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

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	
Preserving the Open Internet	)	GN Docket No. 09-191

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EXECUTIVE SUMMARY

INTRODUCTION

Exactly four years ago, comments on the very same issue concerning appropriate classification of Broadband Internet Access Services were due in some of these very same dockets. In a testament to how the Commission's continued refusal to return to its proper authority continues to tie the agency in knots, here we are again.

Happily, the Commission has a chance in this proceeding to restore its ability to protect consumers, innovators, and all users of broadband telecommunications services. It has a chance to harmonize its policies with the law once again, and with Congress's intent in passing the Telecommunications Act of 1996. And it has a chance to put an end to the massive uncertainty and market power abuses created by the agency's broadband competition policy choices over the last dozen years.

The Commission is right to be concerned about the future of the Open Internet. The companies that operate our nation's essential broadband access facilities have professed their plans to bring an end to Net Neutrality (even as they pay lip service to an unworkable and toothless policy framework that would serve only these broadband providers' interests). The goal of the *Notice* to prohibit broadband providers from blocking and discriminating is the right one. Unfortunately, the rules and legal standard the Commission proposes are not enough to support those goals. In fact, they would produce the opposite outcome. For the first time, the Commission is proposing to give providers a green light to abuse their market power and pick winners and losers online.

Common carriage is one of the most successful legal frameworks in human history. The growth of the communications sector from the telegraph to the Internet is common carriage's greatest success story, though very few decision makers in Washington understand this history or appreciate its applicability to current communications policy debates. Unfortunately, common carriage is now a dirty word in Washington. This is not because of any flaw in that policy, but because for the past two decades some of the most powerful communications companies in America have waged a campaign to demonize common carriage and erase its historical importance. This shameful vilification of a core American value that has long acted as the glue to the communications social contract has only served to abet these companies' market power and facilitate regulatory capture.

Common carriage is nothing more than the basic duty to serve the public indiscriminately. Common carriage has nothing to do with regulated utilities or monopolies. It is a designation that applies to carriage, and it continues to apply in competitive and largely deregulated markets such as airlines, buses, parcel shipping, department store elevators and even roller coasters. Common carriage is the glue that holds the Network Compact together and is the DNA of Network Neutrality. The people grant private companies the ability to build wealth off of their use of our public land and airwaves, and in return for this we expect that access to essential communications services will be made available to all without undue discrimination.

Our Communications Act is designed to uphold common carriage's basic universal service and nondiscrimination principles. Common carriage as embodied in Title II is most certainly not a framework for monopolies offering telephone service, but a framework for competition and consumer protection in two-way communications networks. When it overhauled the Communications Act in 1996, Congress affirmed that common carriage remains vital, regardless of changes in technologies. Congress specifically applied basic common carrier duties to mobile wireless and advanced communications services. Furthermore, Congress specifically intended for the FCC to retain basic authority to prevent undue discrimination, even after markets become fully competitive and deregulated.

Common carriage and Title II have promoted investment and economic growth by ensuring universal access to a nationwide, fully interconnected infrastructure. Because of common carriage, Americans are able to utilize basic communications networks to access other essential services. The principle of nondiscrimination at the heart of Title II common carriage ensures that entrepreneurs have access to networks they can utilize to innovate, without permission of the network operator. And the limited liability concept embodied in common carriage also protects commercial freedoms, just as nondiscriminatory access to the network promotes personal freedoms and the exercise of our basic free speech rights.

The Commission, Congress, consumers and the courts are in agreement: open communications are fundamental to the well being of our society, and should be preserved. However, as the Commission's analysis in the 2010 Open Internet proceeding found, the market alone will not act to preserve the open and nondiscriminatory outcomes our country needs. If the Commission's goal here is to preserve openness, then the Commission's goal is to preserve common carriage. The court could not have been clearer: if the agency wants to prevent blocking and discrimination, then it must revisit its prior decisions to remove common carriage obligations from broadband access carriers.

COMMON CARRIAGE IS A DEREGULATORY FRAMEWORK THAT CONGRESS INTENDED TO APPLY TO BROADBAND ACCESS SERVICES

Somehow we have lost the understanding that common carriage was the DNA of the network revolution, not something than can be tossed aside in hopes that the positive outcomes it ensured will continue in its absence. Too many people have bought the incumbents' snake oil and believe that changes in communications technologies somehow mean we can abandon the successful principles that made those changes possible – even though the law is clear that this should not be the case.

In these comments, we discuss and dispel some of the pernicious myths surrounding Title II. It is not a legal framework for communications monopolies. It is not intended to apply solely to voice communications. It does not require rate regulation, nor does it require network owners to offer wholesale access. It is not a burdensome regulatory framework in any respect. It is in fact a highly deregulatory framework consistent with the 1996 Telecom Act's preference for competition over regulation. It applies today in a highly deregulatory fashion to wireless carriers, companies offering broadband services to large enterprise

businesses, and more than 800 small rural companies' DSL and fiber broadband services. Furthermore, contrary to the concern trolling on the part of some major incumbents, Title II *can* be used to find that particular practices are *per se* unreasonable, including the plans of certain broadband carriers to implement the odious practice known as paid prioritization.

As the Commission noted in a 2007 order preserving basic common carriage for business broadband services, "sections 201 and 202 lie at the heart of consumer protection under the Act." Indeed, as the Commission has explained, competition itself may not be enough to protect consumers from unjust and unreasonable practices. We need to maintain the core of Title II, in the event that the Commission needs to halt harmful practices.

The truth is clear for those that wish to see it: Congress specifically applied Title II in a deregulatory fashion to markets that were and are subject to competition, and it is Commission policy to preserve basic common carrier duties for operators regardless of the level of market competition. That is not because of some innate love of regulation, but specifically because competition is expected to produce nondiscriminatory outcomes, but may not always do so.

However, in a series of misguided decisions that we discuss below, the Commission removed common carriage for data just as there was a major societal and generational shift from voice to data as the primary mode of telecommunications.

The technology may have changed, but the societal and policy reasons for having common carriage obligations have not. The ability to communicate without interference from the network owner is just as important in a data-centric world as it was in the voice-centric world. The ability to connect affordably to these networks no matter where one may live still matters, as does a consumer's right to keep her communications private. Young Americans today barely use voice calls. As most parents with children out of grade school could tell you, kids speak to each other through data, and utilize broadband networks as a conduit to exercise their free speech rights. They deserve to have the same legal protections that guarantee them an open and nondiscriminatory communications platform, just as their parents and grandparents had.

Once all of the myths and distortions about Title II are put to rest, it becomes clear that restoring common carriage is the best outcome for the public interest. A return to Title II's sensible deregulatory approach will harmonize the regulatory framework for broadband with long-standing principles of communications law and policy. Most notably, it will reestablish the traditional distinction between connectivity and content – a distinction that has allowed speech and commerce to flourish while maintaining the integrity and stability of the nation's communications infrastructure.

THE COMMISSION GOT IT WRONG: MASS MARKET BROADBAND ACCESS IS A COMMON CARRIER TELECOMMUNICATIONS SERVICE

This is the third Commission attempt to apply duties that are plainly common carrier obligations to broadband access providers. The Commission is once again asking many of

the same questions it has asked numerous times over the past 15 years. That's a strong indication that its flawed and unfounded policy framework is broken. Indeed, because of the Commission's mistaken classification decisions, Americans are unable to purchase mass market broadband telecommunications services simply because network owners refuse to offer these services, which the massive objection to any loss of Net Neutrality indicates are in high demand. That this demand is not being met is perhaps the strongest sign that something went terribly wrong in the Commission's implementation of the 1996 Act.

What went wrong is clear: The Commission's classification of broadband access services as inextricably intertwined information services was a profound mistake. This classification has repeatedly proven to be unworkable, and it is contrary to the plain language of the law and congressional intent. Congress did not create any ambiguity about the regulatory framework it intended for two-way broadband transmission facilities. The Commission has willfully ignored the law.

An examination of the offering and functioning of broadband services shows clearly that they are "telecommunications services." They allow users to transmit "between or among points specified by the user . . . information of the user's choosing, without change in the form or content of the information as sent and received." If this were not the case, the Internet would not function properly. Over-the-top communications services, cloud storage services, and the thousands of other applications and web services that consumers depend on would not work. Encryption protocols and the https protocol that online commerce depends on would break.

This is the technical reality of today's broadband access services. The Commission would be right to revisit its prior findings, and in fact must revisit them, because its classification decisions were based on the facts of the late-1990s dial-up era – a time when third party, non-facilities-based ISPs were the major providers of access to the Internet.

The Commission's conclusions based on those facts, and its predictions of how the market would develop, have been proven spectacularly wrong. For example, in 2002 and 2005 the FCC predicted that classifying broadband Internet access as an integrated information service would promote both inter- and intra-modal competition, and that third-party ISPs would continue to gain access to last-mile facilities. What happened instead was a tightening of the duopoly home access market and the complete annihilation of the independent ISPs. The Commission also predicted that broadband ISPs would not threaten Internet openness, and if they did, the Commission's ancillary authority would be enough to stop bad practices. The *Comcast v. FCC* decisions proved these predictions wrong as well.

The Commission has clear legal authority and ample cause to reverse its prior classifications. It must do so in order to harmonize its policy framework with the law.

A RETURN TO COMMON CARRIAGE WILL PROMOTE, NOT HARM INVESTMENT

We can say with extreme confidence that a return to Title II would not harm broadband investment because we lived through a period of time when Title II was applied

across the industry. The historical data shows that the period of time following the implementation of the 1996 Act produced the greatest level of investment in the telecom industry that this country has ever seen. And most of that investment came from the companies subjected to the full force of the law. If Title II were bad for investment or business, that would show up in the data during this period. It doesn't.

Indeed, the facts are quite amazing.

- 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 cable industry's average annual network investments were *250 percent higher* in the years before the FCC declared cable modem service not subject to Title II than it has been in the subsequent years.

- The highest investment year in history for cable networks followed the 9th Circuit's ruling that cable modem service contained a Title II common carrier offering.

The cable industry's investment claims are entirely hollow, and the fact is that cable's network investments have been in decline for the past decade. And investment by traditional telecom carriers also declined following the FCC's removal of most Title II obligations. Both of these trends held even as cable completed its migration to the faster DOCSIS 3 standard, and despite the investments made by the Baby Bells in their wireless networks, as well as their limited fiber-to-the-home and fiber-to-the-node deployments.

The data also show that the implementation of the FCC's *2010 Open Internet Order* was followed by an increase in investment. This is noteworthy because the same warnings about the harms of Title II to investment were sounded about the Open Internet rules too – predictions that were flat out wrong.

It is also a myth that the 2010 Third Way proposal harmed the market valuation of ISPs. The data shows that while concerns about the EU Debt crisis took their toll on the market broadly, ISP stocks in particular were one of the few positive sectors. Indeed, in the weeks and months following the announcement of the Third Way reclassification proposal, most ISP stocks increased in value, even as the stocks of edge companies declined.

The facts are crystal clear: Title II didn't harm investment or jobs. Instead, the greater level of competition that Title II created helped stimulate carriers to invest more in their networks, to say nothing of the massive investment it spurred in many other industries that rely on open communications networks.

No major investment analyst has raised concerns about a return to basic common carriage. They understand that this is the same framework that currently applies to several other industries in a highly deregulatory fashion. And they understand that a return to Title II does not mean unbundling requirements or rate regulation. The ISPs themselves only ever make this claim to scare policymakers. When they talk to investors, their assessments are

much more in line with reality.

The facts likely won't be enough to put the scare stories to rest, but that's because those who perpetuate this myth have no incentive to stop.

Indeed, representatives of the cable industry continue to be the loudest proponents of this false claim, boasting about their infrastructure investments and asserting that these expenditures occurred because the Commission shielded them from common carrier obligations. But as was the case in the telecom industry, the truth about cable's investment is very different from the story that the industry tells.

In the mid-1990s, cable companies invested heavily in building hybrid fiber-coaxial middle-mile and long-haul networks in order to differentiate their services from satellite, with Video On Demand offerings as well as two-way telecommunications offerings.

This investment future-proofed the cable network. Today, less than 10 percent of cable industry capital expenditures go to extending or upgrading their networks; put another way, *only about 1 percent of total cable company revenues are devoted to network investment*. The truth is something that cable companies regularly boast to Wall Street investors: cable already has a future-proof network. These companies do not need to invest in order to bring consumers into the gigabit era.

Thus, cable's feigned concerns about the future of investment are belied by the realities of their actual needs for investment, regardless of what the Commission does. Cable's characterization of common carrier principles is particularly disingenuous when you consider that the pay-TV business is far more heavily regulated than broadband would be under a basic application of Title II. In fact, restoring Title II for broadband would make that industry the least regulated among the wireline, wireless and pay-TV industries.

We hope that the Commission and other policymakers learn and understand this history, because the debate cannot be a legitimate one if basic historical facts are replaced by incorrect beliefs. But, we need not even stop at the post-1996 Act historical evidence; we can look also to the current realities of the enterprise broadband and CMRS markets, and the massive investment there, to see the folly in this claim. Wireless voice services and business broadband remain under a "light-touch" Title II framework, and they are spectacularly profitable businesses for the telecom companies. Furthermore, we've been living in a *de facto* common carriage world thanks to rules and merger conditions in transactions like AT&T-BellSouth, Verizon C-Block, and Comcast-NBCU. The data on investment and business growth following the imposition of these conditions show that they had no negative impact on these companies' ROI or investment plans.

Nothing about reversing the Bush-era FCC classification decisions changes the underlying fundamentals in the broadband market. Subscriptions, revenues, and margins all continue to grow as costs continue to decline. That is a favorable climate for investment no matter what steps the Commission may take to ensure that Americans are given back their legal rights to communicate free from unjust or unreasonable discrimination.

The Commercially Reasonable Standard is An Untested, Loophole-Ridden Legal Standard that Permits Substantial Discrimination. Section 706-based Enforcement Cannot Protect the Open Internet.

The *Notice* seems to grasp the importance of common carriage and the agency's success in applying it, even as it stretches to find a non-common carrier legal basis to continue to ensure common carrier outcomes. The Commission is absolutely correct about the dangers of the loss of openness. It is right to note that the introduction of discriminatory practices will threaten our economy and the basic rights of the people to connect and communicate freely.

Which is why the conclusions of this *Notice* are so head-scratching. The Commission propose a legal standard that *encourages* broadband providers to discriminate against edge companies and everyday Americans. This is not a legal framework for preserving the open Internet, promoting the "virtuous circle of innovation" or encouraging investment. It certainly is not a policy framework that will prevent the "unacceptable" prospect of a "gatekeeper choosing winners and losers on the Internet," since it is by its very design a legal blessing for carriers to use their market power and pick which edge services will work.

There is no longer any gray area. There is common carriage and its standard of no unjust or unreasonable discrimination; and there is private carriage, and its standard of required "substantial" discrimination.

The court in *Verizon v. FCC* confirmed what we've all along known to be true: nondiscrimination, which is the entire point of Net Neutrality, is a common carrier obligation. The FCC cannot protect Net Neutrality – before or after a violation – using Section 706 Authority.

The inarguable reality is that unless the Commission first classifies broadband carriers as common carriers, those carriers are legally permitted to degrade traffic; they are legally permitted to decide whether or not their customers can access certain content; they are legally permitted to impose access charges on those seeking to reach their customers; and they can block any site they wish, since the duty to serve all comers indifferently is the core of common carriage. If the Commission adopts this framework, consumers who used to be able to use their favorite application or visit their favorite website no matter who their carrier will suddenly find that they must switch providers to enjoy this "exclusive" service.

These are the unavoidable consequences of the Commission's proposed "commercially reasonable" standard. The court made clear that under this standard the FCC must give broadband carriers free rein to discriminate and establish priority and exclusive arrangements with edge companies. Broadband gatekeepers will be permitted to discriminate at will against the commerce and discourse they disfavor – with an army of lawyers at the ready to fight any "commercially unreasonable" case first at the Commission and then in appellate court.

More than anything, this standard would foist an unprecedented burden on everyday Americans' ability just to communicate freely with each other and engage in our digital economy. The rules contemplated by the *Notice* would make every single online company or speaker negotiate first with every single ISP in order to avoid being blocked. This heretofore-unthinkable outcome would establish a substantial barrier to entry and innovation in the Internet economy, in direct contradiction to the directives of the Act.

That's not a prescription for regulatory certainty, and it is plainly not a standard that can protect the open Internet. If the Commission's overarching goal is to preserve innovation without permission, then it should not implement a legal framework that by its very design requires permission before innovation.

It is time to restore the principle of common carriage and follow the Communications Act's blueprint for reasoned deregulation. We recognize the political difficulty that such a task presents, and the Commission's preference to find a workable alternative is understandable considering the unfounded fears that surround common carriage. But as we detail in these comments, there simply is no workable alternative and there is no need for one. If the Commission wishes to preserve an "open pathway" for Americans to connect and communicate, then it has no choice but to reverse its own actions that removed common carriage and protections against unreasonable discrimination.

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I. THE IMPORTANCE OF COMMON CARRIAGE AND THE TRUTH ABOUT TITLE II.

A. The Importance of Common Carriage.

When the Commission adopted this *Notice*, Chairman Wheeler summarized consumers' expectations of the market as well as his intentions in moving this proceeding forward:

> Let's look at how the Internet works at the retail level. The consumer accesses the Internet using connectivity provided by an Internet Service Provider (ISP). That connectivity should be open and inviolate; it is the simple purchase of a pathway.[1]

The Chairman may not have realized it, but the phrase "the simple purchase of a pathway" is in fact just an easily understood and eloquent lay definition of a common carrier telecommunications service. The legal definition is a service offered to the public that enables the transmission of information of a user's choosing, between points specified by the user, without change to the form or content of the information.[2]

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[1]Statement of Chairman Tom Wheeler, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5647 (2014) (*Chairman Wheeler NPRM Statement*).

[2] *See* 47 U.S.C. § 153(50) ("The term 'telecommunications' means 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"); *see also* 47 U.S.C. § 153(53) ("The term 'telecommunications service' means 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"); *see also* 47 U.S.C. § 153(11) ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."). The discussion *infra* Part II. B. below describes the courts and Commission's interpretation of the circular definition of 47 U.S.C. § 153(11).

Chairman Wheeler's description of "how the Internet works" is not only correct, it is an important statement of policy. It suggests the answer to the Commission's ongoing struggles with the appropriate regulatory treatment of broadband access services. If the Commission agrees with the Chairman's description, then there is no room for debate: Broadband access is a Title II common carrier service, and broadband providers are legally barred from "unjust or unreasonable discrimination" and cannot "give any undue or unreasonable preference or advantage to any particular person or classes of persons."[3]

Common carriage is one of the most successful legal frameworks in human history. While some people may have never heard the term, it is a certain bet that most Americans would agree with the importance of the concepts that it embodies.[4] Common carriage's centrality to the economic and societal development of this country is well documented but not well known.[5] The growth of the communications sector from the telegraph to the Internet is perhaps the greatest success story of common carriage, though very few decision makers in Washington understand this history or appreciate its applicability to current communications policy debates.

Unfortunately, common carriage is now a dirty word in Washington. This is not

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[3] *See* 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or 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.").

[4] The millions of comments in this proceeding asking the Commission to restore common carriage certainly suggest that there is massive public support for it. *See, e.g.*, Katy Bachman, "FCC's Wheeler Vows to Take Next Steps on Net Neutrality 'Shortly'; FCC faces pressure from public interest groups to preserve open Internet," *Adweek*, Jan. 30, 2014.

[5] *See, e.g.*, Eli M. Noam, "Beyond Liberalization II: The Impending Doom of Common Carriage," 18 *Telecomm. Pol'y* 435 (1994).

because of any flaw in the policy itself, but because for the past two decades some of the most powerful communications companies in America have waged a campaign to demonize common carriage and erase its historical importance. This shameful vilification, of a core American value that has long acted as the glue to the communications social contract, has only served to abet these companies' market power and facilitate regulatory capture.

The Commission should view this *Notice*, and the need to yet again confront the mess created by prior Commission administrations' turn away from the law's embrace of common carriage, as a sign that the experiment of "non-regulation"[6] is an irreparable failure. It is time to restore the principle of common carriage and follow the Communications Act's blueprint for reasoned deregulation. We recognize the political difficulty that such a task presents, and the Commission's preference to find a workable alternative is understandable considering the unfounded fears that surround common carriage. But as we detail in these comments, *there simply is no workable alternative*. If the Commission wishes to preserve an "open pathway" for Americans to connect and communicate, then it has no choice but to reverse its own decisions that removed common carriage and that successful and sensible doctrine's protections against unreasonable discrimination.

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[6] In his dissent in *Brand X*, Justice Scalia said of the Commission's definitional deregulatory approach in the *Cable Modem Declaratory Ruling*:

> The Federal Communications Commission [ ] has once again attempted to concoct "a whole new regime of regulation (or of free-market competition) under the guise of statutory construction." Actually, in these cases, it might be more accurate to say the Commission has attempted to establish a whole new regime of non-regulation, which will make for more or less free-market competition, depending upon whose experts are believed. The important fact, however, is that the Commission has chosen to achieve this through an implausible reading of the statute, and has thus exceeded the authority given it by Congress.

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting) (*Brand X*) (internal citations omitted).

To achieve the goals outlined in the *Notice*, the Commission needs to return to the Communications Act and focus on the agency's own successful implementation of the law. The Commission must work to educate other policymakers on the truth about common carriage and Title II, and it must be firm in correcting those who continue to distort history.

And this truth is remarkable.

1. The Origins and Early Successes of Communications Common Carriage.

Common carriage traces it origins back hundreds of years to English common law. Common law has long been viewed as an efficient process, as courts over time establish norms that produce socially and economically positive outcomes in matters dealing with contract performance.[7] The English courts created common law first known as "common callings," which required certain proprietors to serve all who sought their services, on just and reasonable terms without discrimination.[8] English common law first applied these duties to serve indiscriminately to innkeepers, ferry owners, blacksmiths, tailors and others who were considered to be businesses operating as "public callings." Thus we see the early application of common carriage doctrine did not apply solely to *carriers* (and certainly not solely to monopolies), but to those who were generally acting as "tradesmen."[9]

The early application of this common callings doctrine was primarily concerned with standards of care and rights of action, which was subsequently addressed by the continued

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[7] *See* Noam, "Beyond Liberalization II" (citing Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts," 70 *Yale L.J.* 499 (1961)).

[8] *See* J.B. Speta, "A Common Carrier Approach to Interconnection," 54 *Fed. Comm. L.J.* 225, 251 (2001).

[9] *See* Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 *Harv. L. Rev.* 156 (1904).

development of tort law.[10] Thus over time common carrier common law became more focused on actual carriers of persons and goods.

The United States Congress' first statutory application of the principle of common carriage came in 1887 with the Interstate Commerce Act (ICA).[11] Though this law and its associated nondiscriminatory duties were in part motivated by monopoly concerns, the legislative history shows that this was a minor consideration compared to other overall public interest concerns.[12] There are similar concerns today surrounding the so-called "Network Compact" and the duties of carriers that are granted access to public rights-of-way. Advocates of the Interstate Commerce Act felt that whatever the market power exercised by railroads, the public had played a major role in the development of the railroad industry and thus had a right to expect these lines to operate in the public interest.[13]

This early application of common carriage to the American railroad network dealt chiefly at first with nondiscriminatory treatment, but was quickly extended to address the issue of interconnection. While the more powerful owners of these rail companies fought

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[10] *See* Speta, "Common Carrier Approach to Interconnection," at 252.

[11] 24 Stat. 379 (1887).

[12] *See* Tom Wheeler, "Net Effects: The Past, Present, and Future Impacts of Our Networks," at 19-20 (Nov. 26, 2013) (*Net Effects*). ("In 1887 pressure from these farmers resulted in the creation of the Interstate Commerce Commission (ICC). The mandate of the ICC was to apply offsetting government power against the power of the railroads so as to assure the protection of the network's users. It was the first independent Federal regulatory agency and the template for all that was to follow."). Though the Chairman did not mention it by name in his recounting of the history of the ICC as a predecessor to the FCC, the tool the government chose to protect railroad users from the power of the railroad companies was common carriage.

[13] *See* Speta, "Common Carrier Approach to Interconnection," at 259 (citing Shelby M. Cullom, Committee On Interstate Commerce, The Cullom Report of 1886 ("This answer fails to recognize the public nature and obligations of the carrier, and the right of the people, through the Governmental authority, to have a voice in the management of a corporation which performs a public function.")).

these basic common carrier duties,[14] those duties were responsible for the rapid creation of a fully integrated nationwide transportation network key to the early American success story.[15]

In 1910, Congress began to apply the lessons learned from the successful use of common carriage principles in the rail carrier industry to the emerging telecommunications market.[16] Congress first brought telegraph and telephony carriers under the jurisdiction of the ICA, but only for the duty to serve indiscriminately. Congress did not initially address the issue of telecommunications network interconnection, an oversight that had substantial ramifications for the development of competition in this emerging market.[17]

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[14] The railroad business was also seen as a threat to other established carriers, which fought its expansion. *See Net Effects* at 18 ("As one historian noted, 'Every ploy known to shrewd local lawyers was used to keep things nice and cozy for local carting companies, freight forwarders, hack drivers, hotel and restaurant owners, local wholesale merchants, and anyone else' for whom the railroad represented a change from the status quo."). This obstructionism the Chairman documented in his recent book is exactly analogous to the threat that lead the FCC to impose the structural separation of the *Computer Inquiries* at the pre-dawn of the Internet and high-bandwidth telecommunications era. These same concerns about status quo disruption and rent extraction are what lie at the core of the concerns about the loss of common carriage's nondiscrimination protections. The core voice, text and pay-TV businesses of the LEC, wireless and cable broadband carriers are subject to massive disruption enabled by the open Internet pathway – disruption that is enabled and protected by common carriage's nondiscriminatory protections.

[15] *See e.g.* Robert L. Rabin, "Federal Regulation in Historical Perspective," 38 *Stan. L. Rev.* 1189, 1196 (1986).

[16] Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910).

[17] As the first patents held by the Bell Company began to expire at the turn of the 20th century, many local telephone markets began to see new entrants and competition. Some rural areas that the Bell monopoly had previously refused to serve got their first exposure to telephony using crude systems set up and operated by community cooperatives. Though prices dropped as a result of this new competition, the nation's telecommunications system was in disarray. The Bell companies refused to interconnect with many of their competitors (and vice versa), creating a system whereby customers had to be on the same network as those they wished to call. AT&T (the parent company of local Bell exchanges) began dramatically expanding its national reach (at the local and long-distance levels) by building new exchanges and acquiring smaller independent local companies. It is in this context that

In 1934 – following the rapid growth of telephony, AT&T's (at first illegal, later sanctioned) attempts to monopolize the industry, and the subsequent attempts of the government to deal with that threat – Congress adopted the 1934 Communications Act, creating the Federal Communications Commission to oversee all communications by wire or radio. The centerpiece of the Communications Act was the continued application of common carrier duties to all providers of public two-way communications services, regardless of such individual providers' market power.[18] And for much of the following 80 years the Commission successfully applied these common carriage principles, promoting both economic expansion and free expression.

As time and technology progressed, the importance of common carriage became

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the concept of "universal service" arose. In 1907, AT&T President Theodore Vail used the term to describe his company's business plan to establish a single telephone system that served all customers. AT&T's monopolization attempts resulted in the 1913 Kingsbury Commitment between the Justice Department and AT&T. This agreement required that AT&T sell its stake in Western Electric, cease acquisition of independent exchanges, and interconnect its long distance network with other local exchanges. *See* Claude S. Fischer, AMERICA CALLING: A SOCIAL HISTORY OF THE TELEPHONE TO 1940 (University of California Press, 1994); *see also* Milton Mueller, "Universal Service in Telephone History: A Reconstruction," 17 *Telecomm. Pol'y*, 352 (1993).

[18] As we discuss below, one of the lasting myths in the debate around Title II and common carriage is that it is a legal framework developed for the "monopoly telephone era." A simple read of the law or an understanding of its history shows this is not the case. There is no requirement in the law of a finding of market power for the application of Title II common carrier duties. Furthermore, Section 10 forbearance is predicated on the preservation of the nondiscriminatory outcomes secured by Section 201 and 202. *See, e.g.*, Speta, "Common Carrier Approach to Interconnection," at 264 ("Of course, the 1934 Act does not include any explicit monopoly test before applying common carrier obligations. And, while the 1996 Act does give the FCC expansive power to forbear from applying the 1934 Act where competition has taken root, even this provision declares that regulation may be eliminated only where nondiscriminatory service will continue in its absence. In other words, the common carrier obligations of the Communications Act were motivated by (and continued to be motivated by) concerns *over both monopoly and discrimination*.") (emphasis in original).

more apparent.[19] So too did our understanding of the mutual benefits of the social contract between the public and the carriers.[20]

Common carriage, through Title II of the Communications Act, promoted economic growth by ensuring universal access to a nationwide, fully interconnected infrastructure. Americans utilized common carrier networks to access other essential services, and the nondiscrimination obligation created an open network that enabled innovation without prior-approval.[21] The basic duty to serve all comers indiscriminately also promotes a more

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[19] *See* Noam, "Beyond Liberalization II," at Part III (Documenting eight purposes of common carriage: Reduction of Market Power; Assurance of Essential Services; Spread of Basic Infrastructure; Reduction in Transaction Cost; Limited Liability; Extension of Basic Freedoms - Personal and Commercial; Facilitation of Competition; and Interconnectivity).

[20] *See Net Effects* at 24 ("The second policy pillar, therefore, is the Network Compact between those who provide the pathways and those who use them. This civil bond between networks and users has always had three components: access, interconnection, and the encouragement and enablement of the public-purpose benefits of our networks (including public safety and national security.)"). Of course the glue that held this civil bond together and gave meaning to the components of access, interconnection and public-purpose benefits was the principle of nondiscrimination, applied as an *obligation and duty* of "those who provide the pathways." Though Chairman Wheeler somewhat curiously dances around it in his book (and seems reticent to write the word "nondiscrimination"), his Network Compact concept is largely just a rebranding of common carriage. Indeed, the historical compact he speaks of is not a compact between a carrier like AT&T and an individual user. It is a public policy recognition that communications networks are so vital to the functioning of society that the maintenance of such networks cannot be left to the market solely.

[21] The theme of "innovation without permission" is a familiar one in the Network Neutrality policy debates. But it is just another description of an outcome produced by common carriage, one that is simply not possible in non-common carrier communications markets. *See Chairman Wheeler NPRM Statement* ("As a former entrepreneur and venture capitalist, I know the importance of openness first hand. As an entrepreneur, I have had products and services shut out of closed cable networks."). The Chairman was speaking of his involvement in the U.S. subsidiary of the NABU network, a company that was an early predecessor to today's cable modem businesses. The Chairman's experience with the NABU network is simply a reflection of the fact that the cable platform he was trying to access in 1984 was not a common carriage service. Had it been, it's possible that the home computing market would have developed much sooner, given the far greater bandwidth that even this early modem-based technology had when compared with LEC twisted copper pair plant. *See* "What's new? Nabu," *Broadcasting*, Apr. 9, 1984.

efficient and productive economy through the reductions in transaction costs. Common carriage and the FCC's enforcement of the nondiscriminatory principle also reduce market power in a telecommunications industry with high barriers to entry.[22] And the limited liability concept embodied in common carriage protects commercial freedoms just as nondiscriminatory access to the network promotes personal freedoms and the exercise of our basic free speech rights.[23]

2. Common Carriage is the Glue That Holds the Network Compact Together.

As Chairman Wheeler wrote last fall, "[o]ne of the signal achievements of this latest great information revolution – our network revolution – is how the results of its diffused control and increased autonomy produce 'innovation without permission.'"[24] This ability to access an open network is of course one of the greatest economic success stories in all of history, but the civic corollary to innovation without permission is the right to speak freely without permission. As the Supreme Court stated, "[t]hrough the use of chat rooms, any

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[22] One of the most pro-competition and pro-investment features of common carriage is that access is guaranteed for all, even for those companies who compete with the carrier. This meant of course that the early long distance companies that competed with Ma Bell could reach Bell's local customers without having to duplicate the last-mile network. In the *Computer Inquiry* context, it meant that start-ups' enhanced services were not at a disadvantage to those offered by AT&T or GTE. And of course in today's *de facto* world of common carrier broadband, an over-the-top service provider (*e.g.*, Skype, Viber, Google Hangouts, Netflix, Vimeo, Cloudflare, Akamai) can compete with the voice, SMS, pay-TV and cloud services owned by the companies that control the access network.

[23] This is a point that often gets lost in the debate, but common carriage facilitates the exercise of free speech. The doctrine ensures that end users have network access, but also insulates the carrier from any responsibility for the content that it transports. The duty to serve all means carriers cannot act as censors, and are immune to political pressure not to serve parties transmitting controversial content. To say that this has served our democracy well would be an understatement, and we abandon it at our peril. Without common carriage, there's nothing preventing an ISP from bowing to pressure to cut off or degrade service to the headquarters of a local chapter of the NRA, GLAAD, Tea Party, ACLU or any other group that conducts political activities.

[24] *Net Effects* at 4.

person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[25]

The "without permission" part of this apt description of the network revolution is, as the Chairman noted, a result of "diffused control and increased autonomy." But that diffused control and increased autonomy did not happen by the magic of the invisible hand. It was *required* by common carriage. There's a reason the Nabu Network (the Chairman's early cable modem business) failed while CompuServe did not. The former relied on a non-common carrier distribution platform on which getting cable's permission to innovate was an absolute requirement, while the latter benefited from common carriage and the Commission's *Computer Inquiry* polices that ensured access to an open transmission pathway.

Somehow we have lost this understanding that common carriage was the DNA of the network revolution, and not something than can be tossed aside in hopes that the positive outcomes it has ensured will continue in its absence. Too many people have bought the incumbent snake oil and believe that changes in communications technologies somehow mean we can abandon the successful principles that made those changes possible, even though the law is clear that this should not be the case.[26] The Chairman seemed to grasp the folly of this notion in his earlier writings, but the path that the Commission continues to

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[25] *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

[26] *See* 47 U.S.C. § 153(53) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*.") (emphasis added).

chart in this *Notice* does not.[27]

With this *Notice*, the Commission indicates its preferred path is to rebrand common carriage's history as the "Network Compact," while substituting the well established "no unjust or unreasonable discrimination" legal standard adopted by Congress with an untested and loophole ridden "commercially reasonable" standard invented by the Commission. This may serve a political purpose, but it is inadequate to protect the public interest. This change in direction will not enable the Commission to "safeguard, nurture and project into the future the enduring civic values that networks have historically embodied."[28]

The Chairman was right when he said we are at a crossroads.[29] But we are not standing at the intersection of those two paths. The Commission has already marched us in the wrong direction, though we can still see the right way to go. The original crossroads moment came more than a decade ago, when the agency decided to abandon the successful

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[27] *See Net Effects* at 24 ("Beyond such structural issues is the basic relationship between networks and those they serve. The technology that drives the new networks may have changed their design and operation, but the essential components of the relationship between the network and its users has not changed."). The Chairman is 100 percent correct in this view. However as we discuss below, the Commission's path starting in the *Cable Modem Declaratory Ruling* appears to be a preference for policies that are the legal equivalent to a cheap magic trick – one that makes the telecommunications network and its associated legal obligations disappear in favor of "inextricably intertwined" information services, which have at best nebulous network obligations if any.

[28] *Id.* at 5 ("What is clear about our network revolution, however, is that the new information networks are the new economy. Whereas earlier networks enabled the economic activities of their eras, our network revolution defines virtually all aspects of the current economy. In the process, it places even greater importance on the role Congress has given the FCC to protect 'the public interest, convenience, and necessity' of the nation's networks. We are at a crossroads in the evolution of digital networks. The FCC must play the crucial role of facilitating more dynamic, world-leading change to ensure that the gains of the last several decades are dwarfed by the wonders of the years to come. At the same time, the Commission must also safeguard, nurture and project into the future the enduring civic values that networks have historically embodied.").

[29] *Id.*

legacy of the *Computer Inquires* and the 1996 Telecom Act's blueprint for openness, innovation and competition. It is certainly not too late for the Commission to acknowledge that what it chose to do under prior leadership was a mistake. Common carriage and Title II of the Communications Act already adequately protect all the civic values at stake in this and other pending proceedings[30] that the Commission is right to safeguard. That is, the Commission already has the law and the tools it needs to accomplish its goals, it just needs to utilize them.

The *Notice* seems to understand the importance of common carriage and the agency's success in applying it, even as it stretches to find a non-common carrier legal basis to ensure common carrier outcomes. Indeed, the court in *Verizon v FCC* threw out the 2010 Open Internet rules because they were common carrier obligations applied to entities that the Commission has (wrongly) designated as non-common carriers; but the majority agreed with the Commission's rationale for the rules, and the majority understood their fundamental importance.[31] This rationale is summed up well in the current *Notice*:

> "Thus, the risk of broadband provider practices that may reward them in the short term but over the long run erode Internet openness threatens to slow or even break the virtuous circle – chilling entry and innovation by edge providers, impeding competition in many sectors, dampening consumer demand, and deterring broadband deployment – in ways that may be irreversible or very costly to undo. Also, innovation that does not occur due to lack of Internet openness may be hard to detect."[32]

The Commission is absolutely correct about the dangers of the loss of openness, *i.e.*

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[30] *See, e.g.*, *In the Matter of AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353; *see also In the Matter of Rural Call Completion*, WC Docket No. 13-39.

[31] *Verizon v. FCC*, 740 F.3d 623, 644-45 (D.C. Cir. 2014) ("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.").

[32] *Notice* ¶ 26.

the dangers of the introduction of unreasonable discrimination into carrier networks. That is why the policy conclusions of this *Notice* are so hard to fathom. The Commission proposes a process by which broadband carriers are allowed to discriminate first, placing the burden on the public to bring a complaint and try to get the horse back in the barn – with carriers engaging in behavior that the Commission rightly says "may be irreversible or very costly to undo."

Indeed, even though the Commission understands the dangers inherent in moving away from the existing *de facto* common carrier status for broadband access, it is proposing for the first time to give carriers a green light to discriminate. The *Notice* proposes a legal framework that will permit carriers to "negotiate terms of service individually with edge providers," which for the first time in history will allow carriers to "adapt . . . to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms."[33]

This is not a legal framework for preserving the open Internet, promoting the "virtuous circle of innovation" or encouraging investment. It certainly is not a policy framework that will prevent the "unacceptable" prospect of a "gatekeeper choosing winners and losers on the Internet,"[34] since it is by its very design a legal blessing for carriers to use their market power to pick and choose which edge services work best.

The Commission, Congress, consumers and the courts are in agreement: open communications are fundamental to the well being of our society, and should be preserved.

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[33] *Notice* ¶ 97 (internal quotation marks omitted).

[34] *See Chairman Wheeler NPRM Statement* ("This agency supports an Open Internet. There is ONE Internet. Not a fast Internet, not a slow internet; ONE Internet. . . . There is only ONE Internet. It must be fast, robust and open. The speed and quality of the connection the consumer purchases must be unaffected by what content he or she is using. . . . The prospect of a gatekeeper choosing winners and losers on the Internet is unacceptable.").

However, as the Commission's analysis found, the market alone will not act to preserve the open and nondiscriminatory outcomes our country needs. If the Commission's goal in this proceeding is to preserve openness, then the court could not have been more clear about the best and only way to fulfill that goal: revisit the prior decisions to remove common carriage obligations from broadband access carriers.

B. The Truth About Title II.

When a few powerful parties incessantly peddle myths, and their outright distortions of history are repeated in willful ignorance, it undermines reasonable policymaking. Decision makers begin to ignore market power and other fundamental truths. Special interests completely crowd out the public interest. Over time, manufactured talking points can morph into a shared reality embraced by the small community of Washington's telecom practitioners and reporters. In that environment, it becomes difficult for even the most well-meaning policymaker to make fact-based decisions.

Unfortunately, this is the case with common carriage and Title II of the Communications Act. And the blame for this shameful distortion of history cannot solely be placed on the carriers, as all too often the Commission and Congress have joined in the effort to demonize that law and its purpose. However, it's not too late to reverse course and reintroduce truth into this discussion. This will require the Commission to make a concerted effort to educate the public on the facts about Title II and common carriage, in this proceeding and beyond.

Below we discuss and dispel some of the most pernicious myths surrounding Title II. For instance, it is not just a legal framework for communications monopolies. It is not intended to apply solely to voice communications. It is not a burdensome regulatory regime;

it is in fact a highly deregulatory framework consistent with the 1996 Telecom Act's preference for competition over regulation. And finally, Title II can be used to find that particular practices are *per se* unreasonable, including the plans of certain broadband carriers to implement odious practices such as paid prioritization.

1. The Communications Act and the Commission Retain Basic Title II Common Carrier Duties Even in Highly Competitive Markets.

For better or worse, semantics are an important aspect of communications policy debates – particularly when it comes to the perceptions that decision makers and the media have about the various policy options, and how those perceptions influence the range of possible action. It is therefore important that we have a shared understanding of what Title II common carriage is and is not.

So at the outset, let's be clear that the term common carrier under Title II is not merely synonymous or co-extensive with a "public utility" or a "regulated monopoly." As discussed above, common carriage is a legal principle that applies to a carrier that "holds itself out . . . to carry for all people indifferently."[35] In general, common carriage is a designation that applies to *carriage*, and continues to apply in competitive, largely deregulated markets such as airlines, buses, parcel shipping,[36] department store elevators[37]

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[35] *See, e.g.*, *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*).

[36] *See, e.g.*, Brent Wm. Primus, "Fundamental Legal Differences within UPS and FedEx," *Parcel*, Feb. 1, 2010 ("Accordingly, with regard to legal matters, the most relevant question is not whether it is UPS or FedEx that transports a shipment, but in which capacity UPS or FedEx is acting. The Federal Motor Carrier Safety Administration website (www.fmcsa.dot.gov) shows that one member of the UPS corporate family, UPS Ground Freight, Inc. d/b/a UPS Freight, holds operating authority as a motor common carrier, a motor contract carrier and as a motor transportation broker with a federal registration number of MC-109533. Similarly, one member of the FedEx corporate family, FedEx Freight, Inc. d/b/a FedEx Freight, also holds operating authority as a motor common carrier,

and even roller coasters.[38] Southwest Airlines, BoltBus, FedEx, Macy's, and Six Flags are not utilities nor are they monopolies. Conversely, local water, electric and gas companies are public utilities,[39] but they are not common carriers.[40] As we discuss in detail below, Title II common carriers include numerous companies, such as mobile phone and enterprise broadband carriers, that operate in competitive markets subject to very little affirmative regulation.

Title II and common carriage have absolutely no relation to a market's level of

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a motor contract carrier and as a motor transportation broker with a federal registration number of MC-121805.").

[37] *See, e.g.*, *Treadwell v. Whittier*, 80 Cal. 574, 585 (1889) ("The defendants used their elevator in lifting persons vertically to the height of forty feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stage-coach or railway.").

[38] *See, e.g.*, *Gomez v. Superior Court*, 35 Cal. 4th 1125 (2005) (finding that an operator of a roller coaster or similar amusement park ride can be a carrier of persons for reward (*i.e.* common carrier) within the meaning of Cal. Civ. Code Sections 2100 and 2101).

[39] The Communications Act defines a public 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. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1). This definition includes LECs, but only insofar as they own or control poles or ducts, all for the purpose of maintaining nondiscriminatory access to rights-of-way. Thus CMRS providers, which are classified by the law as common carriers, are not public utilities. Nor are any LECs that do not own or control rights-of-way (such as some CLECs).

[40] The term "public utility" outside of the specific definition described above, and various state law definitions inapplicable here, is often a colloquial term. Merriam Webster defines the term as "a business organization (as an electric company) performing a public service and subject to special governmental regulation." Meanwhile, The North American Industry Classification System (NAICS) classifies telecommunications businesses under the "information" category and not the utility category. While it is true that broadband access providers meet the colloquial definition of a public utility, there are no legal duties that would flow from that since they are not necessarily LECs that control rights-of-way facilities. Furthermore, the designation implies rate regulation, something that increasingly does not apply to monopoly LEC telephony services.

competition. This is an obvious and well-established truth. Those who should know better yet insist on suggesting otherwise are either shockingly misinformed or downright disingenuous.[41] A simple read of the Act itself should suffice to clarify this truth. Congress specifically chose to apply the three core sections of Title II (Sections 201, 202 and 208) to Commercial Mobile Radio Service (CMRS) providers despite their non-monopoly status, and did not allow the Commission to deviate from that core.[42] There is no market power test

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[41] *See, e.g.*, Dissenting Statement of Commissioner Michael O'Rielly, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5659 (2014) ("And just in case section 706 proves to be inadequate for this regulatory boondoggle, the Notice explores upending years of precedent and investment by reclassifying broadband Internet access as a Title II service. That is, the Commission examines applying monopoly era telephone rules to modern broadband services solely to impose unnecessary and defective net neutrality regulations."); *see also* Dissenting Statement of Commissioner Robert M. McDowell, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd 7866, 7921 (2010) (*2010 Broadband Framework NOI*) ("The fundamental Title II rules from the Communications Act of 1934, which the majority seeks to apply to today's broadband sector, are the same regulations adopted in the late 19th Century for the railroad monopolies. In essence, the Commission is seeking to impose 19th Century-style regulations designed for monopolies on competitive, dynamic, and complex 21st Century Internet technologies."); *see also* Opening Statement of the Hon. Greg Walden, Subcommittee on Communications and Technology, Hearing on "Oversight of the Federal Communications Commission," May 20, 2014 ("[T]he item the commission adopted last week tees up the long dead idea that the Internet is a common carrier. This reinvigorated willingness to consider regulating the Internet under Title II of the Communications Act – rules that find their roots in 19th century railroad regulation and were designed to regulate the world of a telephone monopoly – harken back to a world in which a twisted copper was the only portal for consumers to the communications network and voice was the only service."); *see also* "Green Leads Letter to FCC Chairman on Net Neutrality," Office of Congressman Gene Green, May 14, 2014 ("A strict, utility-type regulation under Title II—created to regulate telephone services in the 1930's—simply won't work for this new, innovative, ever-evolving technology."). This letter was initially signed by 19 other Representatives, though Rep. Castro later asked to have his name removed.

[42] 47 U.S.C. § 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 for purposes of this Act, except for such provisions of [Title] II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208, and may specify any other provision only if the

tied to this application of common carriage. The Act is structured to give the Commission freedom to forbear from applying almost any other provision in Title II to CMRS providers, but this Section 332 forbearance can only be granted if those provisions are not needed to preserve the nondiscriminatory outcomes[43] required by the three core Title II sections.[44] As the Commission has noted:

> Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years. Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis. These sections set out broad standards of conduct, requiring the provision of interstate service upon

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Commission determines that – (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (ii) enforcement of such provision is not necessary for the protection of consumers; and (iii) specifying such provision is consistent with the public interest.”).

[43] *See Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 19 (1998) (*PCIA Forbearance Order*) (“The first prong of the section 10 forbearance standard is not satisfied unless enforcement of a statutory provision is shown not to be necessary to ensure that charges, practices, classifications, and regulations are just and reasonable, and are not unjustly or unreasonably discriminatory. This standard essentially tracks the central requirements of sections 201 and 202..”).

[44] Section 10 forbearance grants the Commission even more flexibility, but still requires the same nondiscriminatory outcomes. *See* 47 U.S.C. § 160(a) (“Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, 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.”).

> reasonable request, pursuant to charges and practices which are just and reasonable and not unjustly discriminatory. At bottom, these provisions prohibit unreasonable discrimination by common carriers by guaranteeing consumers the basic ability to obtain telecommunications service on no less favorable terms than other similarly situated customers. The Commission gives the standards meaning by defining practices that run afoul of carriers' obligations, either by rulemaking or by case-by-case adjudication. The existence of the broad obligations, however, is what gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance. Thus, sections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized the core nature of sections 201 and 202 when it excluded them from the scope of the Commission's forbearance authority under section 332(c)(1)(A). Although section 10 now gives the Commission the authority to forbear from enforcing sections 201 and 202 if certain conditions are satisfied, the history of the forbearance provisions confirms that this would be a particularly momentous step. [...] Consistent with the centrality of sections 201 and 202 to consumer protection, the Commission has never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.[45]

Indeed, as the Commission has explained, competition itself may not be enough to protect consumers from unjust and unreasonable practices, particularly to ensure that the most vulnerable consumers that carriers might deem "undesirable" are still adequately and justly served.[46] The Commission also has noted that in nominally competitive markets, such as mobile wireless, there are still factors that could frustrate consumers' efforts to avail themselves of the services of a competitor, thus serving as yet another reason to maintain the basic backstop of Section 201 and 202 authority.[47]

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[45] *PCIA Forbearance Order* ¶ 15.

[46] *Id.* ¶ 23 ("Assuming all relevant product and geographic markets become substantially competitive, moreover, carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner. Competitive markets increase the number of service options available to consumers, but they do 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.").

[47] *Id.* ("In addition, certain conditions even in competitive CMRS markets could facilitate discrimination and unfair practices. For example, CMRS systems use a variety of different technologies and operate over different frequency bands, thus requiring handsets

The truth is clear for those who wish to see: Congress specifically applied Title II *in a deregulatory fashion* to markets that were and are subject to competition, and it is Commission policy to preserve those basic common carrier duties for operators regardless of the level of market competition. This not because of some innate love of regulation, but specifically because competition, which is expected to produce nondiscriminatory outcomes, *may not do so at all times*. That remains a public interest concern.[48]

2. Title II Common Carriage Applies to All Telecommunications Services, Not Merely Telephony.

Perhaps because a generation has passed since the days of the Bell System monopoly, it is easy for some to think that the general law governing basic local exchange telephone service was meant *solely* for such services. But this is simply not the case, as even the most cursory review of the law and its implementation would show. This belief that Title II was meant only for telephony is particularly bizarre given that the impetus for the 1996 Amendments to the Communications Act was to promote the deployment of competitive *advanced telecommunications services*.[49]

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with different capabilities to access different systems. The cost of a new handset – as a component of the cost of switching providers – may thus act to undermine market discipline.").

[48] *Id.* ¶ 31 ("Sections 201 and 202 continue to provide important safeguards to consumers of broadband PCS against carrier abuse in an area that has already been largely deregulated by the Commission. We therefore find that at this time it is necessary to maintain sections 201 and 202, which enable the Commission to ensure that broadband PCS carriers provide service in a just, reasonable, and non-discriminatory manner, and to provide all consumers, including other carriers, with a mechanism through which they can seek redress for unreasonable carrier practices.").

[49] *See* "Telecommunications Act of 1996," Conference Report, Rpt. No. 104-230, at 1 (1996) (*Conference Report*) ("The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and

Many in Washington espouse this incorrect belief about the services that are the focus of the Act. Many also have no problem demonizing the principle of common carriage as applied to data communications, while upholding its application to voice calls. Indeed, there's broad agreement from companies like AT&T and consumer advocates that the common carriage principles that have applied and currently apply to wired and wireless voice service should continue even as the underlying technologies evolve.

But as anyone under the age of 30 can surely attest, many people think of voice as just an application. In the LEC and CMRS context, voice is an application that is transmitted via common carrier networks. Data of course can be transmitted via common carrier networks too, as it was for dial-up users and all DSL users a decade ago (and still is for those few who still use dial-up). Moreover, data also travels today on a common carrier basis for special access services, TDM services and enterprise broadband services, as well as the DSL and fiber broadband services offered by more than 800 rural LECs.

The law that governs common carrier networks is not chiefly concerned with how we use these transmission technologies. Nor should it be. A telecommunications service is one that transmits information of the users' choosing, between points of their choosing, without change in the form or content of that information. That is, a telecommunications service provider acts as a carrier, transporting a user's *information* between points chosen by the user. This applies whether the user is speaking with her voice, her phone's keypad or her modem.

While it is true that Congress last amended the Communications Act at a time when voice reigned supreme, it was not in any way a backwards-looking effort. Congress wrote

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services to all Americans by opening all telecommunications markets to competition, and for other purposes[.]").

the law in *anticipation* of the then-rapidly developing transition from a voice-centric communications market to a data-centric market. The law was designed to promote the deployment of broadband telecommunications services that would carry all of this data.[50]

However, in a series of misguided decisions that we discuss below, the Commission removed common carriage for data just as there was a major societal and generational shift from voice to data as the primary mode of telecommunications. As most parents with children out of grade school will tell you, kids today barely use voice calls. They speak to each other through data – text messages, social media, sometimes even email. Their language is data; it is how they exercise their free speech rights.

The technology may have changed, but the societal and policy reasons for having

[50] *See* William J, Clinton, "Remarks on Signing the Telecommunications Act of 1996," The White House Office of the Press Secretary, Feb. 8, 1996:

> [Thomas Jefferson] understood that democracy depends upon the free flow of information. He said, "He who receives an idea from me receives instruction himself without lessening mine. And he who lights his paper at mine receives light without darkening me." Today, the information revolution is spreading light, the light Jefferson spoke about, all across our land and all across the world. It will allow every American child to bring the ideas stored in this reading room into his or her own living room or school room. Americans have always had a genius for communications. The powers of our Founding Fathers' words reverberated across the world from the moment they were said down to the present day. From the Pony Express to the miracle of a human voice over the phone line, American innovations and communications have broken the barriers of time and space to make it easier for us to stay in touch, to learn from each other, to reach for our highest aspirations. Today our world is being remade yet again by an information revolution, changing the way we work, the way we live, the way we relate to each other. Already the revolution is so profound that it is changing the dominant economic model of the age. . . . But this revolution has been held back by outdated laws, designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light. . . . Soon, working parents will be able to check up on their children in class via computer. . . . On a rainy Saturday night, you'll be able to order up every movie ever produced or every symphony ever created in a minute's time.)

common carriage obligations have not. The ability to communicate without interference from the network owner is just as important in a data-centric world as it was in the voice-centric world. The ability to connect affordably to these networks no matter where you live still matters, as does a consumer's right to keep her communications private. The youth of today and tomorrow deserve to have legal protections that guarantee them an open and nondiscriminatory communications platform, just as their parents and grandparents did.

Placing voice on a pedestal is only a recent development in telecom policymaking. It has not always been this way. Indeed, much of the forward-looking structure of the 1996 Act's amendments to Title II was based on Commission policies that applied common carrier principles to non-voice communications.

Washington may have selective amnesia about it, but it is well documented that the Commission's actions in the *Computer Inquiries* were directly responsible for enabling the growth of the Internet.[51] In this legendary and progressive policy framework, the Commission utilized the principle of nondiscrimination to ensure that AT&T, GTE and other LECs could not leverage their ownership of the last mile to unfairly advantage their own enhanced services. That is, the Commission utilized structural and functional separation to create a nondiscriminatory market structure, one that protected competition and ensured that the Internet could be born. This framework was applied in the Modified Final Judgment (where it was applied to the Baby Bells as well as AT&T Long Lines)[52] and codified in the 1996 Act.

The FCC also progressively applied the principle of nondiscrimination in the

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[51] *See, e.g.*, Robert Cannon, "The Legacy of the Federal Communications Commission's Computer Inquiries," 55 *Fed. Comm. L.J.* 167 (2003).

[52] *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (1982).

interconnection context in a manner that directly facilitated the explosive growth of the home Internet access market. These policy decisions based on maintaining the heart of Title II common carriage not only saved consumers from the incumbent LECs' self-interested calls for unjust pricing, but they spurred a cascade of investment across the entire telecommunications and information technology ecosystem.[53]

The Modified Final Judgment provides a particularly clear example of how common carriage is important outside of monopoly markets, and speaks directly to the key issues raised in the *Notice*.

First, even though the court-ordered breakup of the Bell System created AT&T, at the time a non-monopoly long distance company, the court still barred that company from participating in the then-emerging electronic publishing market (a term that could describe an online website of today).[54] AT&T as an interexchange carrier faced competition, but still

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[53] *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (setting favorable rules for ISP-bound traffic that avoided costly access fees); *see also, e.g.*, *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, First Report and Order, 7 FCC Rcd 7369 (1992), vacated in part and remanded, *Bell Atlantic Telephone Cos., v. FCC*, 24 F.3d 1441 (1994); First Reconsideration, 8 FCC Rcd 127 (1993); vacated in part and remanded, *Bell Atlantic*, 24 F.3d 1441; Second Reconsideration, 8 FCC Rcd 7341 (1993); Second Report and Order, 8 FCC Rcd 7374 (1993), vacated in part and remanded, *Bell Atlantic*, 24 F.3d 1441; Remand Order, 9 FCC Rcd 5154 (1994), remanded for consideration of 1996 Act, *Pacific Bell, et al. v. FCC*, 81 F.3d 1147 (1996) (collectively referred to as the Expanded Interconnection proceeding) (adopting orders that pre-date the 1996 Act, which in part ensured that non-carriers could interconnect with LEC networks); *see also* Speta, "Common Carrier Approach to Interconnection," at 249 ("Additionally, a telecommunications carrier's nondiscrimination duty requires it to treat an Internet carrier as if it were any other customer, i.e., without regard to its status as an Internet carrier. Thus, dial-up ISPs could (and did) simply buy business lines or trunk groups from the ILEC and connect their modem pools to those lines.").

[54] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 181 ("[E]lectronic publishing will be regarded as the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in

possessed market power (much in the same way that last-mile broadband access providers face competition now, while maintaining market power). Directly foretelling today's concerns about *vertical* prioritization,[55] the court noted that AT&T could "use its control over the network to give priority to traffic from its own publishing operations over that of competitors," and that "AT&T would have both the incentive and the opportunity to develop technology, facilities, and services that favor its own publishing operations and the areas served by these operations rather than the operations of the publishing industry at large."[56] And foretelling the current controversy about broadband carriers playing games with interconnection to harm Net Neutrality, Judge Greene reasoned that "AT&T could discriminate in interconnecting competitors to the network and in providing needed maintenance on competitors' lines."[57]

Those who flippantly charge that the concerns about preserving the open Internet are nothing more than a "solution in search of a problem" would be wise to revisit Judge Greene's decision, as he had the forethought to anticipate the exact contours of the debate that would repeatedly flare up over the following thirty years. The decision rightly noted that discrimination was not just limited to blocking; it could involve degradation or prioritization of data content that would have anticompetitive consequences.[58]

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which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.").

[55] *E.g.*, concerns about a broadband access provider prioritizing its own content or applications services, such as voice or video services. The abandonment of the *Computer II* framework of course meant that broadband carriers were free to, and did, refuse to offer third-party Internet Service Providers the ability to reach end users.

[56] *United States v. American Tel. & Tel. Co*., 552 F. Supp. at 181.

[57] *Id.*

[58] *Id.* at 182 ("It is also readily apparent that competitors in the electronic publishing industry –far more so than competitors in any other industry –could easily be crushed were

Judge Greene kept AT&T, a company subject to competition, out of the electronic publishing markets because of these concerns about anticompetitive conduct. Judge Greene however did not keep AT&T out of the data processing services business, in part because it did not control the local access networks. He maintained the *Computer II* structural separation policies that kept LECs out of the information services market. And he did so because of concerns that without access to an open and nondiscriminatory pathway, information service providers would have no way to reach end users.[59] In affirming this need to preserve the open pathway by keeping the Baby Bells out of the information services business, Judge Greene rejected the arguments that such action would harm Bell Company investment[60] (arguments that are of course a key component of the current debate, as

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AT&T to engage in the types of anticompetitive behavior described above. Unlike most products and services, information in general and news in particular are by definition especially sensitive to even small impediments or delays. Information is only valuable if it is timely; by and large it is virtually worthless if its dissemination is delayed. This quality is especially important in electronic publishing because up-to-date information and constant availability are the features likely to be sought by subscribers. . . . Any delays of that kind, were they to occur in the context of the transmission of electronic publishing information, would quickly cause subscribers to desert their unreliable publishers and thus cripple AT&T's competitors in that business.").

[59] *Id.* at 189 ("All information services are provided directly via the telecommunications network. The Operating Companies would therefore have the same incentives and the same ability to discriminate against competing information service providers that they would have with respect to competing interexchange carriers. Here, too, the Operating Companies could discriminate by providing more favorable access to the local network for their own information services than to the information services provided by competitors, and here, too, they would be able to subsidize the prices of their service with revenues from the local exchange monopoly.").

[60] *Id*. at 190. ("The restriction on the provision of information services by the Operating Companies has been attacked on the ground that it will remove their incentive to upgrade the local networks and will cause them to become technological backwaters. This claim underrates the role of the Operating Companies under the proposed decree. These companies will carry traffic between the information service providers and their subscribers; their networks will therefore have to be capable of carrying these technologically advanced services; and they will have a financial incentive to create this capability because they will earn access charges for providing this service.").

discussed *infra* Part III).

One only needs to read the MFJ and substitute the term "Internet access services" for "interexchange services," and "online websites and applications" for "information services," to see the level of absurdity the Commission's classification decisions have created. These decisions are directly responsible for the third-party ISP market being vertically integrated out of existence. And now the owners of the last mile refuse to offer *any* telecommunications services. The Commission's policies have produced a marketplace where all that remains is a duopoly pathway to online information services, with no legal protections against discrimination by the owners of that pathway.

3. Title II Common Carriage Is A Highly Deregulatory Policy Framework.

Lost in the current reclassification debate is the fact that Congress made the 1996 Amendments to the Communications Act in order to create a highly deregulatory policy framework for our nations two-way communications networks. Not utter non-regulation, in Justice Scalia's words, but deregulation while retaining the Commission's basic oversight authority to intervene if market forces failed to ensure the nondiscriminatory outcomes required of common carriers.

This is the reality of the history and the law. But it's clear from much reporting about Title II that there is a perception the law requires more of common carriers generally than it actually does.[61] Much of this confusion likely stems from simple unfamiliarity with the law

[61] For example, several leading reporters have incorrectly reported that the application of Title II to broadband access services would result in those providers being required by force of law to offer wholesale network access to competing ISPs. *See, e.g.*, Amy Schatz "Where's Google in the Net Neutrality Fight?," *<re/code>*, July 3, 2014 ("If the FCC were to re-regulate Internet lines, Google could find its new fiber network saddled with rules designed for copper wire networks. Those rules include possible rate regulations of lines and requirements that the company offer wholesale access to its network to competitors.");

and with how lightly the Commission historically applies common carrier duties to non-dominant carriers and non-ILECs.[62] Much confusion may stem as well from unfamiliarity with Congress' general embrace of common carriage for non-monopoly services.[63] But there also appears to be a failure to grasp that while the Commission's authority flows from the law, the agency has substantial discretion in how – and if – it applies the law's general

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Robert McMillan, "The Father of Net Neutrality Returns to Do Battle With Comcast," *Wired*, June 25, 2014 ("One way of doing this is through common carrier law – as defined in the Title II section of the 1934 Telecommunications Act. Basically, this would treat ISPs as utilities. This would allow the government to prevent them from blocking or degrading traffic, but it would also force the ISPs to offer their Internet lines to other companies. That creates competition, which is really the best way of ensuring that ISPs behave. As it stands, there's very little competition.").

[62] *See, 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; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶ 67 (2007) (*AT&T Title II and Computer Inquiry Forbearance Order*) ("Title II and the Commission's implementing rules impose economic regulation on common carriers or LECs generally regardless of whether they are incumbents or competing carriers. This regulation, though much less burdensome than the regulation imposed on dominant carriers, has been thought to provide important protections against unjust, unreasonable, and unjustly or unreasonably discriminatory treatment of consumers.").

[63] *See id.* ("We find, based on the record before us, that granting AT&T [full relief from Title II] would be inconsistent with the market-opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations on carriers that lack individual market power. For example, the protections provided by sections 201 and 202(a), coupled with our ability to enforce those provisions in a complaint proceeding pursuant to section 208, provide essential safeguards that ensure that relieving AT&T of tariffing obligations in relation to its specified broadband services will not result in unjust, unreasonable, or unreasonably discriminatory rates, terms, and conditions in connection with those services. . . In particular, many of the obligations that Title II imposes on carriers or LECs generally, including interconnection obligations under section 251(a)(1) and pole attachment obligations under sections 224 and 251(b)(4), foster the open and interconnected nature of our communications system, and thus promote competitive market conditions within the meaning of section 10(b). . . Moreover, in originally subjecting non-dominant carriers to streamlined discontinuance, transfer of control, and tariffing requirements, the Commission necessarily determined that these requirements were needed to protect the public interest and competitive markets in situations where a carrier lacks market power.").

obligations.

As the Commission has noted, "classification of an entity as a common carrier is not an end unto itself. The primary purpose of the classification is to determine whether Title II applies."[64] If a common carrier offers a telecommunications service, all that Title II requires generally is that the "common carrier's rates and practices must be just and reasonable, and free of unjust and unreasonable discrimination."[65] Furthermore, absent forbearance, common carriers must file tariffs[66] (though this requirement does not apply in many instances today, because of forbearance). Finally, to ensure adequate compliance with the basic just and reasonableness duties, Title II common carriers are "subject to administrative complaints filed with the FCC alleging a violation of the Communications Act."[67]

There are no legal requirements for common carriers generally to unbundle network elements or offer services for resale, and there's certainly nothing that requires the FCC to regulate rates *even in the absence of forbearance* (forbearance that, if the Commission were to reclassify broadband access as common carriage, would surely come). The Act prescribes some duties for telecommunications carriers in general (such as interconnection), but the bulk of Title II outside of the core common carrier duties described above is indeed specific to LECs, ILECs, RBOCs and the provision of basic telephone exchange services.

Though the 1996 Act firmly cemented this deregulatory approach to common carriers, the Commission had a long history even before 1996 of "light-touch" application of Title II for non-dominant carriers. This dominant/non-dominant distinction turned on

[64] *See* Brief for Respondent Federal Communications Commission at 3, *Orloff v. FCC*, (D.C. Cir. filed Nov. 27, 2002) (No. 02-1189) (*Orloff v. FCC Respondents Brief*).

[65] *Id.* (citing 47 U.S.C. §§ 201(b), 202(a)).

[66] 47 U.S.C. § 203.

[67] *Orloff v. FCC Respondents Brief* at 3 (citing 47 U.S.C. § 208(a)).

whether or not a carrier possessed market power, with the Commission reasoning that non-dominant carriers were unlikely to have the ability to impose unreasonable or discriminatory charges and practices.[68]

The 1996 Act's deregulatory approach to the application of Title II (*i.e.*, preserving Sections 201 and 202, and their nondiscriminatory outcomes, as the core duties of common carriers) is itself based on the Commission's approach towards non-dominant carriers. Congress first codified this framework in its 1993 amendments to the Act,[69] which detailed the deregulatory Title II approach to oversight of Commercial Mobile Wireless Services.[70] These 1993 amendments established the Commission's authority to specifically forbear from applying any section of Title II to wireless carriers, *except* for Sections 201, 202 and 208.[71] Pursuant to this authority, the Commission forbore on it own motion, and on a national basis, from applying sections 203, 204, 205, 211, 212 and 214 to CMRS providers.[72]

For the purposes of the discussion around what Title II would or would not mean for

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[68] *See, e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* CC Docket No. 79-252, Notice of Inquiry and Notice of Proposed Rulemaking, 77 FCC 2d 308, 334-38 (1979); First Report and Order, 85 FCC 2d 1, 31 (1980) (*Competitive Carrier Rates*).

[69] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A)- (B), 107 Stat. 312, 392 (1993).

[70] *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, 1478 (1994).

[71] 47 U.S.C. § 332(c)(1)(A).

[72] *See Implementation of Sections 3(n) and 332*, 9 FCC Rcd at 1478 ("We have concluded that although the record does not support a finding that the cellular services marketplace is fully competitive, the record does establish that there is sufficient competition in this marketplace to justify forbearance from tariffing requirements."); *id.* at 1479 ("Compliance with Sections 201, 202, and 208 is sufficient to protect consumers."). Sections of Title II that currently apply in whole or in part to CMRS providers are 201, 202, 206, 207, 208, 209, 216, 217, 223, 225, 226, 227, and 228. *See* 47 C.F.R. § 20.15.

broadband carriers, the history of how the Commission has applied the law in non-monopoly markets is quite important. While there are certainly specific geographic markets in which broadband service is a monopoly, most consumers live in areas served by more than one provider.[73]

For those unlucky enough to live in actual monopoly markets, it is certainly reasonable to ask why they should be subjected to an unregulated monopoly (though it is likely that a significant portion of these consumers are served by a rural LEC that has elected to offer broadband access as a common carrier service).[74] But for the substantial majority of the country, broadband access is offered in a non-monopoly market. This suggests, based on the Commission's consistent application of Title II to non-dominant carriers, that the duties of broadband common carriers would resemble those imposed on CMRS providers, enterprise broadband carriers,[75] interexchange carriers,[76] and non-

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[73] According to Commission analysis of Form 477 data, 78 percent of housing units are located in Census Tracts with 2 wireline broadband providers; 13 percent are located in Tracts with 1 provider; 5 percent are located in Tracts with zero providers; and only 4 percent are located in Tracts with 3 providers (though this latter figure may overstate the extent of overbuilding due to the large size of Census Tracts). *See* Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 37 (rel. Mar. 16, 2010) (*National Broadband Plan*).

[74] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 90 (2005) (*Wireline Broadband Order*), *aff'd, Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[75] Enterprise broadband services are generally those packet-switched (non-TDM-based) transmission services that are marketed to medium- and large-sized businesses ("enterprises"). They include Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services. These are Title II services, and the Commission currently applies only sections 201, 202 and 208 to them. *See AT&T Title II and Computer Inquiry Forbearance Order* ¶ 12.

[76] Long distance services were long ago largely deregulated. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of*

dominant LECs.[77] And as detailed above, the Commission's application of Title II in these contexts is highly deregulatory, with a strong preference for competitive forces.[78] Indeed, the Commission has a long history of *presuming* that carriers that lack market power[79] are unable to engage in unreasonable discrimination.[80] Thus, the practice of the Commission

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the Comm. Act of 1934, as amended, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (detariffing long-distance service because it was competitively provided).

[77] A carrier may still posses market power in a non-monopoly market. But the Commission has a history of avoiding applying any cost-based enforcement of Sections 201 and 202 in non-monopoly markets. *See Kiefer v. PageNet*, 16 FCC Rcd 19129, 19131 (2001). We of course note that if a duopoly broadband provider does possess market power, this should be of great concern to the Commission.

[78] *Id.* ¶ 7 ("We adhere to the views expressed by the Commission in SBMS and other proceedings, that market forces should generally govern the rates and charges assessed by CMRS providers.").

[79] While the Commission's experience with CMRS and other non-dominant carriers is that these carriers generally do not posses market power, this analysis focuses on market power in the offering of their services to the public. However, these carriers are all terminating access monopolies when interconnecting with other carriers to terminate telecommunications. The Commission generally has determined that carriers should not be permitted unilaterally to impose termination charges or practices that are not subject to regulation. In the broadband access context, this means that under Title II, while CMRS data carriers may generally have less retail-level market power than wireline broadband carriers (and thus have presumably less ability to impose unreasonable practices on their retails customers), both wireless and wired broadband providers are terminating access monopolies with respect to those who seek to reach their customers. Thus the concerns about discriminatory treatment (such as paid prioritization) that are at the heart of the Commission's Open Internet rules apply equally across all broadband providers regardless of the level of retail competition. *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4792 (2005) ("Because the terminating carrier controls the only line and local switch connecting the called party to the network, that carrier has strong incentives to extract as high a payment as possible from the calling party's carrier. Competition at the retail level has not diminished the terminating access monopoly of the carrier selected by the called party.") (internal citations omitted)).

[80] *See, e.g.*, *Competitive Carrier* Rates, First Report and Order, 85 FCC 2d 1 (1980). This is a presumption, not an absolute declaration. The Commission could still adjudicate a specific practice by a non-dominant carrier, but the burden of proof on the complaining party would be high. However, the Commission could still find that certain practices are unreasonable, a finding that would apply to all common carriers regardless of the presence

clearly demonstrates that reclassification would not open the door to rate regulation.

Similarly, reclassification would not trigger or lead to any requirement that broadband access carriers offer their services for resale, since the Act requires no such duties of common carriers generally.[81] Though the Commission has found that the *act and practice* of resale is important,[82] the Act itself does not *require* it of all common carriers.[83] And though the Commission did use its Section 201 authority and require CMRS providers to not frustrate resale in the early days of the mobile wireless industry, the agency has long since sunset this requirement.[84]

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of market power. *See Kiefer v. PageNet* ¶¶ 5, 7 ("This does not mean, however, that section 201(b) has no meaning. If a charge is unjust or unreasonable, even in an unregulated market, we will find a violation. . . . We note however, that in a competitive market, certain industry practices will not necessarily 'be lawful under Section 201(b) of the Act and without regard to other contractual, service, and marketing practices of the CMRS provider.'") (internal citations omitted)).

[81] *See* Speta, "Common Carrier Approach to Interconnection," at 252 ("On the whole, common carriers were required to interconnect, but they were not required to refrain from participation in related markets and they were not required to sell their service at wholesale prices to their competitors.").

[82] *See PCIA Forbearance Order* ¶ 32 ("The Commission found that resale confers important public benefits in less competitive markets, including encouraging competitive pricing; discouraging unjust, unreasonable, and unreasonably discriminatory practices; reducing the need for regulatory intervention and concomitant market distortions; promoting innovation; improving carrier management and marketing; generating increased research and development; and positively affecting the growth of the market. . . . We note especially that resale in telecommunications markets has helped bring service to smaller and underserved markets, as well as providing opportunities for small businesses. In wireless markets, in particular, resale allows companies that may not have access to spectrum to offer full packages of services and products.").

[83] *See* 47 U.S.C. § 251(b)(1). There is a duty specific to all LECs (but not all common carriers) to "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."

[84] *See PCIA Forbearance Order* ¶ 33 ("[The cellular resale rule] essentially prohibits covered carriers from unreasonably discriminating against resellers. The resale rule does not require providers to structure their operations or offerings in any particular way, such as to promote resale, adopt wholesale/retail business structures, establish a margin for resellers, or guarantee resellers a profit."). This rule sunset five years after the award of the

Finally, it bears repeating that Title II currently applies not just to mobile voice and to enterprise broadband services, but also the wired broadband offerings of more than 800 rural LECs that voluntarily offer their DSL and fiber broadband services as common carrier offerings. They do this in order to participate in National Exchange Carrier Association (NECA) tariff pools, which allow small carriers to spread costs and risks amongst themselves. So today, there are more than 800 companies offering broadband as common carriage, and there is absolutely no affirmative regulation of those services whatsoever. Just as in the case of enterprise broadband, this is a common carrier offering that only has a basic backstop of Commission oversight.

Title II unquestionably provides the more "certain" regulatory approach for broadband, with its clear and lengthy history of Section 201 and 202 reasonable and nondiscriminatory standards, than carriers would face under an untested "commercially reasonable" standard that itself must allow carriers substantial room to discriminate.

There should be no doubt: a return to common carriage will maintain the current deregulatory status quo. The Commission has a long history of giving non-monopoly common carriers a wide berth when interpreting the reasonableness of practices under Sections 201 and 202, repeatedly emphasizing that the level of market competition factors into the agency's interpretation of reasonableness. If policymakers ignore the fear mongering and take the time to understand how the Commission has applied and still does apply Title II, they will see that it is a highly deregulatory and market-driven approach, precisely as Congress intended.

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last group of initial broadband PCS licenses. *See* 47 C.F.R. § 20.12(b) ("This paragraph shall cease to be effective five years after the last group of initial licenses for broadband PCS spectrum in the 1850-1910 and 1930-1990 MHz bands is awarded.").

4. The Commission Has Ample Authority Under Title II To Declare Certain Practices **Per Se** *Unreasonable.*

Both the Chairman and AT&T's top lobbyist have suggested that Title II is no better than Section 706 for protecting the open Internet because Title II "only bans 'unjust and unreasonable' discrimination."[85] AT&T specifically raises this point to suggest that the Commission would not be able to impose a prohibition on paid prioritization under Title II authority. This misstates the nature of the Commission's Title II authority, and incorrectly suggests that a "commercially reasonable" standard is no different than a "no unreasonable discrimination" rule. Treating broadband Internet access as a Title II service would not automatically ban (or allow) any type of behavior – discriminatory or otherwise. It would restore the Commission's authority to prohibit "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."[86] The Commission could then move in a rulemaking to define access charges, paid prioritization or other types of discrimination as *per se* unreasonable.[87]

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[85] *See* Tom Wheeler, FCC Chairman, "Setting the Record Straight on the FCC's Open Internet Rules," Official FCC Blog (Apr. 24, 2014) ("April 24 Blog Post"); *see also* Jim Cicconi, "Net Neutrality and Modern Memory," AT&T Public Policy Blog (June 6, 2014).

[86] 47 U.S.C. § 202.

[87] Contrary to AT&T's assertion, Free Press did not make the case in 2010 that Title II's no unreasonable discrimination standard was inadequate *as a legal basis of* authority to promulgate Open Internet rules; we did argue that the specific *substantive rule* itself should be a *per se* ban on discrimination by broadband Internet access service providers, subject to a consistent reasonable network management test, rather than an exemption-laden substantive rule finding some kinds of Internet blocking and prioritization to be presumptively "reasonable." The *2009 Open Internet NPRM* proposed the following rule: "Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner." This rule was, as indicated in the first clause, subject to a reasonableness standard, and we supported this approach *for the rule itself*. In the 2009 NPRM, the Commission, after proposing the above rule, then specifically asked, "should we instead adopt *a rule* prohibiting only unreasonable discrimination?" (emphasis added). In responding to this question, we made the point that the specific *rule* adopted should not be a prohibition on

Making such arrangements unlawful and presumptively prohibiting them is just what the Commission should do, and what it had in mind in the original *2010 Open Internet Order*. That's one of the reasons the D.C. Circuit ruled as it did. "The *Open Internet Order* makes no attempt to ensure that its reasonableness standard remains flexible. Instead, . . . the *Order* [ ] declares: it is unlikely that pay for priority would satisfy the no unreasonable discrimination standard."[88] The D.C. Circuit certainly recognized a difference between the two standards.[89] And it is impossible to suggest that the Commission could use them interchangeably to address the same kinds of behaviors. *Verizon v. FCC* confirms that the Commission cannot apply its "commercially reasonable" standard in a "restrictive manner, essentially elevating it to the traditional common carrier 'just and reasonable' standard" without facing an "as applied" challenge.[90]

Pretending that the "no unreasonable discrimination" standard is a green light for paid prioritization is incongruous with the Commission's application of Title II, as we discuss below. But it's also a plain misreading of the meaning of the term unreasonable. The unreasonable standard of course gives the Commission the discretion to determine that certain types of differential treatment are reasonable. But it doesn't mean that any and all forms of discrimination must be reasonable all or even some of the time. If the Commission

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unreasonable discrimination, since the proposed rule itself already had a reasonableness standard built in and properly placed the burden of proof for demonstrating such reasonableness on the carrier. Thus our argument then is no different than now: we believe the Commission should adopt a *per se* ban on certain discriminatory practices, and Title II gives the Commission the authority to do so.

[88] *Verizon v. FCC*, 740 F.3d at 657 (internal quotation marks omitted).

[89] *See id*. ("The Commission has provided no basis for concluding that in permitting 'reasonable' network management, and in prohibiting merely 'unreasonable' discrimination, the Order's standard of 'reasonableness' might be more permissive than the quintessential common carrier standard.").

[90] *Id.* at 652.

classifies broadband access as common carriage, it has the clear legal authority and *obligation* to prohibit unreasonable discrimination. And blocking and degrading traffic (the latter of which is the practical impact of paid prioritization) that is carried over broadband services are *per se* unreasonably discriminatory practices.

Title II obligations apply to all forms of telecommunications services, and there are many. This of course means the application of a specific part of the law to one type of service will necessarily differ from its application to other services. While the Commission's general analytical approach for determining reasonableness of a practice might be consistent (*e.g.*, market power analysis) in a Title II context or otherwise, the specifics of a particular market or technology obviously can lead to differing conclusions and policies.[91] So at the outset, it would be a mistake to assume that the totality of the Commission's approach to determining the reasonableness of practices employed by carriers in their circuit-switched Plain Old Telephone Service (POTS) offerings would be the approach required for such determinations on broadband access services.[92]

Broadband access services are packet-switched services, not circuit-switched services. Described in simplified terms, the information transmitted via broadband is broken

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[91] For example, even the *2010 Open Internet Order* treated mobile wireless broadband Internet access services differently from fixed wireless and wired broadband services. Several companies and organizations opposed this arbitrary differentiation on the merits of the Commission's decision, but did not suggest that the Commission was somehow powerless to make such distinctions.

[92] Analogizing to the pre-2005 market (i.e. the market before the LEC-IXC mergers and the elimination of the *Computer Inquiry* requirements) and the exchange market in general is inapt because of the exchange access market's separation of local lines (and special access) from long distance (and in the case of data, the local line from the information service provider). What is reasonable discrimination in one market structure will be different in another market structure. This is especially the case when one market structure is has structural and functional separations between vertical markets, while the other is totally vertically integrated.

up into smaller "packets." Each of these packets has an "address header" that directs it where to go. These packets of information are sent on their way by "routers," which handle the packets on a "first-in, first-out" basis. If there are more packets coming into a router than it is sending out, there will be a delay. If this delay is too long, the router's "buffer" becomes full, and packets are dropped on a last-in/first-dropped basis (dropped packets are then automatically resent by the sender, according to the TCP protocol).

This basic transmission architecture differs from classic circuit switching, which literally involved establishing a dedicated circuit between two endpoints. In the circuit-switched context, Quality of Service (QoS) involved end-user retail customers purchasing a telecommunications service with a certain guaranteed uptime *for them*, a differential treatment that is perfectly reasonable. But this is not analogous to the current discussion about edge companies paying for preferential treatment to reach end-users. In packet-switching, if there is no congestion, there is no meaning to priority. If there is congestion, the status quo is first-in, first-out. The concerns about paid prioritization are that it changes the status quo by enabling content owners to pay to have their packets moved to the front of the line. That would mean these paid-packets would be routed as if there was no congestion, while all non-priority packets would be pushed to the back of the line. This is an inherently unreasonably discriminatory practice because packet routing is a zero sum game. A router cannot speed up any packets without slowing down others. In the presence of prioritization, packets that would have been routed normally are now artificially slowed down so that priority packets may be pushed to the front of the line. There is no "faster" treatment for some without slower treatment for all others, justifying the conception of packet routing as a zero sum game.

While it is true that individualized contracts have been found to pass Section 202(a) muster so long as those terms are made available to other similarly situated parties,[93] there is a fundamental difference between the routing of IP traffic and the technological realities and market structures of the services on which such decisions relied. The latter involved no *net* discrimination against parties that did not seek or agree to the individualized terms. However, every party that does not enter into a prioritized arrangement is by definition slowed down, and thus discriminated against. And it is not enough to make priority available to all comers, since this is a technological impossibility: for each priority arrangement created, the degree of that priority declines as the degree of discrimination increases for all non-takers. In other words, not only is there an escalating decline in priority for non-takers that are forced to the back of the line, but the efficacy of the priority declines for the takers too as the number of priority relationships increases.

We believe the fundamental realities of this zero sum game, combined with the Commission's court-affirmed findings that ISPs offering preferential treatment harm the "virtuous circle of investment," form a strong basis for a *per se* rule against paid prioritization as a form of unreasonable discrimination.[94] Such a rule would be consistent with how the Commission has applied Sections 201 and 202.[95] The Commission has in

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[93] *See, e.g.*, *MCI Telecomm. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990).

[94] Of course in lieu of a rule, it is clear that the Commission has ample authority to adjudicate a complaint that any particular broadband carrier's use of paid prioritization is unreasonably discriminatory. And in adjudicating such a complaint, the Commission has ample authority to find that the practice as deployed is generally a *per se* unreasonably discriminatory practice.

[95] *See PCIA Forbearance Order* ¶ 15 ("The Commission gives the standards meaning by defining practices that run afoul of carriers' obligations, either by rulemaking or by case-by-case adjudication. The existence of the broad obligations, however, is what gives the Commission the power to protect consumers by defining forbidden practices and enforcing

many instances deemed certain practices to be *per se* unreasonable, both in the Title II context and outside of it.[96]

The record in this proceeding is clear: abandoning the open communications pathway is not in the public interest, and will not serve the goals of the Communications Act or the proper goals of Section 706 of the Telecommunications Act of 1996. But the Commission's turn away from common carriage in favor of a commercially reasonable standard that *encourages* discrimination is abandoning that open pathway. The case against blocking and discrimination is well established and accepted by the Commission and the courts. But the abandonment of Title II common carriage has results that go even beyond these worst-case outcomes. It could produce anti-consumer vertical lock-in.[97] It could

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compliance. Thus, sections 201 and 202 lie at the heart of consumer protection under the Act.").

[96] *See, e.g.*, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶ 75 (2007) ("Any requirement the LFA imposes on the applicant to negotiate or engage in any regulatory or administrative processes before the applicant files the requisite information is *per se* unreasonable and preempted by this *Order*. Such a requirement would delay competitive entry by undermining the efficacy of the time limits adopted in this Order and would not serve any legitimate purpose."); *see also Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777, ¶ 21 (1998) (*1998 Pole Attachment Order*) ("We find that a utility's demand for a clause waiving the licensee's right to federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation. In particular, a request that a pole attachment agreement include a clause waiving statutory rights to file a complaint with the Commission is *per se* unreasonable."). *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Order on Reconsideration, 19 FCC Rcd 21457, ¶ 19 (2004) ("We find *per se* unreasonable a [payphone service provider]'s objection to an [Alternative Compensation Arrangement] on the basis that it does not contain a provision imposing ultimate liability on the interexchange carrier for payphone compensation on calls where it is not the Completing Carrier.").

[97] *See, e.g.*, Mat Honan, "The Nightmare on Connected Home Street," *Wired*, June 13, 2014.

further erode the privacy of our communications.[98] It could frustrate measured and legitimate efforts to protect cybersecurity.[99] It could destroy any possibilities for disruption in the pay-TV markets,[100] and turn back the clock on over-the-top disruption generally.[101]

Once all of the myths and distortions about Title II are put to rest, it becomes clear that restoring common carriage is the best outcome for the public interest. A return to Title II's sensible deregulatory approach will harmonize the regulatory framework for broadband with long-standing principles of communications law and policy. Most notably, it will

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[98] When the user is not in control of his content (*e.g.*, when the service is an information service that does not come with either user control over the information or the privacy protections of Title II), the dangers of loss of privacy are high, and the results we see fill the headlines daily. *See, e.g.*, Matt Pearce, "Facebook experiment becomes a debate over power and consent," *L.A. Times*, July 3, 2014.

[99] *See, e.g.*, Jimm Phillips, "FCC Seen to Have at Least Title I Authority on Cybersecurity," *Comm. Daily*, June 24, 2014. The article notes an FCC official's statement that the Chairman is "pretty confident" he has the authority to move forward his cybersecurity agenda, largely under Title I. That is a confidence that more than one FCC Chair has come to find was misplaced.

[100] Edge companies have clearly figured out how to offer video on demand and virtual multichannel services over the top. Yet fears around access to an open pathway are thwarting more innovation and investment in this market. It is not in the public interest, and it is inconsistent with the Communications Act, for Commission policies to produce a market where only vertically integrated multiple system operators (MSOs) get to choose our pay-TV bundles. Users can satisfy their tastes better in a world of abundant over-the-top competition. Common carriage is the only missing piece of the puzzle.

[101] Carriers clearly view over-the-top services as a threat, and are very interested in how to thwart it. As they thrash around for ways to do this under today's *de facto* common carrier policy, they would rather be more direct about it. *See* Jason Meyers, "How to Fight the OTTs," *Light Reading*, June 23, 2014; *see also* Tim Fernholz, "We need net neutrality to make money work better, too," *Quartz*, June 25, 2014 ("Digital payment services depend on low-cost, speedy and reliable internet connections to offer people better options than cash and plastic cards. For startups trying to innovate in this area, paying more for a better connection would make it harder to offer a cheaper service than the older networks used by banks and credit card companies. Absent that, their customers will likely have fewer options and more hassle – especially small businesses that can't leverage massive volume to reduce transaction fees paid to banks and credit card companies. That means that the choices made around net neutrality could cut the cost of purchases like your morning cup of coffee – or drive it up.").

reestablish the traditional distinction between connectivity and content – a distinction that has allowed speech and commerce to flourish while maintaining the integrity and stability of the nation's communications infrastructure.

II. THE FCC GOT IT WRONG: MASS-MARKET BROADBAND ACCESS SERVICES ARE COMMON CARRIER TELECOMMUNICATIONS SERVICES.

With the current *Notice*, the Commission is seeking to re-establish the Open Internet rules vacated in *Verizon v. FCC*. The court struck those rules down as common carrier duties improperly applied to entities and services that Commission had classified as non-common carriers. This *Notice* marks the third Commission attempt to apply duties that are plainly common carrier obligations to broadband access providers.

That the Commission is once again facing, and asking, many of the same questions that it confronted in 1998,[102] 2000,[103] 2002,[104] 2007,[105] 2009[106] and 2010[107] (as well as in numerous other proceedings covering broader issues) is a strong indication the agency's flawed policy framework is broken.

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[102] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, 13 FCC Rcd 15280, 15308-11 (1998).

[103] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000).

[104] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*).

[105] *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894 (2007).

[106] *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

[107] *2010 Broadband Framework NOI*.

That the Commission is attempting to create a new, pro-discriminatory, and apparently unworkable "commercially reasonable" standard to govern our nation's two-way communications networks (instead of using the laws in Title II written by Congress to do the job) is a strong indication the agency's flawed policy framework is broken.[108]

That the Commission still won't say if interconnected VoIP or SMS services are telecommunications services or information services is a strong indication that the agency's flawed policy framework is broken.

And that by its own definition, the substantial majority of Americans are unable to purchase mass market broadband *telecommunications services*, well that surely is a sign that something went terribly wrong in the Commission's implementation of the 1996 Act.

What went wrong along the way is clear: The Commission's classification of broadband access services as inextricably intertwined information services was a profound mistake. This classification has repeatedly proven to be unworkable, and contrary to the plain language of the law and to congressional intent.

A. In Amending the Communications Act, Congress Cleary Intended Title II To Apply To Mass Market Broadband Services. Congress Established A Process For Deregulation Through Forbearance, Not Non-Regulation By Vertical Integration and Self-Classification.

To understand just how badly the Commission erred, let's review what a Republican-

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[108] *See Wireless Telecommunications Bureau Seeks Comment On Petition For Expedited Declaratory Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations*, WT Docket No. 05-265, Public Notice, DA 14-798 (2014); *see also* Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., WT Docket No. 05-265, May 27, 2014 (*T-Mobile Commercially Reasonable Petition*) ("Despite adoption of the rule, however, real-world industry experience shows that providers continue to be stymied in their efforts to negotiate data roaming agreements on commercially reasonable terms. These problems are due in large part to certain ambiguities in the 'commercially reasonable' standard for data roaming – ambiguities that could not have been foreseen at the time, but which have become apparent with experience.").

led Congress did in amending the Communications Act in 1996 with the Telecommunications Act.

Congress specified that the purpose of these substantial amendments to the Communications Act of 1934 was to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[109] The amendments to the 1934 Act were largely confined to Title II, and the 1996 Act made much less substantial adjustments to Titles III and VI. When it amended the 1934 Act, Congress did not create new titles or definitions in the law for "Internet service providers" or "broadband," but this was not an oversight. All of the references to "information services" in the 1996 Act are contained in amendments to Title II. Congress took this approach to distinguish common carrier services from information services that are provided via common carrier facilities but that are not themselves subject to *any* regulation.[110] Congress added requirements for "telecommunications service" and "telecommunications carrier." The definition of the latter applies "regardless of the facilities used" to anyone who provides telecommunications to the public for a fee. If Congress had not intended for these definitions to apply to cable modem offerings, it certainly could have said as much. But the use of the term "regardless," and the lack of a limitation of the term to LECs' offerings, is suggestive (as is the Congressional record on this point).[111]

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[109] *See Conference Report* at 1.

[110] P.L. 104-104.

[111] *See, e.g.*, "Telecommunications Competition and Deregulation Act of 1995," Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Rpt. 104-23, at 27 (1995) (*Senate Committee Report on S. 652*) ("As defined under the 1934 Act [as

Congress added Sections 251 through 260 to Title II for the purpose of promoting competition and universal service in telecommunications services. With Section 253, Congress granted the Commission affirmative state preemption authority to deal with inconsistent state regulation of telecommunications services.[112] Congress however did not grant the Commission preemption authority over state regulation of information services. Section 254 directs the Commission to advance universal service through an "evolving level of telecommunications services," services that this section says will provide access to "advanced telecommunications and information services."[113] Congress limited Universal Service Fund support to "eligible telecommunications carriers."[114] In order to replace the Modified Final Judgment, Congress crafted sections 271 through 275, in order to open the market for *existing* services to greater competition. To facilitate greater competition in the pay-TV markets, Congress amended Title VI so that cable TV providers who were also LECs could have a less regulatory mechanism to offer pay-TV (*i.e.*, in lieu of a local cable franchise).[115] In amending Title VI and the definitions in the Act, Congress did not alter the definition of a cable service. It chose not to amend this definition knowing full well that

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amended by this bill], 'telecommunications services' includes the transport of information or cable services, but not the offering of those services."); *see also id.* at 18 (noting that the definition of telecommunications "excludes those services, such as interactive games or shopping services or other services involving interaction with stored information, that are defined as information services. *The underlying transport and switching capabilities on which these interactive services are based, however, are included in the definition of 'telecommunications services.'*") (emphasis added).

[112] 47 U.S.C. § 253.

[113] *Id.* § 254.

[114] *Id.* § 214(e).

[115] *See id.* § 573.

cable intended to offer Internet access over the cable plant.[116] This choice kept the original distinction first adopted in the 1984 Cable Act, which made clear that cable would be considered a common carrier when providing non-cable services that allowed users to control the content being sent and received.[117]

Congress in 1996 also left in place the 1993 Amendments to Title III that required the Commission to treat CMRS providers as common carriers under the core of Title II.[118]

And in 1996, Congress gave the Commission forbearance authority, but only for telecommunications services or telecommunications carriers.[119]

Finally, Congress chose to continue requiring nondiscriminatory access to public rights of way at regulated rates only for common carriers[120] or cable operators (the latter for

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[116] *See Senate Committee Report on S. 652* at 13. ("Decker Anstrom testified that *NCTA supports telecommunications legislation because the cable industry is ready to compete*, and legislation must include rate regulation relief for cable. He said that cable will be *the competing wire to the telephone industry*, and cable's coaxial cable carries 900 times more information than telephone's twisted copper pair. The problem, he said, is that cable does not have the capital or, in some states, the authority to compete with the local exchange carriers.") (emphases added).

[117] *See, e.g.*, 47 U.S.C. § 522(6) ("the term ''cable service'' means – (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service").

[118] *Id.* § 332(c)(1)(A).

[119] *Id.* § 160(a).

[120] *Id.* § 224. The 1996 Act amendments to Section 224 (pole attachments) reveal that Congress clearly viewed the then-nascent broadband Internet access services offered by cable companies as telecommunications services. *See Conference Report* at 205-206 ("Section 204 of the Senate bill amends section 224 of the Communications Act. Section 204 requires that poles, ducts, conduits and rights-of-way controlled by utilities are made available to cable television systems at the rates, terms and conditions that are just and reasonable *regardless of whether the cable system is providing cable television services or telecommunications services*."). Congress could also have said "telephone exchange services," "local exchange services," "exchange access" or simply "telephony" had it intended this section to only apply to cable's provision of voice services.

the provision of cable services only).[121] This is important, as it suggests that Congress did not envision unregulated information service providers offfering transmission facilities, *even though the explicit purpose of the Act* is to promote competition and market entry both in the market for advanced telecommunications and the market for information services.

In sum, Congress' actions are clear and deliberate. In 1993 it affirmatively applied common carriage to the emerging and weakly competitive mobile market. Then in 1996 it applied common carriage to new entrants as well as incumbents in their offer of telecommunications to the public, regardless of facilities used. Congress also deregulated entry into the pay-TV market, but only for common carriers subject to Title II. And the resulting Open Video Systems are "open"; they were intended to make pay-TV more like common carriage.[122]

If there's any ambiguity today about what regulatory framework Congress intended for two-way broadband *transmission facilities*, it's not the fault of Congress nor is it to be found in the text of the Act. That ambiguity stems only from the Commission's own willful ignorance. Indeed, in recounting the history of the regulatory regime that has governed broadband services, the court in *Verizon v. FCC* observed that when the 1996 Telecommunications Act passed, the FCC had already been subjecting broadband providers to common carrier regulations, and that "one might have thought, as the Commission

[121] *See* 47 U.S.C. § 224(d)(3); *see also id.* § 541.

[122] *See, e.g.*, *id.* § 573(b)(1) (directing the Commission to prescribe regulations that "prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system, and ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory" and "prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system").

originally concluded, that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously."[123] Indeed, the Senate Committee report on S.652 removes all ambiguity. Section 8 of this report, explaining the Act's definitions, noted "'Telecommunications service'" does not include information services, cable services, or 'wireless' cable services, but does include the transmission, without change in the form or content, of such services."[124] The Committee later noted:

> As defined under the 1934 Act (as amended by this bill), ''telecommunications services'' includes the transport of information or cable services, but not the offering of those services. This means that information or cable services are not included in the definition of universal service; what is included is that level of telecommunications services that the FCC determines should be provided at an affordable rate to allow all Americans access to information, cable, and advanced telecommunications services that are an increasing part of daily life in modern America.
>
> Put another way, the Committee intends the definition of universal service to ensure that the conduit, whether it is a twisted pair wire, coaxial cable, fiber optic cable, wireless, or satellite system, has sufficient capacity and technological capability to enable consumers to use whatever consumer goods that they have purchased, such as a telephone, personal computer, video player, or television, to interconnect to services that are available over the telecommunications network.[125]

There's simply nothing in the law or the legislative history to suggest that Congress erred by omission, or that it desired its substantial amendments to the Act to be easily evaded through vertical integration and definitional trickery. At the time, the substantial majority of mass-market Internet access services were offered by third parties over common

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[123] *Verizon v. FCC*, 740 F.3d at 638-39.

[124] *See Senate Committee Report on S. 652* at 18.

[125] *See id.* at 27. Though these are the findings of the Senate Report and not the Conference Report, the latter indicates that on these definitions the House had "receded" to the Senate's terminology. *See Conference Report* at 116 ("The House recedes to the Senate with respect to the definitions of 'affiliate' and 'cable service.' The House recedes to the Senate with amendments with respect to the definitions of 'number portability,' 'telecommunications,' 'telecommunications carrier,' and 'telecommunications service.'").

carrier networks. Congress certainly anticipated and provided a framework for facilities owners to enter the information services market, including by provisioning Internet access services over their own facilities. But it is absurd to think that Congress wanted the then-highly competitive market for provision of non-facilities-based Internet Service (an information service) to be destroyed simply by the transmission facility owners deeming their transmission facilities to be information services.

Congress adopted the 1996 Act against the backdrop of the *Computer Inquires*, and the Commission's consistent enforcement of the policies developed in those proceedings. Indeed, the Commission's actions in the 1995 *Frame Relay Order* were fresh and certainly well understood by Congress (see below).[126] In the *Computer Inquiries*, the Commission contrasted "basic" transmission services (telecommunications services in today's vocabulary) with "enhanced services" (now information services).[127] Basic services were "common carrier offering[s] of transmission capacity for the movement of information," and they provided "a communications path for the analog or digital transmission of voice, data, [and] video."[128] The Commission distinguished basic services from "enhanced services," which were offered over common carrier services but employed "computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information."[129]

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[126] *Independent Data Manufacturers Ass'n*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (1995) (*Frame Relay Order*).

[127] *Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Final Decision, 77 F.C.C.2d 384, ¶¶ 93, 97-98 (1980) (*Second Computer Inquiry*).

[128] *Id.* ¶ 93.

[129] *Id.* ¶ 86.

After establishing these definitions, the Commission was consistent in refusing to allow the carriers that offered transmission services to escape the reaches of the law through vertical integration. For example, in 1988, the Commission concluded that "[s]ince the *Computer II* regime, we have consistently held the addition . . . of enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations."[130] And in the 1995 *Frame Relay Order*, the Commission rejected the notion that a facilities-based carrier could bundle its common carrier and enhanced services offerings into one completely unregulated enhanced services offering. The Commission stated that this approach "would allow circumvention of the [*Computer Inquiries*'] basic-enhanced framework. . . . This is obviously an undesirable and unintended result."[131]

Similarly, in its first analysis of broadband Internet access over DSL, the Commission concluded:

> An end user may utilize a telecommunications service with an information service, as in the case of Internet access. In such a case, however, we treat the two services *separately*: the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.[132]

Thus, the FCC's early treatment of DSL followed its traditional treatment of facilities-based

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[130] *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Memorandum Opinion and Order, 4 FCC Rcd.1, ¶ 274 (1988) (footnotes omitted).

[131] *Frame Relay Order* ¶ 44 *See also United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990) (characterizing the same approach as creating "an enormous loophole").

[132] *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 24011, ¶ 36 (1998) (emphasis added) (*Advanced Services Order*); *see also id.* ¶¶ 3, 11, 35 (noting that packet-switched services are "basic services" and characterizing advanced services as "wireline broadband telecommunications services").

providers of enhanced services: a facilities-based provider offering an enhanced service always offers both a basic service and that enhanced service.[133]

However, whether or not a service is a telecommunications service (*i.e.* basic service) or an information service (*i.e.* enhanced service) depends on nothing more than whether or not the service is offered to the public, and enables end-users to transmit the information of their choosing between points of their choosing, without change in the form or content of the information as sent and received. As we discuss below, while at one time the information services designation may have been appropriately applied to "Internet Access Services" generally, it is clear that the product offered today by mass market broadband access providers is itself a telecommunications service, per the definitions of the Act.

B. Broadband Access Providers Offer A Transmission Service to the Public That Transmits Information of the Users' Choosing Amongst Points of Their Choosing Without Change in the Form or Content of that Information.

In the *Notice*, the Commission recounts how the *2010 Open Internet Order* rules apply to "broadband Internet access service," which the Commission defined as a "mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints."[134] Before we proceed, let's just pause a second to consider this definition, as it appears to be a specific iteration of the standard definition of a telecom service. Compare the two definitions side-by-side: The

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[133] *See, e.g.*, *Frame Relay Order* ¶ 41 ("The assertion by AT&T and other commenters that the enhanced protocol conversion capabilities associated with AT&T's InterSpan service bring it within the definition of an enhanced service is beside the point. Under the Commission's *Computer II* and *Computer III* decisions, AT&T must unbundle the basic frame relay service, regardless of whether the [service] offering also provides a combined, enhanced protocol conversion and transport service for those customers who require it.").

[134] 47 C.F.R. § 8.11(a) (2013).

Commission defines broadband Internet access service as:

> – a mass market retail service [i.e. the offering for a fee directly to the public]
>
> – that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints [i.e. a service that transmits information between points specified by the user].

The only substantive difference between the two is that the broadband Internet access service definition lacks any precise analogue to the clause in the definition of telecommunications that transmission is "without change in the form or content of the information as sent or received." This seems a point of controversy, though as we discuss below, nothing 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.

But before we get to the specifics of how the service offering does not change the form or content of the users' information, we start with an application of the *NARUC I* test to demonstrate that broadband access services are common carrier services, not private carrier services.[135] As established by *NARUC I*, and affirmed in subsequent cases, "common carrier status turns on: (1) whether the carrier 'holds himself out to serve indifferently all potential users'; and (2) whether the carrier allows 'customers to transmit intelligence of their own design and choosing.'"[136]

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[135] *Notice* ¶ 150 ("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'?").

[136] *See U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (*NARUC II*); *NARUC I*, 525 F.2d at 642 (D.C. Cir. 1976).

As to the first prong, from the perspective of the public, the service is held out for a fee indifferently to all potential users. You only need to look at the broadband providers' web sites, commercials or junk mail offerings that fill your mailbox to see that this is the case. These offerings are made and marketed in the same exact fashion that other common carrier offerings are made. There's no "call us to discuss terms," clause in these websites, commercials or flyers; just the rates, terms, and conditions listed for any and all takers.[137]

As to the second prong, the service broadband access providers offer does allow the user to transmit intelligence of her own design and choosing. Comcast does not pick the information that its broadband customers transmit in the same way that it selects the channels to put on its pay-TV cable service. The broadband customer is in complete control of what information she transmits over the service. An AT&T U-Verse subscriber does not rely on AT&T to select which websites he may visit, or what videos he can upload to YouTube; the customer is in control of those transmissions, by his own design and choosing. In other words, mass-market broadband access is not private telecommunications carriage (prong 1) and it is not a cable or broadcasting service (prong 2).

Mass-market broadband access is thus a common carrier service. But as referenced above, "classification of an entity as a common carrier is not an end unto itself. The primary purpose of the classification is to determine whether Title II applies."[138] That is, to determine whether the common carrier offering is a telecommunications service?

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[137] *See, e.g.*, Noam, "Beyond Liberalization II," at 3 ("The following factors are important in determining common carriage: service is regular; customers are not readily predictable and are changeable; the carrier solicits business from the general public, for example by advertising; law and regulations define the responsibilities of the parties. For contract carriers, on the other hand: service may be occasional; the clientele is identifiable and stable; carriers solicit business on a targeted and individualized basis; contracts define parties' responsibilities.").

[138] *See Orloff v. FCC Respondents Brief* at 3.

To date, the Commission's designation of mass-market broadband as an information service hinges on the finding that these services offer users "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,"[139] yet do not allow the user to transmit "between or among points specified by the user, [ ] information of the user's choosing, without change in the form or content of the information as sent and received."[140]

But a fresh examination of broadband access services shows in fact that this is not the case currently, even if it might have been at one time.[141] First, from a non-technical perspective, of course the service transmits information without a change in the form or content of the information as sent and received. If a consumer subscribes to a cloud storage service, the photos and files she uploads and downloads to and from her computing device and her cloud storage provider are transmitted without change in form or content. If this were not the case, and her broadband carrier transformed this information, she would find no value in the service. Indeed, in this case, it is clear that the cloud company is the information service provider, offering the capability to store and retrieve information via telecommunications, while the broadband provider simply *carries* that information between points selected by the user.

This is true of any other situation. Your broadband provider doesn't modify the form or content of Amazon's web page when you shop for a birthday present for your best friend. Your broadband provider doesn't alter the content of the Gmail message you send to your neighbors alerting them of your upcoming yard sale, nor does it store the message on its

[139] 47 U.S.C. § 153(24).

[140] 47 U.S.C. § 153(50).

[141] A historical question we need not consider for the purposes of the current *Notice*.

servers: Google does. If you want to listen to your favorite album on Spotify, you use your broadband service to send a message to Spotify's servers requesting the music stream, and Spotify transmits it back to you. Your broadband carrier just transmits your request and transmits the music stream back to you. Want to take a selfie at your favorite watering hole and post it to Facebook? You use your smartphone to take the picture, open up a photosharing app, and your mobile carrier transmits that photo just as you requested, without needing to alter it in any fashion or store the photo on its servers.[142] Want to use an over-the-top app to call your friend in Brazil, so you don't have to pay international long-distance charges? You can, and when you do, your broadband carrier does nothing more than transmit your data.[143]

From a more technical perspective, if a broadband carrier did use protocols that modified the content or format of a customer's data, this would break the Internet and make it completely insecure. Encryption protocols like HTTPS and IPSEC, which are critical to online commerce, would not work.[144] Network protocols are "transparent" by design. They

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[142] Whether or not the carrier works with the NSA to store your information is not relevant to the Commission's determination of the appropriate classification of broadband access services.

[143] If this transmission did not involve a telecommunications service, it would be impossible. It's quite literally "riding over the top" of the telecom service.

[144] *See* Kendall J. Koning, "The Internet is a Packet-Switched Telecommunications Network," at 11 (June 27, 2013), available via the Social Science Research Network (SSRN):

> The transparency of network protocols – —that they transmit user-specified data without modification – is a central feature of their design, and the manifestation of a layer-driven design philosophy nearly as old as packet-switched networking itself. If protocols did modify the content or format of user data, applications using them [would] need to be aware of these changes and specifically account for them. They would also need to be redesigned whenever a new technology was used which changed the data in a different way. This would be a major impediment to the development of both new

transmit information without modification, for if they did not, the applications that utilize these protocols would need to know this and act on that knowledge. Otherwise, applications would need to be rewritten any time a new implementation of a protocol that changed the data had been deployed. If this were the case, "innovation without permission" would not be possible.[145]

A broadband access provider performs one main function: transmitting Internet Protocol (IP) packets between the addresses of the user's choosing. One of the main points behind the development of the IP protocol is its separation from the application layer.[146] It is not enough that there is some protocol processing involved in the broadband transmission. If it were, then the PSTN would be an information service. This is why the Commission has

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> network protocols and applications; new network protocols (e.g., MPLS) could not be implemented without breaking applications, and applications would require constant maintenance to account for changes to the network. With the vast number of independently developed applications and networks, this would be a virtually impossible task. Fortunately, the Internet does not work this way. Its transparency in transmitting user data allows a wide variety of applications to be designed and implemented without the network even being aware of their existence, and innovation without coordination with, or permission from, the network provider. In fact, without this transparency widely used encrypted application protocols (e.g., HTTPS and IPSEC) would not be possible.").

[145] *Id.*

[146] *Id.* at 2 ("At the root of this problem is the assertion that the Internet is fundamentally an inexorably integrated information service. To a former network engineer, this claim is absurd. In fact, the separation of concerns and transparency to applications is the central architectural principle of the Internet Protocol; the Internet's transparency to user information can be demonstrated by any competent network engineer with an Internet connection and a protocol analyzer. Of course, it is true that Internet Protocol packets contain protocol information that is processed, but this is true of any telecommunications network, including the legacy PSTN.") (internal citations omitted).

identified three types of protocol processing[147] that are used for the "management, control, or operation of a telecommunications system or the management of a telecommunications service,"[148] and involve no net protocol conversion.[149]

When a user connects a computing device to her broadband access network, she is able to send information in the IP format to any other computer connected to the Internet. The carrier (and those it interconnects with) looks at the IP packets' address headers and routes them on their way. This is a basic service, not an enhanced service.[150]

The Commission needs to revisit the notion of an "inextricably intertwined" service offering. What exactly is inextricably intertwined in this transmission? Are the assumptions of the *Stevens Report, Cable Modem Declaratory Ruling* and *Wireline Broadband Order* discussed below, that lead to the invention and embrace of this concept, still accurate for today's broadband service offerings? The answer to this question is no, the broadband access provider is not inextricably intertwining any information service with its

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[147] *In the Matter of Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Phase II Report and Order, 104 F.C.C.2d 958 (1986) (*Computer III Phase II Order*).

[148] 47 U.S.C. § 153(24).

[149] *See* Koning, "Packet-Switched Telecommunications Network," at 7-10.

[150] *See id.* at 11 ("The Internet Protocol is not used just for interconnecting existing provider networks; it extends all the way to the end-users of these networks. Put another way, end user devices use the Internet as a packet switched network directly; unless blocked by a firewall or similar device, every Internet connected computer can send messages to every other Internet connected computer in the same native, Internet Protocol format. More technically, the Internet is the packet switched network that receives Internet Protocol formatted packets from connected users and delivers them, immediately and unmodified, to the computer specified by the sender in the destination IP address field. This is exactly the type of protocol processing *Computer III Phase II* and subsequent decisions have found constitute basic or telecommunications services, and it is in many ways indistinguishable from those which came before it. The differences, primarily that the Internet is connectionless, globally addressable, and agnostic as to the specific underlying physical transport, are not significant under the rules of the Computer Inquiries or therefore the 1996 Act.").

telecommunications offering, and the basis for this original notion is certainly not accurate now.

Consider the *Wireline Broadband Order*'s finding that "where wireline broadband Internet access service enables an end user to retrieve files from the World Wide Web, the end user has the capability to interact with information stored on the service provider's facilities."[151] This finding, which serves as a major basis for the prior classification decisions, is simply false. It was the case perhaps with the old walled gardens known as "Online Services," when non-facilities-based Internet service providers such as AOL did provide a true information service over the networks of common carriers with whom those Online Service providers were not affiliated. But it certainly is not true of today's broadband access providers.[152] The Commission needs to revisit this finding, and all the others that were the basis of its prior classification decisions. It's clear the Commission's rationale about homepages, email services, newsgroups and DNS services are all currently incorrect

[151] *Wireline Broadband Order* ¶ 9; *see also Wireline Broadband NPRM* ¶ 21 ("For example, in the case where a wireline broadband Internet access service allows end-users to retrieve files from the World Wide Web, an end-user must have the capability to interact with information stored on the facilities of the provider of the wireline broadband Internet access service.").

[152] *See* Koning, "Packet-Switched Telecommunications Network," at 15 ("Given the functionality of the Internet itself as a simple packet switched network, the FCC's regulatory classification of Internet access as an information service is puzzling. In its *Wireline Broadband* and related proceedings, the Commission has repeatedly stated that Internet service 'always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups' and that they are 'inextricably intertwine[d] . . . such that the consumer always uses them as a unitary service.' It argues this is so because end users 'must have the capability to interact with information stored on the facilities of the provider of the Wireline broadband Internet access service' to use the Web. This claim, at least applied to ISPs as opposed to their market predecessors, Online Services, is demonstrably false.") (internal citations omitted).

when applied to today's broadband access services.[153] The developments surrounding the use of proxy caching do not in anyway alter the fundamental conclusion[154] that the service broadband providers offer is a common carrier broadband telecommunications service.[155]

C. The Commission's Classification Decisions Were Based on A Market in Which Third-Party ISPs Were The Major Providers of Internet Access. This is No Longer The Case, and Renders the Logic of the Prior Decisions Inapplicable to Today's Services.

The current classification of broadband traces its origins back to fundamental

[153] *See* Comments of Free Press, GN Docket No. 10-127, at 108-120 (filed July 15, 2010) (*Free Press July 2010 Broadband Framework Comments*); *see also* Koning, "Packet-Switched Telecommunications Network," at 18 ("Not only is it technically possible to access websites by specifying a destination IP address rather than an Internet hostname, DNS service is itself provided using the Internet Protocol network and therefore can be provided by any third party. In fact, until recently the default behavior or most DNS servers was to answer queries from any internet host; users could configure their computers to use any one of more than a million servers for free.").

[154] *See* Koning, "Packet-Switched Telecommunications Network," at 15 ("Nevertheless, intercepting proxy caches do not alter the fundamental nature of Internet service overall. Intercepting proxies are, by their very nature, not explicitly requested by end-users; they are operated by the ISP for its own benefit to reduce usage of its congestible network resources. This means that caching servers must impersonate remote servers as closely as possible to avoid myriad issues that can otherwise arise from this invisible and unrequested intermediation. For similar reasons, intercepting proxies operate on standard HTTP traffic and not IP generally. This strategy is not applicable to most other applications and, as is the case with encrypted transmissions, is theoretically impossible. In any case, intercepting proxy servers are not inextricably intertwined with the network; they are an optional addition, operate only with the implicit consent of users, and have largely been supplanted by CDNs, which now account for more than half of total Internet traffic by volume.").

[155] Even if for some reason the Commission cannot or will not find that the access service is a telecommunications service, it still has the legal authority to require that the underlying transmission component be offered on a common carrier basis. *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (*Southwestern Bell*); *AT&T-SSI*, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21588-89, ¶¶ 8-9; *NORLIGHT Request for Declaratory Ruling*, 2 FCC Rcd 132, 133, ¶ 14 (1987); *NARUC II,* 533 F.2d at 608-09; *NARUC I,* 525 F.2d at 640. In 1998, the Commission found, and the court agreed, that the enactment of the 1996 Act did not disturb the *NARUC I* decision's common carriage test. *See Vitelco v. FCC*, 198 F.3d 921, 927 (D.C. Cir. 1999) (holding that "the legislative history [of the 1996 Act] . . . can be reasonably construed as manifesting Congress' intention to maintain the public-private dichotomy of *NARUC I*").

assumptions about the market that were made nearly two decades ago, a time when the Internet access market had a dramatically different look and functioned than it does today. In the months following adoption of the 1996 Act, Internet access services were largely provided over common carrier facilities by independent third parties. The nascent cable modem offerings were in many instances supplied over cable systems by third party providers. The dial-up ISPs provided access to the broader Internet, but many still resembled their walled-garden "Online services" predecessors. It was against this backdrop that the Commission first made the observation that Internet Access Services were information services.

The Commission's early findings in the late 1990s were correct for the time, as they were made in a world where common carriage existed, for both narrow and broadband transmission. The Commission at the time certainly did not anticipate that common carriage would disappear for non-narrowband transmission, and along with it the third-party ISP market on the existence of which the Commission based these early decisions. That vertical ISP offerings were possible did not matter: because of common carriage and other Commission policies, these offerings were just expected to be one among many, the way they continue to be around the world today.

The first major findings came in the so-called *Stevens Report*, a Commission report to Congress required by the 1998 Appropriations Act on the agency's implementation of Section 254.[156] In this report, the Commission stated that "[Internet] Access providers, more commonly known as Internet service providers, combine computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet

[156] *See Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) ("*Stevens Report*").

content and services," and were thus considered information services under the Communications Act.[157] In making this observation, the Commission noted the characteristics of late-1990s ISPs, features that are anachronistic today.[158] Moreover, the Commission observed then that "Internet service providers themselves generally do not provide telecommunications," something that is 100 percent opposite of today's reality.

Indeed, consider the section of the *Stevens Report* where the term "inextricably intertwined" was first introduced:

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[157] *Id.* ¶ 63.

[158] *Id.* ¶¶ 76-77:

> 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. When subscribers store files on Internet service provider computers to establish "home pages" on the World Wide Web, they are, without question, utilizing the provider's "capability for . . . storing . . . or making available information" to others. . . When subscribers utilize their Internet service provider's facilities to retrieve files from the World Wide Web, they are similarly interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page "cache') or on those of another. . . . The same is true when Internet service providers offer their subscribers access to Usenet newsgroup articles. An Internet service provider receives and stores these articles (in 1996, about 1.2 gigabytes of new material each day) on its own computer facilities. Each Internet service provider must choose whether to carry a full newsgroup feed, or only a smaller subset of available newsgroups. . . In providing this service, the Internet service provider offers "a capability for generating, acquiring, storing, . . . retrieving . . . and making available information through telecommunications." *Its function seems indistinguishable from that of the database proprietor offering subscribers access to information it maintains on-site*; such a proprietor offers the paradigmatic example of an information service.

This analysis illustrates the substantially changed circumstances of today. Not only was this a discussion of a third party ISP that offers its service via common carrier facilities, but today it would be completely incorrect to characterize a broadband access provider as "indistinguishable" from all other web services and applications that users subscribe to, transmitting information to and from these actual information service via their broadband connections.

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information service."
>
> An Internet access provider, in that respect, is not a novel entity incompatible with the classic distinction between basic and enhanced services, or the newer distinction between telecommunications and information services. In essential aspect, Internet access providers look like other enhanced – or information – service providers. *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 – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others. In offering service to end users, however, they do more than resell those data transport services. They conjoin the data transport with data processing*, information provision, and other computer-mediated offerings, thereby creating an information service. Since 1980, we have classed such entities as enhanced service providers. We conclude that, under the 1996 Act, they are appropriately classed as information service providers.[159]

Thus we see from this section that the "inextricably intertwined" doctrine was based on a view of the market that is anachronistic today – and on a market that itself quite simply does not exist anymore, and has not since the Commission sunset the *Computer Inquiry* obligations. The passage above simply described third party ISPs, whose entire existence was due to the *Computer II* obligations of common carriers.[160] This description, and similar

[159] *Id.* ¶ 80 (internal citations omitted).

[160] Even in the *Stevens Report*, the Commission suggested that this analysis did not map cleanly onto vertically integrated facilities-based ISPs. So subsequent actions to do just that are the demarcation of the Commission's original error. *See id.* ¶ 60 ("We recognize 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. It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with

ones contained in the *Stevens Report* do not apply today,[161] and thus subsequent decisions (*e.g.*, the *Cable Modem Declaratory Ruling*[162] and the *Wireline Broadband Order*) must be revisited.

D. The Commission's Classification Decisions Were A Change of Course, Based on Incorrect Assumptions and Inaccurate Predictions, and Must Be Revisited to Account For Changed Circumstances.

It is clear that the conclusions of the *Stevens Report* were based on, and meant for

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voice mail. Since *Computer II*, *we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced. But the matter is more complicated when it comes to offerings by facilities-based providers*. We noted recently in the *Universal Service Fourth Order on Reconsideration* considering a related question, that '[t]he issue is whether, functionally, the consumer is receiving two separate and distinct services.'") (emphasis added).

[161] *See, e.g.*, *id.* ¶ 105 ("Internet service providers and other information service providers also use telecommunications networks to reach their subscribers, but they are in a very different business from carriers. Internet service providers provide their customers with value-added functionality by means of computer processing and interaction with stored data. They leverage telecommunications connectivity to provide these services, *but this makes them customers of telecommunications carriers rather than their competitors*.") (emphasis added). This is an assumption and conclusion that shows the Commission's thinking in 1998 is completely inapt for today's market, as facilities-based broadband access services have obliterated the need for LEC connectivity to reach a third-party ISP. There is no such thing anymore, something that shows they were in fact competitors to telecommunications carriers; *see also id.* ¶ 102 ("'Telecommunications services' provide the basic transmission functionality that enables customers in rural and high-cost areas to connect to the rest of America. These services also enable users to reach Internet access providers, *so reductions in the cost of basic telephone service in rural areas will effectively reduce the cost of Internet access in those areas*. The information services delivered over telecommunications networks are not sensitive to distance and density to the same extent as the telecommunications facilities themselves. *Therefore, the rationale for establishing a subsidy mechanism for these services is far more attenuated.*") (emphases added). This clearly shows the difference between what the Commission was considering in 1998 – dial-up ISP services reached via the PSTN – and today's broadband access market, since if that conclusion remained true there would be no need for the Commission's recent establishment of the Connect America Fund.

[162] *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 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*).

the 1998-era market of third-party dial-up ISPs reaching consumers via common carriers, and not for the vertical ISP services of the carriers themselves. This is made even more clear by another Commission decision that came a few months later. The *1998 Advanced Services Order* shows that the Commission had not in fact reversed its prior findings in the *Frame Relay Order*, and that it still viewed broadband transmission and information services as extricable offerings when provided by a facilities-based carrier. As the Commission noted,

> Incumbent LECs have proposed, and are currently offering, a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path. Neither the petitioners, nor any commenter, disagree with our conclusion that a carrier offering such a service is offering a "telecommunications service." An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.[163]

But despite having concluded in its early analyses that broadband Internet access service offered by a facilities-based provider constituted two separate services (a telecommunications service along with an information service or suite of information services), the Commission reversed this conclusion in the *Cable Modem Declaratory Ruling* when it decided that cable modem service was a unitary information service. The *Cable Modem Declaratory Ruling* represented a departure from the Commission's larger theory regarding the kinds of services that should be regulated. It also departed from Congress's functional approach to categorizing communications and information services.

For most of its history, the cable industry received vastly different regulatory treatment than the wireline telecommunications industry because cable historically offered a one-way communications technology similar to over-the-air broadcasting. But by 1999,

[163] *Advanced Services Order*, ¶ 60.

there were 1.4 million cable modem lines in the United States.[164] Clearly, these systems offered two-way communications, and nothing in the Act suggested that they should be treated differently simply because the transmission medium used packet-switching rather than circuit-switching or because the operator transmitted data over cable facilities rather than traditional telephone networks. In fact, as discussed above, the 1996 Act defines a telecommunications service as the offering of telecommunications "*regardless of the facilities used*."[165] Thus, the 1996 Act clearly demonstrates an awareness of convergence. Congress expected that the cable plant would be used for common carrier services, and it provided common carriers a less regulatory method for entering the pay-TV market. As a result, the Act focuses on the nature of the service at issue rather than the physical facility, and its suggests that like services should be treated alike.[166]

Somehow the Commission lost all of this history and common sense when it adopted the *Cable Modem Declaratory Ruling*,[167] and *Wireline Broadband Order*. But these orders

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[164] *See* Federal Communications Commission Wireline Competition Bureau, *High-Speed Services for Internet Access as of June 30, 2000*, Table 1 (2000).

[165] 47 U.S.C. § 153(53) (emphasis added).

[166] *See Conference Report* at 169 ("The conference agreement adopts the House provisions with modifications. . . . . This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.").

[167] Commissioner Copps' dissent illustrates the predetermined nature of the *Declaratory Ruling*. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4872 ("The Ruling seems uneasy with its own conclusions. Just in case we are wrong, and access requirements *were* to apply, they are waived, on the Commission's own motion, with neither notice nor comment. And if even *that* stretch somehow fails to get the point across, the NPRM adopted today also takes steps to ensure that these services remain deregulated in the face of any court opinion to the contrary. Even if cable modem services are found by the courts to be subject to regulation, the Commission would forbear from enforcing those obligations. So, in this analysis the majority makes a determination, but just in case it got the determination wrong, it waives the rule it determined did not apply, and, should the courts disagree, we simply

were not only ignorant of history; they were also based on findings about the market that have changed, and predictions about the future that were proven to be wrong.

In both of these rulings the Commission concluded that the average user experiences broadband Internet service as a functionally integrated information service with no telecommunications service component.[168] The Commission found that the data transmission component of the service is typically accompanied by other services, including email, newsgroups, webpage creation, and DNS services.[169] Focusing on these latter services, the Commission reasoned that when the consumer buys Internet access service, he purchases the ability to "run a variety of applications,"[170] not connectivity to the Internet. Indeed, the Commission posited that "subscribers to broadband Internet services 'usually d[id] not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account."[171] The Commission first made these factual findings in 2002, when it issued the *Cable Modem Declaratory Ruling*. Subsequent orders did not revisit these conclusions or rely on new evidence.[172] The record on which the

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forbear from enforcing the rule. That's a far distance down the road from the simple NOI we are working from, isn't it?").

[168] *Cable Modem Declaratory Ruling* ¶ 39; *Wireline Broadband Order* ¶ 14.

[169] *Cable Modem Order* ¶¶ 36-38.

[170] *Id.* ¶ 36.

[171] *Id.* ¶ 11).

[172] *Wireline Broadband Order* ¶¶ 5, 12-17 & nn.32, 36-44; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, ¶¶ 25-26 & n.68 (2007) (*Wireless Broadband Order*); *id.* ¶ 31 (citing only the *Cable Modem Order* in support of its finding that wireless broadband access service is an integrated information service and noting, without citation, that an end user does not pay for "a distinct transmission service").

Cable Modem Declaratory Ruling rested was largely developed in late 2000.[173] (And the 2005 Order, though it came nine years after adoption of the 1996 Act, came still at a time when dial-up was the main Internet access technology).[174] But as detailed above, each of these findings is inapplicable to today's services and must be revisited.

In these decisions, the FCC also predicted that classifying broadband Internet access as an integrated information service would promote both inter- and intramodal competition,[175] and that third-party ISPs would continue to gain access to last-mile facilities, not via a regulatory obligation, but by the facilities owner's economic self-interest.[176] These

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[173] *See Inquiry Concerning High Speed Access to the Internet over Cable and Other Facilities*, 15 FCC Rcd 19730 (2000) (extending reply comment deadline to January 10, 2001).

[174] At the time the record was developed for the *Wireline Broadband Order*, approximately 32 percent of Americans had broadband access, while 38 percent had dial-up; but the policy framework was based on the 2002 decision, a time when half of Americans had Internet at home, but only one-fifth of those (or 10 percent of all Americans) had broadband. And that decision in turn was based on a record established when only 5 percent had home broadband access. *See* John B. Horrigan, "Home Broadband Adoption 2006," Pew Internet & American Life Project, May 28, 2006; *see also* "Computer and Internet Use in the United States," US Census Bureau, May 2013.

[175] *See, e.g.*, *Wireline Broadband Order* ¶ 61 ("As the number of subscribers grows, so does the opportunity for alternative technologies and their respective providers. As any provider increases its market share or upgrades its broadband Internet access service, other providers are likely to mount competitive challenges, which likely will lead to wider deployment of broadband Internet access service, more choices, and better terms."). This was wrong, since we've seen no facilities-based entry, and as shown *infra* Part III investment by existing operators has been spotty and is in decline.

[176] The Commission was exceedingly confident that the third-party broadband ISP market would grow absent any compulsory access obligations. These predictions were spectacularly wrong, and these mistaken beliefs provide more than ample reason to revisit these decisions today. *See, e.g.*, *Wireline Broadband Order* ¶¶ 63-64:

> At this time, facilities-based wireline carriers are the only providers of broadband Internet access services that are compelled by regulation to make such an offering available. As stated above, this compulsion is not the result of the Commission's analysis of broadband Internet access services specifically, but rather is the product of the application of legacy rules adopted decades ago. Therefore, we cannot state unequivocally that incumbent LECs would not

predictions were both completely wrong, in spectacular fashion. So too were the *Cable Modem Declaratory Ruling*'s predictions that there would be no concerns about open

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> otherwise provide wholesale access, absent this compulsion. In fact, the record shows that incumbent LECs would and indeed already do provide such access, albeit through arrangements other than a mandatory tariff regime that requires a standardized general offering. In addition, this regulatory compulsion of facilities-based wireline carriers may be impeding the development of competitive alternatives, most notably through entry by other broadband Internet access platform providers. Because our rules require a particular type of generalized wholesale offering, they may reduce incentives for ISPs to seek alternative arrangements from other broadband Internet access platform providers and for those other providers to offer such arrangements.
>
> Based on the record before us, we expect that facilities-based wireline carriers will have business reasons to continue making broadband Internet access transmission services available to ISPs without regard to the *Computer Inquiry* requirements. The record makes clear that such carriers have a business interest in maximizing the traffic on their networks, as this enables them to spread fixed costs over a greater number of revenue-generating customers. For their part, *cable operators, which have never been required to make Internet access transmission available to third parties on a wholesale basis, have business incentives similar to those of incumbent LECs to make such transmission available to ISPs, and are continuing to do so pursuant to private carriage arrangements*. Given the Supreme Court's decision that cable operators can offer the transmission underlying cable modem service as a functionally integrated part of a finished information service without becoming subject to regulation under Title II, we expect that these wholesale arrangements will continue to evolve. We believe that the convergence of these two factors – increasing competition among facilities-based broadband providers and the potential for competition in wholesale network access – *will sustain and increase competitive choice among broadband providers and Internet access products*.

See id. ¶¶ 74-75: ("Given the nature and history of the broadband Internet access services industry, *we expect that wireline broadband transmission will remain available to ISPs and others without any* Computer Inquiry *requirements. Incumbent LECs have represented that they not only intend to make broadband Internet access transmission offerings available to unaffiliated ISPs in a manner that meets ISPs' needs, but that they have business incentives to do so*. . . . We finds these incentives significant, and *therefore disagree with the contention of some commenters that a mandatory common carrier broadband transmission requirement is essential for independent ISPs to obtain wireline broadband transmission that meets their needs at reasonable prices.*") (emphases added); *see also id.* ¶¶ 76, 87-88 for more examples of the Commission's wishful thinking.

Internet violations on the cable modem platform,[177] and that if there were, ancillary authority would be enough to stop bad practices.[178] The *Comcast v. FCC* case shortly proved these predictions to be wrong as well.[179]

It is clear that the *Computer Inquiry* proceeding's mandatory unbundling, which applied to LECs, reflected a policy understanding of the importance of basic transmission for the growth of information services and continued competition in those services. And Congress amended the Act in part based on the success of this approach. But the Commission changed course in its 2002 and 2005 rulings, based on the expectation that the provision of basic transmission would continue. It has not. Despite their promises at the time

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[177] *See Cable Modem Declaratory Ruling* ¶ 87 ("We note that we are unaware of any allegation that a cable operator has denied 'click through' access to other ISPs[.] Moreover, although it is technically feasible for a cable operator to deny access to unaffiliated content, or to relegate unaffiliated content to the 'slow lane' of its residential high-speed Internet access service, we are unaware of a single allegation that a cable operator has done so.")

[178] *See Cable Modem Declaratory Ruling*, Separate Statement of Chairman Michael K. Powell ("The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results. It was this Commission that promulgated *Computer I*, *Computer II* and, *Computer III*, (all under Title I) in an effort to protect against public interest harms, all with the blessing of judicial review and court sanction of its ancillary authority. Additionally, Title VI is a direct progeny of the Commission's assertion of jurisdiction over cable services under its Title I authority and has regulated cable extensively for a number of years under that authority. This exercise, too, was approved by the Supreme Court as within the congressional scheme. There is no basis to conclude that Title I is inadequate to strike the right regulatory balance. The Commission's willingness to ask searching questions about competitive access, universal service and other important policy issues demonstrates its commitment to explore, evaluate and make responsible judgments about the regulatory framework.").

[179] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *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*", WC Docket 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, ¶¶ 41-53 (2008) (*Comcast Order*).

not to kill an adjacent market that relies on access to their facilities to reach customers, the cable companies and ILECs in fact moved expeditiously to kill off third party broadband ISPs. Such agreements are virtually non-existent today. Taken together, these findings conclusively demonstrate that the Commission's earlier predictions have not come true. Instead of the robust consumer choice predicted by the three classification orders, American consumers in 2014 face painfully limited options: they have at best two facilities-based options (and likely only one option at the fastest speeds), and no real choices among non-facilities-based providers.

So we see that Commission policy mistakes helped the incumbents break their promises and kill off an entire industry in order to favor the incumbent telephone and cable companies' own vertically integrated businesses. Why should we believe that in the absence of a strong, legally sustainable nondiscrimination obligation emerging from the instant proceeding, these same incumbents won't do the same to other online services that threaten their vertical businesses? We've got all the evidence we need that in the absence of the current *de facto* common carrier treatment of ISP services, this type of behavior should be the expected outcome. Yet despite this knowledge, the Commission is proposing to adopt a legal standard that would actually *permit and encourage discriminatory treatment against online content companies*.

The Commission needs to reverse course from the tentative proposal in the *Notice*, and must fix its classification mistakes of the past decade-plus. The current Commission did not make this mess, but it has to clean it up. By restoring common carriage and distinguishing connectivity from content, the Title II approach will provide certainty both to carriers and online content providers. Like services will be treated alike, and the FCC will

eliminate the need to shoehorn deregulatory Title II policies expressly designed for our modern communications infrastructure into a framework designed for websites and applications. That is a real possibility under the Section 706 approach (since after all, broadband service providers and online content providers are all considered information services under the current classifications).

A common carrier approach that recognizes the distinct markets, technologies, and purposes of these services would provide greater clarity for all parties. By providing substantive guidance regarding the relevant policies in the broadband space (the applicable provisions of Title II)[180] and to whom they will be applied (only telecommunications carriers), a Title II regime imposes clearer boundaries on the Commission itself. Indeed, there are, and should be substantial concerns about the Section 706 jurisdiction theory precisely because it does not rely on bright-line rules created by statute.

E. The Commission Has Clear Legal Authority to Reverse The Prior Classifications.

The policy framework built on the Commission's flawed view and bad predictions from the dial-up era market has proven repeatedly to be unworkable. This is not a surprising outcome. Congress intended basic common carriage principles to govern our nation's two-way communications networks. Congress directed the Commission to promote competition and preserve nondiscriminatory outcomes through a deregulatory application of common carriage. Under this deregulatory framework, Congress expected that competition would

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[180] Broadly speaking, Title II of the Communications Act lays out several key obligations that Congress deemed critical for two-way communications networks: non discrimination, affordable access, interconnection, competition, and consumer protection. In moving to a Title II framework, Free Press has shown in its earlier filings in this Broadband Framework docket that the Commission should not forbear from sections of the Act that promote these basic objectives. Thus, at a minimum, we have argued that the Commission must apply Sections 201, 202, 208, 222, 251(a), 255, and 256 of the Act to all broadband service providers.

produce the desired policy outcomes; but if it did not, the Commission would retain the basic authority to adopt and enforce rules, and adjudicate complaints about violations of these rules or allegations of discriminatory treatment. Congress never imagined that the Commission would voluntarily give this authority away, and then look elsewhere in the Act for legal authority to do the very same things Congress had empowered the agency to do under Title II.

The overarching goals of this *Notice* are the right ones. But once again returning to the broken policy framework left in place by prior Commission classification decisions would make achieving those goals impossible. The goals of the *Notice* are in all aspects common carrier outcomes. That the Commission desires common carrier outcomes, but cannot legally enforce them because of its prior decisions, is a strong indication of the need to revisit those decisions. This is the right course of action, not simply because of the result and the remand in *Verizon v. FCC*, but because it is inarguable that these prior findings were based in part on market realities that no longer exist and on predictions that were comically wrong. Furthermore, a simple examination of how today's broadband access services actually function clearly indicates that they are telecommunications services as defined by Congress.

The Commission has ample authority to revisit and reverse its past decisions "given the evidence in the record regarding current market realities."[181] And it has authority to

[181] *See, e.g.*, *Implementation of Section 224 of the Act,* WC Docket No. 07-245, Report and Order and Order on Reconsideration, 26 FCC Rcd 524, 613, ¶ 206 (2011) (*2011 Pole Attachment Order*) ("We find it appropriate to change the Commission's prior interpretation of section 224(b) with respect to incumbent LECs given the evidence in the record regarding current market realities."); *see also id.* ¶ 206 n.625 ("The Commission has discretion to change its interpretation of the Act, so long as it acknowledges that it is doing so and provides a reasoned explanation for the change.").

reinterpret the Act.[182] It has done so repeatedly, including a reversal that established the Section 706 basis of authority it seeks to use in the *Notice*.[183]

In *Brand X* the Supreme Court definitively held that the language of the Communications Act confers discretion on the agency, and *Brand X* and *Fox Television Stations v. FCC* make clear that the Commission can and must revisit the classification decision as needed. Relying on *Chevron U.S.A. v. Natural Resources Defense Council*, the Court in *Brand X* deferred to the agency's construction of the statutory definition of "telecommunications service" without accepting it on the merits.[184] In holding that the term "offer" "admit[s] of two or more reasonable ordinary usages," the Court held that the FCC acted within its discretion to conclude that cable modem service "offered" an integrated information service rather than distinct telecommunications and information services.[185] Deference permeates the language of the opinion.[186] Indeed, the Justices carefully

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[182] In reversing its decision in a 1998 pole attachment order, the Commission did not only change its mind because of changed market circumstances: it also fundamentally reversed and reinterpreted the statute itself. *See id.* ¶ 212. It is perfectly reasonable for the Commission to revisit the assumptions of the *Stevens Report* (and the subsequent *Cable Modem Declaratory Ruling* and *Wireline Broadband Order*). They were made at a time when broadband telecom was a nascent market, and Internet access was a service provided over common carrier facilities (consistent with the *Computer II* policy, codified in the 1996 Act, as well as the application of contamination theory in the *Frame Relay Order*).

[183] *Notice* ¶ 19 ("On April 6, 2010, the D.C. Circuit granted Comcast's petition for review and vacated the Commission's enforcement decision. As to section 706 of the Telecommunications Act of 1996, the court noted that the agency had previously interpreted section 706 as not constituting a grant of authority and held that the Commission was bound by that interpretation for purposes of the case.").

[184] 545 U.S. at 973-74 (citing *Chevron U.S.A. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984)).

[185] *See id.* at 989-90.

[186] *See, e.g.*, *id.* at 986 (characterizing the agency's decision as a "reasonable policy choice"); *id.* at 989 ("offering" can reasonably be read to mean a "stand-alone" offering of telecommunications); *id.* at 992 ("We also do not share the dissent's certainty that cable modem service is so obviously like pizza delivery service and the combination of dog

distinguished the question before them – whether the agency adopted a reasonable construction of the statute – from the premise adopted by the Ninth Circuit in the opinion under review that the FCC failed to adopt the "*best* reading" of the statute.[187] *Brand X* gives the FCC ample latitude to interpret the terms relevant to classification: "offer" and "telecommunications service."

When taken together, *Brand X* and the later *Fox* case leave no doubt that the agency can and must periodically reevaluate its 2002 determination. *Brand X* recognized that the classification question presented "technical, complex, and dynamic" issues.[188] It specifically rejected an argument that the 2002 order should be vacated because the order represented a departure from past practice. The Court held in no uncertain terms terms: "[C]hange 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."[189]

Fox affirms the conclusion that changes in agency policy receive the same deference

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leashes and dogs *that the Commission could not reasonably have thought otherwise*.") (emphasis added); *id.* at 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, not by warring analogies."); *id.* at 1003 ("The Commission is in a far better position to address these questions than we are. *Nothing* in the Communications Act or the Administrative Procedure Act makes unlawful the Commission's use of its expert policy judgment to resolve these difficult questions.") (emphasis added); *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.").

[187] *Id.* at 984.

[188] *Id.* at 1002.

[189] *Id.* at 981 (internal quotation marks and citations omitted, ellipsis in original, emphasis added).

accorded to an initial policy determination.[190] It explains that in revisiting a prior policy, "the agency must show that there are good reasons for the new policy. But 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; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better."[191] To the extent that they are relevant, an agency should also take into account changed circumstances and possible reliance interests.[192] But so long as an agency's decision adequately explains its reasons, a change will not be invalidated as arbitrary and capricious.[193] Neither administrative law nor common sense bind the agency to its 2002 determination.

The FCC's potential decision to classify broadband Internet connectivity as a telecommunications service finds particularly strong support in *Fox*'s discussion of changed circumstances. The decision emphasizes that alterations in the factual landscape – what Justice Kennedy terms "the forces at work in a dynamic society" – provide ample reason for an agency to reconsider past policies.[194] Here, the Commission's 2002 conclusions (based

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[190] *Fox Television Stations, Inc. v. FCC*, 129 S.Ct. 1800, 1810 (2009).

[191] *Id.* at 1811.

[192] *See id.*

[193] *See id.*; *see also Brand X*, 545 U.S. at 980.

[194] *Fox Television Stations*, 129 S. Ct. at 1811; *id.* at 1822-23 (Kennedy, J., concurring); *see also Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'"). The Commission could conceivably reconsider the classification orders based solely on a revision of its interpretation of the word "offer" in the definition of telecommunications service. *See Ad Hoc Shrimp Trade Action Comm v. United States*, 596 F.3d 1365, 1372 (Fed. Cir. 2010) (affirming a change in policy at the Department of Commerce based on the department's explanation that its new interpretation better conformed with "the language of the statute and [its] legislative history."). But given the changes in the marketplace, the FCC should also address these changes as they unequivocally demonstrate that broadband providers are offering a telecommunications service.

largely on a 1998 dial-up era view of the market) no longer reflect the marketplace realities of 2014. Furthermore, because of subsequent Commission actions, the only practical impact of reclassification will be restored authority.[195]

F. The Current Notice and the Broader Net Neutrality Debate Are Just a Reflection of an FCC-Created Market Failure, One it Must Fix.

Judging by the flood of consumer comments in this docket, it is clear that a wide cross-section of the American public is invested in the future of Net Neutrality and our national communications infrastructure. The public response is passionate, to say the least. But instead of dismissing this passion, the Commission should view it through a market lens: this massive public uproar over the potential loss of networks that enable Americans to send and receive the information of their choosing, free from undue interference, is simply a reflection of a market failure that the FCC created.

As discussed above, the 1996 amendments to the Communications Act were designed with one purpose in mind: to foster greater competition and greater capabilities in the telecommunications services markets. The 1996 Act was not about old phone services. It was about big open broadband and all the information services these networks could carry.

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[195] For example, because the Commission eliminated the *Computer Inquiry* requirements, the reclassification will not trigger any duties on the LECs that those policies applied to, nor on the cable companies offering broadband services. Also, because of the *2011 Pole Attachment Order*, the telecommunications service designation will not impact carriers' costs. Though the *1998 Pole Attachment Order* applied Section 224(d)(3) rates, non-ILECs and other carriers (*e.g.* wireless) are all paying close to the same basic rate now as cable (*Heritage* and the 1998 finding on commingled services still applies; see *2011 Pole Attachment Order* ¶ 154), and CLECs/CMRS providers were already paying the telecom services rate. Furthermore, under the *2011 Pole Attachment Order*, the Commission ruled that rates for commingled services exceeding Section 224(e) guidelines would not be just and reasonable. Most importantly, ILECs now can avail themselves of Section 224(b). The totality of this decision is that reclassification would have no impact on this cost component, and it would not distort the market (cable vs. non-cable). This decision removes one potential area of concern that may have existed in 2010 when the Commission first considered revisiting its classifications.

As it implemented the law, the Commission in 1998 ruled that DSL was indeed a telecom service, and, like plain old phone services, had to be offered without discrimination. But in 2002 the Commission reversed course, ruling that if a cable company declared its broadband service not a telecom service, the cable company could squirm out of the legal obligation to offer that broadband access to the public on a nondiscriminatory basis. In other words, if cable wanted to, it would be free to discriminate however it wanted to with its broadband service.

The Commission decision allowing cable broadband companies to avoid participating in the telecom market was in direct opposition to Congress' stated intent and the cable industry's promises when the 1996 Telecom Act was adopted. Nonetheless, this decision shouldn't have meant that the phone companies would then be allowed to make the broadband telecom market disappear.

But that's exactly what happened. In 2005, the FCC gave the phone companies the same option to opt out of the law. And then just like that, the broadband telecom services market was gone. Today, most Americans are simply unable to purchase a broadband telecommunications service, because the LECs, CMRS and cable companies that use public-rights-of-way and spectrum simply refuse to offer these services.

That there is no telecom market is a massive market failure – one Congress certainly did not want and did not even anticipate. It couldn't have, because this market failure stems entirely from a highly dubious FCC interpretation of a legal definition.

This discussion is by necessity full of legal jargon. But common carriage and Title II are nothing more or less than legal protections ensuring that Americans can communicate free from undue discrimination. This legal protection no longer exists for broadband, the

mode of telecommunications we use more than any other. And it is the Commission that took away our right to communicate freely.

This outcome is nonsensical. Making the telecom services markets disappear as bandwidth capabilities increased was the exact opposite of Congress' intent in amending the Communications Act in 1996. This is not simply a matter of semantics. Indeed, the Commission's original eagerness to engage in semantics is precisely why Americans no longer have legal protections for their right to speak freely online.

The absence of a mass-market telecommunications services market, despite the near-universal deployment of infrastructure that is capable of offering these services that consumers clearly demand, is a massive market failure. The existence of this market failure is ample evidence that the Commission erred, and ample reason to change course.

III. A RETURN TO COMMON CARRIAGE WILL PROMOTE, NOT HARM INVESTMENT.

There is no debating that the open Internet is directly responsible for promoting an unprecedented level of civic engagement and commercial activity, as well as enabling massive innovation and investment by persons and businesses utilizing the Internet as a carrier platform for these activities. And as we documented above, this was all made possible because common carriage acted as the anti-gatekeeper, protecting openness against the shortsighted and self-serving interests of those who control the access networks.

But while common carriage is a wildly successful policy and legal framework for promoting edge investment, that's not the whole story. Its application, in conjunction with policies that opened up communications markets to greater competition, also was responsible for the largest period of telecommunications industry investment in U.S. history.

In Washington policy debates, facts and the reality they represent are often drowned out by repetition of beliefs, no matter how unmoored those beliefs are from the lessons of history. Such is the case with common carriage in general, but particularly for beliefs (and propaganda) about the impact of Title II on investment. Despite repeated debunking,[196] the leading incumbents and their paid-proxies continue to spread fear amongst policymakers that light application of basic Title II obligations will destroy network investment. This argument is *never* supported by an explanation as to why this would be the case, and no one making it ever bothers addressing the historical evidence that contradicts this belief. And why would they bother? Too often in Washington, cognitive biases are worn as a badge of honor by those who place political analysis above policy analysis.

Indeed, it may not even matter if the Commission staff and the Commissioners themselves knew the facts, or if they understood the strong evidence indicating that narrow application of common carriage to broadband access will not harm investment at all. Too often, smart decisions can be stopped in their tracks if the Chairman merely knows that the political machine in Washington will *say* he is harming investment. Because in this town, repetition is reality.

But because repetition is reality – and the actual reality apparently needs repeating – below we restate and augment the evidence demonstrating conclusively that a Commission return to the deregulatory application of common carriage will not harm telecom industry investment.

[196] *See Free Press July 2010 Broadband Framework Comments* at 89-105; *see also In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, Report and Order, 25 FCC Rcd 17905, ¶¶ 3, 13, 29 (2010).

A. Investors Do Not Think Title II Will Impact Investment or Curtail The Continued Growth of The ISP Sector, and the ISPs Themselves Agree (Except When They Lobby the Commission).

As the Commission prepared to adopt this *Notice*, it received what amounts to a threat letter signed by 24 CEOs of companies that collectively serve the near-entirety of the U.S. broadband market.[197] The message was loud and clear. And also self-serving. And flat out wrong. The CEOs warned the FCC that reclassification "would greatly distort the future development of, and investment in, tomorrow's broadband networks and services."

These stewards of our nation's critical communications infrastructure failed, however, to offer any hint of an explanation of why this would be the case. The CEOs of many of the smaller LECs that have refused to deploy fiber-to-the-home services also failed to note in this letter why their investments have declined since the Commission first deregulated fiber services in 2003 and then removed common carriage obligations from mass market broadband in 2005. The head of CTIA and the CEOs of the wireless companies failed to explain why their businesses invested massively under Title II – which they also failed to note still applies to them to this day for the services that are responsible for the majority of their revenues. None of the CEOs bothered to reconcile the disconnect between what their companies have told Wall Street investors about the actual impacts of common carriage and of FCC policy in general on their capital expenditure plans, and the dire picture they paint for the FCC and beltway media.[198]

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[197] *See* Letter to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly, from Broadband for America, GN Docket No. 14-28 (filed May 13, 2014) (*May 2014 Broadband for America Letter*). The letter was signed by 24 CEOs and/or Presidents of wireless, ILEC and cable companies, as well as the heads of the major trade associations.

[198] For example, shortly after former Chairman Genachowski announced his intention to apply common carriage to broadband access services, the industry was busy telling everyone (except politicians and policymakers) the benign truth: this wouldn't impact their businesses

The only speculation these CEOs could offer for their dire predictions was that a return to the highly deregulated structure mandated by the Communications Act "would impose great costs, allowing unprecedented government micromanagement of all aspects of the Internet economy." These CEOs warned that common carriage would spill over to edge companies (who didn't sign this letter and who are calling for common carriage) because a return to Title II for transmission networks is in these CEOs' minds "a slippery slope that would provide the Commission sweeping authority to regulate all Internet-based companies and offerings." Left unmentioned in the letter is the fact that Title II has been *and continues to be* applied in the CLEC, CMRS and enterprise broadband sectors, without the slightest hint of negative impacts on investment or share prices, much less any slippery slopes. These CEOs also somehow neglected to mention that their preferred alternative approach of Section 706 is in fact a slippery slope, unlike Title II, which is bound tightly to common carrier transmission networks but not the content that traverses those networks.

As the Commission well knows, the impact of policy on investment cannot be reduced to a simple up-or-down heuristic. And certainly the Commission understands the

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at all. 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.

actual realities of its application of Title II to the various telecommunications service markets listed above, and hopefully can see just how disingenuous this and other similar investment scare tactics are.[199]

The record is clear, and those who continue to ignore it are plainly not interested in reasoned policymaking. Regulation in general is a minor consideration in the capital allocation process,[200] and the specific policy framework under consideration here is so light-

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[199] Though the CEO letter is an example of the art of overstatement, it is tame compared to a letter from several members of the House sent the same day to Chairman Wheeler. Reps. Upton, Walden, Blackburn, and Latta warned that a return to the policy framework that is still the law of the land (and which they've failed to change despite being the leaders of the relevant House Committee) would "harm consumers, halt job creation, curtail investment, stifle innovation, and set America down a dangerous path of micromanaging the Internet." Like the CEO letter, this letter also fails to elucidate exactly how this would happen, only citing unnamed "investors, investment analysts, and broadband companies" as saying it would create regulatory uncertainty that will cause stock prices to drop and investment capital to flee. Of course as we discuss *infra*, there are no investment analysts saying such things. In fact, when we last went through this exercise four years ago, ISP-industry stocks were one of the few bright lights in a stock market decimated by the EU debt crisis, while credit rating agencies actually upgraded the ratings levels of certain major ISPs. Whether these elected representatives that are leaders of the relevant Committee are unaware of these basic facts is uncertain, though the facts are readily accessible to those who care to learn them before repeating oft-debunked falsehoods. *See* Letter to Tom Wheeler from Reps. Upton, Walden, Blackburn, and Latta, GN Docket No. 14-28 (filed May 13, 2014) (*May 2014 Upton et al. Letter*).

[200] *See Free Press July 2010 Broadband Framework Comments* at 90, explaining that building and maintaining networks requires substantial upfront investments, and that decisions regarding these investments are driven by factors that influence the value of the return on investment (ROI) as well as by underlying market structure realities. These factors are themselves in turn driven by other considerations – some interrelated – making overall investment decision-making a complex process that depends on the specifics of a given market at a given time. As we demonstrated those earlier comments, the five primary factors influencing the decision by an operator to invest as well as its ability to access debt capital are: 1) expectations about demand (certainly demand for bandwidth is growing); 2) supply costs (for cable ISPs, the cost-per-bit and cost-per-customer-served have dropped so much thanks to the efficiencies of DOCSIS3 that their operating margins are near 70 percent; for LECs, the ability to utilize vectoring and the general declining cost of infrastructure has lowered supply costs, and for those that aren't afraid to deploy fiber-to-the-home the costs there have declined by half in the past decade alone; wireless carriers are also seeing declining costs thanks to greater spectrum supply, efficiency gains from LTE, Wi-Fi

touch as to be practically invisible. Indeed, on a spectrum from most- to least-regulatory, the reapplication of common carriage is less regulatory than the proposed use of Section 706 authority, and it is far less regulatory than the past application of the totality of Title II to Regional Bell Operating Companies (RBOCs). Yet those RBOCs' largest period of investment and job growth came while they were under the full weight of Title II, during a period when they faced far more competition than they likely ever will again.

If there were even a kernel of truth to the CEOs' investment claims, the dispassionate investment analyst community would be the first to sound the alarm. But it has not. For example, in a recent note to investors, Bernstein Research stated:

> Title II reclassification is unlikely in this iteration of the net neutrality rules and wouldn't matter much even if it happened: We think investors are overly concerned about both the likelihood of Title II reclassification and the consequences on the sector if it were to occur. On the first, although Title II is the cleanest legal foundation for net-neutrality rules and there is little doubt

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offloading and small cell technologies, as well as a move away from the handset subsidy business model); 3) competition (in markets where technological change is relatively swift and competition is healthy, firms have a strong incentive to invest in order to keep up with or get ahead of their competitors. However, abandoning the basic no-unreasonable discrimination standard at the heart of Title II common carriage and thus permitting broadband providers to discriminate against content, applications or devices will create incentives for them to profit from artificial scarcity by delaying or avoiding network investments – and will in turn reduce investment in the adjacent content, application, and device sectors.); 4) interest rates and corporate taxes (there is no sign that the credit markets are tightening and interest rates appear to be in a near-permanent low state. Even if they were to increase, the ISPs enjoy high credit ratings and have shown no problems in accessing capital for repeated mergers even when many on Wall Street question the financial wisdom of those acquisitions. As for corporate taxes, major ISPs like Verizon are quite adept at legally avoiding paying any taxes); and 5) general economic confidence (uncertainty about the economy can translate into uncertainty about demand, and in turn impact a firm's confidence for investing in its own business as well as the confidence of institutional investors, many whom are averse to capital investments even in boom times. However, the data from the recent recession suggests that the ISP sector may be somewhat immune to the financial impacts from low economic confidence, because not only do these companies offer a product many consider an essential service, it is also a product that many people turn to during times of recession as they curtail other forms of entertainment and leisure).

> that the Commission has the authority to reclassify broadband, it is very challenging politically and – if the FCC was planning to take this path – would likely have been more prominent in the proposed rules released in May. That being said, we think the option is, and will remain, on the table (e.g., if the next iteration of the rules is once again challenged and overturned the Commission will have little choice but to reclassify). We think, though, that even if broadband were to be reclassified in the next few months or at some point in the future, there is little chance that the Commission would use its authority to regulate broadband pricing, as no Chair would want to return to being a price regulator unless explicitly directed by Congress.[201]

There is nothing particularly insightful about Bernstein's conclusion and it shouldn't be surprising to anyone who follows the Commission or the financial side of this industry. Indeed, the collective yawn from investors in 2014 mirrors the reaction to reclassification in 2010 from investors[202] as well as providers, including incumbents,[203] new entrants[204] and

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[201] *See* Paul de Sa *et al.*, "U.S. Internet and U.S. Telecoms: Why the Current Net Neutrality Debate Does Not Matter for Investors," Bernstein Research, July 9, 2014.

[202] For example, responding to the initial investor over-reaction to Chairman Genachowski's May 6, 2010 announcement (which was very short-lived, confined mostly to cable stocks, and as we discuss below, tied up with investors general freak-out over the EU debt crisis), Merrill Lynch released an investor note stating that "the FCC's 'Third Way' reclassification largely keeps the status quo intact . . . . [W]e see no transformative change in our [c]able thesis, creating a buying opportunity on market fear over the specter of regulation. . . . [A]ny Third Way regulation will have no impact on [c]able growth." *See* Jessica Reif Cohen, "FCC Decision Centered on Net Neutrality; Not Overreaching," BofA Merrill Lynch Research, May 6, 2010. A Morgan Stanley research report issued on June 17, 2010 asserts that the issue should not impact investment, stating, "We believe that most actions being considered are unlikely to impact industry financials in the near-term. Also, today's NOI supports our view that the FCC seeks to use Title II to restore its former regulatory authority around net neutrality and not to seek more onerous regulation (e.g. price regulation, wholesaling)." *See* "Cable/Sat & Telecom: No Surprises As FCC Begins Broadband Reg. Review," Morgan Stanley Research Reports, June 17, 2010.

[203] *See, e.g.*, *supra*, note 198.

[204] Though actual new entrants are few and far between (due to the high barriers to entry in both wired and wireless telecom markets), in 2010 the wireless start-up Lightsquared was viewed as a viable new competitor. And the CEO of Harbinger Capital Partners (the group funding Lightsquared) Philip Falcone said in June 2010, "I understand that there has been a fair amount of debate about the regulatory framework that the FCC has chosen for broadband Internet services. . . . I have made a substantial investment in what I expect will be a major new broadband wireless network in the United States. In that respect, I can say

established non-incumbents.[205] As detailed above, the Commission has largely abandoned price regulation of any sort even in pure monopoly telecom markets, and has never regulated prices in the CMRS markets even as that market has become highly concentrated. Indeed, based on the few formal Section 201/202 complaints the FCC has addressed over the past two decades, it is clear there is a deep institutional reticence to intervene in any non-monopoly market; and even in monopoly markets action of any sort is rare.[206] The other possible regulations that *might* impact *perceptions* about Return on Investment (ROI) such as resale (*i.e.* § 251(b)(1)) don't even apply to CMRS carriers, and even the most aggressive FCC could not legally apply them to the majority of ISPs since that part of the law applies only to LECs.

The actual responses by analysts and the broadband companies to the return of basic common carriage for IP transmission reflects the reality that limited Title II classification would in practice do nothing more than preserve the status quo. Analysts, investors and the providers themselves all understand that this industry cannot function without any regulatory oversight at all. The FCC has demonstrated that it has the ability to effectuate a light touch

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that the FCC's broadband policies continue to actively encourage Harbinger's and others' multi-billion dollar investment in broadband innovation. It's a truism that investment goes where it is welcome and this FCC, under Chairman Genachowski's leadership, has gotten it right." *See* Press Release, Harbinger Capital Partners, "Statement on the Federal Communications Commission's Broadband Policies," June 17, 2010.

[205] For example, twelve CEOs of competitive local exchange carriers and independent Internet service providers, including companies like tw telecom and XO Communications, issued a joint statement supporting the FCC's Third Way proposal. The letter stated in part: "We add our collective voice to those supporting the Third Way and commend the FCC for showing the kind of innovative thinking and leadership critical in a broadband world." *See* Press Release, "Broadband Providers Support FCC Proposal," June 15, 2010.

[206] The continued inaction in the Separations Freeze and Special Access dockets are a prime example of how unwilling the FCC is to act, even when markets are clearly monopolies and where the states or multibillion dollar corporations are requesting relief.

through Title II, and it must retain and use this authority for broadband in order to promote further investment and innovation in the Internet ecosystem.

B. The Greatest Period of Investment in the Telecom Industry Occurred During the Most Forceful Implementation of Title II.

But even if the full weight of Title II were applied to mass market broadband services – something that no one is asking for, and that is not even a possibility given that much of Title II is specifically written for Baby Bells' provision of telephony – it does not follow that such a policy would harm investment. The mere application of limited portions of Title II (*e.g.*, the same Sections 201, 202 and 208 that have always applied to CMRS services) certainly wouldn't be "devastating to the United States," as NCTA spokesman Brian Dietz outlandishly claimed in a note to reporters.[207]

We can say with extreme confidence that a return to Title II would not harm investment because we lived through a period of time when that law was applied across the industry; as it so happens, that same period of time that saw the greatest level of investment in the telecom industry that this country has ever seen, with most of that investment coming from the companies subjected to the full force of the law. Those predicting Title II doom don't seem to understand (or care) that their proposition can easily be evaluated, and that the results of this evaluation completely contradict their talking points about chilled investment.

First, let's consider investment by all companies subjected to Title II, before and after the adoption and implementation of the Telecommunications Act of 1996, as well as the subsequent period of deregulation (either by forbearance, rule changes, or reclassifying services out of Title II).

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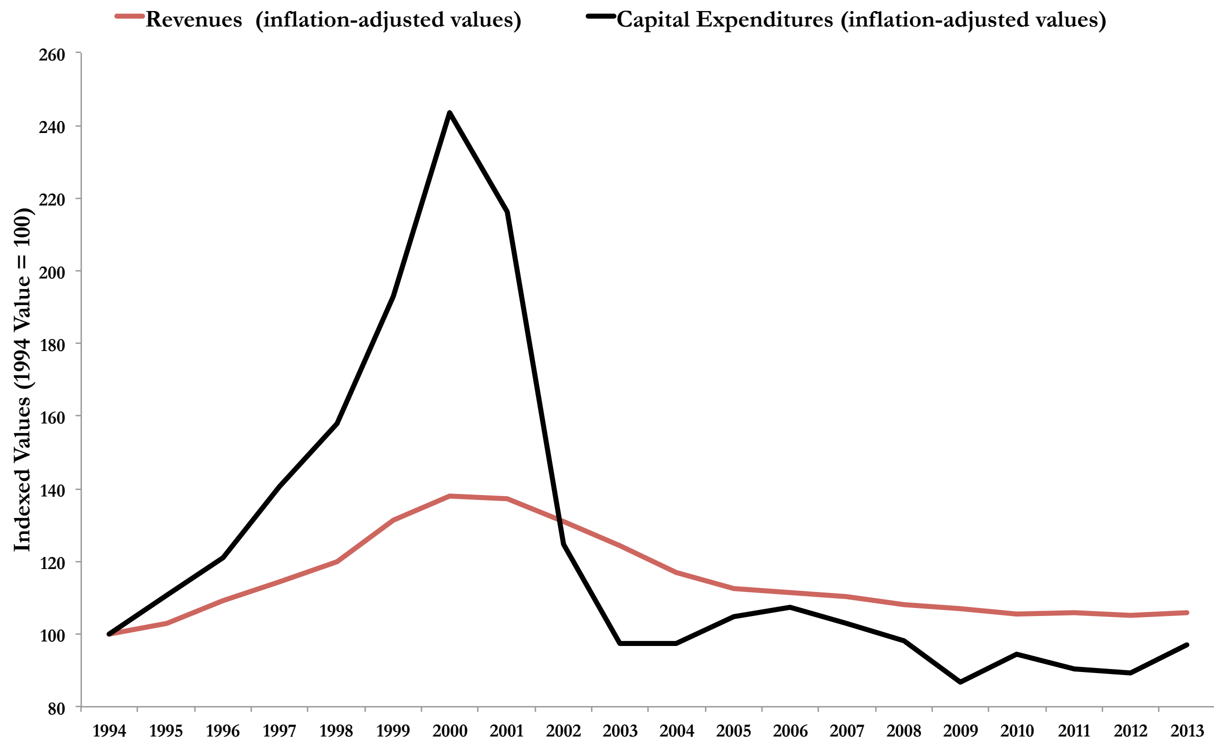
[207] *See* Matt Sledge and Zach Carter, "Broadband Companies Nervous Over Latest Net Neutrality Push," *Huffington Post*, May 12, 2014.

Below in Figure 1 we present the capital expenditures and revenues of the companies that comprise the bulk of the U.S. telecommunications service industry and that were and/or are subject to common carrier treatment under Title II. That means the data includes historical values for the old Interexchange Carriers like AT&T, MCI and Qwest; for the old RBOCs; for other ILECs like CenturyLink, Fairpoint and Frontier; as well as all predecessor and successor companies, in order to maintain comparability across the 20-year period; but the data does not reflect values from cable Multiple System Operators (MSOs), who largely operated outside of Title II during this period. The revenue and capital values are adjusted for inflation (*i.e.* restated in 2013 dollar-values), and are indexed to their 1994 values, which allows for easier comparison of the change in each over time.

As Figure 1 shows, it is simply inaccurate to suggest that the impact of Title II regulations or baseline Title II regulatory authority on investment decisions is automatically negative. During the period from 1996 to 2014, the telecommunications sector saw the imposition of substantial regulation followed by equally substantial deregulation. In examining investment patterns over these years, it appears that the implementation of the expanded version of Title II may have actually helped encourage investment – and that deregulation and consolidation might have decreased investment.

Figure 1: Telecom Services Industry Revenues and Investment (1994–2013) – Changes from 1994 Values (inflation-adjusted)



Source: Free Press Research based on company SEC filings. Data reflects year-end reported values for AT&T, Verizon, CenturyLink, Frontier, Fairpoint, Cincinnati Bell, and Sprint as well as all predecessor and successor companies in order to maintain comparability across the 20-year period (*i.e.* in order to capture the impacts of mergers, acquisitions and divestitures). Companies included are: AT&T, BellSouth, Southwestern Bell, PacTel, SNET, SBC, Ameritech, Cingular Wireless, AT&T Wireless, Verizon, Bell Atlantic, NYNEX, GTE, Qwest, US West, CenturyLink, Embarq, Pacific Telecom, Madison River, Sprint-Florida Inc., Sprint, Nextel, Clearwire, Alltel, Frontier, Fairpoint, Global Crossing, Level 3 Communications, Broadwing, Cincinnati Bell, AT&T (pre-merger CLEC), MCI (pre-merger CLEC), WorldCom (pre-merger CLEC), Qwest (pre-merger CLEC).

Connecting the history to the changes shown in Figure 1 helps to tell a very clear story. The 1996 Telecom Act was signed into law in February that year, and then the FCC set about the long and arduous task of implementing it. Investment and revenues were already on the rise in the telecom sector, spurred in part by technological advances that enabled the mass marketing of new services and gave rise to new companies that offered those services.

The period following the initial implementation of the Act saw a steady growth in revenues and a sharp increase in capital investment. In 1998, the FCC affirmed that DSL

was a Title II telecommunications service.[208] In 1999, it affirmed that the Bell Companies had to offer DSL as an "open access" service, meaning that third-party ISPs could serve residential customers by leasing access to these incumbents' networks.[209] And of course the late-1990s saw the full imposition (and litigation) of the most controversial aspects of the 1996 Act, which codified the FCC's practice begun in *Computer III* of requiring ILECs to unbundle network elements for use by competitors at regulated rates.

Yet despite all of this strong regulatory intervention to promote competition and open networks, the years following the adoption of the 1996 Act saw substantial growth in telecom industry revenues and jobs[210] and even larger growth in investment. This was particularly the case for the RBOCs. The RBOCs that now comprise AT&T and Verizon were alone responsible for 34 percent of the growth in the industry's capital expenditures between 1994 and 2000, and 49 percent of the industry's revenue growth. If Title II were bad for investment or business, that would show up in the data during this period. It doesn't.

The 2001 recession and the economic impact of the September 11th attacks took their toll on the U.S. economy, and the telecom sector wasn't spared. But as the economy improved, so too did telecommunications service industry investments, all under Title II.[211]

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[208] *See Advanced Services Order*.

[209] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order and Fourth Report and Order, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

[210] *See Free Press July 2010 Broadband Framework Comments* at 100-104.

[211] The story for revenues is a little more complicated due primarily to the entry of cable MSOs into the telecom market, the FCC-authored destruction of the CLEC industry, and the technology-driven decline in long distance revenues. However, as we show below, when the MSOs are added to this analysis the story on investment is the same, and overall industry revenues are 27 percent higher today in inflation-adjusted terms than in 1994.

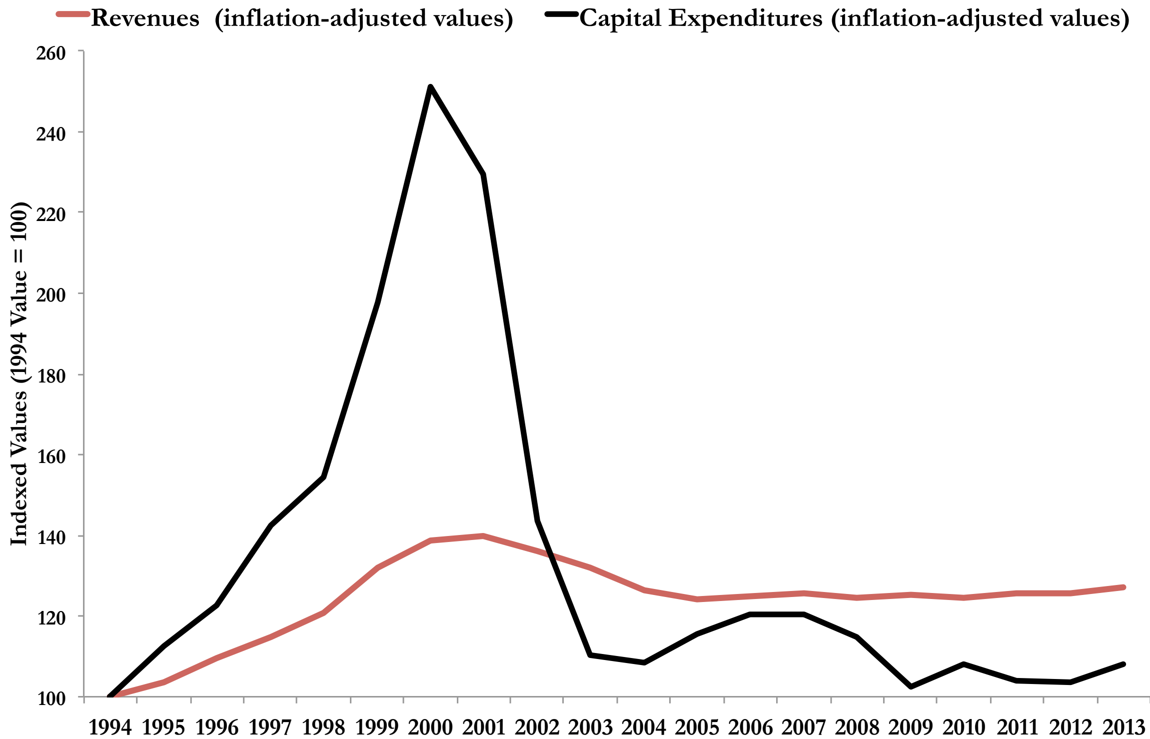
By August 2006, there was no longer common carriage in advanced services. This was the effective date of the *Wireline Broadband Order*, which killed off what remained of the residential CLEC and third-party ISP industry. This followed the FCC's other moves away from the 1996 Act's competitive blueprint, namely the 2003 *Triennial Review Order*. And as Figure 1 shows, investment declined following these actions that substantially removed most Title II obligations. And this is despite the investments made by the Baby Bells in their wireless networks as well as the limited fiber-to-the-home and fiber-to-the-node deployments. AT&T and Verizon's combined annual capital expenditures are down 8 percent from the end of 2006, while their revenues are up.

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.

So, the data are crystal clear: Title II didn't harm investment or jobs. Indeed, 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 greater level of competition Title II created helped stimulate the Bells to invest more in their networks, to say nothing of the massive investment it spurred in many other industries that rely on open communications networks.

Figure 2 below augments the data from Figure 1 by adding the revenues and capital investments made by the cable industry. The lessons do not change one bit.

Figure 2: Telecom and Cable Industry Revenues and Investment (1994–2013) – Changes from 1994 Values (inflation-adjusted)



Source: Free Press Research. See notes to Figure 1. Data above reflect those companies tracked in Figure 1, with the addition of the major publicly traded Cable MSOs: Comcast, Time Warner Cable, Cablevision and Charter (these four MSOs account for three-quarters of the cable MSO subscribers). Note that unlike Figure 3 below, to maintain comparability between the data reported by the telecoms and cable MSOs, values here include total cable MSO capital expenditures, not just plant investments.

C. The Greatest Period of Cable Industry Investment Came in the Late 1990s During a Time When The Industry Fully Expected its Two-Way Telecom Offerings to Be Covered Under Title II. Cable Industry Investment in Physical Infrastructure Declined Sharply Following the 2002 Cable Modem Declaratory Ruling.

Are the above facts enough to put to this false notion to rest, that a return to a light application of the core of Title II will harm investment? Probably not, since the parties perpetuating this myth have no incentive to stop, and the politics of the moment do not reward the Commission itself for telling the truth on this issue.

Indeed, representatives of the cable industry continue to boast about their infrastructure investments, making the case that these expenditures occurred *because* the

Commission shielded them from common carrier obligations.[212] But as was the case in the telecom service industry, the truth about cable's investment under different regulatory expectations and frameworks is very different from the story the cable industry tells.

The cable industry's average annual network investments were *250 percent higher* in the years before the FCC declared cable modem was not subject to Title II than it has been in the subsequent years. Indeed, *the highest year in history for cable network investment* came *following* the 9th Circuit's ruling that cable modem service contained a Title II common carrier offering.[213] Following this ruling, for the next 21 months until the FCC handed down its *Cable Modem Declaratory Ruling*, the cable industry invested $36 billion in network deployments and upgrades. However, in the 21 months following the FCC's classification order, cable's network investments declined to $26 billion, nearly 30 percent lower than during the time it appeared cable modem would remain a Title II service.

The cable investment story, like the LEC investment story, is one of investment in response to greater competition – competition in part produced by public policy. In the mid- to late-1990s, largely in response to the entry of satellite into the pay-TV markets, the MSOs invested heavily in building hybrid fiber-coaxial middle-mile and long-haul networks in order to differentiate their services from satellite through Video On Demand (VOD) offerings as well as two-way telecommunications services.[214]

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[212] *See, e,g*, "Why It's a Good Thing Broadband Isn't a Common Carrier," *NCTA Platform* (Jan., 27, 2014).

[213] *See AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

[214] *See, e.g.*, Testimony of Blair Levin, Stifel Nicolaus & Company Inc., Before the United States Senate Committee on the Judiciary, on the matter of Reconsidering Our Communications Laws: Ensuring Competition and Innovation, June 14, 2006.

And as we discuss below, the inherent capacity advantages of coax over copper, combined with the channel bonding capabilities of DOCSIS3 and the additional capacity freed up by phasing out analog TV services, has all combined to dramatically reduce the cable industry's need for capital investments since the mid-2000s. Today less than 10 percent of cable industry capital expenditures go to the physical plant; put another way, only about 1 percent of cable company revenues are devoted to physical network investment.

One detail lost in the discussion on industry investment is the difference between network investment and total capital investments. Capital investments of course include money spent on the fiber and coaxial cables that carry our data and deliver the 500 channels that none of us watch. This is known as investment in the "physical" or "plant" network. But capital investments also include expenditures on things like set-top boxes, which have nothing to do whatsoever with "broadband investment," though that is how the cable industry prefers to characterize all of its spending. Fortunately, cable companies break down their spending into plant and non-plant investments in their reports to investors. This data allows us to separate out the non-broadband investments from the money that is actually spent on physical networks (something that is critical to understanding the relationship between regulation and network investment, as well as understanding the future trajectory of the U.S. broadband market).

Figure 3 below presents the investments made by the cable industry in its physical plant (*i.e.*, the capital used for line extensions and upgrades or rebuilds of existing lines)[215]

[215] *See, e.g.*, Time Warner Cable Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, For the Fiscal Year Ended December 31, 2013, Commission File No. 001-33335, at 50 (*TWC 2013 10-K*). Capital expenditures for "line extensions" represent "costs incurred to extend TWC's distribution network into a geographic area previously not served. These costs typically include network design, the

from 1996 though 2013. The investment values are adjusted for inflation (*i.e.*, restated in 2013 dollar-values), and are indexed to their 1996 values, which allows for easier comparison of the change in each over time.

The data shows the cable MSOs following the same *initial* pattern as the telecommunications service providers: massive increases in network investments in the late-1990s, which cratered as the initial deployments were completed and the dotcom bubble burst. Like the telecoms, cable's investments saw a small uptick after the economy recovered and as the mid-2000s housing boom took off (necessitating greenfield network deployments to new housing developments). And as was the case with telco investment, cable also trailed off after 2007, stabilizing slightly after the end of the 2008–2009 recession.

However, unlike the telecoms, cable's current investment is *well below* what it was in 1996. In inflation-adjusted terms, the telcos' 2013 capital investments are 20 percent

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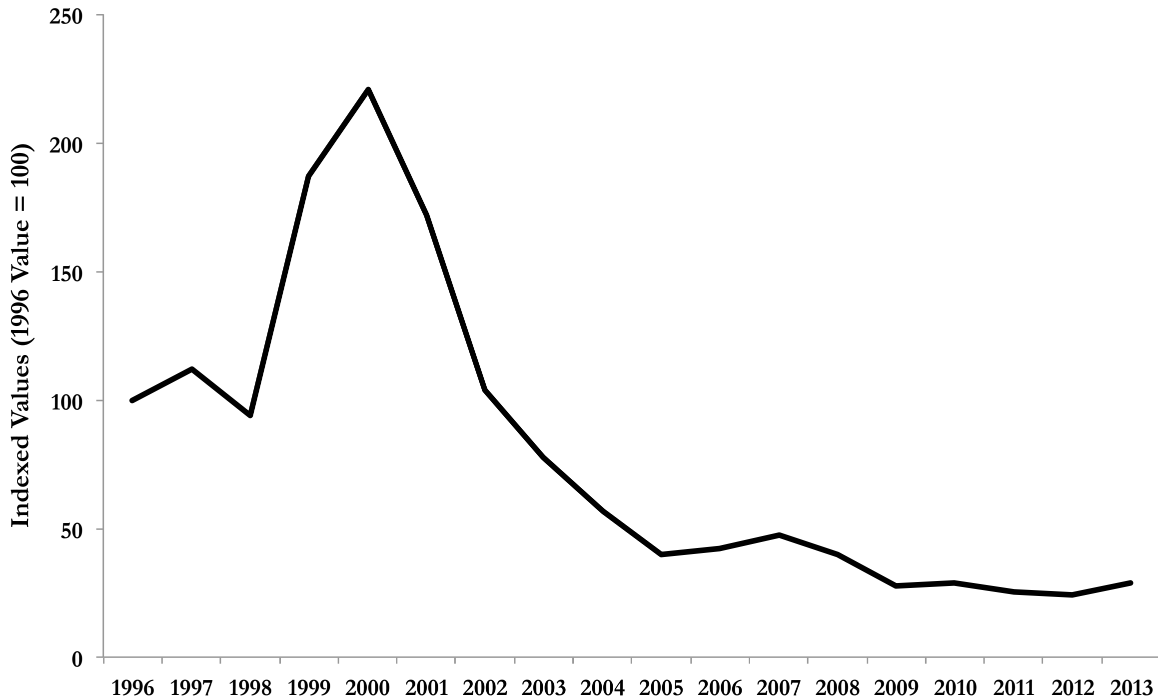
purchase and installation of fiber optic and coaxial cable and certain electronic equipment." Capital expenditures for "upgrades/rebuilds" primarily represent "costs incurred to upgrade or replace certain existing components or an entire geographic area of TWC's distribution network. These costs typically include network design, the purchase and installation of fiber optic and coaxial cable and certain electronic equipment." Compare these values (which are captured in our Figure 3 below) with expenditures for "customer premise equipment," which "represent costs incurred in the purchase and installation of equipment that resides at a customer's home or business for the purpose of receiving/sending video, high-speed data and/or voice signals. Such equipment includes set-top boxes, remote controls, high-speed data modems (including wireless), telephone modems and the costs of installing such new equipment;" or "support capital," which "represent all other capital purchases required to run day-to-day operations. These costs typically include vehicles, land and buildings, computer hardware/software, office equipment, furniture and fixtures, tools and test equipment."

lower than they were in 1996. Cable's plant investments are more than 70 percent lower today than they were in 1996.[216]

Figure 3: Cable Industry Network Investment (Line Extensions, Upgrades & Rebuilds) (1996–2013) – Changes from 1996 Values (inflation-adjusted)



Source: Free Press Research based on company SEC filings and data collected by SNL Kagan. Data reflects year-end reported values for Comcast, Time Warner Cable, Cablevision and Charter, which collectively control more than three-quarters of all cable MSO subscribers.

And while cable companies like to brag about how much they are investing, the untold truth is that nearly all of this investment is in the pay-TV side of the business, particularly in the energy inefficient[217] and technologically outdated set-top boxes that most

[216] Illustrating the impact of set top boxes on cable's capital expenditures, total cable MSO capital investment in 2013 was actually 50 percent higher than in 1996. But as we discuss *infra*, in 1996 less than one-third of cable's capital spending was in non-plant areas, while today these non-physical network investments comprise more than 90 percent of all capital expenditures.

[217] *See, e.g.*, Ralph Vartabedian, "Cable TV boxes become 2nd biggest energy users in many homes," *L.A. Times,* June 17, 2014 (noting that a single box can consume as much as $8 per month in electricity.) Many homes now have to rent a box for every television, as the Commission has enabled operators to force this practice on consumers without fixing its broken implementation of Section 629.

consumers are now forced to rent at ever-escalating cost.[218] Figure 4 below shows the composition of the cable industry's capital expenditures broken down into three categories: percent of investment in new deployment; percent of investment in upgrading existing deployment; and percent of investment in set-top-boxes and other non-plant capital.

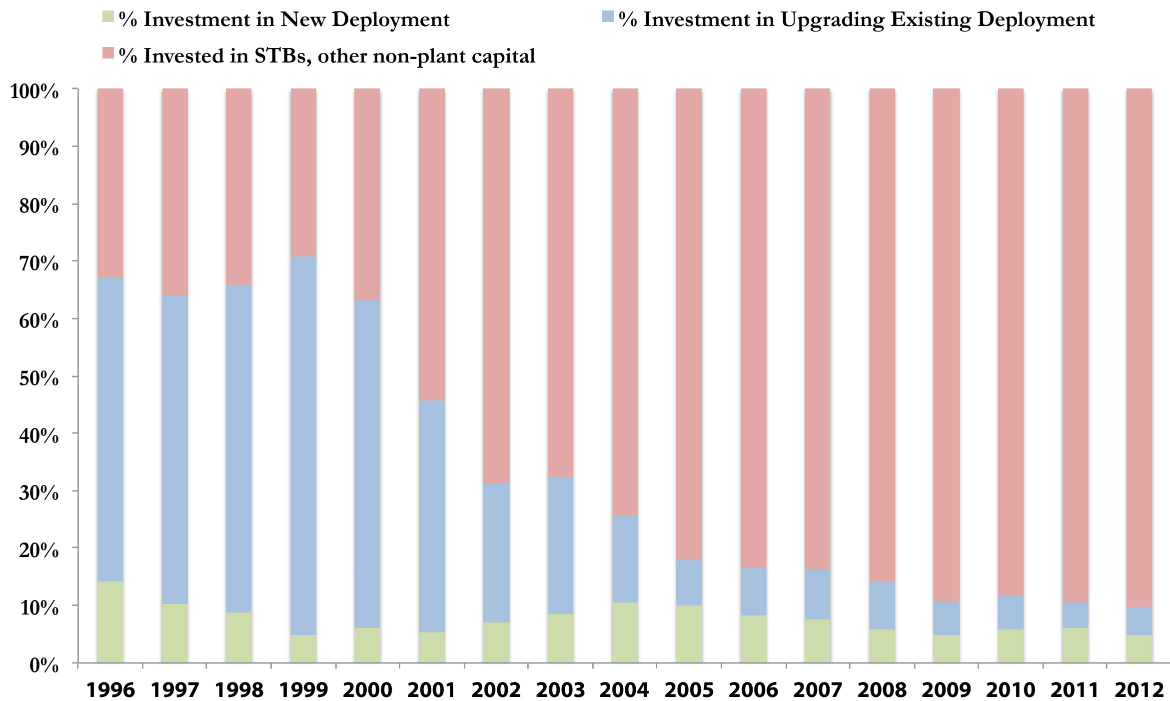
The results shown in Figure 4 should (but won't) quiet the cable industry's bragging about its broadband investments. Actual plant investments (line extensions and upgrades/rebuilds) comprised 67 percent of the industry's capital investments in 1996. This peaked at 71 percent in 1999, and then declined sharply. Today, cable's network investments account for less than 10 percent of the industry's capital spending. Put another way, today *only about 1 percent of cable company revenues are devoted to extending new lines or upgrading existing plant*. The proportion of cable investment in plant extensions and upgrades actually declined during the period when MSOs were migrating from DOCSIS2 to DOCSIS3, as well as repurposing analog QAM bandwidth for use in digital and IP transmission.

Again, this decline in network investment should come as no surprise, given that aside from deployments to new housing developments, cable companies have not expanded their national footprint since the 1990s. Also, the capacity in the cable last-mile coax is so

[218] *See, e.g.*, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, MM Docket No. 92-266, (May 16, 2014). This annual survey noted that "most equipment prices increased on an annual basis. Increases in the overall price for the most commonly leased equipment ranged from 4.4 percent for basic service, to 4.2 percent for expanded basic, to 3.9 percent for the next most popular service." A perhaps strange result given the massive decline in the costs seen in every other consumer electronics market. Also notable is that the equipment price increases were all substantially higher in markets that the FCC has deemed "effectively competitive" than they were in other markets.

great, and the cost of upgrading from DOCSIS2 to DOCSIS3 is so small,[219] the late-1990s investments in hybrid fiber-coaxial infrastructure were enough to position cable MSOs for the gigabit era without requiring a relative increase in capital spending.

Figure 4: Cable Industry Investment (1996–2013) –
Proportion of Capital Spending Invested in New Deployment,
Network Upgrades and Set Top Boxes/Other Non-Plant Capital



Source: Free Press Research based on data collected by SNL Kagan.

Cable is by far the dominant broadband platform in America, and that is not expected to change given the telecom companies' preference for targeting their investments in the wireless market. Though Google's fiber experiment has shown that in most areas a company with no existing infrastructure can deploy gigabit fiber for less than $800 per home passed (about half the cost that Verizon faced in its initial FiOS deployments some seven years earlier), the short-sightedness of the LECs and their Wall Street backers won't let them make

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[219] *See* Karl Bode, "DOCSIS 3.0 Can Be Funded By 'Couch Change'," *DSL Reports*, May 9, 2007 (quoting a Comcast executive stating "Cable can go deploy DOCSIS 3.0 for a couple billion dollars – It's the kind of money we can find in the sofa cushions.").

the leap to nationwide fiber. Mergers are more expensive and don't position the LECs well for the long term, but investors are willing to fund them since a reduction in competition brings these investors a more tangible "benefit" and lower risk than capital spending that promotes new competition.

So *this* is the reality of broadband investment in America: cable is done investing because it doesn't need to invest any more in order to offer multiple gigabits of capacity to 90 percent of Americans. The ILECs won't invest in new capacity that could effectively compete with cable, since they fear the reprisals from Wall Street that will follow any uptick in capital spending (see below for discussion of how investors punished Verizon for its FiOS investments). Thus, the concern about a return to common carriage and its impact on investment is misplaced and bizarre. Even if the Commission were to regulate cable broadband the way it regulated Ma Bell in the mid-19th century (something that no one wants and that would never happen) it would not impact *network* investment one iota, since the network was built more than a decade ago.

Cable's characterization of the results from a return to the common carrier principles in the Communications Act are particularly disingenuous when you consider that cable's pay-TV business is far more heavily regulated than would be the case for broadband under basic Title II. In fact, the basic application of Title II to broadband would make that industry the *least* regulated when compared to the POTS, CMRS or MVPD industries.

We hope that the Commission and other policymakers learn and understand this history, for this debate cannot be a legitimate one if basic historical facts are replaced by incorrect beliefs. The truth about investment in the telecommunications industry is rather mundane. Following the 1996 Act there was massive investment by common carriers,

wireless carriers, and cable companies (even when there was an assumption and an industry promise that cable would provide a "telecommunications service"), and by incumbents and new entrants alike. The 1996 Telecom Act (as well as the 1992 Cable Act) played a major role in all of this by jumpstarting competitive entry into both the telco and video markets. But these policy changes also coincided with a major leap in computing. This leap, combined with a strong economy in the mid-1990s and the corresponding willingness for investors to reward and not punish capital investments, led to massive network investment. Much of this investment was not in the last mile: it was in the guts of the communications system (*e.g.*, intercity fiber; hybrid fiber-coax), and it was a bubble fueled by the rapid adoption of home computers and dial-up Internet services.

But this bubble investment was not wasted, as it enabled a steady growth in revenues and new lines of business that would not have otherwise been possible. And despite all of the Commission's retail-level focused deregulation, and generous tax policies, there has never been a corresponding massive investment in the last mile.

For cable, there's simply no need because the coax wires it put in the ground and attached to our houses three decades ago have multiple gigabits of capacity. For the ILECs, they either skimped on their investments (choosing fiber-to-the-node over fiber-to-the-home); targeted their investments to the most lucrative suburbs; and/or simply focused on wireless. Organic market growth, the desire to not completely lose all wireline market share to cable, and policies that reward investment over consolidation are the only things that might result in the ILECs finally fulfilling their 20-year old promises to bring fiber to every home.

One thing is certain: the Commission proceeding down the path that this *Notice* sets

out, and once again for no good reason avoiding common carriage, is most certainly not going to promote investment. Giving broadband carriers a green light to blatantly shut down the open communications path and impose a QoS-driven model of artificial scarcity will not incentivize those very same companies to make investments that would then eliminate that profitable scarcity.

D. The 2010 Third Way Proposal Did Not Cause Any Short-Term or Long-Term Harm to ISP Market Valuations.

The above analysis focused on the capital investments made by the cable and telecom carriers. But there is also an incorrect belief that a return to common carriage will depress the *market valuations* of these carriers, and in turn make it more difficult for them to borrow capital. For example, in the *May 2014 Broadband for America Letter*, the major ISP CEOs said that "the potential threat of Title II had an investment-chilling effect by erasing approximately ten percent of some ISPs' market cap in the days immediately surrounding the Title II announcement in 2009/10."[220] The letter from Rep. Upton sent the same day claimed that "when the FCC briefly considered its 'third way' implementation of Title II several years ago, broadband provider stocks dropped sharply."[221]

Forget for a moment the CEOs' odd confusion about the timing of Chairman Genachowski's Third Way proposal in May of 2010, not "2009/10." The notion that this announcement was itself responsible for a change in ISP market valuations is simply incorrect. To show why, let's first review the timeline surrounding that May 6th, 2010 announcement.

On April 28th, 2010 (one week prior) cable stocks in particular were outperforming

[220] *See May 2014 Broadband for America Letter.*

[221] *See May 2014 Upton et al. Letter.*

ILEC stocks and the broader market. This stemmed from first quarter 2010 earnings reports. For example, Comcast on April 27th reported results that outperformed analyst predictions, boosting its share price by 10 percent to a 52 week high.[222] This is noteworthy, because investors have a tendency to get over-excited as much as they have a tendency to get over-anxious. In other words, Comcast and other cable MSOs likely were over-valued in the week leading up to the Third Way announcement. That despite the fact that speculation about possible reclassification existed for a month prior to Comcast and other ISP stocks seeing new highs. So if investors were concerned, it did not show up in the weeks following the April 6th release of the *Comcast v. FCC* decision.

On May 3rd, the *Washington Post* reported that Chairman Genachowski was leaning against reclassification.[223] But despite this report, Comcast shares lost 3.2 percent of their value over the next 48 hours. Some of this was likely due to ongoing investor uncertainty surrounding Comcast's acquisition of NBCU. Indeed, on May 5th Comcast resubmitted economic studies about that transaction to the Commission, which had previously stopped its merger review shot clock.[224]

On the evening of May 5th, after the markets closed, the Chairman's staff alerted reporters via email to expect an announcement the following morning. The email stated that Chairman Genachowski would announce a "third way" approach that the Commission said would strike an appropriate balance "between a weak Title I and a needlessly burdensome

[222] *See, e.g.*, Robin Flynn, "Comcast shares hit 52-week high on solid ARPU growth," *SNL Kagan*, April 29, 2010.

[223] *See* Cecilia Kang, "FCC Chairman Genachowski expected to leave broadband services deregulated," *Wash. Post*, May 3, 2010.

[224] *See* Tim Doyle, "Comcast files economic reports; merger review should resume," *SNL Kagan*, May 5, 2010.

Title II approach."[225] The following morning the FCC made the Third Way proposal official. Most 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 the above-mentioned 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 (discussed just below).

On May 10th, top cable industry analyst Craig Moffett (then at Bernstein Research) downgraded cable stocks to neutral,[226] but this had no impact at all: cable stocks outperformed the broader market that week immediately following the Third Way announcement.[227] The Commission's timing was fortuitous, because it preceded Genachowski's appearance at NCTA's annual convention by less than a week. On May 11th, Comcast CEO Brian Roberts downplayed the impact of Third Way at NCTA Cable Show, stating that "I honestly don't believe the government is trying to turn the clock back," and adding that "the government is not a big worry."[228] Roberts specifically addressed the investment question, telling the audience that he expected the industry would to continue to invest.

Over the following weeks, Comcast was the only laggard amongst the ISPs in terms

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[225] *See* Sarah Barry James, "Genachowski seeks compromise on classification question," *SNL Kagan*, May 5, 2010.

[226] *See* Sarah Barry James, "Genachowski answers cable concerns about Title II," *SNL Kagan*, May 13, 2010.

[227] For the week of May 10th, 2010, Comcast stock rose 0.4 percent; Time Warner Cable increased 5.6 percent; SNL Kagan's MSO Index was up 2.1 percent; Kagan's ILEC index was up 0.6 percent; and its Wireless Carrier Index rose 1.1 percent. That week the Dow was *down* 1.5 percent; the NASDAQ declined 0.9 percent; and the S&P 500 dropped 2 percent.

[228] *See* Michelle Ow, "Top MSOs Weigh In on Reclassification," *SNL Kagan*, May 12, 2010.

of an even bigger rebound in market valuation, but this had nothing to do with the Third Way. On May 21st, the FCC issued yet another request for information from Comcast in the NBCU merger proceeding.

These events cannot be fully understood without knowing the context of the broader changes in the markets during that month. Whatever concerns investors had about the Third Way largely vanished within days, and paled in comparison to the larger macroeconomic jitters created by the European debt crisis and the financial meltdown in Greece. Yet despite the beating that most stocks took during the month of May 2010, some cable stocks were actually in the green, led by a strong rebound from Time Warner Cable and Cablevision in particular.[229] Cable shares overall ultimately were down 5.1 percent in May 2010, but this was better than the broader market declines of 10.6 percent for the NASDAQ and 9.1 percent for the Dow.[230]

On June 17th, 2010, the Commission released the Third Way NOI. This was preceded on June 10th by some of the first reports of then-FCC Chief of Staff Eddie Lazarus convening "secret backroom meetings" with industry stakeholders. By August these meetings had fallen apart amidst public scrutiny, though they had already served their

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[229] *See* Steve Birenberg, "Some cable stocks green in a sea of red," *SNL Kagan*, May 25, 2010 ("Quarterly earnings are in the rear view mirror, leaving investors to sort out specific news items that often are off the radar screen. However, what little news there has been is completely secondary to the punishing decline in the market related to macroeconomic fears originating in Europe."). The author noted that in his portfolio of 327 companies, only 10 were up that day, and five of those were cable stocks.

[230] *See* Michelle Ow, "Cable's early May rally dissipates, but public markets have still boosted sub values in '10," *SNL Kagan*, May 28, 2010 ("Investors responded positively to first-quarter earnings by the six publicly traded MSOs, and shares of the six MSOs in our PMV table rose an average 10.7% from April 28 to May 5. After the FCC on May 6 announced its proposal to reclassify broadband under selected Title II sections, shares dropped 6.1% but retained a 3.9% premium over the end of April. Even though the regulatory picture has improved during the month, broader market turmoil drove cable shares down an additional 8.7% on average by the end of the month.").

purpose with Verizon and Google announcing an agreed-upon policy framework.

So to review the facts: in the week prior to the May 6th announcement about the Third Way, buoyed by unexpectedly high earnings reports, cable stocks in particular were outperforming the broader market and thus had more to give back.[231] While all ISP stocks fell along with the broader market in the two days following the first news of the announcement, the cable stocks fell slightly more than the other ISP stocks and the broader market. However, this simply reflects a correction of the higher performance in the week prior. Any initial trader concern that arose following Genachowski's May 6th announcement passed within a very short period. To illustrate this, below in Figure 5 we present the change from the week prior to May 6th to three weeks after the announcement (i.e. a month-to-month change). This shows that not only was the broader market moving down, but the stocks of the companies calling for reclassification did *worse* than the ISP stocks. Unrelated sectors like Banking also did worse than the ISPs.

One could ask whether the Commission's potential return to common carriage had a longer-term impact. The Third Way item was released for comment at the June 17, 2010, open meeting, with the comment cycle closing on August 12th. So in Figures 6 and 7 we examine the changes in the share prices three and five months after the Third Way announcement (*i.e.*, the change from the week prior to the announcement through August 6th; and through October 6th). Here the comparison shows that the ISP sector vastly outperformed the broader market and the edge companies too, with the ISPs in the black

[231] For the week prior to the Third Way news breaking, Comcast was up 6.9 percent; Time Warner Cable was up 4.1 percent; SNL Kagan's MSO Index was up 5.6 percent; Verizon was up 1.2 percent; AT&T was up 0.04 percent; SNL Kagan's ILEC Index was up 0.5 percent; SNL Kagan's Wireless Carrier Index was up 0.6 percent. The Down was down 0.5 percent; the S&P 500 was down 0.8 percent; and the NASDAQ was down one percent.

(save for Comcast, which again was still dealing with a major merger).

Figure 5: The Third Way's Non-Impact on ISP Valuations – Month One

Month-to-Month Change in Share Prices
(% Change in 4/26/10 and 5/25/10 Closing Prices)

ISPs	% Change	Broad Market	% Change
Comcast	-7.4%	S&P 500	-11.2%
TWC	-1.7%	DJIA	-9.5%
AT&T	-5.6%	NASDAQ	-11.9%
Verizon	-1.4%		

ISP Sector Indices	% Change	Other Sector Indices	% Change
SNL Kagan ILEC	-3.8%	SNL Kagan New Media	-12.5%
SNL Kagan MSO	-6.0%	SNL Kagan US Banking	-13.5%
SNL Kagan Wireless	-4.0%		

Edge Companies/CLEC	% Change
Google	-11.0%
Yahoo	-14.9%
eBay	-14.7%
Earthlink	-6.4%

Source: Free Press analysis of SNL Kagan and public market data

Figure 6: The Third Way's Non-Impact on ISP Valuations – Month Three

Three-Month Post Announcement Change in Share Prices
(% Change in 4/26/10 and 8/6/10 Closing Prices)

ISPs	% Change	Broad Market	% Change
Comcast	-2.3%	S&P 500	-7.5%
TWC	1.2%	DJIA	-5.0%
AT&T	1.0%	NASDAQ	-9.2%
Verizon	2.0%		

ISP Sector Indices	% Change	Other Sector Indices	% Change
SNL Kagan ILEC	1.3%	SNL Kagan New Media	-10.1%
SNL Kagan MSO	-1.0%	SNL Kagan US Banking	-14.7%
SNL Kagan Wireless	1.1%		

Edge Companies/CLEC	% Change
Google	-5.9%
Yahoo	-17.5%
eBay	-12.7%
Earthlink	1.9%

Source: Free Press analysis of SNL Kagan and public market data

The three and five month post-announcement data should put this issue to rest. 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 Third Way.

Figure 7: The Third Way's Non-Impact on ISP Valuations – Month Five

Five-Month Post Announcement Change in Share Prices
(% Change in 4/26/10 and 10/6/10 Closing Prices)

ISPs	% Change	Broad Market	% Change
Comcast	-5.3%	S&P 500	-4.2%
TWC	1.6%	DJIA	-2.3%
AT&T	11.7%	NASDAQ	-4.8%
Verizon	16.0%		

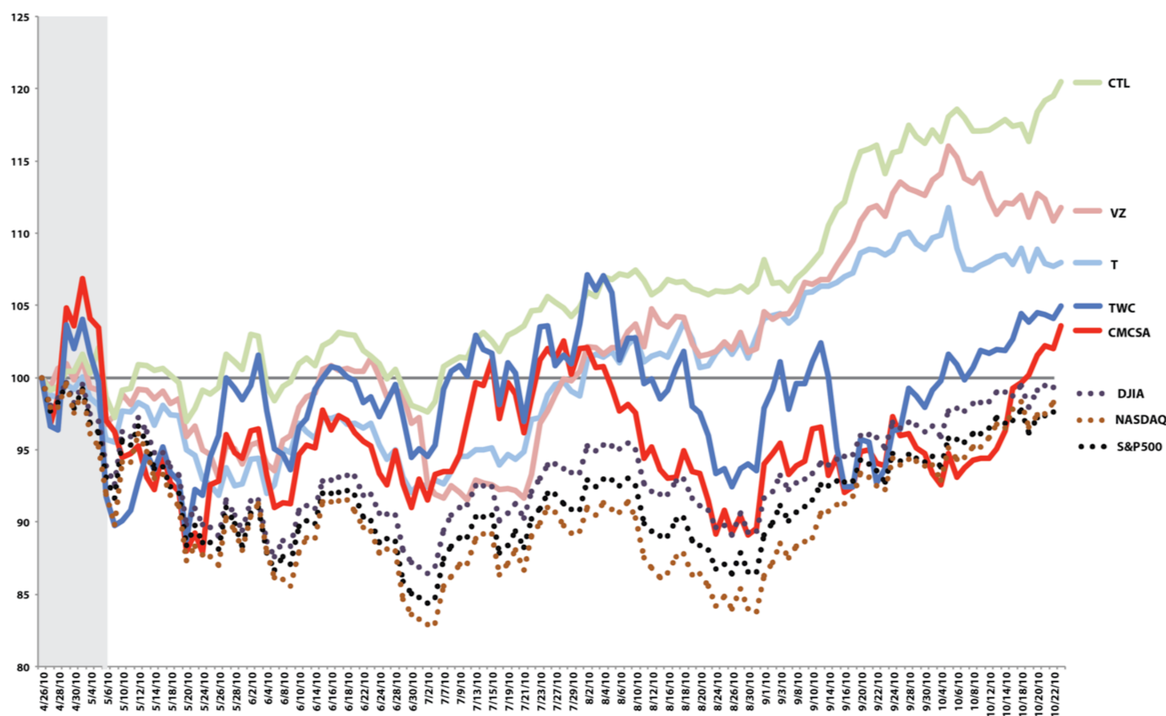
ISP Sector Indices	% Change	Other Sector Indices	% Change
SNL Kagan ILEC	12.8%	SNL Kagan New Media	-3.8%
SNL Kagan MSO	-2.8%	SNL Kagan US Banking	-16.5%
SNL Kagan Wireless	12.4%		

Edge Companies/CLEC	% Change
Google	1.2%
Yahoo	16.0%
eBay	0.1%
Earthlink	-0.9%

Source: Free Press analysis of SNL Kagan and public market data

Figure 8 below shows the market's movements over the six-month period beginning the week prior to the Third Way announcement. It shows the changes in Comcast, Time Warner Cable, AT&T, CenturyLink and Verizon share prices, along with the changes in the three major market indices. The key takeaway from this figure is that the ISP stocks throughout this period moved roughly in phase with the broader market, but they were outperforming the broader market. This reflects the reality that the fluctuations during this time were largely driven by macroeconomic concerns, but that investors still felt more comfortable with the ISP stocks than others. There's simply no evidence that the Third Way had any short-term impact on ISP market valuations. The data shows that the LEC stocks did particularly well during this period, despite the fact that because of the structure of the Act, the LECs had the most regulatory exposure to Title II in the absence of forbearance.

Figure 8: The Third Way's Non-Impact on ISP Valuations – Full Six-Month Period



Source: Closing prices for select companies and market indices, normalized to closing price on April 26th, 2010.

We strongly caution the Commission against ever making decisions based on the day-to-day movements of stock markets, as investors tend to overreact to good news, bad news and even no news (not to mention their institutional bias for market power abuses and against capital investments). However, the market data above strongly indicates that the Third Way proposal had no impact whatsoever on the ISP sector valuations, over the short- or medium-term. The movement of stock prices in such short terms is no indication of impact on any particular company's ability to access the credit markets (*i.e.*, the only quasi-legitimate reason that the Commission is allegedly supposed to care about the claims of this incorrect talking point). And even if it were, the one week period pre- and post-announcement shows only Comcast underperforming the broader market – barely.

However, the industry's talking points rarely die a dignified death, so it is likely that a retort to the above analysis will come in the form of a specific focus on the changes in

Comcast's valuation in 2010. This is of course misplaced, since there is not any legitimate reason that the Third Way proposal would have impacted Comcast alone. Indeed, it could be argued that the LECs would have the most exposure in the absence of certain forbearance due to the structure of Title II, yet all ILEC and wireless stocks were up one week post-announcement. But the real-time reporting explains clearly that ongoing investor uncertainty about the NBCU transaction was the source of any sourness on Comcast during the spring and summer of 2010.[232]

There is a reason it is the FCC, and not the talking heads regularly appearing on CNBC, that is entrusted with oversight of our nation's communications infrastructure. Legal and policy expertise and a record of understanding the public interest concept are far more important skills to have than the ability to successfully short a stock. However, if the notion that the FCC should watch the market's short-term movements is going to be afforded any weight, then we should be consistent in applying this analytical tool. And if we do, we see once again that Wall Street investors care way more about other realities than regulation.

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[232] For example, as shown above, by the end of May most of the ISPs had fully recovered despite market concerns about the EU debt crisis, with Comcast as the lone standout. However, this had more to do with investor concerns over the NBCU merger and little or nothing to do with the Third Way. BTIG LLC analyst Richard Greenfield wrote in a May 29th 2010 research report that "Comcast is proud of the attractive financial structure that enabled them to pursue NBC. However, 51%/49% joint ventures are far from ideal from an investor perspective. While Comcast has a cable networks division today, it is essentially just a cable company (given the two divisions relative size) – that all changes with NBC. We simply believe there are simpler ways to play the cable sector (such as CVC and TWC) and that investors who want cable network exposure (the core driver of Comcast's NBC joint venture) have plenty of pure play options at attractive valuations (such as VIA/B). While Comcast is likely undervalued at current levels, we have lived through enough major media mergers to realize that companies with this level of complexity usually trade at meaningful discounts to their peers and that their size usually causes operating performance to underperform their smaller, more nimble peers." *See* Chetan Ramani, "BTIG LLC analyst Richard Greenfield initiated coverage of Comcast Corp. with a rating of 'neutral'," *SNL Kagan*, May 29, 2010.

For example, right after FCC issued the *Wireline Broadband Order*, Verizon's stock did not increase. It declined because of ongoing Wall Street concern about the company's FiOS capital investment. In other words, investors *punished* Verizon for its (now highly profitable and sustainable) network investment, and ignored the fact that its broadband business was removed from any common carriage obligations.[233] The same result held for AT&T during August 2005. Both AT&T and Verizon shares declined after the Commission's decision. AT&T did not recover its value until nearly four months later (in part due to the FCC's Halloween approval of the AT&T-SBC merger). And Verizon's stock did not recover to its pre-August 5th value for six months. Both companies were slowly buoyed by their actual earnings performance, particularly those earnings reported for Q4 2005, which showed gains in wired broadband and record earnings in wireless. Also, investors finally seemed to realize that Verizon's long-term vision of using FiOS to capture cable's market share was actually likely to work.[234]

There's other evidence supporting the notion that changes to Comcast's market valuation in 2010 had everything to do with uncertainty about its NBCU merger and the EU debt crisis, and not Title II or Net Neutrality. The Commission and Justice Department

[233] *See* Michael Buckley, "Media Money: Verizon Hits 52-Week Low Despite Good Industry News," *SNL* Kagan, Aug. 9, 2005 ("In a move that should help telcos compete with cable Internet providers, the FCC on August 5th unanimously agreed to treat DSL as an 'information' rather than a 'telecommunications' service, thus avoiding traditional telephony rules such as those requiring RBOCs to lease their networks to competitors at regulated rates. The news failed to lift shares of telecom giant Verizon, however, which hit a new 52-week low of $33.04 on August 8th. Investors still seem wary of the many challenges facing traditional telcos and are uncomfortable with Verizon's projected $15.3 bil. in 2005 CapEx.").

[234] *See* Mari Rondeli, "Telco TV: Tales of Two Competitors," *SNL Kagan*, Feb. 28, 2006 ("[Verizon CFO Doreen Toben] told attendees FiOS TV penetration in Keller, TX, Verizon's first video market, has climbed to 23% in only five months, quickly approaching the five-year goal of 25%. In recently launched markets Temple Terrance, FL, and Herndon, VA, FiOS TV has surpassed 11% and 5% marks, respectively.").

required Comcast to agree to Net Neutrality and over-the-top video conditions as a part of the approval of that merger. Yet these conditions had no impact at all on Comcast's credit rating.[235] Indeed, this past February, even as it became apparent that Chairman Wheeler would seek to restore the vacated 2010 Open Internet rules, Comcast's credit rating actually increased (an upgrade that occurred prior to the Time Warner Cable merger announcement, which may undermine this increased confidence).[236]

We've spoken here of investors as if they are a monolith. In reality, they are the sum of their parts, and certain institutional investors have a more detailed understanding of telecommunications policy than others. Take for example Steve Birenberg, co-portfolio manager of the Entermedia Funds, who offered a level-headed view on the Third Way in the weeks following the Commission's initial announcement:

> [T]he proposed Title II regulations really are not too bad. Called "Title II Lite," the FCC is claiming the goal of the regulation is to re-establish its

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[235] *See* Taigh Khan, "Moody's: Conditional approval of NBCU deal does not affect Comcast ratings," *SNL Kagan*, Jan. 20, 2011 ("Moody's on Jan. 20 said it does not expect the requirements, many of them voluntary, as well as restrictions imposed by regulators on Comcast Corp. for its pending acquisition of NBC Universal Inc. to impact their potential for profitability or their credit ratings. The rating agency thinks its forecasts for the companies will not be impacted by regulatory intervention imposed as a condition for regulatory approval for completing Comcast's acquisition of 51% of NBCU from General Electric.").

[236] *See* Mikolo Ilas, "Fitch upgrades Comcast, units," SNL Kagan, Feb. 4, 2014 ("The rating agency also upgraded to A- from BBB+ the issuer default ratings of Comcast's wholly owned subsidiaries included in Comcast's cross-guaranty structure. The issuer default rating of NBCUniversal Enterprise Inc. was also raised to A- from BBB+. The outlook for all of Comcast's ratings has been revised to stable from positive, Fitch said Feb. 4. Fitch noted that Comcast's capital structure and financial strategy remain consistent and centered on reducing leverage to its target ranging between 1.5x and 2.0x. Fitch expects that Comcast's credit profile will continue to strengthen as 2014 unfolds. The agency also believes that Comcast's strong operating profile and solid free cash flow metrics afford the company a high degree of financial flexibility at the current rating category. In addition, the ratings incorporate sufficient capacity to accommodate limited merger and acquisition activity provided that the company's financial policy remains intact. Fitch does not expect any material change to Comcast's capital allocation strategy over the near term.").

> authority regarding broadband networks that a federal appeals court knocked down in the Comcast case when the cable giant attempted to restrict Internet use of its largest data consumers. Of the extensive regulations under Title II, the FCC plans to show forbearance on all but a half dozen. There is reason and precedent to believe the FCC's claims, as wireless has been regulated under Title II for many years with minimal to no restrictions on network build-outs, network access or monthly pricing to consumers.
>
> Furthermore, the real goal of the FCC is to enforce the Obama administration's policy of Net neutrality. Net neutrality is basically the status quo, and the status quo is a perfectly acceptable outcome for cable companies, even as they protest and demand the right to tier pricing and restricting large users of network capacity.
>
> Despite seemingly minimal impact from Title II, cable's poor history with regulators and in Washington generally leaves investors thinking that the FCC cannot be trusted in the long term. Sure, forbearance is great now, but what if the composition of the FCC changes, the political environment differs or business developments change? An easy retort, of course, is that all that has happened with wireless, and forbearance survived. . . . In the short run, I think cable stocks are oversold and have overreacted to the Title II developments. The stocks already have bounced off their post-Title II lows.[237]

In sum, while the views of the investor community are interesting, history shows that stock market traders often favor the short-term gain over the larger, long-term benefit, particularly when it comes to capital investment in natural monopoly industries. We think Chairman Wheeler put it best in a recent exchange with Commissioner Pai. Mr. Pai noted how certain broadcast stocks had moved lower following the FCC's announcement of its intention to partially close the Joint Sales Agreement loophole (stocks that now have all more than fully recovered). Chairman Wheeler responded, "that's a whole different issue. Are we talking about encouraging minority voices or protecting Wall Street barons?"[238] This is the right sentiment, one we hope the Chairman and the Commission apply in this context.

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[237] *See* Steve Birenberg, "Title II changes cable forecast from sunny to cloudy," *SNL Kagan*, May 18, 2010.

[238] See Lauren Wilson, "FCC Chairman Wheeler and Commissioner Pai Duke It Out Over Broadcast Diversity," *Freepress.net*, March 26, 2014.

We're talking about preserving and promoting the nation's open pathway for free speech, communications and commerce. That is the public interest question, not the fluctuations in the balances of billionaires' investment portfolios.

The Commission's actions in this proceeding should be based in the law and the truth. The data discussed in this section suggest that ISP investment decisions are not driven simply by regulation or the lack thereof. The data suggests that certain regulations designed to promote competition can in fact actually stimulate investment. Under a full application of Title II, telecommunications companies invested more than during any other period in history before or since, because the market for investment was ripe. It was ripe, in part, because the newly introduced statutory and regulatory mandate promoting competition worked to stimulate investment and innovation.

There is simply no evidence to suggest that a limited return to common carriage would negatively impact network investment in any manner whatsoever. In order for this to be true, the rules would have to substantially impact a network operator's potential return on investment. However, no opponent of common carriage has provided any explanation of how the application of the core of Title II will lower ROI. And they can't, because there simply isn't one (and certainly not an explanation that would not also be equally true of the uncertainty that the expanded use of the Section 706 doctrine may cause). The same investment claims were made about the FCC's now-vacated Network Neutrality rules, and those claims were proven wrong.

We need not even stop at the historical evidence, because the current realities of the enterprise broadband and CMRS markets and the massive investment there show the folly in this claim. Furthermore, we've been living in a *de facto* common carriage world through the

imposition of requirements and merger conditions in transactions like AT&T-BellSouth, Verizon C-Block, and Comcast-NBCU. The data on investment and business growth following the imposition of these conditions show that they had no negative impact on these companies' ROI or investment plans.[239]

Nothing about reversing the Bush-era FCC classification decisions changes the underlying fundamentals in the broadband market. Subscriptions, revenues, and margins all continue to grow as costs continue to decline. That is a favorable climate for investment no matter what steps the Commission may take to restore Americans legal rights to communicate free from unjust or unreasonable discrimination.

IV. SECTION 706 AUTHORITY AND THE COMMERCIALLY REASONABLE STANDARD ARE INSUFFICENT TO PROTECT THE OPEN INTERNET. ONLY A RETURN TO COMMON CARRIAGE CAN ENSURE AMERICANS ARE ABLE TO TRANSMIT THE INFORMATION OF THEIR CHOOSING WITHOUT BLOCKING OR DISCRIMINATION.

A. Net Neutrality is Common Carriage.

For those who've followed the Network Neutrality debate even at a cursory level, it's pretty clear that it originated from concerns about the Commission's failure to treat cable modem service as common carriage.[240] It exploded once the agency removed the LEC's

[239] *See, e.g.*, *Free Press July 2010 Broadband Framework Comments* at 95 n.266.

[240] *See, e.g.*, Michael K. Powell, Chairman, Federal Communications Commission, "Preserving Internet Freedom: Guiding Principles for the Industry" at 3, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004) (citing the work of professors Phil Weiser and Joe Farrell, as well as Tim Wu, during 2002–2003, all noting threats to Internet openness). Indeed, Chairman Powell's speech and the unenforceable "four freedoms" that he elucidated in it were in essence an attempt to deflect criticism over the consequences of his earlier push to exempt two-way telecommunications offerings from the Act's common carrier obligations.

common carriage obligations.[241] Those who call for Net Neutrality policy are simply seeking a restoration of the built-in openness protections that are the DNA of common carriage.

Network Neutrality is an outcome. It is an outcome produced in part by common carriage; in part by abundance; and in part by competition. This outcome flows from common carriage's core principle of nondiscrimination. Public policy, as guided by the Communications Act, is the tool to implement this principle. Therefore the Commission's turn away from common carriage means it will never be able to preserve the open Internet until it remedies that mistake. There is no longer any gray area. There is common carriage and its standard of no unjust or unreasonable discrimination; and there is private carriage, and its standard of allowing what the *Verizon* court called "substantial" discrimination.[242]

As documented above, facilities-based providers of two-way communications services have always been thought of as common carriers, regardless of whether or not they

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[241] The ink on the *Wireline Broadband Order* was barely dry before incumbents started abandoning openness. This was of course a predictable outcome of the sweeping deregulation the FCC had just enacted. Free from the rules that prevented anti-competitive activity and the abuse of market power, network owners began to talk openly about their intentions. Just three months after the Commission adopted the *Wireline Broadband Order*, when asked about his feelings on companies like Google, SBC CEO Ed Whitacre made comments that live in infamy as the shot heard round the Web:

> How do you think they're going to get to customers? Through a broadband pipe. Cable companies have them. We have them. Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes? The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!

Whitacre's words proved that the Commission's beliefs that the market would continue to preserve openness were misplaced, and served to ignite the current advocacy to save the Internet. *See* "At SBC, It's All About 'Scale and Scope,'" *Business Week*, Nov. 7, 2005.

[242] *See Verizon v. FCC*, 740 F.3d at 652.

were transporting voice or data communications. Indeed, the *Verizon v. FCC* decision speaks 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."[243] But this all changed with the *Cable Modem Declaratory Ruling* and subsequent *Wireline Broadband Order*.

With its decision in *Verizon v. FCC*, the court did not find that broadband providers aren't common carriers. What it said is that the Commission should stop pretending it can regulate broadband providers as common carriers without first reclassifying them as such. But with this *Notice*, it appears that pretending is what the Commission proposes to do, yet again.

The rhetoric of the *Notice* would have the public think that the agency is readopting the vacated no blocking and nondiscrimination rules under a sustainable basis of authority. But in reality the Commission's main proposal turns away from a century of success with nondiscriminatory policies, and turns towards a brave new world of discrimination and regulator-approved *commercial* reasonableness.

The "roadmap" offered by *Verizon v. FCC* is clear. A prohibition on discrimination that applies to a broadband carrier's transmission of any and all content and to its interactions with its actual end-user customers, is a prohibition that can only be applied to common carriers. The court had "little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has 'relegated [those providers] . . . to common carrier status.'"[244]

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[243] *Id.* at 638.

[244] *Id.* at 655.

The court merely confirmed what we've all long known to be true: nondiscrimination, which is the entire point of Net Neutrality, is a common carrier obligation. This means that the FCC cannot protect Net Neutrality – before or *after* a violation – using Section 706 Authority.[245] Preventing blocking or discrimination after the fact would be the imposition of a common carrier duty on an entity that the Commission (wrongly) calls a non-common carrier.

A restoration of basic common carriage is the Commission's only option to achieve the high-level goals of the *Notice*.[246] Section 706 simply fails to give the Commission the authority to do what the Chairman says the *Notice* will do.[247]

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[245] *Id.* at 649-50 ("Even though section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers, the Commission may not . . . utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act. . . . We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers. Given the Commission's still-binding decision to classify broadband providers not as providers of 'telecommunications services' but instead as providers of 'information services,' . . . such treatment would run afoul of section 153(51).").

[246] Indeed, the *Notice* is in constant conflict with itself; the Commission repeatedly states its intention to protect anyone's ability to reach anyone else online without facing blocking or discrimination, something that the *Notice* recognizes is a common carrier outcome that the court just rebuked based on the existing information services designation. *See, e.g.*, *Notice* ¶ 114 ("[The court found] that by compelling fixed broadband providers to serve all edge providers who provided content, services, and applications over the Internet without unreasonable discrimination, the rule compelled those providers to hold themselves out 'to serve the public indiscriminately' – thus treating them as common carriers.").

[247] *See Chairman Wheeler NPRM Statement* ("If the network operator slowed the speed below that which the consumer bought it would be commercially unreasonable and therefore prohibited. If a network operator blocked access to lawful content it would violate our no-blocking rule and be commercially unreasonable and therefore be doubly prohibited. . . . When a consumer purchases specified network capacity from an Internet provider, he or she is buying open capacity, not capacity a network provider can prioritize for their own purposes.").

B. No Blocking is A Common Carrier Obligation.

In a press gaggle after the adoption of the *Notice*, the Chairman said "I buy a pipe. I buy a pathway. Nobody can mess with that. They can't degrade it, they can't tell me I can't access something, they can't tell somebody you can only get on to Tom's pathway if you pay me a price. They can't block." It is refreshing to see the Chairman echoing the expectations of consumers. Yet the inarguable reality is that without first classifying broadband carriers as common carriers, Chairman Wheeler's agency must permit those carriers to degrade. They are legally permitted to decide whether or not their customers can access certain content; they are legally permitted to impose access charges on those seeking to reach their customers; and they can block any site they wish, since the duty to serve all comers indifferently is the core of common carriage.

It appears that the Chairman may be unwittingly playing the role of Charlie Brown in a game of kick-the-football, with the court acting as a stand-in for Lucy. The majority opinion in *Verizon v. FCC* suggests the Commission might at least be able to justify a "no blocking" rule, but to do so that opinion speculates about an argument the Commission failed to make properly in court. The majority asserts nonetheless that the Commission *might* guarantee edge providers an "effectively usable" or "minimum" carriage service that could survive under Section 706, so long as broadband providers had license to "charge an edge provider . . . for high-speed, priority access" or "negotiate separate agreements with each individual edge provider."[248] (The opinion does not really suggest how the Commission could determine what this basic level of service should be, only tossing out the notion of a 4

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[248] *Verizon v. FCC*, 740 F.3d at 658 (internal quotation marks omitted).

Mbps download speed that is slower than the "basic speed" many broadband customers already purchase today.)

In his partial dissent, Judge Silberman viewed this argument with great skepticism. He reasoned that even with room for discrimination on top of it, the basic service "that most users receive[d] under this rule would still have to be offered as common carriage, at a regulated price of zero."[249] His reasoning is consistent with prior court-approved Commission findings that an obligation to deal with any member of the public, and to refuse service to no one, is one and the same as the "quasi-public character implicit in the common carrier concept."[250]

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[249] *Id*. at 668 (Silberman, J., concurring in part and dissenting in part).

[250] *See, e.g.*, *Orloff v. FCC*, 352 F.3d 415*,* 422 (D.C. Cir. 2003) ("As common carriers under § 332, CMRS providers still have duties. They cannot – as the Commission put it – refuse ''to deal with any segment of the public whose business is the 'type normally accepted.'"); *see also Orloff v. FCC Respondents Brief* at 20, 32 ("The FCC acknowledged 'case law holding that a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, on whether and what terms to deal, and explained that this language 'articulates the quasi-public character implicit in the common carrier concept – that the carrier 'undertakes to carry for all people indifferently.' Orloff, the agency noted, did not allege that Verizon Wireless refused to deal with any segment of the public, nor did she contest Verizon Wireless's assertion that it stood willing to engage in negotiations initiated by any customer. . . . All customers are entitled to take service from Verizon Wireless according to the rates, terms, and conditions of its standard rate plans and promotions. All customers also are entitled to bargain with the sales agent and to make a case for a concession, using the availability of competition and the option of taking business elsewhere as a bargaining tool. Thus, to the extent that this statement from the two-part judicial definition of 'common carrier' sheds the slightest light on substantive Title II duties, the Commission reasonably determined that the record failed to demonstrate any failure on the part of Verizon Wireless to carry out those duties.") (internal citations omitted). It should be noted here that the *Orloff* case involved customer interaction with a retail provider in a competitive market. This is not the analogous to a party seeking to terminate traffic onto a carrier's network, since in that instance, regardless of the level of retail competition, there still exists a terminating access monopoly. The language above shows that the basic duty to deal embodied in the *Notice*'s proposed no-blocking rule remains a common carrier duty. That is so even if the negotiation that may occur beyond that duty could involve *reasonable discrimination* by a common carrier (such as mutually negotiated interconnection

Whether Judge Silberman's view of such a no-blocking rule would be the majority view the next time Section 706 winds up in the D.C. Circuit is anyone's guess. But there is no reason for the Commission to take such chances in the first place when it has a clearer legal path.

What's more, the majority opinion acknowledges that while the Commission *might be able to* order a non-common carrier to carry specific content, the agency cannot readily require such a provider to refrain from blocking all traffic. The Commission seems bent on relying on *Southwestern Cable* and *Midwest Video II* to support its conception of a Section 706 blocking prohibition. As the *Verizon* decision makes clear though, those Supreme Court precedents suggest only that the Commission can compel carriage of a specific content channel – not compel facilities to be held out "indifferently for public use."[251] Of course the very nature of an Open Internet requires that it be open to all members of the public, not just a chosen few that the Commission decides to protect. Thus, any no-blocking rule that the Commission might fashion from scraps of Section 706 authority and get past judicial review would be useless at best. Conversely, any rule that might purport to prevent blocking would be struck down again in court if the Commission proceeds with Section 706 and does not instead fix its broadband classification mistakes first.

The *Notice* appears destined for the first path, for now: a useless rule that would provide useless assurances about "basic" service. A close examination of the *Notice's* description of its proposed no-blocking rule shows inconsistencies in how the Commission contemplates applying that requirement. As the Commission notes, "[u]nder the approach

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arrangements) but not unreasonable discrimination (*e.g.*, paid prioritization that by definition imposes degradation on all those who do not enter into such arrangements).

[251] *Verizon v. FCC*, 740 F.3d at 656 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 n.16 (1979)).

described by the D.C. Circuit, 'broadband providers [would] have no obligation to actually provide an edge provider with the minimum service necessary to satisfy the rules,' because they could instead 'deliver all edge providers' traffic' in a manner that exceeds that minimum, and they would then be free to 'negotiate separate agreements with each individual edge provider' and also to 'charge similarly-situated edge providers completely different prices for the same service.'"[252]

Thus we see from the plain language of *Verizon* that any no-blocking rule would be completely meaningless, because it would permit a broadband provider to tell every content provider (including non-commercial speakers) that there is "better" treatment to be had, but *only* if the content provider first negotiates for what that individualized treatment will entail. The *Notice* suggests this convoluted process because a simple and effective duty to deal imposed on the broadband provider would be a common carrier obligation.

So under the proposed framework in the *Notice*, a content provider can only avail itself of the minimum standard after it has first made an effort to arrange for individualized treatment. And even then, the broadband provider could "charge . . . completely different prices" to content providers just to deliver traffic to the broadband customers who have requested it.

It's hard to contemplate how any real no-blocking rule would *not be considered* common carriage, and in all likelihood even the no-blocking rule in the Notice would suffer the same fate as the one which came before. However, assuming it were found to be a permissible non-common carrier obligation, it would hardly be a sufficient tool to protect Internet openness.

[252] *See Notice* ¶ 99.

There are literally billions of potential "content" providers on the Internet. Those content providers are *not* properly considered customers of a particular broadband ISP just because that ISP's subscribers visit the content providers' websites or use their apps. If the Commission were to proceed with that approach, it would need to concede for example that the Commission itself is now a potential customer of *any and every* ISP in the United States whose subscribers use their ISPs' connections to visit FCC.gov. Does the Commission seriously expect each of these billions of content providers to negotiate with *every individual* broadband provider in order to avoid being blocked? Even if the application of the practice is limited somehow to commercial content, it still establishes a giant burden on trade and the exercise of free speech, one that substantially raises transaction costs and thus breaks the "virtuous cycle of investment" that this rule is supposedly designed to promote.

What's even more puzzling is the Commission's proposal to impose this no-blocking rule, yet simultaneously maintain the recently vacated rule that allowed wireless providers to block applications. The 2010 rules prohibited wireless providers from blocking websites and telephony apps, but all other apps were fair game.[253] This is nonsensical within the conceptualization of the no-blocking rule described in the *Notice*. The Commission supposedly views the no-blocking rule as standard that requires the offering of a "minimum level of service," *i.e.*, a minimum level of bandwidth and/or latency.[254] So then why does it

[253] *See* 47 C.F.R. § 8.5 (2013).

[254] Further illustrating just how unmoored the proposed framework in the *Notice* is from the realities of how networks function, the Commission suggests that one "way to define a minimum level of access is as a requirement that broadband providers apply no less than a 'best effort' standard to deliver traffic to end users. For any particular type of Internet traffic, best-effort delivery would represent the 'typical' level of service for that type of traffic – in effect, routing traffic according to the 'traditional' architecture of the Internet. Broadband providers would be free to negotiate 'better than typical' delivery with edge providers, and would be prohibited (subject to reasonable network management) from

matter if this minimum level of service is used to serve up a webpage, or used to deliver content to and from an application? It shouldn't matter, which strongly suggests that the Commission has not fully thought out the real world implementation of this framework. Furthermore, one of the main motivations behind the *Wireline Broadband Order* was the Commission's disdain for "regulatory asymmetry."[255] If this remains the case, separate rules for wireless conflict with this objective, to say nothing of the problems that such asymmetrical and inequitable rules create for people who rely on wireless broadband as a primary connection to the Internet.

These inconsistencies and burdensome outcomes once again are strong signs that the current regulatory path is the wrong one. Section 201 and 202's reasonableness standards are a clearly superior, generally applicable approach. Under common carriage, like services are held to the same standard, but reasonableness can differ based on specific circumstances. This tried and proven approach is much cleaner and more certain than the maze of complexity suggested in the *Notice.*

C. The Commercially Reasonable Standard is An Untested, Loophole-Ridden Legal Standard that Permits Substantial Discrimination. It Cannot Serve as a Basis To Protect the Open Internet or Promote the Virtuous Cycle of Investment.

Innovation on the Internet should be possible without the permission of a broadband provider. To make such innovation without permission a reality, the Commission must adopt

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delivering 'worse than typical' service in the form of degradation or outright blocking." *Notice* ¶ 102. Here the Commission describes something that is not technically possible, since by definition any deviation from best efforts to create priority for some creates "worst efforts" for others. Furthermore, the above scenario is the antithesis of Net Neutrality, as it provides "better" or faster service to some users, and so it is inapposite to the high-level goals of the *Notice*.

[255] *See Wireline Broadband Order* ¶ 1. ("Second, the framework we adopt in this Order furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner, after a transitional period.").

effective and enforceable nondiscrimination rules. Yet Chairman Wheeler's claim that the Commission can craft tough, enforceable Open Internet rules with Section 706 as a legal foundation just doesn't stand up to scrutiny or, more importantly, to the D.C. Circuit's opinion in *Verizon v. FCC*. Even a cursory reading of that decision makes it abundantly clear that the Commission must allow substantial discrimination if it resorts to Section 706.

As with the blocking rules described above, any nondiscrimination standard that the Commission could adopt using this authority would be either wildly ineffective or immediately struck down. There is no middle ground. The majority opinion in Verizon held that any standard the Commission designs under Section 706 would have to permit "substantial room for individualized bargaining and discrimination in terms."[256]

Resolving any doubt about how weak it would need to be to survive judicial review – and how completely such a standard would change the fundamental character of the Open Internet – the majority opinion laid out the best that the Commission could do under Section 706. Broadband providers could "charge an edge provider . . . for high-speed, priority access while limiting all other edge providers to a more standard service," and could "negotiate separate agreements with each individual edge provider regarding the level of service provided" or "charge similarly-situated edge providers completely different prices for the same service."[257]

The Commission simply can't allow this sort of targeting and discrimination to occur and slap the label "Open Internet" on it. And creating an Internet on which broadband providers charge for priority access to their customers, and discriminate freely against any

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[256] *Verizon v. FCC*, 740 F.3d at 652 (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012)).

[257] *Id.* at 658.

content, service or application they see fit to slow down, is not the result the Commission claims to be after in this *Notice*. As we showed above in our discussion of how first in/first out packet-switching is a zero-sum game, the Commission cannot use Section 706 authority to ban broadband providers from "degrading service" to create a "fast lane." This is because degrading everyone else's service is the *only way* to create a priority service on a packet-switched network – and the only way to make it worthwhile for people to buy it.

Despite these realities, the Commission appears to believe that a non-common carrier application of the "commercially reasonable" standard will suffice to protect Internet openness. That is, the Commission appears to believe that the "commercially reasonable" and "no unreasonable discrimination" standards are interchangeable, and that the former serves as an adequate standard to uphold the remanded no-blocking and non-discrimination rules. This view however is in direct conflict with the ruling in *Verizon v. FCC*, where the court confirmed that the Commission cannot apply the commercially reasonable standard in a "restrictive manner, essentially elevating it to the traditional common carrier 'just and reasonable' standard" without facing an "as applied" challenge.[258] In other words, the stronger such rules were for preventing harms, the weaker they'd be in court.

Under the commercially reasonable standard, the very best the Commission could do is analyze broadband provider discrimination after the fact, allowing substantial flexibility for individual deals with different edge providers. This regime would shift the burden to prove such practices commercially unreasonable onto Internet users and edge providers who can least afford to bear that burden. Broadband gatekeepers could discriminate at will against the commerce and discourse they disfavor – with an army of lawyers at the ready to

[258] *Id.* at 652.

fight any "commercially unreasonable" case first at the Commission and then in appellate court. That's not a prescription for regulatory certainty, or for innovation without permission. It's innovation only by permission of the ISPs and their legal teams.[259]

The commercially reasonable standard is new, and in the contexts where it currently applies, it has already shown to be cumbersome and uncertain.[260] More than anything, this standard would foist an unprecedented burden on everyday Americans just to communicate freely with each other and engage in our digital economy. It would erect a new and substantial barrier to entry and innovation in the Internet economy, in direct contradiction to the directives of the Act and the stated Section 706-based purposes of these rules.[261]

The *Notice* demonstrates awareness of this conflict. "We also seek comment on how a rule requiring broadband providers to engage in commercially reasonable practices with respect to delivery of traffic to and from end users should apply in circumstances in which no individualized negotiation occurs between the edge provider and the broadband provider."[262] The Commission notes that some small content owners may not "seek to enter

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[259] In the *Notice* the commission proposes "to adopt a rebuttable presumption that a broadband provider's exclusive (or effectively exclusive) arrangement prioritizing service to an affiliate would be commercially unreasonable." *See Notice* at ¶ 126. But nowhere in the legal history is there any suggestion that such moves would run afoul of any "commercially reasonable" standard. One can easily imagine a legal challenge in which a carrier argues that there is perhaps nothing more commercially reasonable than a company looking out for its own best interests. Furthermore, it is nonsensical to suppose that the standard could leave the provider "substantial room for individualized bargaining and discrimination in terms" but only with non-affiliated companies, and then bar that same treatment for the providers' affiliated services.

[260] *See, e.g.*, *T-Mobile Commercially Reasonable Petition*.

[261] *See, e.g.*, 47 U.S.C. § 230(b).

[262] *Notice* ¶ 120. The same passage continues: "To cite just a few of many possible examples, consider a start-up VoIP service, a politically oriented website with an audience of fewer than 100 unique visitors per day, a social networking application narrowly focused on a particular demographic, or peer-to-peer communications among individuals. Not all of

into a contract with a broadband provider; they may simply wish to reach its subscribers." Indeed, this is the crux of the problem with the commercially reasonable standard specifically, and the non-common carrier approach generally. If you are just the average non-profit, new start-up, or even big start-up, under the approach envisioned by the *Notice*, *you have an obligation to try to negotiate with each and every ISP in America*, lest you be blocked. This would ensure that those unwilling or unable to navigate this Kafka-esque maze will be, by default, on the outside looking in.

The practical impact of this standard on broadband investment, particularly in rural areas for which the Commission (and the Communications Act) expresses special concern, appears to elude the agency. If a content provider must negotiate with each and every ISP to ensure adequate delivery of its products and services, this by definition creates transaction costs that did not previously exist. Because of this, a rational business will engage in as few negotiations as possible in order to reach as many potential customers as possible. This means the Commission's framework in effect will encourage content owners to avoid negotiations with smaller carriers, as the returns outside of the top ten ISPs decline rapidly. Thus the policy proposed by the Commission is a recipe for Internet balkanization. It favors larger carriers over smaller carriers, and contravenes the universal service purposes central to the Communications Act.[263]

The Commission also fails to grasp how the commercially reasonable standard would give carriers outsized bargaining power if implemented in a market in which carriers

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those actors may seek to enter into a contract with a broadband provider; they may simply wish to reach its subscribers." *Id.* Precisely. It would be hard to offer a clearer recitation of the folly underlying the Section 706 approach.

[263] *See, e.g.*, 47 U.S.C. § 254(b)(1) ("Access to advanced telecommunications and information services should be provided in all regions of the Nation.").

have a terminating access monopoly to end-users.[264] This is exacerbated when the carrier is negotiating for access to its customers with an over-the-top competitor to the carrier's own vertical services. The carrier holds all the leverage in such a negotiation: while the content provider's products serve to add value to the carrier's service, this value may ultimately be less than the value of pushing users to the carrier's vertical content. This is plain from the cable carriage and retransmission consent disputes that have left consumers with escalating bills and denied them the services they contracted for. It's puzzling that the Commission would want to port this model over to the open Internet.

Indeed, in yet another example of the *Notice's* contradictions, it asks "How can the Commission ensure that parties are acting in a commercially reasonable manner without foreclosing the creation of pro-competitive opportunities through certain forms of price discrimination or exclusivity agreements?"[265] Setting aside the strange presupposition that exclusivity agreements are "pro-competitive," it is likewise strange that the Commission seeks to adopt policies that will *actively encourage Internet Balkanization*. If the Commission adopts this framework, consumers who used to be able to use their favorite application or visit their favorite website no matter who their carrier was will suddenly find that they must switch providers to enjoy this "exclusive" service.[266]

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[264] *See 2011 Pole Attachment Order* ¶ 206 n. 618 ("Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating.").

[265] *Notice* ¶ 128.

[266] We of course recognize that a content provider is already free to restrict who accesses its services, as is its right. Today, very few choose to do this because in the *de facto* open Internet environment, it makes little financial sense for either party (TV Everywhere participants being the main exception, but this is directly a result of the pay-TV business model, something that consumers are loath to see ported over to the open Internet). However, in the Commission's commercially reasonable world, this practice would become the rule, not the exception.

D. Enforcement of the Commercially Reasonable Standard Will Require Users to Navigate A Kafkaesque Maze in Order to Secure the Mere Chance of Relief.

The commercially reasonable standard envisioned in the *Notice* is fundamentally unworkable. This is because by precedent, the Commission cannot find a practice to be commercially unreasonable if the aggrieved party did not first try to negotiate with the ISP.[267] So, if a start-up is simply unable to pay for preferential treatment and thus relegated to the worst-efforts slow lane, under the commercially reasonable standard that start-up can complain, but it will lose because it did not first attempt to engage in good faith negotiation.

The commercially reasonable regime necessitated by Section 706 would therefore shift the burden to prove that such practices are harmful onto Internet users and edge providers. Again, broadband gatekeepers could discriminate at will against the commerce

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[267] Once again, the Commission recognizes this problem, but has no real solution. And the one it hints at pushes the policy framework closer to common carrier treatment, meaning that it destabilizes the entire framework once again for purposes of judicial review. *See Notice* ¶¶ 162-163 ("[I]n *Cellco*, the D.C. Circuit considered a circumstance in which an identified party, a wireless carrier, would desire to enter into a business arrangement with another identified party, another wireless carrier. The rule at issue was designed to create circumstances that both incented individualized bargaining and, in specific circumstances, curbed the limits of such negotiation where necessary to serve the public interest. A similar circumstance could arise in the open Internet context, if for example, an app developer wished to enter into a contractual arrangement with a broadband provider. *But it is just as possible that the entity that feels aggrieved by an alleged violation of an open Internet rule does not seek a direct contractual relationship with a broadband provider. That could arise, for example, if a website is blocked or if an edge provider feels that it is being harmed by differential treatment afforded by a broadband provider to its own affiliate*. For this reason, the dispute resolution mechanism adopted by the Commission to enforce our proposed open Internet rules should be designed to operate between parties that *do not necessarily desire to enter into a binding agreement*. We tentatively conclude that an effective institutional design for the rules proposed in today's Notice must include at least three elements. First, there must be a mechanism to provide legal certainty, so that broadband providers, end users and edge providers alike can better plan their activities in light of clear Commission guidance. Second, there must be flexibility to consider the totality of the facts in an environment of dynamic innovation. Third, there must be effective access to dispute resolutions by end users and edge providers alike.") (emphases added).

and discourse they disfavor – ready to fight any "commercially unreasonable" case first at the Commission and then in appellate court. That's not a prescription for regulatory certainty, nor for innovation without permission. If adopted in its present form, *at best* these rules would create a Kafkaesque maze for all Internet users to navigate just to ensure they're not blocked. Even after figuring out this maze, users could still find themselves shoved into a slow lane.[268]

This portion of the *Notice* should give the start-up community pause, as the Commission cites the retransmission consent negotiation process as an example of how it has implemented the "good faith" negotiation standard.[269]

After enumerating the half a dozen poorly defined "factors" that might go into determining commercial reasonableness (and noting that in the data roaming case, there are a whopping 16 such categories) the Commission proudly notes its belief that "this approach will provide the advantage of certainty and guidance to broadband providers and edge providers – particularly smaller entities that might lack experience dealing with broadband providers – while also allowing parties flexibility in their individualized dealings."[270] It is unfathomable that the Commission thinks an amorphous, poorly defined and untested standard that requires parties to negotiate before they can complain – then undertake the expense of securing counsel and filing a complaint, then waiting for the Commission to rule

[268] Indeed, the Commission holds up Section 628 enforcement as a possible dispute resolution model to emulate in the Open Internet context. This should not give the start-up community any hope, as the list of companies that have tried and failed to avail themselves of relief under the Commission's implementation of this statute is quite long.

[269] *Notice* ¶ 133 ("The Commission has imposed good faith negotiation requirements in a variety of contexts. For example, the Commission explicitly requires television broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent agreements in good faith.").

[270] *Id.* ¶ 136.

– can provide small edge companies any certainty. For an edge provider under today's *de facto* common carrier market, the Internet just works. That common carrier-like regime provides far more certainty than the enforcement maze the Commission is asking these companies to navigate, especially considering that the commercially reasonable standard allows for substantial discrimination.

In sum, if the Commission's overarching goal is to preserve innovation without permission, then it must not implement a legal framework that, by its very design, requires permission before innovation.

E. Section 208 Enforcement Is a Better Approach.

The truth that seems to elude many in this discussion is that the newly bestowed Section 706-based authority creates a much more regulatory framework than common carriage. Section 706 is not concerned with market power, while the precedent of implementing Section 201 and 202 is centered on market power analysis. And Section 706 for the first time directly extends the reach of the Commission's authority to non-facilities-based information services. And it does so in an unbounded fashion, with the Commission as the sole arbiter of its own authority (as the one who gets to ask and answer the question of a regulation's impact on broadband deployment). Title II by contrast is built on a long history that, as discussed above, is highly deregulatory and bound by a very specific objective: to ensure that the practices of telecommunications carriers are not unjust or unreasonably discriminatory.[271]

[271] The Commission has previously found that its application and process of enforcing the core common carrier obligations offer a high degree of certainty to carriers to innovate in services and offerings. *See PCIA Forbearance Order* ¶ 29 ("Furthermore, we disagree that enforcement of sections 201 and 202 puts carriers in the position of speculating about the legal ramifications of offering innovative service packages and prices, and that such speculation chills innovative services and plans.").

So one must wonder why then the largest broadband carriers are the most vocal supporters of the 706 approach. The answer is obvious: these incumbents understand that with their size, market power and political weight comes the ability to use the nebulous nature of Section 706 enforcement to advantage their businesses over those of smaller competitors and over the myriad of large, medium and small edge companies that rely on these carriers' good graces to reach consumers.

This is obviously the wrong approach, and vastly inferior to the Section 208 process. Under the common carriage approach, the legal standard is the appropriate one for the essential facilities that carry our speech and commerce in a market with insurmountable entry barriers. Furthermore, the *burden of proof* in the Section 208 complaint process is not unfairly tilted in the favor of the powerful owners of the essential facilities, and against individual customers and those that they seek to reach. Under the Section 208 process, the party complaining "has the evidentiary burden of establishing that the services are like and that discriminatory pricing or treatment exists. Once a *prima facie* showing of like services and discrimination has been made, *the defendant has the burden of establishing that the discrimination is justified and, therefore, not unreasonable*."[272] This is the exact opposite of

[272] *Beehive Telephone, Inc. v. Bell Operating Companies*, Memorandum Opinion and Order, 10 FCC Rcd 10562 (2005) ("Applicable judicial precedents establish a three-prong test for determining whether a defendant has unreasonably discriminated in violation of Section 202(a). The first prong requires the Commission to determine whether the services at issue are like one another. If so, the Commission must, under the second prong, determine whether there is disparate pricing or treatment between the like services. Third, if disparate pricing or treatment is found to exist, the Commission must decide whether the disparity is justified and, therefore, not unreasonable. In the context of a Section 208 complaint proceeding, the complainant has the evidentiary burden of establishing that the services are like and that discriminatory pricing or treatment exists. *Once a* prima facie *showing of like services and discrimination has been made, the defendant has the burden of establishing that the discrimination is justified and, therefore, not unreasonable*.") (emphasis added).

the process envisioned by the *Notice*, in which the aggrieved party would have the burden of proving that the treatment was not commercially reasonable, a difficult feat given the nebulous nature of the standard.

F. Title II Is Designed Specifically to Address Interconnection Issues in Order to Promote Economic Efficiency and Serve the Public Interest.

Millions of consumers are currently experiencing poor performance from their broadband connections. And they have no one to tell them why they are, or how to get relief. As ISPs use this poor performance to upsell users into more expensive packages, the Commission has done little to aid these consumers. This is a classic terminating access interconnection issue, though the media and even the Commission itself have added to the confusion by describing it simply as "interconnection" or even more inaccurately, "peering." The issue has also been characterized as not a Net Neutrality concern, which is curious since SBC's desire to impose terminating access charges is precisely what elevated Net Neutrality into a national issue.

In order to address these disputes, it is important that they are properly characterized. There are various kinds of arrangements to transport Internet content between users and content providers.

Peering – This is the exchange of traffic on the "Internet backbone," and it occurs roughly "in ratio." That is, Peer A takes about as much traffic from Peer B as it gives to Peer B. Peering is usually "settlement free," or "bill-and-keep," meaning that Peer A and Peer B meet each other at an exchange point, they exchange traffic, and no money changes hands. One important thing that is currently getting lost in discussions around the so-called "Netflix issue" is that peering is on the backbone; meaning if Peer A thinks Peer B is acting unreasonable, it can route around the problem by using Peer C in order to reach Internet

endpoints.

Paid peering – This is similar to peering, except money changes hands pursuant to private contract. This is not a common practice on the backbone, but the paying part is taking hold in the termination of traffic onto last-mile networks. This is the subject of the current controversy, but it is not really appropriate to call it “peering” or paid peering, since as we discuss below, it is simply terminating access.

Transit – This is where Party A pays Party B to carry its traffic from one point to another (that point could be all reachable destinations on the Internet, or it could simply be an interexchange point to hand off to another carrier that then can reach all destinations). There is no exchange of traffic here, so Party B is paid for the transit services it is offering to Party A.

Termination – All traffic has a destination, and that destination is usually on a last-mile ISP’s network.

Termination is the area of current debate, and one the ISPs have purposefully confused and conflated with traditional backbone peering.

Many of the largest retail ISPs operate in all of these markets. Comcast for example is a Tier-1 Backbone provider (*i.e.*, it has a massive backbone network and it peers with other Tier-1 providers and can reach all destinations); and it sells transit; but it is also a last-mile provider. If for example Comcast and Level 3 are acting as actual peers (*i.e.*, Comcast is participating in its interaction with Level 3 in its capacity as a backbone carrier, and not the destination for Level 3’s traffic), then it is not unreasonable for Comcast to seek compensation if its backbone peering arrangement gets “out of ratio.” However, if Level 3 is sending traffic to *terminate onto Comcast's last-mile network* (with Level 3 delivering the

content requested by Comcast's last-mile customers), then this isn't "peering," it's "termination." In this situation, if Comcast demands a payment for traffic being out of ratio, that is not reasonable. Termination of traffic onto a last-mile network will never be even close to in ratio, since use of the Internet is asymmetric. Also, more importantly, in this instance Level 3 has *no ability to route around Comcast,* as Comcast is the destination.

Thus, a last-mile provider has a terminating access monopoly, and its imposition of access charges on the companies that are seeking to terminate traffic onto the last-mile provider's network is a suspect practice. It is not the imposition of the access charge that is objectionable. It is the fact that the last-mile provider is the "cost-causer" in this scenario, not the delivery carrier, since the last-mile provider's customer is the party that requested delivery of the traffic.

In Plain Old Telephone Service (POTS), access charges (if they exist at all) are regulated to curb abuse of the terminating access monopoly. In wireless voice, and increasingly in POTS, the FCC has established policies that are essentially "bill-and-keep." There's no reason the ISP last mile should be any different.

What governs sound policy here is the principle of cost-causation, meaning whoever causes the cost, pays the cost. This is why access charges existed in POTS. If Jack calls Jill, Jack caused the cost (yes, Jill picked up the phone, but that's just being polite). As the market evolved (caller ID, do-not-call list, wireless, all with telecom costs plummeting), it became more efficient to simply move to bill and keep.

In the ISP context, the end-user, and not the content company, "caused" the cost. Netflix isn't sending Jill a streaming video unless Jill first requests the stream. So for a last-mile ISP to ask for, or demand, payment from Netflix or its intermediary carriers to access

the last-mile network is an unreasonable abuse of the ISP's terminating access monopoly.

Therefore, the current debate is not about peering and it is in fact a Net Neutrality issue, even if it isn't an "Open Internet rules" issue. Terminating monopoly abuse is at the core of the concerns about the preservation of Net Neutrality. The wrinkle here, if there is one, that makes this issue more difficult to shoehorn into the normal Net Neutrality concerns is that what last-mile ISPs are doing in their interactions with Netflix does not involve *overtly* singling out a specific content provider, but rather the delivery service used by a specific content provider. (For instance, Cogent is delivering content from a variety of sources onto the ISP's network, not just Netflix content). This should not make a difference from an analytical perspective. The question for the Commission is whether or not there is abuse of terminating access monopoly power.

However, this is all academic unless the Commission restores Title II and its regulatory authority to require nondiscriminatory interconnection. The Commission's oversight of interconnection in the context of terminating access has largely been quite successful, and there's no reason this success should not extend into the broadband last-mile context.[273]

In the *Notice*, the Commission appears to prefer the use of disclosure to address this issue. That may be a prudent *first step*, but it's insufficient to addressing the core issue of cost-causation and terminating monopoly power abuse. Perhaps the Commission is reluctant to weigh in here (even though the Chairman himself has firsthand experience with this

[273] The Commission's history here suggests it would be very successful in ensuring fair and efficient interconnection in the terminating access broadband market. The Commission has extended interconnection rights to non-carriers, which would be important to correcting the current market failures. This history pre-dates the 1996 Act (enhanced service providers) and is a main reason for the early proliferation of enhanced services.

problem) because it understands that its authority to act is limited by the current regulatory classifications. This is unfortunate, since Title II is designed around cost-causation principles, making the oversight quite straightforward: the consumers request the content, they cause the cost. All of the telecom investment discussed in the earlier portion of these comments flowed from this regulatory model for interconnection,

However, if we move away from Title II and its clear dividing line between transmission and content, the analysis becomes unbounded by cost-causation principles that are at the core of the law. Indeed, under the Section 706 approach, the Commission could find that deployment is not reasonable and timely, and it is because of an edge company "dumping too much traffic onto" the last-mile carriers' networks, so the solution is a rule requiring content companies pay terminating access fees for the first time in history. Section 706 is a troubling basis for regulating, precisely because it is not neatly bounded, and thus increases the likelihood of regulatory capture.

In sum, the Commission is right to investigate this issue; but unless the agency uses the clear authority it has to correct it, consumers should not expect relief from the effects of terminating monopoly abuse anytime soon.

CONCLUSION

The right, just and only legally sustainable path available to this Commission is clear: reclassify and reverse the mistakes of its predecessors. Sure, it will be a heavy political lift. But the American people should not be robbed of their legal rights to communicate free from undue discrimination simply because the ISPs have bought political Washington. This is precisely why the Commission was created as an independent agency.

The obligation to protect our ability to exercise our free speech rights cannot be left to the self-designations and promises of private entities. And the Commission's authority to protect that right derives from the immutable text of the law, not the opinions of bureaucrats about the meanings of phrases like "reasonable and timely." Our ability to exercise our free speech rights and participate in the information economy should be protected and promoted even after the universal deployment of any particular telecommunications medium.

The Commission should take an honest look at the law. Congress was clear that it thought advanced networks would be offering telecommunications services, and it gave the Commission substantial flexibility in how those services would be regulated under Title II. Those who suggest that Congress did not anticipate the rise of broadband simply don't understand or willfully distort the historical truth.

The current regulatory framework for our nation's two-way telecommunications networks has proven time and time again to be unworkable. And this is because it is not the one dictated by Congress in the law; the Commission created the framework *de novo*, inventing definitions not in the Act and offering tortuous interpretations of the statute and legislative history. The result we have today is truly bizarre: the Commission apparently has authority under Section 706 to regulate information services and information service

providers, yet this portion of the law does not mention the word "information service" once. And the methods this portion of the law suggests the Commission may use to accelerate investment in "advanced telecommunications capability" are all methods that the Act *solely* applies to common carriers, including forbearance. It is strange that the FCC now has regulatory authority over non-infrastructure services like websites and applications and their providers (*i.e.* information services and information service providers), given that the authors of Section 706 stated, "this provision is a necessary failsafe to ensure that the bill achieves its intended *infrastructure* objective."[274]

Congress, with its amendments to the Communications Act, recognized that common carriage was critical in order to foster an unregulated, competitive and innovative content market. This is the successful legacy of the Commission's *Computer Inquires* that Congress sought to preserve with its adoption of the "information service" and "telecommunications service" definitions.

Congress drew a sharp dividing line between content and carriage, with the former untouchable by regulation and the latter held to basic, but deregulatory common carrier obligations. The FCC has erased that line. And now, through subsequent court deference, we find the Commission has given itself legal authority over content, and taken away its common carrier authority over carriage.

The Commission would be wise to look at just how convoluted things have become and change course. Its goals are right and noble, but unless it restores its policy framework to harmony with the law, it will never be able to adequately and permanently achieve those goals. Adoption of the tentative conclusions in this *Notice* would only create more

[274] *See Senate Committee Report on S. 652* at 51.

uncertainty. Those rules would fail to prevent blocking or harmful discrimination. And by all estimates, they would be rejected by the courts. Ensuring all Americans enjoy unfettered access to the Internet is just too important to risk on shaky legal theories, or on the Chairman's confidence that he will be able to identify and stop bad practices before they do damage to the Internet ecosystem. That's the kind of approach that created the mess this current FCC needs to clean up.

The goal is to preserve the open pathway. The only way to do that is to restore common carriage.

Respectfully submitted,

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