

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

In the Matter of )  
 )  
Open Internet Remand ) GN Docket 14-28  
 )  
 )

**COMMENTS OF  
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March 21, 2014

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## **I. Introduction**

An open internet is central to countless social, economic, and political priorities of the United States. As such, it is critical that the Federal Communication Commission work quickly to establish effective, legally robust rules to ensure its protection. Commenters urge the Commission to take a holistic view of an open internet, and to establish a firm foundation for its open internet rules by developing a thorough record examining classifying internet access service as a Title II service. However, if the Commission elects to ground open internet rules in its Section 706 authority, Commenters urge the Commission to clarify its interpretation of certain provisions of the Communications Act in order to minimize the conflict between its open internet rules and any prohibition on treating non-Title II services as common carriers.

## **II. Foundational Values of the Phone Network Also Apply to the Internet**

In adopting technical trials for the phone network transition, the Commission unanimously endorsed the concept that certain core statutory values—public safety, ubiquitous and affordable access, competition, and consumer protection—lie at the heart of our nation’s communications policy.<sup>1</sup> Public Knowledge has similarly advocated for

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<sup>1</sup> *Technology Transitions*, GN Docket No. 13-5, *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353, *Connect America Fund*, WC Docket No. 10-90, *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, *Numbering Policies for Modern Communications*, WC Docket No. 13-97, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice

Five Fundamentals for the phone network: service to all Americans, competition and interconnection, consumer protection, network reliability, and public safety.<sup>2</sup> These critical and enduring fundamental principles have shaped the nation’s communications networks for decades, and created a phone system that is the envy of the world.

Far from falling away as the country moves from plain old telephone service to broadband internet access, these basic fundamentals are equally crucial to ensure that our newest and most promising communications networks continue to serve users first. As the Commission put it, “[o]ur mission and statutory responsibility are to ensure that the core statutory values endure as we embrace modernized communications networks.”<sup>3</sup> Indeed, these values are so important that the Commission is requiring trial proposals for the phone network transition to meet specific conditions and presumptions for each of the values before receiving Commission approval.<sup>4</sup>

Broadband internet access is quickly becoming the *de facto* basic service for those who seek to earn an education, conduct business, or take advantage of new technologies like over-the-top VoIP to contact loved ones. As internet access becomes increasingly necessary to participate in our culture, economy, and civic life, it becomes increasingly important that people can continue to rely on the same basic values in our next-generation networks.

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of Proposed Rulemaking, Proposal for Ongoing Data Initiative, ¶ 1 (rel. Jan. 31, 2014) (“Technology Transitions Order”).

<sup>2</sup> Jodie Griffin and Harold Feld, *Five Fundamentals for the Phone Network Transition*, PKthinks (July 24, 2013), available at <http://www.publicknowledge.org/news-blog/blogs/five-fundamentals-for-the-phone-network-transition>.

<sup>3</sup> Technology Transitions Order, ¶ 4.

<sup>4</sup> Technology Transitions Order, ¶ 26.

As the Commission considers its next actions to ensure an open internet, it must consider how the Five Fundamentals can also serve as a guide for strategies and priorities when protecting an open internet. These fundamental values, after all, exist to serve everyday Americans' essential needs and reach basic social goals. Those needs and goals are technology-agnostic, and so too must be the Commission's efforts to serve those goals.

The Commission should now recognize that the fundamental values that have shaped our phone network apply equally to internet access today. The reasons these enduring values have come to define our phone network are the same reasons those same values apply to broadband access today. Ubiquitous and affordable access is crucial to everyday Americans' ability to participate in the nation's economy, culture, and civic life.<sup>5</sup> Interconnection and competition between providers is crucial to achieving build-out and encouraging a customer-focused marketplace. Consumers must be protected from misleading or fraudulent practices, and their privacy must be a priority for providers and regulators alike. internet access must be reliable, and the logistics behind providing access should operate unfailingly and seamlessly. Finally, as consumers increasingly use the internet and other IP-based technologies to communicate during emergency situations, our broadband networks must ensure those people can seek aid reliably and immediately. It is now time for the Commission to recognize these fundamental values have endured through the development of the phone network and continue to be just as relevant as users look to the next generation of technologies as their basic communications service.

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<sup>5</sup> See *Connecting America: The National Broadband Plan*, Federal Communications Commission, pp. 127-190 (2010), <http://www.broadband.gov/plan/>.

### **III. The Commission Must Understand Forces that Impact the Open Internet in Order to Protect the Open Internet**

One of the recurring themes of threats to the open internet is that customers and the public have very little information. While we have seen a rotating cast of explanations from ISPs, it is still unclear why data caps are being imposed on end users.<sup>6</sup> It is similarly unclear how those caps are set, if they are evaluated against internal goals, and what conditions could cause them to be adjusted.

The same can be said for peering and interconnection. The truth of the matter is that anyone not directly involved with a specific agreement has no way to know if the agreement represents a reasonable agreement between the two parties or a degradation of the open internet.

Fortunately, the Commission retains clear authority to impose transparency on entities positioned to impact an open internet. While transparency is rarely an end unto itself, it can be a powerful tool to protect an open internet. The Commission should not shy away from using it as such.

The transparency requirements that remain in the Open Internet Order should be considered a baseline. The Commission must build on that baseline and use its clear transparency authority to shed light on agreements with the potential to impact an open internet. In doing so, the Commission cannot simply assume that markets effectively regulated by competitive pressure in the past will continue to be so in the future. Even a requirement for transparency that does not uncover troubling conduct can provide a

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<sup>6</sup> Michael Weinberg, *After All These Years, We Still Don't Know Much About Data Caps*, Public Knowledge (Aug. 22, 2013), <http://www.publicknowledge.org/news-blog/blogs/after-all-these-years-we-still-donot-know-muc>.

useful check on such conduct in the future. Mere assurances from involved parties cannot substitute for a detailed first-hand examination of an issue.

#### **IV. The DC Circuit Provides the Commission with an Opportunity to Recognize the Scope of Behavior That Can Impact an Open Internet**

Three years ago, the Commission established a set of high-level rules designed to protect and maintain an open internet.<sup>7</sup> Critically, the Commission decided to define its rulemaking in terms of an open internet, as opposed to a potentially more narrow concern such as network neutrality. While these principles were designed to be flexible enough to accommodate changes in both technology and use over time, they also contained notable ambiguity on then just-emerging challenges. Some of these challenges fell to the Open Internet Advisory Committee to address. Others were not yet recognized as challenges to the open internet.

In addition to reaffirming its enforceable commitment to an open internet, the current proceeding provides the Commission with an opportunity to fully engage with threats to an open internet that have emerged since 2010. As such, the Commission should not limit itself to merely grounding its previous open internet rules in a more robust theory of statutory authority. Instead, once the Commission settles on a more robust theory of statutory authority it should strive to craft rules that protect the open internet from threats that have continued to emerge throughout the process. The two most obvious examples of these types of threats are data caps and interconnection.

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<sup>7</sup> *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*, WC Docket No. 07-52, Report and Order (Dec. 2010) (“Open Internet Order”).

## A. Data Caps

Although the Open Internet Order briefly addresses usage-based billing, it does not specifically discuss the use of data caps that force consumers into usage buckets and punish them for exceeding their monthly allowances. However, in the years since the order was issued, data caps have emerged as a tool with a potential to significantly influence the viability of an open internet.

Public Knowledge and its allies have been raising questions about data caps for some time. In 2011, spurred by AT&T's then-newsworthy announcement that it would start capping wired internet subscribers,<sup>8</sup> Public Knowledge wrote to the Commission urging it to consider the impact that such caps would have on the future growth of the internet.<sup>9</sup> Since then, the impact of caps has only grown,<sup>10</sup> increasing the chance that they discourage the growth of an open internet.

Data caps have begun to emerge as the mechanism by which ISPs test the boundaries of what is and is not a violation of open internet rules. In 2012, Comcast began exempting its own online video service from the data caps that it imposes on it

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<sup>8</sup> David Goldman, *AT&T Starts Capping Broadband*, CNNMoney.com, May 3, 2011, available at [http://money.cnn.com/2011/05/03/technology/att\\_broadband\\_caps/?section=money\\_lates](http://money.cnn.com/2011/05/03/technology/att_broadband_caps/?section=money_lates).

<sup>9</sup> Letter from Public Knowledge and New America Foundation's Open Technology Initiative to Sharon Gillett, Chief, Wireline Competition Bureau, FCC (May 6, 2011) available at <http://www.publicknowledge.org/letter-to-FCC-on-ATT-Data-Caps>.

<sup>10</sup> See, e.g. Stacey Higginbotham, *Verizon CEO Lowell McAdams just took us on a tour of the next-generation internet: telco-style*, GigaOm (Feb. 28, 2014) <http://gigaom.com/2014/02/28/verizon-ceo-lowell-mcadam-just-took-us-on-a-tour-of-the-next-generation-internet-telco-style/>.



subscribers.<sup>11</sup> The result of this is that online video services that compete with Comcast's offering count against a consumer's data cap while Comcast's own offering does not.<sup>12</sup> This type of special lane for affiliated content is precisely the type of behavior that originally motivated concerns about preserving an open internet. It even undermines the basic tenet of competition among content providers established in the Commission's Internet Policy Statement in 2005.<sup>13</sup>

We have seen similar behavior in the wireless world. Earlier this year, AT&T announced a "sponsored data" exemption to the data caps that it imposes on its wireless customers. This type of arrangement strikes at the heart of the concept of an open internet unrestricted by interference from ISPs.<sup>14</sup> The Commission's own Open Internet Order details the problems with the type of two-sided market that AT&T is attempting to create with this scheme.<sup>15</sup>

This two-sided market scheme has the potential to further expand the digital divide in low-income and communities of color. Studies show Latino and African American users are more likely than White users to access the internet via a smart phone

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<sup>11</sup> Richard Lawler, *Xbox 360's Comcast Xfinity TV App in Beta Testing, Won't Count Against Data Caps When It Launches*, Engadget (Mar. 23, 2012), <http://www.engadget.com/2012/03/23/comcast-xbox-360-video-app/>.

<sup>12</sup> This behavior triggered a petition for enforcement of Comcast's merger conditions that remains unresolved to this day. Public Knowledge Petition to Enforce Merger Conditions, *Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56 (August 1, 2012).

<sup>13</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14,986 (2005).

<sup>14</sup> See Michael Weinberg, *AT&T's New Sponsored Data Scheme is a Tremendous Loss for All of Us*, Public Knowledge (Jan. 8, 2014), available at <http://www.publicknowledge.org/news-blog/blogs/attas-new-asponsored-dataa-scheme-tremendous>.

<sup>15</sup> See *Open Internet Order* at ¶¶ 23-26, 29.

than Whites, —76% and 73% respectively versus 60%. Smart phones provide a less expensive alternative to purchasing a home broadband connection, but are susceptible to expensive data plans and overage charges. Although advances in mobile phone technology have increased internet accessibility, data caps present a unique affordability challenge to these users.<sup>16</sup>

While ISPs have made it clear that data caps are tools to charge content providers<sup>17</sup> and have nothing to do with congestion,<sup>18</sup> it is not hard to see how they could be leveraged by ISPs to undermine a free and open internet.

In light of this possibility, it is somewhat surprising how little the Commission currently knows about caps.<sup>19</sup> This general ignorance was highlighted last summer by the Commission’s Open Internet Advisory Committee report.<sup>20</sup> The report contained four sections, the first of which focused on data caps and usage based pricing.

The Committee’s conclusion was simple – while data caps were significant, there was a paucity of information available for use in analyzing them. The lack of definitive

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<sup>16</sup> Mark Hugo Lopez, Ana Gonzalez-Barrera, and Eileen Patten, *Closing the Digital Divide: Latinos and Technology Adoption*, Pew Research Hispanic Trends Project (Mar. 7, 2013), <http://www.pewhispanic.org/2013/03/07/closing-the-digital-divide-latinos-and-technology-adoption/>.

<sup>17</sup> Sue Marek, *AT&T’s Stephenson: Content players will subsidize consumer’s data*, Fierce Wireless (Mar. 15, 2013), available at <http://www.fiercewireless.com/story/atts-stephenson-content-players-will-subsidize-consumers-data/2013-05-15>.

<sup>18</sup> John Eggerton, *NCTA’s Powell: Usage-Based Pricing About Fairness, Not Capacity*, Broadcasting & Cable (Jan. 17, 2013), available at <http://www.broadcastingcable.com/news/washington/nctas-powell-usage-based-pricing-about-fairness-not-capacity/61022>.

<sup>19</sup> The Commission has ignored at least two requests from Public Knowledge and its allies to ask simple questions about how data caps operate. See Letter from Future of Music Coalition, New America Foundation’s Open Technology Initiative, and Public Knowledge to Julius Genachowski, Chairman, FCC (July 14, 2011).

<sup>20</sup> Open Internet Advisory Committee, *2013 Annual Report* (Aug. 20, 2013).

data, standards, and analysis created a massive gap in understanding, a gap that undermines the Commission's ability to evaluate the use of caps across the country.

Fortunately, this proceeding provides the Commission with an excellent opportunity to examine the use of data caps and begin to build a factual record. As caps clearly have the potential to negatively impact both the open internet and the long-term growth of the network, the Commission should incorporate a thorough examination of the current state of data caps into its review. It was not entirely clear how the Commission's 2010 rules applied to this type data cap abuse. The Commission must take the opportunity provided by this proceeding to remedy that ambiguity and to establish clear rules of the road to prevent such abuse in the future.

## **B. Interconnection and Peering**

Traditionally, interconnection and peering have been seen as somewhat beyond the scope of net neutrality concerns. However, recent events have made it clear that disputes over interconnection and peering have the potential to significantly impact broader open internet concerns.

While peering and interconnection disputes are nothing new, the evolving structure of the internet has pushed them into public consciousness like never before. Most obviously, the ongoing conflict between Netflix and various ISPs (and the public response to the conflict) highlights just how easily peering and interconnection can cause conflicts that correlate highly with traditional open internet concerns. Specifically, there has been widespread concern that ISPs have the capacity to heavily influence the future

viability of high-bandwidth applications such as video through the manipulation of various interconnection and peering agreements.

Of course, the capacity to unreasonably manipulate interconnection and peering agreements is not the same as taking steps to do so. But that capacity is undeniable and, perhaps more importantly, poorly understood outside of the companies directly party to the agreements that govern interconnection.

As part of its commitment to an open internet, the Commission must take steps to, at a minimum, understand the true dynamics of the peering and interconnection markets. Today, public information about these agreements is largely found in blog posts from unverified third parties.<sup>21</sup> While some of these posts can be quite illuminating, disclosure-via-unverified-third-party-report is not a viable model to protect the continuing openness of a critical communications network such as the internet.

Moreover, such ad hoc reporting does not allow the Commission to build the in-depth understanding to truly evaluate the functioning of the market. From the outside, it can be difficult to distinguish between reasonable peering and transit agreements and problematic ones. As the importance and ability of these agreements to impact the open internet increases, the Commission has a responsibility to develop and maintain a nuanced understanding of the border between reasonable business practice and unreasonable undermining of an open internet. Whatever the wisdom of the

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<sup>21</sup> See Dan Rayburn, *Here's How The Comcast & Netflix Deal is Structured, With Data & Numbers*, StreamingMediaBlog.com (Feb. 27, 2014), <http://blog.streamingmedia.com/2014/02/heres-comcast-netflix-deal-structured-numbers.html> ; Adam Rothschild, *Despite Comcast-Netflix deal, settlement-free peering is alive and well*, Internap Blog (Mar. 7, 2014).<http://www.internap.com/2014/03/07/despite-comcast-netflix-deal-settlement-free-peering-alive-well/>.

Commission's traditional inclination to let this area of the market regulate itself through competitive pressures, current trends suggest that internal regulation may be breaking down. The Commission would be well served to begin building its understanding of the market in advance of a full-blown crisis so that it can fulfill its role as an expert agency positioned to protect an open internet.

## **V. Title II Gives us a Clear Model for How an Open Internet Can Operate**

As Public Knowledge and others have advocated for some time, Title II is the proper regulatory framework for telecommunications services such as broadband.<sup>22</sup>

### **A. Use Title II to Create a Light-Touch Regulatory Framework**

The most logical conclusion to draw from the DC Circuit's recent decision is that the Commission should move towards a Title II-grounded regulatory structure to protect an open internet. This structure should strive to be a light-touch, prophylactic set of rules that protect consumers online without unnecessarily burdening internet access service providers.

Public Knowledge detailed how the Commission could create this structure in previous filings, and therefore will not belabor the details here.<sup>23</sup> As was true during the

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<sup>22</sup> *Comments of Public Interest Commenters*, GN Docket No. 09-191, WC Docket 07-52 (Jan. 14, 2010); *Reply Comments of Public Knowledge*, GN Docket No. 09-191; WC Docket No. 07-52 (Apr. 26, 2010); *Comments of Public Knowledge*, GN Docket No. 10-127 (July 15, 2010); *Reply Comments of Public Knowledge*, GN Docket No. 10-127 (Aug. 12, 2010).

original open internet proceeding, Sections 201 and 202 provide strong statutory grounding for creating strong rules to protect an open internet.<sup>24</sup>

Violating any nondiscrimination rule will necessarily involve violating Sections 201 and 202 by engaging in practices that unjustly or unreasonably give preference to or disadvantage a particular class of persons: namely, the users of particular lawful applications, services, or content. The unjust or unreasonable standard also simplifies the application of any rules by incorporating elements such as “reasonable network management” into their definition of reasonableness.

Furthermore, grounding open internet rules in Title II authority allows the Commission to rely on the time-tested enforcement mechanism in Section 208.<sup>25</sup> This alleviates the need to create a new open internet-specific enforcement mechanism that may contain unexpected flaws or shortcomings.

When combined with the Commission’s Section 10 forbearance ability,<sup>26</sup> Title II provides the clear statutory authority to implement rules critical to protecting an open internet while avoiding importing unnecessary legacy regulations of the past.

## **B. Broadband Problems Echo Telephone Problems**

Title II communications systems have established a set of norms and expectations that have helped to keep the phone system operating in a reasonably neutral and functional way for decades. Phone customers – both residential and commercial – have

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<sup>23</sup> *Id.*

<sup>24</sup> *See* 47 U.S.C. §§ 201, 202.

<sup>25</sup> *See* 47 U.S.C. §§ 208.

<sup>26</sup> 47 U.S.C. § 160.

come to accept that they will be able to access the phone system at reasonable rates and that the phone system will seamlessly connect them to numbers of their choosing. Phone network operators understand the bounds of acceptable interconnection behavior and there is a structure to resolve differences between networks without an interruption of service. Would-be holders of termination monopolies cannot exploit their position in the network to the detriment of others, and information asymmetry does not result in gouging of customers.

However, these problems continue to dog both the open internet and the IP transition of the phone network itself. There are disputes surrounding interconnection and concerns of abuses by termination monopolists. Information asymmetry abounds, with consumers and the Commission alike unaware of the forces that influence the ongoing development of internet access service across a wide variety of issues. Concerns about the cost of network exclusion – the same type of behavior that defined the earliest days of the telephone network – remain very real in the internet access context.

In light of the success of the phone network and Title II, it should come as no surprise that the solutions to these modern challenges are essentially the same answers that define the Title II regulatory regime. Title II has proven itself to be both useful and durable, to the point where many consumers take its protections for granted. There is no reason not to ground the protection of the open internet in the firm foundation of this successful structure.

### **C. Regardless of How it Handles Its Examination of Section 706, the Commission Needs to Refresh the Record on Title II**

The DC Circuit did not fully foreclose the possibility that the Commission could ground future open internet rules in Section 706. In light of that opening, the Commission has indicated its intention to explore the possibility of using Section 706 to create a regulatory framework to protect an open internet. While Commenters are highly skeptical that Section 706 can form a sound legal basis for effective open internet protections, they recognize that part of the coming open internet proceeding may examine that possibility. Regardless of how it decides to handle this Section 706 inquiry, the Commission must also take this opportunity to simultaneously refresh the record in its reclassification proceeding.<sup>27</sup>

The Commission has prioritized protecting an open internet because protecting an open internet is both urgent and important. If the Commission concludes that Section 706 cannot adequately serve as a basis for strong open internet rules, the public should not be forced to wait for the Commission to initiate and complete yet another proceeding to examine its Title II authority before benefiting from effective open internet rules. Simultaneously exploring Section 706 and Title II statutory groundings for authority will guarantee that the Commission will be able to move quickly to implement open internet rules once it concludes its statutory review.

This examination and refreshing of the record must be done in an empirical, fact-based manner. It should also examine assumptions that have formed the basis for broadband access regulation in the past. It has been over a decade since the Commission

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<sup>27</sup> *Framework for Broadband Internet Service*, GN Docket No. 10-127.



has made a significant broadband access classification decision and many things, including the way that broadband is being offered, have evolved in the interim. If today's market offers broadband materially differently than it did in 2002, or if the Commission's predictive judgments about the market's trajectories have turned out to be wrong, the Commission and the public would be best served by an acknowledgement of that change. There is no reason to assume, without investigation, that the broadband access market has remained essentially unchanged since 2002.

## **VI. The FCC Must Examine the Scope of the “Common Carrier Prohibition”**

As Commenters have consistently held, the Commission's best path to protect internet users is Title II. Title II is an established framework for telecommunications regulation that provides a clear set of consumer protections. It builds on decades of legal precedent and gives the FCC clear consumer protection authority without giving it plenary discretion over providers.

However, as Commenters have also consistently held, if the Commission fails to use the clear authority at its disposal, it is not without second- and third-best options. The DC Circuit has held that Section 706 provides the Commission authority over broadband. Given the untested nature of Section 706 authority, this is not the best approach to take when Title II is available. In particular, a “case by case” approach is risky and does not provide the correct level of protections, and an approach modeled on the FCC's data roaming rules, which have been upheld, likewise falls short.

However, if the Commission does choose to go forward with Section 706, it can take certain preliminary steps to ensure that Section 706 could be more helpful.

Under the DC Circuit’s current reasoning, 706 does not actually allow the Commission to protect internet openness. But the Commission can overcome this, at least in part. In particular, the Commission should clarify its interpretation of certain provisions of the Communications Act where its interpretation trumps that of any court.<sup>28</sup> First, the FCC should find that 47 U.S.C. § 153(51), which states that “A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services,” does not in the first instance apply to entities other than “telecommunications carriers.” It does not apply to entities that under current law are not “telecommunications carriers,” such as cable broadband providers. Second, the FCC should clarify--and if challenged, argue in court--that nondiscrimination protections like those in the Open Internet Order that fall short of full Title II protections do not constitute “common carrier” rules.<sup>29</sup>

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<sup>28</sup> *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 US 967, 982 (2005) (“A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”)

<sup>29</sup> Coupled with its reading of 47 U.S.C. § 153(51), the DC Circuit's broad interpretation of “common carriage” could prohibit many kinds of rules designed to prohibit harmful conduct, not just the open internet rules in question. Even to the extent that the Commission does formally classify broadband as a common carriage service, it should clarify the meaning of the statutes relied on by the DC Circuit.

**A. Under the DC Circuit’s Reasoning, the FCC is Prohibited from Protecting the Open Internet Unless It Reclassifies Broadband Providers as Common Carriers**

Under Commission precedent, broadband providers are not regulated the same way as other communications services.<sup>30</sup> Instead, broadband providers – though they operate last-mile communications networks, with access to public rights-of-way, utility poles, and the like--are fitted into the same regulatory category, “information services,” as social networks, online shopping, and email.

In *Verizon v. FCC*, the court reasoned that because the open internet rules limit a broadband provider's ability to make “individualized decisions” with respect to “edge” companies (that is, the services people purchase broadband service to gain access to), the rules treated them as common carriers with respect to those providers.<sup>31</sup> According to the court, this runs afoul of 47 U.S.C. § 153(51), which provides that “A telecommunications carrier shall be treated as a common carrier ... only to the extent that it is engaged in providing telecommunications services.” Under the court's reasoning, because of this provision, the Commission cannot treat a broadband provider as a common carrier without a formal finding that it is one. The court therefore struck down the portions of the open internet rules that prevent a broadband provider from discriminating among and blocking internet services.<sup>32</sup>

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<sup>30</sup> *Verizon v. FCC*, No. 11-1355, at \*8-9 (DC Circuit Jan. 14, 2014). Traditionally, communications networks are treated as “common carriers,” a category that recognizes that some private enterprises are “affected with the public interest” and have an obligation to serve the public in a nondiscriminatory manner.

<sup>31</sup> *Verizon* at \*51-52.

<sup>32</sup> *Verizon* at \*63.

Under this holding, regardless of what powers the Commission might have under Section 706,<sup>33</sup> unless and until the Commission formally declares that broadband providers are in fact common carriers, it has a net neutrality-shaped hole in its authority granted by this section. It cannot enact any rules with respect to them that appear (at least in the DC Circuit's view) similar to common carrier obligations. While it can do other things to promote broadband under Section 706, it cannot directly protect the open internet by preventing broadband service providers from discriminating between internet applications and services and by ensuring that customers are able to access the internet content they buy internet access for in the first place. In the Court's view, if the Commission wishes to preserve the policies behind the Open Internet Order using alternate legal means, it has no choice but to reclassify broadband access service providers as common carriers under Title II of the Communications Act.

*1. Case-by-Case Adjudication Is No Substitute for Reclassification*

Unless the Commission reclassifies, there are no back doors that would allow the Commission to re-introduce the complete set of protections that Title II provides. Short of reclassification, the Commission may have room to reintroduce some form of "better than nothing" consumer protection along the lines of the initial Open Internet rules. If it goes down this path, it will have to grapple directly with issues of statutory interpretation it has thus far avoided. This means it must adopt, as it may, statutory constructions different than those described by the DC Circuit. Because at some point the Commission does need to have a clearer interpretation of matters such as the scope of "common carriage," it

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<sup>33</sup> 47 U.S.C. § 1302

may be advisable for the Commission to consider these points. But it would be more straightforward for the Commission, in the short term, to simply reclassify broadband as a telecommunications service, a choice clearly put before it by the appeals court.

For instance, it is true that the Commission, under Section 706 and other authority, could probably act to stop a particular instance of anticompetitive conduct that impedes broadband development. It may even be that the reason that a particular act is proscribed is that it is discriminatory. However, even a system of case-by-case adjudication would not provide the Commission an avenue to reintroduce a *de facto* prohibition on anticompetitive conduct. The precedential value of any decision would be limited since 47 U.S.C. § 153(51) would prevent any case standing for the proposition that discriminatory conduct is prohibited. Rather, in each adjudication, the Commission would be required to start from a blank slate and argue why a given act frustrates the goals of Section 706, and would be not be able to learn from its experience and simply prohibit discriminatory behavior even after it is routinely shown to be anticompetitive.

Even if the Commission were to strike down individual instances of anticompetitive, discriminatory conduct more than once, it would likely be subject to an “as applied” challenging arguing, probably with some merit, that the Commission was merely attempting to impose *de facto* nondiscrimination rules on the industry without expressly saying it is. Such conduct by the FCC would at least be questionable in light of *Verizon v. FCC*, but perhaps more relevant at this stage of analysis is the likelihood that such an approach would not work.

What’s more, any system of adjudication instead of prophylactic rules suffers other defects. First, it is burdensome. What startup, what individual entrepreneur, and

what small company would risk its future on such a system? Why would an investor fund a business that a large ISP could just block or degrade--with the mere possibility that if it happens an adjudication might come to the rescue? There are other things to do in this world, and without certainty that an internet business would be able to reach consumers it is likely that investment will be reduced. Second, a solely adjudicatory system lacks teeth. It is difficult to penalize an ISP for violating either a rule against discrimination that does not actually exist, or for engaging in conduct that in the judgment of an expert agency in some indirect way works against the “deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>34</sup> While the Commission might be able to enjoin certain conduct, it is unlikely that this alone would be enough to prevent anticompetitive conduct. If an ISP’s only risk is that it might be told to stop, there is nothing to prevent it from seeing how much it can get away with.

## 2. *The Data Roaming Order Does Not Provide a Model for Protecting the Open Internet*

Nor is it clear that the FCC’s approach in the data roaming context is adequate. The data roaming order requires carriers to interconnect with each other on “commercially reasonable” terms.<sup>35</sup> The DC Circuit has deferred to the FCC’s judgment that this falls short of common carrier regulation.<sup>36</sup>

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<sup>34</sup> 47 U.S. § 1302.

<sup>35</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 F.C.C.R. 5411, ¶ 13 (2011) (“Data Roaming Order”).

<sup>36</sup> *Cellco Partnership v. FCC*, 700 F. 3d 534, 537 (DC Circuit 2012).

In its data roaming order, the Commission observed that “The rule we adopt will allow individualized service agreements and will not require providers to serve all comers indifferently on the same terms and conditions.”<sup>37</sup> Even assuming that edge providers (as opposed to individual subscribers) constitute “comers” for carriage purposes, it would fall well short of the open internet rules if the FCC were to require broadband ISPs to treat edge providers on a “commercially reasonable” basis.

First, the issue is not that broadband ISPs are charging commercially unreasonable rates to edge providers when they should be charging them commercially reasonable ones; the issue is that any charges or differential treatment between a broadband ISP and a pure edge provider (as opposed to an interconnecting network) are unreasonable. A “commercial reasonableness” rule would change this norm by giving formal FCC blessing to the very kinds of arrangements the open internet rules sought to prohibit.

Second, the essence of commercial reasonableness is discrimination. As the Commission has expressly found,<sup>38</sup> it may be “commercially reasonable” for a broadband ISP to charge an edge provider higher rates because its service is competitively threatening. It may even be “commercially reasonable” to engage in pure price discrimination by charging more to those edge providers with a greater ability to pay. These kinds of charges would not be “just and reasonable” and are inherently discriminatory, but the very purpose of the “commercial reasonableness” standard is to offer less protection. It is difficult to see how the data roaming model, which was

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<sup>37</sup> Data Roaming Order ¶ 68.

<sup>38</sup> *Id.*

expressly designed to provide a lesser degree of protection than the Open Internet Order, can adequately serve the same policy goals.

Finally, before proceeding with any approach modified on the Data Roaming Order's approach, the Commission should examine whether that approach has been as effective as it predicted.

### **B. However, the DC Circuit's Reasoning is Not Necessarily Final**

The FCC does not need to appeal the DC Circuit's ruling to escape from some of its reasoning, since it is the FCC, not courts, that has the final say as to the construction of ambiguous terms in the Communications Act.<sup>39</sup> While the DC Circuit's construction of 47 U.S.C. § 153(51) may be reasonable, it is far from inevitable, and the FCC could shed valuable light on how to interpret it in a way that is not at odds with the Commission's need to protect internet openness.

#### *1. The "Common Carrier Prohibition" Need Not Be Any Such Thing*

The plain language of the statutory provision that the DC Circuit's reasoning depends on does not prevent the FCC from treating non-common carrier services as common carriers. It prevents the FCC from regulating *telecommunications carriers* as common carriers with respect to their non-common carriage services. But, under

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<sup>39</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); see also *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (“[W]e apply the Chevron framework to the Commission’s interpretation of the Communications Act.”).



Commission precedent, many broadband providers are *not* telecommunications carriers. The statute thus appears inapplicable to broadband providers that are not telecommunications carriers, and would work only to prevent regulators from, for example, requiring that local exchange carriers provide nondiscriminatory access to their non-common carriage activities. For example, AT&T is both a common carrier (with respect to its local telephone service) and an MVPD. The “common carrier prohibition” could be read merely to preclude claims that it is required to offer nondiscriminatory access to its MVPD service, or, for that matter, its retail stores. At most, under this reading, 47 U.S.C. § 153(51) would limit the FCC with respect to those broadband providers that also provide telecommunications service, but it would not limit the Commission’s ability to impose some sort of open internet rules on other broadband providers.

Again, the DC Circuit’s interpretation of 47 U.S.C. § 153(51) is not necessarily unreasonable under a *Chevron*-type analysis. But it is not inevitable, and to the extent that the court supports its interpretation, it does so by citing the FCC itself. For example, the court cites the FCC’s statement that a “service provider is to be treated as a common carrier for the telecommunications services it provides, but it cannot be treated as a common carrier with respect to other, non-telecommunications services it may offer, including information services.”<sup>40</sup> Even if the Commission had given 47 U.S.C. § 153(51) such an interpretation, it would be free to change its mind.<sup>41</sup> But more critically, the FCC orders that the DC Circuit relies on are not discussing 47 U.S.C. § 153(51), they

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<sup>40</sup> *Verizon* at \*45-46, citing Wireless Broadband Order, 22 F.C.C.R. at 5919 ¶ 50.

<sup>41</sup> *FCC v. Fox Television Stations*, 556 U.S. 502 (2009) (agencies do not bear a higher burden of proof when changing their interpretations of statutes than in interpreting them in the first place).

are discussing 47 U.S.C. §332(c)(2), a different provision that was enacted at a different time for different purposes. It is questionable, at best, to apply the Commission’s current construction of one statutory provision to clarify another. The Commission should address these issues by providing its definitive interpretation of the meaning of the provisions in question.

3. *It is Up to the Commission to Decide The Bounds of “Common Carriage” as Used in the Act*

The DC Circuit notes that the statutory phrase "common carrier" is ambiguous. It writes,

Offering little guidance as to the meaning of the term “common carrier,” the Communications Act defines that phrase, somewhat circularly, as “any person engaged as a common carrier for hire.” Courts and the Commission have therefore resorted to the common law to come up with a satisfactory definition.<sup>42</sup>

Turning to the common law in this case is wise: common carriage is an ancient concept, developed over hundreds of years into a robust doctrine that is able to adapt to broadband internet services, hotels and inns, package delivery, oil pipelines, and many other things. It is instructive to review this history in determining how best to apply its concepts to modern technologies like broadband access service. But in the first instance, as with any ambiguous statute administered by an expert agency, the FCC and not the courts have the primary interpretive responsibility. If the FCC, turning to the wisdom of the common law, comes to a reasonable determination as to the scope of common carriage, then its determination, and not any contrary one by the DC Circuit, must prevail.<sup>43</sup>

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<sup>42</sup> *Verizon* at \*47 (citations omitted).

<sup>43</sup> *Cellco Partnership* at 544 (2012) (“the Commission’s interpretation and application of the term ‘common carrier’ warrants Chevron deference”).

Indeed, there is reason to think that the DC Circuit’s view of what constitutes common carriage is not the best one. Common carriage traditionally requires that a service provider serve the public on nondiscriminatory terms, often under tariffed rates. But the open internet rules did not do that. At most, they prohibited a broadband provider from charging edge providers, whom they traditionally have no business relationship with, new fees to prevent their content from being blocked or degraded relative to other services. Broadband ISPs enter deals and negotiate with business and residential users and with interconnecting networks. Were they to start also negotiating with internet services, this would constitute an entirely new line of business – in some cases, a line of business that enables them to extract a third revenue stream for providing the same service. It is a question of policy for the FCC to decide whether to prohibit a broadband ISP from entering a new line of business by charging a new class of entities with whom it has no traditional business relationship. But such a prohibition need not be seen as a “common carrier” rule, and interpreting line-of-business restrictions as “common carriage” appears to be a novel development of the DC Circuit itself.

As the court noted, the FCC has already indirectly raised these issues. In the Open Internet Order,<sup>44</sup> the Commission expressly rejects much of the reasoning that the DC Circuit incorporated in its ruling. The Commission even noted in the record that “Courts have acknowledged that the Commission is entitled to deference in interpreting the definition of ‘common carrier.’”<sup>45</sup> But the DC Circuit found that “the Commission has

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<sup>44</sup> Open Internet Order ¶ 79 n. 246-252.

<sup>45</sup> Open Internet Order n.248 (citing *AT&T v. FCC*, 572 F.2d 17, 24 (2d Cir. 1978)).

forfeited this argument by failing to raise it in its briefs here.”<sup>46</sup> This suggests that even the original Open Internet Order could still be found lawful provided the FCC chooses to defend it with a different strategy, foregrounding its long-established *Chevron* deference with regard to “common carriage.”

While the DC Circuit has interpreted the Open Internet Order’s nondiscrimination and blocking rules as a form of common carriage, this conclusion does not unambiguously follow from the text of the Act. It is therefore a question where the FCC and not any court has primary jurisdiction. Were the Commission to conclude that rules preventing a broadband ISP from blocking, degrading, or charging fees to internet content and service providers do not constitute common carriage, this conclusion would be entitled to deference.

*4. The Formalist Concept that the Commission Must Actively  
“Classify” Services Has No Basis in the Act*

It has become accepted wisdom that the FCC must first “classify” a communications service and put it in one regulatory bucket or the other before it can enact rules respecting it. While this has become the FCC’s practice, such a process has no basis in the Act.

Accepting for a moment the argument that the open internet rules do constitute common carriage, a rule directing a communications provider to act as a common carrier should be the only “classification” that is needed. Without more, directing a provider to

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<sup>46</sup> *Verizon* at \*57.

operate a common carrier service turns it into a common carrier – common carriage is determined by activities, not by formal declarations.<sup>47</sup>

While the precise edges of common carriage may be ambiguous and thus subject to agency discretion, once the FCC has (1) defined common carriage, and (2) directed a service provider to act in ways consistent with common carriage, a further “classification” step is unnecessary. 47 U.S.C. § 153(51) does not prevent the FCC from treating a common carrier as a common carrier, nor does it prevent the FCC from directing a non-common carrier to become one.

This is not to say that the Commission does not need to ground its actions in relevant statutory authority (e.g., Title II), nor does it accept that the open internet rules in fact constitute common carriage rules. Rather, the strange focus on "classification" is an example of how the FCC has trapped itself in a maze of its own creation.<sup>48</sup> The best way out of this maze is a single-minded focus on consumer welfare, not industry sensibilities. The Commission should not allow formalistic rituals it has created for itself to stand in the way of doing its job.

## **VII. The Commission Must Work to Define the Limits on Section 706**

As the DC Circuit recognized, Section 706 provides a broad authority for a wide variety of rules and policies designed to promote advanced telecommunications

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<sup>47</sup> *National Ass'n of Reg. Util. Com'rs v. FCC*, 533 F. 2d 601, 608. DC Circuit 1976.

<sup>48</sup> Cf. *Raze the Mystery House*, *The Economist* (Apr. 8 2010), <http://www.economist.com/node/15867976>.

capability. The statute not only names specific types of measures (“price cap regulation” and “regulatory forbearance”), but also a more general category of action (“measures that promote competition in the local telecommunications market”) as well as a broad catchall for any other methods, limited within Section 706 only insofar as they must “remove barriers to infrastructure investment.”

As discussed above, this broad authority is significantly limited in the DC Circuit’s interpretation of what “specific prohibition[s]” exist within the Communications Act. In particular, the majority focuses on the common carrier prohibition. While this may, under the current regulatory scheme, carve out a number of substantial things that Section 706 cannot do, the larger universe of what is possible under this section remains largely undefined. The only other expressly defined limits are the end goal of the regulatory action—encouraging the reasonable and timely deployment of advanced telecommunications—and the general outer bounds of the Commission’s jurisdiction over “interstate and foreign communication by wire and radio.” While this may suffice for a court to find that the authority has a limiting principle, it does not give much practical guidance as to what the Commission may or may not consider within its scope.

The breadth of authority contained with these principles raises the possibility of the Commission having authority to promulgate rules of all sorts, so long as they could rationally be said to contribute to the deployment of broadband. For instance, the case could be made that the prevalence of adult content online was discouraging certain households from adopting broadband; therefore, decency regulations on online content could be promulgated under section 706. Or, to circumvent the ruling in *Am. Library*

*Assoc. v. FCC*,<sup>49</sup> the Commission could argue that unauthorized recording and distribution of copyrighted material online was deterring broadband adoption, thus providing authority for the inspection and filtering of online communications for infringement.

In both of these cases, measures of dubious policy merit and with goals somewhat attenuated from promoting broadband adoption in itself could be justified under the statutory authority of Section 706. Other similarly tangential policies could be similarly justified. At the same time, such theoretical outliers could be used to challenge the legitimacy of more relevant efforts to promote adoption.

The Commission must therefore be clear about its views of its Section 706 authority and what limiting principles may or may not apply to it. Some principles may be derived from interpretations of the express statutory limitations (such as the limitation in *ALA v. FCC* preventing regulations on post-communication activity), while others might be determined by a clearer explication of what constitutes a reasonable relationship to the goals of Section 706 and what is consistent with the public interest, convenience, and necessity.

### **VIII. The Court's Decision Paves The Way For the FCC To Take Action To Promote Municipal and Rural Broadband.**

As the Chairman observed, the court's decision suggests that the FCC can and should take further steps to spur deployment of high-quality, high-speed municipal and

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<sup>49</sup> 406 F.3d 689 (D.C. Cir. 2005).

rural broadband using its authority under Section 706.<sup>50</sup> In particular, the FCC seeks comment on whether to preempt state laws restricting the ability of local governments to provide broadband services or partner with others to provide broadband services. The Commission's recent *IP Transition Order* recognized that broadband deployment still lags in rural areas, preventing deployment to "all Americans" in a "timely manner" as required by Section 706.<sup>51</sup>

Public Knowledge has long supported Commission action to encourage deployment of broadband in rural communities. In particular, PK encourages a "self-provisioning" approach that takes advantage of changes in technology to permit local providers to offer service, rather than relying solely on traditional carriers that view these communities as either a source of federal subsidy or a regulatory obligation under carrier of last resort (COLR) regulation.<sup>52</sup> Although the Commission has authority to adopt such proposals even without an expansive reading of its authority under Section 706, Commenters welcome the renewed focus the recent court decision has brought to this issue and urge

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<sup>50</sup> Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules (Feb. 19, 2014).

<sup>51</sup> *In the Matter of Technology Transitions, AT&T Petition To Launch A Proceeding Concerning TDM-To-IP Service, Connect America Fund, Structure and Practices of the Video Relay Service Program, Telecommunications Relay Service and Speech-to-Speech Services For Individuals With Hearing and Speech Disabilities, Numbering Policies For Modern Communications*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, Docket Nos. 13-5, 12-353, 10-90, 10-51, 03-123, 13-97 (rel. Jan. 31, 2014) ("IP Transition Order") at ¶¶130-135.

<sup>52</sup> *See In the Matter of A National Broadband Plan for Our Future*, Docket No. 09-51 Comments of Public Knowledge, *et al.*, (filed June 8, 2009) at 46-50, *available at* <http://apps.fcc.gov/ecfs/document/view?id=6520220265>; Reply Comments of Public Knowledge (filed July 21, 2009) at 34, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7019917823>; *In the Matter of Connect America Fund*, Docket No. 10-90, Comments of Public Knowledge and Benton Foundation (filed Aug. 24, 2011) at 11-14, *available at* <http://apps.fcc.gov/ecfs/document/view?id=7021704659>.



the Commission to take swift action to promote competition and encourage deployment of rural broadband services “comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”<sup>53</sup>

#### **A. The FCC Should Act To Preempt State Laws Limiting Local Broadband Solutions.**

As an initial matter, Commenters once again urge the Commission to preempt state laws that limit the flexibility of local governments to find innovative ways to provide broadband to their communities. As a recent study by the Government Accountability Office (GAO) demonstrated,<sup>54</sup> municipal broadband services can provide small businesses and other local residents with significantly improved services at lower prices and higher quality than were otherwise available in the market.<sup>55</sup> Congress’ inclusion of the Rural Gigabit Network Pilot program in the recent farm bill<sup>56</sup> further highlights the need to take action to promote rural broadband.

In addition to laws limiting localities, the Commission should also compile, or delegate to state utility Commissions to compile pursuant to Section 706(a), a list of state laws and other barriers to entry to prohibit or limit the ability of state-owned institutions,

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<sup>53</sup> 47 U.S.C. 254(b)(3).

<sup>54</sup> See GAO, *Federal Broadband Deployment And Small Business* at 10-20 (Feb. 2014) available at <http://www.gao.gov/assets/670/660734.pdf>

<sup>55</sup> See Nick Russo, Patrick Lucey, Danielle Kehl, Hibbah Hussain, *Reining In the Cost of Connectivity*, New America Foundation Open Technology Institute (Jan. 2014) available at [http://www.newamerica.org/publications/policy/reining\\_in\\_the\\_cost\\_of\\_connectivity](http://www.newamerica.org/publications/policy/reining_in_the_cost_of_connectivity); Mark Cooper, *Comparing Apples To Apples: How Competitive Provider Services Outpace The Bell Duopoly*, Consumer Federation of America (Dec. 2013) available at <http://www.consumerfed.org/pdfs/comparing-apples-to-apples-11-2013.pdf>.

<sup>56</sup> Agriculture Act of 2014, P.L. 113-79 §6105.

such as state-owned colleges and universities, from offering broadband services to their local communities either directly or by making resources such as “dark fiber” available. The Commission has long recognized the role of community “anchor institutions” in bringing broadband to their communities.<sup>57</sup> Project such as Gig U<sup>58</sup> and the Digital Libraries Network TVWS pilot program<sup>59</sup> demonstrate the ability of these community anchor institutions to effectively leverage access to fiber and access to enhanced unlicensed spectrum to deliver “advanced telecommunications capabilities” cheaply and effectively to their communities.

To the extent state laws, acceptable use policies, or other regulatory or contractual barriers prohibit or discourage these local and regional efforts, the FCC should declare them contrary to law and preempted. Legal authority to do so lies not merely in Section 706(a). Pursuant to the Commission’s obligation under Section 257 of the Communications Act of 1934<sup>60</sup> to remove barriers to small business entry and its obligation to compile a report on the timeliness of deployment pursuant to Section 706(b),<sup>61</sup> the Commission may (either on its own or in combination with state PUCs) conduct an inventory of municipal and state fiber resources and remove any barriers to the utilization of these resources for the delivery of broadband services.

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<sup>57</sup> *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-06 Sixth Report and Order (rel. Sept. 28, 2010) at ¶¶2-3; *Connecting America: The National Broadband Plan*, Federal Communications Commission, at 237 (2010).

<sup>58</sup> See <http://www.gig-u.org/>.

<sup>59</sup> John Engebretson, *Gigabit Libraries Network To Trial TV White Spaces*, Telecompetitor (July 9, 2013) available at <http://www.telecompetitor.com/gigabit-libraries-network-to-trial-tv-white-spaces/>.

<sup>60</sup> 47 U.S.C. §257(a).

<sup>61</sup> 47 U.S.C. §1302(b).

### 1. Legal Authority To Preempt

As the Supreme Court recently reaffirmed in *City of Arlington*, the FCC has broad powers to preempt state and local laws it finds contrary to its responsibilities under the Communications Act.<sup>62</sup> Even without the explicit direction of the court in *Verizon v. FCC*,<sup>63</sup> the Commission had authority both to compel states and localities to report on barriers to entry<sup>64</sup> and the authority to preempt these laws and policies to promote competition.<sup>65</sup>

The Commission has previously used its authority to preempt private agreements, as well as state or local regulation, contrary to the goals of the Communications Act. For example, the Commission's Over The Air Receiver Device rules preempt not merely state and local regulation prohibiting the use of satellite antennas and wifi,<sup>66</sup> but also prohibit private contracts such as rental agreements or neighborhood associations and condominium boards from interfering with the use of these devices and services.<sup>67</sup> Previously, the Commission has sought to promote broadband competition by preempting

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<sup>62</sup> *City of Arlington, TX v. FCC*, 133 S. Ct. 1863, 1871 (2013).

<sup>63</sup> 740 F.3d at 661 n.2 (Silberman, J., dissenting).

<sup>64</sup> 47 U.S.C. §257(a) requires the Commission to compile the report, Section 4(i) allows the FCC to require entities to respond to the inquiry. *See Comcast Corp. v. FCC*, 600 F.3d 642, 659-60 (D.C. Cir. 2010).

<sup>65</sup> *See Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (preemption of state franchising authority).

<sup>66</sup> *See In the Matter of Continental Airlines*, Petition for Declaratory Ruling Regarding Over-The-Air Receiver Devices (OTARD) Rule, ET Docket No. 05-247 (Nov. 1, 2006).

<sup>67</sup> *Id.*

state and local franchising authority,<sup>68</sup> local zoning laws,<sup>69</sup> and exclusive contracts between landlords and service providers.<sup>70</sup>

## 2. *Nixon v. MO Municipal League Is Not To The Contrary*

The Commission's past interpretation of Section 253, and the Supreme Court's decision in *Nixon v. MO Municipal League*<sup>71</sup> are not to the contrary. *Nixon* supports interpreting Section 706 (and other sources of federal authority) as providing the FCC with sufficient power to take the steps described above.

In *Nixon*, the Court affirmed the FCC's reading of Section 253(a) that Congress had not intended to unambiguously prohibit states from regulating their own political subdivisions. Because the FCC found that Section 253(a) did not apply, the FCC declined to apply the mandatory preemption under Section 253(b).<sup>72</sup> Performing the requisite analysis under *Chevron I*, the Court concluded using traditional tools of legislative analysis that Congress had not intended for Section 253(a) to automatically prohibit states from limiting their own political subdivisions in this manner.<sup>73</sup>

Critically, the question addressed by the FCC, and subsequently the Court in *Nixon*, was whether Section 253(a) on its face *required* the FCC to preempt state law

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<sup>68</sup> 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, Second Report & Order, MB Docket No. 05-311 (Nov. 6, 2007).

<sup>69</sup> See *City of Arlington supra*.

<sup>70</sup> See *National Cable Telecommunications Association. v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

<sup>71</sup> *Nixon v. MO Mun. League*, 541 U.S. 125 (2004).

<sup>72</sup> *Id.* at 129-30.

<sup>73</sup> *Id.* at 134-40; See also at 141 (Scalia, J. and Thomas, J. concurring in judgment).

prohibiting municipalities from offering telecommunications services. The Court said nothing about the FCC’s decision to preempt a state prohibition on local service generally.

Here, Congress has given the FCC an explicit, affirmative command to “encourage deployment” of broadband through “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>74</sup> Congress specifically circumvented the authority of state legislatures by investing this affirmative authority, and affirmative responsibility, in “each State Commission with regulatory jurisdiction over telecommunications services.”<sup>75</sup> If the Commission concludes that preempting state restrictions on local governments will “encourage deployment” by promoting competition and removing barriers to infrastructure, then it may clearly do so under the authority of Section 706.

### *3. Steps to Promote Competition*

Commenters urge the Commission to begin a broader proceeding to determine whether the existing market structure in either the broadband transit market or the provision of last mile services constitutes a barrier to entry and/or discourages investment in infrastructure. The FCC should view this inquiry as a combination of its Section 706(b) and its Section 257(a) authority. In addition to focusing on the speed and nature of deployment, the “Commission shall seek to promote the policies and purposes of this

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<sup>74</sup> 47 U.S.C. §1302(a).

<sup>75</sup> *Id.*

chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”<sup>76</sup>

Specifically, the Commission should determine whether some or all of its previous rules adopted in the *Computer* proceedings and in the wake of the *Carterfone* decision would remove barriers to entry and promote timely deployment of broadband. With regard to rural broadband in particular, the FCC should look to see whether rural interconnection policies by incumbent Title II or Title I providers inhibit the provision of broadband services by others. The Commission should explicitly consider whether the obligation to provide comparably efficient interconnection to rival Title I providers, or whether mandating availability of points of presence for broadband providers seeking access to local fiber, would further the goals of promoting competition and deployment.

## **IX. An Open Internet Is Consistent with the First Amendment**

Rules that protect an open internet are consistent with the First Amendment. An open internet serves the First Amendment’s goal of ensuring that every voice has an opportunity to be heard. Moreover, rules mandating an open internet would not violate the First Amendment.

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<sup>76</sup> 47 U.S.C. §257(b). *See also* 47 U.S.C. §254(b) (principles of Universal Service), 47 U.S.C. §151 (purpose of Commission).

### **A. An Open Internet Serves the Goals of the First Amendment by Facilitating the Free Flow of Diverse Speech**

The First Amendment aims to ensure that every voice can be heard, which is critical to a functioning democracy. An open internet serves this goal by facilitating the free flow of diverse speech over the internet.

The First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>77</sup> Thus, “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.”<sup>78</sup> Indeed, facilitating speech from diverse sources “has long been a basic tenet of national communications policy.”<sup>79</sup>

Recognizing the great First Amendment value of online speech, courts have consistently acted to preserve speech over the internet. In *Reno v. ACLU*, the Supreme Court held that speech over the internet deserved unqualified First Amendment protection.<sup>80</sup> That case followed *Sable Communications of California v. FCC*, in which the Court found that phone communications received greater First Amendment protection than did broadcast because “the dial-in medium requires the listener to take affirmative steps to receive the communication.”<sup>81</sup>

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<sup>77</sup> *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945); see also *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668 n. 27 (1972).

<sup>78</sup> *Turner Broadcasting System, Inc. v. FCC (Turner I)*, 512 U.S. 622, 663 (1994).

<sup>79</sup> *Turner Broadcasting System, Inc. v. FCC (Turner II)*, 520 U.S. 180, 192 (1997); *Turner I*, 512 U.S. at 663-664; *Midwest Video Corp.*, 406 U.S. 649, 668, n. 27 (1972) (plurality opinion); *Associated Press v. United States*, 326 U.S. 1, 2 (1945).

<sup>80</sup> *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

<sup>81</sup> *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 128 (1989).

An open internet serves the goals of the First Amendment by facilitating and protecting the free flow of information from diverse and antagonistic sources.

### **B. Open Internet Rules Would Not Violate the First Amendment**

Rules mandating an open internet would not violate the First Amendment. First, broadband access providers are not speakers for First Amendment purposes, and open internet rules therefore would not even trigger First Amendment analysis. Second, even if broadband access providers were speakers under the First Amendment, open internet rules would withstand First Amendment scrutiny.

Broadband access providers are not speakers under the First Amendment. Unlike newspaper publishers, radio broadcasters, or even cable operators, broadband access providers do not exert editorial control over the content they deliver, and no reasonable user ascribes that content to their broadband access provider. Rather, as the Supreme Court has consistently held, a subscriber affirmatively seeks out content on his or her own initiative.<sup>82</sup> Congress has also recognized broadband providers' special status as conduits for the speech of others, offering them statutory "safe harbors" that are unavailable to traditional speakers.<sup>83</sup> Because broadband access providers are not considered speakers, open internet rules that apply to them would not even trigger First Amendment analysis.

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<sup>82</sup> See *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

<sup>83</sup> The Communications Act and the copyright law each contain a safe harbor for broadband providers. 47 U.S.C. § 230; 17 U.S.C. § 512(a).



But even if broadband access providers were speakers under the First Amendment, open internet rules would withstand applicable intermediate scrutiny.<sup>84</sup> Under that standard, the rules would be upheld if they advanced important governmental interests unrelated to the suppression of free speech and did not burden substantially more speech than necessary to further those interests.<sup>85</sup> The governmental interests at stake are surely important because, as discussed above, “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order.”<sup>86</sup> The rules would be appropriately narrowly tailored if they allowed for broadband providers’ reasonable network management.

## **X. Conclusion**

The Commission must move quickly and purposefully to implement rules that protect an open internet. These rules must be designed both to protect an open internet and withstand the inevitable court challenge. Crafting “open internet-lite” rules in the hopes of avoiding political and legal objections would do a disservice to internet users across the country. Similarly, crafting robust open internet rules while failing to ground them in strong statutory authority turns this entire exercise into a waste of time and resources. In light of ongoing threats to an open internet and the importance of the internet to the civic, economic, and social health of the United States, the Commission

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<sup>84</sup> Intermediate scrutiny would apply because open internet rules would be content neutral, applying to all lawful content, applications, and devices, without regard to the specific message(s) conveyed. *See Turner II*, 520 U.S. at 189 (citing *U.S. v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>85</sup> *Id.*; *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001).

<sup>86</sup> *Turner I* at 663.

must take this opportunity to craft modern, robust open internet rules grounded in robust legal authority.

Respectfully Submitted,

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Common Cause

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