Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

REPLY COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Telecommunications Industry Association ("TIA") respectfully submits these reply comments in the above-referenced proceedings.[1] The opening comments reveal significant agreement on several key points. First and foremost, there is broad recognition that the Commission's light-touch approach to regulation of the broadband marketplace has been successful, and that the agency should not veer from that time-tested policy now. Many commenters explain the value of the Commission's adherence to this course as a policy matter, while a number also point out the various legal obstacles that the Commission would have to overcome were it to introduce a more heavy-handed regulatory regime. No commenter has seriously disputed the technical challenges that all types of broadband providers face today as traffic grows sharply, which also continues to warrant flexible rules that will support – rather than potentially impede – new engineering developments and the service improvements they will deliver to consumers.

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

INTRODUCTION AND SUMMARY

In exploring ways to adopt open Internet protections going forward, the Commission should not lose sight of how successful the Internet has become even in the absence of regulation. Any decision in this docket should recognize that the United States already enjoys world-leading broadband service – and that demand for it is escalating. Numerous commenters have noted the differences in broadband deployment, investment, and speed between the United States, with its light-touch regime, and Europe, which has applied a more heavy-handed approach.[2] According to Professor Christopher Yoo's research:

> The difference in regulation and competition models influenced the amount of broadband investment in the U.S. and Europe. In Europe, where it was cheaper to buy wholesale services from an incumbent provider, *there was little incentive to invest in new technology or networks*. … Data analysis indicates that as of the end of 2012, the U.S. approach promoted broadband investment, while the European approach had the opposite effect ($562 of broadband investment per household in the U.S. vs. $244 per household in Europe).[3]

In contrast, the United States broadband market is marked by intense competition, which has led to significant investment.[4] With room for experimentation, new services have been rolled out and many are on the horizon.[5]

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[2] *See, e.g.*, Christopher Yoo, "U.S. vs. European Broadband Deployment: What Do the Data Say?" at 14 (June 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521285448 (attached to *Ex Parte* Notice from Christopher Yoo, University of Pennsylvania, to Marlene H. Dortch, Secretary, GN Docket Nos. 14-28 et al. (filed June 10, 2014)); CenturyLink Comments at 20; Ericsson Comments at 3; Verizon Comments at 14.

[3] Yoo at i (emphasis added).

[4] *See, e.g.*, CenturyLink Comments at 8; Information Technology & Innovation Foundation ("ITIF") Comments at 15 (Since 2010 "network speeds have increased substantially as technology has improved and intermodal competition has spurred providers to upgrade networks. U.S. networks see consistently above average growth in broadband speeds – recent reports put average connection speed up 31% over last year. Moreover, some new entrants, most notably

This trend is much needed in an economy still recovering from recession, and it will continue at a healthy pace if the FCC maintains its light-touch approach and recognizes the regulatory framework created over the last two decades is working. As a group of manufacturers and suppliers to broadband providers recently explained in a letter to the Department of Commerce, infrastructure equipment spending is expected to grow from $38.6 billion in 2013 to $42.9 billion in 2017.[6] The manufacturers and suppliers explain that investment to date has been fueled in part by the current light-touch regulatory environment, and that projections for future growth are not guaranteed if the Commission were to move to a Title II approach.

No commenter seriously disputes that nearly all American consumers enjoy a variety of broadband technologies – with different capabilities, speeds, and prices – from which to choose among providers in the marketplace. As TIA has consistently articulated, those consumers, rather than the government, should decide what combination of price, speed and capability is "best" for each individual user. The now-updated record in this proceeding shows that while the technologies underlying each broadband platform have advanced since 2010, each technology still rests on differing engineering realities that greatly affect optimal operation, capacity, and management. Increasing use of shared network capacity (whether on the edge or in transit) combined with sharply rising bandwidth demands, are placing ever greater strain on network resources. Mobile may be the clearest example of a broadband platform confronting the

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Google, have built entirely new networks, offering a third pipe to the home."); Verizon Comments at 5.

[5] *See, e.g.*, Sandvine Comments at 4-8 (describing a number of different service models it and others provide such as Application, Content and Device-Based Charging and Sponsored Data).

[6] Letter of ACS Solutions, et al., to the Honorable Penny Pritzker, Department of Commerce (Sept. 9, 2014), available at http://www.tiaonline.org/sites/default/files/pages/Assn%20Title%20II%20letter%20FINAL.pdf.

technical challenges of its own success: Although wireline and fixed networks present their own complexities, expert data now before the Commission details that mobile networks are more capacity constrained, thanks in part to constantly changing user requirements and operating environments; face unique interference and blockage challenges that change by location and vary from one millisecond to another; and confront the need to support multiple generations of technologies and devices all at the same time. For every platform, however, network management remains key to delivering services that customers value, and so the Commission must avoid the imposition of new restraints that might end in degradation of services to many users, especially at peak demand periods. The record also supports the need to allow specialized services to emerge and develop without unnecessary regulation. These services are still nascent, and no commenter claims that these offerings—which by definition are not "broadband Internet access" services—have had, or will have, a negative impact on Internet openness.

In addition, the docket now contains considerable analytical support for the Commission's use of its Section 706 authority as a legal matter. The Court of Appeals for the D.C. Circuit in *Verizon v. FCC* has clarified that the Commission's Title I authority supports reasonable transparency rules and provides a blueprint for crafting light-touch regulations concerning reasonable network management and general prohibitions on blocking. The Commission would be well warranted in following that blueprint rather than reclassify broadband Internet access service as Title II common carriage, which would be unworkable as a practical matter, vulnerable to court challenge, and highly likely to stifle the investment needed to expand the reach and capacity of broadband facilities.

I. NO DATA BEFORE THE FCC CONTRADICTS THE ENGINEERING REALITIES THAT DIRECTLY AFFECT THE OPERATION OF DIFFERENT TYPES OF BROADBAND PLATFORMS

As TIA and other commenters explained in the initial round of comments, the engineering realities support the Commission's tentative conclusion that any new rules should continue to distinguish between different broadband Internet access platforms.[7] Although an email delivered via mobile networks to a mobile phone and via fixed broadband networks to a desktop computer appears the same to an end-user, the process of delivery over the access network (*e.g.*, LTE, 3G, DOCSIS, DSL, fiber), including speed and contention mechanisms, differ in material ways. Moreover, as TIA explained, engineers have responded to the technology-specific challenges, stemming from both the nature of the technology and historic deployment, using technology-appropriate management tools.[8] This kind of innovation should be encouraged with appropriately tailored regulations. As detailed below, the mobile industry has developed technologies to cope with connections that will move and cluster in a way that wireline connections will not. While wireline broadband providers must also respond to technical, historic deployment, and market challenges, they still have inherent advantages over mobile broadband.

Beyond physical technology differences, the record also confirms what the Commission first explained over a decade ago in the *Cable Modem Order*[9]: Broadband is a comprehensive

[7] TIA Comments at 29-30; *Notice* ¶ 100.

[8] TIA Comments at 13-17.

[9] *Inquiry Concerning High-Speed Access to the Internet over Cable Modem and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002.

service that relies on third parties in ways that a telecommunications service does not.[10] Broadband cannot be segregated into end user "calls" for data and edge provider "responses" to such calls. As one broadband provider observed, "[E]ven relatively simple operations like downloading a webpage can entail a significant number of interactions among the website, the end user, and third parties that provide, for example, authentication, analytics, advertising, or other services."[11] Each interaction is a result of a complicated web of formal and informal agreements and network management.

A. THE DISTINCT ATTRIBUTES OF MOBILE BROADBAND MERIT LIGHTER REGULATORY TREATMENT

Mobile broadband use continues its exponential growth as consumers increasingly depend upon, and enjoy, the "anytime and anywhere" nature of the platform—attributes which also reveal its technical challenges. Mobile wireless services inherently come with complexities that other broadband platforms do not confront, and the record provides substantial empirical data to justify Commission adoption of its tentative decision to continue distinguishing mobile wireless Internet access service from other broadband Internet services.

Industry commenters widely agree that the technical differences require that regulatory demarcation.[12] Simply put, "[w]ireless networks are unique,"[13] and the Commission should be

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[10] "'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." 47 U.S.C. § 153(50).

[11] Comcast Comments at 62. *See also* CenturyLink Comments at 42-43 ("Whether a consumer is using the service to browse web pages, to download or upload files, or for any other function, the consumer is generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. And, broadband Internet access is, at its essence, a service that provides such capability to the consumer.")

[12] *See, e.g.*, Akamai Comments at 2; Alcatel-Lucent Comments at 27; Cisco Systems Comments at 20-22; Ericsson Comments at 8-10; T-Mobile Comments at 5-7.

commended for "recognize[ing the] inherent differences between wireline and wireless broadband networks."[14] As Cisco observed, "[M]obile wireless broadband services continue to face technical and operational constraints distinct from fixed broadband services."[15] "While wireless providers can and do innovate to maximize the traffic that can be transmitted over the available spectrum, they cannot make more of it, and must instead manage their networks to overcome spectrum scarcity."[16]

Expert submissions now explain in detail the complexity a mobile broadband Internet access provider must manage.[17] On the macro-level, these networks are both intricate and decentralized.[18] Though mobile data use is exponentially growing,[19] new spectrum is becoming available only at a much lesser rate. As Drs. Jeffrey H. Reed and Nishith D. Tripathi explain in their new technical paper, the resulting spectrum shortage:

> is exacerbated by the rapid rate of data intensive applications, now enabled by mass adoption of screen based smartphones and tablets that encourage use of pictures, graphics and video, and hence drive data demand as well as driving requirements for lower latency (real time response). Scarcity of radio resources, such as spectrum, necessitates efficient management of aggregate radio resources that needs to strike a balance among numerous competing factors such

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[13] Ericsson Comments at 9.

[14] Akamai Comments at 2.

[15] Cisco Comments at 21.

[16] Verizon Comments at 42.

[17] *See, e.g.*, Jeffrey Reed and Nishith Tripathi, *Net Neutrality and Technical Challenges of Mobile Broadband Networks* (Sept. 4, 2014) attached to Letter from Scott Bergmann, CTIA, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 10-127 and 14-28 (filed Sept. 4, 2014).

[18] *Id.* at 9.

[19] Qualcomm Comments at 6; Cisco Comments at 21-22.

> as the number of active users, target QoS of user services, and prevailing radio channel conditions.[20]

As new spectrum becomes available, mobile providers are incorporating these new bands into their networks. However, techniques to upgrade technology both in the network—deploying advanced antenna techniques, adding more cells, and cell-splitting—and to put it in the hands of end users take many years.[21] On a macro-level, more than just accounting for new generations of technology, mobile broadband providers typically manage multiple *revisions* of multiple generations of technologies simultaneously.[22] And once the network incorporates the new generations and intra-generational updates, troubleshooting and then on-going optimization are carried out.[23]

On a micro-level, because end-users are mobile, the network must also allocate radio resources among active users as they enter and leave a geographic area, as often as every millisecond.[24] The allocation must factor in the number of active user devices, capabilities of these devices, capabilities of the base station in the area, prevailing channel conditions of different devices on the network, distance from the serving cell, and target QoS of different services to determine the amount of radio resources for individual users.[25] Further, prevailing channel conditions can vary significantly, affecting the amount of redundant coding and retries needed for a certain level of service even though a user's *perceived* data rate appears the same as

[20] Reed and Tripathi at 14.

[21] *Id.* at 15.

[22] *Id.* at 8.

[23] *Id.*

[24] *Id.* at 14.

[25] *Id.*

another user requiring fewer resources.[26] Thus, in this dynamic environment, regulatory requirements for static or outdated disclosures could undermine effective network management, while at the same time providing little useful information to the typical consumer.[27]

Expert input now before the Commission explains that LTE technology—expected to be the dominant standard for some time to come—and next generation LTE-advanced networks rely on numerous evolving network management techniques. For example, as Reed and Tripathi detail, a series of algorithms comes into play in matching user demand to available resources:

> The eNodeB scheduler allocates radio resources for the downlink and the uplink data transfer to achieve target QoS levels for the established Evolved Packet System bearers. The eNodeB executes a handover algorithm to choose the best possible serving cell for a user. The eNodeB also manages uplink power control commands to the mobiles to minimize inter-cell interference. The user equipment would be allowed to transmit more power if its uplink channel conditions are poor and/or its uplink throughput requirements are high. The eNodeB and the Mobile Management Entity manage connected-to-idle transitions for the user equipment. The network management must consider different capabilities of different mobile device categories to optimize the experience for the user. … The network needs to configure the user equipment with suitable measurements and needs to connect radio networks supporting different radio access technologies. Integration testing within the network is also required to verify error-free coordination across radio access technologies. Nevertheless, this cross-layer optimization of the overall network is important for overall system performance and continues to be a promising area for further improving overall network performance.[28]

Even many who call for heavy-handed (and unwarranted) regulation agree that mobile services have special technical constraints that require accommodation for reasonable and "flexible" network management. Some argued that such a flexible approach would take into

[26] *Id.* at 14- 15.

[27] *Id.* at 20-26. *See also* AT&T Comments at 79-80.

[28] Reed and Tripathi at 16.

account "the particular network architecture and technology" and "accommodate exceptions appropriate to different technology and platforms."[29] They confirm that network management allows providers to maintain functionality while accommodating spectrum constraints and other technical limitations in wireless network architecture.[30]

B. NETWORK MANAGEMENT IS CRITICAL TO THE INTERNET'S FUNCTIONING, AND PRIORITIZATION SERVES VALID PURPOSES FOR CONSUMERS

The record and years of experience confirm the importance of network management.[31] Managing the many factors that affect network performance and ensuring a positive customer experience require active "intelligence" in the network itself. As Alcatel-Lucent explained:

> [N]etwork management is essential to provide the network functionality that consumers expect — from enforcing per-subscriber service-level agreements, to preventing harms to the network by malicious activities, such as Denial of Service attacks, to ensuring the requisite security of virtual private networks ("VPN"). And … consumers will expect even greater "management" of networks with the increasing number of cloud services, and as their media, content and files are continually transmitted to, stored in, and retrieved from, the cloud.[32]

Providers are persistently evolving their network management practices to respond to a changing cybersecurity environment, with "white hats" and "black hats" locked in a constant battle.[33]

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[29] Open Technology Institute at the New America Foundation and Benton Foundation Comments at 57.

[30] Public Knowledge *et al.* Comments at 30.

[31] *See, e.g.*, Alcatel-Lucent Comments at 16-17; American Enterprise Institute for Public Policy Research Comments at 3-8; CenturyLink Comments at 23; Verizon Comments at 45.

[32] Alcatel-Lucent Comments at 16.

[33] *See* ADTRAN Comments at 43.

Likewise, comments from both representatives of higher education institutions and libraries support rules that allow for reasonable network management.[34] One of the "Net Neutrality Principles" jointly put forth by a number of higher education associations include this safety-valve: "Public broadband network operators and ISPs should be able to engage in reasonable network management to *address issues such as congestion, viruses, and spam* as long as such actions are consistent with these principles."[35] Similarly, the Communications Workers of America and the NAACP acknowledge the need for reasonable network management.[36]

TIA also agrees with other commenters that prioritization can be beneficial for customers, and to the extent it is separate from specialized services, is a form of traffic management.[37] As some have observed, "Prioritizing E-911 calls or telemedicine applications ahead of 'cat videos' clearly serves the public interest."[38] Recognizing that not all uses of our communications infrastructure are equal, the Commission mandates prioritization in the public safety context already.[39] In areas outside of public safety, the Commission should not foreclose particular business models, but continue to encourage experimentation and market responses for market demand.

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[34] American Association of Community Colleges *et al*. Comments at 3; American Association of State Colleges and Universities *et al.* Comments at 18.

[35] American Association of Community Colleges *et al*. Comments at 3 (emphasis added).

[36] Communications Workers of America and National Association for the Advancement of Colored People Comments at 19-20.

[37] ADTRAN Comments at 7 ("Moreover, 'prioritization,' 'discrimination' and 'traffic management' are different labels affixed to the same conduct by the ISP.").

[38] *Id.* at 6.

[39] *See, e.g.*, Government Emergency Telecommunications Service (GETS) and Wireless Priority Service (WPS), http://transition.fcc.gov/pshs/emergency/priorityservices.html.

C. SPECIALIZED SERVICES BENEFIT CONSUMERS AND SHOULD BE ALLOWED TO PROSPER WITHOUT REGULATION

Virtually every party to address the issue agrees with the *Notice*'s tentative conclusion that the Commission should retain its current policy of regulatory restraint with respect to specialized services,[40] generally echoing TIA's primary arguments in that respect.[41] Many commenters observe that specialized services are an important means to promote new, innovative service offerings.[42] Nevertheless, they also recognize that this category of services is still in its infancy and is continuing to evolve.[43] Intervening with regulation at this early and critical stage in the development of specialized services—particularly in light of the rapid rate of change—would risk stymying their growth and the important consumer benefits they can deliver.[44] In addition, with new cloud storage and services hosting capabilities and increased security and privacy features, the processing and transmission components of these services are increasingly intertwined, which would make the application of such rules complex.

Moreover, there is no basis for imposing rules in any event. By definition, specialized services are offered separately from broadband Internet access;[45] as such, they do not implicate

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[40] *Notice* ¶ 60.

[41] TIA Comments at 29-31.

[42] Alcatel-Lucent Comments at 18; Bright House Networks Comments at 18; Verizon Comments at 76 ("As technology advances and turns concepts such as remote surgery, distance-learning, and the Internet of Things into realities, the ability to offer specialized services could be critical to promoting consumer interests and national policy priorities.").

[43] Bright House Networks Comments at 18; Cisco Comments at 15.

[44] Declaration of Marcus Weldon at 4-5 ("Weldon Declaration"), attached hereto as Exhibit A.

[45] *Id*. at 2 ("[B]y design and definition, specialized services cannot 'interfere with' or degrade Best Effort broadband Internet access services, as they utilize a separate allocated portion of the IP network capacity.").

any of the policy concerns underlying the proposed rules.[46] Thus, many commenters point out the (unsurprising) absence of any openness problems caused by specialized services.[47] And, to the extent this category is understood to include IP-based voice and video services, they are already subject to extensive regulations that safeguard consumers' interests, and no further rules are needed.

TIA previously has submitted evidence concerning the unique characteristics of the services that likely fall within the scope of what generally are considered to be specialized services, and detailing the potential harmful impact that regulation could have on the continued development of specialized services and, in turn, on broadband innovation and investment generally.[48] TIA incorporates that previous submission herein by reference, and also attaches to these comments an updated declaration reaffirming those previous assertions. As this updated declaration from the current President of Bell Labs describes, in the four years since the Commission last inquired about specialized services, a common, industrywide understanding regarding the precise scope of this category has not yet developed – a function of the rapid pace of change and innovation that continues to redefine service preferences and needs of end users.[49] At the same time, ongoing investment in these types of services—that is, services that typically involve the provision of quality of service or bandwidth guarantees to address sensitivity to

[46] Alcatel-Lucent Comments at 23-24; Verizon Comments at 76 ("Specialized services are by definition distinct from the customer's broadband Internet access service—they merely supplement such service, increasing the range of options available to the consumer and expanding consumer welfare.").

[47] Cisco Comments at 15 (noting that there is no evidence that specialized services give rise to "serious anticompetitive or anti-consumer conduct").

[48] Comments of the Telecommunications Industry Association, Managed Services Declaration, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010).

[49] Weldon Declaration at 4.

either packet loss or packet delay—continues to drive overall network investment, which in turn enhances the capacity for "best efforts" Internet access services, rather than undermining them.[50] Accordingly, what TIA showed in its prior comments remains true today: Regulation in this area risks impeding the development of specialized services just as their full value and utility are becoming known, which in turn would risk undermining network investment generally,[51] contrary to the overarching goals of this proceeding. The Commission thus should stay the course and refrain from adopting rules for specialized services.

II. THE RECORD AFFIRMS THAT RECLASSIFYING BROADBAND ISP OFFERINGS AS TITLE II SERVICES IS UNWARRANTED AND COULD CHILL OR FREEZE INNOVATION

The opening comments reflect a broad-based consensus that the Commission should adopt any open Internet rules only pursuant to the "blueprint" set forth by the D.C. Circuit,[52] rather than invite the host of problems that would follow were the Commission to reclassify broadband Internet access service under Title II. As discussed further below, commenters from all sectors of the industry warn that reclassification would be unwise as a policy matter and unsound as a legal one. The Commission should firmly reject the heavy-handed Title II approach and extinguish the tremendous uncertainty produced by the revival of this option.

Contrary to the concerns expressed by a few parties that the *Verizon* decision disabled the Commission from taking any action in this area,[53] many commenters point out that the Commission in fact has sufficient statutory authority under Section 706 to adopt open Internet

[50] *Id*. at 3-4.

[51] Weldon Declaration at 4-5.

[52] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Notice* ¶ 4.

[53] *See, e.g.*, Free Press Comments at 126; Consumer Union Comments at 7.

safeguards.[54] For one thing, the D.C. Circuit left intact the prior transparency rules, which themselves can be an effective means of preserving an open Internet.[55] In addition, the court explained how the Commission could craft a standard for assessing "commercially reasonable" practices as proposed in the *Notice*,[56] and also, how the Commission could rely on Section 706 to put the no-blocking rule back in place.[57] Furthermore, the record supports maintaining light-touch regulation that will continue to foster the Internet openness that has served consumers well.[58] With the benefit of a court-sanctioned roadmap and the experience from a successful time-tested approach, the Commission should not have difficulty devising open Internet protections that would survive judicial scrutiny and preserve broadband providers' ability to invest and innovate.

As discussed in TIA's opening comments, the *Notice*'s proposal of an enforceable rule requiring broadband providers to use "commercially reasonable" practices in the provision of

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[54] AT&T Comments at 26; ITIF Comments at 5-7; USTelecom Comments at 45-46.

[55] *Verizon*, 740 F.3d at 659. *sSee also* TIA Comments at 22 (noting that these rules have been in place for three years without attracting a single complaint). TIA cautions again, however, against the imposition of new, overly detailed transparency rules that likely would not be useful to the average consumer and could inadvertently hamstring broadband providers. The record indicates that this concern is widespread. *See, e.g.*, Cisco Comments at 18-19; ACA Comments at 27-30; ADTRAN Comments at 42-43; TWC Comments at 31-34; Bright House Networks Comments at 8-12; CTIA Comments at 27; Minority Media and Telecommunications Council Comments at 11-12; AT&T Comments at 79-80; T-Mobile Comments at 7-11.

[56] *Verizon*, 740 F.3d at 657; *Notice* ¶ 116.

[57] *Verizon*, 740 F.3d at 658.

[58] *See, e.g.*, Mobile Future Comments at 14 ("The light-touch regulatory approach of the past two decades has benefited American mobile broadband users and promoted strong investment in the mobile broadband ecosystem. Free to experiment and design products that meet the fast-changing demands of their customers, wireless broadband providers have invested tens of billions of dollars' worth of investments into their networks, unleashing greater capabilities and speeds while creating an entire economic sector that simply did not exist when the 1996 Act took effect."). *See also* Akamai Comments at 9; Comcast Comments at 43.

broadband Internet access service may strike the right balance between ensuring Internet openness without introducing the various harms of common carrier regulation.[59] While a number of commenters agree with that view in theory, it is not clear how such a standard would be applied as a practical matter, particularly given the range of factors that could be relevant to the analysis, and the number of ways in which those factors could be weighted. In an effort to assist in resolving that matter, TIA suggests that in cases involving a new broadband service or practice, the Commission consider a competitive analysis of the market at issue as a complete defense.

The *Notice* acknowledges the central relevance of marketplace conditions to determining commercial reasonableness in seeking comment on the weight to be given to the issues of "market structure and the extent of competition in a given market."[60] To the extent that the Commission undertakes such a competitive market analysis, TIA suggests that in cases involving a challenge to a newly introduced broadband service or practice, the broadband provider could, at its option, rest on a showing that the relevant broadband market in which the new service or practice is being offered is currently performing competitively. In competitive markets, the Commission should conclude that new services and practices are commercially reasonable. Such a conclusion coincides with past Commission precedent directly on point.[61]

Accordingly, the Commission incorporated into the commercial reasonableness standard adopted in the data-roaming context a consideration of "the level of competitive harm in a given

[59] TIA Comments at 24-26.

[60] *Notice* ¶¶ 124-25.

[61] *See, e.g., Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3285-92 (1995).

market and the benefits to consumers," a standard that inspired the *Notice*'s proposal here.[62] To avoid triggering an unending series of case-by-case competitive analyses that could create substantial uncertainty and inhibit innovation, the Commission should adopt a presumption that if a given broadband market is competitive, then new services or practices are commercially reasonable – unless a complainant presents clear and convincing evidence to the contrary. This procedure would preserve the ability to undertake a meaningful competitive analysis without forcing broadband providers to make a specific showing for each and every new practice or service they launch or seek to introduce.

In stark contrast to the merits of the light-touch regulatory approach, the opening comments make clear that the Commission would invite substantial harm were it to proceed by reclassifying some component of broadband Internet access as a Title II telecommunications service. As TIA has explained, and as many other parties likewise describe, imposing a legacy common carrier regime onto broadband at this stage would unduly restrict innovation, chill investment, and inject tremendous uncertainty into the marketplace[63]—unintended consequences that are not just inconsistent with, but which would eviscerate, the asserted goals of open Internet regulation.[64]

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[62] *Notice* ¶ 115 & n.243.

[63] TIA Comments at 15-19; Cisco Comments at 24 ("Classifying broadband Internet access service as a Title II common carrier service would necessarily cripple that freedom by exposing providers of cutting-edge broadband services to an archaic regulatory regime, enforced by a time consuming and uncertain administrative adjudication process."); Ericsson Comments at 11 ("The risks of long-term rate regulation, unbundling, and other uncertainties caused by the application of Sections 201 and 202 of the Act to broadband Internet access would stifle investment and innovation."); Verizon Comments at 50 ("Many Title II provisions cannot rationally be applied to broadband providers at all. Section 223, for example, deals with obligations related to obscene or harassing telephone calls; Section 226 with telephone operator services; Section 227 with restrictions on the use of telephone equipment.").

[64] *See, e.g., Notice* ¶ 25.

The record further establishes that relying on Title II as a jurisdictional alternative is not only a bad idea in theory, it makes little practical sense. Many parties observe that it is far from clear how the Commission would even implement and administer a Title II-based framework. TIA, for instance, has pointed out that the Commission would need to parse through its existing regulations to determine which specific mandates would and would not apply.[65] Doing so would require some reliance on the Commission's forbearance authority,[66] a process that itself is cumbersome, unpredictable, and prone to uncertainty.[67] More generally, the fact that considerable forbearance would be needed for the Internet to continue operating as consumers expect is a clear sign that Title II is ill-suited to Internet traffic.

TIA and others also note that a reclassification decision under Title II would raise the important question of how to draw demarcation lines between the various entities other than broadband Internet access providers that own broadband facilities or transmit information by wire or radio and thus would fall within the scope of regulation.[68] While the *Notice* states

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[65] TIA Comments at 16-17; *see also* Ericsson Comments at 12 (explaining that reclassification would force the Commission to "recognize that an admittedly overly burdensome set of requirements is not appropriate for a dynamic industry, apply those requirements anyway, but in the same breath make the determination that only a subset of those requirements should *actually* apply"); TechFreedom and International Center for Law and Economics Comments at 37-41.

[66] CenturyLink Comments at 49 ("[U]nder Section 10's forbearance standard, the Commission would have to forbear from the application of all provisions in Title II.").

[67] *See, e.g.*, WISPA Comments at 41 ("The time, effort, and legal fees associated with participating in multi-faceted and potentially contentious forbearance proceedings would place small businesses at an extreme disadvantage given their lack of resources. And just because the Commission has the right to forbear does not mean that a majority of the Commissioners will make the right legal or policy decision every time. Moreover, forbearance now is no guarantee about forbearance in the future.").

[68] TIA Comments at 17-18; Ericsson Comments at 12 ("In addition to burdening current operators, the other very real danger of applying common carrier regulation to the Internet is the scope of entities that could be swept in.").

without elaboration that conduct by these other participants in the Internet ecosystem "is beyond the scope of this proceeding," neither it nor any commenters explain how the Commission could lawfully or even sensibly pick and choose which entities would and would not be required to comply.[69]

Moreover, many parties explain reclassification would *not* accomplish what proponents of this approach claim it would – which means, when combined with its various harmful consequences – that Title II offers a far less appealing or effective alternative to Section 706 as interpreted in *Verizon*. For instance, Title II permits reasonable discrimination, and thus would not support the flat ban on paid prioritization arrangements that proponents of reclassification appear to be seeking.[70] In fact, Title II allows what some would consider "paid prioritization," in that different levels of service at different rates are permissible; different prices for similar services are permissible where there is a neutral, rational basis for disparate charges; and individualized contracts for specialized classes of users, including a single affiliated customer, are permissible.[71]

Not only is there widespread agreement that the Commission should not pursue the Title II approach, but a number of parties aptly explain why the Commission could not do so lawfully. These parties identify a number of obstacles that the Commission would need to overcome in

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[69] *See* TWC Comments at 26 (noting that the absence of any cogent explanation for the *Notice's* selectivity would render such a decision arbitrary and capricious under the Administrative Procedure Act) (citing *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)).

[70] Mobile Future Comments at 14 ("[R]eclassification would not address the concerns expressed by its advocates, because Title II only bars *unreasonable* discrimination.").

[71] CenturyLink Comments at 51 ("[R]eclassification would also mean that Title II's reciprocal compensation and Sections 201 and 202 requirements apply and thus that broadband providers must be paid and have some ability to discriminate on price and other terms."); TWC Comments at 14-16 (citing and quoting court and Commission precedent).

order to reverse its previous classification decisions, noting further that doing so would be highly difficult if not outright impossible. They explain, for instance, that the Commission is not entitled to reverse years' worth of precedent simply because its policy preference has changed. Some parties note that the D.C. Circuit has specifically warned the Commission against imposing common carrier status on any entity simply because of its desire to achieve a particular policy goal.[72] In addition, the Supreme Court has made clear that "[t]he entire question" in classifying broadband Internet access "turns ... on the factual particulars of how Internet technology works and how it is provided," meaning that the Commission must undertake a factual analysis of how broadband Internet access is actually offered rather than merely decide between various bases of regulatory authority.[73] The *Notice* did not identify any changes in the relevant facts that would enable the Commission to reach a different classification decision, and no commenter fills that void.[74]

Even if there had been meaningful factual changes in how broadband Internet access is offered, these same commenters observe that the Commission would need to provide a highly detailed rationale to take a new policy course, given the extensive reliance that the industry has placed on the prior classification rulings as well as the fact that any new factual findings would

[72] *See, e.g.*, TWC Comments at 13 (citing *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). *See also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976)).

[73] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

[74] Alcatel-Lucent Comments at 2 ("The Commission is revisiting its open Internet rules due to a court decision made on technical legal grounds, not because of any type of change in facts or circumstances that long guided the Commission away from heavy-handed utility-like regulation of the Internet.").

contradict those underlying the earlier decisions.[75] In light of the assorted and substantial harms that Title II would cause for the broadband marketplace, the challenges of implementing such a regime in this context, the ultimate insufficiency of Title II as a means of adopting open Internet safeguards, and the fact that Section 706 would allow the Commission to proceed in a manner that avoids that entire tangle of problems, it is difficult to imagine how the Commission could develop a sustainable justification for the radical reversal that the *Notice* suggests.

For all of these reasons, the Commission should reject, once and for all, the proposal that it rely on the heavy-handed Title II reclassification approach, and instead adopt any new open Internet protections pursuant to its broad authority under Section 706.

[75] *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account"); *see also, e.g.*, Alcatel-Lucent Comments at 11; Cisco Comments at 25. .

CONCLUSION

The record now before the Commission demonstrates that if the agency is to adopt any new open Internet rules, those regulations must be highly flexible in order to accommodate the rapid technological change that characterizes the broadband marketplace today – and that serves consumers well. TIA looks forward to continuing to work with the Commission to develop a light-touch regime that will preserve Internet openness without undermining the investment and innovation that has made this platform as robust and vibrant as it is.

Respectfully submitted,

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