II in this Order.

Today's Order will also use the significant powers in Section 706, not as a substitute but as a complement. This one-two punch applies both Title II, as well as Section 706, to protect broadband Internet access. It is the FCC using all of the tools in its toolbox to protect innovators and consumers.

Building on this strong legal foundation, the Open Internet Order will:

- Ban Paid Prioritization: "Fast lanes" will not divide the Internet into "haves" and "have-nots."
- Ban Blocking: Consumers must get what they pay for – unfettered access to any lawful content on the Internet.
- Ban Throttling: Degrading access to legal content and services can have the same effect as blocking and will not be permitted.

These enforceable, bright-line rules assure the rights of Internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone's permission.

The Order also includes a general conduct rule that can be used to stop new and novel threats to the Internet. That means there will be basic ground rules and a referee on the field to enforce them. If an action hurts consumers, competition, or innovation, the FCC will have the authority to throw the flag.

Under the Order we adopt today, open Internet protections would – for the first time – apply equally to both fixed and mobile networks. Mobile wireless networks account for 55 percent of Internet usage. We cannot have two sets of Internet protections – one fixed and one mobile – when the difference is increasingly anachronistic to consumers.

Today's Order also asserts jurisdiction over interconnection. The core principle is the Internet must remain open. We will protect this on the last mile and at the point of interconnection.

We also ensure that network operators continue to have the incentives they need to invest in their networks. Let me be clear, the FCC will not impose "utility style" regulation. We forbear from sections of Title II that pose a meaningful threat to network investment, and over 700 provisions of the FCC's rules. That means no rate regulation, no filing of tariffs, and no network unbundling. During the 22 years that wireless voice has been regulated under a light-touch Title II like we propose today, there has never been concern about the ability of wireless companies to price competitively, flexibly, or quickly, or their ability to achieve a return on their investment.

The American people reasonably expect and deserve an Internet that is fast, fair, and open. Today they get what they deserve: strong, enforceable rules that will ensure the Internet remains open, now and in the future.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

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

Following years of vigorous debate, the United States adopted the Bill of Rights in 1791. The Framers recognized that basic freedoms, as enshrined in the first ten amendments to the Constitution, were fundamental to a free and open democratic society.

James Madison gave life to the First Amendment in a scant 45 words, which are fundamental to the spirit of this great nation. Almost two centuries later, Justice William Brennan would write in the historic 1964 *New York Times v. Sullivan* decision that "debate on public issues. . . [should be] . . . uninhibited, robust and wide-open."[1] I believe President Madison and Justice Brennan would be particularly proud of the rigorous, robust, and unfettered debate that has led us to this historic moment. … And what a moment it is.

I believe the Framers would be pleased to see these principles embodied in a platform that has become such an important part of our lives. I also believe that they never envisioned a government that would include the input and leadership of women, people of color, and immigrants, or that there would be such an open process that would enable more than four million citizens to have a direct conversation with their government. They would be extremely amazed, I venture to say, because even we are amazed.

So here we are, 224 years later, at a pivotal fork in the road, poised to preserve those very same virtues of a democratic society – free speech, freedom of religion, a free press, freedom of assembly and a functioning free market.

As we look around the world we see foreign governments blocking access to websites including social media -- in sum, curtailing free speech. There are countries where it is routine for governments, not the consumer, to determine the type of websites and content that can be accessed by its citizens. I am proud to be able to say that we are not among them.

Absent the rules we adopt today, however, any Internet Service Provider (ISP) has the liberty to do just that. They would be free to block, throttle, favor or discriminate against traffic or extract tolls from any user for any reason or for no reason at all.

This is more than a theoretical exercise. Providers here in the United States have, in fact, blocked applications on mobile devices, which not only hampers free expression but also restricts competition and innovation by allowing companies, not the consumer, to pick winners and losers.

As many of you know, this is not my first Open Internet rodeo. While I did vote to approve the 2010 rules, it was no secret that I preferred a different path than the one the Commission ultimately adopted. Specifically, I preferred: (1) Title II with forbearance, (2) mobile parity, (3) a ban on paid prioritization, and (4) preventing the specialized services exemption from becoming a loophole.

So, I am sincerely grateful to the Chairman for his willingness to work with my office to better ensure that this Order strikes the right balance and is positioned to provide us with strong, legally sustainable rules. This is our third bite at the apple and we must get it right.

Today, we are here to answer a few simple questions:

[1] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

- Who determines how you use the Internet?
- Who decides what content you can view and when?
- Should there be a single Internet or fast lanes and slow lanes?
- Should Internet service providers be left free to slow down or throttle certain applications or content as they see fit?
- Should your access to the Internet on your mobile device have the same protections as your fixed device at home?

These questions, for me, get to the essence of the Open Internet debate: How do we continue to ensure that consumers have the tools they need to decide based on their own user experience. The consumer … not me, not the government and not the industry, but you, the consumer, makes these decisions.

Keeping in touch with your loved one overseas; interacting with your health care provider, even if you are miles away from the closest medical facility; enrolling in courses online to improve your educational, professional or entrepreneurial potential without worrying whether the university paid for a fast lane to ensure that the lecture won't buffer for hours because the quality has been degraded or throttled; not wondering if that business affiliated with your Internet Service Provider is getting preferential treatment over that start up you worked so hard to establish.

We are here so that teachers don't have to give a second thought about assigning homework that can only be researched online because they are sure that their students are free to access any lawful website, and that such websites won't load at dial-up speed. And, today, we are answering the calls of more than four million commenters who raised their voices and made a difference through civic, and sometimes not so civil, discourse.

We are here to ensure that every American has the ability to communicate by their preferred means over their chosen platform, because as one of our greatest civil rights pioneers, Representative John Lewis, said so eloquently: "If we had the Internet during the movement, we could have done more, much more, to bring people together from all around the country, to organize and work together, to build the beloved community. That is why it is so important for us to protect the Internet. Every voice matters and we cannot let the interests of profit silence the voices of those pursuing human dignity."

We are here to ensure that there is only one Internet where all applications, new products, ideas and points of view, have an equal chance of being seen and heard. We are here because we want to enable those with deep pockets, as well as those with empty pockets, the same opportunities to succeed.

There are many aspects of this item that I am particularly pleased to support. And, while time and stamina prohibit me from naming them all, I do want to highlight a few.

Mobile Parity. Users of mobile devices should not be relegated to a second class Internet. We know that many low-income Americans rely heavily on their mobile device and, for some, that mobile device is their only access to the Internet. They need and deserve a robust experience on par with their wired peers. So again, I thank the Chairman for ensuring equality and erasing the mobile versus fixed distinction.

*No Blocking, No Throttling, No Paid Prioritization***.** The item contains strong, clear rules to ensure that all content, all applications and all bits are treated equally. These are all essential to the free market and this is pro-competitive.

No Loopholes. We must also ensure that companies are not able to take actions that circumvent or undermine the Open Internet rules, whether through exemptions in the definition or at the point of interconnection. And despite a flurry of press reports earlier this week, I would never advocate for any policy that undermines FCC oversight or enforcement of any open Internet protections including interconnection. I'm pleased that the Order commits to monitor Internet traffic exchange arrangements, and enables the FCC to intervene, if appropriate.

Promoting Affordable Access. I have also been vocal about my call to modernize the Lifeline program, which has been stuck in an MC Hammer, parachute-pants time warp since 1985. The Order enables the FCC to support broadband as a separate service, which will truly help low-income communities break out of digital darkness.

In the seemingly endless meetings with stakeholders, my office has heard concerns from many sides. To some, the item does not go far enough, others want a ban on "access fees," and there are those who advocate a ban on zero rating, and others, who feel that it goes too far, whether on the scope of forbearance or the focus on interconnection.

We worked closely with the Chairman's office to strike an appropriate balance and yes, it is true, that significant changes were made at the request of my office, including the elimination of the sender-side classification. I firmly believe these edits have strengthened this item. Reports that this weakens our legal authority over interconnection are completely inaccurate.

But it should come as no surprise that, with any item in excess of 300 pages, there are a few issues I would have decided differently.

First, I would have preferred to readopt the unreasonable discrimination and reasonable network management rules from 2010.

Second, I think we should tread lightly when it comes to preempting the states' ability to adopt and implement their own universal service funds. Not doing so could put a strain on the tremendous federal-state partnership that I have worked so hard to create, and state universal service funds are completely distinct from any federal program.

Finally, I have been struck by how much rhetoric in this proceeding is completely divorced from reality. While as a rule, I generally refrain from responding, in this case, I must address concerns about rate regulation.

Many of you know that reforming the inmate calling service regime has been a priority for me. Despite clear legal authority, the FCC dragged its feet for over a decade, while families, friends, lawyers, and clergy, paid egregiously high and patently unlawful fees to make a simple phone call to and from inmate facilities.

I bring this up today because the inmate calling proceeding represents a prime example of how the FCC resisted rate regulation for years, even where consumers were subjected to blatantly unreasonable charges by providers with a clear monopoly, where severe costs to society were evident, and where there was a clear case of market failure. So, for those in a panic about rate regulation, there are millions who can testify to how high the bar is when it comes to the FCC intervening on rates and charges.

And I repeat this challenge to anyone willing to accept it: Highlight examples, where the FCC has ruled that a rate is unreasonable in a context other than inmate calling or a tariff investigation over the last decade. To date, no one has come forth with any examples, and that in and of itself is telling.

And, lest we forget, over 700 small broadband providers in rural America offer broadband Internet access pursuant to the full panoply of Title II regulation. They contribute to universal service and, amazingly, the sky has not fallen and things are okay. Indeed, such carriers advocated that the Open Internet proceeding not change their status and require a lighter touch Title II.[2] Their retail broadband Internet access rates are not regulated, and I am unaware of any stream of class action lawsuits. Even so, the item does assert primary jurisdiction to reduce such concerns.

Mr. Chairman, today I support this item because I believe it provides the strong protections we need and balances the concerns raised by stakeholders, large and small.

The Order we are poised to adopt is not the product of some artificial life force. A dedicated team from the Wireline Competition and Wireless Telecommunications Bureaus and Office of General Counsel worked extremely hard on this significant item. There are too many people to thank, but I would be remiss if I didn't mention Jonathan Sallet, Stephanie Weiner, Matt DelNero, Claude Aiken, Marcus Maher, Roger Sherman, Jim Schlichting, Joel Taubenblatt, and Michael Janson. And, of course, I must thank my legal advisors, Louis Peraertz and Rebekah Goodheart for their hard work and dedication. Last, but not least, I want to thank you, the American people – more than four million strong, for your role in framing this historic Order. Today, we better enable millions to tell their stories, reach their potential and realize their American ideals.

[2] *See* Letter from Michael R. Romano, Senior Vice President Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28; CC Docket No. 96-45; WC Docket No. 06-122, at 2 (Feb. 13, 2015) ("NTCA and NECA urged the Commission to ensure that small rural telcos such as those within their respective memberships can continue to avail themselves of the option to tariff broadband-capable transmission services that underpin retail broadband Internet access services.").

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

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

Our Internet economy is the envy of the world. We invented it. The applications economy began here—on our shores. The broadband below us and the airwaves all around us deliver its collective might to our homes and businesses in communities across the country. What produced this dynamic engine of entrepreneurship and experimentation is a foundation of openness. Sustaining what has made us innovative, fierce, and creative should not be a choice—it should be an obligation.

We also have a duty—a duty to protect what has made the Internet the most dynamic platform for free speech ever invented. It is our printing press. It is our town square. It is our individual soapbox—and our shared platform for opportunity.

That is why open Internet policies matter. That is why I support network neutrality.

We cannot have a two-tiered Internet with fast lanes that speed the traffic of the privileged and leave the rest of us lagging behind. We cannot have gatekeepers who tell us what we can and cannot do and where we can and cannot go online. And we do not need blocking, throttling, and paid prioritization schemes that undermine the Internet as we know it.

For these reasons, I support Chairman Wheeler's efforts and rules today. They use our existing statutory tools, including Title II authority, to put back in place basic open Internet policies that we all rely on but last year our courts took away. The result honors the creative, collaborative, and open Internet envisioned by those who were there at the start, including the legendary Sir Tim Berners-Lee, the creator of the World Wide Web—whom we have had the privilege of hearing from today.

This is a big deal. What is also a big deal is 4 million voices. Four million Americans wrote this agency to make known their ideas, thoughts, and deeply-held opinions about Internet openness. They lit up our phone lines, clogged our e-mail in-boxes, and jammed our online comment system. That might be messy, but whatever our disagreements on network neutrality are, I hope we can agree that's democracy in action and something we can all support.

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

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

Americans love the free and open Internet. We relish our freedom to speak, to post, to rally, to learn, to listen, to watch, and to connect online. The Internet has become a powerful force for freedom, both at home and abroad. So it is sad to witness the FCC's unprecedented attempt to replace that freedom with government control.

It shouldn't be this way. For twenty years, there's been a bipartisan consensus in favor of a free and open Internet. A Republican Congress and a Democratic President enshrined in the Telecommunications Act of 1996 the principle that the Internet should be a "vibrant and competitive free market . . . unfettered by Federal or State regulation."[1] And dating back to the Clinton Administration, every FCC Chairman—Republican and Democrat—has let the Internet grow free from utility-style regulation. The result? The Internet has been an amazing success story, changing our lives and the world in ways that would have been unimaginable when the 1996 Act was passed.

But today, the FCC abandons those policies. It reclassifies broadband Internet access service as a Title II telecommunications service. It seizes unilateral authority to regulate Internet conduct, to direct where Internet service providers put their investments, and to determine what service plans will be available to the American public. This is not only a radical departure from the bipartisan, market-oriented policies that have served us so well for the last two decades. It is also an about-face from the proposals the FCC made just last May.

So why is the FCC changing course? Why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so.

On November 10, President Obama asked the FCC to implement his plan for regulating the Internet, one that favors government regulation over marketplace competition.[2] As has been widely reported in the press, the FCC has been scrambling ever since to figure out a way to do just that.

The courts will ultimately decide this *Order*'s fate. And I doubt they will countenance this unlawful power grab. Litigants are already lawyering up to seek judicial review of these new rules. Given the *Order*'s many glaring legal flaws, they will have plenty of fodder.

But if this *Order* manages to survive judicial review, these will be the consequences: higher broadband prices, slower speeds, less broadband deployment, less innovation, and fewer options for American consumers. To paraphrase Ronald Reagan, President Obama's plan to regulate the Internet isn't the solution to a problem. His plan is the problem.

In short, because this *Order* imposes intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have, I dissent.

I.

The Commission's decision to adopt President Obama's plan marks a monumental shift toward government control of the Internet. It gives the FCC the power to micromanage virtually every aspect of how the Internet works. It's an overreach that will let a Washington bureaucracy, and not the American people, decide the future of the online world.

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[1] Communications Act of 1934, as amended, § 230(b)(2).

[2] The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

One facet of that control is rate regulation. For the first time, the FCC will regulate the rates that Internet service providers may charge and will set a price of zero for certain commercial agreements.[3] And the *Order* goes out of its way to reject calls to forbear from section 201's authorization of rate regulation,[4] thus making clear that the FCC will have the authority to determine the appropriate rates and charges for service.[5] The *Order* also expressly invites parties to file such complaints with the Commission.[6] A government agency deciding whether a rate is lawful is the very definition of rate regulation.

As a consequence, if the FCC decides that it does not like how broadband is being priced, Internet service providers may soon face admonishments, citations,[7] notices of violation,[8] notices of apparent liability,[9] monetary forfeitures and refunds,[10] cease and desist orders,[11] revocations,[12] and even referrals for criminal prosecution.[13] The only limit on the FCC's discretion to regulate rates is its own determination of whether rates are "just and reasonable," which isn't much of a restriction at all.

Although the *Order* plainly regulates rates, the plan takes pains to claim that it is not imposing further "*ex ante* rate regulation."[14] Of course, that concedes that the new regulatory regime will involve *ex post* rate regulation. But even the agency's suggestion that it today "cannot . . . envision" *ex ante* rate regulations "in this context" says nothing of what a future Commission—perhaps this very Commission in a few months or years—could envision.[15] Indeed, the FCC grants forbearance against *ex ante* rate regulation but then turns around and says there's no apparent "incremental benefit" to doing so since the Commission could just reverse that decision in any future rulemaking.[16]

Indeed, it's actually quite easy to envision this same Commission deciding to discard the predictive judgment that *ex ante* rate regulation is unnecessary. After all, the Commission in this very *Order* and without explanation junks the agency's 2002 predictive judgment that intermodal broadband competition would develop.[17] The short shrift the *Order* gives to our past bodes poorly for our future—for why should anyone trust these latest promises at all?

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[3] The *Order* bans paid prioritization, and as the *Verizon* court put it: "In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service." *Verizon v. FCC*, 740 F.3d 623, 658 (D.C. Cir. 2014). Setting a prospective rate of zero for a service is the very definition of *ex ante* rate regulation.

[4] *Order* at paras. 449–50.

[5] Communications Act § 201(a), (b).

[6] *Order* at para. 455.

[7] *See* Communications Act § 503(b)(5).

[8] *See* 47 C.F.R. § 1.89.

[9] *See* Communications Act § 503(b)(4).

[10] *See* Communications Act § 503(b).

[11] *See* Communications Act § 312(b).

[12] *See* 47 C.F.R. § 1.91.

[13] *See* Communications Act § 501.

[14] *Order* at paras. 441, 443, 447, 451, 452.

[15] *Order* at para. 452; *see Order* at para. 451 ("[W]e do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future").

[16] *Order* at note 1352.

[17] *Order* at para. 330.

Just as pernicious is the FCC's new "Internet conduct" standard, a standard that gives the FCC a roving mandate to review business models and upend pricing plans that benefit consumers.[18] Usage-based pricing plans and sponsored data plans are the current targets. So if a company doesn't want to offer an expensive, unlimited data plan, it could find itself in the FCC's cross hairs.[19]

Consider that activists promoting this rule had previously targeted neither AT&T nor Verizon with their first net-neutrality complaint but MetroPCS—an upstart competitor with a single-digit market share and not an ounce of market power. Its crime? Unlimited YouTube. MetroPCS offered a $40-per-month plan with unlimited talk, text, Web browsing and YouTube streaming. The company's strategy was to entice customers to switch from the four national carriers or to upgrade to its newly built 4G Long Term Evolution network. Whatever the benefits of MetroPCS's approach, activists have said "there can be no compromise."[20]

Or take T-Mobile's Music Freedom program, which the Internet conduct rule puts on the chopping block. The "Un-carrier" lets consumers stream as much online music as they want without charging it against their monthly data allowance. Consumers love it, judging by T-Mobile's rapid subscriber growth. Yet Music Freedom too stands on the brink of a ban—with the FCC "mindful of the concerns raised in the record that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on different service plans."[21]

Affordable, prepaid plans are now also suspect. These plans have enabled millions of low-income households to have mobile service. And yet the *Order* plays up the "concern that such practices can potentially be used by broadband providers to disadvantage over-the-top providers."[22] In other words, these plans aren't the all-you-can-eat plans endorsed by the FCC, and so they, too, may violate the Internet conduct standard.

Our standard should be simple: If you like your current service plan, you should be able to keep your current service plan. The FCC shouldn't take it away from you. Indeed, economists have long understood innovative business models like these are good for consumers because they give them more choices and lower prices. To apply outmoded economic thinking to the Internet marketplace would just hurt consumers, especially the middle-class and low-income Americans who are the biggest beneficiaries of these plans.

In all, the FCC will have almost unfettered discretion to decide what business practices clear the bureaucratic bar, so these won't be the last business models targeted by the agency. And though the FCC spends several paragraphs describing seven vaguely worded factors that it will consider when applying the Internet conduct standard—end-user control; competitive effects; consumer protection; effect on innovation, investment, or broadband deployment; free expression; application agnostic; and standard practices[23]—these factors lead to more questions than they answer. As the Electronic Frontier Foundation

[18] *Order* at paras. 133–53.

[19] *Order* at paras. 152–53.

[20] *See*, *e.g.*, Susan Crawford, Zero for Conduct, *Medium* (Jan. 7, 2015) ("Zero-rating . . . is absolutely inappropriate. It makes certain kinds of traffic exempt from any data cap at all, or creates a synthetic 'online' experience for users that isn't the Internet. . . . [Z]ero rating is not just a competition issue. It's also a human rights issue. Saying that walled gardens are "good enough" for poorer people is clearly destructive. . . . All compromise is based on give and take. But when it comes to fundamentals—including the earth-shaking idea of the Internet, which has made possible for the first time an open, global, interoperable platform for communications—there can be no compromise."), *available at* http://bit.ly/14xVnUT.

[21] *Order* at para. 152.

[22] *Order* at para. 153.

[23] *Order* at paras. 139, 140, 141, 142, 143, 144, 145.

wrote just this week: This open-ended rule will be "anything but clear" and "suggests that the FCC believes it has broad authority to pursue any number of practices." And "multi-factor test gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence." Or as they put it more bluntly, this rule is "hardly the narrow, light-touch approach we need to protect the open Internet."[24] Even FCC leadership conceded that, with respect to the sorts of activities the Internet conduct standard could regulate, "we don't really know" and that "we don't know where things go next," other than that the "FCC will sit there as a referee and be able to throw the flag."[25]

And because this list is "non-exhaustive," with "other considerations relevant to determining whether a particular practice violates" the standard,[26] Internet service providers are left to guess. Will the rate of return on investment be a factor? How about an operator's margins? What if the Internet service provider separately offers an interconnected VoIP service?

Net neutrality proponents are already bragging that it will turn the FCC into the "Department of the Internet"[27]—and it's no wonder. The FCC's newfound control extends to the design of the Internet itself, from the last mile through the backbone. Section 201(a) of the Communications Act gives the FCC authority to order "physical connections" and "through routes,"[28] meaning the FCC can decide where the Internet should be built and how it should be interconnected. And with the broad Internet conduct standard, decisions about network architecture and design will no longer be in the hands of engineers but bureaucrats and lawyers.

So if one Internet service provider wants to follow in the footsteps of Google Fiber and enter the market incrementally, the FCC may say no. If another wants to upgrade the bandwidth of its routers at the cost of some latency, the FCC may block it. Every decision to invest in ports for interconnection may be second-guessed; every use of priority coding to enable latency-sensitive applications like Voice over LTE may be reviewed with a microscope. How will this all be resolved? No one knows. 81-year-old laws like this don't self-execute, and even in 317 pages, there's not enough room for the FCC to describe how it would decide whether this or that broadband business practice is just and reasonable. So businesses will have to decide for themselves—with newly-necessary counsel from high-priced attorneys and accountants—whether to take a risk.

That's just from some of the rules that the FCC is deciding to apply now. Yet *more* rules are on the horizon. The Commission commits "to commence in the near term a separate proceeding to revisit the data roaming obligations of [mobile broadband] providers in light of our reclassification decisions" and to determine whether full-fledged common-carriage wholesale obligations should apply.[29] And it

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[24] Corynne McSherry, Electronic Frontier Foundation, Dear FCC: Rethink The Vague "General Conduct" Rule (Feb. 24, 2015), *available at* http://bit.ly/1AIJrKU; *see also* Letter from Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191, 14-28 (Feb. 19, 2015) ("The Commission has an important role to play in promulgating 'rules of the road' for broadband, but that role should be narrow and firmly bounded. We fear the proposed 'general conduct rule' may meet neither criteria. Accordingly, if the Commission intends to adopt a 'general conduct rule' it should spell out, in advance, the contours and limits of that rule, and clarify that the rule shall be applied only in specific circumstances."), *available at* http://go.usa.gov/3cP53.

[25] February 2015 Open Meeting Press Conference of Chairman Tom Wheeler (Feb. 26, 2015), *available at* http://www.fcc.gov/events/open-commission-meeting-february-2015 (165:30-166:51).

[26] *Order* at para. 138.

[27] *See*, *e.g.*, Nilay Patel, We won the internet back, *The Verge* (Feb. 4, 2015), *available at* http://bit.ly/1C17xB5.

[28] Communications Act § 201(a).

[29] *Order* at para. 526.

promises a new rulemaking to apply section 222's customer-proprietary network information provisions to Internet service providers.[30] Still more are sure to come.

And then there is the temporary forbearance. Did I forget to mention that? Although the *Order* crows that its forbearance from Title II's provisions and rules yields a "'light-touch' regulatory framework,"[31] in reality it isn't light at all, coming as it does with the provisos, limitations, and qualifications that the public has come to expect from Washington, DC. The plan is quite clear about the limited duration of its forbearance decisions, stating that the FCC will revisit them in the future and proceed in an incremental manner with respect to additional regulation.[32] In discussing additional rate regulation, tariffs, last-mile unbundling, burdensome administrative filing requirements, accounting standards, and entry and exit regulation, the plan repeatedly states that it is only forbearing "at this time."[33] For others, the FCC will not impose rules "for now."[34]

To be sure, with respect to some rules, the agency says that it "cannot envision" going further.[35] But as the history of this proceeding makes clear, temporal statements like these don't tend to last very long. Ask people who have followed this proceeding closely, and they could tell you that as late as November 2014, reclassification was not under serious consideration by the FCC "at this time," Title II was not going to be imposed "for now," and the agency "could not envision" going further than either a 706-based approach or the Mozilla-inspired hybrid proposal. In other words, expect the forbearance to fade and the regulations to ratchet up as time marches on.

A.

Consumers will be worse off under President Obama's plan to regulate the Internet. Consumers should expect their bills to go up, and they should expect that broadband will be slower going forward than it otherwise would have been. This isn't what anyone was promised, and no one likes paying more for less.

1. New Broadband Taxes.—One avenue for higher bills is the new taxes and fees that will be applied to broadband. Here's the background. If you look at your phone bill, you'll see a "Universal Service Fee," or something like it. These fees (what most Americans would call taxes) are paid by Americans on their telephone service and funnel about $9 billion each year through the FCC—all outside the congressional appropriations process. Consumers haven't had to pay these taxes on their broadband bills because broadband Internet access service has never before been a Title II service.

But now it is. And so the *Order* explicitly opens the door to billions of dollars in new taxes on broadband. As the *Order* frankly acknowledges, Title II "authorizes the Commission to impose universal service contributions requirements on telecommunications carriers—and, indeed, goes even further to require '[e]very telecommunications carrier that provides interstate telecommunications services' to contribute."[36] And so the FCC now has a statutory obligation to make sure that all Internet service providers (and in the end, their customers) contribute to the Universal Service Fund.

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[30] *Order* at para. 462.

[31] *Order* at para. 5.

[32] *See, e.g.*, *Order* at note 1487.

[33] *Order* at paras. 497 (additional rate regulation and tariffing), 500 (same), 501 (same), 502 (same), 508 (administrative filing requirements and accounting standards), 510 (entry and exit regulation), 513 (last-mile unbundling and resale).

[34] *Order* at paras. 470, 488.

[35] *Order* at para. 451; *see also Order* at paras. 452, 508.

[36] *Order* at para. 488 (quoting Communications Act § 254(d)).

That's why the *Order* repeatedly states that it is only deferring a decision on new broadband taxes—not prohibiting them.[37] This is fig-leaf forbearance, a reprieve only "insofar as [the provisions] would immediately require new universal service contributions for broadband Internet access services sold to end users but not insofar as they authorize the Commission to require such contributions in a rulemaking in the future."[38]

That future is swiftly approaching; it may be just a few months. The *Order* notes that the FCC has referred the question of assessing state and federal taxes on broadband to the Federal-State Joint Board on Universal Service and has "requested a recommended decision by April 7, 2015," right before Tax Day—although a "a short extension of that deadline" may be in order.[39] It's no surprise that many have interpreted this referral as a question of *how* to tax broadband, not *whether* to do so, and states have already begun discussions on how they will spend the extra money.[40]

And the agency's preference is clear. The *Order* argues that taxing broadband "potentially could spread the base of contributions" and could add "to the stability of the universal service fund."[41] For those not familiar with this Beltway argot, let me translate: "Extending these taxes to broadband would make it easier to spend more without public oversight." But using plain English hardly makes for a compelling public message.

We've seen this game played before. During reform of the E-Rate program in July 2014, the FCC secretly told lobbyists that it would raise USF taxes after the election to pay for the promises it was making.[42] Sure enough, in December 2014, the agency did just that—increasing E-Rate spending (and with it telephone taxes) by $1.5 billion per year.[43]

The federal government is sure to tap this new revenue stream soon to spend more of consumers' hard-earned dollars. Indeed, it's been publicly reported that the FCC is itching to use the Universal Service Fund to extend the Lifeline program to broadband. That won't come cheap. In order to provide discounted broadband service to millions of Americans, the FCC will have to find the money somewhere. With this *Order*, that somewhere is your wallet. So when it comes to broadband, read my lips: More new taxes are coming. It's just a matter of when.[44]

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[37] *See, e.g.*, *Order* at para. 489 ("We therefore conclude that limited forbearance is warranted at the present time in order to allow the Commission to consider the issues presented based on a full record in that docket.").

[38] *Order* at para. 490.

[39] *Order* at note 1471.

[40] *See*, *e.g.*, Vermont Public Radio, Under New FCC Standard, 30 Percent Of Vermonters Now Lack Broadband (Feb. 3, 2015) ("One of the things that would come along with [reclassification] is the ability to assess a universal service fee on broadband services. . . . If that happens, the money might be there to fund these higher speeds."), *available at* http://digital.vpr.net/post/under-new-fcc-standard-30-percent-vermonters-now-lack-broadband.

[41] *Order* at para. 489.

[42] *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 9042 (2014) (Dissenting Statement of Commissioner Ajit Pai); *see also* http://youtu.be/6LDko49R9YM.

[43] *Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, FCC 14-189 (rel. Dec. 19, 2014) (Dissenting Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/3cpm4.

[44] In fact, broadband taxes may go up even further than this should the FCC revisit its decision to forbear from requiring contributions to the Telecommunications Relay Service (TRS) Fund. *See Order* at para. 470 ("[*F*]*or now* we do forbear in part from the application of TRS contribution obligations that otherwise would newly apply to broadband Internet access service") (emphasis added). There, too, the fix may be in. *See id*. ("Applying new TRS contribution requirements on broadband Internet access potentially could spread the base of contributions to the TRS Fund, having the benefit of adding to the stability of the TRS Fund. Nevertheless, before taking any steps that

(continued….)

The great irony of all of this? The broadband tax increase enabled by reclassification is going to deter broadband adoption, especially among the low-income Americans for whom broadband (especially mobile broadband) is increasingly important for professional success, education, and more.[45] The iron law of microeconomics still holds: The more you tax something, the less you get of it. In this case, the FCC's decision today will mean fewer digital opportunities for hard-working Americans tomorrow.

2. Slower Broadband.—These Internet regulations will work another serious harm on consumers. Their broadband speeds will be slower than they would have been without these regulations.

The record is replete with evidence that Title II regulations will slow investment and innovation in broadband networks.[46] Remember: Broadband networks don't have to be built. Capital doesn't have to be invested here. Risks don't have to be taken. The more difficult the FCC makes the business case for deployment—and micromanaging everything from interconnection to service plans makes it difficult indeed—the less likely it is that broadband providers big and small will connect Americans with digital opportunities. And neither big nor small providers will bring rural and poor Americans online if it's economically irrational for them to do so. Utility-style regulation of the kind the FCC adopts here thus will simply broaden the digital divide.

The Old World offers a cautionary tale here. Compare the broadband market in the United States to that in Europe, where broadband is generally regulated as a public utility. Data show that 82% of Americans, and 48% of rural Americans, have access to 25 Mbps broadband speeds. In Europe, those figures are only 54% and 12%, respectively. Similarly, wireline broadband providers in the United States are investing more than twice as much as their European counterparts ($562 per household versus $244). The data for wireless broadband providers shows the same pattern ($110 per person versus $55). In the United States, broadband providers deploy fiber to the premises about twice as often (23% versus 12%). And with respect to mobile broadband, 30% of subscribers in the United States have the fastest technology in wide deployment, 4G LTE, but in Europe that figure is only 4%. Moreover, in the United States, average mobile speeds are about 30% faster than they are in Western Europe.[47]

(Continued from previous page)
would depart from the *status quo* in this regard, the Commission would like to assess the need for such additional funding, and the appropriate contribution level.").

[45] Letter from Kim Keenan, President & Chief Executive Officer, MMTC, to the Honorable Tom Wheeler, Chairman, FCC, et al., GN Docket No. 14-28, at 3 (Feb. 18, 2015) ("Title II regulation, even when ostensibly administered with a lighter touch, will likely have unintended consequences on broadband adoption for people of color, the disabled, the economically disadvantaged, rural residents, and seniors."), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001030899.

[46] *See, e.g.*, ACA Comments at 60–66; Alcatel-Lucent Comments at 2; AT&T Comments at 51–53; CenturyLink Comments at 5–6; Charter Comments at 13, 15–16; Cisco Comments at 27; Comcast Comments at 46–50; Cox Comments at 34–36; CTIA Comments at 46–48; Ericsson Comments at 12; Frontier Comments at 2–4; Qualcomm Comments at 4–7; Verizon Comments at 57; Letter from Matthew A. Brill, Counsel for National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3–5 (Dec. 23, 2014); Letter from Patrick S. Brogan, USTelecom to Marlene Dortch, Secretary, FCC, GN Docket No. 14-28 (Nov. 19, 2014) (attaching Kevin A. Hassett & Robert J. Shapiro, Sonecon, The Impact of Title II Regulation of Internet Providers on Their Capital Investment (Nov. 2014)); Letter from Laurence Brett Glass, d/b/a LARIAT to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (Jan. 9, 2015); Letter from John Mayo, Exec. Director, Georgetown Center for Business and Public Policy to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (Jan. 16, 2015) (attaching Anna-Maria Kovacs, Regulatory Uncertainty: The FCC's Open Internet Docket (Jan. 2015)); Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models (June 2013), *available at* http://bit.ly/1zJritJ.

[47] Christopher S. Yoo, U.S. vs. European Broadband Deployment: What Do the Data Say? Penn Law Center for Technology, Innovation and Competition, at 4–5, 13, 23 (June 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521285448; CISCO, VNI Mobile Forecast Highlights, 2014-2019 (compare the average mobile connection speed in the United States of 2,619 kbps with the 2,037 kbps average

(continued….)

It's no wonder that many Europeans are perplexed by what is taking place at the FCC. Just days before the FCC adopted this *Order*, for example, the Secretary General of the European People's Party, the largest party in the European Parliament, observed that the FCC, "at the behest of . . . [P]resident [Obama] himself,", was about to impose the type of "[r]egulation which . . . has led Europe to fall behind the US in levels of investment."[48]

But the *Order* doesn't just adopt utility-style regulation. It goes even further and injects tremendous uncertainty into the market. At least with easy-to-understand, bright-line rules, a business can plan. But a thick regulatory haze—rules that are unclear with the overhang of more rules to come—should make any rational businesses hold back on investment and start returning any free cash back to their shareholders.

Ironically enough, the Commission itself acknowledges at one point that "vague or unclear regulatory requirements could stymie rather than encourage innovation."[49] But those are precisely the kind of requirements the FCC is adopting. Its predictive judgment that uncertainty is "likely to be short term and will dissipate over time as the marketplace internalizes our Title II approach"[50] prioritizes faith above experience.

Making it all worse is the fact that the FCC cannot promise anything about how these new rules will be enforced because it is not the only adjudicator. After this decision, "[a]ny person claiming to be damaged by any" Internet service provider "may bring suit for the recovery of the damages" in any federal district court.[51] Although the *Order* hesitates to admit it,[52] the FCC has now condoned litigation—from individual claims about the justness and reasonableness of ISP pricing to sprawling class actions for violations of the new Internet conduct rule—as an appropriate means of regulating the Internet economy. Is there any American who believes that administrative wrangling at the FCC and endless litigation in the federal courts will do anything for the American consumer?

The not-so-dirty secret, of course, is that this will be a boon for trial lawyers. And the *Order*'s decisions will make their lives even easier. Every edge provider, and thus every person online, is now swept up by FCC's new and rather peculiar view of what constitutes broadband Internet access service. This means that a wayward plaintiff's attorney could sue every single Internet service provider in the country from his hometown courtroom. I'm sure such litigation will benefit our nation's lawyers, but the American people—not so much.

And these are just the intended results of reclassification!

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mobile connection speed in Western Europe), *available at* http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/index.html#~Country; *see also* Roger Entner, Spectrum Fuels Speed and Prosperity, Recon Analytics (Sep. 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60000870483; Letter from Scott K. Bergmann, Vice President – Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (Feb. 10, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001028379; Letter from Scott K. Bergmann, Vice President – Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28 (Oct. 2, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60000870404.

[48] Letter from Antonio López Istúriz-White MEP, Secretary General, European People's Party, to the Editor, *Financial Times* (Feb. 22, 2015), *available at* http://on.ft.com/1DViF4r.

[49] *Order* at para. 138.

[50] *Order* at para. 410.

[51] Communications Act § 207.

[52] *Order* at para. 455 (noting the importance of the "doctrine of primary jurisdiction" but declining to forbear from applying section 207 to Internet service providers).

There are unintended consequences as well. *For one*, the rate that broadband providers—ranging from small-town cable operators to new entrants like Google—pay to deploy broadband will go up by an estimated $150–200 million per year.[53] And that's because the Communications Act establishes a higher rate for telecommunications carriers to pay for access to poles, conduits, and rights of way than other Internet service providers.

While it may not be the "Commission's intent to see any increase in the rates for pole attachments,"[54] the agency has no power to stop it. The actual utilities that own these poles get to charge what they want up to the statutory maximum, and the FCC has just raised that maximum. Or to use the FCC's preferred parlance, utilities will have the "incentive and ability" to exploit this new maximum rate for Internet service providers. The end result: Reclassification would subject Internet service providers "to significantly higher attachment rates, inadvertently threatening the very broadband deployment the Commission seeks to facilitate."[55]

For another, reclassification will expose many small companies to higher state and local taxes. Tax rates on telecommunications companies are often significantly higher than those imposed on general businesses, and so reclassification threatens Internet service providers with property tax hikes, new transaction-based taxes and fees, and greater income, franchising, and gross receipts taxes.[56] And these tax hikes won't necessarily be *de minimis*. In the District of Columbia, for instance, companies will face an instant 11% increase in taxes on their *gross receipts*.[57] That big bite will leave a welt on Washington consumers' wallets.

The *Order* trots out Congress's recent (temporary) extension of the Internet Tax Freedom Act to claim that states and localities cannot impose new "[t]axes on Internet access."[58] And that's true (and a victory for consumers). But broadband taxes like those imposed by the *Order* have evaded the scope of the Internet Tax Freedom Act so far—because they are "fees," not "taxes," and because they're not exclusively about "Internet access" but more generally applied.[59] And since Congress has not entrusted the Commission with interpreting the Internet Tax Freedom Act, even our most fervent pronouncements for it to be broader will not make it so.

All of these new fees and costs add up. One estimate puts the total at $11 billion a year.[60] And every dollar spent on fees and new costs like lawyers and accountants has to come from somewhere:

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[53] *See, e.g.*, Letter from Steven F. Morris, Vice President and Associate General Counsel, National Cable & Telecommunications Association, GN Docket No. 14-28, WC Docket No. 07-245, at 2 (Jan. 22, 2015), *available at* http://go.usa.gov/3cppB.

[54] *Order* at para. 482.

[55] Letter from Thomas Cohen & Edward A. Yorkgitis, Jr., Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, 09-51, WC Docket No. 07-245, at 2 (Jan. 20, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001014745.

[56] Letter from James Assey, Executive Vice President, National Cable & Telecommunications Association, to Jonathan Sallet, General Counsel, FCC, GN Docket Nos. 14-28, 10-127, at 2 (Dec. 2, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60000989301.

[57] *Id*. at 3–4.

[58] *Order* at para. 430 (quoting Internet Tax Freedom Act § 1101(a)(1), Pub. L. 105-277, 112 Stat. 2681, 2719 (1998), and citing Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 624, 128 Stat. 2130, 2377 (2014)).

[59] Letter from James Assey, Executive Vice President, National Cable & Telecommunications Association, to Jonathan Sallet, General Counsel, FCC, GN Docket Nos. 14-28, 10-127, at 3 (Dec. 2, 2014).

[60] Hal Singer & Robert Litan, No Guarantees When It Comes to Telecom Fees, *Progressive Policy Institute Blog*, at FN5 (Dec. 16, 2014) (estimating annual taxes and fees of $11 billion assuming the Internet Tax Freedom Act is made permanent), *available at* http://bit.ly/1AcraGq; Robert Litan & Hal Singer, Outdated Regulations Will Make

(continued….)

either the pockets of the American consumer or projects to deploy faster broadband. And so these higher costs will lead to slower speeds and higher prices—in short, less value—for the American consumer.

B.

So do American consumers want slower speeds at higher prices? I don't think so.

That's certainly not what I heard when I hosted the Texas Forum on Internet Regulation in College Station, the FCC's *only* field hearing on net neutrality where audience members were allowed to speak. There, I heard from Internet innovators, from students, from everyday people who wanted something else from the FCC—something that I thought had a familiar ring to it. The consumers I spoke with wanted competition, competition, competition.

And yet, literally nothing in this *Order* will promote competition among Internet service providers. To the contrary, reclassifying broadband, applying the bulk of Title II rules, and half-heartedly forbearing from the rest "for now" will drive smaller competitors out of business and leave the rest in regulatory vassalage. Monopoly rules designed for the monopoly era will inevitably move us in the direction of a monopoly. President Obama's plan to regulate the Internet is nothing more than a Kingsbury Commitment for the digital age.[61] If you liked the Ma Bell monopoly in the 20th century, you'll love Pa Broadband in the 21st.

Today there are thousands of smaller Internet service providers—wireless Internet service providers (WISPs), small-town cable operators, municipal broadband providers, electric cooperatives, and others—that don't have the means or the margins to withstand a regulatory onslaught. Imposing on competitive broadband companies the rules designed to constrain Cornelius Vanderbilt's railroad empire or the continent-spanning Bell telephone monopoly will do nothing but raise the costs of doing business. Smaller, rural competitors will be disproportionately affected, and the FCC's decision will diminish competition—the best guarantor of consumer welfare.

This isn't just my view. The President's own Small Business Administration—apparently acting independently—admonished the FCC that its proposed rules would unduly burden small businesses. The SBA urged the FCC to "address[] the concerns raised by small businesses in comments" and "exercise appropriate caution in tailoring its final rules to mitigate any anti-competitive pressure on small broadband providers as well."[62] Following the President's lead, the FCC ignores this admonition by applying heavy-handed Title II regulations to each and every small broadband provider as if it were an industrial giant. As a result, small providers will be squeezed—perhaps out of business altogether. If they go dark, consumers they serve (including my parents, who are WISP subscribers in rural Kansas) will be thrown offline.

Unsurprisingly, small Internet service providers are worried. I heard this for myself at the Texas Forum on Internet Regulation. One of the panelists, Joe Portman, runs Alamo Broadband, a WISP that serves 700 people across 500 square miles south of San Antonio. As he put it, his customers "had very limited choices for internet service before we came along. The big names, the telcos and cable

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Consumers Pay More for Broadband, *Progressive Policy Institute Policy Brief*, at 1 (Dec. 1, 2014) (estimating annual taxes and fees of $15 billion assuming the Internet Tax Freedom Act expires), *available at* http://bit.ly/1wcR7VX.

[61] Remarks of FCC Commissioner Ajit Pai at TechFreedom's Forum on the 100th Anniversary of the Kingsbury Commitment (Dec. 19, 2013), *available at* http://go.usa.gov/3cKdk.

[62] Small Business Administration Office of Advocacy, Fact Sheet: Advocacy Submits Comments to the Federal Communications Commission regarding Small Business Engagement and Regulatory Flexibility Act Compliance, http://go.usa.gov/3cKdP (Sept. 25, 2014); Letter from Winslow L. Sargeant, Ph.D., Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 13-5, 12-353, WC Docket Nos. 05-25, 10-90, RM-10593 (Sept. 25, 2014), *available at* http://go.usa.gov/3cKsm.

companies, when it comes to rural areas such as the areas we serve don't see the value and won't invest the capital (at least if it's their money) to build infrastructure and bring service to the people that live there. We, and thousands others like us, have found a way to do it."[63]

What does Joe think of Title II? He thinks it's "pretty much a terrible idea."[64] His staff "is pretty busy just dealing with the loads we already carry. More staff to cover regulations means less funds to run the network and provide the very service our customers depend on." Bottom line? Title II will just impede broadband deployment—especially from WISPs like his.

Other WISPs feel the same way. Take Galen Manners, in my hometown of Parsons, Kansas. He runs Wave Wireless, a WISP that delivers Internet access to residents of rural Labette County[65]—including my parents. I can tell you from personal knowledge that folks back home have few options. Google Fiber isn't building there; other major ISPs wouldn't bother either.

Manners said that Wave Wireless "will feel the sting of the [Title II] regulations," which "will complicate and increase the cost of providing service. The result is the consumer will pay more for [his] service." Manners hopes he can weather the regulatory storm, unlike WISPs that he thinks may go out of business. But he summed up his situation in a way that applies to companies and customers nationwide: "It's not a good thing for business. It's not a good thing for the consumer. . . . It's going to be a game-changer."[66]

Just last week, 142 WISPs joined the chorus. Whether it's Aerux.com in Castle Rock, Colorado, or Aristotle.Net in Little Rock, Arkansas, whether it's STE Wireless in Utica, Nebraska, or Cyber Broadcasting in Coal City, Illinois, these WISPs have deployed wireless broadband to customers who often have no alternatives. They rely heavily on unlicensed spectrum, take no federal subsidies, and often run on a shoestring budget with just a few people to run the business, install equipment, and handle service calls. They have no incentive and no ability to take on commercial giants like Netflix. And they say the FCC's new "regulatory intrusion into our businesses . . . would likely force us to raise prices, delay deployment expansion, or both."[67]

Or consider the views of 24 of the country's smallest Internet service providers, each with fewer than 1,000 residential broadband customers. The largest, FamilyView Cablevision, has just 900 customers in Pendleton, South Carolina. The smallest, Main Street Broadband, has just 4 residential customers in Cannon Falls, Minnesota. They wrote us that Title II "will badly strain our limited resources" because these Internet service providers "have no in-house attorneys and no budget line items for outside counsel" and the "rules of the road . . . could change anytime the issues an advisory, rules on a complaint, or adopts new rules. To subject small and medium-sized ISPs to such a regime, no less the very smallest of ISPs, is simply unreasonable."[68]

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[63] Testimony of Joe Portman, President and Founder, Alamo Broadband Inc., Elmendorf, Texas, at the Texas Forum on Internet Regulation, at 1 (Oct. 21, 2014), *available at* http://go.usa.gov/3cpPe.

[64] *Id.* at 2.

[65] *See* Wave Wireless, About Us, http://www.wavewls.com/about-us.html.

[66] Ray Nolting, Proposed regulations concern business, FCC commissioner, *Parsons Sun* (Feb. 21, 2015), *available at* http://bit.ly/1JOoplx.

[67] Letter from Dustin Surran, Aerux.com, Castle Rock, Colorado, Bryan Robinson, Affordable Internet Solutions, Waverly, Nebraska, and 140 other WISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket No. 14-28 (Feb. 19, 2015), *available at* http://go.usa.gov/3c8rH.

[68] Letter from Robert J. Dunker, Owner/President, Atwood Cable Systems, Inc., Atwood, Kansas, Richard A. Nowak, Owner/President, Bellaire TV Cable Company, Bellaire, Ohio, and 22 other small ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127 (Feb. 17, 2015), *available at* http://go.usa.gov/3cpPw.

Or how about the 43 municipal broadband providers that flatly told the FCC that "there is no basis for the Commission to reclassify our Internet service for the purpose of imposing any Title II common carrier obligations."[69] They continued, "Title II regulation will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband."[70] Their closing is a stinging rebuke to those who argue that Title II is harmless to those providers who don't harm consumers:

> [W]e ask that you not fall prey to the facile argument that if smaller ISPs are not blocking, throttling, or discriminating amongst Internet traffic on their networks today, they have nothing to fear because they will experience no harm under Title II regulation. The economic harm will flow not from following net neutrality principles, which we do today because we think it is beneficial to all, but from the collateral effects of a change in regulatory status that will trigger consequences beyond the Commission's control and risk serious harm to our ability to fund and deploy broadband without bringing any concrete benefit for consumers or edge providers that the market is not already proving today without the aid of any additional regulation.[71]

There's a special irony given that right before this vote, the FCC voted to preempt state laws regarding city-owned broadband projects. This is an initiative President Obama announced just one month before this *Order* was adopted while he was in Cedar Falls, Iowa, and the FCC is now dutifully implementing that initiative too. But I'm not sure the President realized that Cedar Falls Utilities, the very municipal broadband provider he touted, thinks that Title II is a tremendous mistake.[72] Well, now he—and we—know better.

It's for these reasons that the Small Business & Entrepreneurship Council, a nonprofit organization representing nearly 100,000 small businesses nationwide, wrote to us that Title II "will deeply erode investment and innovation, which will dramatically harm entrepreneurs and small businesses."[73]

It's for these reasons that the National Black Chamber of Commerce, the National Gay & Lesbian Chamber of Commerce, the U.S. Hispanic Chamber of Commerce, and the U.S. Pan Asian American Chamber of Commerce wrote us that "Forcing the Internet into a Title II classification can only make it more difficult for individuals to make the highest and best use of this important tool . . . . The last thing small businesses in America need are more forms to fill out; more regulations to track; and more rules to follow."[74]

And it's for these reasons that the trade associations for our nation's smallest Internet service providers asked the FCC last month to "conduct an *en banc* hearing to examine the significant economic

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[69] Letter from Randy Darwin Tilk, Utility Manager, Alta Municipal Broadband Communications, Alta, Iowa, Loras Herrig, City Administrator, Bellevue Municipal Cable, Bellevue, Iowa, and 41 other municipal ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127, at 1 (Feb. 10, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001028442.

[70] *Id.* at 1.

[71] *Id.* at 2.

[72] *See* Editorial, Obama's Favorite Internet Company, *The Wall Street Journal* (Feb. 5, 2015), *available at* http://on.wsj.com/1KnkoBh; Matthew Patane, Obama-touted Iowa utility balks at FCC Internet plan, *Des Moines Register* (Feb. 5, 2015), *available at* http://dmreg.co/1zg2VCS.

[73] Small Business & Entrepreneurship Council Comments at 2.

[74] National Black Chamber of Commerce et al. Comments at 2.

impact of its proposals on small broadband providers."[75] I would have welcomed such an *en banc* hearing. But like all other calls for greater transparency in this proceeding, this request was denied.

So what does the *Order* tell the Americans whose Internet service provider isn't a Comcast, an AT&T, a Google, or a Sprint? What does it tell those whose service will be more expensive as a direct result of reclassification? What does it tell those who may lose their Internet service if their small operator goes out of business? What does it tell those who worked for years to serve their community and build a business, one that's finally in the black? There's no explanation. There's not even an acknowledgement. There's just the smug assurance that it won't be that bad.

C.

So while the FCC is abandoning a 20-year-old, bipartisan framework for keeping the Internet free and open in favor of Great Depression-era legislation designed to regulate Ma Bell, at least the American public is getting something in return, right? Wrong. The Internet is not broken. There is no problem for the government to solve.

That the Internet works—that Internet freedom works—should be obvious to anyone with a Dell laptop or an HP Desktop, an Apple iPhone or Microsoft Surface, a Samsung Smart TV or a Roku, a Nest Thermostat or a Fitbit. We live in a time where you can buy a movie from iTunes, watch a music video on YouTube, post a photo of your daughter on Facebook, listen to a personalized playlist on Pandora, watch your favorite Philip K. Dick novel come to life on Amazon Streaming Video, help someone make potato salad on KickStarter, check out the latest comic at XKCD, see what Seinfeld's been up to on Crackle, manage your fantasy football team on ESPN, get almost any question answered on Quora, navigate bad traffic with Waze, and do literally hundreds of other things all with an online connection. At the start of the millennium, we didn't have *any* of this Internet innovation.

And no, the federal government didn't build that. It didn't trench the fiber. It didn't erect the towers. It didn't string the cable from one pole to the next, and it didn't design the routers that direct terabits of data across the Internet each and every second. It didn't invest in startups at the angel or seed stage or Series A rounds. It didn't code the webpages, the software, the applications, or the databases that make the online world useful. And it didn't create the content that makes going online so worthwhile.

For all intents and purposes, the Internet didn't exist until the private sector took it over in the 1990s, and it's been the commercial Internet that has led to the innovation, the creativity, the engineering genius that we see today.

Nevertheless, the *Order* ominously claims that "[t]hreats to Internet openness remain today," that broadband providers "hold all the tools necessary to deceive consumers, degrade content or disfavor the content that they don't like," and that the FCC continues "to hear concerns about other broadband provider practices involving blocking or degrading third-party applications."[76]

The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced FaceTime over Wi-Fi first, cellular networks later. Examples this picayune and stale aren't enough to tell a coherent story about net neutrality. The bogeyman never had it so easy.

[75] Letter from Ross J. Lieberman, Senior Vice President of Government Affairs, American Cable Association, Lisa Schoenthaler, Vice President for Association Affairs Office of Rural/Small Systems, and Stephen E. Coran, Counsel for the Wireless Internet Service Providers Association, to the Honorable Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, at 1 (Jan. 9, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001012562.

[76] *Order* at para. 8.

But the *Order* trots out other horribles: "[B]roadband providers have both the incentive and the ability to act as gatekeepers,"[77] "the potential to cause a variety of other negative externalities that hurt the open nature of the Internet,"[78] and "the incentive and ability to engage in paid prioritization"[79] or other "consumer harms."[80] The common thread linking these and countless other exhibits is that they simply *do not exist*. One could read the entire document—and I did—without finding anything more than hypothesized harms. One would think that a broken Internet marketplace would be rife with anticompetitive examples. But the agency doesn't list them. And it's not for a lack of effort.

So what is there to fear? A sober reader might borrow from the father of Title II: "The only thing we have to fear is fear itself." But the FCC instead intones the nine scariest words for any friend of Internet freedom: "I'm from the government, and I'm here to help."

To put it another way, Title II is not just a solution in search of a problem—it's a government solution that creates a real-world problem. This is not what the Internet needs, and it's not what the American people want.

D.

So—that's substance. A few words on process. When the Commission launched this rulemaking, I said that we needed to "give the American people a full and fair opportunity to participate in this process."[81] Unfortunately, over the course of the past nine months, we have fallen woefully short of that standard.

Most importantly, the plan in front of us today was not formulated within this building through a transparent notice-and-comment rulemaking process. Rather, *The Wall Street Journal* reports that it was developed through "an unusual, secretive effort inside the White House."[82] Indeed, White House officials, according to the *Journal*, functioned as a "parallel version of the FCC."[83] Their work led to the President's announcement in November of his plan for Internet regulation, a plan which "blindsided" the FCC and "swept aside . . . months of work by [Chairman] Wheeler toward a compromise."[84]

Therefore, all of the action at the Commission was just for show. Those filing comments, holding publicly disclosed meetings with FCC officials, or participating in FCC roundtables were being led to believe that their input would matter. But the joke was on them. While the media and the public were focusing on events at the FCC, the real action was occurring behind closed doors at the White House.

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[77] *Order* at para. 20.

[78] *Order* at para. 83.

[79] *Order* at para. 127.

[80] *Order* at para. 200.

[81] *Protecting & Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5656 (2014) (*Notice*) (Dissenting Statement of Commissioner Ajit Pai), *available at* http://go.usa.gov/3cpEj.

[82] Gautham Nagesh & Brody Mullins, Net Neutrality: How White House Thwarted FCC Chief, *Wall Street Journal*, (Feb. 4, 2015), *available at* http://on.wsj.com/16FXTcH.

[83] *Id.*

[84] *Id.*; *see also* Gautham Nagesh, FCC 'Net Neutrality' Plan Calls for More Power Broadband: Chairman Tom Wheeler Considers Hybrid Approach to Internet Access, *Wall Street Journal* (Oct. 30, 2014) ("Mr. Wheeler is close to settling on a hybrid approach, people close to the chairman say."), *available at* http://on.wsj.com/1ES0YkT.

Of course, a few insiders were clued in about what was transpiring. Just listen to what a leader for the government-funded[85] group Fight for the Future had to say: "We've been hearing for weeks from our allies in DC that the only thing that could stop FCC Chairman Tom Wheeler from moving ahead with his sham proposal to gut net neutrality was if we could get the President to step in. So we did everything in our power to make that happen. We took the gloves off and played hard, and now we get to celebrate a sweet victory."[86]

What the press has called the "parallel FCC" at the White House opened its doors to a plethora of special-interest activists: Daily Kos, Demand Progress, Fight for the Future, Free Press, and Public Knowledge, just to name a few.[87] Indeed, even before activists were blocking Chairman Wheeler's driveway late last year, some of them had met with White House officials.[88] But what about the rest of the American people? They certainly couldn't get White House meetings. They were shut out of the process. They were being played for fools.

And the situation didn't improve once the White House announced President Obama's plan and "ask[ed]" the FCC to "implement" it.[89] The document in front of us today differs dramatically from the proposal that the FCC put out for comment last May. It differs so dramatically that even net neutrality advocates frantically rushed in recent days to make last-minute filings registering their concerns that the FCC might be going too far.[90] Yet the American people to this day have not been allowed to see President Obama's plan. It has remained secret.

Especially given the unique importance of the Internet, Commissioner O'Rielly and I asked for the plan to be released to the public. Senate Commerce Committee Chairman John Thune and House of Representatives Energy and Commerce Chairman Fred Upton requested this as well. And according to a survey last week by a respected Democratic polling firm, 79% of the American people favored making the document public.[91] But still the FCC's leadership has insisted on keeping it hidden. We have to pass President Obama's 317-page plan so that the American people can find out what is in it.

This isn't how the FCC should operate. We should be an independent agency making decisions in a transparent manner based on the law and the facts in the record. We shouldn't be a rubber stamp for political decisions made by the White House.

And we should have released this plan to the public, solicited their feedback, incorporated that input into the plan, and then proceeded to a vote. There was no need for us to resolve this matter today. There is no immediate crisis in the Internet marketplace that demands immediate action.

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[85] *See* The Center For Rights, d/b/a Fight for the Future Education Fund, Form 990, Schedule A (2013–14) (self-characterizing group as "[a]n organization that normally receives a substantial part of its support from a governmental unit or the general public" and listing over $1 million in taxpayer support between 2011 and 2013).

[86] Kerry Picket, Obama's Move to Regulate Internet Has Activists' "Fingerprints All Over It," *The Daily Caller*, (Feb. 23, 2015), *available at* http://bit.ly/1zg6pFj.

[87] *Id.*

[88] *Id.*

[89] *See* The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

[90] *See, e.g.*, Letter from Austin C. Schlick, Director, Communications Law, Google Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (Feb. 20, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001032150; Letter from Corynne McSherry, Intellectual Property Director, Electronic Frontier Foundation, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-191, 14-28 (Feb. 19, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001031536.

[91] The Progressive Policy Institute, Press Release, New Survey Finds Americans Skeptical that FCC Regulation of the Internet Will Be Helpful; Favor More Disclosure (Feb. 19, 2015), *available at* http://bit.ly/1FyPKoO.

The backers of the President's plan know this. But they also know that the details of this plan cannot stand up to the light of day. They know that the more the American people learn about this plan, the less they like it. That is why this plan was developed behind closed doors at the White House. And that is why the plan has remained hidden from public view.

II.

There's another reason the public does not know what rules the *Order* adopts. The Commission never proposed them.

A.

Recall that last year's *Notice* came on the heels of the D.C. Circuit's *Verizon* decision, which "struck down the 'anti-blocking' and 'anti-discrimination' rules," holding that "the Commission had imposed *per se* common carriage requirements on providers of Internet access services."[92] The purpose of the *Notice* was to "respond directly to that remand and propose to adopt enforceable rules of the road, consistent with the court's opinion, to protect and promote the open Internet."[93] Or, as Chairman Wheeler put it: "In response [to the *Verizon* decision], I promptly stated that we would reinstate rules that achieve the goals of the 2010 *Order* using the Section 706-based roadmap laid out by the court. That is what we are proposing today."[94]

And it was. Every single proposal and every single tentative conclusion in the *Notice* was tailored to avoid reclassification and to comply with the limits the *Verizon* court put on the Commission's authority under section 706 of the Telecommunications Act.

For example, the *Notice* proposed to define "blocking" as failing "to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers."[95] It did so "to make clear that the no-blocking rule would allow individualized bargaining above a minimum level of access," which was "the revised rationale the court suggested would be permissible rather than *per se* common carriage."[96] The *Notice* then devoted an entire section to "establishing the minimum level of access under the no-blocking rule,"[97] because "the [*Verizon*] court suggested [such a rule] would be permissible rather than *per se* common carriage"[98] and would be "[c]onsistent with the court's ruling."[99]

The *Notice* was even more forthright that its proposed rule barring commercially unreasonable practices was tied to the limits of the *Verizon* decision. Under that rule, the Commission would, "consistent with the court's decision, . . . permit broadband providers to engage in individualized practices"—indeed, the "encouragement of individualized negotiation" was one of its "essential elements."[100] The *Notice* tentatively concluded that such a rule was appropriate because the "court

[92] *Notice*, 29 FCC Rcd at 5569, para. 23 (citing *Verizon v. FCC*, 740 F.3d 623, 656–59 (D.C. Cir. 2014)).

[93] *Notice*, 29 FCC Rcd at 5569, para. 24.

[94] *Notice*, 29 FCC Rcd at 5647 (Statement of Chairman Tom Wheeler).

[95] *Notice*, 29 FCC Rcd at 5627 (Proposed Rule § 8.11(a)).

[96] *Notice*, 29 FCC Rcd at 5595, para. 95.

[97] *Notice*, 29 FCC Rcd at 5596, Section III.D.3 (capitalizations omitted); *see Notice* 29 FCC Rcd at 5596–98, paras. 97–104 (discussing the proposed minimum-level-of-access requirement).

[98] *Notice*, 29 FCC Rcd at 5595, para. 95.

[99] *Notice*, 29 FCC Rcd at 5596, para. 97.

[100] *Notice*, 29 FCC Rcd at 5599–5600, para. 111.

underscored the validity of the 'commercially reasonable' legal standard"[101] and "explained that such an approach distinguished the data roaming rules at issue in *Cellco* from common carrier obligations."[102] Or as the *Notice* put it: "The core purpose of the legal standard that we wish to adopt . . . is to effectively employ the authority that the *Verizon* court held was within the Commission's power under section 706."[103] Or as the title of that subpart put it even more bluntly: The goal of the FCC was "codifying an enforceable rule to protect the open Internet that is not common carriage *per se*."[104]

If this weren't enough, the FCC "propose[d] that the Commission exercise its authority under section 706, consistent with the D.C. Circuit's opinion in *Verizon v. FCC*, to adopt our proposed rules"[105] and then cited section 706 of the Telecommunications Act—*but not a single provision of Title II*—in the *Notice*'s ordering clauses.[106] And it affirmatively proposed to remove several legal provisions from the "authority" section of our Part 8 "Open Internet" rules—including all references to Title II—and leave section 706 of the Telecommunications Act as the prime authority for the proposed rules.[107]

In all, the *Notice* cited or quoted the *Verizon* decision 52 separate times,[108] proposed two pages of rules that would be consistent with that decision and within the Commission's section 706 authority,[109] and reiterated in tentative conclusion after tentative conclusion that the FCC should tread no further than the limits the *Verizon* court set on the FCC's authority under section 706.

Contrast that with today's decision. The entire *Order* is premised on the reclassification of broadband Internet access service as a Title II, telecommunications service. Accordingly, none of these rules follow the section 706-based roadmap laid out by the *Verizon* court, and none of them purport to do so.[110] As a result, instead of a minimum-level-of-access rule (that would follow the roadmap), the *Order* adopts the flat no-blocking rule that the *Verizon* court overturned.[111] Instead of the rule against commercially unreasonable practices, which was intended to encourage "individualized negotiation," the

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[101] *Notice*, 29 FCC Rcd at 5599, para. 110.

[102] *Notice*, 29 FCC Rcd at 5602, para. 116.

[103] *Notice*, 29 FCC Rcd at 5602, para. 118.

[104] *Notice*, 29 FCC Rcd at 5599, Subpart III.E (capitalizations omitted); *see also Notice*, 29 FCC Rcd at 5602–10, paras. 116–41 (discussing the proposed no-commercially-unreasonable-practices rule).

[105] *Notice*, 29 FCC Rcd at 5610, para. 142.

[106] *Notice*, 29 FCC Rcd at 5625, para. 183 ("Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i)–(j), 303 and 316 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302, that this Notice of Proposed Rulemaking IS ADOPTED."). Title II of the Act consists of sections 201 through 276, 47 U.S.C. §§ 201–276.

[107] *Compare* 47 C.F.R. Part 8 ("Authority: 47 U.S.C. secs. 151, 152, 153, 154, 201, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302."), *with Notice*, 29 FCC Rcd at 5626 ("Part 8 of Title 47 of the Code of Federal Regulations is amended to read as follows: . . . AUTHORITY: 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302."). Note that section 706 of the Telecommunications Act has been unofficially codified at 47 U.S.C. § 1302.

[108] *See Notice*, 29 FCC Rcd at 5564, n.11; 5569, nn.42–48; 5571, nn.58–59; 5574, n.88; 5576, nn.97–100; 5577, n.101; 5579, nn. 111, 114; 5580, n.122; 5581, n.125; 5585, n.153; 5593, n.200; 5594, nn.206–12; 5595, n.213; 5596, nn.219, 221, 223; 5599, n.231; 5600, nn.236–37; 5601, nn.238–39, 241–42; 5602, nn.244–47; 5608, n.270; 5610, n.282; 5612, nn.291–94; 5613, n.296; 5615, n.309.

[109] *Notice*, 29 FCC Rcd at 5626–27 (Appendix A: Proposed Rules).

[110] Although the general Internet conduct rule does claim that it should not be read to constitute common carriage *per se*, the *Order* concedes that the rule "represents our interpretation of these 201 and 202 obligations in the open Internet context," *Order* at para. 295—which is to say that it too is premised on reclassification.

[111] *Order* at paras. 113–15.

Order adopts a flat ban on individual negotiations through a no-paid-prioritization rule.[112] And rather than limiting the new rules to those proposed in the *Notice*, the *Order* also adopts a never-before-proposed no-throttling rule[113] and a wholly new no-unreasonable-interference-or-unreasonable-disadvantage standard for Internet conduct.[114]

Given this new legal justification, it's no wonder that the FCC now feels compelled to cite nine new sources of legal authority for adopting the *Order*, invoking sections 201 and 202 of Title II along with sections 3, 10, 301, 332, 403, 501, and 503 of the Communications Act.[115] Nor that the final rules purport to rely on 20 sections of the Communications Act that were not included in the original proposal, including several sections not discussed even once in the *Notice*.[116]

In sum, the *Notice* proposed "the terms . . . of the proposed rule" and a "reference to the legal authority under which the rule is proposed."[117] But the *Order* adopts something completely different. That's not what the Administrative Procedure Act envisions.

B.

None of this is to say that the Commission had to adopt the exact same rules under the precise rationale proposed in the *Notice*. Of course, the adopted rules may be the "logical outgrowth" of the original proposal.[118] But the *Order*'s decision to reclassify, to forbear, and to adopt rules grounded in Title II is a reversal of the proposals and tentative conclusions in the *Notice*, not a natural evolution.

The standard is whether all interested parties "*should have* anticipated" the final rule.[119] The question "is one of fair notice"[120]: whether "persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake."[121] In other words, "general notice that a new standard will be adopted affords the parties scant opportunity for comment"—the "agency's obligation is more demanding."[122]

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[112] *Order* at para. 125.

[113] *Order* at para. 119.

[114] *Order* at paras. 133, 136.

[115] *Order* at para. 583.

[116] *Compare Notice*, 29 FCC Rcd at 5626 ("Part 8 of Title 47 of the Code of Federal Regulations is amended to read as follows: . . . AUTHORITY: 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302"), *with Order* at Appendix A ("The authority citation for part 8 is amended to read as follows: AUTHORITY: 47 U.S.C. §§ 151, 152, 153, 154, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302."). The *Notice* made no mention whatsoever of sections 218, 251, 256, 257, 301, 304, 307, 403, 503, 522, and 536.

[117] 5 U.S.C. § 553(b)(2)–(3).

[118] *See, e.g.*, *Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005).

[119] *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (emphasis added) (internal quotation marks omitted); *see also Council Tree Communications v. FCC*, 619 F.3d 235, 256 (3d Cir. 2010) ("[E]ven if some sophisticated observers would have seen the connection between the stricter compliance that had been noticed and the lower standards eventually announced, the proper question under the APA was whether the agency had provided notice to all 'interested parties.' . . . [T]he inferential notice purportedly provided . . . did not satisfy that standard." (quoting *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972))).

[120] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

[121] *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) (internal quotation marks omitted).

[122] *Horsehead Resource Development Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

Although the agency dutifully recites that standard,[123] at points it seems to apply a different one: something akin to asking whether parties *could have* anticipated the final rule.[124] In essence, the *Order* suggests an agency may adopt *any* rule unless it was impossible for anyone to anticipate that rule. No court, to my knowledge, has ever endorsed such a standard. And it's easy to see why: Such a standard would give an agency a tremendous incentive to outline its proposals in broad and vague terms to expand the realm of possibility. Notices of proposed rulemaking could be nothing more than a single sentence: "We propose to regulate XYZ."

Here's an illustration of how those standards differ. Say you and a friend are in Kansas. The two of you have been talking every day for months about how wonderful it would be to visit San Francisco. One day, your friend brings up San Francisco yet again and says "Say, we've talked enough about this. I propose we go on a cross-country drive. Do you want to come?" Eager to go west, you say yes. You get in the car, fall asleep for a few hours, and wake up to find that . . . you're heading east toward Boston! "Wait," you protest, "I thought we were heading to San Francisco!" Your friend replies: "Well, I proposed merely that we go on a cross-country drive. I know we'd been talking every day for months about San Francisco, but you could have realized that I had Boston in mind." Deflated, you retort: "But *should* I have? Shouldn't you have told me we were heading to Boston and given me a chance to say yes or no before we hit the road?"

Here's another one. Say a government agency seeks competitive bids to build a suspension bridge. The request for proposals details how the suspension bridge should be built but reserves the right to build another type of bridge instead. Could a bidder anticipate that the government will hire someone to build an arch bridge through this RFP? Perhaps. But what should bidders expect? That if the agency decides not to build the proposed suspension bridge, it will issue a new RFP. Otherwise, a serious bidder would be obligated to draw plans and submit a proposal for each and every type of bridge feasible—thus reducing the quality of each response since every bidder would need to spread its resources anticipating possibilities rather than focusing on the proposal at hand.

Indeed, courts have repeatedly held that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal."[125] And so when a notice of proposed rulemaking has "clearly stated that the FCC intended to adopt [a proposed rule]" and "even recited the rationale for the proposed rule," the courts have reversed the Commission when "the final rule took a contrary position."[126]

The *Order*'s primary retort appears to be that—alongside its section 706-based proposals and tentative conclusions—the *Notice* sought comment on alternatives.[127] As the *Order* puts it, the *Notice*

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[123] *Order* at para. 539.

[124] *Compare, e.g.*, *Order* at para. 37 ("[O]ur forbearance approach results in over 700 codified rules being inapplicable . . . ."), *with Order* at para. 540 (claiming notice for such a result based on two sentences seeking general comment "on the extent to which forbearance from certain provisions of the Act or our rules would be justified"); *see also Order* at note 1671 (arguing that the FCC used "slightly different wording to the same effect" when it had previously endorsed a "could have anticipated" standard).

[125] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[126] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d. Cir. 1986).

[127] As the *Order* points out, almost every section of the *Notice* included a generic paragraph seeking comment on alternatives. For example, the *Order* points to paragraph 96 of the *Notice*, which spends six sentences discussing possible alternatives for how to define a no-blocking rule and then one sentence asking commenters to "address the legal bases and theories, including Title II, that the Commission could rely on for such a no-blocking rule, and how different sources of authority might lead to different formulations of the no-blocking rule." *Notice*, 29 FCC Rcd at 5595–96, para. 96 (cited by *Order* at note 1100). Such back-of-the-hand mentions are hardly sufficient to apprise commenters on the hows, the whats, and the whys of reclassification, and so I focus on the *Notice*'s most fulsome discussion instead.

"proposed to rely on section 706 of the Telecommunications Act of 1996, but at the same time stated that it would 'seriously consider the use of Title II of the Communications Act as the basis for legal authority.' The [*Notice*] sought comment on the benefits of both section 706 and Title II, and emphasized its recognition that 'both section 706 and Title II are viable solutions.'"[128]

It's true that the *Notice* sought comment on reclassification. Here is that entire discussion:

> *Title II—Revisiting the Classification of Broadband Internet Access Service*. In a series of decisions beginning in 2002, the Commission has classified broadband Internet access service offered over cable modem, DSL and other wireline facilities, wireless facilities, and power lines as an information service, which is not subject to Title II and cannot be regulated as common carrier service. In 2010, following the D.C. Circuit's *Comcast* decision, the Commission issued a Notice of Inquiry (*2010 NOI*) that, among other things, asked whether the Commission should revisit these decisions and classify a telecommunications component service of wired broadband Internet access service as a "telecommunications service." The Commission also asked whether it should similarly alter its approach to wireless broadband Internet access service, noting that section 332 requires that wireless services that meet the definition of "commercial mobile service" be regulated as common carriers under Title II. In response, the Commission received substantial comments on these issues. We now seek further and updated comment on whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service (or components thereof). How would such a reclassification approach serve our goal to protect and promote Internet openness? What would be the legal bases and theories for particular open Internet rules adopted pursuant to such an approach? Would reclassification and applying Title II for the purpose of protecting and promoting Internet openness impact the Commission's overall policy goals and, if so, how?
>
> What factors should the Commission keep in mind as it considers whether to revisit its prior decisions? Have there been changes to the broadband marketplace that should lead us to reconsider our prior classification decisions? To what extent is any telecommunications component of that service integrated with applications and other offerings, such that they are "inextricably intertwined" with the underlying connectivity service? Is broadband Internet access service (or any telecommunications component thereof) held out "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public?" If not, should the Commission compel the offering of such functionality on a common carrier basis even if not offered as such? For mobile broadband Internet access service, does that service fit within the definition of "commercial mobile service"? We also note that on May 14, 2014, Representative Henry Waxman, Ranking Member of the Committee on Energy and Commerce of the U.S. House of Representatives, sent a letter to Chairman Wheeler proposing an approach to protecting the open Internet whereby the Commission would proceed under section 706 but use Title II as a "backstop authority." We seek comment on the viability of that approach.[129]

If these two paragraphs, tucked into an 85-page document, are sufficient notice to discard the regulatory framework for Internet access services that the Commission has relied on for almost two decades—a framework the FCC has affirmed time[130] and again[131] and again[132] and again[133] and again[134]—

[128] *Order* at para. 327 (quoting *Notice*, 29 FCC Rcd at 5563, para. 4) (footnotes omitted).

[129] *Notice*, 29 FCC Rcd at 5613–14, paras. 149–50 (footnotes omitted).

[130] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*) (classifying Internet access service).

and the myriad of related precedents and agency rules, then the FCC (and likely every federal agency) has been doing notice-and-comment rulemaking wrong for decades. I am not aware of, and the *Order* does not cite, one single notice of proposed rulemaking that the Commission has issued that is so abbreviated. Nor one that would reverse so much precedent with so little analysis. Nor one whose consequences would be so far reaching (and collateral impacts so many) with so little discussion. Just look at the *Notice*'s detailed discussion of the FCC's section 706 authority to see how we normally tee up a proposal.[135] Or look at the 83-paragraph notice of proposed rulemaking that preceded the classification of wireline broadband Internet access service as an information service to see how we normally tee up a new regulatory framework.[136] The contrast could not be starker.[137]

The failure of the *Notice* to properly frame the Title II proposal matters. Indeed, "[a]n agency adopting final rules that differ from its proposed rules is required to renotice when the changes are so major that the original notice did not adequately frame the subjects for discussion. The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form."[138]

And given the *Notice*'s framing, I simply cannot understand how any commenter could have anticipated—let alone should have anticipated—the 128 paragraphs of the *Order* that explain the Commission's rationale for reclassification and the ramifications of that decision.[139] Search the *Notice*'s two paragraphs as I might, I cannot ferret out *any discussion* of the three factual changes that have led to the Commission's determination today—namely, "(1) consumer conduct, . . . (2) broadband providers' marketing and pricing strategies . . . and (3) the technical characteristics of broadband Internet access service."[140] Nor can I find any discussion of how Domain Name System (DNS) service, caching, or any

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[131] *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Order*) (classifying broadband Internet access service over cable systems), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[132] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*) (classifying broadband Internet access service over wireline facilities).

[133] *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (classifying broadband Internet access service over power lines).

[134] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (*Wireless Broadband Internet Access Order*) (classifying broadband Internet access service over wireless networks).

[135] *Notice*, 29 FCC Rcd at 5610–12, paras. 143–47.

[136] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002).

[137] *Accord Council Tree Communications v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (holding that the FCC failed to provide APA notice for a rule after "find[ing] it instructive that the FCC had previously solicited broader comment on" the point covered by the rule "and in much more specific terms than it did here" and observing that "[t]he contrast could not be more stark").

[138] *Connecticut Light & Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 533 (D.C. Cir. 1982).

[139] *Order* at paras. 306–433. Note that I exclude from this discussion any mention of forbearance, which I address below.

[140] *Order* at para. 330; *see also Order* at paras. 346–54.

other feature of broadband Internet access service falls into the telecommunications system management exception to the definition of information service (or even any discussion of the meaning of that exception).[141] Nor can I find any discussion of the benefits reclassification would have for broadband investment.[142] Nor can I find any discussion of what reclassification means for state or local regulation of broadband services.[143] Nor can I find any mention that the FCC's past "predictive judgments . . . anticipating vibrant intermodal competition" were wrong.[144]

To get to the point: Could someone reading the *Notice* have anticipated the FCC might reject its past proposals and tentative conclusions and instead pursue reclassification? Perhaps. Anything is possible. But *should* the public have anticipated the FCC would move forward with reclassification without issuing a Further Notice of Proposed Rulemaking? Surely not. The *Notice* itself left just too many questions unanswered—and too many questions unasked for that matter.

To be clear, the deficiencies in the *Notice* were not the product of incompetence. Rather, they reflect the fact that the agency was headed in a different direction until political pressure was applied to the Commission last November. Specifically, President Obama's endorsement of Title II forced a change in the FCC's approach.[145] Indeed, the agency was publicly considering a so-called "hybrid" approach on the day of the President's announcement[146] and was reportedly pursuing such an approach even in the days after that announcement[147]—only to succumb to executive branch entreaties when pen was put to paper.[148]

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[141] *Order* at paras. 366–75.

[142] *Order* at paras. 409–25.

[143] *Order* at paras. 430–33.

[144] *Order* at para. 330. To be sure, that last omission is understandable. The FCC could not have mentioned that point until just 22 days before this vote, when the agency decided to hike the standard for what qualifies as broadband Internet access service from 4 Mbps to 25 Mbps, excluding in one fell swoop all wireless and most wireline operators from the market. *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*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, FCC 15-10 (rel. Feb. 4, 2015) (*2015 Broadband Progress Report*), *available at* http://go.usa.gov/3ay5d. Indeed, the agency still has not published that decision in the Federal Register and the public still has more than a month before the comment period closes on the accompanying notice of inquiry. *Id.* (establishing a deadline for initial comments of March 6, 2015, and a deadline for replies for April 6, 2015).

[145] Gautham Nagesh and Brody Mullins, Net Neutrality: How White House Thwarted FCC Chief, *The Wall Street Journal* (Feb. 4, 2015) ("In November, the White House's top economic adviser dropped by the Federal Communications Commission with a heads-up for the agency's chairman, Tom Wheeler. President Barack Obama was ready to unveil his vision for regulating high-speed Internet traffic. The specifics came four days later in an announcement that blindsided officials at the FCC."), *available at* http://on.wsj.com/16FXTcH. It strains credulity to think otherwise; had the agency been on track to adopt the President's plan all along, there would have been no need for him to "la[y] out a plan to do [Title II]" and (critically) "ask[] the FCC to implement it." The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

[146] FCC Chairman Tom Wheeler's Statement on President Barack Obama's Statement Regarding Open Internet (Nov. 10, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-330414A1.pdf.

[147] *See* Brian Fung, How Obama's net neutrality comments undid weeks of FCC work, *Washington Post* (Nov. 14, 2014) ("Three people who met with [FCC Chairman Tom] Wheeler in the days after the president's statement say he was 'adamant' that all options remain on the table—but they also walked away with the impression that the chairman is still not ready to give up on the agency's hybrid proposal. 'He certainly referred to the hybrid glowingly,' said one official, who met with Wheeler late this week and spoke on condition of anonymity to speak

(continued….)

But the Commission cannot credibly claim APA notice from the White House's November 10 YouTube announcement of "President Obama's Plan for a Free and Open Internet."[149] Although that announcement did (unlike the *Notice*) propose reclassification under Title II[150] and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,[151] I can find no record of the FCC voting on that proposal, publishing it in the Federal Register, nor soliciting the public for comment.

Nor, for that matter, can the *Order* point to Chairman Wheeler's February 4 editorial on Wired.com explaining "This Is How We Will Ensure Net Neutrality."[152] Although that announcement did (unlike the *Notice*) propose reclassification under Title II[153] and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,[154] I again can find no record of

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freely about the gathering. 'If we had to bet where he's heading, it's still the hybrid.'"), *available at* http://wapo.st/1alNQed.

[148] Indeed, the agency did not think it could prohibit paid prioritization—the *bête noire* of net neutrality proponents—under Title II before the President's announcement. As the Chairman testified to Congress less than a week after the Commission adopted the Notice, "[t]here is nothing in Title II that prohibits paid prioritization." Hearing before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, "Oversight of the Federal Communications Commission," Video at 44:56 (May 20, 2014), available at http://go.usa.gov/3aUmY. And he was right: Title II makes clear that "different charges may be made for the different classes of communications." Communications Act § 201(b). And there's more than a century of precedent that common carriers may charge different rates for different services. *See, e.g.*, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, WT Docket No. 96-86, Second Report and Order, 15 FCC Rcd 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, "*prima facie* lawful" under section 202); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221 (1999) (granting dominant carriers pricing flexibility or special access services, allowing both higher charges for faster connections as well as individualized pricing and customers discounts); *GTE Telephone Operating Companies Tariff F.C.C. No. 1 et al.*, Transmittal Nos. 900, 102, 519, 621, 9 FCC Rcd 5758 (Common Carrier Bur. 1994) (approving tariffs for Government Emergency Telephone Service(GETS), a prioritized telephone service, and additional charges therefor); *see also, e.g.*, *Interstate Commerce Commission v. Baltimore & O.R. Co.*, 145 U.S. 263, 283–84 (1892) (noting that common carriers are "only bound to give the same terms to all persons alike under the same conditions and circumstances" and that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge").

[149] The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

[150] *Id.* ("I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act . . . .").

[151] *Id.* ("The rules I am asking for are simple, common-sense steps that reflect the Internet you and I use every day, and that some ISPs already observe. These bright-line rules include: No blocking. . . . No throttling. . . . No paid prioritization.").

[152] Tom Wheeler, FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality, *Wired*, http://wrd.cm/1EGifR4 (Feb. 4, 2015) ("[T]he time to settle the Net Neutrality question has arrived. This week, I will circulate to the members of the Federal Communications Commission (FCC) proposed new rules to preserve the internet as an open platform for innovation and free expression.").

[153] *Id.* ("I am proposing that the FCC use its Title II authority to implement and enforce open internet protections.").

[154] *Id.* ("These enforceable, bright-line rules will ban paid prioritization, and the blocking and throttling of lawful content and services.").

the FCC voting on that proposal, publishing it in the Federal Register, nor soliciting the public for comment.

Some of us at the FCC have seen this movie before. About one month before concluding the FCC's 2006 media ownership proceeding, then-FCC Chairman Kevin Martin published an editorial in *The New York Times* unveiling his own proposal for revising the newspaper/broadcast cross-ownership rule. In its *Prometheus* decision, the Third Circuit explained that the editorial "did not satisfy the APA's notice requirements. The proposal was not published in the Federal Register, the views expressed were those of one person and not the Commission, and the Commission voted days after substantive responses were filed, allowing little opportunity for meaningful consideration of the responses before the final rule was adopted."[155] It then went on: "Although it was clear from [several Commission notices], taken together, that the Commission was planning to overhaul its approach to newspaper/broadcast cross-ownership, they did not contain enough information about what it was planning to do, or the options it was considering, to provide the public with a meaningful opportunity to comment. Until Chairman Martin's November 2007 personal Op-Ed/Press Release, the public did not know even what options he was considering, let alone the Commission."[156] If anything, Chairman Martin provided more notice than has been offered in this proceeding. There, he made public the exact text of his proposed newspaper/broadcast cross-ownership rule. Here, the details of the Chairman's complex proposal have remained shrouded in mystery.

Indeed, it was widely reported that the Commission strongly considered seeking additional comment because of the notice problems.[157] In an email sent to the press, a "commission spokeswoman" described a blog post that Chairman Wheeler published just hours after President Obama called for reclassification and said: "The Chairman said in his statement last Monday that there is more work to do and substantive legal questions to answer." She then added that "[t]he Commission is considering the best way to invite additional comments on those questions."[158] But ultimately, after even more political pressure was put on the agency to move forward without seeking comment,[159] the agency decided to plow ahead.

So here we are. We are moving forward with an *Order* the contours of which no one could have or should have anticipated, considering how drastically different the *Notice*'s proposals were. The FCC

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[155] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011).

[156] *Id.* at 451.

[157] *See, e.g.*, Jesse Jackson Urges Wheeler Against Title II, *Communications Daily* (Nov. 19, 2014) ("Several involved in the net neutrality debate have said in recent days that they expect the agency, in light of Wheeler's statement last week, to seek additional comments in the proceeding."); Lydia Beyoud, Obama's Call for Title II Reclassification Forces Rulemaking Delay, *Bloomberg BNA* (Nov. 12, 2014) ("Several sources said that [figuring out a way forward] could involve an additional public comment period, whether from a further notice of proposed rulemaking or through a public notice at the bureau level."), *available at* http://bit.ly/17zHLcC; Laura Ryan, Brendan Sasso and Dustin Volz, What's Next in the Never-Ending Net Neutrality Fight, *National Journal* (Nov. 11, 2014) ("An FCC official said the chairman hasn't decided yet whether he'll need to issue a further notice of proposed rule-making before moving on to final rules."), *available at* http://bit.ly/1AsB4EA; No December Vote: Obama Wants Title II; Wheeler Says There are Issues to Be Resolved, *Communications Daily* (Nov. 12, 2014) ("[S]ome industry attorneys said the agency may seek even more comments."); *id.* ("Some industry attorneys said the commission may open up . . . [the] proceeding . . . to another round of comments to bolster the record for classification.").

[158] Jesse Jackson Urges Wheeler Against Title II, *Communications Daily* (Nov. 19, 2014).

[159] *See, e.g.*, Mario Trujillo, Dems to FCC: 'Time for action' on Web reclassification, *The Hill* (Dec. 18, 2014), *available at* http://bit.ly/1GwPOTF; *see also* No December Vote: Obama Wants Title II; Wheeler Says There are Issues to Be Resolved, *Communications Daily* (Nov. 12, 2014) ("Heartened by Obama's statement, Title II advocates pressed the agency to quickly move ahead with approving net neutrality rules involving reclassification.").

proposed to the public a cross-country trip to San Francisco. Only after the car was on the road did the public realize the agency was taking it to Boston.

C.

The failure of notice extends beyond the rules and rationale to discrete decisions littered throughout the *Order*. Rather than cataloging each and every failure, I'll give three examples to illustrate just how far afield the *Order* has strayed from the *Notice*: (1) its application of forbearance to broadband Internet access service; (2) the treatment of Internet traffic exchange (or IP interconnection); and (3) the new definition of the statutory term "the public switched network."

1. Forbearance Applied to Broadband Internet Access Service.—Consider the application of forbearance to broadband Internet access service. To be sure, the *Notice* included three paragraphs seeking comment on "the extent to which forbearance from certain provisions of the Act or our rules would be justified in order to strike the right balance between minimizing the regulatory burden on providers and ensuring that the public interest is served,"[160] asked whether forbearance should differ for mobile broadband services,[161] and identified six sections of Title II that might be "excluded from forbearance."[162] But as the courts have told us before, even if it was "clear from those sources, taken together, that the Commission was" considering forbearance, "they did not contain enough information about what it was planning to do, or the options it was considering, to provide the public with a meaningful opportunity to comment."[163]

For one, the *Order*'s forbearance decisions are expansive, encompassing at least 49 separate decisions. The *Order* decides, for example, that sections 201 (in part), 202 (in part), 206, 207, 208, 209, 214(e), 216, 217, 222, 224 (including subsection (e)), 225 (but not subparagraph (d)(3)(B)), 229, 230, 251(a)(2), 254 (but not the first sentence of subsection (d) nor subsections (g) or (k)), 255, 257, 276, and 309(b) & (d)(1) of the Communications Act will apply to broadband Internet access service.[164] That's 20 separate sections that will apply in whole or part, 14 more than mentioned in the *Notice*. The *Order* then goes on to temporarily forbear, in whole or part, from applying 15 sections[165] and to permanently forbear, in whole or part, from 14 more.[166] And that's just the provisions of the Act! The *Order* also forbears from some of the Commission's rules,[167] applies others,[168] forbears from conducting certain further

[160] *Notice*, 29 FCC Rcd at 5615–16, para. 153.

[161] *Notice*, 29 FCC Rcd at 5616, para. 155.

[162] *Notice*, 29 FCC Rcd at 5616, para. 154.

[163] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 451 (3d Cir. 2011).

[164] *See Order* at paras. 441 (sections 201 and 202); 453 (sections 206, 207, 208, 209, 216, and 217); 463 (section 222); 469 (section 225); 472 (sections 251(a)(2) and 255); 478 (section 224); 481 (section 224(e)); 486 (sections 214(e) and 254); 521 (section 276); 531 (section 257); 532 (section 230(c)); 533 (section 229); 535–36 (sections 309(b) and (d)(1)).

[165] *See Order* at paras. 470 (section 225(d)(3)(B)); 488 (section 254(d)'s first sentence); 497 (section 203); 505 (section 204); 506 (section 205); 508 (sections 211, 213, 215, 218, 219, 220); 509–12 (section 214 except for subsection (e)); 513 (section 251 except for subsection (a)(2), section 256); 515 (section 258). The *Order* makes clear that forbearance from each of these provisions is only appropriate "at this time," "for now," or "on this record."

[166] *See Order* at paras. 492 (sections 254(g), (k)); 507 (section 212); 517–18 (sections 271, 272, 273, 274, 275); 519 (sections 221, 259); 520 (sections 226, 227(c)(3), 227(e), 228, 260).

[167] *See Order* at para. 522 (forbearing from applying the Commission's truth-in-billing rules).

[168] *See Order* at paras. 472–74 (declining to forbear from the Commission's rules implementing section 255 except "insofar as there is any conflict" with "sections 716–718 and our implementing rules").

rulemakings,[169] and commits to commencing still others.[170] To suggest that any party could have or should have anticipated the byzantine dictates that the *Order* takes 103 paragraphs over 62 pages to explain,[171] based on three high-level paragraphs in the *Notice*, is simply implausible.

For another, no party could have anticipated the Commission's rationale for forbearing from some provisions but not others based on the *Notice*.[172] The *Notice* gave no rationale for when forbearance might be appropriate under these particular circumstances. Instead, it asked commenters to provide a "justification for the forbearance" and told commenters to "define the relevant geographic and product markets in which the services or providers should receive forbearance."[173] In other words, this isn't even a case where the agency has "simply propose[d] a rule and state[d] that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration."[174] Here, the *Notice* proposed *nothing at all* and asked commenters for forbearance proposals—and the *Order* now adopts some but not all of those proposals using a rationale never before explained.[175] The "'logical outgrowth' doctrine does not extend to a final rule that finds no roots in the agency's proposal because '[s]omething is not a logical outgrowth of nothing.'"[176]

And to put it lightly, this isn't how forbearance usually works. When the Commission has previously forborne as part of a rulemaking, the underlying notice has sought specific comment on whether the FCC should forbear from applying a particular statutory provision to a particular class of carriers and has specified why such forbearance may be appropriate.[177] Indeed, when the FCC first applied forbearance to commercial mobile services, it commenced that proceeding with a detailed notice of proposed rulemaking that examined its new forbearance authority under section 332(c)(1)(A). It explained how the Commission's view of competition affected its forbearance analysis. And it offered rationales for forbearing or not forbearing from each statutory provision.[178]

The standard for petitioners seeking forbearance is equally high: Petitions must identify "[e]ach statutory provision, rule, or requirement for which forbearance is sought" and "[e]ach geographic

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[169] *See Order* at para. 451 (forbearing from applying sections 201 and 202 to the extent they would enable the Commission to "adopt[] new *ex ante* rate regulation . . . in the future").

[170] *See Order* at para. 526 (committing "to commence in the near term a separate proceeding to revisit the data roaming obligations of MBIAS providers in light of our reclassification decisions today").

[171] *Order* at paras. 434–536.

[172] To be fair, the *Order* really doesn't make the rationale clearer for many of its decisions. At most, it claims in a footnote that the rationale for forbearance is to "protect and promote Internet openness." *Order* at note 1673. But like beauty or a public interest standard, what that means is in the eye of the beholder. If notice and comment is to mean anything, commenters must be able to wrestle with a concrete rationale for action, not one so vague that no one could anticipate how it might be applied in any particular circumstance.

[173] *Notice*, 29 FCC Rcd at 5616, para. 154.

[174] *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986).

[175] For more on this novel rationale, *see infra* Section III.D.

[176] *See Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (alteration in original) (quoting *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).

[177] *See, e.g.*, *Lifeline and Link Up Reform and Modernization et al.*, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45, Notice of Proposed Rulemaking, 26 FCC Rcd 2770, 2862–64, paras. 303–09 (2011) (seeking comment on forbearing from the Act's facilities requirement for resellers that want to participate in the FCC's Lifeline program since that requirement appeared only relevant to participants in the FCC's high-cost program).

[178] *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Notice of Proposed Rulemaking, 8 FCC Rcd 7988, 7998–8001, paras. 49–68 (1993).

location, zone, or area from which forbearance is sought," must "contain facts and argument which, if true and persuasive, are sufficient to meet each of the statutory criteria," and must offer a "full statement of the petitioner's *prima facie* case for relief."[179] The FCC itself never seriously attempted to meet these standards in the *Notice*, thus "present[ing] interested parties with a moving target, which frustrates their efforts to respond fully and early in the process."[180] Or as one party to this proceeding put it: "In essence the Commission is asking the public to shadowbox with itself."[181]

2. Internet Traffic Exchange (also Known as IP Interconnection).—The *Notice* discussed Internet traffic exchange in a single paragraph, tentatively concluding that the FCC should maintain the approach it had previously taken so that the Part 8 "Open Internet" rules would not apply "to the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection."[182] Today, the *Order* follows through on that tentative conclusion and concludes that application of the Part 8 rules to Internet traffic exchanged "is not warranted."[183]

But the *Order* then goes quite a bit further and adopts a "regulatory backstop prohibiting common carriers from engaging in unjust and unreasonable practices,"[184] subjecting Internet traffic exchange arrangements like those mentioned immediately above to "sections 201 and 202 on a case-by-case basis."[185] With this authority, the Commission can order an Internet service provider "to establish physical connections with other carriers, to establish through routes and charges applicable thereto . . . , and to establish and provide facilities and regulations for operating such through routes."[186] In other words, the *Order* classifies Internet traffic exchange as a Title II telecommunications service in everything but name.

The *Notice* proposed nothing like this. As one commenter has observed: "Nowhere did the Commission remotely indicate that it was considering classifying the distinct *wholesale* Internet traffic-exchange services that ISPs provide to other network owners as Title II telecommunications services."[187] To add to the list, nowhere did the *Notice* propose applying sections 201 or 202 of the Act to Internet traffic exchange, and nowhere did the *Notice* suggest that the FCC might order physical connections, through routes, or appropriate charges in response to an IP interconnection dispute.

And when the Commission adopted the *Notice*, the Chairman himself disclaimed that Internet traffic exchange would be part of this proceeding: "Separate and apart from this connectivity is the question of interconnection ('peering') between the consumer's network provider and the various

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[179] *See* 47 C.F.R. § 1.54(a), (b), (e).

[180] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, 9550, para. 12 (2009).

[181] Letter from Earl Comstock et al., Counsel for Full Service Network and TruConnect, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 10 (Feb. 3, 2015), *available at* http://go.usa.gov/3aUDR.

[182] *Notice*, 29 FCC Rcd at 5582, para. 59.

[183] *Order* at para. 195; *see Order* at para. 206 ("To be clear, we are not applying the open Internet rules we adopt today to Internet traffic exchange.").

[184] *Order* at para. 203.

[185] *Order* at para. 205.

[186] Communications Act § 201(a).

[187] Letter from Matthew A. Brill, Counsel for the National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 8 (Jan. 14, 2015), *available at* http://go.usa.gov/3aUDF; *see id.* ("[T]he portions of the NPRM seeking comment on the application of Title II are focused on the potential reclassification of *retail* broadband Internet access service as a telecommunications service.").

networks that deliver to that ISP. That is a different matter that is better addressed separately. Today's proposal is all about what happens on the broadband provider's network and how the consumer's connection to the Internet may not be interfered with or otherwise compromised."[188] When the Chairman of the Commission—the agency's "chief executive officer"[189]—says that the proposal is "all about" something other than interconnection, why should parties have anticipated the opposite?

To claim, as the *Order* does, that these are just "regulatory consequences" flowing from other decisions in the *Order* is no defense.[190] Not once in the *Notice* did the Commission suggest that Internet traffic exchange was a "component" of broadband Internet access service (as the *Order* now claims).[191] If anything, the *Notice* disclaimed that notion, tentatively concluding to "retain" the definition of broadband Internet access service from the 2010 *Open Internet Order* "without modification."[192] As the *Notice* stated, the rules based on that definition were "not intended 'to affect existing arrangements for network interconnection'" and "did not apply beyond 'the limits of a broadband provider's control over the transmission of data to or from its broadband customers.'"[193] The *Notice* then confirmed that any edge-provider-facing service it recognized would "include the flow of Internet traffic on the broadband providers' own network[s], *and not how it gets to the broadband providers' networks*."[194]

Nor can the *Order* plausibly claim that "numerous submissions in the record . . . illustrate that the Commission . . . gave interested parties adequate notice" of the Title II-based backstop adopted here.[195] Although many parties discussed Internet traffic exchange during the comment period, they did so because the *Notice* asked if the FCC should change course and apply the Part 8 rules to IP interconnection, a proposal the *Order* squarely rejects today. The submissions during the comment period say nothing about a Title II-based backstop—and even a cursory review of those filings shows that no party anticipated the approach the *Order* now adopts.

3. Redefining the Public Switched Network.—Consider the *Order*'s new definition for the statutory term "the public switched network."[196] As background, section 332 of the Communications Act bars the FCC from treating any mobile service—such as mobile broadband Internet access service—as a telecommunications service unless that mobile service is interconnected with the public switched network.[197] By redefining the term "the public switched network" to include services that use "public IP

[188] *Notice*, 29 FCC Rcd at 5647 (Statement of Chairman Tom Wheeler).

[189] Communications Act § 5(a).

[190] *Order* at para. 206 ("[C]ertain regulatory consequences flow from the Commission's classification of BIAS, including the traffic exchange component, as falling within the 'telecommunications services' definition in the Act.").

[191] *See Order* at note 521 ("Internet traffic exchange is a component of broadband Internet access service, both of which meets the definition of 'telecommunications service.'").

[192] *Notice*, 29 FCC Rcd at 5581, para. 55.

[193] *Notice*, 29 FCC Rcd at 5582, para. 59 (quoting *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17944, n.209 (2010); *id.* at 17933, n.150).

[194] *Notice*, 29 FCC Rcd at 5615, para. 151 (emphasis added).

[195] *Order* at para. 206.

[196] *Order* at para. 391; *see also Order* at Appendix A (amending the definition of "public switched network" in rule 20.3).

[197] Communications Act § 332(c)(2) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act . . . ."); Communications Act § 332(d)(3) ("[T]he term 'private mobile service' means any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service . . . ."); Communications Act § 332(d)(1) ("[T]he term 'commercial mobile service' means any mobile service . . . that is provided for profit and

(continued….)

addresses,"[198] the *Order* argues that mobile broadband Internet access service now meets the definition for commercial mobile service and thus can be treated as a telecommunications service.[199]

But the *Notice* never proposed a new definition for the public switched network. Appendix A of the *Notice* did not include such a definition in the list of "proposed rules."[200] The text of the *Notice* did not seek comment on redefining the term.[201] Indeed, the *Notice* never even mentioned the term "the public switched network" or the portion of the FCC rule that currently defines it. Instead, the new definition came from Vonage Holdings Corp. in its comments two full months after the Commission adopted the *Notice*.[202] Although the Commission can address comments in the record (and must respond to significant ones), an agency "must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."[203]

The *Order* attempts to establish notice for this new definition by pointing to several other questions asked in the *Notice*,[204] such as "whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service"[205] and "the extent to which forbearance should apply, if the Commission were to classify mobile broadband Internet access service as a CMRS service subject to Title II."[206] But even the most specific question the *Order* points to—"does [mobile broadband Internet access] service fit within the definition of 'commercial mobile service'?"[207]—falls short of putting the public on notice, since that question takes the definition of commercial mobile service (and hence public switched network) as a given. As the courts have told us before, "[e]ven if this *was* the FCC's intent, 'an unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated.'"[208]

(Continued from previous page)
makes interconnected service available"); Communications Act § 332(d)(2) ("[T]he term 'interconnected service' means service that is interconnected with the public switched network . . . .").

[198] *Order* at para. 391.

[199] *Order* at paras. 391–99, 402 (applying the new definition).

[200] *See Notice*, 29 FCC Rcd at 5626–27 (Appendix A: Proposed Rules).

[201] *See Notice*, 29 FCC Rcd at 5614, para. 150.

[202] Vonage Comments at 43–44.

[203] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original); *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (explaining that a proposal "not published in the Federal Register" expressing the views of a party but "not the Commission" does not satisfy the APA's requirements).

[204] *See Order* at para. 391. The *Order* also points to various questions in the *2010 NOI*—but even that item did not propose a new definition for the public switched network and used the term only once in an utterly unrelated context. *See 2010 NOI*, 25 FCC Rcd at 7871, n.24. What is more, I do not see how the *Order* can credibly point to the *2010 NOI* for APA notice when it does not incorporate the record produced by that notice into this proceeding. *See Order* at page 1 (listing GN Docket No. 14-28 (the docket of the *Notice*) but not GN 10-127 (the docket of the *2010 NOI*)). The Commission cannot have it both ways: Either the *2010 NOI* and its associated record is part of this proceeding (and the agency must address the full record against reclassification compiled therein) or it is not (and the agency cannot claim notice based on the *2010 NOI*).

[205] *See Notice*, 29 FCC Rcd at 5614, para. 149.

[206] *See Notice*, 29 FCC Rcd at 5616, para. 155.

[207] *See Notice*, 29 FCC Rcd at 5614, para. 150.

[208] *Council Tree Communications v. FCC*, 619 F.3d 235, 254 (3d Cir. 2010) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir.1991)).

Notably, the *Order* relies on these same passages as providing notice that the FCC would amend its rules to define mobile broadband Internet access service as the "functional equivalent of a commercial mobile service."[209] But, again, the *Notice* never proposed to amend this rule. Appendix A of the *Notice* did not include any change to this rule in the list of "proposed rules."[210] And the text of the *Notice* did not mention the term "functional equivalent" even once in the context of classifying mobile broadband Internet access service.[211] Nor does the *Notice* anywhere mention the FCC rule that delineates the framework that the agency has long used to determine whether a service is a "functional equivalent" of a commercial mobile service.[212] Yet today's *Order* fashions and applies a novel and entirely different framework for doing so.

With the *Notice* silent on all of these points, the first filing to address "functional equivalency" came 32 days after the comment period had closed on the *Notice*, following a private meeting between FCC officials and CTIA.[213] Just as the Commission cannot "bootstrap notice from a comment,"[214] it cannot use *ex parte* meetings to inform select members of the public of the Commission's thinking and then claim notice from such meetings.[215] The Administrative Procedure Act's notice-and-comment provisions were intended to ensure a robust debate among *all* parties, not just those invited to participate.

What is more, the lack of notice for these rule amendments prejudices even those who are not party to this proceeding. After all, the statutory bar on common carrier treatment applies to *any* mobile service not interconnected with the public switched network.[216] Thus, before today, online innovators could be sure that mobile applications that did not interconnect with the public switched telephone network could *not* be regulated as telecommunications services. That statutory safe harbor is now gone, even though the FCC never alerted those innovators that such a change could be coming.

D.

In sum, the Commission issued the *Notice* in May when it was heading in one direction (a section 706 solution). It shifted course in November after the President urged the agency to implement a very different plan (a reclassification regime). Rather than following the proper procedure and issuing a further notice, the FCC charged ahead at the behest of activists who were suspicious of the Commission's commitment to their cause and thus demanded that agency adopt rules without delay. That is not what the Administrative Procedure Act demands nor what the American people deserve.

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[209] *See Order* at paras. 404, 406; *see also Order* at Appendix A (amending the definition of "commercial mobile radio service" to include mobile broadband Internet access service as a "functional equivalent" in rule 20.3).

[210] *See Notice*, 29 FCC Rcd at 5626–27 (Appendix A: Proposed Rules).

[211] *See Notice*, 29 FCC Rcd at 5614, para. 150.

[212] *See* 47 C.F.R. § 20.9(a)(14).

[213] *Compare* Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-137 (Oct. 17, 2014), *available at* http://go.usa.gov/3aUW9, *with* Wireline Competition Bureau Extends Deadline for Filing Reply Comments in the Open Internet and Framework for Broadband Internet Service Proceedings, GN Docket Nos. 14-28, 10-127, Public Notice, 29 FCC Rcd 9714 (Wireline Comp. Bur. 2014) (extending the close of the comment cycle to September 15, 2014).

[214] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

[215] The *Order* specifically relies on a conversation the FCC's general counsel had with Public Knowledge for its contention that "Interested parties should have reasonably foreseen and in fact were aware that the Commission would analyze the functional equivalence of mobile broadband . . . . Indeed, several parties have submitted comments on this question." *Order* at para. 406.

[216] Communications Act § 332(c)(2) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act . . . .").

III.

The legal flaws with this *Order* are not limited to improper procedures; they extend into substance as well.

A.

One of the most basic of those flaws is the FCC's determination that it can reclassify broadband Internet access service as a Title II telecommunications service. Neither the text of the Communications Act nor our precedent condones such a decision. And while the *Order* invokes changed circumstances to justify its reversal of course, the cited circumstances are neither changed nor otherwise adequate to justify applying Title II to broadband Internet access services. In short, this decision is unlawful.

Start with the text of the Communications Act, and specifically the term "information service," which was added through the Telecommunications Act of 1996. Congress defined the term to mean:

> [T]he 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.[217]

Internet access service comfortably fits within this framework. Can an ISP's subscriber generate, store, and make available information via telecommunications? Of course—Internet users do that every day on Facebook. Can such a subscriber acquire, retrieve, and process information via telecommunications? Yes—just check out Google Translate. Can such a subscriber transform and utilize information via telecommunications? Absolutely—just try one of the Internet's hundreds of video editing sites. Would such a subscriber have these capabilities without Internet access service? Obviously not.

Indeed, Congress itself called on the Commission to treat Internet access service as an unregulated, information service elsewhere in the Communications Act.[218] Section 230 established 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."[219] That section went on to define "interactive computer service" as "any information service . . . provider that provides or enables computer access by multiple users to a computer server, *including specifically a service or system that provides access to the Internet*."[220] In other words, Congress directly addressed the question of whether an ISP offered an information service—and answered with a resounding "Yes."

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[217] Communications Act § 3(24).

[218] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("Thus, an agency interpretation that is inconsistent with the design and structure of the statute as a whole . . . does not merit deference." (internal quotation marks and brackets omitted)).

[219] Communications Act § 230(b)(2) (emphasis added); *see also* Communications Act § 230(a)(1), (a)(3), (a)(4), (b)(1), (b)(3) (all using the phrase "Internet and other interactive computer services").

[220] Communications Act § 230(f)(2) (emphasis added). To respond, as the Commission does, that section 230 does not "classify broadband Internet access service, as we define that term herein, as an information service" misses the point. *Order* at para. 386. When Congress adopted section 230 as part of the Telecommunications Act of 1996, of course it did not anticipate the precise definition the FCC would adopt almost 20 years later—but it could and did broadly define "interactive computer service" to envelop "*any*" information service provider, and "specifically a service or system that provides access to the Internet." Communications Act § 230(f)(2) (emphasis added). The *Order* cannot and does not dispute that Internet service providers squarely fall within the definition. At most, it argues that other services also fall within that definition, *Order* at note 1097, which seems rather obvious given how broadly the statute is written.

So it's no wonder that every time the Commission has previously confronted the question of whether an Internet access service is an information service, it has answered yes.[221] And it's no wonder that when the Supreme Court reviewed the FCC's determination that broadband Internet access service over cable facilities was an information service, that decision went "unchallenged."[222]

1. The Stevens Report.—The Commission's first major decision in this regard—1998's *Stevens Report*—is particularly instructive regarding why.[223] That report came at the behest of Congress to review "the definitions of 'information service' . . . [and] 'telecommunications service,'" along with "the application of those definitions to mixed or hybrid services . . . including with respect to Internet access."[224] The *Stevens Report* then exhaustively reviewed the text and legislative history of the Telecommunications Act, along with the agency's own administrative precedent and the courts' administration of antitrust law, to answer these questions. Here are the highlights:

First, the *Stevens Report* found that Congress intended to incorporate judicial precedent into the term "information service"—specifically, the Modification of Final Judgment breaking up the Bell system.[225] The court had prohibited the Bell operating companies from providing any "information service,"[226] and the Telecommunications Act's definition paralleled the court's definition almost word for word.[227] Most relevant here, the court explained that the term covered "two distinctly different types" of services: both "data processing and other computer-related services" and "electronic publishing services," such as news and entertainment.[228]

Second, the *Stevens Report* found that Congress intended to incorporate administrative precedent into the term "information service"—specifically, the Commission's development of the concept of "enhanced service" in its *Computer Inquiries* proceeding.[229] Under that precedent, the Commission had eschewed the idea that it could divide up an integrated service into its component parts: "[N]o regulatory scheme could 'rationally distinguish and classify enhanced services as either communications or data processing,' and any dividing line the Commission drew would at best 'result in an unpredictable or inconsistent scheme of regulation' as technology moved forward."[230] In other words, even though enhanced services were "offered '*over* common carrier transmission facilities,' [they] were themselves

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[221] *See Stevens Report*, 13 FCC Rcd at 11501; *Cable Modem Order*, 17 FCC Rcd at 4798; *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14853; *BPL Internet Access Order*, 21 FCC Rcd at 13281; *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5901.

[222] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 987 (2005).

[223] Although the *Order* now claims the *Stevens Report* was "not a binding Commission order," *Order* at para. 315, our precedent has repeatedly treated it as such. *See, e.g.*, *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105, 7120, n.70 (1999); *Cable Modem Order*, 17 FCC Rcd at 4799, n.2; *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14862, para. 12. Nor does the *Order* offer any reason to dismiss the considered views of five Commissioners reporting to Congress about how to construe the classification provisions of the Telecommunications Act.

[224] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2521, § 623 (1998).

[225] *Stevens Report*, 13 FCC Rcd at 11520, para. 39.

[226] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982).

[227] *Compare* Communications Act § 3(24), *with United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982). The only difference? The Telecommunications Act added the phrase "and includes electronic publishing."

[228] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 179–80 (D.D.C. 1982) (capitalizations omitted).

[229] *Stevens Report*, 13 FCC Rcd at 11520, para. 39.

[230] *Id.* at 11513, para. 27 (citations omitted) (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 425, 428, paras. 107–08, 113 (1980)).

not to be regulated under Title II of the Act, *no matter how extensive their communications components*."[231]

Third, the *Stevens Report* found that the "functions and services associated with Internet access," such as "the provision of gateways (involving address translation, protocol conversion, billing management, and the provision of introductory information content) to information services" and "[e]lectronic mail, like other store-and-forward services," were all "classed as 'information services' under the [Modified Final Judgment]."[232] Similarly, the "Commission has consistently classed such services as 'enhanced services.'"[233]

Fourth, the *Stevens Report* concluded that "address[ing] the classification of Internet access service *de novo*" led to the same conclusion: Internet access service is an information service according to the statute. The question was "whether Internet access providers merely offer transmission . . . or whether they go beyond the provision of a transparent transmission path."[234] And the report concluded that "the latter more accurately describes Internet access service"[235] since Internet access services "combine computer processing, information provision, and other computer-mediated offerings with data transport."[236] The fact that data transport was a component of the service was irrelevant[237]—what mattered was that "[s]ubscribers can retrieve files from the World Wide Web, and browse their contents, *because* their service provider offers the 'capability for . . . acquiring, . . . retrieving [and] utilizing . . . information."[238]

In other words, the *Stevens Report* endorsed the view of a bipartisan group of Senators—John Ashcroft, Wendell Ford, John F. Kerry, Spencer Abraham, and Ron Wyden—that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."[239] And it essentially agreed with Senator John McCain that "[i]t certainly was not Congress's

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[231] *Id.* at 11514, para. 27 (emphasis added) (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 428, paras. 114 (1980)).

[232] *Id.* at 11536–37, para. 75.

[233] *Id.* (citing *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 420–21, paras. 97–98 (1980)).

[234] *Id.* at 11536, para. 74; *id.* at 11520, para. 39 (finding a service to be a telecommunications service only if it offers "a simple, transparent transmission path, without the capability of providing enhanced functionality"); *id.* at 11520–21, para. 40 ("[A]n entity is *not* deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information."); *id.* at 11511, para. 21 ("Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'").

[235] *Id.* at 11536, para. 74.

[236] *Id.* at 11536, para. 73.

[237] *Id.* at 11539–40, para. 80.

[238] *Id.* at 11538, para. 76 (emphasis added); *id.* at 11537, para. 76 ("Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others." (footnotes omitted)).

[239] *Id.* at 11520, para. 38 (quoting Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC (Mar. 23, 1998) (*Five Senators Letter*), *available at* http://apps.fcc.gov/ecfs/document/view?id=2038710001); *see also Five Senators Letter* ("[W]ere the FCC to reverse its prior conclusions and suddenly subject some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being.").

intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to *extend* the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation."[240]

Indeed, the *Stevens Report* noted that while the 1996 Telecommunications Act's "explicit endorsement of the goals of competition and deregulation represents a significant break from the prior statutory framework,"[241] the Commission's review of the statute and its legislative history revealed no similar intent to effect a "major change" with respect to the regulatory treatment of enhanced services like Internet access service.[242] And if anything, it found the goals of the Telecommunications Act to "promote competition and reduce regulation"[243] supported the Commission's classification decisions, since making Internet access and other enhanced services "presumptively subject to the broad range of Title II constraints[] could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry."[244] Indeed, in passing the 1996 Telecommunications Act, Congress made this clear by declaring it 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."[245]

2. Recent Developments.—Developments in the marketplace since the *Stevens Report* make it even more clear that ISPs do not "merely offer transmission" between points of the user's choosing but instead offer a highly complex information service.

Take the most basic example of visiting a webpage via a browser. When the user types a domain name into a browser, the browser typically queries the ISP's Domain Name System (DNS) service for the proper IP address to send that information. The DNS service determines whether that information is stored on the local server; if so, it returns that IP address to the user, and if not, it queries another DNS server. Such DNS servers are typically arranged in a hierarchy and searched recursively; once the URL is found, the appropriate information is forwarded and stored by each DNS server in the chain. These functionalities—caching information and storing and forwarding information—are classic enhanced services.[246]

It gets even more complicated. For one, there is no necessary one-to-one correlation between domain names and IP addresses.[247] So if an Internet user in California and a user in New York City both seek the IP address for www.yahoo.com, an ISP could return different IP addresses to each user. The assignment could be random (to balance the load the server at each IP address must handle). Or the ISP could make the decision based on any number of factors, such as the physical proximity of the servers to the user (to reduce the latency of the connection).

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[240] *Stevens Report*, 13 FCC Rcd at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

[241] *Id.* at 11511, para. 21.

[242] *Id.* at 11524, para. 45.

[243] Telecommunications Act of 1996, as amended, preamble.

[244] *Stevens Report*, 13 FCC Rcd at 1524, para. 46.

[245] Communications Act § 230(b)(2).

[246] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 FCC 2d 384, 421, para. 97 & n.35 (1980).

[247] To rebut this point, the *Order* notes that it "is not uncommon in the toll-free arena for a single number to route to multiple locations." *Order* at para. 361. But the FCC expressly found that the management of toll-free numbers is "*not* a common carrier service" in 1996 and that "Resporgs" that manage toll-free numbers "do not need to be carriers." *800 Data Base Access Tariffs and the 800 Service Management System Tariff; Provision of 800 Services*, CC Docket Nos. 93-129, 86-10, Report and Order, 11 FCC Rcd 15227, 15248–49, paras. 44–45 (1996) (emphasis added).

For another, even with an IP address, an ISP may not connect a user with a particular end point. Instead, ISPs regularly cache popular content—anything from simple text to streaming video—so that when a subscriber requests such content it can be retrieved more quickly (and with less load on the network) than would occur if the request were sent to its specified destination.[248] And it's not just an ISP's own servers that cache content; an entire industry of content delivery networks have sprung up to move content closer to Internet users to improve performance.[249]

And there's still more: ISPs are eliminating viruses and other malicious attacks on their networks, including by (1) implementing DNS Security Extensions to verify the integrity of the DNS information retrieved for subscribers, (2) erecting firewalls and other screening mechanisms to prevent denial-of-service attacks and the effectiveness of botnets, and (3) monitoring network traffic patterns to ensure early detection of security threats.[250] They are using network address translation to establish non-public IP addresses for their subscribers.[251] And they are processing protocols to bridge the gap between IPv4 and IPv6.[252]

The end result of all this? Even for the most basic web browsing functions, an ISP is doing more than merely offering transmission between points of the user's choosing. Indeed, as one commenter put it, "it is literally *impossible* for a broadband user to specify the 'points' of an Internet 'transmission' on the web" since the user is really just "specifying the original *source of the information* the user wants to retrieve" and the ISP then uses that information to choose the endpoint among several alternatives.[253] Or as the *Stevens Report* put it, Internet access service enables subscribers "to access information with no knowledge of the physical location of the server where that information resides,"[254] not "between or among points specified by the user."[255]

The contrary conclusion—that Internet access service is a telecommunications service and that DNS service, caching, and "a variety of new network-oriented, security-related computer processing capabilities"[256] all fall within the telecommunications system management exception[257]—is in error. These capabilities serve the interests of subscribers, not ISPs. For instance, DNS service doesn't facilitate an ISP's "management . . . of a telecommunications system or . . . service"; it allows a subscriber's request for access to particular content to be translated into an IP address. And in any case, these

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[248] AT&T Reply at 54; Bright House Reply at 6–7.

[249] Akamai Comments at 3; *see also* Netflix, Netflix Open Connect Content Delivery for ISPs ("Unlike traditional content caches which retrieve new content when a user requests an object that is not currently present in the cache, new and popular content is pushed from Netflix to the [Netflix-supplied Open Caching Appliances at interconnection points] on a nightly basis over peering or IP transit."), *available at* http://nflx.it/1wpo0jw.

[250] ACA Comments at 54–60; AT&T Comments at 48–49; CenturyLink Comments at 44–45; Charter Comments at 14–15; Comcast Comments at 57; NCTA Comments at 34–35; T-Mobile Comments at 20; Time Warner Cable Comments at 12; USTelecom Comments at 26–27; USTelecom Reply at 29; Verizon Comments at 59–60.

[251] *See, e.g.*, Broadband Internet Technical Advisory Group, Report on Port Blocking at 6 (Aug. 2013), *available at* http://www.bitag.org/documents/Port-Blocking.pdf.

[252] Comcast Reply at 22; Verizon Comments at 60–61.

[253] Fred B. Campbell, Center for Boundless Innovation in Technology, Broadband Transmissions Are Not "Telecommunications," GN Docket No. 14-28, at 30 (Feb. 18, 2014), *available at* http://go.usa.gov/3aUWA.

[254] *Stevens Report*, 13 FCC Rcd at 11532, para. 64.

[255] Communications Act § 3(50) (defining "telecommunications").

[256] *Order* at para. 373.

[257] Communications Act § 3(24) (defining the term "information service" and noting that it "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").

capabilities are not telecommunications services unless the underlying service itself is a telecommunications service—which, as explained above, it is not.

Moreover, the notion that these capabilities might fall within the management exception to the definition of information services would have been unthinkable to the Congress that enacted the Telecommunications Act. Had Internet access service been a basic service, dominant carriers could have offered it (and all related computer-processing functionality) outside the parameters of the *Computer Inquiries*. Had Internet access service been a telecommunications service, Bell operating companies could have offered it themselves under the Modified Final Judgment. But I cannot find a single suggestion that anyone in Congress, anyone at the FCC, anyone in the courts, or anyone at all thought this was the law during the passage of the Telecommunications Act.[258] Statutory interpretation "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[259] And it is highly unlikely that Congress drew upon historical sources to define a statutory term, but then intended to give the FCC the discretion to reach the exact opposite result.[260]

Furthermore, given the increasing use of computer processing in the networking, I do not see how "[c]hanged factual circumstances" could lead the FCC to revisit the classification of Internet access service.[261] Although the FCC's prior determinations rested on "a factual record compiled over a decade ago,"[262] the *Order* does not identify any actual change.

First, the *Order* points to "consumer conduct"[263] to show that consumers use the Internet "today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties."[264] Examples include 350–400 million visits a day to Google and Yahoo!'s "popular alternatives to the email services provided" by ISPs, Go Daddy providing "website hosting," and Apple, Dropbox, and Carbonite operating "'cloud-based' storage."[265]

But the availability and popularity of third-party content is hardly new. Yahoo! Mail went online in 1997.[266] HoTMaiL (the original web-based email) launched in 1996.[267] GeoCities, a website-hosting service, launched in 1995 and was the third most-visited site on the web in 1999.[268] And Amazon.com

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[258] Despite the *Order*'s claim to the contrary, *Order* at note 975, this line of reasoning does not contradict the Court's holding in *Brand X*, since the last-mile transmission service discussed there (and which I discuss below) is just not the same service as the Internet access service that the *Order* claims is a telecommunications service here. And one need look no further than section 230 of the Communications Act along with the legislative history reviewed in the *Stevens Report*—all described above—to find compelling evidence that Congress did in fact think that Internet access service was an information service.

[259] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000).

[260] *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.").

[261] *Order* at para. 330.

[262] *Order* at para. 330.

[263] *Order* at para. 330.

[264] *Order* at para. 350.

[265] *Order* at para. 348.

[266] Internet Archive Wayback Machine: Yahoo!, http://bit.ly/18xSlB5 (Oct. 15, 1997).

[267] Internet Archive Wayback Machine: HoTMaiL, http://bit.ly/1887bOB (Dec. 20, 1996).

[268] Rosalie Marshall, Yahoo closing GeoCities web hosting service, vnunet.com (Apr. 24, 2009), *available at* http://bit.ly/198SoVg; *see also* Internet Archive Wayback Machine: GeoCities, http://bit.ly/1B0pV9E (Feb. 22, 1997).

was selling books, music, and videos before the turn of the century, and began offering cloud-based Amazon Web Services in 2002.[269] Were the most successful sites back then as large as the most successful sites today? Of course not. The number of broadband Internet connections has skyrocketed from 4.3 million in 2000 (at speeds of 200 kbps) to 122 million (at speeds of 10 Mbps)[270]—and a rising tide lifts all ships (or most, alas for GeoCities).

And the FCC was certainly aware that consumers were visiting third-party sites and using third-party applications in its previous classification decisions. The *Cable Modem Order* itself noted that "cable modem service subscribers, by 'click-through' access, may obtain many functions from companies with whom the cable operator has not even a contractual relationship. For example, a subscriber to Comcast's cable modem service may bypass that company's web browser, proprietary content, and e-mail. The subscriber is free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft's 'Hotmail.'"[271] So what has changed? Nothing legally relevant. New automotive makes, models, and functions have arrived since 2005; that doesn't change the fact that what we are doing is driving. LED bulbs are replacing incandescent bulbs by the millions; that doesn't change the fact that we're using something to light up a room. We access and use the capabilities that Internet access service provides in new and novel ways; that doesn't change the fact that we're accessing and using the Internet.

Next, the *Order* points to "broadband providers' marketing and pricing strategies."[272] Some "advertisements . . . emphasize transmission speed as the predominant feature that characterizes broadband Internet access service offerings," such as AT&T's claim that it offers the "[n]ation's most reliable 4G LTE network" with "speeds up to 10x faster than 3G."[273] Others "link higher transmission speeds and service reliability with enhanced access to the Internet at large," such as RCN's claim that its "110 Mbps High-Speed Internet" offering is "ideal for watching Netflix."[274] And ISPs "price and differentiate their service offerings on the basis of the quality and quantity of data transmission" with higher prices for faster speeds.[275]

But again, this is nothing new. In 1999, Qwest asked customers "Could your business use the bandwidth to change everything?" and advertised service fast enough to access "every movie ever made in any language anytime, day or night."[276] In 2001, Charter was offering "Internet Light" (256 kbps service for $24.95 per month) and "Residential Classic" (1024 kbps for $39.95 per month) as part of its "Charter Pipeline" service.[277] Even America Online in 1999 was advertising how it "spent over $1 billion to build the world's largest high-speed network—now with 56k, connections are faster than ever!"[278]

And again, the FCC knew this when it decided the *Cable Modem Order*. In the Commission's *Second Broadband Deployment Report* in 2000, the FCC noted the prices for broadband Internet access

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[269] Internet Archive Wayback Machine: Amazon.com, http://bit.ly/198StZ0 (Oct. 13, 1999).

[270] *Compare* FCC, High-Speed Services for Internet Access: Subscribership as of June 30, 2000, at 2 (Oct. 2000), *available at* http://go.usa.gov/3aUZe, *with* FCC, Internet Access Services: Status as of December 31, 2013, at 4 (Oct. 2014), *available at* http://go.usa.gov/3aUBH.

[271] *Cable Modem Order*, 17 FCC Rcd at 4816, para. 25.

[272] *Order* at para. 330.

[273] *Order* at para. 351 (citing Public Knowledge Comments Appendix at A-2).

[274] *Order* at para. 352 (citing Public Knowledge Comments Appendix at A-3).

[275] *Order* at para. 353 (citing Public Knowledge Comments Appendix at A-1).

[276] Qwest, Qwest Commercial 1999 – Every Movie, https://www.youtube.com/watch?v=xAxtxPAUcwQ.

[277] Charter, Charter Pipeline (2001), http://bit.ly/1EQV19H.

[278] America Online, AOL Commercial from 1999, https://www.youtube.com/watch?v=MQcCnPWHlLk.

service, from "low-end ADSL service" priced at $39.95 to $49.95 per month, to "[f]aster ADSL services" at $99.95 to $179.95 per month, and "symmetric DSL . . . well-suited to applications . . . such as videoconferencing" and priced at $150 to $450 per month.[279]

But more to the point, contemporary marketing doesn't suggest that a wheel's been invented. Deploying last-mile facilities generally has long been the biggest cost of broadband. As a result, the way in which broadband providers have competed is product/service differentiation. So of course broadband providers today advertise their speeds and their prices—that's a large part of what makes each distinct. But it doesn't mean that their last-mile transmission service *by itself* is what they're selling—I don't know many consumers lining up for fast transmission to a cable headend or central office but not actual access to the Internet.

Lastly, the *Order* argues that "the predictive judgments on which the Commission relied in the *Cable Modem Declaratory Ruling* anticipating vibrant intermodal competition for fixed broadband cannot be reconciled with current marketplace realities."[280] One problem is that this argument doesn't address the reclassification question at all. The statute doesn't classify a service based on the quantity of providers, so it doesn't matter whether there are 4,462 (like there are for Internet access service) or just one (like there is for telegraph service).

The greater problem is this assertion comes up empty too.[281] Alongside the high-speed broadband Internet access service offered by cable operators and telephone companies, 98% of Americans now live in areas covered by 4G LTE networks (*i.e.*, networks capable of delivering 12 Mbps mobile Internet access),[282] wireless ISPs are using unlicensed spectrum to offer new, cheaper services, and new entrants like Google are bringing 1 Gbps service to areas around the country. Indeed, it's no wonder that the *Order* offers no factual support for this assertion. To the contrary, the Commission itself has repeatedly recognized that "current marketplace realities" reflect intermodal competition[283]—including in this very *Order*![284]

In short, all the facts point in the same direction: Broadband Internet access service is an information service.

3. Broadband Internet Access Transmission Services.—Nor can the Commission seek refuge in the Commission's past identification of a transmission service as a component of broadband Internet access service. Even if a broadband Internet access service provider could be said to offer a separable transmission service (and it can't), the transmission service discussed in our precedent is very different from the broadband Internet access service that the FCC classifies today.

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[279] *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*, CC Docket No. 98-146, Second Report, 15 FCC Rcd 20913, 20931, paras. 36–37 (2000).

[280] *Order* at para. 330.

[281] Despite the *Order*'s suggestion to the contrary, the *Cable Modem Order* did not limit its prediction to "fixed broadband."

[282] *2015 Broadband Progress Report* at para. 109.

[283] *See 2015 Broadband Progress Report* at paras. 15–16 (observing that "[p]rivate industry continues to invest billions of dollars to expand America's broadband networks" and explicitly comparing cable, telco, wireless, Google Fiber, and municipal broadband investments).

[284] *Order* at para. 76 & note 114 (noting "the remarkable increases in investment and innovation seen in recent years" and citing as evidence of robust broadband infrastructure investment cable, telco, wireless incumbent investment and new entrants like Google Fiber).

Start with the precedent. In the *Advanced Services Order*, the Commission examined digital subscriber line (DSL) technology, which allowed "transmission of data over the copper loop at vastly higher speeds than those used for voice telephony or analog data transmission" between each "subscriber's premises" and "the telephone company's central office."[285] For this service, a DSL access multiplexer would direct the traffic onto a carrier's packet-switched data network, where it could then be routed to a "location selected by the customer" like a "gateway to a . . . set of networks, like the Internet."[286] The FCC then classified only the *last-mile transmission service* between the end user and the ISP as a telecommunications service, while observing that the Internet access service itself was still an information service.[287]

Similarly, the Commission identified "broadband Internet access transmission service" as a possible telecommunications service in the *Wireline Broadband Internet Access Services Order*.[288] Again, however, that service was the *last-mile transmission service* between the end user and the ISP, and one the carrier could choose to offer as common carriage or private carriage.[289] And it is these last-mile transmission services that many rural carriers still offer as a telecommunications service (in large part in order to receive subsidies from our legacy universal service program, which funds the regulated costs of high-cost loops used to provide telecommunications services).[290]

It was this potential last-mile transmission service that was at issue in the *Brand X* case. As the Commission reasoned, this service was not a separable telecommunications service because the "consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access."[291]

And it was this last-mile transmission service that Justice Scalia identified in his dissent as being a telecommunications service. As he put it: "Since . . . the broad-band connection between the customer's computer and the cable company's computer-processing facilities[] is downstream from the computer-processing facilities, there is no question that it merely serves as a conduit for the information services that have already been 'assembled' by the cable company in its capacity as ISP."[292] He analogized to a pizzeria, arguing that a delivery service was being offered *after* the pie was baked:

> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery."[293]

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[285] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24026–27, para. 29 (1998).

[286] *Id.* at 24027, paras. 30–31.

[287] *Id.* at 24030, para. 36.

[288] *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14899, para. 86.

[289] *Id.* at 14899–900, paras. 86–88 (describing this as a service that both end users and ISPs would purchase).

[290] *Id.* at 14900–03, paras. 89–95; NTCA Comments at 9. Notably, rural carriers exercising this option do *not* treat the Internet access service itself as a Title II telecommunications service and generally offer that service through a separate, affiliated ISP that purchases the last-mile transmission service from the carrier. To the extent the *Order* suggests otherwise, *see Order* at para. 422, it is incorrect.

[291] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005).

[292] *Id.* at 1010 (Scalia, J., dissenting).

[293] *Id*. at 1007 (Scalia, J., dissenting).

In contrast, consider the broadband Internet access service at issue in this proceeding. It is not limited to the last-mile transmission service between a customer and an ISP's point of presence. It extends into the ISP's network all the way to "the exchange of traffic between a last-mile broadband provider and connecting networks"[294]—a scope that necessarily extends onto the Internet's backbone, since that's where many networks interconnect. And the *Order* reclassifies Internet access service for "all providers of broadband Internet access service . . . regardless of whether they lease or own the facilities used to provide the service."[295]

To extend the pizzeria analogy, this *Order* does not only cover the delivery of a baked pie. Instead, the *Order* reaches the exchange of ingredients between a pizzeria and its suppliers, since all those ingredients must be "delivered" to the pizzeria. To the extent a pizzeria stores popular ingredients, that's just an adjunct to the delivery services that came before and afterwards. To the extent a pizzeria processes the ingredients, that's just an adjunct too.[296]

In other words, when the *Order* claims that "[t]here is no disputing that until 2005, Title II applied to the transmission component of DSL service,"[297] it is being intentionally misleading. The service being reclassified today is different in kind from the last-mile transmission services that were at issue in prior FCC orders. And so the *Order*'s claim that it is just returning things to how they were ten years ago is just wrong. In fact, the *Order* overturns three decades of precedent—indeed, all the precedent we've ever had on the subject.[298]

4. Heightened Scrutiny.—Not only does the FCC lack the authority to classify broadband Internet access service as a Title II telecommunications service; it also, in any event, fails to supply a reasoned basis for departing from decades of agency precedent that determined it is an information service.[299]

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[294] *Order* at para. 204.

[295] *Order* at para. 337.

[296] *Order* at paras. 366–75. The *Order* misunderstands the analogy when it supposes that "the pizzeria owners discovered that other nearby restaurants did not deliver their food and thus concluded that the pizza-delivery drivers could generate more revenue by delivering from any neighborhood restaurant (including their own pizza some of the time). Consumers would clearly understand that they are being offered a delivery service." *Order* at para. 45. Of course they would. And if someone offered a last-mile transmission service available to any ISP, of course that would be a telecommunications service. But that's not what any broadband Internet access service provider is offering, and so the analogy utterly fails.

[297] *Order* at para. 313.

[298] The *Order* objects in a footnote that "the service we define and classify today *is* the same transmission service as that discussed in prior Commission orders." *Order* at note 1257. But it undermines that argument just one sentence before, when it describes the service as one with "the capability to send and receive packets to all or substantially all Internet endpoints." *Id.* The transmission service the FCC previously recognized was not and is not so expansive—it's a last-mile transmission service connecting customers to computer-processing facilities for Internet access. That's why the *Wireline Broadband Internet Access Services Order* recognized that ISPs would be customers of such service. *See* 20 FCC Rcd at 14902, para. 92 (describing the transmission service offered to "end user and ISP customers"). And that's why even today the tariffs of the National Exchange Carrier Association describe Digital Subscriber Line (DSL) as a local point-to-point service. *See, e.g.*, NECA Tariff FCC No. 5, 20th Revised Page 8-1 http://bit.ly/1wkvPH8 (effective through Mar. 1, 2015) (describing DSL Access service as a transmission service "over local exchange service facilities . . . between customer designated premises and designated Telephone Company Serving Wire Centers"). To return to the pizzeria analogy: Before, the Commission regulated the delivery from the pizzeria to the customer; now, the Commission wants to regulate that delivery plus the delivery of all or substantially all of the ingredients to the pizzeria. The one thing is not like the other.

[299] *See, e.g.*, *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983).

The agency faces one further obstacle in its quest to reclassify broadband Internet access service: heightened judicial scrutiny. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account,"[300] an agency decision to reverse course is subject to heightened or more searching review.[301] Both circumstances are present here.

First, as discussed above, the Commission's decision to reclassify broadband Internet access service rests upon a series of factual findings that run directly contrary to those it made in all prior classification decisions.

Second, if there ever could be a case where an agency has engendered serious reliance interests, this is it. After the passage of the 1996 Telecommunications Act and the confirmation that Internet access service was an information service in the *Stevens Report*, the FCC trumpeted the multi-billion investments that AT&T, MCI, Qwest, Level 3, UUNet Technologies, Sprint, and others were making in the Internet backbone, noting that bandwidth on the backbone was doubling every four to six months.[302] Starting the year after the *Stevens Report*, broadband providers have invested over $1.125 *trillion* in their networks.[303] To suggest these providers did not rely on the FCC's decision not to subject Internet access services—broadband or otherwise—to Title II is absurd.

Indeed, look just at the wireless industry as an example. In 2007, when the Commission classified wireless broadband Internet access service as an information service, FCC Chairman Kevin Martin stated that "[t]oday's classification eliminates unnecessary regulatory barriers for wireless broadband Internet access service providers and will further encourage investment and promote competition in the broadband market."[304] It certainly did. Between that decision and now, wireless providers alone have invested over $175 billion.

Regardless of whether the heightened or more traditional standard applies, the *Order* fails to offer an adequate basis for changing course. Indeed, given that neither the material facts nor relevant laws have changed, it is quite plain that the only reason the FCC is departing from prior precedent is because the President told the agency to do so.[305] But courts have been quite clear that this is not a lawful basis for shifting course, with the D.C. Circuit stating that "an agency may not repudiate precedent simply to conform with a shifting political mood."[306] As a result, the FCC's attempt to offer a reasoned basis for turning heel on decades of agency precedent falls far short of meeting APA requirements.

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[300] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (citing *Smiley v. Citibank (South Dakota), N. A.,* 517 U.S. 735, 742 (1996)).

[301] *Id.* at 513–16.

[302] *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*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, para. 38 (1999).

[303] *See, e.g.*, USTelecom, Broadband Investment, Historical Broadband Provider Capex (2015) (data through 2013), *available at* http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex.

[304] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5926 (Statement of Chairman Kevin J. Martin).

[305] *See supra* Part I.

[306] *National Black Media Coalition v. FCC*, 775 F.2d 342, 356 n.17 (D.C. Cir. 1985); *see also Fox*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation.").

B.

Section 332 of the Communications Act independently bars the FCC from reclassifying mobile broadband Internet access service as a Title II telecommunications service.

In section 332, Congress added a mobile gloss onto the definition of telecommunications service originally formulated for wireline carriers. Pursuant to the statute, providers of "commercial mobile service" are common carriers, and thus telecommunications carriers.[307] By contrast, providers of "private mobile service" are not.[308]

In order to understand why mobile broadband Internet access service is a private mobile service and thus cannot be classified as a Title II service, it is necessary to begin by running through a number of definitions. First, a "commercial mobile service," in relevant part, is any mobile service that "makes interconnected service available."[309] "[I]nterconnected service," in turn, means a "service that is interconnected with the public switched network"[310] and "gives subscribers the capability to communicate to or receive communication from all other users on the public switched network."[311] "[P]ublic switched network," for its part, means the public switched telephone network, *i.e.*, the "common carrier switched network . . . that use[s] the North American Numbering Plan in connection with the provision of switched services."[312] And "private mobile service" is the reverse of commercial mobile service: "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[313]

Given these definitions, it's no surprise that the FCC back in 2007 classified mobile broadband Internet access service as a private mobile service—and hence recognized that it could not be treated as a common-carriage, telecommunications service.[314] As the Commission put it: "[M]obile wireless broadband Internet access service does not fit within the definition of 'commercial mobile service' because it is not an 'interconnected service.'"[315] That's because it does not interconnect with the public switched telephone network but instead a different network—the Internet.[316] The Commission reaffirmed that finding four years later when it held that "commercial mobile data service," which, as relevant here, is the equivalent of retail mobile Internet access service, "is not interconnected with the public switched network."[317]

Courts have repeatedly confirmed this view. The D.C. Circuit in *Cellco* explained that, "providers of 'commercial mobile services,' such as wireless voice-telephone service, are common

[307] Communications Act § 332(c)(1)(A) ("A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier.").

[308] Communications Act § 332(c)(2) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose.").

[309] Communications Act § 332(d)(1).

[310] Communications Act § 332(d)(2).

[311] 47 C.F.R. § 20.3.

[312] 47 C.F.R. § 20.3.

[313] Communications Act § 332(d)(3).

[314] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5901.

[315] *Id.* at 5916, para. 41.

[316] *Id.* at 5916, 5917, paras. 41, 45 & n.118.

[317] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 26 FCC Rcd 5411, 5431, para. 41 (2011).

carriers, whereas providers of other mobile services are exempt from common carrier status."[318] The court recognized what it described as Section 332's "statutory exclusion of mobile-internet providers from common carrier status."[319] And it noted that, when read in conjunction with the Communications Act's separate prohibition on treating information services providers as common carriers, mobile broadband Internet access service providers are "statutorily immune, perhaps twice over, from treatment as common carriers."[320] The D.C. Circuit in *Verizon* put it even more bluntly: The "treatment of mobile broadband providers as common carriers would violate section 332."[321]

This regulatory framework creates major problems for the task that President Obama specifically assigned the Commission: reclassifying mobile broadband Internet access service as a Title II telecommunications service.[322] And so the Commission only makes a half-hearted attempt to work within it. In two short paragraphs, the *Order* claims that because mobile broadband Internet access service enables the use of VoIP and similar applications, it "gives subscribers the capability to communicate with all NANP endpoints"[323] and is thus an interconnected service, a commercial mobile service, and a telecommunications service.

But this isn't a new argument—the Commission squarely addressed it and rejected it seven years ago.[324] A service is classified based on its *own* functions and properties,[325] and there is no question that a subscriber to mobile broadband Internet access service, without interconnected VoIP service, *cannot* reach the public switched telephone network. In other words, interconnected VoIP service and mobile broadband are distinct services,[326] so while VoIP might be an interconnected service, mobile broadband is not.[327]

Today's *Order* offers no reasoned basis for departing from these precedents, nor for concluding that VoIP service and mobile broadband Internet access service are now a single, unified service. Yes, mobile users can now communicate with different types of networks; but they could do that in 2007. Yes, there are more subscribers to mobile broadband Internet access service now than in 2007; but that has nothing at all to do with whether VoIP and mobile broadband are distinct services. And while the FCC may assert that "changes in the marketplace have increasingly blurred the distinction between services

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[318] *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

[319] *Id.* at 548.

[320] *Id.* at 538; *see also id.* (recognizing that the Communications Act's definition of the term "common carrier" has been "interpreted . . . to exclude providers of 'information services'").

[321] *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

[322] The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014) ("I believe the FCC should make these rules fully applicable to mobile broadband as well.").

[323] *Order* at paras. 400–01.

[324] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5917–18, para. 45.

[325] *See, e.g.*, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3521–22, paras. 15–16 (Wireline Comp. Bur. 2007) (noting the "regulatory classification of the [VoIP] service provided to the ultimate end user has no bearing on" the regulatory status of the entities "transmitting [the VoIP] traffic").

[326] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5918, para. 45 (stating that "users of a mobile wireless broadband Internet access service need to rely on another service or application, such as certain voice over Internet Protocol (VoIP) services . . . to make calls").

[327] *Id.* at 5917–18, paras. 45–46.

using NANP numbers and those using public IP addresses,"[328] that's just an *ipse dixit*; no consumer that I know types a phone number into a web browser to make a call, and no one tries to dial a URL into their phone.

What is more, the *Order*'s attempted conflation makes no sense. If mobile broadband Internet access service could lose its status as a distinct service and blend into another merely because it enables access to interconnected VoIP service, then it truly is a regulatory chameleon. Is it a cable service because consumers can use apps to watch cable programming? Is it a radio service because people can use apps to listen to an FM station? Is it food delivery service because some apps let you order pizza from your phone? Obviously not.

Implicitly recognizing these problems with its approach, the *Order* next attempts to jettison the whole regulatory framework and replace it with one far more amenable to the outcome it desires—first by redefining the meaning of public switched network, next by redefining the meaning of functional equivalence, and finally by summoning a "statutory contradiction" into being. None of these attempts withstands scrutiny.

1. Redefining the Meaning of the Public Switched Network.—The Commission's first move is to broaden the definition of the public switched network to include not only services that use the North American Numbering Plan but also those that use "public IP addresses."[329] In other words, the public switched network would now encompass the Internet in addition to the traditional public switched telephone network.

But that's not what the statute allows. A "fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[330] In the case of a term of art, that ordinary meaning is determined based on common usage among those practiced in the art.

And in the years preceding the passage of section 332(d)(2), the FCC and the courts repeatedly used the term "the public switched network" to refer to the traditional, circuit-switched network that AT&T and local exchange carriers had built to offer telephone service, *i.e.*, the public switched telephone network. In 1981, the Commission noted that "the public switched network interconnects all telephones in the country."[331] In 1982, the D.C. Circuit noted that wide area telecommunications service "calls are switched onto the interstate long distance telephone network, known as the *public switched network*, the same network over which regular long distance calls travel."[332] In 1985, the Federal-State Joint Board on Separations noted that the "costs involved in the provision of access to the public switched network[] are assigned . . . on the same basis as . . . [t]he local loop used by subscribers to access the switched telephone network."[333] And in 1992, the FCC characterized its cellular service policy as "encourag[ing] the creation

[328] *See Order* at para. 401.

[329] *Order* at para. 391.

[330] *Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) (Where a "'word is obviously transplanted from another legal source, whether common law or other legislation, it brings the old soil with it.'" (quoting Justice Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947)).

[331] *Applications of Winter Park Tel. Co.*, Memorandum Opinion and Order, 84 FCC.2d 689, 690, para. 2, n.3 (1981).

[332] *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 793 (D.C. Cir. 1982).

[333] *MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Order Inviting Further Comments, 50 Fed. Reg. 31749, 41749 (Fed.-State Jt. Bd. 1985).

of a nationwide, seamless system, interconnected with the public switched network so that cellular and landline telephone customers can communicate with each other on a universal basis."[334]

So it's no wonder that when the FCC first defined "the public switched network," it expressly rejected calls to decouple that concept from the traditional public switched telephone network. Commenters had asked the Commission to broaden the scope of the term to include the then-emerging "network of networks."[335] Still others teed up defining the term to "include all networks."[336] But the Commission said no, and tied its definition of the public switched network to "the traditional local exchange or interexchange switched network."[337] In other words, the agency recognized that "Congress intended [the term] to have its established meaning,"[338] which in this case means the public switched telephone network—not the Internet.[339]

In the 20 years since the FCC defined the term, Congress has amended the Communications Act—and section 332—numerous times.[340] On every occasion, it has chosen not to disturb the Commission's interpretation. As the Supreme Court has explained, this "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[341]

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[334] *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, CC Docket No. 90-358, Report and Order, 7 FCC Rcd 719, 720, para. 9 (1992); *see also Provision of Access for 800 Service*, CC Docket No. 86-10, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421, 5421, n.3 (1991) ("800 numbers generally must be translated into [plain old telephone service] numbers before 800 calls can be transmitted over the public switched network."); *Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Notice of Proposed Rulemaking, 5 FCC Rcd 7187, 7190, para. 20 (1990) (noting that "subscribers to every telephone common carriers' interstate service, including private line, public switched network services, and other common carrier services, will contribute"); Letter from Scott Bergmann, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-137, at 7 n.2 (Dec. 22, 2014) (collecting authorities).

[335] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1434, para. 53 (1994) (*CMRS Second Report and Order*).

[336] *Id.*

[337] *Id.* at 1436–37, para. 59. To support its action here, the Commission cites commenters that called on the FCC in 1994 to broaden the scope of the term "the public switched network" to include the "network of networks," or otherwise separate the term entirely from the traditional public switched telephone network. *See Order* at note 1145. Again, this ignores that the Commission *rejected* those commenters' calls to so fundamentally alter the term "the public switched network" and made clear that, consistent with section 332, it was limiting the term to covering services that are "interconnected with the traditional local exchange or interexchange switched network." *CMRS Second Report and Order*, 9 FCC Rcd at 1436–37, para. 59.

[338] *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

[339] Indeed, section 332's legislative history confirms that Congress used the terms interchangeably. Although both the House and Senate versions of the legislation used the term "the public switched network," the Conference Report characterized the House version as requiring interconnection with "the Public switched *telephone* network." H.R. Rep. 103-213, 103d Cong., 1st Sess. 495 (1993) (emphasis added).

[340] *See, e.g.*, Telecommunications Act § 704(b) (amending section 332 of the Communications Act).

[341] *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–275 (1974)); *see also Cottage Sav. Ass'n v. C.I.R.* 499 U.S. 554, 561 (1991) ("'[I]nterpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.'" (quoting *U.S. v. Correll*, 389 U.S. 299, 305–06 (1967))); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 468 (1987) (Where Congress is aware of an administrative interpretation when it revises a statute, it "implicitly approve[s] it.").

And Congress itself has distinguished between "the public switched network" on the one hand and the "public Internet" on the other. In the Spectrum Act of 2012, for example, Congress assigned the First Responder Network Authority certain responsibilities, including developing for public safety users a "core network" that "provides connectivity" to "the public Internet or the public switched network, or both."[342] This provision makes clear that Congress knows the difference between "the public switched network" and the "public Internet." The Commission must respect that distinction.[343]

There's another problem with the Commission's attempt to expand the definition of "the public switched network" to include the Internet: Congress used the definite article "the" and the singular term "network" in section 332(d)(2)—suggesting Congress was referring to a single, integrated network. And the Commission followed that lead when it defined interconnected service as giving "subscribers the capability to communicate to or receive communication from *all other users* on the public switched network."[344] Here, the *Order* impermissibly attempts to define "the public switched network" to be two networks. Furthermore, expanding the definition of the public switched network to encompass two distinct networks—the public switched telephone network and the public Internet—means that *no mobile service* would be interconnected since no service offers interconnection with substantially all of each network. For example, mobile voice service would no longer be an interconnected service nor a commercial mobile service nor a telecommunications service since it unquestionably does not give consumers a way of dialing up websites. And so the one service that everyone agrees Congress intended to be a commercial mobile service would not be one.[345]

In light of all this evidence that the term "the public switched network" in section 332(d)(2) does not include the Internet, the Commission's contrary interpretation is neither reasonable nor credible.

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[342] 47 U.S.C. § 1422(b)(1).

[343] *See, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" to a single term used in two separate, but related, statutes (internal quotation marks omitted)).

[344] 47 C.F.R. § 20.3 (emphasis added).

[345] In an effort to try to avoid this absurdity, the *Order* says in a footnote that it is making a "conforming change to the definition of Interconnected Service in section 20.3 of the Commission's rules." *Order* at note 1175; *see also* 47 C.F.R. § 20.3 (defining interconnected service as one "[t]hat is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network") (emphasis added). That change? Deleting the word "all" from the definition of interconnected service! *Order* at Appendix A. There are many words one could use to describe this amendment. "Conforming" (or "minor") is not one of them. Under this change, every user of Network A (say, the public switched telephone network) could lack the capability to communicate with any user of Network B (say, the Internet) and vice-versa, but, because of the FCC's definitional change, Network A and Network B would now be a single, interconnected network. That is plainly at odds with the entire structure of section 332 and any reasonable understanding of the concept of an interconnected network and interconnected services.

Indeed, the FCC never proposed such a change, has no record on which to do so, and nowhere explains how the change can be squared with the text, purpose, or history of section 332, including the Commission's own view that the purpose of the interconnected services definition is to ensure that those services are "broadly available." *See Order* at para. 402. Although the *Order* tries to bolster its approach by contending that the definition of "interconnected service" and the *CMRS Second Report and Order* recognize that a service can be interconnected even if access is limited in some ways, *Order* at para. 402 & note 1172, this effort fails because the FCC there was focusing on phenomena such as service providers intentionally limiting users' access to the public switched network to certain hours each day, for the sole purpose of avoiding classification as a commercial mobile service. *See, e.g.*, *CMRS Second Report and Order*, 9 FCC Rcd at 1435, para. 55. That is the apple to the *Order*'s orange, given that the Commission here is attempting to deem two networks and services "interconnected" even though they never interconnect.

How does the Commission respond? The *Order*'s primary argument is that Congress "expressly delegated authority to the Commission to define the term 'public switched network,'" and that, in doing so, "Congress expected the notion to evolve and therefore charged the Commission with the continuing obligation to define it."[346] But that's just wishful thinking. Nothing in the text of section 332 nor in its legislative history supports the view that Congress intended the term "the public switched network" to be capable of such an amazing feat of mutation that it could swallow today's Internet.

The actual text makes that clear. The referenced delegation appears in section 332's definition of the term "interconnected service."[347] It states: "the term 'interconnected service' means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending."[348]

This language simply cannot bear the weight the Commission places on it. The idea that this limited interpretative authority means that the Commission has the authority to redefine the traditional public switched network as incorporating today's Internet simply proves too much. Surely, the FCC could not define the public switched network as something that is not the public switched network, whether it be an apple or a turnip. Even when Congress delegates interpretive authority to an agency, that agency must abide by traditional norms of statutory interpretation. So "[w]here Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."[349]

All this delegation recognizes is the uncontroversial notion that the Commission has *some* authority to interpret the relevant terms. Indeed, the Commission previously exercised that limited interpretive authority, and that precedent undermines the Commission's position here. In the *CMRS Second Report and Order*, for example, the Commission defined "the public switched network" as including those switched common carrier services and networks that themselves interconnect with and are thus part of the traditional public switched telephone network.[350] In doing so, the Commission rejected all calls to define the terms so expansively as to include the Internet or otherwise fundamentally alter them.[351]

Relatedly, the *Order* suggests that the Commission's decision in the *CMRS Second Report and Order* to codify the term "the public switched network," rather than the "'technologically based term 'public switched telephone network,'" supports the agency's position today.[352] But this claim also misses the mark. The FCC in 1994 was not broadening the scope of "the public switched network" beyond the traditional local exchange or interexchange switched network. Instead, it was making clear that when a provider offers a switched common carrier—yet, non-telephone—service that nonetheless interconnects with the public switched telephone network, that service cannot avoid treatment as a commercial mobile

[346] *Order* at para. 396.

[347] Communications Act § 332(d)(2).

[348] Communications Act § 332(d)(2). Compare, too, the parenthetical language in section 332(d)(2) with the parallel statutory provisions that nest around the definition of "interconnected service." In both section 332(d)(1), which defines "commercial mobile service," and section 332(d)(3), which defines "private mobile service," the parallel parentheticals state "(as defined in section 153 of this title)." So rather than providing evidence that the phrases are not terms of art or that Congress was delegating the FCC unbounded discretion to define the relevant terms, it is both a far more modest delegation, as explained above, and one that simply recognizes that Congress itself had not codified the relevant terms.

[349] *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1874 (2013); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

[350] *CMRS Second Report and Order*, 9 FCC Rcd at 1436, para. 59.

[351] *See id.* at 1433–34, para. 53.

[352] *Order* at paras. 391, 396, & note 1145 (citing *CMRS Second Report and Order*, 9 FCC Rcd at 1436, para. 59).

service simply because it is not offering "telephone" service.[353] The Commission could have had any number of non-"telephone" switched common carrier services or networks in mind. This becomes quite plain when one reads this portion of the *CMRS Second Report and Order* in context, including its statement that it was adopting an "approach to interconnection with the public switched network [that] is analogous to the one" it used previously.[354] Thus, this precedent undermines, rather than supports, the Commission's view that it can define the term "the public switched network" in a way that includes services or networks that are not interconnected with the traditional public switched telephone network.

Indeed, the Commission does not really dispute this point.[355] The FCC's discretion to define non-telephone switched common carrier services as part of the public switched network, when those services are interconnected with the network, is of no relevance here because mobile broadband Internet access is not such a service. As explained above—and as the *Order* never seriously argues otherwise—mobile broadband Internet access service itself is not a switched offering that interconnects with the traditional public switched network.[356]

In sum, it is clear that the Commission lacks authority to define the public switched network as including the Internet.

2. Redefining the Meaning of Functional Equivalent.—Alternatively, the Commission claims that it can classify mobile broadband Internet access as a commercial mobile service by finding that it is the "functional equivalent" of that service.[357] But as the Commission's own decisions make clear, section 332(d)(3)'s functional equivalency standard does not give the Commission nearly enough leeway to make that determination. Indeed, the Commission does not even attempt to satisfy the relevant standard.

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[353] *See CMRS Second Report and Order*, 9 FCC Rcd at 1431–37, paras. 50–60; *id.* at 1434, para. 54 ("The purpose underlying the congressional approach, we conclude, is to ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering (if the other elements of the definition of commercial mobile radio service are also present[.)]"); *id.* at 1433, para. 52 ("Several parties caution that making distinctions based on technologies could encourage mobile service providers to design their systems to avoid commercial mobile radio service regulation."); *see also Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5918, para. 45 n.119 (describing the *Second CMRS Report and Order* and stating that, "[i]n fact, the Commission found that 'commercial mobile service' must still be interconnected with the local exchange or interexchange switched network as it evolves").

[354] *See CMRS Second Report and Order*, 9 FCC Rcd at 1432, 1435, paras. 52, 57 (discussing *Establishment of Satellite Systems Providing International Communications*, CC Docket No. 84-1299, Report and Order, 101 FCC 2d 1046, 1101, para. 114 (1985) (discussing various "switched message services such as MTS, telex, TWX, telegraph, teletext, facsimile and high speed switched data services"); *see also id.*at 1454–59, paras. 100–15 (identifying then-existing common carrier services).

[355] *See Order* at note 1145 (noting that the *Second CMRS Report and Order* recognized that non-telephone common carrier switched services and networks that themselves interconnect with the traditional public switched network are considered part of that network for purposes of section 332).

[356] The *Order* attempts to evade this argument when it contrasts the "millions of subscribers" to mobile broadband Internet access service with the fact that private mobile service "includes services not 'effectively available to a substantial portion of the public.'" *Order* at para. 398. But the statute poses a three-part test: To be a commercial mobile service, a service must be provided for a fee, available to the public, *and* an interconnected service. So a service *is* a private mobile service if it isn't interconnected with the public switched network—even if it's provided for a fee and made available to a substantial portion of the public (or even every single American). Any other reading of the statute would render one part of the statutory test surplusage. Indeed, the Commission has made this very point. *See CMRS Second Report and Order*, 9 FCC Rcd at 1450–51, paras. 88–93 (concluding that most specialized mobile radio services meet the first two parts of the test so that the classification of any particular specialized mobile radio service thus "turns on whether they do, in fact, provide interconnected service as defined by the statute"). Again, the problem for the *Order* is that mobile broadband Internet access service falls squarely into the non-interconnected camp and thus cannot be classified as a commercial mobile service.

[357] *See Order* at paras. 404–05.

Instead, it invents an entirely new method of determining functional equivalency that turns the statutory framework on its head.

The Commission has an established framework for determining whether a service is the functional equivalent of a commercial mobile service.[358] What is the first tenet of that framework? A mobile service that does not meet the literal definition of a commercial mobile service "is presumed to be a private mobile service."[359]

What is the one way that this presumption can be overcome? By showing, through a petition-based process and specific allegations of fact supported by affidavits, that the mobile service in question is the functional equivalent of a commercial mobile radio service based on an evaluation of a variety of factors, expressly including: "consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review."[360]

So does the *Order* apply the required presumption when determining whether mobile broadband Internet access service is the functional equivalent of commercial mobile service? No. Does the *Order* evaluate the required factors? No. Did the Commission provide APA notice before jettisoning this required framework? Of course not.

And why does the Commission fail to do any of this? The answer to that is clear. Because there are no facts in the record—let alone ones supported by affidavit—that could overcome the presumption or otherwise show that the two services are close substitutes. The Commission doesn't apply the law because the law prevents it from reaching the outcome demanded by the White House.

While not disputing any of this directly, the *Order* suggests that the two services are useful as substitutes because consumers of mobile broadband Internet access service can use VoIP services to place calls to the public switched telephone network.[361] But at most, that observation goes to whether VoIP services are the functional equivalent of commercial mobile services. It has nothing to do with whether the separate mobile broadband Internet access service is.[362]

The fact that mobile broadband Internet access service does not meet the functional equivalency test is not just some quirk in the law. The FCC has been clear that, in light of Congress's determinations in section 332, "very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service."[363] But the Commission's new test for determining

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[358] *See* 47 C.F.R. § 20.9(14); *see also CMRS Second Report and Order*, 9 FCC Rcd at 1442–48, paras. 71–80 (adopting the current framework for determining whether a service may be deemed the functional equivalent of a commercial mobile service).

[359] *See* 47 C.F.R. § 20.9(14)(i).

[360] *See* 47 C.F.R. § 20.9(14)(ii)(B).

[361] *See Order* at paras. 400–01, 405, 407.

[362] That the FCC classifies a service based on the nature of the service itself is well established. The Commission has found as much in this very context. *See, e.g.*, *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5917–18, paras. 45–46 (recognizing that the regulatory classification of VoIP services is irrelevant to the regulatory classification of the separate mobile broadband Internet access service); *see also Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3520–21, paras. 15–16 (Wireline Comp. Bur. 2007) (noting the "regulatory classification of the [VoIP] service provided to the ultimate end user has no bearing on" the regulatory status of the entities "transmitting [the VoIP] traffic").

[363] *CMRS Second Report and Order*, 9 FCC Rcd at 1447, para. 79.

functional equivalency, which consist of just one question—namely, whether the new service "enables ubiquitous access to the vast majority of the public"—completely eviscerates the statutory scheme.[364] Sure, it's more efficient to ask just one question, rather than applying the required framework. And it does make it easier to reach predetermined outcomes. But it upends the statutory scheme Congress put in place. And it's also impermissible here because the Commission did not provide notice that it might abandon that framework.

3. Statutory Contradiction.—Finally, the Commission trots out what it says is an independent basis for reclassifying mobile broadband Internet access as a section 332 commercial mobile service.[365] The Commission says that it must be able to reclassify the service because, if it were otherwise, there would be a "statutory contradiction" between section 332(d)(2), which prohibits the Commission from applying common carrier requirements to private mobile services, and the Commission's decision today to treat mobile broadband Internet access service as a telecommunications service subject to common carriage requirements.[366]

But this argument is just silly. The Commission is simply complaining that it must be able to interpret a statutory provision one way because otherwise it will not able to interpret a second statutory provision as it would like. It is like saying that we must call all dogs "cats" because, if we did not, we could not declare dogs to be feline. Any contradiction here does not lie with the statute. Rather, it is the product of the Commission's attempt to twist the statutory language into a pretzel in order to advance a preferred policy outcome. But no matter how the Commission tries to manipulate the statute, one fact remains: Section 332 prevents the Commission from treating providers of mobile broadband Internet access service as providers of telecommunications services subject to common carriage requirements.[367]

C.

The Commission also relies on section 706 of the Telecommunications Act, claiming that Congress expressly delegated authority to the FCC through this provision.[368] This is simply wrong. The text, statutory structure, and legislative history all make clear that Congress intended section 706 to be hortatory—not delegatory—in nature.

In pertinent part, subsections (a) and (b) of section 706 read:

> (a) . . . The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
>
> (b) . . . If the Commission's determination [of whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion] is negative, it shall take immediate action to accelerate deployment of such capability by

[364] *See Order* at para. 407.

[365] *See Order* at para. 403.

[366] *See Order* at para. 403 (citing Communications Act § 332 (prohibiting the common carrier treatment of private mobile service providers) and Communications Act § 3 (requiring the common carrier treatment of providers of telecommunications services)).

[367] Recall, too, that a provider of private mobile service "shall not . . . be treated as a common carrier for any purpose." Communications Act § 332(c)(2). One of those purposes is certainly treating it as such for the purpose of avoiding manufactured "statutory contradictions."

[368] *See, e.g.*, *Order* at paras. 275–82.

removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[369]

Although each of these subsections suggests a call to action ("shall encourage," "shall take immediate action"), neither reads like nor is a delegation of authority. *For one*, neither subsection expressly authorizes the FCC to engage in rulemaking. Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (*e.g.*, "[t]he Commission shall prescribe regulations to implement the requirements of this subsection"[370] or "the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section"[371]), and it has done so more generally (*e.g.*, "[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e Communications] Act"[372]). Congress did not do either in section 706.

For another, neither subsection expressly authorizes the FCC to prescribe or proscribe the conduct of any party. Again, Congress knows how to empower the Commission to prescribe conduct (*e.g.*, "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge"[373]) and to proscribe conduct (*e.g.*, "the Commission is authorized and empowered . . . to make an order that the carrier or carriers shall cease and desist"[374]). And again, Congress has repeatedly empowered the FCC to direct the conduct of particular parties (*e.g.*, "[t]he Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier,"[375] or "the Commission shall have the power to require by subpoena the attendance and testimony of witnesses"[376]). Congress did not do any of this in section 706.

For yet another, neither subsection expressly authorizes the FCC to enforce compliance by ordering payment for noncompliance. Where Congress has authorized the Commission to impose liability it has always done so clearly: For forfeitures, the Communications Act directs that "[a]ny person who is determined by the Commission . . . to have . . . failed to comply with any of the provisions of this Act . . . shall be liable to the United States for a forfeiture penalty"[377] and "[t]he amount of such forfeiture penalty shall be assessed by the Commission . . . by written notice."[378] And for other liabilities, the Communications Act directs that "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled."[379]

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[369] Telecommunications Act § 706(a)–(b).

[370] Communications Act § 227(b)(2).

[371] Communications Act § 251(d)(1).

[372] Communications Act § 201(b) ("The Commissioner [*sic*] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."); *see also* Communications Act § 303(r) ("Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall— . . . [m]ake such rules and regulations and prescribe such restrictions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . .").

[373] Communications Act § 205(a).

[374] Communications Act § 205(a).

[375] Communications Act § 213(b).

[376] Communications Act § 409(e).

[377] Communications Act § 503(b)(1).

[378] Communications Act § 503(b)(2)(E).

[379] Communications Act § 209.

The lack of express authority to issue rules, order conduct, or enforce compliance should be unsurprising, however, since section 706's subsections lay out precisely *how* Congress expected the FCC to "encourage . . . deployment" and "take action": Congress expected the FCC to use the authority it had given the agency elsewhere. The FCC already had the authority to adopt "price cap regulation" since it had started converting carriers from rate-of-return regulation to price-cap regulation in the early 1990s.[380] The Telecommunications Act established the FCC's "regulatory forbearance" authority.[381] The Telecommunications Act also authorized the FCC to "remove barriers to infrastructure investment," specifically barriers to entry created by state or local laws,[382] and instructed it to identify and eliminate market entry barriers.[383] And as for "promoting competition in the telecommunications market," the Telecommunications Act added a whole second part to Title II of the Communications Act, titling it "Development of Competitive Markets."[384] In other words, Congress did in fact "invest[] the Commission with the statutory authority to carry out those acts" described in section 706[385]—it just did so through provisions other than section 706.

The structure of federal law confirms this reading. Although Congress directed that many provisions of the Telecommunications Act be inserted into the Communications Act,[386] section 706 was not one of them. Instead, it was left as a freestanding provision of federal law.[387] As such, the provisions of the Communications Act that grant rulemaking authority "under this Act" (like section 201(b)), that grant prescription-and-proscription authority "[f]or purposes of this Act" (like section 409(e)), and that grant enforcement authority for violations of "this Act" (like section 503) simply do not apply to section 706 of the Telecommunications Act. Indeed, the so-called subject-matter jurisdiction of the FCC under section 2 applies, by its own terms, only to "provisions of this Act"[388]—and so the "most important[]" limit the *Verizon* court thought applied to section 706 does not in fact exist.[389] In other words, the statutory superstructure that normally undergirds Commission action just does not exist for section 706 of the Telecommunications Act.

What is more, reading section 706 as a grant of authority outside the bounds of the Communications Act yields absurd results. As the Commission recognized in the *Advanced Services Order* with respect to "regulatory forbearance," reading section 706 as an "independent grant of

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[380] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990).

[381] Telecommunications Act § 401 (titled "Regulatory Forbearance" and inserting section 10 into Title I of the Communications Act).

[382] Telecommunications Act § 101 (inserting section 253 into Title II of the Communications Act).

[383] Telecommunications Act § 101 (inserting section 257 into Title II of the Communications Act).

[384] Telecommunications Act § 101 (inserting Part II, §§ 251–61, into Title II of the Communications Act).

[385] *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (quoting *Open Internet Order*, 25 FCC Rcd at 17969, para. 120).

[386] Telecommunications Act § 1(b) ("[W]henever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 *et seq*.)."); *see also* Telecommunications Act § 101 ("Establishment of Part II of Title II. (a) Amendment.—Title II is amended by inserting after section 229 (47 U.S.C. 229) the following new part: . . . ."). Notably, all of the provisions at issue in the Supreme Court case *AT&T v. Iowa Utils. Bd.* were in fact inserted into the Communications Act, and thus the Court could plausibly claim that "Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act." *AT&T v. Iowa Utils. Bd*., 525 U.S. 366, 377 (1999).

[387] For other examples, see Telecommunications Act §§ 202(h), 704(c).

[388] Communications Act § 2(a).

[389] *Verizon v. FCC*, 740 F.3d 623, 640 (D.C. Cir. 2014).

authority . . . would allow us to forbear from applying" certain provisions in the Act even when section 10 would not let us do so.[390] That same logic applies to every "regulating method" specified in section 706. If Congress had intended to grant the FCC almost limitless authority for "price cap regulation," "removing barriers," or "promoting competition," what was the point of specifying limited authority in the Telecommunications Act's actual amendments to the Communications Act?[391]

And the problems proliferate as you dig into each subsection. Subsection (a) is directed not just at the FCC but also to "each State commission with regulatory jurisdiction over telecommunications services."[392] So whatever authority subsection (a) grants the FCC, it also grants state commissions. Such coterminous authority is a statutory oddity to say the least. The Communications Act draws lines between interstate and intrastate regulatory authority.[393] It empowers States to act but reserves authority for the FCC when they fail to do so.[394] It authorizes the FCC to preempt state authority.[395] And it even authorizes States to preempt the FCC.[396] But nowhere does the Communications Act contemplate state action coterminous with, or even at cross-purposes with, the FCC. And it is strange to think that a state commission could forbear from the federal statutory scheme or price regulate broadband Internet access service so long as it thought doing so would encourage broadband deployment.

Perhaps recognizing the problems such a reading would create, the *Order* does not read the authority of state commissions this way—far from it. Instead, the *Order* suggests that States cannot regulate broadband Internet access service because that service is "jurisdictionally interstate for regulatory purposes"[397] and that the Commission will preempt States that impose "obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme."[398] In other words, the *Order* seems to suggest that section 706(a) gives state commissions no authority over broadband (or "advanced telecommunications capability" to use the statutory term) at all![399] But the plain text of the statute does not permit the Commission to have it both ways and invent a scheme that has no basis in the text of the statute. Either subsection (a) delegates authority to the FCC and the state commissions or it does not.

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[390] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24046, para. 73 (1998) (*Advanced Services Order*).

[391] The *Verizon* court asked the wrong question when it noted that it "might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle." *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014). The question is not whether section 706 of the Telecommunications Act contains some "intelligible principle" and thus does not violate the non-delegation doctrine. *Cf. Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001). Instead, the question is one of congressional intent: Did Congress really intend to put specific limits on the Commission's forbearance authority in one place (section 10 of the Communications Act) only to largely eliminate them in another (section 706 of the Telecommunications Act)? Such an interpretation doesn't make sense.

[392] Telecommunications Act § 706(a).

[393] *See, e.g.*, Communications Act § 2(a) ("The provisions of this Act shall apply to all interstate and foreign communication . . . ."); § 2(b) ("[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . . .").

[394] *See* Communications Act §§ 214(e)(6), 252(e).

[395] *See* Communications Act §§ 10(e), 253(d).

[396] *See* Communications Act § 224(c).

[397] *Order* at para. 431.

[398] *Order* at para. 433.

[399] To be fair, the *Order* suggests that States might have some role to play, at least with data collection, *see Order* at notes 708 & 1276, but such a role hardly squares with hardy "regulating methods" like "price cap regulation" and "regulatory forbearance" that the Commission claims for itself.

Subsection (b) creates other problems. That subsection is triggered only if the FCC determines that broadband is not being reasonably and timely deployed to all Americans in its annual report. So what happens when the determination is affirmative? Poof—it's gone.

The consequences of such a light-switch delegation of authority are hard to fathom. One would assume that once the delegation switched off, any adjudications or enforcement actions being taken by the FCC under that subsection would have to be dismissed, since we'd have lost the authority to prosecute them. But if we've preempted a state law using subsection (b), would it still remain preempted? If we've forborne from federal law using subsection (b), would we then need to start enforcing it again? Or if we've adopted rules using subsection (b), would they remain on the books—unenforceable—until a negative determination is again reached? Could we even repeal rules passed using subsection (b) during a period in which subsection (b) has not been triggered? And how would our authority change if, as happened last year, the FCC failed to issue a timely determination under section 706(b)?

Unsurprisingly, the *Order* does not attempt to answer these questions.[400] Nor could it. Absurd results lie behind every possible answer premised on subsection (b) being an independent grant of authority.

Lastly, the history of section 706 confirms its hortatory nature. For years after 1998's *Advanced Services Order*, the Commission consistently interpreted the section to direct the agency to "use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."[401] And so the Commission has consulted section 706 in resolving one forbearance petition[402] after another[403] after another.[404] The Commission has also looked to section 706 when employing its authorities under the Communications Act to promote local competition[405] and to remove barriers to

[400] Relying on a statement contained in a *dissenting* opinion by a U.S. Supreme Court Justice, the *Order* speculates that "Commission actions adopted pursuant to a negative section 706(b) determination would not simply be swept away by a future positive section 706(b) finding." *Order* at note 714. But what authority would the Commission have to enforce a section 706(b) rule without section 706(b) authority? Indeed, if Congress gave the Federal Emergency Management Agency (FEMA) authority to act during a hurricane, would anyone think that FEMA could continue that course once the storm had passed, sunny skies had returned, and recovery efforts were over? Of course not. So too here. But more to the point, even asking this question is sure to trap the agency in the labyrinth of section 706(b)'s on-off authority; the only way to escape is not to enter. Here, that means not interpreting section 706 to provide the Commission with authority in the first place.

[401] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047, para. 77 (1998).

[402] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19469, para. 107 (2005), *aff'd by Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[403] *Petition of ACS of Anchorage*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16356, para. 118 (2007).

[404] *Petition of the Embarq Local Operating Companies for Forbearance et al.*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19503–04, para. 46 (2007), *aff'd by Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

[405] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3840, para. 317 (1999) ("Our overriding objective, consistent with the congressional directive in section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the 'Information Age.'"); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22426–27, paras. 36–37 (2004).

infrastructure investment (such as the Commission's authority over pole attachments).[406] In other words, our own history shows that we can meet section 706's goals without relying on it as an independent grant of authority.

Section 706's legislative history clinches the point. Recall that the *Verizon* court looked to the Senate Report's description of the provision as a "necessary fail-safe to ensure that the bill achieves its intended infrastructure objective."[407] That was a mistake because the provision described in the Senate Report was *not* the section 706 that Congress enacted. When the Senate passed in 1995 the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC to "preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans]."[408] In other words, the Senate version would have let the FCC step into the shoes of the state commissions and exercise their authority under federal law if they failed to act. That's a "fail-safe." But the enacted version contained, as the Conference Report dryly put it, "a modification" to that section: This preemptory language was excised.[409] In other words, Congress contemplated giving the FCC fail-safe authority in section 706, but then expressly decided not to do so.

Whether one looks at the statute's text, structure, or history, only one conclusion is possible: Congress did not delegate substantive authority to the FCC in section 706 of the Telecommunications Act. Instead, that statutory provision is a deregulatory admonition. Accordingly, the agency's attempt to adopt these Part 8 rules under section 706 must fail.

D.

The forbearance section of the *Order* most clearly reveals that the Commission's decision today is driven neither by the law nor the facts but rather by the need to reach certain predetermined policy outcomes. Before the forbearance section, the Commission paints a dark and dreary portrait of the broadband marketplace. It is one where broadband providers "hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like."[410] It is one where consumers largely have no "meaningful alternative broadband options," and "45 percent of households have only single provider option for these services."[411]

After reading such bleak pronouncements, anyone familiar with the Commission's forbearance precedents and the Act's statutory forbearance framework would approach the forbearance section with a sense for foreboding. How is the Commission possibly going to grant the amount of forbearance promised earlier in the document? How can it create a "Title II tailored for the 21st century"?[412] The answer? By inventing out of whole cloth a new method of conducting a forbearance analysis that bears little resemblance to either the terms of the Act or the Commission's precedents.

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[406] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5317, 5330, paras. 173, 208 (2011); *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20209, para. 36 (2007).

[407] S. Rep. No. 104-23 at 50–51 (1995); *see Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014).

[408] *See* S. 652 § 304(b) (104th Cong. 1995) (contained in "Title III—An End to Regulation").

[409] S. Rep. No. 104-230 at 210 (1996).

[410] *Order* at para. 8; *see also Order* at paras. 78–101.

[411] *Order* at note 134; *see also Order* at para. 81.

[412] *Order* at para. 38.

Relying on dicta from the D.C. Circuit, the *Order* claims "'significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.'"[413] Exercising that apparent discretion, the *Order* first labels a bevy of Title II requirements the "core broadband Internet access service requirements" and applies them to the service. It then "grant[s] extensive forbearance" from other Title II requirements based on a predictive judgment, but it does so without ever finding that there is competition sufficient to ensure just and reasonable rates and practices.[414] That is not what the law allows.

In section 10, Congress set forth the three-part test for forbearance. First, we must find that "enforcement of [a] regulation or provision [of the Act] is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[415] Next, we must find that "enforcement of such regulation or provision is not necessary for the protection of consumers."[416] And finally, we must "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services,"[417] and determine whether forbearance is "consistent with the public interest."[418] Section 332(c)(1) lays out largely the same criteria with respect to commercial mobile services.[419]

And there is no question how our precedents apply the statutory forbearance standard. Take just the subset of our forbearance precedents that involve forbearance from economic regulations—such as *ex ante* rate regulation under section 201, tariffing under section 203, rate prescription under section 205, interconnection, resale, and unbundling regulation under section 251, or interconnection, resale, and unbundling regulation under section 271. In *every* case where the Commission has eliminated economic regulations, it has characterized market competition as the determining factor in assessing whether forbearance was appropriate.[420] As the Commission said not so long ago: "[I]n the context of its section 10(a)(1) analysis, 'competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory.'"[421]

So when the Commission forbore from applying economic regulations to commercial mobile services in 1994 (under section 332(c)(1)(A)), it concluded that "the most prudent approach for us to follow in reaching decisions regarding forbearance in this Order must involve an examination of the

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[413] *Order* at para. 437 (quoting *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 906-07 (D.C. Cir. 2009)).

[414] *Order* at para. 458.

[415] Communications Act § 10(a)(1).

[416] Communications Act § 10(a)(2).

[417] Communications Act § 10(b).

[418] Communications Act § 10(a)(3).

[419] Communications Act § 332(c)(1)(A), (c)(1)(C).

[420] Although I focus here on precedent related to section 10(a)(1)'s criterion for forbearance, our precedent uses this same analysis when examining whether forbearing from an economic regulation would comply with section 10(a)(2)'s focus on protecting consumers.

[421] *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance From Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, Order, 27 FCC Rcd 11532, 11544, para. 27 (2012) (quoting *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc., for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket Nos. 97-172, 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999)).

prevailing climate of competition."[422] That is because "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power."[423] And so the FCC ultimately concluded that "the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements."[424]

And when the Commission used forbearance to detariff the long-distance telephone market in 1996, market forces and competition lay at the center of the analysis: "Just as we believe that competition is sufficient to ensure that nondominant interexchange carriers' charges for interstate, domestic, interexchange services are just and reasonable, and not unreasonably discriminatory, and to protect consumers, we believe that competitive forces will ensure that nondominant carriers' non-price terms and conditions are reasonable."[425]

And the Commission has analyzed competition *every time* it has granted relief from economic regulations for dominant carriers. In the *Qwest-Omaha Forbearance Order*, the Commission reviewed the local market and determined that "sufficient facilities-based competition for local exchange and exchange access services exists in certain of Qwest's Omaha MSA wire center service areas to justify forbearance relief."[426] In the *ACS of Anchorage Dominance Forbearance Order*, the Commission could only find "that enforcement of dominant carrier rate-of-return regulations and certain related tariffing and pricing rules is not necessary" "[b]ased on the significant competition ACS faces for both mass market and enterprise switched access services."[427] In the *Qwest-Terry Forbearance Order*, the Commission noted the "showing of competition ensures that Qwest is unable to implement charges, practices, classifications, or regulations that are not just and reasonable or that are unjustly or unreasonably discriminatory in this exchange."[428]

And the Commission has not hesitated to find that a lack of competition makes forbearance from economic regulations inappropriate. In the *Verizon 6 MSA Forbearance Order*, the Commission denied forbearance because it found that "the evidence of competition in this record is insufficient . . . to ensure that, in each of the 6 MSAs, charges, practices, classifications, or regulations for or in connection with

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[422] *CMRS Second Report and Order*, 9 FCC Rcd at 1467, para. 136.

[423] *Id.* at 1478, para. 173.

[424] *Id.* at 1478, para. 175.

[425] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20752, para. 42 (1996). For those not steeped in Commission arcana, an interexchange carrier is a long-distance carrier, and all interstate, interexchange carriers had been determined to be nondominant at the time of this decision.

[426] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19447, para. 64 (2005).

[427] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance of Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16330–31, para. 58 (2007); *see also Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1959, para. 1 (2007) (eliminating other economic obligations "under comparable competitive conditions").

[428] *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, WC Docket No. 07-9, Memorandum Opinion and Order, 23 FCC Rcd 7257, 7264, para. 13 (2008).

those services are just and reasonable and are not unjustly or unreasonably discriminatory."[429] In the *Qwest 4 MSA Forbearance Order*, the Commission denied forbearance because "there is inadequate evidence of facilities-based mass market competition and we are unable to conclude from the evidence in the record that Qwest no longer holds a significant market share of the services at issue."[430] And in the *Qwest-Phoenix Forbearance Order*, the Commission denied forbearance because the evidence "fails to demonstrate that there is sufficient competition to ensure that, if we provide the requested relief, Qwest will be unable to raise prices, discriminate unreasonably, or harm consumers."[431]

What I cannot find—and what our precedent does not countenance—is any instance where the FCC eliminated economic regulations without first performing any market analysis or finding competition sufficient to constrain anticompetitive pricing and behavior.[432] It's easy to see why. Economic regulations are *designed* to ensure just and reasonable rates and practices. Some do it directly by capping rates,[433] by requiring rates to be tariffed and approved by the FCC,[434] or by letting the Commission prescribe a rate for a particular carrier.[435] Others do it indirectly by generating competition, such as through mandating resale or network element unbundling.[436] And so the FCC has not and, under the statute, cannot forbear from *any* economic regulation on a whim or a lark. Instead, it must identify *something else* that will constrain pricing, and that something else has always been—and can only be—competition.

But in forbearing from economic regulations in today's *Order*, the Commission doesn't just fail to find sufficient competition. It goes so far as to find that competition is lacking in the market for broadband Internet access service: Competition "appears to be limited in key respects,"[437] with consumers facing "high switching costs . . . when seeking a new service,"[438] and "broadband providers hav[ing] significant bargaining power in negotiations with edge providers and end users."[439] Indeed,

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[429] *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc.*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21311, para. 33 (2007), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009).

[430] *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11752, para. 31 (2008).

[431] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8623, para. 2 (2010).

[432] Rather than citing such precedent, the *Order* attempts to sweep aside all competition-focused precedent by claiming it was "responding to arguments that competition was sufficient." *Order* at note 1307. That's no coincidence. Until this *Order*, no Commission has *ever* found that it could forbear from economic regulation absent competition—and so every Commission order and every commenter has focused on the presence or absence of competition.

[433] *See, e.g.*, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107 (2013) (establishing price caps for interstate inmate calling services under section 201 of the Communications Act), *pets. for review pending and pets. for stay granted in part sub nom. Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014).

[434] Communications Act § 203.

[435] Communications Act § 205.

[436] Communications Act § 251(b)(1), (c)(3)–(4).

[437] *Order* at para. 501.

[438] *Order* at para. 81.

[439] *Order* at para. 80.

"meaningful alternative broadband options may be largely unavailable to many Americans . . . . When we look to the new standard articulated in the Broadband Progress Report, . . . 45 percent of households have only single provider option for these services."[440] If that's truly how the FCC sees the market, it should go ahead and use the m-word—monopoly—and rely on the economic regulations of the Communications Act that Congress designed to prevent a monopolist (back in 1934, it was Ma Bell) from exercising market power to the detriment of consumers. I do not see how the Commission could possibly forbear from economic regulations while at the same time finding that competition is so limited or non-existent. Yet the *Order* does just that.

And lest there be any doubt that the Commission's analysis here marks a dramatic departure from that employed in prior forbearance decisions, consider this. In just 109 paragraphs, the Commission purports to analyze whether to forbear from *every* statutory provision and regulation applicable to Title II services on a nationwide basis for every broadband Internet service provider in the country.[441] That is substantially shorter than the 199 paragraphs than it took for the Commission to analyze whether to forbear from applying a subset of Title II economic regulations to a single company in just two markets: Omaha (99 paragraphs) and Phoenix (100 paragraphs).[442]

The *Order* offers several justifications for its approach; none are convincing. *First*, it notes "the Commission has in the past granted forbearance . . . where it found the application of other requirements (rather than marketplace competition) adequate to satisfy the section 10(a) criteria."[443] And that's true but only in a sense that's not relevant to today's item.

The FCC has used forbearance to *make adjustments* to *ex ante* rate regulation without looking to marketplace competition. For example, in the cited *Iowa Telecom Forbearance Order*, the Commission granted forbearance so that a dominant carrier could move from one form of *ex ante* rate regulation (a price cap) to another (a forward-looking cost study).[444] In the cited *SMS/800 Refund Forbearance Order*, the Commission granted forbearance so that several dominant carriers could issue a one-time refund to their customers while leaving all other *ex ante* rate regulation in place.[445] And in the cited *USTelecom Forbearance Order*, the Commission eliminated several accounting and reporting requirements while otherwise leaving intact all *ex ante* rate regulation and unbundling requirements.[446]

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[440] *Order* at note 134.

[441] *Order* at paras. 434–542.

[442] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010).

[443] *Order* at para. 439; *see also Order* at note 1305 (citing cases).

[444] *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a/ Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on The CALLS Order or a Forward Looking Cost Study*, CC Docket No. 01-331, Order, 17 FCC Rcd 24319, 24325–26, paras. 18–19 (2002).

[445] *Petition for Forbearance from Application of the Communications Act of 1934, as Amended, to Previously Authorized Services*, Memorandum Opinion and Order, 12 FCC Rcd 8408, 8411–12, paras. 9–10 (Common Carrier Bur. 1997).

[446] *See, e.g.*, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order, 28 FCC Rcd 7627, 7675–76, para. 107 (2013) (finding that the data filed in ARMIS Report 43-01 "is not needed to ensure just and reasonable rates, terms, and conditions" given the continuation of "price cap regulation"); *id.* at 7691, para. 142 (eliminating the "separate affiliate requirement" for non-Bell operating company dominant carriers while retaining the remainder of *ex ante* rate regulation such as "dominant carrier regulation, Part 32 accounting rules, equal access obligations" and "section 251 [unbundling and resale] obligations").

And it's true that the FCC has used forbearance to eliminate *non-economic regulations* without looking to marketplace competition. For example, in the cited *Foreign Ownership Forbearance Order*, the Commission found "no evidence that the foreign ownership of a common carrier licensee, in and of itself, is directly relevant" to whether rates and practices are "just and reasonable and not unjustly or unreasonably discriminatory."[447] And in the cited *USTelecom Forbearance Order*, the Commission eliminated several noneconomic regulations, such as a requirement to keep a paper copy of a long-distance carrier's "rates, terms, and conditions available in at least one location during business hours."[448]

But merely adjusting economic regulations while keeping most in place or eliminating noneconomic regulations—as the Commission did in each of these cases—without conducting a competitive analysis is hardly the same as what the *Order* purports to do. Namely, the *Order* eliminates certain economic regulations entirely without finding competition sufficient to meet the concerns of section 10(a)(1). *That* the Commission has never done.

Second, the *Order* cites its "predictive judgment that the statutory and regulatory requirements that remain"—particularly section 201 and 202 of the Act—"are sufficient" to ensure just and reasonable rates and practices.[449] What's the basis for this predictive judgment? The *Order* doesn't say, although it goes out of its way to "reject suggestions that market forces will be sufficient to ensure that providers of broadband Internet access service and broadband subscriber access service do not act in a manner contrary to the public interest."[450]

This is precisely the opposite tack of previous FCC forbearance decisions. The Commission has reserved the "regulatory backstop" of sections 201 and 202 as a *supplement* to competition, not a replacement for it. As the Commission's *CMRS Second Report and Order* put it: Even though "there is sufficient competition in this marketplace to justify forbearance," "the continued applicability of Sections 201, 202, and 208 will provide an important protection in the event there is a market failure."[451] The *Order* itself acknowledges as much elsewhere: "Of course, this regulatory backstop is not a substitute for robust competition."[452] And yet the *Order* somehow concludes that forbearance from economic regulations is warranted even though the Commission claims that competition is lacking.

Nor does the Commission explain how "recent experience" informs its predictive judgment.[453] It would be one thing if the *Order* surveyed existing rates and practices and concluded that present rates and practices were just and reasonable—that could be a "practical reference point" for considering the need for economic regulation.[454] But the *Order* doesn't do that. If anything, it specifically calls into question the reasonableness of common industry practices like usage-based pricing, data allowances, and sponsored data plans.[455] And it says the record "demonstrates that [carriers] have the ability to use terms

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[447] *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees*, IB Docket No. 11-133, First Report and Order, 27 FCC Rcd 9832, 9839, para. 15 (2012).

[448] *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order, 28 FCC Rcd 7627, 7671–72, paras. 94, 98 (2013).

[449] *Order* at para. 458; *see also Order* at para. 497 ("[It] is our predictive judgment that other protections that remain in place are adequate to guard against unjust and unreasonable and unjustly and unreasonably discriminatory rates and practices in accordance with section 10(a)(1) . . . .").

[450] *Order* at para. 444.

[451] *CMRS Second Report and Order*, 9 FCC Rcd at 1478–79, para. 175.

[452] *Order* at para. 203.

[453] *Order* at para. 499.

[454] *Order* at para. 499.

[455] *See Order* at paras. 151–53.

of interconnection to disadvantage edge providers and that consumers' ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs."[456] And yet the *Order* somehow concludes that forbearance from economic regulations is warranted.

And the *Order* never attempts to explain how it can possibly ensure just and reasonable rates and practices nationwide through its case-by-case approach. The Final Regulatory Flexibility Analysis attached to the *Order* estimates that it may need to adjudicate complaints against 4,462 separate broadband Internet access service providers to ensure just and reasonable rates,[457] each without the presumption that marketplace competition will constrain anticompetitive pricing and practices. And section 208(b)(1) gives the Commission only 5 months to resolve such complaints.[458] It is simply infeasible that our dedicated staff could process and investigate all such complaints in the statutory time frame—and deploying economic regulations like *ex ante* rate regulation is precisely how the FCC normally avoids this practical problem. And yet the *Order* somehow concludes that forbearance from economic regulations is warranted.

Third, the *Order* claims that the "overlay of section 706 of the [Telecommunications] Act and our desire to proceed incrementally" enable the Commission to forbear from large swaths of the Communications Act, including its economic regulations, without a finding of sufficient competition.[459] But neither section 706 nor the Commission's desires allow it to ignore the plain terms of federal law.

For one, whatever direction section 706 gives to the Commission regarding forbearance, it does not allow the FCC to forbear when the section 10(a) criteria are not met—and specifically, the FCC may not grant forbearance where it cannot be assured of the justness and reasonableness of rates and practices. In every case where the agency has incorporated section 706's directive into its forbearance analysis to repeal economic regulations, the FCC has first found sufficient competition to meet section 10(a)(1)'s criterion.

So in the *Triennial Review Order*, the Commission found a sufficiently "competitive environment" to forbear from uncertain unbundling obligations[460]—and the reviewing court agreed that "that robust intermodal competition from cable providers . . . means that . . . mass market consumers will still have the benefits of competition between cable providers and ILECs."[461] In the *Qwest Enterprise Forbearance Order* and the *Embarq/Frontier Enterprise Forbearance Order*, the agency noted that "the marketplace generally appears highly competitive" and found certain economic regulations "no longer appropriate in light of the market conditions"[462]—and the reviewing court upheld the FCC's findings on

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[456] *Order* at para. 205.

[457] *Order* Appendix B at para. 19.

[458] Communications Act § 208(b)(1) ("[W]ith respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed."); *see also* Communications Act § 208(a) ("If [a] carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.").

[459] *Order* at para. 458.

[460] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17151–52, paras. 292 (2003).

[461] *United States Telecom Association v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004).

[462] *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and* Computer Inquiry *Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12275, 12280, paras. 26, 34 (2008); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of* Computer Inquiry *& Certain Title II Common-Carriage Requirements; Petition of the*

(continued….)

the "feasibility of competitive self-deployment of special access lines—a development that both helps justify and will be furthered by the FCC's decision."[463] And in the *Section 271 Forbearance Order*, the FCC specifically called out "the importance of competition in ensuring just, reasonable, and nondiscriminatory charges and practices for broadband services"[464]—and the reviewing court agreed that the carriers' "secondary market position relative to cable internet providers tends to mitigate the impact of forbearance on the state of competition in the broadband market, especially where cable internet providers themselves are not required to unbundle."[465]

To the extent the *Order* suggests otherwise (*e.g.*, arguing that section 706 allows the Commission "to balance the future benefits of encouraging broadband deployment against the short term impact from a grant of forbearance"[466]), it is wrong.[467] And though the *Order* cites the court reviewing the *Section 271 Forbearance Order* for this proposition, the court was actually making a point about *competition*. The court first noted: "the FCC concluded that any short-term effects on competition are offset by the prospect of additional intermodal competition and the benefits that forbearance will provide: incentives for both ILECs and CLECs to invest in and deploy broadband facilities, which will increase competition going forward and thereby keep rates reasonable, benefit consumers, and serve the public interest."[468] It then upheld the FCC's conclusion: "[T]he agency only needed to show that the positive short-term impact of unbundling would be out-weighed by the longer-term positive impact that *not* unbundling would have on rates, consumers, and the public interest. The record here is up to the task."[469] In contrast, the *Order* blithely recognizes that "the record . . . does not provide a strong basis for concluding that the forbearance granted in this Order is likely to directly impact the competitiveness of the marketplace."[470]

For another, neither section 706 nor a desire to proceed incrementally can give the FCC *carte blanche* to displace the reticulated economic regulatory regime Congress mandated in favor of its own, largely boundless discretion.[471] Sure, the FCC might prefer the "tailored framework" of section 201 over "compliance with interconnection under section 251" because aspects of section 201 interconnection are "at the Commission's discretion" (*e.g.*, the Commission can order through-routes), "rather than being

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Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry *Rules with Respect to Their Broadband Services*, WC Docket No. WC 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19492, 19496, paras. 22, 30 (2007).

[463] *Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009).

[464] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21507, para. 24 (2004).

[465] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 11 (D.C. Cir. 2006).

[466] *See, e.g.*, *Order* at para. 495 (internal quotation marks and brackets omitted) ("We note in this regard that when exercising its section 10 forbearance authority '[g]uided by section 706,' the Commission permissibly may 'decide[] to balance the future benefits' of encouraging broadband deployment 'against [the] short term impact' from a grant of forbearance." (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006))).

[467] Notably, the *Order*'s response studiously avoids using the statutory word "charges" in favor of the vaguer term "conduct," *Order* at para. 496 & note 1502, and does not explain what, if anything, will ensure just and reasonable charges absent either competition or economic regulation.

[468] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 7 (D.C. Cir. 2006).

[469] *Id.* at 11.

[470] *Order* at para. 501.

[471] *Order* at para. 458.

subject to mandatory regulation under section 251."[472] But such reasoning implies the FCC could have pretty much ignored 90% of the Telecommunications Act—rejecting Congress's entire framework for opening local markets to competition—based on the forbearance authority Congress gave the agency in that same act. That makes no sense whatsoever.

The only sensible way to reconcile the framework of the Telecommunications Act is to demand something more from the FCC than its own "desire" before replacing the mandatory requirements of the law with its own discretionary authority. That something more is today what is always has been: a showing of marketplace competition.

Finally, I take issue with the *Order*'s repeated complaints about the state of the record. To wit:

- "Nor do commenters adequately explain how forbearance could be tailored . . . ."[473]
- "[C]ommenters . . . do not meaningfully explain what incremental benefit that would achieve . . . ."[474]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need to protect consumer privacy is not self-evidently linked to such marketplace considerations."[475]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need to protect disability access is not self-evidently linked to such marketplace considerations."[476]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that the need for regulated access to access to poles, ducts, conduit and rights-of-way is not self-evidently linked to such marketplace considerations."[477]
- "[C]ommenters do not meaningfully explain how these arguments impact the section 10 analysis here, given that, even taken at face value, arguments based on such marketplace considerations do not purport to sufficiently address the policy concerns underlying section 254 and our universal service programs."[478]
- "Commenters do not meaningfully explain why the transparency rule is inadequate, and thus their arguments do not persuade us to depart from our section 10(a) findings above in the case of section 203."[479]
- "Commenters have not explained why we should not find the protections of section 201(b) and antitrust law adequate here, as well."[480]
- "[C]ommenters fail to demonstrate at this time that other, applicable requirements or protections are inadequate, for the reasons discussed below."[481]
- "[C]omments contending that the Commission should not forbear as to that provision do not explain why the core broadband Internet access service requirements do not provide adequate protection at this time."[482]

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[472] *Order* at para. 513.

[473] *Order* at para. 450.

[474] *Order* at note 1352.

[475] *Order* at note 1390.

[476] *Order* at note 1438.

[477] *Order* at note 1447.

[478] *Order* at note 1466.

[479] *Order* at para. 503.

[480] *Order* at para. 507.

[481] *Order* at para. 494.

- "Given that decision [made elsewhere in the *Order*], commenters do not indicate what purpose section 204 still would serve, and we thus do not depart in this context from our overarching section 10(a) forbearance analysis above."[483]
- "[T]he record here does not demonstrate specific concerns suggesting that Commission clarification of statutory terms as needed would be inadequate in this context."[484]
- "Commenters do not indicate, nor does the record otherwise reveal, an administrable way for the Commission to grant the requested partial forbearance . . . ."[485]
- "Bare assertions that the record here is inadequate to justify forbearance from certain provisions from which we forbear above similarly are too conclusory to warrant deferring a decision to a future proceeding."[486]

Blaming the public rather than the agency itself for the state of the record should shock the administrative conscience. It certainly takes chutzpah. If commenters did not explain how forbearance could be adequately tailored to meet the FCC's needs, it's because the FCC never told commenters what its needs were (at least until this *Order*) nor what forbearance was being contemplated (at least until Chairman Wheeler's Feb. 4, 2015 editorial) nor that forbearance was even necessary (at least until President Obama's Nov. 10, 2014 YouTube announcement). If commenters did not foresee how the FCC would approach forbearance or how certain forbearance decisions would impact other forbearance decisions, how can we possibly blame them?

IV.

At the beginning of this proceeding, I quoted Google's former CEO, Eric Schmidt, who once said: "The Internet is the first thing that humanity has built that humanity doesn't understand."[487] This proceeding makes abundantly clear that the FCC still doesn't get it.

But the American people clearly do. The threat to Internet freedom has awakened a sleeping giant. And I am optimistic that we will look back on today's vote as an aberration, a temporary deviation from the bipartisan path that has served us so well. I don't know whether this plan will be vacated by a court, reversed by Congress, or overturned by a future Commission. But I do believe that its days are numbered.

For all of these reasons, I dissent.

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[482] *Order* at para. 512.

[483] *Order* at para. 505.

[484] *Order* at para. 466.

[485] *Order* at para. 450.

[486] *Order* at note 1660.

[487] *Notice*, 29 FCC Rcd at 5653 (Dissenting Statement of Commissioner Ajit Pai) (quoting Jerome Taylor, Google chief: My fears for Generation Facebook, *The Independent* (Aug. 18, 2010), *available at* http://ind.pn/1vWHCty).

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

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

Today a majority of the Commission attempts to usurp the authority of Congress by re-writing the Communications Act to suit its own "values" and political ends. The item claims to forbear from certain monopoly-era Title II regulations while reserving the right to impose them using other provisions or at some point in the future. The Commission abdicates its role as an expert agency by defining and classifying services based on unsupported and unreasonable findings. It fails to account for substantial differences between fixed and mobile technologies. It opens the door to apply these rules to edge providers. It delegates substantial authority to the Bureaus, including how the rules will be interpreted and enforced on a case-by-case basis. And, lest we forget how this proceeding started, it also reinstates net neutrality rules. Indeed, it seems that every bad idea ever floated in the name of net neutrality has come home to roost in this item.[1]

To read public statements over the last few weeks, one might think that this item uses Title II in some limited way solely to provide support for net neutrality rules and to protect consumers. And a casual observer might be misled to believe that the ends justify the means.

Along the way, however, the means became the end. Net neutrality is now the pretext for deploying Title II to a far greater extent than anyone could have imagined just months ago. And that is the reality that the Commission tried to hide by keeping the draft from the public and releasing a carefully worded "fact" sheet in its place.

While I see no need for net neutrality rules, I am far more troubled by the dangerous course that the Commission is now charting on Title II and the consequences it will have for broadband investment, edge providers, and consumers. The Commission attempts to downplay the significance of Title II, but make no mistake: this is not some make believe modernized Title II light that is somehow tailored to preserve investment while protecting consumers from blocking or throttling. It is fauxbearance: all of Title II applied through the backdoor of sections 201 and 202 of the Act, and section 706 of the 1996 Act. Moreover, all of it is premised on a mythical "virtuous cycle"—not actual harms to edge providers or consumers.

In some ways, this evolution is not surprising. I have consistently expressed concerns, across a number of proceedings—tech transitions, text-to-911, over-the-top video, VoIP symmetry, etc.—that this Commission has been slowly but steadily attempting to bring over-the-top and other IP services within its reach. Now the Commission goes all in and subjects broadband networks—the foundation of the Internet—to Title II itself. Furthermore, because there is no limiting principle, other providers will eventually be drawn in as well. I cannot support this monumental and unlawful power grab.

The Proceeding Did Not Provide Sufficient Notice and Opportunity for Comment

Last year, the Commission seemed on track to reinstate net neutrality rules under section 706. The D.C. Circuit provided a roadmap for the Commission and, while I strongly disagree with the court's analysis of section 706,[2] a number of providers appeared ready to accept the new regime.

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[1] Perhaps not *every* bad idea. At least the Commission won't be separately classifying and regulating "broadband subscriber access service," which was widely regarded to be an imaginary service.

[2] *See, e.g.*, The Free State Foundation, *Section 706, Wild Assumptions, and Regulatory Restraint* (Mar. 31, 2014), http://freestatefoundation.blogspot.com/2014/03/section-706-wild-assumptions-and.html.

Hardly anyone at the time thought that the Commission would seriously consider applying Title II. And truth be told, the Commission did not give it much thought either, as is evident from the NPRM. Outside parties warned the Commission to take a few months to seek further comment, but the Commission was not operating on its own timetable because it has to be responsive to the political winds and views of the perpetually outraged. As a result, the item is highly vulnerable because the Commission did not provide adequate notice and opportunity to comment as required by the Administrative Procedure Act (APA).

To put it plainly, this is not the order that the NPRM envisioned. While the item claims that the decisions are a logical outgrowth of a few open ended questions tacked on the NPRM, that argument is not at all persuasive. This is a clearly a situation where "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule."[3]

In fact, even within the agency, staff and Commissioners were left to guess at the ultimate conclusions and reasoning because most of the substance was still "in flux" just a week prior to circulation. A number of critical decisions and rationales were not apparent until I read the circulated draft. It is a page turner—not because it is well written but because I literally could not predict what would come next or why, and when I did arrive at the conclusionary paragraphs, they often lacked foundation and sufficient justification.

Interested parties effectively had no notice or opportunity to respond to the vast evolution that took place from NPRM to final order. Key points include: the scope of the newly defined services, including how they relate to each other; the legal analysis underlying the classification or reclassification of each service; how forbearance would apply in the context of these newly defined services; and the theory underlying forbearance, including using sections 201, 202, and 706 to backfill other provisions.[4]

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[3] *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

[4] *See, e.g.*, Letter from Henry G. Hultquist, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 2 (filed Feb. 19, 2015) (AT&T Feb. 19, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001031079 ("The Commission's failure to provide adequate notice for a number of the proposals under consideration has resulted in a record that is bereft of support for the Commission's actions. For example, the Commission has no record basis on which it could determine that every ISP holds itself out as a common carrier. To give just one example, AT&T does not offer its GigaPower service indifferently to the public, and there is no basis in the record on which the Commission could mandate that AT&T do so."); Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 4 (filed Feb. 19, 2015) (Verizon Feb. 19, 2015 Title II Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001031374 ("For starters, the Open Internet NPRM did not even mention "adjunct-to-basic" services, so the Commission cannot justify its action on that rationale."); Letter from Scott K. Bergmann, CTIA to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 6 (filed Dec. 22, 2014) (CTIA Dec. 22, 2014 White Paper), http://apps.fcc.gov/ecfs/document/view?id=60001014008 ("[T]he Notice asked only whether mobile broadband Internet access service 'fit[s] … the definition of 'commercial mobile radio service.'" ... "It never asked whether 'the definition' – set out in Section 20.3 – should be changed, or provided notice that it might be.")(internal citation omitted); Letter from Kathryn A. Zachem, Comcast to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 6 (filed Jan. 30, 2015) (Comcast Jan. 30, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001024748 ("As an initial matter, the Open Internet NPRM gave no notice of any proposal to reclassify Internet traffic exchange as a Title II service. Although the NPRM raised the prospect that the FCC could depart from its historical approach of excluding interconnection issues from open Internet rules – asking whether it "should expand the scope of the open Internet rules to cover issues related to traffic exchange" – it nowhere suggested that the Commission might reclassify ISPs' interconnection-related services to achieve that end.") (internal citation omitted); Letter from Matthew A. Brill, Counsel to National Cable & Telecommunications Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28, 10-127 (Jan. 14, 2015) (NCTA Jan. 14, 2015 Ex Parte Letter).

Moreover, major changes were made during the waning hours of the Sunshine Period, including the elimination of broadband subscriber access service, which required staff to overhaul the discussions of broadband Internet access service and Internet traffic exchange. Parties had no opportunity to weigh in on these changes.

The Findings are Not Supported by Evidence of Actual Harms

Even after enduring three weeks of spin, it is hard for me to believe that the Commission is establishing an entire Title II/net neutrality regime to protect against hypothetical harms.[5] There is not a shred of evidence that any aspect of this structure is necessary. The D.C. Circuit called the prior, scaled-down version a "prophylactic" approach. I call it guilt by imagination.

Tellingly, although we received a record-breaking number of comments, those comments did not reveal any additional instances of actual harm to consumers. The item is sprinkled with references to what an ISP "may", "could", "might", or "potentially" to do to block or degrade applications, services, or content, but no new tangible violations. To be sure, the item selectively quotes a statement that a provider was interested in exploring commercial arrangements. Yet those "arrangements" were sponsored data plans—something that the Commission has not (as of yet) determined to be a net neutrality violation.[6]

Moreover, the Commission, once again, takes a pass on performing a market power analysis in favor of repetitive invocation of the "virtuous cycle" nonsense. That may have been good enough to narrowly survive review when all that was at stake was net neutrality rules. But that's no guarantee that such flimsy reasoning will withstand another round (or two) of scrutiny now that all of Title II hangs in the balance as well.

The APA requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[7] These rules, however, are not based on facts or data but on unsubstantiated fears of future wrongdoing. The item regurgitates the theory that ISPs act as "gatekeepers" between edge providers and consumers. Specifically, as the provider of access to end users, an ISP supposedly has the ability and incentive to disadvantage other network providers, edge providers, and end users. But while the item makes an economic argument, it does not back it up with economic analysis. The theory that rests on claims that consumers might not switch providers because consumers "may experience" switching costs, that bundled pricing "can also play a role" in reducing churn, and that consumers "may be confused" about their service.[8] Difficulty switching providers "is certainly a factor that might contribute to a firm's having market power, but that itself is not market power."[9]

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[5] *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 844 (D.C. Cir. 2006) (finding that "if [an agency] chooses to rely solely on a theoretical threat, it will need to explain how the potential danger …unsupported by a record of abuse, justifies such costly prophylactic rules").

[6] Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket No. 14-28 at 1-2 (filed Feb. 11, 2015) (Verizon Feb. 11, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001028587. In a single footnote, the item trots out the same three outdated examples it has cited in the past. It does not cite any other subsequent examples.

[7] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)).

[8] *Supra* para. 81.

[9] *Verizon v. FCC,* 740 F.3d 623, 664 (D.C. Cir. 2014) (Silberman, J., concurring in part and dissenting in part).

Moreover, there is a "significant rate of switching by wireless broadband subscribers." Letter from Kathleen Grillo, Verizon to Marlene H. Dortch, FCC, GN Docket No. 14-28 (filed Jan. 15, 2015) (Verizon Jan. 15, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001013599 (attaching Andres V. Lerner and Janusz A.

(continued….)

Moreover, the theory breaks down completely when it comes to small ISPs.[10] Many small providers—including WISPs, small cable providers, and municipal broadband providers—have made the case that they do not have the leverage to interfere with edge providers. As one group put it, "These ISPs cannot compel payments for unblocking, non-discriminatory treatment or paid prioritization services because each serves too few Internet subscribers to matter to edge providers such as Netflix, Amazon or Hulu, who have hundreds of millions of subscribers combined in the U.S. and internationally."[11] Moreover, it is simply not in the interest of small providers that are trying to grow their businesses and compete against larger providers to block or degrade their customers' connections.

While "an agency's predictive judgments about the likely economic effects of a rule" are entitled to deference, "deference to such ... judgment[s] must be based on some logic and evidence, not sheer speculation."[12] The predictions in this item are based on pure conjecture and deserve no deference.

Title II is an Extreme Solution to an Imaginary Problem

While some providers may have been willing to live with net neutrality rules under section 706 based on nothing more than speculative harms, it is an entirely different matter to impose Title II without concrete evidence that doing so is absolutely necessary. The item supposedly invokes Title II in order to

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Ordover, *"Terminating Access Monopoly" Theory and the Provision of Broadband Internet Access*, at 10-11 (Jan. 15, 2015) ("Wireless subscriber monthly churn rates in the third quarter of 2014 were 1.0% for Verizon and AT&T, 1.6% for T-Mobile, and 2.2% for Sprint, which means that 12 percent of Verizon and AT&T customers, 19 percent of T-Mobile customers, and 26 percent of Sprint customers, churn each year."). Additionally, "[a]ll four nationwide carriers offer pro-rated ETF policies that lower the costs to consumers who transfer services." Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket No. 14-28 at 5 (filed Feb. 19, 2015) (Verizon Feb. 19, 2015 Wireless Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001031470.

"Nor could the Commission find that any participant in the marketplace for Internet interconnection has market power, including those that also provide broadband Internet access." Letter from Gary L. Phillips, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 9 (filed Feb. 2, 2015) (AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001025387. *See also infra* note 37.

[10] The only concession to small providers is a temporary reprieve from the enhanced disclosure requirements. There is no relief from Title II. Moreover, ACA, NCTA and WISPA pointed out that the Commission did not adequately address the impact of Title II on small providers in the NPRM and Initial Regulatory Flexibility Act (IRFA) analysis. *See, e.g.*, Letter from Ross Lieberman, ACA, Lisa Schoenthaler, NCTA, and Stephen Coran, WISPA, to Tom Wheeler, FCC, GN Docket No. 14-28 at 4 (filed Jan. 9, 2015) ("The proposal of the most concern and potential significant negative impact on small broadband providers – whether wireline and wireless, fixed or mobile – is the FCC's proposal to regulate information services under Title II. However, there is no discussion in the NPRM nor IRFA of the major changes that a Title II regulatory scheme will impose on small broadband providers.").

[11] Matthew M. Polka, American Cable Association, *FCC Must Address Harm to Small and Medium-Sized ISPs from Title II Regulation* (Feb. 9, 2015), http://americancable.org/node/5189; Letter from Barbara S. Esbin, Counsel to American Cable Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 3-4 (filed Feb. 2, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001025667.

"Indeed, across the broad array of broadband providers that USTelecom represents, the vast majority *pay* to request and receive Internet traffic. It belies common sense and economics to suggest that a broadband provider that is paying to receive Internet traffic has a meaningful 'terminating access monopoly.'" Letter from Jonathan Banks, USTelecom to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 3 (filed Feb. 18, 2015) (USTelecom Ex Parte Letter).

[12] *Sorenson Communications Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014) (quoting *Nat'l Tel. Coop. Ass'n v. FCC,* 563 F.3d 536, 541 (D.C. Cir. 2009); *Verizon v. FCC,* 740 at 663 (Silberman, J., concurring in part and dissenting in part)).

put the net neutrality rules on the firmest legal footing. But Title II is far more than a convenient legal theory—it is a comprehensive set of regulations designed to rein in monopoly telephone companies.[13] And it is laden with decades of precedent that cannot be shrugged off with simple incantations like, "To the extent our prior precedents suggest otherwise, for the reasons discussed in the text, we disavow such an interpretation as applied to the open Internet context."[14]

There is a reason that Title II has been called the nuclear option. No matter what the FCC tries to do to limit the fallout (and it is not trying very hard to do that here) the decision will still impact investments. As one analyst reportedly wrote just last week, "terminal growth rate assumptions need to be lowered…Title II is about price regulation. It would be naïve to believe that the imposition of a regime that is fundamentally about price regulation, in an industry that the FCC has now repeatedly declared to be non-competitive, wouldn't introduce risk to future pricing power."[15]

While the FCC tailors certain statements from providers to reject assertions that Title II will "substantially diminish overall broadband investment", that doesn't give me a lot of comfort.[16] Even a *modest* reduction is too great a price to pay when weighed against purely speculative harms. Moreover, the harms to small ISPs will be disproportionately severe and the FCC gives them no reprieve from Title II whatsoever.

Incredibly, the item gives significant weight to a theoretical cost of forgone innovation but gives essentially no weight to the cost of forgone investment. I am far more concerned about the Americans that will remain unserved as a result of our rules. Forget about an open Internet; they have no Internet. We need to be focused on ways to promote deployment, and not in some roundabout virtuous cycle way, but through proven deregulatory measures. I am very concerned that, far from a virtuous cycle, we are creating a vicious cycle where regulation deters investment in broadband and that begets more regulation to stimulate competition and deployment that will further deter investment. In other words, the beatings will continue until morale improves.

The item trots out three examples of Title II "success stories" but they are all inapposite. First, it notes that during the time that mobile voice service has been subject to Title II, investment has flourished. But that assumes that companies were investing in their mobile networks for the sake of *voice* service. That is plainly not the case. That investment was made to improve the capacity of the networks to handle mobile *broadband* traffic.[17]

Second, it points to rural carriers that opted to provide a transmission service on a common carriage basis. Many did so, but not for the sake of Title II. They did so to participate in the NECA tariff

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[13] Letter from Berin Szoka, Tech Freedom et al. to Chairman Wheeler, FCC, GN Docket No. 14-28 at 2 (filed Sept. 15, 2014), http://apps.fcc.gov/ecfs/document/view?id=7522679800. Moreover, "Title II would undermine 15 years of American insistence around the world that the Internet shouldn't be regulated under traditional telecom rules." *Id*. at 1.

[14] *See, e.g., supra* note 753.

[15] Kery Murakami, *Wheeler Defends Proposed Net Neutrality Rules at NARUC*, COMM. DAILY at 4, 6 (Feb. 18, 2015) (quoting Craig Moffett).

[16] *Supra* para. 414.

[17] Verizon Feb. 19, 2015 Wireless Ex Parte Letter at 1-2 ("Chairman Wheeler, for example, has written that '[o]ver the last 21 years, the wireless industry has invested almost $300 billion' under rules 'similar' to those he is proposing for broadband Internet access, 'proving that modernized Title II regulation can encourage investment and competition.' This analogy is misplaced. The wireless industry's capital expenditures have been driven not primarily by CMRS voice service offerings, but by Title I mobile broadband services offered over 3G and 4G platform.") (internal citation omitted).

and pooling process, which helps stabilize cost recovery and reduce administrative costs.[18]

Third, it points to forbearance from certain provisions of Title II as applied to enterprise broadband. In that situation, a heavily regulated service was granted some measure of relief, improving the case for investment. Here we would be subjecting services to greater regulation, which is another matter entirely. Furthermore, if enterprise broadband forbearance is such a success story, then why has it taken the Commission so long to act on a pending "me too" enterprise forbearance petition?

The Commission's Decision to Classify Broadband Internet Access Service as a Telecommunications Service is Contrary to Law and Fact

Notably, the item not only reverses its decision to treat broadband Internet access service as an information service, but it also determines, for the first time, that Title II applies to the entire service—not just a transmission component. As one provider put it, "the conclusion that retail 'broadband Internet access' is a telecommunications service is contrary to the plain text of multiple provisions of the Communications Act, decades of Commission decisions, and the views of all nine Supreme Court Justices in [*Brand X*]."[19]

The item also gives short shrift to the argument that prior decisions to classify broadband Internet access service as an information service "engendered serious reliance interests that must be taken into account."[20] For example, one White Paper noted, "the Commission expressly invited the reliance at issue here: When it classified mobile broadband as an integrated information service more than seven years ago, it explained that '[t]hrough this classification, we provide the regulatory certainty needed to help spur growth and deployment of these services.'"[21] Under these circumstances, the Commission must "provide a more detailed justification" for changing course "than what would suffice for a new policy created on a blank slate."[22]

The item utterly fails that test. It counters that a few carefully selected statements by providers and investors show that classifications have an indirect impact on investment. It does not respond at all to the White Paper and, as noted above, this type of reasoning doesn't account for foregone investment. Moreover, statements from 2010 are inapposite because the reclassification under discussion at the time concerned a transmission component. Here we are talking about reclassifying the entire retail broadband service and regulating Internet traffic exchange to boot. There's simply no comparison. Additionally, arguing that providers should have known since 2000 that this was a real possibility is disingenuous to the extreme given that the FCC leadership itself did not know if or how it would use Title II almost up until

[18] Letter from Richard A. Askoff, NECA et. al to Marlene H. Dortch, FCC, CC Docket No. 02-33 & WC Docket No. 04-36 (July 26, 2005), http://apps.fcc.gov/ecfs/document/view?id=6518022135 ("Over 900 small telephone companies currently offer Digital Subscriber Line (DSL) transmission services under NECA's tariff and participate in associated revenue pools. Existing NECA tariff and pooling arrangements permit these companies to offer new services in an efficient and timely manner, while providing stable monthly cash flows and protection against unexpected demand reductions or increased costs. Absent pooling, for example, the potential loss of only one large customer could make a significant difference in whether a rural company can risk investments in new service deployments.").

[19] Letter from Gary L. Phillips, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 1 (filed Feb. 18, 2015) (AT&T Feb. 18, 2015 Fact Sheet Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001030836.

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

[21] CTIA Dec. 22, 2014 White Paper at 21 (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5911 ¶ 27 (2007)).

[22] *FCC v. Fox Television Stations, Inc*., 556 U.S. at 515.

today's vote. And saying that the forbearance keeps reclassification within the bounds of Title I is laughable given that the relief is really fauxbearance.

The significant legal infirmities, which have been persuasively demonstrated in the record and by my colleague Commissioner Pai, are enough to overturn the decision. Yet I am just as troubled by the substantial factual errors underlying the decision. Adherence to "factually unsupportable assertion[s]" shows that the Commission has "abdicate[d] its role as the expert federal agency on communications networks and services, and ignore[d] the administrative record in this proceeding."[23]

Once again, the item relies heavily on providers' advertisements—this time to claim that the broadband Internet access service that they are offering is merely "a conduit for the transmission of data across the Internet."[24] But that is no basis for changing the classification now; speeds have always been the focus of broadband ads.[25] Moreover, as one provider observed, "when consumers use broadband, their goal is not simply to 'send' and 'receive' information from one end point to another. Rather, they aim to acquire, retrieve, and manipulate information located on remote servers. These are all fundamental attributes of information services: the driver is the information, not the transportation of the information."[26]

Conveniently, the item also determines that other functionalities of Internet access, such as DNS and caching, that were previously considered enhanced services or information services, now fall within the telecommunications management exception to the definition of information services or do not affect the fundamental nature of broadband Internet access service. As such, the item claims that they do not turn broadband Internet access service into a functionally integrated information service. This is absurd. The very essence of functionalities like DNS and caching is to provide the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[27] Thus, these ISP functions do not exist solely to "facilitate" transmission or make

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[23] Letter from Austin H. Schlick, Google to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 3 (filed Feb. 20, 2015) (Google Feb. 20, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001032150.

[24] *Supra* para. 354. The item also points to the ads to determine that ISPs holds themselves out to serve the public indifferently. *Supra* note 965. A smattering of general advertisements, however, is not a substitute for a reasoned analysis, nor does it establish that each and every ISP has made "a conscious decision" to hold itself out to serve the public indifferently. *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). Moreover, the Commission itself has recognized that ISPs may "decide case-by-case basis whether to serve a particular end user, what connection speed(s) to offer, and at what price" and this "flexibility to customize service arrangements for a particular customer is the hallmark of private carriage, which is the antithesis of common carriage." *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17951, ¶ 79 (2010) (*2010 Open Internet Order*), *aff'd in part*, *vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (citing *Sw. Bell Tel. Co. v. FCC*, 19 F.3d at 1481 ("If the carrier chooses its clients on an individual basis and determines in each particular case whether and on what terms to serve and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.") (internal quotation marks omitted)). Indeed, "[t]aking advantage of this flexibility, AT&T, for example, reserves the right to refuse to provide its wireline broadband Internet access service to potential customers that it perceives as credit risks." AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 7.

[25] *See* Verizon Feb. 19, 2015 Title II Ex Parte Letter at Appendix 1.

[26] *Id*. at 2.

[27] 47 U.S.C. § 153(20) (defining an "information service"). Accordingly, these functionalities do not merely "facilitate establishment of a basic transmission path". *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958, ¶ 107 (1996).

it more "useful";[28] they are "what allow consumers to interact with and obtain information, as well as to make their own information available."[29] Indeed, the item points out that CDN caching remains an information service, thereby undercutting the classification of ISP caching, because the only difference between the two, according to the item, is the extent to which CDN caching is deployed within networks. Accordingly, contrary to the item, all services that include such functions also must meet the statutory definition of an information service.[30]

The item also emphasizes that consumers increasingly use third parties for services such as email, website hosting, DNS, newsgroups, and video streaming. Yet that ignores the Commission's prior determinations that "[t]he information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service (e.g., e-mail or web-hosting), and whether every wireline broadband Internet access service provider offers each function and capability that could be included in that service."[31]

The Commission Cannot "Subsume" Internet Traffic Exchange into Broadband Internet Access Service to Regulate it Under Title II

The record is replete with evidence that content providers and network operators enter into interconnection relationships with ISPs through individually negotiated private agreements.[32] Regardless of the form they take—"peering," "transit," or "on-net-only"—providers do not hold themselves out to serve the public indifferently.[33] When considering whether to enter into these "voluntary, market-based agreements," providers "independently make decisions about interconnection by weighing the benefits and costs on a case-by-case basis."[34] As one provider stated, "the exchange of Internet traffic invariably entails arrangements between sophisticated commercial parties with very large amounts of traffic and

[28] *Supra* paras. 370, 372.

[29] Letter from Christopher Heimann, AT&T to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 7 (filed Feb. 2, 2015) (AT&T Feb. 2, 2015 Brand X Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001025378.

[30] *See id*. at 1-2, 6-8. *See also* AT&T Feb. 18 Fact Sheet Ex Parte Letter at 5 ("As long as the offering contains more than what the Commission has called a 'pure transmission path' — broadband Internet access is an information service.") (internal citation omitted).

[31] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 15 (2005) (*WBIAS Order*) (citing *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-785, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 38 (2002), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). The *WBIAS Order* also observed, "This classification appears consistent with Congress's understanding of the nature of Internet access services. Specifically, in section 230(f)(2) of the Act, Congress defined the term 'interactive computer service' to mean 'any information service, . . . including specifically a service or system that provides access to the Internet….'" *WBIAS Order* at fn. 41 (citing 47 U.S.C. § 230(f)(2)).

[32] *See* Google Feb. 20, 2015 Ex Parte Letter at 1. *See also, e.g.*, Letter from William H. Johnson, Verizon to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127 at 1, 4-5 (filed Dec. 17, 2014) (Verizon Dec. 17, 2014 Interconnection Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001010005; AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 7-8; Comcast Jan. 30, 2015 Ex Parte Letter at 2-6.

[33] AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 7-8.

[34] Federal Trade Commission, *Broadband Connectivity Competition Policy* at 25 (June 2007), http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.

their own network facilities – parties that directly connect only when they perceive mutual value in doing so."[35] Indeed, another provider noted that providers reserve the right not to enter into agreements even where guidelines are met.[36] This "flexibility to customize service arrangements for a particular customer is the hallmark of private carriage, which is the antithesis of common carriage."[37] As such, these arrangements, which some mistakenly refer to as "interconnection", have never been regulated as common carriage services subject to Title II.[38]

Undeterred by this long history, the item concocts a novel service laundering scheme. It attempts to transform this "interconnection" into a telecommunications service by "subsuming" it into another service—broadband Internet access service. Specifically, because providers supposedly hold themselves out to provide broadband Internet access service, that includes a "representation" to customers that they will be able to reach "all or substantially all Internet endpoints", and that representation necessarily includes the "promise" to make the interconnection arrangements necessary to allow that access.[39] And just like that, retail broadband Internet access service is no longer a last mile service; it is the entire "Internet traffic path", including all Internet traffic relationships.

This approach is riddled with holes. First, such "interconnection" has always been understood to be distinct from the last mile, including in this proceeding.[40] Second, the item does not show how this service laundering scheme is consistent with precedent. Third, it depends on broadband Internet access service being a telecommunications service, which it is not. Fourth, there was absolutely no notice for this novel approach. Even parties that guessed that interconnection might be subject to Title II (despite

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[35] Comcast Jan. 30, 2015 Ex Parte Letter at 3.

[36] *See* AT&T Feb. 2, 2015 Common Carrier Ex Parte Letter at 8 ("For example, AT&T's peering policy expressly states that "[m]eeting the peering guidelines set forth herein is not a guarantee that a peering relationship with AT&T will be established," that AT&T will "evaluate a number of business factors" before entering into a peering agreement, and "reserves the right not to enter into a peering agreement with an otherwise qualified applicant.") (citing AT&T Global IP Network Settlement-Free Peering Policy, http://www.corp.att.com/peering).

[37] *Open Internet Order*, 25 FCC Rcd at 17951, ¶ 79. Moreover, this market is highly competitive. *See, e.g.*, AT&T Feb. 2, 2015 Common Carrier Ex Parte at 9 ("At the same time that transit rates are declining rapidly, the volume of Internet traffic flowing over peering and transit arrangements has been growing at a remarkable pace. This combination of falling prices and increased output is exactly the opposite of what occurs where providers have market power, which is the ability 'to raise price and restrict output.' On the contrary, these facts lead inexorably to the conclusion that there is robust competition among competing networks of all types, fueled by massive continuing investments in fiber and IP platforms — investments that were made in reliance on the Commission's long-standing, hands-off policy with respect to Internet access services and Internet interconnection arrangements.") (internal citations omitted); Comcast Jan. 30, 2015 Ex Parte Letter at 5 ("Thanks to fierce competition, unit prices for transit services have dropped over 99% in the past 15 years.").

[38] *See, e.g.*, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 133 (2005) ("[I]nterconnection between Internet backbone providers has never been subject to direct government regulation."); *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17663, ¶ 1338 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom. In re FCC 11-161*, 753F.3d 1015 (10th Cir. 2014).

[39] *Supra* para. 204.

[40] *See, e.g.*, Verizon Dec. 17, 2014 Interconnection Ex Parte Letter at 1 ("Both the previous Open Internet rules and the Notice of Proposed Rulemaking in this proceeding focused on concerns relating to the management of traffic within a broadband provider's local network and over the last-mile connection to a subscriber. By contrast, interconnection agreements inherently involve routing traffic between networks. Issues surrounding these agreements, which relate to the physical connections between networks, are "very distinct" from issues concerning the management of traffic over the last-mile….") (internal citation omitted).

the lack of notice) clearly did not understand that the primary mechanism for doing so would be to re-interpret broadband Internet access service to include interconnection.[41]

Moreover, this shift to regulate Internet traffic exchange highlights that the Commission's real end game has become imposing Title II on all parts of the Internet, not just setting up net neutrality rules. Parties noted that interconnection arrangements are unrelated to last-mile net neutrality concerns.[42] But the item doesn't attempt to apply the net neutrality rules to Internet traffic exchange; it applies Title II. To be sure, it does so under the guise of net neutrality. But the market for Internet traffic exchange serves a far broader purpose than ensuring that retail consumers are able to reach points on the Internet.[43] In subjecting a thriving, competitive market to regulation in the name of net neutrality, the Commission is trying to use a small hook and a thin line to reel in a very large whale. This line will surely break.

Mobile broadband services warrant different regulatory treatment

Similarly, this item, for the first time, subsumes mobile broadband services under Title II common carrier regulation, reversing decades of precedent. Until now, the Commission has followed Congress's mandate under section 332 of the Communications Act and has correctly exercised regulatory restraint by classifying mobile broadband as an information service free from common carrier regulation as required by the statute.[44] Yet today, we use sleight of hand to change our definitions so that overnight

[41] *See, e.g.*, Comcast Jan. 30, 2015 Ex Parte Letter at 6 ("As an initial matter, the Open Internet NPRM gave no notice of any proposal to reclassify Internet traffic exchange as a Title II service. Although the NPRM raised the prospect that the FCC could depart from its historical approach of excluding interconnection issues from open Internet rules – asking whether it 'should expand the scope of the open Internet rules to cover issues related to traffic exchange' – it nowhere suggested that the Commission might reclassify ISPs' interconnection-related services to achieve that end."). As a backstop, the item notes in passing that BIAS provider practices with respect to such interconnection are "for and in connection with" the BIAS service. This last second addition based on a last minute ex parte filing cannot salvage this effort because there is no notice for this theory either.

[42] *See id.* at 1-3 ("These [traffic exchange] arrangements are distinct from the issues that are the subject of the Commission's open Internet rules, such as the ability of end-users to access particular content or the priority with which content might be delivered to end-users over an ISP's last-mile network."). *See also, e.g.*, Verizon Dec. 17, 2014 Interconnection Ex Parte at 1 ("[I]nterconnection agreements involve issues that are distinct from net neutrality, which has always focused on broadband Internet access providers' handling of traffic over the last-mile connection to consumers.").

[43] Comcast Jan. 30, 2015 Ex Parte Letter at 2-3 ("Traffic-exchange arrangements concern the transport of Internet traffic across the increasingly complex and dynamic backbone architecture of the Internet, and are negotiated based on the amounts of traffic – not the type, content, or source of traffic – being delivered to each party's network by the other.").

[44] 47 U.S.C. § 332. In 1993, Congress codified section 332(c) differentiating between commercial and private mobile services. *Compare* 47 U.S.C. § 332(c)(1) *with id.* § 332(c)(1); *see also id.* § 332(d) (providing definitions); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312. Under the law, mobile broadband has been treated as a "private mobile service" as opposed to a "commercial mobile service or the functional equivalent of a commercial mobile service." A "commercial mobile service" interconnects with the public switched telephone network; whereas, a "private mobile service" does not. Because mobile broadband is not interconnected and, therefore, a "commercial mobile service," Section 332 of the Communications Act prevents the Commission from regulating mobile broadband under Title II. Instead, mobile broadband is a "private mobile service" free from common carrier regulation. *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1434 ¶ 54 (1994); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5915–21 ¶¶ 37–56 (2007); *Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012); *Verizon v. FCC*, 740 F.3d at 650; *see also* Testimony of Robert M. McDowell, Partner, Wiley Rein LLP & Senior Fellow, Hudson Institute, before the Senate Committee on Commerce, Science & Transportation, at 14-15, http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=14755dd8-95c7-45e0-a7b9-bfb33f222f45.

mobile broadband magically falls under the confines of Title II.

In subjecting wireless broadband to Title II, the majority ignores fundamental differences between the wireless and fixed broadband industries and technologies. Unlike last century's voice-only telephone service, the wireless sector has developed and flourished in a fiercely competitive environment.[45] Wireless consumers have ample choices and can readily switch between offerings.[46] This competition has yielded unparalleled investment and innovation, lower prices, higher speeds and product differentiation as sector participants vie for an edge to attract and retain subscribers.[47] Applying a regulatory regime established for monopoly voice service to the dynamic mobile sector defies logic.

The majority also flagrantly ignores the fundamental technical and operational requirements necessary for mobile broadband networks. Unlike fixed systems, mobile network capacity is constrained by the relative scarcity of spectrum resources. Given this unique limitation, wireless providers must maintain their ability to vigorously and nimbly mitigate the congestion inherent to wireless networks.[48] I expect that the rigid Title II rules adopted today will hamstring the smooth functioning of these networks. Although some may argue that the exception for reasonable network management will allow such flexibility, a case-by-case approach whereby a wireless provider's congestion management practices are judged after the fact by the Commission's Enforcement Bureau is unlikely to provide much comfort to wireless providers.

Finally, the majority defines mobile broadband as a telecommunications service without adequately explaining its rationale for the drastic change of course.[49] In addition, there has been no meaningful opportunity for public comment on this change of definition.[50] This action is nothing less than an attempt to improperly capture mobile broadband under Title II, in direct contravention of

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[45] *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311, 15336 Chart III.2.A (WTB 2014) (stating that approximately 99 percent of consumers have a choice of two or more competitors and more than 82 percent of Americans today have a choice of four or more mobile providers).

[46] Now more than any time in history, wireless consumers have the freedom to take advantage of myriad incentives to switch providers, whether through early termination fee buyouts, unlocking, or one of various options to buy or finance the latest mobile devices. *See, e.g.,* Letter from Scott K. Bergmann, CTIA – The Wireless Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127, at 3-5 (Feb. 10, 2015) (CTIA Feb. 10, 2015 Ex Parte Letter).

[47] And, to remain competitive, carriers will continue to deploy new technologies, upgrade current networks, improve service offerings, and evolve to consistently meet or exceed consumer expectations. *See, e.g.,* Testimony of Meredith Attwell Baker, President and CEO, CTIA – The Wireless Association, before the House Energy & Commerce Subcommittee on Communications and Technology, at 5 (Jan. 21, 2015), http://docs.house.gov/meetings/IF/IF16/20150121/102832/HHRG-114-IF16-Wstate-BakerM-20150121-U1.pdf.

[48] *See, e.g., id*. at 4 (stating that a single strand of fiber can carry more traffic than the entirety of spectrum allocated for commercial wireless use); Letter from Scott Bergman, CTIA – The Wireless Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 (Oct. 6, 2014).

[49] By doing so, my colleagues in the majority bring an end to the regulatory approach established by Congress, implemented by the Commission and relied upon by the wireless sector. *See* CTIA Feb. 10, 2015 Ex Parte Letter at 5-10.

[50] *See, e.g.,* Letter from Gary L. Phillips, AT&T, to Marlene H. Dortch, FCC, at 3 (Feb. 2, 2015) (AT&T Feb. 2, 2015 Ex Parte Letter); CTIA Feb. 10, 2015 Ex Parte Letter at 13-14; CTIA Dec. 22, 2014 White Paper at 6; Letter from William H. Johnson, Verizon, to Marlene H. Dortch, FCC, at 5-6 (Verizon Dec. 24, 2014 Ex Parte Letter).

congressional intent,[51] and it is not likely to survive judicial scrutiny.

The Promised Forbearance is Fauxbearance

Perhaps the most surprising—and troubling—aspect of the item is that it promises forbearance from most of Title II but does not actually forbear from the substance of those provisions. Instead, the item intends to provide the same protections using a few of the "core" Title II provisions that are retained: chiefly, sections 201, 202, and 706. I call this maneuver fauxbearance.

The item is quite candid about this strategy, stating, "[A]pplying [sections 201 and 202] enables us to protect consumers of broadband Internet access service from potentially harmful conduct by broadband providers both by providing a basis for our open Internet rules *and for the important statutory backstop they provide regarding broadband provider practices more generally*."[52] Indeed, in section after section, the item claims to forbear from a provision but then quickly points to available protections in other provisions that effectively gut the forbearance. It's an end run for purposes of spin and allows proponents to claim that it's a new "modern Title II" when really it only would exclude 56 percent directly and even then allow the inexcusably broad language of certain sections to govern. Suffice it to say, the majority seems to be comfortable with suggesting that they can forbear from parts of Title II because section 201 does it all anyway. I will highlight a just few examples to make my point:

Fauxbearance from Tariffing (sections 203, 204): To quote the item, "It is our predictive judgment that [the protections in sections 201 and 202 of the Act] will be adequate to protect the interests of consumers—including the interest in just, reasonable, and nondiscriminatory conduct—that might otherwise be threatened by the actions of broadband providers. Importantly, broadband providers also are subject to complaints and Commission enforcement in the event that they violate sections 201 or 202 of the Act, the open Internet rules, or other elements of the core broadband Internet access requirements."[53] This is backdoor rate-setting authority.

Fauxbearance from Information Collection and Reporting (sections 211, 213, 215, 218-20): "[S]ection 706 of the 1996 Act, along with other statutory provisions, give the Commission authority to collect necessary information." (Citing as one example the Special Access Data Collection, which relied on sections 201 and 202 of the Act and section 706 of the 1996 Act).[54]

Fauxbearance from Discontinuance Approval (section 214(a)): "Further, the conduct standards in our open Internet rules provide important protections against reduction or impairment of broadband Internet access service short of the complete cessation of providing that service."[55]

Fauxbearance from Duty to Maintain Adequate Facilities (section 214(d)): "In practice, we expect that the exercise of this duty here would overlap significantly with the sorts of behaviors we would expect providers to have marketplace incentives to engage in voluntarily as part of the 'virtuous cycle.' Beyond that...it is our predictive judgment that other protections will be sufficient to ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to

[51] *See, e.g.,* AT&T Jan. 8, 2015 Ex Parte Letter; AT&T Feb. 2, 2015 Ex Parte Letter; CTIA Feb. 10, 2015 Ex Parte Letter at 14-16; CTIA Dec. 22, 2014 White Paper at 2-19; Verizon Dec. 24, 2014 Ex Parte Letter.

[52] *Supra* para. 446 (emphasis added).

[53] *Supra* para. 499.

[54] *Supra* para. 509.

[55] *Supra* para. 510.

protect consumers....”[56]

Fauxbearance from Interconnection and Market-Opening (sections 251, 252, 256): “The Commission retains authority under sections 201, 202 and the open Internet rules to require a provider of broadband Internet access to address interconnection issues should they arise, including through evaluating whether broadband providers’ conduct is just and reasonable on a case-by-case basis. We therefore conclude that these remaining legal protections that apply with respect to providers of broadband Internet access service will enable us to act if needed to ensure that a broadband provider does not unreasonably refuse to provide service or interconnect.”[57]

Section 201 is apparently so broad that it is even a backstop for section 202. Several commenters had pointed out that the Commission has interpreted Title II—specifically, section 202(a)—to allow carriers to engage in reasonable discrimination, including by charging certain customers more for better or faster service.[58] But we are told that is longer an obstacle because the Commission can simply ban service differentiation as an unjust and unreasonable practice under section 201(b).[59] While courts have determined that sections 201 and 202 afford the Commission with substantial discretion, it is not unbounded. This statutory shell game seems to be height of arbitrary and capricious rulemaking.

Yet even if one were to buy the story that the Commission is granting broad forbearance, that only serves to undercut the argument for Title II in the first place. Broad forbearance would prove that Title II is ill-suited for the dynamic broadband market. As one provider stated, “The very fact that the Commission feels the need to re-work so many provisions of Title II is proof that Congress never intended for Title II to apply to broadband providers.”[60] It would be evident that the Commission is merely engaging in an end-run around the statute in order to advance its own vision.

The Commission Does Not Have Authority to Re-Write the Act

The Supreme Court has made clear that “an agency has no power to ‘tailor’ legislation to bureaucratic policy goals” by interpreting a statute to create a regulatory system “unrecognizable to the Congress that designed it.”[61] Yet the item attempts to do just that by engaging in a wholesale re-write of the Communications Act to advance its own vision for the Internet.

The item casts its re-write as a “modernized” version of Title II. In doing so, the Commission forgets that “it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”[62] Congress gave us 48 provisions in Title II, but apparently all we really need is section 151 (which establishes the FCC and gives it authority over all interstate service)

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[56] *Supra* para. 513 (internal citation omitted).

[57] *Supra* para. 514.

[58] *See, e.g.*, NCTA Comments 27-29; TWC Comments 14-16; Letter from William L. Kovacks, Chamber of Commerce to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127, at 3, n.13 (filed July 15, 2014); ITIF Comments at 9.

[59] *Supra* para. 292 (“In light of our discretion in interpreting and applying sections 201 and 202 and insofar as section 706(a) is ‘a ‘fail-safe’ that ‘ensures’ the Commission’s ability to promote advanced services,’ we decline to interpret section 202(a) as preventing the Commission from exercising its authority under sections 201(b) and 706 to ban paid prioritization practices that harm Internet openness and deployment.”) (internal citation omitted).

[60] Verizon Feb, 19, 2015 Title II Ex Parte Letter at 7.

[61] *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444, 2445 (2014).

[62] *Ragsdale v Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (internal quotation marks omitted).

and 201 (which provides the substantive basis for all FCC rules). Or, to put it another way: "Presto, we have a new statute".[63] It is the unified theory of communications law.

Moreover, the Commission cannot cast aside specific provisions in favor of more general provisions of the Act. If Congress had thought that sections 201 and 202 provided the authority necessary to regulate interconnection, for example, then why was it compelled to add section 251 in 1996? The fact that Congress added more specific provisions is, by itself, evidence that the Commission does not have sufficient authority to do what the item envisions with the "core" Title II provisions. Indeed, "such an argument implies that the provision being forborne is redundant or surplus."[64] And it is axiomatic that statutes should be construed "so as to avoid rendering superfluous" any statutory language.[65]

Additionally, the fact that the agency has forbearance authority does not justify the re-write. Using Title II combined with forbearance to cherry pick its preferred provisions is an egregious abuse of forbearance authority. As the D.C. Circuit has explained, "To further the deregulatory aims underlying the 1996 overhaul of the Communications Act, Congress provided the FCC with the unusual authority to forbear from enforcing provisions of the Act as well as its own regulations."[66] That is, forbearance was intended to *relieve* carriers of *existing* regulations during a time of regulatory transition. It was not meant to be used as a tool to selectively subject new services to previously inapplicable provisions.

This deregulatory objective is reinforced by other provisions enacted at the same time. For example, in the same Title of the 1996 Act, Congress directed the Commission to engage in a biennial review of regulations adopted under the Act and remove regulations that were no longer justified.[67] Therefore, increasing regulation would run counter to this plain intent.

Congress was even clearer with respect to the minimal regulatory treatment it expected for the Internet and Internet access services. In section 230(b)(2), Congress stated that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation".[68] Congress defined an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[69] Accordingly, applying new rules to broadband would be contrary to the Act, even if one was to accept the misguided premise that this hortatory language provides any authority.

This usurpation of Congressional authority is especially troubling given that Congress started the process to legislate in this space. The FCC leadership did not even consider a brief pause to see that process play out. Instead, they invited Congress to supplement the FCC's re-write. Not surprisingly, the FCC's arrogance has already invited greater Congressional scrutiny and the FCC ultimately could see its

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[63] *Verizon v. FCC,* 740 F.3d at 662 (Silberman, J., concurring in part and dissenting in part).

[64] Letter from Earl W. Comstock, Counsel to Full Service Network and TruConnect, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 4 (filed Feb. 20, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001031994.

[65] *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

[66] *Verizon and AT&T Inc. v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014).

[67] 47 U.S.C. § 161.

[68] 47 U.S.C. § 230(b)(2).

[69] 47 U.S.C. § 230(f)(2).

authority curtailed in many areas.

Case-by-case Enforcement Will be a Trap for the Unwary

The FCC "fact" sheet promised bright line rules, but the reality is that the bulk of this rulemaking will be conducted through case-by-case adjudication, mostly at the Bureau level and in the courts. To be sure, there are three bright line rules: no blocking, no throttling, and no paid prioritization. But those are mere needles in a Title II haystack.

Many practices will be reviewed under the general conduct standard that will be, quite literally, a catch-*all*. Moreover, charges, practices, and classifications will also be reviewed under the amorphous just and reasonable standard in sections 201 and 202. Parties will have no way of knowing, in advance, how a Bureau or the Commission—much less courts acting pursuant to sections 206 and 207[70]—will rule on a particular matter. There will be no certainty. Indeed, one public interest group called the catch-all a "recipe for overreach and confusion".[71]

The item notes that parties may seek an advisory opinion, which appears utterly useless: they are only available in certain circumstances and are not binding. (I'm also not sure why any party would want to refer itself to the Enforcement Bureau when its request could be used against it later.)

Those that haven't monitored enforcement actions should take heed: the Commission has enforced statutory provisions even where it has not "give[n] fair notice of conduct that is forbidden or required."[72] This happened in the *Terracom Notice of Apparent Liability for Forfeiture* where the Commission determined, for the first time—during an enforcement action—that sections 201 and 222 cover data protection.[73] As I explained at length in my dissent, the Commission had never adopted any rules to that effect. To the contrary, prior orders had made clear that the Commission viewed section 222 as being limited to CPNI.[74] Moreover, if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice "in connection with" a communications service. There is no limiting principle. I would also note that this was a situation where the provider voluntarily disclosed the data breach to the Enforcement Bureau and Wireline Competition Bureau.

This is Just the Beginning

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[70] Letter from Matthew A. Brill, NCTA to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 & 10-127 at 5 (filed Feb. 20, 2015) (NCTA Feb. 20, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001031778 ("Private suits and damages awards have never been necessary to protect broadband consumers in the past, and leaving these two provisions in place would be immensely destabilizing to the broadband industry.…The Commission is all too familiar with the growing trend of class action lawsuits that aim to capitalize on ambiguities in the Commission's rulings—most notably in the context of the Telephone Consumer Protection Act ('TCPA'). A regime that exposes the broadband industry to similar threats of abusive litigation would be anything but 'light touch,' and could be particularly devastating for smaller ISPs, many of which cannot afford the cost of litigating or settling class action lawsuits.") (internal citation omitted).

[71] Electronic Frontier Foundation, *Dear FCC: Rethink The Vague "General Conduct" Rule* (Feb. 24, 2015), https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.

[72] *FCC v. Fox Television Stations, Inc*., 132 S.Ct. 2307, 2317 (2012) (citing *Connally v. General Constr. Co*., 269 U.S. 385, 391 (1926)).

[73] *TerraCom, Inc. and YourTel America, Inc.*, Apparent Liability for Forfeiture, File No.: EB-TCD-13-00009175, 29 FCC Rcd 13325 (2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1_Rcd.pdf. The NAL also wrongly suggested that section 201(b) covers cybersecurity.

[74] *Id*. at 13351 (dissenting Statement of Commissioner Michael O'Rielly), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A5.pdf.

Although there are many caveats about what "this item" does, the Commission's path forward is clear. For example, the Commission claims that this item does not require broadband providers to contribute to the federal universal service fund at this time. But that's because it defers that decision to a pending proceeding which is likely to result in new fees on broadband service.

Nor can providers take any comfort in the item's other promises to refrain from further regulation. In particular, the item repeatedly disavows any present intent to adopt *ex ante* rate regulation. Banning paid prioritization is, itself, a form of *ex ante* rate regulation. Additionally, the Commission fully intends to review rates after the fact. As one group noted, "[A]llowing post hoc scrutiny of broadband rates through the filing of complaints (either before the Commission or in federal court) is "rate regulation" in the purest sense—no less so than ex ante requirements to file tariffs or to seek Commission approval for rate changes."[75] The Commission expressly contemplates examining, on a case-by-case basis, whether interconnection agreements are just and reasonable under sections 201 and 202. That necessarily includes an evaluation of the rates, terms, and conditions of such arrangements. The Commission also intends to review data allowances and usage-based pricing plans on a case-by-case basis.

Moreover, last-mile ISPs aren't the only ones that should be concerned by today's actions. The item attempts—albeit in a failed way—to carve out, for now, CDNs, transit providers, backbone providers, edge providers, and certain specialized services, including e-readers. But the new legal framework for telecommunications services has let the proverbial genie out of the bottle. As one association observed, "the Commission should not and cannot legally or logically distinguish between kinds of broadband transmission (e.g., last-mile, middle-mile, etc.) in classifying broadband as a telecommunications service. If data are conveyed from points A to Z or exchanged between networks of any kind, those functions are broadband transmission – and the mere location of that transmission at a given point in the network ecosystem is irrelevant by itself to regulatory classification."[76] In other words, the decisions made today will necessarily impact future decisions. The fact that certain decisions will happen later does nothing to diminish the culpability of the current majority.

For all of these reasons, I dissent.

[75] Letter from Matthew A. Brill, Counsel to National Cable & Telecommunications Association, to Marlene H. Dortch, FCC, GN Docket Nos. 14-28, 10-127 at 2 (Feb.11, 2015) (NCTA Feb. 11, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001028642.

[76] Letter from Michael R. Romano, NTCA to Marlene H. Dortch, FCC, GN Docket Nos. 14-28 &10-127, at 1 (filed Feb. 19, 2015) (NTCA Feb. 19, 2015 Ex Parte Letter), http://apps.fcc.gov/ecfs/document/view?id=60001031424.

IN THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

PROOF OF SERVICE

I, Richard K. Welch, hereby certify that on March 27, 2015, I electronically filed the foregoing Notice to the Judicial Panel on Multidistrict Litigation of the Multicircuit Petitions for Review with the Clerks of the United States Courts of Appeals for the Fifth and D.C. Circuits by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: FEDERAL COMMUNICATIONS COMMISSION,
IN THE MATTER OF PROTECTING AND PROMOTING
THE OPEN INTERNET, REPORT AND ORDER ON REMAND,
DECLARATORY RULING, AND ORDER, FCC 15-24
(RELEASED MARCH 12, 2015) MCP No. 128

(SEE ATTACHED SCHEDULE)

CONSOLIDATION ORDER

The Federal Communications Commission issued an Order dated March 12, 2015. On March 27, 2015, the Panel received, pursuant to 28 U.S.C. § 2112(a)(3), a notice of multicircuit petitions for review of that order. The notice included petitions for review pending in two circuit courts of appeal as follows: Fifth Circuit Court and District of Columbia Circuit Court.

The Panel has randomly selected the United States Court of Appeals for the District of Columbia Circuit in which to consolidate these petitions for review.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 2112(a)(3), the petitions on the attached schedule are consolidated in the District of Columbia Circuit and that this circuit is designated as the circuit in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

FOR THE PANEL:

Dana Stewart

Dana Stewart, Operations Support Specialist
Random Selector

Quaina Brooks

Quaina Brooks, Case Administrator
Witness

**IN RE: FEDERAL COMMUNICATIONS COMMISSION,
IN THE MATTER OF PROTECTING AND PROMOTING
THE OPEN INTERNET, REPORT AND ORDER ON REMAND,
DECLARATORY RULING, AND ORDER, FCC 15-24
(RELEASED MARCH 12, 2015)**

MCP No. 128

SCHEDULE OF PETITIONS

CIRCUIT NO.	CASE CAPTION
DC Circuit, No. 15-1063	United States Telecom Association v. Federal Communications Commission, et al.
Ninth Circuit, No. 15-60201	Alamo Broadband Inc. v. Federal Communications Commission, et al.