

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

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

In the Matter of)
) GN Docket No 10-127
Framework for Broadband Internet Service)

In the Matter of)
) GN Docket No. 13-5
Technology Transitions)

In the Matter of)
) GN Docket No. 09-51
A National Broadband Plan for Our Future)

In the Matter of)
) WT Docket No. 13-135
State of Wireless Competition)

In the Matter of)
) WC Docket No. 07-52
Broadband Industry Practices)

COMMENTS OF i2COALITION

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EXECUTIVE SUMMARY

The most effective way for the Commission to protect and promote the open Internet is to implement Open Access by reclassifying the broadband transmission component as a Title II telecommunications service. The *NPRM's* proposed Net Neutrality rules attempt to alleviate the effects of an uncompetitive last mile by regulating broadband access, but Open Access strikes at the heart of the problem by opening up the network to robust competition. Open Access would bring competition back to the Internet access market and consumer choice would be the primary safeguard against abusive and discriminatory network practices.

Open Access was the Commission's prevailing policy for over 40 years. The *Computer Inquiries* laid the groundwork for a vibrant Internet access market and the Commission's policies were successfully adopted around the world. It was not until the Commission abandoned Open Access and broadband competition evaporated that the need for Net Neutrality regulations became apparent. The Commission's decisions to classify broadband as an information service were based on predictions that competition and infrastructure investment would flourish without Open Access. This proceeding provides the Commission the opportunity to reevaluate whether Title I has produced the expected benefits. The evidence is clear that it has not and i2Coalition submits that now is the time to return to Open Access.

If the Commission does not reinstitute Open Access, then it should protect the open Internet with enforceable no-blocking and anti-discrimination rules based on its Title II authority. Section 706 does not provide a solid legal foundation for the Commission's proposed rules and paid prioritization arrangements would be counterproductive. The incredible success of the Internet is largely attributable to the fact that it has always been a level playing field. Minimal barriers to entry have allowed innovation to come from big and small players alike.

However, a bifurcated Internet where the wealthy and powerful can purchase preferential treatment is anathema to the open Internet.

Paid prioritization also presents a dangerous threat to Internet privacy. The only way that broadband access providers can proactively prioritize edge providers' traffic is by monitoring the content of their users' online communications. The Commission should not sanction a prioritization regime that requires Americans to sacrifice their privacy or that allows broadband providers to discriminate against encryption tools. Protecting the open Internet means establishing meaningful rules that stop discriminatory practices. Open Access, the policy i2Coalition recommends the Commission undertake, would deter abuse through vibrant competition. For 40 years, the Commission's Open Access rules were the foundation of the information services market and they succeeded in fostering competition, preventing discrimination, and incentivizing network investment. These are the results that Commission seeks in this proceeding and it can best achieve them by bringing back Open Access.

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I. DESCRIPTION OF i2COALITION

The Internet Infrastructure Coalition (“i2Coalition”) is an industry group that represents the interests of Internet and technology companies on Capitol Hill and before regulatory agencies. i2Coalition believes that an open and free Internet drives economic growth and enhances the lives of people across the United States and around the globe. As an organization, we promote policies that foster continued development and expansion of the Internet. Our members include companies that would fall under the *2014 Open Internet NPRM*’s proposed definition of “edge providers.”¹ In fact, some of i2Coalition’s members were specifically identified as edge providers in the recent *Verizon v. FCC* decision.² i2Coalition’s members have an important interest at stake in this proceeding and we hope to contribute to the Commission’s final rules in a meaningful way.

II. THERE IS A SIGNIFICANT LIKELIHOOD THAT THE COURTS WILL FIND THE PROPOSED NO-BLOCKING RULE AND COMMERCIALY REASONABLE STANDARD TO BE *PER SE* COMMON CARRIER REQUIREMENTS.

The *NPRM* proposes three enforceable rules to safeguard Internet openness.³ The first is an enhancement of the transparency rule established in the 2010 *Open Internet Order*.⁴ The second is the reinstatement of the no-blocking rule adopted in the *Open Internet Order*, but which was ultimately struck down by the D.C. Circuit in the *Verizon* decision.⁵ The third rule is a prohibition of commercially unreasonable actions that threaten Internet openness. The latter of

¹ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 2014 FCC LEXIS 1689 (2014) (“*NPRM*”) at § 8.11(c).

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

³ *NPRM* at ¶ 3.

⁴ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17910, ¶ 13 (2010) (“*Open Internet Order*”), aff’d in part, vacated and remanded in part *sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁵ *Verizon*, 740 F.3d 623 (D.C. Cir. 2014).

the three is designed to replace the *Open Internet Order's* anti-discrimination rule and is the primary change of the proposed rules.

The Commission bases its authority to establish these new open Internet rules on Section 706 of the Telecommunications Act of 1996.⁶ The *Verizon* decision held that Section 706 grants the Commission authority to implement rules to protect the open Internet, but struck down the no-blocking and anti-discrimination rules as *per se* common carrier obligations.⁷ The D.C. Circuit reasoned that because the Commission classified broadband Internet access service as a non-common carrier unregulated information service in several decisions between 2000 and 2005, it cannot impose common carrier regulations on broadband Internet access providers.⁸ The Commission has again proposed to use its Section 706 authority to reinstate these rules without undertaking a reclassification of broadband Internet service or its underlying transmission component so as to bring them under Title II. But *Verizon* makes clear that Section 706-based rules will only stand if they do not constitute *per se* common carriage.

When the inevitable appeal of the proposed rules occurs, the reasoning contained in the *Verizon* decision will be applied in the exact same manner. The Commission will return with the same legal authority, an identical no-blocking rule (but with paid prioritization), and a commercial reasonableness standard that is loosely based on the Commission's data roaming rule. The *Verizon* decision provides a clear guide for how the courts will judge the proposed rules and it shows that there is a very good chance the no-blocking rule and the commercially

⁶ Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended in relevant part by the Broadband Data Improvement Act (BDIA), Pub. L. No. 110-385, 122 Stat. 4096 (2008), is now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 et seq.

⁷ *Verizon*, 740 F.3d at 657-58.

⁸ *Id.*

reasonable standard will be vacated once again because they impose *per se* common carrier obligations and Section 706 does not grant that authority.⁹

A. It is very likely that the proposed no-blocking rule will be struck by the courts as a *per se* common carrier requirement.

The *NPRM* proposes to reinstitute the original no-blocking rule that the D.C. Circuit struck down as a *per se* common carrier obligation.¹⁰ Not one change has been made to the text of the rule.¹¹ As proposed, the no-blocking rule will still require that broadband providers transmit data associated with “lawful content, applications, services, or non-harmful devices” between their customers and edge providers at a prescribed minimum level of service.¹²

The *NPRM* asserts that reintroducing the rule in the same form will not constitute *per se* common carrier regulation this time around because the Commission will allow broadband providers and edge providers to enter into paid priority agreements. The Commission believes that this allowance for individualized bargaining for favored treatment will bring the rule within the Commission’s Section 706 authority because it allows for discriminatory terms, a non-common carrier attribute.¹³

The *NPRM* claims that the *Verizon* ruling invited the reintroduction of the no-blocking rule with permission for broadband providers to negotiate terms for paid priority treatment.¹⁴

Unfortunately, this is an overly-optimistic reading of the ruling and the decision should not be

⁹ i2Coalition believes that the Commission should simply embrace and apply its Title II authority, and then require unbundling and a separate offer of the transmission component by returning to *Computer Inquiry* Open Access. New competitive entry in the Internet access market will then deter the evils identified in the *NPRM*. If the Commission does not return to Open Access then i2Coalition concurs with many of the commentators who recommend reliance on Title II to regulate the currently non-competitive Internet access market through meaningful and effective no-blocking and non-discrimination rules.

¹⁰ *NPRM* at ¶¶ 89-109.

¹¹ The Commission has proposed a new definition for “block” that was absent from the original rules, which contemplates a new “minimum level of access” and performance below that minimum level constitutes a “block.”

¹² *NPRM* at ¶¶ 89-90. .

¹³ *Id* at ¶ 95.

¹⁴ *Id* at ¶ 97.

read with such certitude. The court refused to consider this argument because it was not in the original order or briefed. The portion of the decision the *NPRM* cites as support for the currently-proposed no-blocking rule was instead merely a recitation of the oral argument made by the Commission. At no point does the decision actually state that a no-blocking rule could be implemented under the Commission's Section 706 authority if only it is combined with individualized negotiations for priority. And even if it had, such a statement would have been made without the benefit of briefing. To say the least, the Commission is on very tenuous grounds basing its approach on the belief that this sort of no-blocking rule has already been preapproved in *Verizon*.

The *Verizon* decision shows that this new effort would be analyzed primarily against the Supreme Court's 1979 decision in *Midwest Video II*.¹⁵ Under that precedent the new rule will almost certainly be found to still be a *per se* common carrier obligation.¹⁶ The *Verizon* decision found the *Open Internet Order*'s no-blocking rule to be "indistinguishable" from the no-blocking rule in *Midwest Video II* because both require the regulated entities to carry the content of third parties to their customers. In both cases, the service provider could otherwise block content absent the rule, which, according to the court, effectively transfers control over the transmissions to the third parties.¹⁷ In both *Midwest Video II* and *Verizon*, the no-blocking rule constituted a minimum level of service that third parties received free of charge. Both conditions are common carrier obligations and both remain present in the *NPRM*'s no-blocking rule. This iteration of the no-blocking rule will produce the same Section 706 result as the last iteration and for the same reasons.

¹⁵ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

¹⁶ *Verizon*, 740 F.3d at 651.

¹⁷ *Id* at 655.

The addition of negotiated, commercially reasonable paid priority service does not change this analysis. Prioritization would be completely separate from the mandatory minimum level of service that constituted *per se* common carriage in *Verizon*. The no-blocking rule sets the floor below which the broadband provider's service cannot fall. Priority treatment, on the other hand, would simply constitute the purchase of adjunct, premium service on top of the minimum level of service. Common carriers have always had the ability to negotiate individual agreements for supplemental and priority services above standard minimum levels of service without affecting common carriage obligations.¹⁸

Nor would the addition of paid prioritization to the non-blocking rule be analogous to the Commission's data roaming rule, which the D.C. Circuit found to be a non-common carrier obligation in *Cellco*.¹⁹ The data roaming rule does not require free access and in fact does not require a minimum level of service at all. The "substantial room for individualized bargaining" central to the data roaming rule is significantly curtailed by the present proposal to impose a no cost "minimum level of service" option for edge providers.²⁰ The no-blocking rule also severely curtails broadband providers' right to "make individualized decisions, in particular cases, whether and on what terms to deal."²¹ Minimum terms are dictated by the Commission and decisions regarding "whether" to serve edge providers are foreclosed. The contemplated option of providing an additional service – presumably for a charge – does not change the fact that the proposed rule would still require a basic service, without any room for negotiations about whether, or on what terms, that service will be provided. This plainly constitutes the imposition

¹⁸ See, e.g., Letter from Robert W. Quinn, Jr., AT&T Services, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (filed May 9, 2014) at pp. 7-8.

¹⁹ See *Cellco P'ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

²⁰ *Id.* at 548.

²¹ See *National Association of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 643 (D.C. Cir. 1976) (*NARUC I*); *National Association of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608-609 (D.C. Cir. 1976) (*NARUC II*).

of *per se* common carriage obligations under *Midwest Video II* and *Cellco* and meets the common carrier attributes set out in *NARUC I* and *II*.

The *Verizon* decision struck down the *Open Internet Order*'s no-blocking rule because it mandated that all edge providers receive a minimum level of access, which is a hallmark of common carriage.²² Allowing the provision of negotiated preferential treatment above this minimum level of service does nothing to actually eliminate the underlying *per se* common carrier obligation. If the *NPRM*'s rules are adopted as proposed, the D.C. Circuit will again apply the *Midwest Video II* holding in the inevitable appeal and the no-blocking rule will almost certainly be struck down for the same reasons it was rejected in *Verizon*.

B. There is a significant likelihood that the proposed commercially reasonable rule will be struck by the courts as a *per se* common carrier requirement.

The *NPRM* has replaced the *Open Internet Order*'s anti-discrimination rule with a general prohibition of commercially unreasonable practices by broadband Internet access providers.²³ This new rule replicates the Commission's *Data Roaming Order* and the attendant data roaming rule in many respects.²⁴ The data roaming rule was held by the D.C. Circuit to not constitute a common carrier obligation because it allowed "substantial room for individualized bargaining and discrimination in terms."²⁵ However, the new commercially reasonable standard significantly expands upon the data roaming rule and may very well be held to include so many marks of common carriage as to be outside the Commission's Section 706 authority.

²² *Verizon*, 740 F.3d at 658-9 ("In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose *per se* common carrier obligations with respect to that minimum level of service.").

²³ *NPRM* at ¶ 116.

²⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411, 5433, ¶ 45 (2011) (*Data Roaming Order*).

²⁵ *Cellco*, 700 F.3d at 548.

The commercially reasonable standards proposed in the *NPRM* go well beyond the scope of the data roaming rule in several important respects. For instance, the data roaming rule imposes an obligation for wireless carriers to undertake commercially reasonable actions in only one situation, namely negotiations over data roaming agreements. The *NPRM*'s commercially reasonable standard, however, would apply to all actions involved in the provision of broadband service.²⁶ This would include relations with customers, network management, and interactions with edge providers.

One aspect that the D.C. Circuit found determinative when holding that the *Data Roaming Order* did not impose common carriage obligations was that the rule includes no presumption of reasonableness.²⁷ The Commission set neither an upper limit nor a lower limit outside of which a data roaming agreement became commercially unreasonable. Instead the Commission left it to the market to determine the range of acceptable terms and rates. The *NPRM*'s commercially reasonable rule does not do this, however. Instead, the Commission presumes that providing the mandatory minimum level of service free of charge to edge providers is reasonable. This sets a floor below which negotiations for priority delivery will never drop.

By imposing a no-blocking rule and a minimum level of free service for edge providers, the Commission is mandating “generally applicable terms” for broadband.²⁸ Every customer will have access to every edge provider and every edge provider will secure unblocked transmission of their traffic free of charge. It is likely that only the largest edge providers will negotiate prioritized treatment and the vast majority will instead make do with the generally

²⁶ *NPRM* at ¶ 116.

²⁷ *Cellco*, 700 F.3d at 550.

²⁸ *Id* at 546 (“[T]he indiscriminate offering of service on generally applicable terms . . . is the traditional mark of common carrier service.”) (quoting *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481, (D.C. Cir. 1994)).

applicable minimum level of service. Most edge providers will forego negotiations for paid priority treatment for many reasons, including cost and traffic volume. They will accept the minimum level of service available to them. Data roaming, however, cannot occur at all, at any level, until there are negotiations and an agreement. An agreement is a mandatory prerequisite to obtaining access of any kind. In these respects, the *NPRM*'s commercially reasonable rule significantly departs from the *Data Roaming Order*.²⁹

The *NPRM*'s commercially reasonable standard creates substantially less room for individualized bargaining and discrimination in terms than the *Data Roaming Order*. The *Cellco* decision noted that the *Data Roaming Order* "bears some marks of common carriage," but deferred to the Commission because those marks did not so predominate as to relegate wireless carriers to common carrier status.³⁰ By eliminating the mandatory negotiation process, creating a presumption of reasonableness, setting generally applicable terms, and proposing to apply the commercially reasonable standard as a general rule for broadband providers, the *NPRM* bears far more marks of common carriage than the data roaming rule. There is a significant likelihood that this expansion of *per se* common carrier obligations will be found to so predominate as to relegate broadband providers to common carriers in violation of the Commission's Section 706 authority.

C. The Commission should not risk years of regulatory and marketplace uncertainty by implementing rules with dubious legal authority.

Section 706 does not provide solid legal authority for the Commission to implement the no-blocking rule and the prohibition on commercially unreasonable practices. The latter is being proposed in order to impose a non-discrimination rule while not calling it common carriage. The

²⁹ *Id* at 546 ("[T]he indiscriminate offering of service on generally applicable terms...is the traditional mark of common carrier service.") (quoting *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481, (D.C. Cir. 1994)).

³⁰ *Id* at p. 537.

allowance for individually negotiated priority agreements only affects the upper bounds of edge provider access to broadband networks, but leaves the common carrier minimum level of service untouched. Similarly, the significant expansion of the commercially reasonable standard risks so predominating broadband service as to constitute *per se* common carriage. The Commission's efforts bear a very high likelihood that one of the two rules, if not both, will be struck yet again.

Should the Commission's open Internet rules be vacated for a third time, the result will be a decade and a half of market and regulatory uncertainty, as well as a non-neutral Internet. Those are years that the broadband market cannot get back and in which the United States became increasingly uncompetitive with other developed countries. The Commission should not knowingly set out on tenuous legal authority to protect the open Internet. To do so invites legal challenge and forecloses the type of certainty that businesses and investors require. This is especially unwise when the Commission plainly has the ability to accomplish the same policy objectives on well-established, indisputable legal authority under Title II.

III. PAID PRIORITIZATION AND THE COMMERCIALY REASONABLE STANDARD WOULD NEGATIVELY AFFECT EDGE PROVIDERS.

The *NPRM* has proposed to replace the *Open Internet Order's* anti-discrimination rule with a commercially reasonable standard and permission for broadband Internet access providers to enter into negotiated paid prioritization agreements with edge providers.³¹ The Commission believes that the combination of these two changes brings the proposed rules within the Commission's Section 706 authority.³² These rules, therefore, were not developed and proposed for the positive benefits they would bring consumers, but rather as jurisdictional hook.

³¹ *NPRM* at ¶¶ 97 and 110.

³² *Id* at ¶ 118.

Paid prioritization on the last mile is a significant and unnecessary change to the way that Internet access has traditionally been provisioned. Allowing edge providers to purchase preferential treatment, and therefore a higher-quality connection to end users, dramatically changes one of the Internet's most beneficial features; the level playing field. The Chairman's statement is adamant that prioritization will not lead to a fast lane-slow lane dichotomy.³³ However, bandwidth is a zero-sum resource. Any increase in the share of bandwidth to certain edge providers necessarily reduces the share available to the non-favored edge providers.

A paid prioritization regime will benefit broadband access providers and established edge providers, but hurt small edge providers, competition, innovation, and ultimately consumers. Preferential treatment for those edge providers that can afford premium service provides a competitive advantage against all non-prioritized edge providers. In a paid priority system, wealthy edge providers will be able to prevail over competitors by out-spending them, rather than by creating superior products. This will further entrench the established and presently-successful edge providers at the expense of new and small competitors. Start-ups that require priority service may not be able to bring their product to market without significant outside investment and investors will be affected by the increased equity needs of entrepreneurs. All of these negative effects are incompatible with the concept of an open and dynamic Internet. Instead, a prioritized Internet is one that favors the status quo over innovation and change.

The commercially reasonable standard also threatens to further entangle unregulated edge providers in the Commission's regulatory regime. The *NPRM* proposes to enforce the commercially reasonable standard through the Commission's formal complaint process.³⁴ This means that the Commission is delegating watchdog responsibilities to edge providers with no

³³ *Id.* at pp. 86-88.

³⁴ *Id.* at ¶ 172.

experience with the Commission or its rules. The prospect of hiring attorneys to litigate a potentially years-long formal complaint at the Commission whenever faced with an unreasonable practice is an incentive *not* to venture into the edge provider business.

Paid prioritization and a complaint-based commercially reasonable standard do not advance the open Internet. Instead these factors water-down the *Open Internet Order's* anti-discrimination rule in order to sustain a claim to Section 706 authority. However, this is entirely unnecessary because Title II authority is indisputably available to the Commission.

IV. TITLE II RECLASSIFICATION OF THE BROADBAND TRANSMISSION COMPONENT AND REINSTITUTION OF OPEN ACCESS WOULD BETTER PROTECT AGAINST THE HARMS OF AN UNCOMPETITIVE LAST MILE.

The fundamental dilemma that the Commission faced with the Internet Policy Statement, in the *Open Internet Order*, and which it faces in this proceeding is that it wants to impose a common carrier principle upon non-common carriers. “Net Neutrality” is a euphemism for the combination of common carrier prohibitions against blocking and discrimination.³⁵ Twice the Commission has failed to lawfully impose Net Neutrality obligations on unregulated broadband providers, yet it is once again attempting to fit a square peg in a round hole. Instead, the Commission should reclassify the transmission component of broadband Internet access and open it up to competition. In other words, bring back Open Access.

The need for Net Neutrality regulations arises entirely because predecessor Commissions between 1999 and 2007 allowed telephone and cable companies to close off competitive access to bottleneck broadband infrastructure and services, thereby eliminating broadband Internet

³⁵ The avowed purpose is to prohibit or limit access provider discretion that is inconsistent with user choice or societal goals. i2Coalition agrees that this is necessary precisely because access providers have the incentive and ability to act in ways contrary to the public interest and user choice in many ways and have so acted, just as the Commission has recently recognized. In other words, i2Coalition agrees that blocking and discrimination are evils to be avoided. The point here is that *per se* common carriage through Open Access or some form of Net Neutrality is the only way the Commission can effectively eliminate unreasonable discrimination in access to or the use of broadband transmission.

access competition. Thus, the telephone and cable companies were effectively granted a duopoly over wireline broadband access. Without competition and consumer choice to reign in harmful broadband practices, the Commission has sought to protect American Internet users with Net Neutrality rules for the past nine years.

The Commission has now properly recognized that the duopoly providers have both the incentive and the means to act in ways contrary to the public interest.³⁶ In an effort to rectify these evils, the Commission chose to regulate Internet access providers through Net Neutrality rules, rather than taking the more logical step of re-opening the network by returning to the Open Access rules that allowed the Internet to flourish from the beginning. The Internet developed into an open platform because the essential underlying facilities and services were themselves open to competition. It was the move away from Open Access and competition on the underlying network that ultimately necessitated this *NPRM*.

The Commission's explanation for excluding dial-up Internet access from Title I reclassification the *Open Internet Order* directly illustrates that this is so. The Commission explained that competitive forces and regulation of the underlying transmission component protected dial-up service from monopoly abuses and the *Order's* Net Neutrality rules were therefore unnecessary.

[T]he easy ability to switch among competing dial-up Internet access services. Moreover, the underlying dial-up Internet access service is subject to protections under Title II of the Communications Act. The Commission's interpretation of those protections has resulted in a market for dial-up Internet access that does not present the same concerns as the market for broadband Internet access.³⁷

This statement acknowledges that Open Access and a competitive marketplace is preferable to Net Neutrality rules. If the Commission reinstates Open Access on the last mile transmission

³⁶ *Open Internet Order*, 25 FCC Rcd at 17915-928, ¶¶ 20-37; see also *NPRM* at ¶¶ 6, 26, and 39-53.

³⁷ *Open Internet Order*, 25 FCC Rcd at 17935, ¶ 51.

networks, then the underlying concerns will go away and regulation of bundled Internet access services will not be necessary.

The Commission should also determine – now that experience has been gained and lessons learned – that the *Brand X* dissent was right: “the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being on offer.”³⁸ The Commission now has the experience to find that a course-reversal is indicated and the transmission component *can and should be* regarded as a separate offering. The transmission component should be isolated and brought back under Title II. The Commission will then have firm ground upon which to rest its rules preventing the evils that have been identified in the *NPRM*.

i2Coalition suggests that the Commission does not have to directly regulate the bundled Internet access product. That product can plausibly remain an unregulated, non-common carrier information service – even when offered by the infrastructure owner or an affiliate – so long as the transmission component is available to unaffiliated parties on just, reasonable and non-discriminatory terms, equal to those applicable its affiliate. While i2Coalition believes that structural separation is preferable, it is not mandatory. Nonstructural safeguards can be crafted that would allow the infrastructure owners to offer the bundled information service if the underlying transmission is available to others on an unbundled basis.³⁹

³⁸ *Nat’l Cable & Telecomms. Ass’n. v. Brand X Internet Servs.*, 545 U.S. 967, 1008 (2005) (Scalia, J., dissenting).

³⁹ If the Commission chooses the incongruous course of keeping the network closed while trying to still save the open Internet, and proceeds to regulate the Internet access output, then bringing the transmission component within Title II is still a necessary legal foundation because all of the potential alternatives constituting effective and enforceable remedies will meet the test for *per se* common carriage. The Commission should include Title II as a basis for the rules that emerge from this proceeding.

- A. The Commission should acknowledge its prior decisions to close off the network were based on predictive judgments that time has shown were incorrect. The Commission should reverse course and reinstate *Computer Inquiry* open network principles.**

The D.C. Circuit's *vacatur* of the nondiscrimination and no blocking rules provides an opportunity for the Commission to once again embrace and preserve Open Access, which is a preferable and less intrusive way to ensure an open Internet in the United States.

1. Open Access Defined and Contrasted with Net Neutrality.

There is a significant difference between “Open Access” and “Net Neutrality” as that phrase has been applied in the United States. Whereas Open Access creates alternatives to cable- or telco-affiliated ISPs at the physical and logical layer, Net Neutrality focuses on protecting competition at the application and content layers. Net Neutrality is a remedy for evils that arise in the absence of Open Access and competition in the broadband marketplace.

The Commission unwisely abandoned Open Access when it closed off competition on the transmission facilities deployed by the incumbent telephone and cable companies. This about-face from the Open Access policies established in the *Computer Inquiry* trilogy⁴⁰ began in the late 1990s and has continued to date, through a series of cases restricting enhanced/information service providers' ability to obtain access to infrastructure – both directly and through

⁴⁰ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service Facilities*, Notice of Proposed Rulemaking and Tentative Decision, 28 F.C.C.2d 291 (1970), Final Decision and Order, 28 F.C.C.2d 267 (1971) (*Computer I*), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2nd Cir. 1973), *decision on remand*, Order, 40 F.C.C.2d 293 (1973); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Tentative Decision, 72 F.C.C.2d 358 (1979), Final Decision, 77 F.C.C.2d 384 (1980) (*Computer II*), *recon.*, Mem. Op. and Order 84 F.C.C.2d 50 (1981), *further recon.*, Order on Further Reconsideration, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, Mem. Op. and Order, 56 Rad. Reg. 2d (P&F) 301 (1984); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report & Order, 104 F.C.C.2d 958 (1986), *recon.*, Phase I Reconsideration Order, 2 F.C.C.R. 3035 (1987), *further recon.*, Order on Further Reconsideration, 3 F.C.C.R. 1135 (1988), *second further recon.*, Order on Second Further Reconsideration, 4 F.C.C.R. 5927 (1989), *Report & Order and Phase I Reconsideration Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *decision on remand*, Computer III Remand Proceedings: Report and Order, 5 F.C.C.R. 7719 (1990) (*Computer III*).

competitive carriers – and then changing the regulatory classification for broadband Internet access provided by cable, telephone companies, wireless providers, and broadband over powerline.

Past Commissions took these actions despite the fact that the current Communications Act was almost entirely premised on competitive access to unbundled monopoly or duopoly transmission facilities, the epitome of Open Access. Much of the rest of the world followed the original American model and embraced Open Access – probably because the U.S. Government urged them to do so⁴¹ – and they have retained it even after the Commission reversed course. That is one of the major reasons there is far more competition, better and faster Internet capabilities, and lower prices abroad.

There is not a universally-accepted definition of Open Access. The Commission has equated Open Access with multiple-ISP access in the context of cable networks, but the concept of Open Access truly arose in the *Computer Inquiries*. In particular, Open Access was the shorthand term for the ability of unaffiliated enhanced service providers to obtain telecommunications inputs from LECs in the form of “Open Network Architecture” or “ONA.” However, the Open Access concept is not unique to communications. For example, the energy industry still operates under some variants of an Open Access regime.⁴²

For fixed networks, Open Access policies usually take the form of regulated access, such as local loop unbundling, dark, grey and lit fiber and other wholesale access products. These

⁴¹ See Press Release, *United States Urges EU to Continue Progress in Opening Communications Market To Competition*, 2000 FCC LEXIS 1383 (2000), available at http://www.fcc.gov/Bureaus/International/News_Releases/2000/nrin0005.doc (“In order to harness the full power of the Internet, we urge EU Member State regulators to Open Access of local networks to competitive suppliers of Digital Subscriber Lines and other innovative technologies.”).

⁴² See, e.g., *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1007 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468, 1469 (1988) (upholding FERC authority to establish Open Access for gas transmission); *New York v. FERC*, 535 U.S. 1 (2002) (upholding FERC authority to establish Open Access for electric transmission); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21540 (1996).

products derived capacity such as digital and optical carrier (DSx, OSx), as well as other capacity-based offerings like Ethernet, and can also include next layer (e.g., bitstream) services. Policy makers and regulators in most countries realize that these infrastructure elements represent a major barrier for the entry of alternative ISPs without mandatory access.

Net Neutrality is not Open Access. Indeed, Tim Wu, who is credited with crafting the Net Neutrality concept, took great pains to distinguish Net Neutrality from Open Access in his original paper that introduced the topic.⁴³ Open Access is about opening essential infrastructure to competition. Net Neutrality accepts that there is no Open Access, and regulates Internet access rather than the essential facilities.

The 2005 Commission concluded that retaining Open Access as a regulatory policy would not provide sufficient incentives for the telephone companies and cable companies to invest in broadband transmission.⁴⁴ They underappreciated the fact that eliminating Open Access meant that the incumbents would obtain monopoly control of both the transmission market and the adjacent Internet access market, and both would be susceptible to abuses of market power. The 2010 Commission then applied Net Neutrality as a palliative band-aid to mask the fact that eliminating Open Access removed the possibility for intramodal competition in the Internet access market.

⁴³ Prof. Tim Wu, *Network Neutrality, Broadband Discrimination*, Journal of Telecommunications and High Technology Law, Vol. 2, p. 141 (2003). Available at SSRN: <http://ssrn.com/abstract=388863>. Wu's paper appears to equate "Open Access" with "structural separation." See, e.g., *id.* at 148 ("The term open-access is used in many different ways; it generally refers to a structural requirement that would prevent broadband operators from bundling broadband service with Internet access from in-house Internet service providers.") Open access, however, is possible even in the absence of structural separation. For example, *Computer III* replaced structural separation with accounting safeguards, but retained Open Access. *Computer Inquiry* allowed the incumbents to bundle their own offering, so long as they had an unbundled offering available to third party providers.

⁴⁴ See, e.g., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14855, 14860, and 14877-878, ¶¶ 1, 19, and 44 (2005) (*DSL Reclassification Order*).

It is time for the Commission to bring back Open Access and competition in the broadband market. Net Neutrality to date has not cured the disease, and it presents insuperable legal and practical problems.

2. Forty years ago, the Commission led the world and created a new Open Access framework.

Over 40 years ago, the Commission instituted Open Access primarily through the original service unbundling rules established in the seminal *Computer Inquiry* trilogy. Other competition-enhancing efforts dealing with customer premises equipment and inside wiring were adopted by Congress and approved by the courts. All of these actions were based on Open Access concepts. Other federal agencies applied the same concepts to the energy industry, resulting in tremendous competition and consumer benefits.⁴⁵ This set the stage for the explosive growth of the Internet and much of the world followed the Commission's lead.

The *Computer Inquiries'* Open Access model was deregulatory, but did not eschew Title II regulation where widespread competition was not truly feasible. The first step was to isolate monopoly telecommunications components, and impose regulation on the monopoly activity – and that activity only. The regulations made these non-competitive components available to users and potential entrants in order to allow competition to thrive where it was possible.⁴⁶ The

⁴⁵ Electric and gas transmission Open Access has reduced wholesale prices for energy, and the cost reduction input has flowed to retail customers. On the electric side it has much contributed to the growth of solar and wind power as an alternative to carbon fuels and nuclear. The same concept has also directly benefitted retail energy customers, because the principle has also allowed retail customers to “attach” solar and gas self-generation to the electric grid, allowing them to self-generate but also receive standby and back-up and sell excess energy. In many respects this is akin to the original Policy Statement that “consumers are entitled to connect their choice of legal devices that do not harm the network.” *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986, 14988 (2005). Consumer attachment rights arose from *Hush-a-Phone*, *Hush-a-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956), and *Carterphone*, *In the Matter of Use of the Carterfone Device*, 13 F.C.C.2d 420 (1968), but the *Computer Inquiries* also advanced attachment rights by deregulating CPE and inside wire while maintaining regulations enforcing the attachment right, including the Part 68 process.

⁴⁶ Although Internet access certainly depends on transmission service inputs, it is not solely raw transmission. Other arguably non-telecommunications functions are sometimes offered along with the transmission. Internet access is a distinct, secondary service that can plausibly be said to reside in an “adjacent” market. The question, however, is whether the bundled output is still telecommunications. If one uses the *Computer Inquiries* parlance, the decision to

second step was to deregulate value-added enhanced service markets that rely on telecommunications inputs, but are not themselves telecommunications *and* can be competitive if bottleneck telecommunications inputs are available on a nondiscriminatory basis.

The *Computer Inquiries* spurred the rise of unregulated value-added networks that had specific rights to access facilities, such as local plant, so they could provide “enhanced services.” Those decisions directly and inexorably led to the rise of the Internet.⁴⁷ The Commission itself – until relatively recently – repeatedly emphasized that the Internet as we know it would not exist but for the *Computer Inquiry* Open Access rules.⁴⁸

be made depends on whether the telecommunications component is “contaminated” by and subsumed within the bundled output. That is the basic perspective used in the *Cable Modem Declaratory Ruling* and then leveraged into the *DSL Reclassification Order*. A correct application of the *Computer Inquiries* would have resulted in application of “adjunct to basic” rather than “contamination” to most of the major providers since they were carriers and facilities-based. The Commission long ago explained – for good reason – that the contamination doctrine cannot and should not be used for facilities-based entities that engage in common carrier activity. *See IDCMA Frame Relay*, Memorandum Opinion & Order, 10 FCC Rcd 13717, 13719-720, and 13723-24, ¶¶ 17-18 and 42-45 (“AT&T cannot avoid its *Computer II* and *Computer III* obligations under the auspices of the contamination doctrine, which applies only to nonfacilities-based service providers”). As we explain below, the Commission should have used “adjunct to basic” for the preponderance of cable modem providers, all of the major DSL providers and even the broadband wireless providers that are CMRS because they were in fact common carriers, at least in part, and they are facilities-based.

⁴⁷ The entities the *NPRM* labels edge providers are predominately non-carriers, and most do not own extensive transmission networks. Some do have some privately-owned transmission, but they still much resemble the “Value Added Networks” discussed in *Computer Inquiry* although their primary function is no longer protocol conversion. All exist entirely as a result of *Computer Inquiry* because that set of proceedings ensured these entities would have Open Access to bottleneck transmission and would not suffer unnecessary regulation.

⁴⁸ A fine collection of such observations appears in *The FCC and the Unregulation of the Internet*, FCC OPP Working Paper, July 31, 1999, available at http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf:

Open access across the telecommunications network has driven the deployment of innovative and inexpensive Internet access services. ... the growth and continued success of the Internet, and the ability of market forces to sustain and encourage that growth, can be attributed to one basic attribute: the openness of both the Internet and the underlying telecommunications infrastructure. ... To the extent that the Internet has relied on the openness of this nation’s communications infrastructure to reach all corners of this nation, this ingredient in its success has not been an accident. The FCC has taken numerous steps since the early days of the telecommunications data services industry three decades ago to permit competitive forces, not government regulation, to drive the success of that industry. As discussed in greater detail below, the success of the Internet today is, in part, a direct result of those policies. ... First, the Commission noted that data processing services required common carrier facilities and services as necessary inputs, and common carriers that offered their own data services would have the ability and incentive to discriminate against unaffiliated data service providers by denying them access to fairly priced telecommunications services. Second, the Commission noted that common carriers might improperly cross-subsidize their unregulated data processing services with rate-regulated common carrier revenues.

Net Neutrality is perceived as needed today only because the Commission decided to abandon the prior Open Access rules that had been in place for almost 40 years and had served as the foundation upon which the open Internet was able to grow into a primary communications tool. This decision to eliminate Open Access created the underlying problems the Commission now seeks to fix because it produced monopoly or duopoly control over transmission.

3. Congress adopted, applied and extended Open Access in the 1996 amendments.

Congress adopted and reaffirmed the *Computer Inquiry* service unbundling model in the 1996 amendments, and then further extended it through the interconnection and facility unbundling requirements in §§ 251 and 252. But soon after 1996, the Commission abandoned the Open Access policies it had established by serially closing the network, despite Congress's clear policy supporting Open Access.

The 1996 amendments adopted and reaffirmed *Computer Inquiry* in several ways. First, the definitions in § 153 employed the Open Access model by distinguishing between telecommunications services offered by carriers and information services offered by non-carriers. The former retained Title II common carrier obligations, but the latter received virtually no regulation. Congress maintained Open Access by preserving existing "information access" obligations in § 251(g), as well as the right to attach end-user equipment that has been properly registered. Section 257(a) required the Commission to identify and remove entry barriers facing information service providers, and also addressed "provision of parts or services to providers of ... information services." Second, Bell Operating Companies' pathways for entry into the information service market (interLATA information services, electronic publishing and alarm monitoring), which were still denied them at the time, employed both structural separation and

accounting safeguards quite similar to those arising from *Computer II* and *Computer III*, including nondiscriminatory access by unaffiliated information service providers.⁴⁹

Congress used a modified *Computer Inquiry* Open Access framework to require “interconnection” and “facility unbundling” as a means for competitive carriers to enter and participate in the market. The entirety of Sections 251 and 252 is modeled after *Computer Inquiry* Open Access concepts. Section 251(a) and (c)(2) require interconnection between ILECs and competing carriers. Section 251(c)(3) grants competitive carrier access to underlying facilities and infrastructure through facilities unbundling. Nothing in those provisions provides even a hint that broadband was to be excluded, or that use of a different protocol would remove anything from coverage. Instead, Section 251(h)(2) allows the Commission to bring cable companies within the regime.

Enhanced/information service providers formed a significant part of the customer base for the CLEC industry. Past Commissions allowed the incumbents to undercut this relationship in a host of ways and seize the Internet access market all for themselves. That is why we are where we are today.

4. The Commission serially closed the Open Access network between 1999 and 2007.

The Commission decision to abandon Open Access is often said to stem from the *Cable Modem Declaratory Ruling*.⁵⁰ But it actually started before then. Since 1999, the Commission

⁴⁹ See 47 U.S.C. §§ 272(C)(2), 274(d), 275(d), and 276(b)(1)(C) (referencing *Computer III* “nonstructural safeguards” and adopting approach for payphone).

⁵⁰ *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

has consistently declined requests to mandate cable Open Access as a merger condition.⁵¹ The only time that the Commission imposed any access requirements was during AOL's acquisition of Time Warner, however this was done at the insistence of the FTC⁵² and the Commission has not fully enforced the condition.⁵³

In 2002, before the *Cable Modem Declaratory Ruling*, the Commission tentatively concluded that DSL and other broadband services provided by LECs constituted "information services" not subject to Title II tariffing and common carriage requirements. The Commission sought comment on whether it should modify or eliminate *Computer Inquiry* Open Access.⁵⁴ DSL offered by SBC's Advanced Services subsidiary was detariffed the same year.⁵⁵ Then in 2005, the Commission removed all remaining *Computer Inquiry* obligations when it deemed DSL to be an information service.⁵⁶

⁵¹ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelpia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8296-99, ¶¶ 217-223 (2006); *Applications for Consent to Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23299-301, ¶¶ 135-137 (2002); *Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9872-73 ¶ 127 (2000); *Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3205-08, ¶¶ 92-96 (1999).

⁵² See *Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6568-69 ¶¶ 57-58 (2001); *America Online, Inc.*, No. C-3989, slip op. at 2, 6-9, 11-17 (F.T.C. Dec. 18, 2000) (Decision and Order), at <http://www.ftc.gov/os/2000/12/aoldando.pdf>.

⁵³ See *In the Matter of Texas Networking, Inc., Petitioner; Petition for Declaratory Ruling and Complaint*, 16 FCC Rcd 17898 (Media Bureau, 2001), Order Dismissing Application for Review, 23 FCC Rcd 6096 (2008).

⁵⁴ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3029-33 and 3040-43, ¶¶ 17-24 and 43-53 (2002) ("Wireline Broadband NPRM").

⁵⁵ *Review of Regulatory Requirements for Incumbent LEC Broadband Services*, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002).

⁵⁶ *Wireline Broadband Report and Order*, 20 FCC Rcd 14853, 14860-61 ¶ 9 & n.15, 14862-65, ¶¶ 12-17, 14875-79, ¶ 41-46 & n.107, 14882-98, ¶¶ 32-85, 14904, ¶ 96 (2005) petition for review denied *sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

During this time, the Commission was not content to just allow the incumbents to avoid Open Access for broadband; the Commission also eliminated the §§ 251(c)(4) and 252(d)(3) resale arrangements for independent ISPs⁵⁷ and overlooked serious reports of rules violations raised by independent ISPs.⁵⁸ The Commission also declined Open Access requests when evaluating major telecommunications mergers between SBC and AT&T, Verizon and MCI, and AT&T and BellSouth.⁵⁹

The result of these policy decisions was that the folks that brought the Internet to the masses – independent ISPs – went out of business. Commissioner Copps persistently pointed out this very problem.⁶⁰ The current Commission cannot fairly be held responsible for these

⁵⁷ The *Advanced Services Second Report and Order* applied the resale discount to DSL services offered to end users, but held it did not apply to DSL arrangements made with independent ISPs. *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237, 19247, ¶ 21 (1999), *pet. for review denied sub nom Ass'n of Commc'ns Enters. v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

⁵⁸ See Texas Internet Service Providers Reply Comments, Docket 00-4 (February 22, 2000), available at <http://apps.fcc.gov/ecfs/document/view?id=6010955248>; Texas Internet Service Providers Reply Comments, Dockets 95-20 and 98-10 (April 30, 2001), available at <http://apps.fcc.gov/ecfs/document/view?id=6512566340>.

⁵⁹ *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5727-31 ¶¶ 116-120, 5742-46 ¶¶ 151-153 (2007); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18507-09 ¶¶ 139-142 (2005); *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18365-68 ¶¶ 140-143 (2005).

⁶⁰ For example, Commissioner Copps' dissent to the *Broadband 271 Forbearance Order* (19 FCC Rcd at 21517-21519) has proven prescient:

The mismatch between the Commission's broadband rhetoric and reality reaches new heights with today's decision. ... While the country experiences broadband freefall, the Commission has embarked on a policy of closing off competitive access to last mile bottleneck facilities. ... Today, the majority pounds another nail into the coffin it is building for competition. ... [T]here is now absolutely no obligation to provide competitive access to any broadband facilities—from fiber-to-the-home to fiber-to-the curb to packetized functions of hybrid loops to packetized switching capabilities—at just and reasonable rates. [The majority] conclude[s] that the public interest is served by retreating to a policy of non-competition and last mile monopoly control. I cannot support such conclusions nor the underlying analysis.

...

One problem here is that the majority gets so carried away with its vision of the country's telecom future that they act like it is already here, that competition is everywhere flourishing, and that intermodal competition is already ubiquitous reality. But their cheerful blindness to stubborn market reality actually pushes farther into the future the kind of competitive telecom world they say they want.

...

policy decisions, but it can and should undo the damage by reinstating Open Access and reinvigorating competition for Internet access.

5. The Commission also eliminated UNE-based Open Access.

The Commission at first made significant, but incomplete efforts to apply Open Access principles to UNEs. The *Local Competition Order* declined to subject packet switches to UNE access requirements and ruled that collocation did not extend to equipment used to provide enhanced services. The Commission did allow multifunction equipment supporting both conventional telephone and enhanced services so long as that equipment was necessary to providing conventional telephone service. The Commission also held that any company obtaining interconnection or UNE access to provide telecommunications services could offer information services through the same arrangement. The order mandated UNE access to all loops connecting central offices to end users, including the loops used to provide DSL and obligated incumbent local telephone company to fulfill any requests to condition existing loops to make them DSL-compatible.⁶¹ A subsequent order confirmed that collocation included multifunction equipment that could be used to provide both voice and data services.⁶² Perhaps most importantly, the *Line Sharing Order* mandated UNE access to the high frequency portion of the loop used to carry DSL so that two competitors could provide services over the same loop,

The lack of analysis in this proceeding—and in the Commission’s approach to broadband generally – amounts to a regulatory policy of crossing our fingers and hoping competition will somehow magically burst forth. ... if we want to enter the brave new world of broadband, we need to move away from our current course. The facts show we are headed in the wrong direction at warp speed. I dissent.

⁶¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15691-92, 15713, 15794-95, and 15990, ¶¶ 380-382, 427, 580-581, and 995 (1996).

⁶² *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4776-79, ¶¶ 27-31 (1999).

with one offering conventional telephone service in the lower frequencies and the other offering DSL in the upper frequencies.⁶³

The courts were admittedly no great help to Open Access. The Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board* remanded the Commission's initial UNE access rules because the Supreme Court held the Commission had construed the "necessary" and "impair" standards too broadly.⁶⁴ On remand, the Commission reiterated that incumbent local telephone companies must condition DSL loops upon request. Although UNE access to loops generally included all attached electronics, the Commission nonetheless again specifically excepted packet switches and DSLAMs, based on the notion that granting UNE access to them would deter investment in a nascent market. The Commission did permit UNE access to DSLAMs located in remote terminals that were too small to permit physical collocation, but to date this "right" was rarely actualized into viable and functional CLEC arrangements – largely because of ILEC roadblocks.⁶⁵

In 2000, the D.C. Circuit struck down the Commission's decision permitting the collocation of multifunction equipment.⁶⁶ In response, the Commission revised its rules in 2001 to limit collocation of multifunction equipment to equipment whose primary purpose is to provide the requesting carrier either with interconnection that is "equal in quality" to that provided by the incumbent local telephone company for its own services or with

⁶³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order and Fourth Report and Order, 14 FCC Rcd 20912 (2000).

⁶⁴ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387-92 (1999).

⁶⁵ *Implementation of Local Competition Provisions of Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3775, 3776-77, 3783-84, 3835-37, 3839-840, ¶¶ 172, 175, 190-194, 306-309, 314-317 (1999).

⁶⁶ *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000) (quoting 47 U.S.C. § 251(c)(6)).

“nondiscriminatory access” to an unbundled network element.⁶⁷ These revisions to the collocation rules survived review in the face of challenges from ILECs.⁶⁸

The Commission then began a broader retreat from any real effort to extend the regulatory regime applicable to conventional telephone service to DSL and other wireline broadband technologies. In 2002, the Commission issued the *Wireline Broadband NPRM*, which tentatively concluded that DSL and other broadband services provided by local telephone companies constituted “information services” not subject to Title II tariffing and common carriage requirements, and sought comment on whether to modify or eliminate *Computer Inquiry* rules.⁶⁹ Later in 2002, the Commission detariffed DSL services that SBC offered through its separate subsidiary.⁷⁰

In 2002, the D.C. Circuit struck the Commission’s decision requiring line sharing.⁷¹ This led the Commission to eliminate line sharing and lift UNE access obligations to most high-capacity loops in the 2003 *Triennial Review Order*. The Commission also eliminated the limited exceptions it had recognized for UNE access to DSLAMs and other packet switching equipment.⁷² The *Triennial Remand Review Order* then eliminated high-capacity transport and

⁶⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, 15452-60, ¶¶ 32-44 (2001).

⁶⁸ *Verizon Tel. Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002).

⁶⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3029-33 ¶¶ 17-24, 3040-43 ¶¶ 43-53 (2002).

⁷⁰ *Review of Regulatory Requirements for Incumbent LEC Broadband Services*, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002).

⁷¹ *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002).

⁷² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17327-33 ¶¶ 549-580 (2003).

high-capacity loops from the list of § 251(c)(3) UNEs.⁷³ The Commission granted forbearance from 271 requirements for broadband in 2004.⁷⁴

In sum, the situation today is that an independent ISP has no means to obtain high-capacity loops from an ILEC or a cable company under nondiscriminatory and reasonable terms, either directly or through a competitive carrier. There is no wholesale access to network infrastructure or services provided on fair and reasonable terms, for which there is some degree of transparency and non-discrimination. There is no mandatory regulated access, such as local loop unbundling, and other wholesale access products such as dark fiber or next layer (e.g., bitstream) are unavailable, except by leave and on adhesive “negotiated” terms reluctantly offered by a cable or telephone company.

Open Access is gone, and with it, the independent ISP industry that originally brought the Internet to the masses. The fact is the Commission’s predecessors made a series of decisions that led to the elimination of a source of robust competition and beneficial economic incentives. This history, however, need not dictate future policy choices. This Commission now has the opportunity to change course and bring Open Access and competition back to American broadband.

⁷³ *In re Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533, 2575-641 (2005), aff’d, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁷⁴ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Broadband 271 Forbearance Order*).

6. Commission predictions that closing the networks would lead to ubiquitous broadband and not threaten the open Internet have proven incorrect.

When the Commission classified cable broadband Internet access and DSL Internet access as information services, it predicted that broadband competition would take off as a result. The *DSL Reclassification Order* explained that deregulation was appropriate because competition amongst independent ISPs was flourishing and would continue to thrive.⁷⁵ The Commission also believed that intermodal competition would blossom, leading to additional investment and reduced prices for consumers.⁷⁶ This expectation was not merely peripheral to the decision to classify broadband as an information service, it was the primary basis for Title I classification.⁷⁷ Yet nearly a decade since the *Cable Modem Declaratory Ruling* was issued, at a time when the Commission expected broadband competition to be in full bloom, the current *NPRM* instead acknowledges that Americans have “limited choice between broadband providers in many areas of the country.”⁷⁸

Not only did these expectations fail to materialize, but the classification decisions based upon these expectations have proven counterproductive. The competition that existed at the time of the orders has vanished. In 1998, there were between five thousand and seven thousand independent ISPs offering Internet access to the American public,⁷⁹ but today almost all of them are gone. The independent ISPs are the collateral damage of the Commission’s misjudgment that, in a deregulatory environment, “wireline platform providers will find it necessary and

⁷⁵ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14907, ¶ 100 (2005) (*DSL Reclassification Order*).

⁷⁶ *Id.*, ¶ 57.

⁷⁷ *Id.*, ¶ 44.

⁷⁸ *NPRM* at ¶ 48.

⁷⁹ Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past* 18 & n.88 (Fed. Commc’ns Comm’n Office of Plans and Policy, Working Paper No. 30, 1998).

desirable to negotiate arrangements with unaffiliated ISPs for access to their broadband networks in order to grow the base of users of their broadband infrastructures.”⁸⁰ The Commission predicted that deregulation would ensure these ISPs “continued availability of this transmission component, under reasonable rates, terms, and conditions.”⁸¹ Instead, the incumbent telephone and cable companies closed their networks and began offering broadband Internet access on monopoly terms.

All of the problems that the *NPRM* attempts to remedy arise from an uncompetitive broadband market. If American Internet users had the option to vote with their feet, the marketplace would punish harmful behavior. Users themselves could impose neutrality requirements by ditching broadband providers with abusive practices. A Comcast decision to inject reset headers into its users’ BitTorrent traffic would be weighed against the loss of customers and shareholder fury, rather than the merits of challenging the Commission’s Section 706 authority in court.

Not only did the Commission miss the mark on its prediction that intramodal competition would thrive, but it also misjudged the likelihood of intermodal competition. The *DSL Reclassification Order* argued that “other existing and developing platforms, such as satellite and wireless, and even broadband over power line in certain locations, indicat[e] that broadband Internet access services in the future will not be limited to cable modem and DSL service.”⁸² However, none of these technologies have developed into a competitive threat to the telephone and cable companies. Wireless broadband has developed its own niche, but has failed to become an alternative for wired Internet access because of limitations inherent to broadcasting data over

⁸⁰ *DSL Reclassification Order*, 20 FCC Rcd 14853, 14895 ¶ 79.

⁸¹ *Id.* at ¶ 100.

⁸² *Id.* at ¶ 50.

radio spectrum. Eighty-three percent of smartphone owners continue to maintain their wired home broadband connections, indicating that wireless is not a viable replacement.⁸³ If the average American Internet user were to even attempt to substitute a wireless connection for their wired connection, overage charges would drive their bill to more than \$800 per month.⁸⁴ Indeed, the fact that the *NPRM* proposes to allow non-neutral wireless broadband service shows that it is not yet a fully substitutable and competitive equivalent for wired service.

In addition to unrealistic expectations regarding competition, the Commission also incorrectly predicted that infrastructure investment would take off. The telephone and cable companies assured the Commission that they would make commercially-reasonable alternative facilities available to unaffiliated ISPs.⁸⁵ The Commission believed them and agreed that ending Open Access was an acceptable concession for the promised broadband deployment. However, the promised investment has not occurred.

The incumbents robustly improved the telecommunications network for decades even after Open Access principles were first developed in the 1960s. The Commission embraced Open Access as a means to facilitate competition in a series of cases related to interconnection, customer premises equipment, inside wiring and enhanced/information services. The incumbents had no real choice but to continue investing, because their profits came from a return on investment under traditional regulatory principles; if they failed to make new investment they earned less profit.

In hindsight, the fact that competition didn't develop in an unregulated environment should not come as a surprise. From a practical perspective, companies that sell wires will only

⁸³ Susan P. Crawford, *First Amendment Common Sense*, 127 Harv. L. Rev. 2343, 2355-56 (2014).

⁸⁴ *Id.*

⁸⁵ See, e.g., *DSL Reclassification Order* 20 FCC Rcd 14853, 14886-87 ¶¶ 63-64; see also *Broadband 271 Forbearance Order*, 19 FCC Rcd at 21508, ¶ 26.

survive in a competitive market if they assiduously tend to making new wire. On the other hand, if that company faces little competition in the wire market, it can earn extraordinary profit from both wire and adjacent products that use wires by restricting output and keeping the price high. The rest of the developed world understands this incentive and has maintained Open Access. Some commentators have observed that domestic capital investment and employment growth have slowed since the mid-2000s, while overseas investment – even under Open Access – has accelerated, especially when analyzed on a constant-dollar basis⁸⁶ AT&T and Verizon have reduced or ended their network extension efforts and essentially yielded to the cable companies in many areas.

The problem does not reside with those who provide Internet; it arises because transmission is still a monopoly (or a duopoly). From a technical and economic perspective, transmission and Internet access are two separate markets, although they are adjacent.⁸⁷ Once again, the Commission recognized this very fact in the *Computer Inquiries*. The very purpose of that proceeding was to isolate monopoly components and impose regulation on monopoly activity, while deregulating potentially competitive enhanced services.

The broadband service sector could become fully competitive again if the underlying bottleneck transmission components are available on a common carrier basis to all potential purchasers. That is precisely how it worked in the dial-up days and the move to broadband does not justify a different result. If we return to Open Access and allow competition back into the

⁸⁶ See, e.g., S. Derek Turner, [Fighting the Zombie Lies: Sorry ISPs, Title II Is Good for the Economy](http://www.freepress.net/blog/2014/05/14/fighting-zombie-lies-sorry-isps-title-ii-good-economy), TM + © 2009–2014 Free Press, available at <http://www.freepress.net/blog/2014/05/14/fighting-zombie-lies-sorry-isps-title-ii-good-economy> (“Investment: Under Title II, Bell Company capital investments increased by 20 percent (a CAGR of 1.8 percent). But after the Commission removed Title II, capital investment at these companies declined by 5 percent (a CAGR of negative 0.7 percent). ... Jobs: Bell Company jobs are down 20 percent since the removal of Title II. Employment at these companies peaked in 2000 following the period when the Bells were subjected to the most comprehensive implementation of Title II.”).

⁸⁷ Internet Access depends on transmission service inputs, but they are logically and practically separate markets. From an antitrust perspective, the Commission basically allowed the incumbents to engage in monopoly leveraging and then a tying arrangement.

Internet access market, then any Internet access provider that fails to act consistent with consumer expectations will quickly be faced with alternative providers offering prices and terms that users really want.⁸⁸ As it stands, however, the last mile transmission input is available only to the telephone and cable companies for Internet access. They therefore can now monopolize both the transmission and the Internet access. The Commission had recognized for 40 years that this kind of vertical integration and leveraging inexorably leads to discrimination and rationing as a means to keep prices and profits artificially high. But the rules put in place to prevent these predictable harms were jettisoned in favor of still-unfulfilled investment promises and expectations that competition would thrive.

V. TITLE II RECLASSIFICATION WOULD BE BASED ON THE COMMISSION'S WELL-ESTABLISHED LEGAL AUTHORITY AND WOULD NOT BE SUBJECT TO REJECTION BY THE COURTS.

The Commission's decision to classify cable modem service as an information service was affirmed in *Brand X*, largely due to *Chevron* deference. A decision to reclassify the transmission component of broadband Internet access – or broadband Internet access itself – would again receive *Chevron* deference from the courts. The decision could be well-reasoned and supportable because broadband providers clearly constitute common law common carriers. But there are lessons to be learned by reviewing the premises and expectations upon which the classification decision was based.

First, it is noteworthy that the *Cable Modem Declaratory Ruling* glossed over the fact that many if not most cable companies have historically provided “telecommunications service”

⁸⁸ Many of the activities identified as “problems” in this entire debate would not much of a concern if there was a competitive market. A provider's attempt to impose “content value” pricing, or even “discrimination” simply would not succeed if there were alternatives – unless consumers decided that is what they actually want. If that is what they want, then the activity is merely fulfilling consumer desires and that is a good thing. The problem arises when the two dominant providers impose these results, *despite* rather than *because of* consumer desires.

(“basic service” under *Computer Inquiry I*), albeit perhaps not for “broadband Internet access.”⁸⁹ Several were, in fact, common carriers. Several also offered “telecommunications” on a private carrier basis, including a few that successfully convinced the Commission to preempt state efforts to impose intrastate common carrier regulation over their “telecommunications” offering.⁹⁰

Cox/CoxDTS and *United Cable* centered on state commission efforts to regulate cable company institutional high-speed digital transmission services. The “high-speed digital transmission service” supported *enhanced services* supplied by “governmental and educational institutions and private businesses.”⁹¹ Presumably *United Cable*’s high-speed digital transmission service was or could also be used to support enhanced operations as well.

This was “telecommunications.” This was “broadband.” It was used (at least in part) to support enhanced functionalities. In *Cox/Cox DTS* the Commission chose to not impose common carriage on Comline’s service. Cox’s “DTS” service, however, was common carrier although it enjoyed “forbearance” from tariffing.⁹² These cases demonstrate that cable companies have provided broadband transmission “telecommunications,” some of which was a “telecommunications service,” and this transmission product was used to support enhanced/information services supplied by unaffiliated private and public third parties. The case was about “broadband data services.”⁹³ The *Cable Modem Declaratory Ruling* overstated one of its premises by overlooking the fact that cable companies had indeed offered a stand-alone

⁸⁹ See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4824-4826, 4828, ¶¶ 42-46, 51.

⁹⁰ See e.g., *In the Matter of Cox Cable Communications, Inc., Comline, Inc. and Cox DTS, Inc.*, Declaratory Ruling, and Order, 102 F.C.C.2d 110, 120-21 ¶¶ 24-25 (1985), vacated as moot on other grounds, 1 FCC Rcd 561 (1986); see also *In the Matter of United Cable Television of Colorado, Inc., et al*, Memorandum Opinion and Order, 1 FCC Rcd 555 (1986) (recognizing the cable company service is telecommunications, but refusing to preempt).

⁹¹ See *Cox*, 102 F.C.C.2d 110, 112 ¶ 3.

⁹² *Id* at 128, ¶ 36, citing to *Competitive Carrier Rulemaking*, Fifth Report and Order, 98 FCC 2d 1191, 1205-09 (1984).

⁹³ *Id* at 132 (Quello, dissenting).

broadband transmission service, and several of those were offered on a common carrier basis. Further, some of those were used to support enhanced services provided by the subscriber to the service.

Further, few seem to recall that *NARUC II* involved two-way non-video cable company provided transmission service offerings that were ultimately held by the court to be common carrier. The Commission had preempted state regulation and refrained from imposing common carriage. The *NARUC II* court reversed, however, and held that the specific offer in issue there was telecommunications and should have been treated as common carrier because it met all the relevant indicia of common carriage.⁹⁴ “The clear content of that term (common carrier) as developed at common law and discussed in our previous *N.A.R.U.C.* opinion indicates that most or all of the two-way, non-video cable operations at issue here do fit within the common carrier concept. Because at least the bulk of those activities are also clearly intrastate, we cannot avoid the conclusion that the § 152(b) jurisdictional bar clearly applies, beyond any margin for deference or discretion.”⁹⁵

All seem to agree that cable companies’ broadband transmission is telecommunications and both the Commission and courts have recognized that some of their offerings can be, or are, common carrier and thus telecommunications service. The question then becomes whether the Commission should – after the experience gained over the last several years – decide that it will isolate the transmission portion in issue today and require that it be offered on a common carrier basis going forward, by declaring that the transmission involved here is and should be a “telecommunications service.” The answer to both parts of this question should be “yes.”

⁹⁴ *NARUC II*, 533 F.2d at 608-610.

⁹⁵ *Id* at 618.

Although the Commission decided not to impose or find common carriage in the *Cable Modem Declaratory Ruling*, the cable companies' current offerings of bundled Internet access most certainly do meet the holding out and indifference prongs. They have a standard offer and do not negotiate individual contracts, particularly for residential and small-business customers. They typically hold out to serve all comers that meet their eligibility criteria. They do not generally choose clients on an individual basis or determine in each particular case whether and on what terms to serve.⁹⁶ They meet all of the indicia of common carriage under the common law. While the Commission has not required common carriage, the cable companies have exhibited all the classic signs of a voluntary undertaking to be a common carrier.

It is true that *NARUC I*⁹⁷ states that the Commission does not have “unfettered discretion” to “confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve” and went on to hold that “[t]he common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”⁹⁸ However, if an entity or class of entities has voluntarily chosen to act like a common carrier, then the Commission can and should recognize that reality, and proceed accordingly. “If practice and experience show the [cable companies and telephone companies] to be common carriers, then the Commission must determine its responsibilities from the language of the Title II common carrier provisions.”⁹⁹

The actual operations of cable and telephone companies' broadband Internet access services

⁹⁶ Cf. *NARUC II*, 533 F.2d at 608-09; *NARUC I*, 525 F.2d at 643; see also *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

⁹⁷ *NARUC I* involved whether the Commission could deem a particular wireless service to not be common carrier and pre-empt state regulation.

⁹⁸ *NARUC I*, 525 F.2d at 644.

⁹⁹ *Id.*

“appear(s) to bring them within the common carrier definition.”¹⁰⁰ Experience has shown that there are “reasons implicit in the nature of [broadband Internet access] operations to expect an indifferent holding out to the eligible user public.”¹⁰¹ The cable and telephone companies’ actual manner of providing retail Internet access services easily meet the *NARUC* common carrier tests. Title II can and should be applied. Then the Commission should require unbundling of the transmission component.

The Commission has the power to require unbundling and a stand-alone common carrier offer. The *NARUC I* court expressly contemplated this result by asking whether “there will be any legal compulsion thus to serve indifferently.”¹⁰² The court recognized that as a valid question and engaged in an analysis of whether there was (and thus could be) a compulsion, so there is room for regulators to compel common carrier classification in appropriate circumstances, especially when the providers are already acting consistent with that designation in their actual dealings.

i2Coalition believes that the proper choice is to return to Open Access by using Title II authority and mandating unbundling of the transmission component. If this is done, the Commission does not need to regulate Internet access because competition will sufficiently constrain the dominant actors. If, however, the Commission does not return to Open Access, then it *is* necessary to regulate broadband Internet access under Title II because the dominant providers face no competitive constraints. If the Commission is going to eliminate the Internet access evils identified in the *NPRM* through direct regulation, then effective and clear prohibitions on blocking and unreasonable discrimination are imperative. Since that is *per se*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 643.

¹⁰² *Id.*

common carriage, the Commission should invoke its common carrier jurisdiction and use Title II tools.

VI. MOBILE AND FIXED BROADBAND SERVICE SHOULD BE SUBJECT TO EQUAL AND CONSISTENT RULES.

The *NPRM* proposes to maintain the *Open Internet Order*'s mobile no-blocking rule, and thus maintain inconsistent requirements for fixed and mobile broadband. i2Coalition supports the principle of technology neutral rules and believes that the same no-blocking rule should be applied in a consistent manner. Separate rules and standards entrench differences, rather than encourage convergence and competition. If wireless broadband is ever to become a viable alternative to wired broadband, the product should not evolve with different regulatory expectations that become more ingrained and permanent over time.

Of note, the current and proposed rule for mobile broadband is also far less robust than the standards imposed for Upper 700 MHz C-Block mobile licensees. For example, Verizon's previous blocking of tethering that led to the settlement described in *NPRM* at paragraph 41 and note 93 would not be a violation of the current and proposed mobile no-blocking rule, since it does not at all address attachment of devices and speaks only to "applications that compete with the provider's voice or video telephony services."¹⁰³ The *NPRM* cites other examples of mobile blocking that were mentioned in *Open Internet Order*.¹⁰⁴ The current and proposed mobile no-blocking rule would likely prohibit the blocking of Skype, because it at least arguably competes with voice service. However, it would not ban blocking many alternative online payment services since they are not always provided via a website (and often involve installing an

¹⁰³ The proposed mobile no-blocking rule would probably outlaw AT&T's prior actions blocking FaceTime that is also referenced in *NPRM* at paragraph 41.

¹⁰⁴ *NPRM* at ¶ 53.

application)¹⁰⁵ and are not voice or video telephony services. Similarly, the rule would not ban a mobile provider from blocking Slingbox¹⁰⁶ or peer-to-peer applications. The *Open Internet Order* decided to have a “targeted prophylactic rule” restricting “only practices that appear to have an element of anticompetitive intent” and held that restrictions regarding applications that compete with a mobile providers’ voice or video telephony offerings was “appropriate at this time” in lieu of a “broader no-blocking rule.”¹⁰⁷ The Commission said it would “monitor” developments and reassess should the need arise.¹⁰⁸

The Commission should indeed revisit its original decision and apply the same no-blocking rules to both fixed and mobile broadband service.¹⁰⁹ Consistency is a far superior policy. Any technical differences based on network technology that may justify a different outcome can be dealt with through the “subject to reasonable network management” exception.

VII. CASE STUDY: PRIVACY AND ENCRYPTION

A. Paid prioritization arrangements are a threat to Internet privacy.

The *NPRM* gives significant consideration to content-based network practices, but never stops to consider the privacy implications for American Internet users. The Commission discusses at great lengths whether paid priority arrangements are consistent with an open Internet and if they could be implemented on a commercially reasonable basis, yet never seems to realize that it is contemplating the wholesale monitoring of the content of Americans’ broadband Internet connections.

¹⁰⁵ Cf. *Open Internet Order*, 25 FCC Rcd at 17960 ¶ 100.

¹⁰⁶ Slingbox may or may not be a “video service” depending on how that is defined, but it is clearly not a “video telephony service” and therefore would be excluded from protection.

¹⁰⁷ *Open Internet Order*, 25 FCC Rcd at 17961 ¶ 101.

¹⁰⁸ *Id.* at 17962 ¶¶ 104-105.

¹⁰⁹ *NPRM* at ¶ 62.

However, any arrangement in which a broadband ISP provides priority treatment to an edge provider necessarily contemplates content monitoring. For example, should Comcast enter into paid prioritization deal with Netflix, Comcast will need technological means to identify the Netflix traffic subject to the arrangement. This will require that Comcast, at a minimum, monitor the services, applications, devices, and websites with whom its customers are communicating. Furthermore, Section 8.9 of the proposed rules officially sanctions copyright enforcement efforts by broadband Internet access providers. This would mean that broadband providers now have the blessing of the Commission to open up their end users' packets to filter content. Unless there is a competitive market where users have choices among multiple broadband Internet access providers, the Commission should uphold Americans' privacy rights and be wary of content inspection-based services.

B. The proposed rules fail to account for encryption technologies.

Internet users themselves are quite concerned about the privacy of their online communications. Virtual private network (VPN) services are thriving. Other privacy applications like the TOR browser are becoming increasingly popular. Edge providers are providing privacy enhancing options and the use of SSL encryption has become ubiquitous. It is generally considered a positive development that American Internet users are becoming more jealous of their fundamental privacy rights. The Commission should not adopt policies that frustrate Americans' exercise of their civil liberties and should instead encourage such behavior.

This proliferation of encryption-based privacy tools presents significant uncertainty to the viability of the *NPRM's* proposed paid priority regime. For example, how could Comcast prioritize Netflix traffic (to use the example above) when an end user utilizes an encrypted VPN service? Would that user have to choose between their privacy and their ability to access Netflix

as intended? Would Comcast have the right to decrypt encrypted traffic in order to make prioritization decisions? Section 8.9 of the proposed rules permits “reasonable” efforts to address unlawful content. Does that include decryption to filter for copyrighted content, or even an outright ban on encryption because it would interfere with efforts to address unlawful content? Would encrypted traffic constitute lawful traffic subject to the no-blocking rule even though encryption is sometimes used to mask unlawful traffic? The no-blocking rule for mobile broadband only prevents the blocking of applications with which the wireless carriers compete. Therefore, can mobile broadband providers block encryption tools that Internet users utilize to protect their online privacy?

The example of encryption and privacy demonstrate that the market does not neatly fit into the Commission’s proposed definitions and rules. Nor do the rules meet users’ desires and needs. A paid priority regime assumes that innovation will only occur at the minimum level of service. It assumes that all Internet traffic is and will remain transparent to broadband access providers. It also ensures that innovation at very high bandwidth levels is only available to existing, successful edge providers with the means to purchase prioritization. Fundamentally, the Commission is attempting to limit the future Internet to the confines of today’s Internet, which favors the current large market participants over small players. Innovation and the market are unpredictable. The best way to ensure that the Internet remains open well into the future is by ensuring that competition exists on all parts of the network, especially the presently-closed last mile transmission component.

VIII. ANALYSIS OF THE TEXT OF THE PROPOSED RULES

i2Coalition offers the following observations and recommendations on the text of the proposed rules.

A. Authority for Part 8 Rules

NPRM Appendix A sets out the proposed rules. The Appendix states that the authority for the rules is derived from 47 U.S.C. §§ 151, 152, 154(i)-(j), 303, 316 and 1302. The Commission should also invoke its Title II authority. As explained above, i2Coalition does not believe the Commission should impose common carrier regulation on “Internet access” at this point and should instead reinstate Open Access so competition can return to the Internet access market. Title II is a necessary prerequisite to reinstating Open Access through *Computer Inquiry* type rules. But if the Commission does choose to regulate Internet access and wants rules that are meaningful and effective to deter the harms identified in the *NPRM*, then Title II is a prerequisite as well. As shown above, the no-blocking and commercially reasonable rules are *per se* common carrier obligations. The Commission should expressly rely on its Title II authority as the basis for these rules because § 706 (47 U.S.C. § 1302) on its own does not provide sufficient authority to promulgate or enforce common carrier rules. Therefore, references to §§ 201, 202, 203, 204, 205, 206, 208, 209, 211, 215, 218, 219, 220, 251 and 252 should be added. Given that it may be appropriate to forbear from applying some of the above-listed statutory provisions, a reference to § 160 should be added as well.

The following analysis and recommendations on the proposed rules assumes a decision to regulate Internet access either in addition to or instead of returning to Open Access.

B. Transparency Rule

The transparency rule should expressly require meaningful and plain-English disclosures of practices and policies that impact user privacy. Specifically, i2Coalition recommends that a new subsection (d) be added to § 8.3 stating as follows:

(d) A person engaged in the provision of broadband Internet access service shall have a publicly-available privacy policy that meaningfully explains what user

information is gathered, how it is gathered, the purposes for which any user information that is gathered will be used, and to whom user information will be disclosed and under what circumstances. The privacy policy must be a part of any contractual relationship with each user and enforceable as such. The privacy policy must state whether the provider employs Deep Packet Inspection and inspects content, and if so for what purpose(s) Deep Packet Inspection is employed, and disclose each purpose for which the information collected or gleaned from collected information is used; the length of time any intercepted content or derived information is stored; and the specific circumstances under which any intercepted content or derived information will be disclosed to third party governmental or private entities. If a provider does employ Deep Packet Inspection and retains any user content or information derived from such content, the privacy policy must expressly provide that the provider does not assert any ownership or property rights to the content or derived information, and all property rights remain with the original owner of the content, e.g., the edge provider or end user.

C. No-Blocking Rule

The simplest way to reinstate a workable no-blocking requirement would be to accept, indeed embrace, the concept that no blocking is a *per se* common carrier obligation, and apply Title II. The Commission should also eliminate the proposed different treatment between fixed and mobile broadband. The Commission should apply one no-blocking standard.

As explained above, the same concerns apply to both fixed and mobile, and the basic rule should be the same. Different treatment will invite gaming the definitions by all sides: those that want the harsher rule to apply will try to argue that the wireless service is fixed, while the wireless provider will say it is mobile.

The lesser standard will allow wireless broadband providers to block content from sources other than lawful websites. The Internet, however, is far more than just a collection of websites and content can be acquired from or sent to Internet destinations that are not on the web. Content is available from and is routinely sent to servers that are not based on HTML. The mobile no-blocking obligation should apply to all content.

The draft mobile wireless no-blocking rule only prohibits providers from blocking “applications that compete with the provider’s voice or video telephony services.” It would therefore allow a mobile provider to block any application that is not voice or video telephony. If the wireless provider does not offer video telephony, then it could block such applications. The rule would allow the wireless provider to block email applications or individual emails. The rule would allow the wireless provider to block the great preponderance of applications and services that presently exist.¹¹⁰ The rule would allow wireless providers to block encryption and virtual private networks, which are useful for privacy-conscious individuals and imperatives for many businesses and their employees.

D. “Commercially reasonable” vs. “No unreasonable discrimination”

The Commission should abandon the pretext of banning unwanted discrimination through the commercially reasonable rule, expressly invoke Title II and then proceed to ban unreasonable discrimination. “Unreasonable discrimination” should be further defined, and broader than the discrimination rule contained in the now-vacated § 8.7. The *Open Internet Order* indicated that use-agnostic differential treatment would not be unreasonable.¹¹¹ The original rule prevented discrimination yielding anti-competitive results, as well as other forms of discrimination not based on anti-competitive intent, but still deemed harmful to the public interest.¹¹² Nonetheless, the Commission indicated that some forms of discrimination based on application, content, services, use, source/destination or device might not be unreasonable. For example, *Open Internet Order* ¶ 71 explained that “packet prioritization” as part of service to consumers is likely

¹¹⁰ If one peruses the app stores for Apple, Google, Microsoft, or any of the others offering mobile apps, it quickly becomes apparent that voice and video telephony apps are a small minority in comparison to other kinds.

¹¹¹ *Open Internet Order*, 25 FCC Rcd at 17946 ¶¶ 73 and 75. Commenters sometimes call for “application-agnostic” rules, but this characterization is actually a shorthand way of describing concerns over differential treatment of applications, content, services, use, source/destination or device based on network provider choices rather than user choice or desire.

¹¹² *Open Internet Order*, 25 FCC Rcd at 17949 ¶ 78.

not unreasonable discrimination. This could be read to allow prioritization regimes regarding specific applications, content, services, use, source/destination or devices determined solely by the network provider and independent of (and perhaps even despite) user desire.

If the Commission decides to continue regulating Internet access, it should invoke Title II and reinstate the “no unreasonable discrimination” rule. It should then make clear that discrimination between or among applications, content, services, use, source/destination or devices determined solely by the network provider and independent of user desire is unreasonable discrimination. The rule should be truly use agnostic – except where *the user* requests differential treatment.

E. Other Laws and Considerations

The Commission proposes to retain § 8.9. i2Coalition believes that the final sentence invites and encourages Internet access providers to invasively surveil user activity, or at least give permission for providers to inspect users’ content. It therefore implicitly blesses invasions of privacy. The entire sentence should be stricken, or clarified in some fashion so it cannot be used as a defense to or justification for content inspection absent express user consent.

F. § 8.11 Definitions

1. Definition of “Block” (8.11(a))

The proposed definition for “block” should not exclusively focus on what is being delivered to the *edge provider* for purposes of assessing whether a “minimum level of access” is not being provided and thus there is blocking. The Commission should be at least equally (if not exclusively) concerned with whether the end user is receiving an adequate level of access that allows the end user to simultaneously send information to and receive information from all desired endpoints, both individually and collectively.

The proposed definition should be amended to reinforce that the purpose of the no-blocking obligation: to ensure that users may send or receive desired content and employ the “applications, services, or non-harmful devices” they choose.

i2Coalition recommends this text for the final definition:

~~The failure of a broadband Internet access service to provide an edge provider with a minimum level of access~~¹¹³ that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers, and allows end users to send or receive desired content and employ the applications, services, or non-harmful devices they choose.

2. Definition of “Broadband Internet access service” (8.11(b))

The Commission proposes to retain the original definition for Broadband Internet Access Service promulgated in the *Open Internet Order*. i2Coalition believes it should be changed.

The present and proposed definition states as follows:

(a) Broadband Internet Access Service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up¹¹⁴ Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

¹¹³ i2Coalition has significant concerns with the proposal to define a “minimum level of access” in order to then allow priority services to edge providers that exceed that level. The avowed purpose is to have a back-door means to prevent unreasonable discrimination while purporting to satisfy the D.C. Circuit’s reasons for vacating the discrimination rule. i2Coalition believes that – if the Commission decides to regulate Internet access – the Commission should instead proceed to invoke Title II and reinstate the no-discrimination rule under that authority. Thus, we have stricken the reference to minimum level of access in this proposed edit is made in the alternative. If the Commission persists in taking the approach proposed in the *NPRM* then the reference to “minimum level of access” should be retained.

¹¹⁴ *Open Internet Order*, 25 FCC Rcd at 17935 ¶ 51. The Commission excluded “dial-up Internet access service” because of “the easy ability to switch among competing dial-up Internet access services. Moreover, the underlying dial-up Internet access service is subject to protections under Title II of the Communications Act. The Commission’s interpretation of those protections has resulted in a market for dial-up Internet access that does not present the same concerns as the market for broadband Internet access.” This is a frank acknowledgement that if the Commission had not eliminated Open Access for broadband facilities then the concerns driving today’s debate of “Net Neutrality” would not exist. If the Commission reinstates Open Access then the underlying concerns will go away and regulation of Internet access will not be necessary.

This definition has not been adequately subjected to critical analysis. There are some potential problems and a better definition can be devised.

First, the definition may capture activities beyond merely Internet access. *Open Internet Order* ¶¶ 47 and 52 stressed that it was not supposed to include activities that appeared to meet the definition in whole or in part, such as “virtual private network services, content delivery network services, multichannel video programming services, hosting or data storage services, or Internet backbone services (if those services are separate from broadband Internet access service)” or “coffee shops, bookstores, airlines, and other entities when they acquire Internet service from a broadband provider to enable their patrons to access the Internet from their establishments.” That is fine so far as it goes, but the list is not exhaustive. There are other activities that are not listed and meet the definition. For example, an open proxy server that facilitates requests using all protocols and extending to “substantially all Internet endpoints” would meet the definition.¹¹⁵

Second, the definition does not focus on the transmission component, and that is one of the reasons the definition may be stretched past its intended limitations. The primary differentiating quality of the activity sought to be regulated (broadband Internet access) and other activities that need not be regulated and should not be regulated is the *broadband transmission link* between the provider and end user. Without this link there is no access. Other activities that are not intended to be covered (like the proxy server example above) do not come with transmission. While this point is illustrated by the focus on transmission type in the definitions for fixed and mobile, i2Coalition has recommended that the two types be treated the same, and have the same text. Any justifiable differential treatment based on network technologies used for

¹¹⁵ TOR proxies, for example, support more than just web requests, and provide connectivity to virtually the entire Internet.

the transmission portion should be resolved through the reasonable network management exception. But even if the differential treatment is maintained the main definition should also include transmission as a distinguishing and qualifying characteristic.

A preferable definition can be pulled from § 706. The Commission maintains that § 706 is an important source of authority for the contemplated rules. While i2Coalition does not believe § 706 is sufficient, it is relevant. The alternative definition supplied below draws heavily from § 706, and then adds some of the components in the existing rule.

(a) **Broadband Internet Access Service.** A mass-market retail service, without regard to any transmission media or technology, that provides high-speed, switched, broadband telecommunications capability and allows the retail user purchasing broadband telecommunications links and any bundled or ancillary functionalities to (1) originate and receive high-quality voice, data, graphics, video and other information content of the user's choosing, (2) obtain applications, services and content from one or more Edge Providers, and/or (3) communicate with other end users or endpoints on the Internet. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

3. Definition of "Edge Provider" (8.11(c))

This proposed definition uses other terms of art that are not themselves defined in the proposed rules. i2Coalition believes that definitions for "application" and "content" are also needed. Proposed definitions for these terms are supplied below.

4. Definition of "Fixed broadband Internet access service" (8.11(e))

The terminology used in this rule (and the one for mobile) could lead to disputes over whether a given service is mobile or fixed wireless broadband. If the no-blocking differences are maintained, then given the material regulatory differences under the proposed rules between a fixed wireless service and mobile service, providers will be much incented to call the service mobile but others will want to label it fixed. Since there may be different reasonable network

management outcomes depending on whether a service is mobile or fixed the terms do need to be defined. The final rules must be clear, which the current proposed rules are not.

Assume that a wireless user has a 4G capable router (with or without an externally-mounted antenna) that distributes the signal to desktops, laptops, tablets or smartphones using Wi-Fi. The router can in fact operate while in motion, assuming it is powered from some form of battery. But even if the router is stationary several of the other devices (laptop, tablet, smartphone) that connect to it are not. Does this type of arrangement serve end users primarily at fixed endpoints using stationary equipment? If the router is the endpoint then the answer is yes. If the other devices are the endpoints that matter, then the answer is no.

Second, a mobile station can be “stationary” at certain times, or even most of the time and still be a mobile station. In one case before the Commission, complaining parties claimed that a wireless device and associated service was fixed based on the size and the difficulty associated with moving it about, as well as the fact that it tended to be stationary most of the time. A “laptop-sized wireless access unit” powered from an electrical outlet or by battery that was “approximately 2.76 inches x 12.9 inches x 11.8 inches and weigh[ed] 8.3 pounds including the built-in battery” that came with a short antenna and “a larger high gain antenna for exterior mounting” was found to be a mobile station because it could move, could operate while in motion, and had been operated while in motion in some instances.¹¹⁶

i2Coalition recommends that the final rule delete “using stationary equipment.” There does not appear to be much caselaw on what stationary would mean. The definition for “fixed

¹¹⁶ *In the Matter of Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, Memorandum Opinion and Order, 17 FCC Rcd 14802 (2002), vacated, dismissed as moot, Order on Reconsideration, 22 FCC Rcd 12015 (2007).

station” at 47 C.F.R. § 1.907 is clearer.¹¹⁷ The Commission has far more experience with applying this definition in specific contexts. Then the Commission should make clear that the station under inquiry is the one that makes the direct connection to the wireless network, and authenticates on that network, rather than other devices that receive information via the station’s router capabilities.

5. Definition of “Mobile broadband Internet access service” (8.11(f))

The reference to “mobile stations” as the qualifier for what is a “Mobile broadband Internet access service” can also lead to disputes over whether a given service that relies on spectrum for transport is mobile or fixed.

The Act and Commission rules have several different definitions and they are not all the same. The Act (§ 153(34)) defines a mobile station as “a radio-communication station capable of being moved and which ordinarily does move.” The definition for “mobile station” in 47 C.F.R. § 1.907 exactly matches the statutory definition. On the other hand, 47 C.F.R. §§ 22.99¹¹⁸ and 27.4¹¹⁹ employ slightly different definitions. The Commission should specify one definition that will apply. i2Coalition recommends that the statutory definition, and therefore also the one at § 1.907, be used. This will not fully flesh out potential disputes, but it will at least eliminate arguments over which definition applies.

6. Additional Definitions

As noted above, i2Coalition believes that certain terms used in the proposed rules but do not have definitions should be defined as part of the final rules. Suggested definitions for those terms are:

¹¹⁷ “Fixed station. A station operating at a fixed location.”

¹¹⁸ “One or more transmitters that are capable of operation while in motion.”

¹¹⁹ “A station in the mobile service intended to be used while in motion or during halts at unspecified points.”

Application. 1. Software that embodies the primary logic characterizing and supporting an end-user service and its features. Such an application may reside on an application server within a service provider's network or may be a 3rd party application outside of a service provider network. 2. Software on user devices providing something of value consumed by the end user. E.g., Microsoft Word, Firefox Web Browser or Google Maps. 3. Software that performs a specific task or function, such as word-processing, creation of spreadsheets, generation of graphics, facilitating electronic mail, etc. Synonym application software.¹²⁰

Content. Any information concerning the substance, purport, or meaning of a communication.

IX. CONCLUSION

The discriminatory practices that the Commission is attempting to address in this proceeding are the direct result of the absence of competition in the broadband market. The proposed rules would regulate Internet access providers' actions, but would not address the root problem. Only Open Access would allow competition and consumer choice back into the broadband access market. i2Coalition recommends that the Commission return to the Open Access policies that first brought us the open Internet by reclassifying the broadband transmission component as a telecommunications service under Title II.

¹²⁰ This proposed definition was taken from the ATIS Telecom Glossary (© Alliance for Telecommunications Industry Solutions), available at <http://www.atis.org/glossary/definition.aspx?id=5445>.