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

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

REPLY COMMENTS

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EXECUTIVE SUMMARY

The American Cable Association ("ACA") submits these reply comments in response to comments filed concerning the Restoring Internet Freedom NPRM. As in the previous Open Internet rulemaking, all interested parties want to ensure a free and open Internet with the only question being how to achieve that objective in a manner that encourages Internet investment and innovation by all market participants. The record confirms that the Commission's attempt to achieve the objective of a free and open Internet through reclassification of broadband Internet access service as a Title II common carrier offering was a mistake. The Commission had reasonable alternatives to Title II reclassification in the 2014 to 2015 timeframe, but chose instead to take the radical step of reclassifying the service and imposing burdensome common carrier regulation on broadband Internet service providers ("ISPs") that had only the barest relationship, if any, to protecting the open Internet against threats, real or imagined. Title II reclassification was harmful because it was a classic case of government overreach, unnecessary as a matter of economics, and incorrect as a matter of law. It was especially harmful to smaller ISPs, their customers and communities because it increased smaller ISP costs while decreasing their incentive and ability to invest in broadband Internet infrastructure and offer innovative or beneficial new features and services to consumers.

The Commission can achieve its open Internet objective by undoing the Title II reclassification decision, restoring the information service classification, and eliminating the Internet General Conduct standard. Should the Commission determine *ex ante* rules are necessary, it may apply light-touch regulation pursuant to its affirmative authority to protect Internet openness against any actual threats by information service providers pursuant to Section 706. Achieving this objective will also require a stable, uniform framework applied nationally to all forms of broadband Internet access service – fixed and mobile alike. Should the Commission determine *ex ante* rules are needed but that it lacks adequate authority to adopt them under Section 706 or any other provision of the Communications Act, the answer is for Congress to enact new, bipartisan legislation clarifying the Commission's authority and establishing a stable and appropriate regulatory framework to ensure an open Internet.

Title II reclassification was costly and harmful

Contrary to the assertions of Title II proponents, broadband ISPs were harmed by the imposition of Title II regulation. The record shows that utility-style Title II regulation imposes significant direct and indirect costs on ISPs and harms consumers by chilling ISP innovation and investment, without offsetting benefits to competition or consumers. These adverse impacts were reported by ISPs large and small, and supported by both economic theory and empirical evidence.

While there is some dispute in the record over investment impacts and the correct way to measure them, *nothing* in the evidence submitted by Title II proponents refutes the showing made by ACA and others that the imposition of Title II, with its attendant increase in compliance burdens and regulatory uncertainty, harmed smaller ISPs, their customers and communities. ACA member companies have attested to the fact that it did so by increasing their costs and decreasing their incentive and ability to invest in broadband plant and roll out new features and services that would have benefitted consumers and brought in additional revenues that would have been re-invested in their broadband networks and services.

Title II proponents' uninformed assertions that ISP reports of undue costs and burdens associated with Title II status are overblown, "hypothetical" or "imaginary" reflect a fatal lack of understanding about how smaller ISPs ensure regulatory compliance and attempt to reduce regulatory risk. They are directly belied by the experiences of ACA member companies reflected in the record. Smaller ISPs reported incurring significant direct costs for additional regulatory compliance reviews and actions by both internal staff, outside counsel and consultants and the need to set aside additional reserves to address potential regulatory enforcement actions and customer complaints. Increased compliance burdens factor into the economics of ISPs' planning for network investments, capital reserves to cover regulatory compliance costs, as well as the introduction of new product offerings.

Fear of adverse Commission enforcement or consumer complaints, for smaller ISPs, was concrete and far from "imaginary," as Title II proponents claim. These well-grounded fears prevented ACA members from deploying innovative features and services that would have benefitted both the providers and their customers because the costs of defending actions after-the-fact before the regulator or courts, even if successful, can outweigh any economic benefit. Smaller ISPs are simply unwilling to "roll the dice" under these circumstances. ACA members also described how the decision caused them to delay, defer or curtail broadband investments. They cite, as a key driver, the potential threat of after-the-fact rate regulation that would impair an ISP's ability to recoup its investment through revenues and repay loans. Direct adverse economic impacts of the Title II decision identified include cutbacks in the scope of planned network upgrades, delays in embarking upon existing network upgrades and expansions, delays in engaging in full system rebuilds, and decisions to refrain from investing to expand broadband into rural unserved areas. As prudent businesses, ACA members report continuing to invest in broadband out of competitive necessity and to satisfy customer demand, but they delayed, deferred and invested less in broadband plant and service expansions than they otherwise would have but for the Title II reclassification decision.

The availability of the Commission's advisory opinion process, cited by Title II proponents as the antidote to any increased regulatory uncertainty, does little to change this equation. For a smaller ISP, seeking a non-binding advisory opinion from the Commission would be both costly and offer little more than cold comfort.

Title II reclassification was unnecessary to protect the free and open Internet

The record again shows overwhelming support for a free and open Internet and support for adherence to the core "Net Neutrality" precepts contained in former FCC Chairman Powell's Internet Four Freedoms and the Commission's 2005 Internet Policy Statement. It was unwise and unnecessary to reclassify broadband Internet access service and impose asymmetric utility-style regulation on only one sector in the multi-dimensional Internet ecosystem in 2015 when appropriate rules could have been adopted using other statutory authority. Reclassifying primarily to afford a legal basis for flatly prohibiting paid prioritization – a practice virtually non-existent in the marketplace and recognized to be both pro- and anti-competitive in effect – was particularly unjustified. Given the enormous level of industry consensus that an open Internet is one where ISPs do not block, throttle or censor lawful content and are transparent with consumers, the Commission could have crafted a set of consensus rules using its authority under Section 706. Reclassifying and imposing common carrier regulation on broadband ISPs in order to adopt "bright line" Net Neutrality prohibitions was simply regulatory overkill.

<u>The "gatekeeper" theory cannot justify Title II regulation</u>. The record confirms that continued reliance on ISPs' purported roles as Internet "gatekeepers" would be misguided for at

least two principal reasons. ISPs do not have "terminating access monopolies" that cause market failures with respect to Internet edge providers. The economic literature overwhelmingly demonstrates that the vertical gatekeeper theory is inapplicable to broadband Internet access markets because ISPs do not have terminating access monopolies with their subscribers giving them the ability to leverage Internet edge providers by either favoring one over another or extracting terminating access charges. With respect to smaller ISPs in particular, Title II proponents misconceive ISP incentives to prevent end user access to online video while vastly overestimating their abilities to extort interconnection fees for delivering online content to their subscribers. Claims that gatekeeper power is always present, even with respect to the smallest ISPs, miss the mark. ISPs have no economic ability to profit from impairing their subscribers' access to popular edge providers, and the view that all ISPs, no matter how small, wish to keep their MVPD subscribers from accessing online video content to protect the margins on their own video service is laughable. Smaller ISPs recognize that consumer video preferences are changing and are actively pursuing new ways to offer more video choices on more consumer devices, increasingly teaming up with both online on-demand and streaming video services and device makers and integrating online and linear video services to provide subscribers with a seamless video experience. Smaller ISPs fight to get the attention of Internet edge providers even for striking mutually beneficial deals.

The Commission should expressly disavow use of the "gatekeeper" theory in determining whether compelled common carrier status is necessary and appropriate. Instead, any market imbalances in the Internet ecosystem should be put through the filter of a traditional market power analysis to determine where demonstrable market power lies and what an appropriate regulatory response should be. To the extent anything resembling "gatekeeper" power is to be considered by the Commission, it must be done in a holistic fashion by examining all sources of gatekeeping power among information service providers, including Internet edge providers.

Title II classification cannot be justified on grounds unrelated to protecting the open Internet. Contrary to the claims of several Title II proponents, the Commission cannot retain the telecommunications service classification to address policy issues unrelated to protecting the open Internet. Regulatory classification is first and foremost a factual matter – whether the characteristics of the service fit the terms of the statutory definition at issue. Policy matters come into play, but it is well established that in the absence of identified market power as prerequisite for potentially compelling common carriage, the Commission cannot impose common carrier regulation to achieve policy objectives alone. Given the lack of statutory "fit" for broadband Internet access service under Title II, the absence of identified ISP market power and the enormous costs involved, there is no lawful basis for maintaining the Title II classification.

The Commission has authority under Section 706 to adopt baseline Net Neutrality rules should it determine them necessary. To the extent the Commission determines that the benefits of having enforceable Net Neutrality rules would outweigh their costs, the record shows a high level of consensus from ISPs, industry groups and Internet edge providers alike that the Commission has sufficient regulatory authority under Section 706 to adopt baseline protections consisting of no blocking, no throttling, subject to reasonable network management, and transparency, as well as a fair amount of consensus that anticompetitive paid prioritization should not be tolerated.

Any remaining legal uncertainty is best addressed by Congress. There is also a high level of consensus that, should the Commission determine *ex ante* rules are needed but that it

lacks adequate authority to adopt them under Section 706 or any other provision of the Communications Act, the answer is for Congress to enact new, bipartisan legislation clarifying the Commission's authority and establishing a stable and appropriate regulatory framework to ensure an open Internet. In the meantime, it is imperative that the Commission undo its harmful Title II classification decision and restore the information service classification for broadband Internet access service.

Additional actions to ensure an appropriate light-touch regulatory framework

Achieving the objective of a free and open Internet in a manner conducive to investment and innovation by all participants in the Internet ecosystem requires the Commission to take additional steps that go beyond revoking the telecommunications service classification, restoring the information service classification, eliminating the Internet General Conduct standard, and, if necessary, adopting an appropriately tailored set of Net Neutrality protections. ACA supports the recommendations of other commenters that the Commission must also (i) expressly establish the primacy of federal law with respect to broadband Internet access service regulation by preempting state and local laws that attempt to regulate this service and conflict with federal goals; (ii) establish regulatory parity for fixed and mobile broadband Internet access services; and (iii) exercise its forbearance authority as a prophylactic measure to ensure regulatory stability.

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REPLY COMMENTS

I. INTRODUCTION

The American Cable Association ("ACA") submits these reply comments to address certain issues raised in comments filed in response to the Commission's proposals in the above-captioned proceeding.[1] As in the previous Open Internet rulemaking, all interested parties want to ensure a free and open Internet with the only question being how to achieve that objective in a manner that encourages Internet investment and innovation by all market participants. The record in this proceeding supports ACA's position that the Commission's attempt to achieve the objective of a free and open Internet through reclassification of broadband Internet access service as a Title II common carrier offering was a mistake.

[1] *Restoring Internet Freedom,* Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) ("NPRM").

The Commission had reasonable alternatives to Title II reclassification in the 2014 to 2015 timeframe, but chose instead to take the radical step of reclassifying the service and imposing burdensome common carrier regulation on broadband Internet service providers ("ISPs") that had only the barest relationship, if any, to protecting the open Internet against threats, real or imagined. Title II reclassification was harmful because it was a classic case of government overreach, unnecessary as a matter of economics, and incorrect as a matter of law. The decision was especially harmful to smaller ISPs, as documented in ACA's initial comments, increasing their costs and decreasing their incentives and abilities to invest in broadband Internet infrastructure, extend lines into unserved rural areas, and offer innovative or beneficial new features and services to consumers. The Commission can achieve its open Internet objective by undoing the Title II reclassification, restoring the information service classification, and eliminating the Internet General Conduct standard.[2] Should the Commission determine *ex ante* rules are necessary, it may apply light-touch regulation pursuant to its affirmative authority to protect Internet openness against any actual threats by information service providers pursuant to Section 706. Achieving this objective will also require a stable, uniform framework applied nationally to all forms of broadband Internet access service – fixed and mobile alike.

In these reply comments, ACA focuses on record evidence demonstrating (i) the widespread harms of burdensome Title II regulation on broadband ISPs; (ii) that Title II reclassification was unnecessary to protect the open Internet; and (iii) additional actions the Commission should take to ensure an appropriate light-touch regulatory framework that is

[2] *See Restoring Internet Freedom,* WC Docket No. 17-108, Comments of the American Cable Association at 59-65 (filed Jul. 17, 2017) ("ACA Comments") (as part of its restoration of a regulatory framework under Title I that provides regulatory certainty and is conducive to infrastructure investment, the Commission should eliminate, without replacement, the hopelessly vague and open-ended Internet General Conduct standard); *see e.g.*, CenturyLink Comments at 33; Comcast Comments at 52-53, 68-73; CTIA Comments at 9; NCTA Comments at 43; WISPA Comments at 31-32; Sprint Comments at 2; Cox Comments at 30-31.

conducive to continued investment and innovation in the Internet ecosystem by all market participants.

II. TITLE II RECLASSIFICATION WAS COSTLY AND HARMFUL

The record confirms that Title II reclassification was as harmful as it was unnecessary to achieve the Commission's goals in its 2014 Open Internet rulemaking. Specifically, it strongly demonstrates that Title II reclassification was costly and harmful to ISPs without corresponding benefit to competition or consumers because the record before the Commission then, as now, showed that ISPs posed no colorable threat to either Internet openness or consumer welfare requiring their treatment as common carriers. As discussed below, despite filing reams of figures concerning capital expenditures and broadband speed increases purporting to show that ISP investment in broadband infrastructure was unaffected by the Commission's decision, pro-Title II advocates have offered no compelling evidence to refute the fact that the Title II decision imposed costs and caused widespread harm to the businesses of ISPs and consumers.

A. The Record Shows Title II Reclassification Decision Harmed Broadband ISPs' Incentive and Ability to Invest and Innovate.

Contrary to the assertions of Title II proponents, ample theoretical and empirical evidence in the record from ISPs large and small demonstrates how the Commission's Title II reclassification decision increased ISP costs and regulatory uncertainty, decreased their incentive to invest and bring innovative features and services to market, and harmed rather than benefitted consumers. Specifically, consistent with the NPRM's premise, ISPs as a whole have demonstrated that utility-style Title II regulation imposes significant costs on Internet service providers and harms consumers by chilling innovation and investment.[3] Further, ISPs have

[3] NPRM, ¶¶ 4, 44-46. *See, e.g.*, AT&T Comments at 49-59 (illustrating the negative impact of Title II regulation on investment, innovation and experimentation); Charter Comments at 9-11 (Title II regulation affects ISP ability to obtain financing; describing deterrent effects of Title II on its own operations and willingness to undertake new or innovative business ventures, projects, or service delivery models, including rolling out a WiFi service); Cox Comments at 14-18 ("Cox's own experience illustrates the

produced evidence showing a reduction in relevant capital spending during the period immediately following adoption of the 2015 Open Internet Order. Several economic studies demonstrate how the threat of Title II regulation and eventual adoption of the Title II Order significantly dampened investment and innovation, consistent with what the economic literature would predict.[4] Moreover, the record demonstrates how Free Press's and other Title II proponents' economic "studies" purporting to show increases in ISP capital expenditures following the 2015 Open Internet Order suffer from fundamental methodological flaws that conflict with properly conducted studies showing that ISP investment in fact suffered as a result

dampening effects of the Title II Order, as Cox has been forced to recalibrate its investment strategy for broadband based on concerns that capital outlays could be jeopardized by the overly expansive and uncertain regulatory framework imposed by that order. A hostile regulatory climate can be particularly relevant for multi-sector holding companies, like Cox Communications' parent company Cox Enterprises, that can readily choose to invest in business opportunities without similar burdens."); WISPA Comments at 11-16 (discussing impacts of largely unquantifiable costs of increased regulatory uncertainty and cataloging new direct costs imposed on small wireless Internet service providers by Title II decision); USTelecom Comments at 2-9 (evidence from countries with heavy-handed, backwards-looking regulatory schemes like Title II suffer from investment levels far below those of the United States prior to 2015); Frontier Comments at 2-4 (imposition of Title II regulation reduced investment in publicly traded ISPs).

[4] *See, e.g.*, AT&T Comments at 49-59, Declaration of Mark A. Israel, Allan J. Shampine & Thomas A. Stemwedel, Economists at 43-57 ("Economists Declaration") (discussing economic theory and empirical evidence demonstrating that the imposition of Title II regulation and attendant regulatory uncertainty and regulatory creep reduces investment incentives and that relevant capital spending declined during the period immediately following adoption of the 2015 Open Internet Order); Comcast Comments at 27-43, Appendix C, White Paper, Christian M. Dippon, PhD, NERA Economic Consulting, *Public Interest Repercussions in Repealing Utility-Style Title II Regulation and Reapplying Light-Touch Regulation to Internet Services* at 18-41 ("Economic Appendix") (economic analysis of how imposition of Title II has a chilling effect on ISP investment, particularly in rural markets, and a negative impact on innovation); CTIA Comments at 7-13, 21-28, Exhibit B, Robert Hahn, *How Economics Can Inform Telecommunications Policy: The FCC's Proposed Action on Restoring Internet Freedom* at 16-23 ("Hahn Declaration") (discussing economic literature demonstrating decline in capital expenditures by ISPs); NCTA Comments at 31-42 (threat and eventual adoption of Title II Order significantly dampened investment and innovation), Appendix A, Bruce Owen, *Internet Service Providers as Common Carriers: Economic Policy Issues* at 18 ("Owen Paper") (concluding that the possibility of continuing and additional future output and profit-reducing regulatory interventions under Title II creates ongoing "regulatory peril constrains ISPs from utilizing the most efficient production processes or deploying the most valuable (to consumers) services, or simply from providing as much capacity and service as otherwise, or all three"); CALinnovates Comments at 6-8 (filed Jul. 16, 2017) (Title II harmed ISPs by increasing level of fear and regulatory uncertainty), Attachment, Dennis W. Carlton and Bryan Keating, *An Economic Framework for Evaluating the Effects of Regulation on Investment and Innovation in Internet-Related Services* at 2-3 ("Economic Attachment") (utility-style Title II regulation can be expected to reduce investment and innovation); CenturyLink Comments at 11-14 (numerous studies document Title II's negative impact on capital investment).

of the Title II decision.[5] These impacts were felt by ISPs large and small, but, as the NPRM suggests, the record demonstrates that these adverse impacts fall the hardest on smaller ISPs.[6]

[5] *See* NCTA Comments at 33-38 (the analysis in Free Press's report is unreliable because it fails to exclude capex for broadband services outside the U.S. and by relying only on investment data from the first two years, fails to account for the long-term harms if Title II regulation is kept in place); NCTA Comments, Owen Paper at 9-15 (common carrier regulation has a known dampening effect on investment, as seen by comparing the higher broadband investment levels in the U.S. with the lower investment levels in the more heavily regulated European Union nations, and as exemplified by decreased cable investment in the U.S. following the imposition of rate regulation in 1992); Comcast Comments at 30-34 (economic analysis of the studies of investment post-Title II decision put out by Free Press have been roundly criticized by academic economists and investment analysts who point out that Free Press fails to understand the actual drivers of network investment); AT&T Comments at 54 (Free Press's claims notwithstanding, AT&T executives have made clear that utility-style regulation is "suppressive of investment" and a proper analysis of available evidence shows a reduction in relevant capital spending during the period immediately following adoption of the 2015 Open Internet Order; while not isolating all possible variables, "this empirical research tends to support a basic conclusion that it is indisputable as a matter of economic theory: unpredictable regulation chills investment in dynamic industries such as this one"); AT&T Comments, Economists Declaration (economic theory demonstrates that regulatory uncertainty and opportunism reduce incentives to invest and empirical evidence confirms that the Title II classification reduces broadband investment incentives); CTIA Comments at 25-26 (harms of imposition of heavy handed Title II regulation are significant; economists have shown that following adoption of the 2015 Open Internet Order, capital expenditures by ISPs fell relative to investment trends that prevailed under lighter regulation; economists analyzing CTIA's data have shown wireless network capital investment per subscriber fell from $92.28 per year in 2014 to $68.12 in 2016, representing a three-year per-subscriber capex decline of 33 percent); CTIA Comments, Hahn Declaration, ¶¶ 41-44 (economic studies of large ISP data and a CTIA survey of capital expenditures by wireless ISPs in 2016 show significant capital flight due to heavier regulation post-Title II reclassification); CenturyLink Comments at 9-14 (capacity demand on ISP networks continues to grow at a robust pace but utility-style Title II regulation has constrained the investment needed to keep up; the deleterious impact of the Title II decision on ISP stock ratings an prices as a result of just the threat rate regulation is well documented). *See also* George S. Ford, Phoenix Center Perspectives 17-09, *A Review of the Internet Association's Empirical Study on Network Neutrality and Investment* (Jul. 24, 2017), http://www.phoenix-center.org/perspectives/Perspective17-09Final.pdf (although Hooten correctly affirms the necessity of using a counterfactual analysis to assess investment effects of Net Neutrality starting in 2010, his "empirical work suffers from a number of fatal and sometimes shocking defects, including making up a significant part of his data (thought he concedes this aspect of his work is a 'flawed approach')" that undermines the value of his counterfactual analysis); George S. Ford, Phoenix Center Perspectives 17-10, *A Further Review of the Internet Association's Empirical Study on Network Neutrality and Investment*, (Aug. 14, 2017), http://www.phoenix-center.org/perspectives/Perspective17-10Final.pdf (Dr. Hooten's "difference-in-difference" analysis utilizes a corrupted set of data to analyze actual investment data provided by USTelecom, producing results that do not comport with the USTelecom data, which when properly analyzed reveal ISP investment down 19 percent, on average, since reclassification was first introduced in 2010 by then-Chairman Julius Genachowski; Dr. Hooten's analysis of data provided by SNL Kagan on cable investment improperly uses cumulative investment, which is always larger in the future than in the past; 16 of his 21 data points are fabricated by interpolation – that is, Dr. Hooten has simply made up data for his analysis and, switching from cumulative to annual investment data and adjusting for inflation, reveals that cable industry investment is actually down 11 percent since the FCC's 2015 Open Internet Order).

B. Claims that ISP Investment Was Not Harmed by the Title II Decision Are Belied by the Experiences of ACA Members and Should Be Disregarded.

Several proponents of Title II regulation and the 2015 Open Internet Order dispute the NPRM's thesis that the reclassification decision created regulatory uncertainty and burdens that have depressed broadband investment and innovation as "mere conjecture" and "ungrounded in fact."[7] Public Knowledge, for example, takes issue with the NPRM's reliance on "unsubstantiated BIAS provider claims of regulatory uncertainty and hypothetical harms arising from the 2015 Open Internet Order."[8] Title II proponents claim, contrary to the NPRM's assertions, that ISP investment in broadband infrastructure post-Title II reclassification showed no demonstrable negative impact, based on an economic study of ISP analysis, *inter alia*, of reported capital expenditure investment figures and statements by some publicly traded ISPs.[9]

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[6] CenturyLink Comments at 30 (while a large company such as CenturyLink may be able to take on the expense, smaller providers – both ISPs and edge – will be burdened; even for larger ISPs, Title II regulation decision is a significant and unnecessary burden).

[7] *See, e.g.*, Microsoft Comments at 2-3 (NPRM's premise of adverse impact on ISP investment is disputed); Internet Association Comments at 12-13 (IA's research shows no demonstrable negative impact on broadband infrastructure investment; broadband penetration continues to grow and cable broadband speeds have doubled from 2014 to 2016; investment in the cloud economy boomed following Title II decision); Attachment, C. Hooten, *An Empirical Investigation of the Impacts of Net Neutrality*, Internet Association (2017) (analysis of publicly available data shows ISPs continued to invest and innovate at similar or greater levels post-Title II reclassification; broadband subscriptions, speed and service improvements have increased); Public Knowledge Comments at 65-73 (filed Jul. 19, 2017) (ISP claims of adverse investment impacts are overstated, unsupported and incoherent); Free Press Comments at 63 (NPRM's claims about broadband investment post-Title II classification are false and myopic in focus, ignoring increased investment levels for the majority of broadband providers that publicly report their spending and the growth in edge company investment): AARP Comments at 47-61, Appendix: Evaluation of *the Ford Counterfactual* paper (the investment evidence cited by the 2017 NPRM fails to present a broad perspective on investment and is rife with questionable assumptions and methodology); Consumers Union Comments at 7-10 (NPRM's rationale that investment in broadband networks declined is inadequately supported and contradicted by news reports concerning ISP broadband capital expenditures and network improvements).

[8] Public Knowledge Comments at 66.

[9] *See, e.g.*, Free Press Comments at 86-208, Appendix*, Individual ISP Results Demonstrate the FCC's Open Internet Policy is Working* (economic analysis by Free Press); Public Knowledge Comments at 65-73 (the NPRM relies on faulty and unsupported evidence, and ISPs have failed to make the case that the 2015 Open Internet Order has reduced deployment); CCIA Comments at 11-25 (the NPRM's reliance on studies purporting to show a decline in broadband investment is deeply flawed; broadband capex has actually increased and, in any event, cannot alone provide a basis for undoing the Title II classification); Internet Association Comments at 11-13 (assertions that the reclassification of broadband Internet access

Free Press, in fact, argues that following the 2015 Open Internet Order broadband deployment, investment and speeds increased.[10] Several Title II proponents also point to a letter filed by a group of ISPs averring that they "encountered no new additional barriers to investment or deployment as a result of the 2015 decision to reclassify broadband as a telecommunications service."[11]

Nothing in these filings undermines the veracity of the NPRM's fundamental premise that investment suffered post-Title II decision for the vast majority of ISPs, and most particularly for "the smallest Internet service providers that serve consumers in rural, low-income, or otherwise underserved communities."[12] While there may some dispute in the record over investment impacts and the correct way to measure them, *nothing* in the evidence submitted by Title II proponents undermines the showing made by ACA and others responding to the NPRM that the imposition of Title II regulation harmed ISPs' incentives and abilities to invest in broadband infrastructure and extend lines to unserved rural areas, causing them to delay, defer or curtail the scope of planned broadband investments.[13]

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as a Title II service has hurt investment in broadband networks are incorrect; there is no reliable evidence that the 2015 Open Internet Order has reduced ISPs' investments in broadband infrastructure).

[10] Free Press Comments at 86-143.

[11] *See* Letter from A Better Wireless, NISP, LLC et al., to Ajit Pai, Chairman, FCC, WC Docket No. 17-108 (filed Jun. 27, 2017) ("Forty ISP Letter") ("no new barriers to investment or deployment as a result of the 2015 decision"); CCIA Comments at 26-27; OTI Comments at 43-44; Internet Association Comments at 14. *See also* Public Knowledge Comments at 259, *citing* Jacob Kastrenakes, *The FCC Says Net Neutrality Destroys Small ISPs. So Has It?*, THE VERGE (Jul. 13, 2017), https://www.theverge.com/2017/7/13/15949920/net-neutrality-killing-small-isps. In fact, this article reports mixed results in interviews of small ISPs as to impacts of 2015 Open Internet Order, with some ISPs reporting no impacts from the imposition of Title II status and the Net Neutrality rules but others noting that while small ISPs were not the target of the Commission's action, they were "a byproduct casualty." *Id*. ACA recognizes that harmful impacts it detailed in its comments may not have been felt equally by *all* small ISPs and trusts the Commission will give due weight to the evidence adduced on both sides of the investment-impact debate. Nonetheless, ACA maintains that the record as a whole will overwhelmingly confirm that the vast majority of smaller ISPs were significantly harmed by the Title II reclassification decision.

[12] NPRM, ¶ 4.

[13] In its reply comments, AARP claims the record fails to support the NPRM's reduced investment thesis by challenging the economic studies submitted with their comments by the larger ISPs, but neither refutes

1. Smaller ISPs were harmed by the Commission's decision to reclassify broadband Internet access as a Title II telecommunications service and subject them to core common carrier regulations.

In response to the NPRM's request for comment on whether and how the Commission's increased regulation of broadband under Title II has adversely impacted broadband investment and innovation, particularly for smaller ISPs,[14] ACA filed comments detailing precisely how and why reclassification harmed smaller providers. Specifically, Title II reclassification, with its attendant increase in compliance burdens and regulatory uncertainty, harmed smaller ISPs, their customers and communities. It did so by raising the potential for after-the-fact rate regulation, thereby decreasing ISPs' incentive and ability to invest in broadband plant and roll out new features and services that would have benefitted consumers and brought in additional revenues that would have been re-invested in their broadband networks and services.[15]

Like the many ACA member companies who wrote to the Commission prior to adoption of the NPRM describing the harms they suffered as a result of the Title II decision,[16] in their

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nor even acknowledges the empirical evidence submitted by ACA demonstrating that investment by its smaller ISP members suffered as a direct result of the decision. AARP Reply Comments at 23-24 (filed Aug. 16, 2017).

[14] NPRM, ¶¶ 46-47.

[15] ACA Comments at 3-18; Declaration of Jim Hickle, President, Velocity Telephone, Inc./Gigabit Minnesota (Attached to ACA Comments as Exhibit A) ("Hickle Declaration"); Declaration of Chris Kyle, Vice President of Industry Relations & Regulatory, Shenandoah Telephone Company (Attached to ACA Comments as Exhibit B) ("Kyle Declaration"); Declaration of Brian Lynch, Senior Vice President of Cable Operations, Schurz Communications, Inc. (Attached to ACA Comments as Exhibit C) ("Lynch Declaration"); Declaration of Richard Sjoberg, President & CEO, Sjoberg's Inc. (Attached to ACA Comments as Exhibit D) ("Sjoberg Declaration"); Declaration of Steve Timcoe, Superintendent – CATV Telecommunications, Wyandotte Cable (Attached to ACA Comments as Exhibit E) ("Timcoe Declaration") (detailing how Title II common carrier status increased compliance costs and regulatory uncertainty for smaller ISPs).

[16] Letter from Herb Longware, President, Cable Communications of Willsboro, Inc., et al., to The Honorable Ajit Pai, Chairman, FCC, GN Docket No. 14-28 and WC Docket No. 16-106 (filed Apr. 25, 2017) ("22 Small ISPs Letter"); Letter from William Bottiggi, General Manager, BELD Broadband, et al., to The Honorable Ajit Pai, Chairman, FCC, WC Docket No. 17-108 (filed May 11, 2017) ("19 Muni ISPs Member Letter"). *See also* Letter from Brian Lynch, President, Antietam Cable Television, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108 (filed Jul. 14, 2017) (Title II reclassification has had a detrimental impact on Antietam Gigabit fiber buildout plans) ("Lynch Jul. 14 Letter").

sworn Declarations, these ACA members described economic harms flowing directly from the Title II decision and how that decision cause them to delay, defer or curtail broadband investments. A key driver cited for these investment decisions is the potential threat of after-the-fact rate regulation that would impair an ISP's ability to recoup its investment through revenues and repay loans.[17]

In its comments, ACA described how members reported making investment cutbacks in planned upgrades, curtailing investments to expand broadband into rural unserved areas, and making decreases in hiring.[18] Several members identified cutbacks in the scope of planned network upgrades,[19] delays in embarking upon existing network upgrades and expansions,[20]

[17] Sjoberg Declaration, ¶¶ 3, 14-15 (fear of rate regulation "is not some abstract fear for us" but is based on experience with cable rate regulation in the mid-1990s, which had a "devastating effect" on smaller operators and the fact that "[w]e at Sjoberg's have our own money on the line – our houses and cars are pledge against our bank loans – so we have our own skin in the game. After-the-fact rate regulation means I could lose everything I have as the result of a regulatory regime designed to constrain the behavior of large monopolists. It simply makes no sense."); Lynch Declaration, ¶¶ 4-6, 8 (overhang of Title II caused Antietam to curtail the scope and altered the timing of its fiber investment; the "prospect of Title II rate regulation curbed our enthusiasm for making a greater investment in rebuilding more of our network with fiber to bring higher capacity broadband Internet service to more of our rural Maryland county;" not assured by statements that the government would refrain from rate regulation and made protectionist moves to shelter the company from risk); Timcoe Declaration, ¶¶ 9, 10 ("The level of regulatory uncertainty facing Wyandotte grew tremendously with this decision, depressing the level of investment we were comfortable making given the prospect of rate regulation hanging over our heads." "We were apprehensive about making a larger, longer term investment due to the uncertainty of what Title II would mean for us, particularly with respect to the imposition of rate regulation…."); Hickle Declaration, ¶¶ 12, 13-15 (risk of rate regulation harmed our ability to finance by increasing our cost of capital; "the threat of Title II rate regulation has had a detrimental effect on our investment decision and expansion plans"). *See also* Kyle Declaration, ¶ 16 (removing the threat rate regulation by revoking the Title II decision will allow Shentel to focus on increasing broadband deployment in hard-to-serve rural areas); Lynch Declaration, ¶ 7 (revoking the Title II decision will remove the threat of rate regulation, which will allow Antietam to move forward with major FTTH system upgrades); Sjoberg Declaration, ¶ 11 ("[P]rospect of rate regulation hangs heavily over us and has a depressive effect on our incentives to invest and roll-out new features and services.").

[18] ACA Comments at 23-27.

[19] *See* Lynch Declaration, ¶¶ 4-6 (scaled back the scope of a planned fiber buildout due to the Title II reclassification); Timcoe Declaration, ¶¶ 10-11 (modified plans for an in-cycle system rebuild, opting instead for an upgrade to DOCSIS 3.1 due to the Title II uncertainty).

[20] *See* Hickle Declaration, ¶ 15 ("But for the Title II decision, we would have upgraded and expanded service earlier and reaped the competitive benefits sooner."); Sjoberg Declaration, ¶ 14 ("We have opportunities to extend our network further into rural areas with fewer households per mile, but we were

and delays in engaging in full system rebuilds[21] as direct adverse impacts of the Title II decision on the degree of their broadband investments. Other members reported refraining from investing to expand into rural unserved areas. Sjoberg's, for example, a small rural ISP, curtailed investing to expand its network into sparsely populated, unserved rural areas due to concerns that the possibility of Title II rate regulation "looming overhead" would raise its cost of capital and impair its ability to repay loans.[22] Members also reported decreases in hiring due to the impacts of the Title II decision, as their ability to invest in hiring staff was impaired by the overhang of common carrier regulation.[23] Other small ISPs refrained from purchases of additional systems they could have upgraded and expanded as uncertainty created by Title II decision negatively affected plans to invest in infrastructure by buying other systems.[24] These decisions, in turn, delayed bringing the benefits flowing from additional broadband infrastructure investments to the ISPs, their customers and their communities.[25]

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forced to consider whether we want to borrow to execute an 8 to 10-year plan with Title II regulation, particularly rate regulation, looming overhead.").

[21] *See* Timcoe Declaration, ¶¶ 3, 9 ("The level of regulatory uncertainty facing Wyandotte grew tremendously with this decision, depressing the level of investment we were comfortable making given the prospect of rate regulation hanging over our heads. We took no comfort from statements that the Commission would refrain from rate regulation. Those statements were simply not believable."); Sjoberg Declaration, ¶ 17 (threat of rate regulation caused Sjoberg's to delay upgrades of existing plant by increasing uncertainty about ability to recoup very large capital investments).

[22] Sjoberg Declaration, ¶ 9 (banks take increased regulatory uncertainty and risk into account in setting interest rates; the marked increase over prime in Sjoberg's interest rates at the time of the Title II decision could not be explained by other factors).

[23] Hickle Declaration, ¶¶ 16-17 (Velocity held off hiring an expensive employee in order to keep money in reserve); Sjoberg Declaration, ¶ 16 (had Sjoberg's gone forward with contemplated network build-out investment, it would have applied for federal grants and hired a technician to oversee the work).

[24] Hickle Declaration, ¶ 17 (Velocity is an innovative company looking for opportunities to expand its fiber footprint and bring Gigabit service to the home but its appetite to acquire other systems slowed as a result of the reclassification decision; the potential for rate regulation "depresses the level of our potential return on these investments. Without a doubt, Title II factors into the investment climate and our decision-making.").

[25] *See, e.g.*, Lynch Declaration, ¶ 6 (delayed plans for fiber buildout that Antietam would otherwise have moved forward with if it were not feeling the overhang of Title II regulation); Lynch Jul. 14 Letter at 1 (Title II reclassification caused Antietam to "pull back the scope of planned investment and deployment, and

With respect to smaller ISPs, the evidence submitted by ACA amply refutes claims by commenters like Public Knowledge and Free Press (who have zero first-hand experience) that there is no demonstrable evidence that ISP investment suffered as a result of the imposition of Title II regulation and that, to the contrary, broadband investment increased in the wake of the Title II decision.[26] As prudent businesses, ACA members report continuing to invest in broadband out of competitive necessity and to satisfy customer demand, but they delayed, deferred and invested less in broadband plant and service expansions than they otherwise would have but for the Title II reclassification decision.[27]

2. Title II reclassification and the increased regulatory uncertainty it caused increased ISP costs and diverted resources away from investments in broadband, harming ISP customers and communities.

In its comments, Public Knowledge asserts that the theory that the 2015 Open Internet Order created an overly burdensome and uncertain regulatory environment is not supported in the record and that ISPs have failed to make the case that the 2015 Open Internet Order caused them to divert resources that would otherwise have been used for deployment or create opportunity costs that would reduce deployment.[28] These assertions are simply incorrect. Consistent with economic theory,[29] ACA members report increased regulatory burdens and

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delay, for a year bringing the benefits of Gigabit fiber broadband Internet access services to a larger area of the region we serve.").

[26] Public Knowledge Comments at 66-68 (NPRM premise is thinly supported by letters from small ISPs it cites, which, at most point only to chilling of their business practices under the general conduct standard; other news reports undermine their claims); Free Press Comments at 86-123; Internet Association Comments at 12-13.

[27] *See, e.g.*, Sjoberg Declaration, ¶¶ 14-17; Lynch Declaration, ¶¶ 4-6 (Decreased Investment); Lynch Jul. 14 Letter at 1; Hickle Declaration, ¶¶ 13-15, 17; Timcoe Declaration, ¶¶ 10-12.

[28] Public Knowledge Comments at 67-71. *See also, e.g.*, CCIA Comments at 23-25 ("It is simply a bizarre form of wishful thinking to believe that the [2015 Open Internet Order] was the prime mover for AT&T's or any [broadband Internet access service provider's] supposed decreases in capex.").

[29] *See, e.g.*, NCTA Comments, Owen Paper at 18 ("In economic terms, as noted, the possibility of continuing and additional future output- and profit-reducing regulatory interventions, made possible by the *Title II Order*, is a new business risk facing ISPs. Because it is rational to take account of all significant

uncertainty, leading to diversion of resources and lost opportunities flowing directly from the 2015 Open Internet Order.

The Commission's decision imposed costs that reduced the funds available for broadband deployment by vastly increasing regulatory uncertainty and compliance costs, particularly for the majority of the smaller ISPs comprising ACA's members that had no prior experience with Title II regulation. ACA's evidence vividly explains why Title II reclassification presented particular difficulties for these smaller ISPs. In their Declarations, ACA members each explain how their regulatory compliance costs rose as a result of the need to analyze the impact of Title II's core self-executing commands in Sections 201 and 202, as well as the Internet General Conduct standard (the Commission's application of Sections 201 and 202 to broadband Internet access) on their existing and future rates, terms, conditions, and practices associated with their broadband service and take steps to reduce regulatory risk.[30] Members experienced "'well out-of-trend' legal expenses to ensure compliance with the new legal standards."[31] Dealing with this increased regulatory risk required smaller ISPs to incur direct costs for additional regulatory compliance reviews and actions by both internal staff and outside counsel and consultants and the need to set aside additional reserves to address potential regulatory enforcement actions and customer complaints.[32] Several ACA members have noted

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risks and returns in making investment decisions, the creation of a new risk, particularly one that is open-ended, reduces the attractiveness of investment projects compared to alternative uses of financial resources. This regulatory peril constrains ISPs from utilizing the most efficient production processes or deploying the most valuable (to consumers) services, or simply from providing as much capacity and service as otherwise, or all three.").

[30] Hickle Declaration, ¶¶ 8-11; Lynch Declaration, ¶¶ 6-7; Sjoberg Declaration, ¶ 7; Timcoe Declaration, ¶¶ 7-8. Even Shentel, with its experience as a rural local exchange carrier, found itself in unchartered territory with respect to how Title II obligations would apply to its broadband Internet access service, which theretofore had not been subjected to common carrier regulation. Kyle Declaration, ¶¶ 8-9.

[31] *See, e.g.*, Lynch Declaration, ¶ 8.

[32] Kyle Declaration, ¶¶ 10, 12; Timcoe Declaration, ¶ 8; Hickle Declaration, ¶ 10; Sjoberg Declaration, ¶ 8; Lynch Declaration, ¶ 8. ACA notes that the harmful effects of increased regulatory uncertainty and compliance costs were felt by all ISPs, regardless of size, who found that "application of Sections 201 and 202 and the Commission's 'General Conduct Standard' has compelled them to take extra care in their

that money spent on backward-looking regulatory compliance is money not spent on more productive uses, such as investments in broadband plant and services.[33]

Other smaller ISPs reported the same impacts. WISPA notes that in addition to the letter earlier submitted by 70 fixed wireless Internet service providers detailing how the uncertainty and regulatory risk created by the Title II decision made it more difficult to attract capital and comply with regulatory burdens,[34] 80 percent of respondents to its subsequent member survey reported that they had incurred additional compliance expenses associated with Title II obligations, delayed or reduced network expansion, delayed or reduced service, and allocated additional budget for regulatory compliance.[35] For the smaller ISPs funding their business through subscriber revenues and commercial lending, the costs resulting from Title II reclassification are tangible, concrete and far from "modest," as Public Knowledge has claimed.[36]

With regard to opportunity costs, several ACA members report forgoing use of planned data caps and overage charges due to regulatory uncertainty following Title II reclassification and the lack of "certainty that these practices would be found to pass muster under the law" if they had to be justified after-the-fact in an enforcement action.[37] Use of these mechanisms

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legal and regulatory reviews and has had a significant negative impact on product development, deployment and time to market." *See* NCTA Comments at 38-40.

[33] Timcoe Declaration, ¶ 7; Kyle Declaration, ¶ 9; Hickle Declaration, ¶ 7; Lynch Declaration, ¶ 8; Sjoberg Declaration, ¶ 8.

[34] Letter from Mark Radabaugh, President of Amplex, et al., to The Honorable Ajit Pai, FCC Chairman, et al., WC Docket No. 17-108 (filed May 9, 2017).

[35] WISPA Comments at 13-14 (costs and effects include modified web pages and terms of service; changes in network management; legal costs to assure compliance (including in one case a 300 percent increase in legal costs); cessation of service in two markets; and cancelled VoIP service).

[36] Public Knowledge Comments at 64. *See* WISPA Comments at 15 ("These are not 'minor adjustments necessary to adapt to the new regulatory reality,' but concrete, tangible evidence that consumers and small businesses in unserved and underserved rural communities have seen service decline, innovation stall, and costs increase.").

[37] Kyle Declaration, ¶ 15; Sjoberg Declaration, ¶ 12; Hickle Declaration, ¶ 11.

would have benefitted the ISPs by allowing them to better manage network usage and would have benefitted subscribers by sending accurate pricing signals to a small group of end users about their disproportionate bandwidth usage, creating an economic incentive to deter these subscribers from "max[ing]-out capacity in parts of the network each month," causing capacity issues for others.[38] For Sjoberg's, loss of this additional revenue due to forgone overage charges left the operator basically subsidizing its heaviest users (roughly 10 percent of its subscriber base) because it could not recoup its additional costs to bring Internet connectivity to its remote system in Northwest Minnesota from the cost causers.[39]

The increased risk of Title II enforcement actions creates risks for ISPs rolling out new features or services, which can benefit consumers, and those risks are greatest for small ISPs because the cost of defending against an enforcement action or complaint, even if successful, can outweigh any economic gains to be had.[40] As a whole, smaller ISPs tend to be risk averse, because, as Dick Sjoberg, President & CEO of Sjoberg's, Inc., explains, many have their "own skin in the game."[41] This, in turn, decreases their willingness to take the risk of introducing a new feature or service even if they believe the risk of it not passing muster is low. Increased direct regulatory compliance costs also decrease the funds available to smaller ISPs for broadband network investment.[42] Regulatory uncertainty also kept Sjoberg's from serving "additional rural areas unserved by high speed broadband" because it could not "take the risk of making that investment because of the potential of Title II rate regulation."[43] Contrary to the

[38] Kyle Declaration, ¶ 15; Hickle Declaration, ¶ 11.

[39] Sjoberg Declaration, ¶¶ 12-13.

[40] *Id*., ¶ 11. *See also* Hickle Declaration, ¶ 14; Kyle Declaration, ¶¶ 14-15; Timcoe Declaration, ¶ 11.

[41] Sjoberg Declaration, ¶ 15.

[42] Timcoe Declaration, ¶ 7; Kyle Declaration, ¶ 9; Hickle Declaration, ¶ 7; Lynch Declaration, ¶ 8; Sjoberg Declaration, ¶ 8.

[43] Sjoberg Declaration, ¶ 15.

claims of Free Press, these fears of adverse regulatory intervention under the Commission's broad Title II authority are not "wholly irrational" and they translated directly into "a systemic effect" of depressed broadband investment by smaller ISPs.[44]

In further seeking to rebut claims that smaller ISPs were harmed by the Title II decision, Public Knowledge argues that "many of the alleged harms listed by small ISPs in interviews – such as an alleged duty to provide new service on demand to anyone who asks for it, to continue providing service to a delinquent customer, or non-existent reporting requirements – are purely imaginary and not part of the Commission's rules."[45] This argument betrays a lack of understanding of both the law and the practical impacts of Title II reclassification on smaller ISPs.

First, the duty to provide service on demand is far from "purely imaginary." Section 201(a) clearly provides that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ."[46] This is a command taken very seriously by smaller ISPs, as explained by Shentel's Vice President of Industry Relations & Regulatory, Chris Kyle. In his Declaration, Mr. Kyle explains that reclassification imposed additional burdens on Shentel "associated with being considered like the broadband 'carrier of last resort' in terms of [its] flexibility to respond to requests for service and line extensions as a common carrier."[47]

> Under the Act, we must provide service upon "reasonable request." We feared we would be dragged into confrontations with customers for not building out under the "reasonableness" standard. Shentel has a method for making determinations whether it is economical to extend broadband lines and how

[44] Free Press Comments at 124-25 ("There should be no doubt: the fears about a negative impact from Title II on the successful trajectory of the U.S. broadband market are wholly irrational. That is why such fears are not actually held by the broadband market's firms collectively, nor by this market's individual firms. They are simply impractical fears espoused largely by third party agitators in service of these parties' larger goal of unthinking deregulation.").

[45] Public Knowledge Comments at 68-69.

[46] 47 U.S.C. § 201(a).

[47] Kyle Declaration, ¶ 12.

> much of that burden the company should take on and how much the customer should be asked to shoulder. Because of reclassification, we had the added burden of being subject to a Section 208 complaint at the FCC if we determined we couldn't fill a request under our normal parameters and the customer felt aggrieved. This makes a difference in rural America. We build anywhere, and a lot of people will pay their reasonable share of the build out expenses, but some are not happy with that. If a customer does not want to pay for some of the build out, it could claim that we are being unreasonable in asking for a customer contribution to defray the costs and file a complaint with the FCC. Defending against such a complaint is a costly proposition. We had to set aside additional reserves to take account of the added risks resulting from the change in our regulatory status.[48]

Second, it bears noting that the full effects of reclassification have not even been felt yet by the smaller ISPs reporting that they were harmed by being subjected to the self-executing commands of Sections 201 and 202, as the Commission to date has not yet implemented several important common carrier requirements under other non-forborne provisions of Title II. Even aside from the enormously burdensome set of broadband privacy rules adopted by the Commission from which they were spared by congressional action, broadband ISPs surely would have seen increased regulatory and reporting requirements as the Commission moved to develop rules to implement other non-forborne provisions of Title II for broadband Internet access service, such as the disabilities access requirements of Sections 225, 255, and 251(a) and the universal service requirements of Sections 254 and 214(e).[49] Related after-effects of reclassification likely would have eventually included the assessment of regulatory fees on broadband Internet access service providers with its attendant compliance burdens and costs. While they may be prospective, such increased compliance burdens can hardly be described as "purely imaginary," and they factor into the economics of ISPs' planning for network

[48] Kyle Declaration, ¶ 12.

[49] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016); Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Pub. L. No. 115-22, 131 Stat. 88 (enacting S.J. Res. 34, 115th Cong.) (2017); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶¶ 456-77 (2015) ("2015 Open Internet Order"); 47 U.S.C. §§ 225, 255, 251(a), 254 and 214(e).

investments, capital reserves to cover regulatory compliance costs, as well as the introduction of new product offerings.

3. The advisory opinion process is not cost-effective and does not reduce regulatory uncertainty for ISPs.

Public Knowledge disputes "theories" that increased regulatory uncertainty harmed ISPs by pointing to the Commission's Open Internet advisory opinion process whereby ISPs can seek a non-binding advisory opinion by the FCC's Enforcement Bureau regarding planned features, practices or services and arguing that ISPs can reduce uncertainty by availing themselves of this option.[50] It is simply naïve to believe that the Open Internet advisory opinion process diminishes the regulatory uncertainty experienced by ISPs following the imposition of common carrier status on their broadband Internet access service.

For a smaller ISP, seeking a non-binding advisory opinion from the Commission offers cold comfort. Even receiving a favorable advisory opinion does not meaningfully decrease the level of regulatory risk smaller ISPs are comfortable taking on. Pursuing an advisory opinion is also costly. There are direct costs associated with preparing and submitting a formal request and opportunity costs associated with waiting for a decision to be issued. The majority of ACA member companies have no in-house legal counsel and therefore would likely have to hire outside counsel to review their plans and prepare a request for an advisory opinion according to the guidelines established by the Commission, and be ready to respond to any staff requests for additional information.[51] There is no time limit for obtaining such an opinion. Moreover, there is no guarantee that the full Commission would act upon a request for an advisory opinion itself. Waiting for a decision can delay the ISP's launch of a service and feature, impacting the

[50] Public Knowledge Comments at 66, 69.

[51] The requirements for obtaining an advisory opinion are quite exacting and also require the requesting party to certify that all factual representations "are truthful and accurate" and do not intentionally omit "any material information from the request." 2015 Open Internet Order, ¶¶ 229-33.

provider's timeline for receiving a return on its investment. However, even if an opinion is issued, there's no guarantee that an Enforcement Bureau in a subsequent action will arrive at the same conclusion as the non-binding opinion.[52] Nor is there is any guarantee that an ISP that has obtained an advisory opinion will be immune from facing complaints based on the feature or practice that has been cleared through the advisory process from consumers or Internet edge providers unaware that it has been "blessed" by the Commission or its Enforcement Bureau. Having an advisory opinion in such a case would not insulate an ISP, particularly a smaller ISP, in any meaningful way from the regulatory uncertainty or risks associated with common carrier status or from the burdens and costs of defending its actions before the Commission, even if it prevails on the merits.[53] Despite the availability of the advisory opinion process, introducing an innovative feature or service under the Title II framework is neither a certain nor a cost-free undertaking, and a smaller ISP is far more likely to forgo taking a chance than rolling the dice.

[52] *See, e.g.*, Comcast Comments at 72-73 ("The 'advisory opinion' process established in the *Title II Order* offers no real relief from these harmful, unintended consequences of the general conduct standard. As Chairman Pai has remarked, 'seeking the government's blessing in advance is precisely the opposite of permission-less innovation.' In fact, the process seems only to add to the cost and uncertainty of compliance with the substantive standard. In order to take advantage of the process, ISPs must reveal detailed future business plans, subject to a potential request for more information from the Commission. Even then, there is no guarantee that the Commission would issue an opinion, much less in a timely manner that would align with ISPs' business planning needs. Nor would the issuance of an opinion provide any real assurances to ISPs, as the opinions would not be binding and could be rescinded at a later time."); AT&T Comments at 51-52 (this "mother-may-I regime is a parody of bureaucratic overreach" that ISPs would rarely invoke and "might well increase their liability for increased forfeiture penalties if the Commission later concludes that staff's 'maybe' answer had put them on due notice of potential concerns"); WISPA Comments at 68-69 ("The absence of specific timeframes for the Bureau to act makes the value of Advisory Opinions illusory and essentially unavailable to small providers.").

[53] *See* United States Telecom Ass'n v. FCC, 825 F.3d 674, 755-56 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 154517 (D.C. Cir. May 1, 2017) ("USTelecom") (Williams, J., dissenting) ("For the smaller fry, the internet service provider firms whose growth is likely to depend on innovative business models . . . , the slow and costly advisory procedure will provide only a mild antidote to those prescriptions' negative effect. This of course fits the general pattern of regulation's being more burdensome for small firms than for large, as larger firms can spread regulation's fixed costs over more units of output.").

III. TITLE II CLASSIFICATION IS UNNECESSARY TO PROTECT INTERNET OPENNESS AND CANNOT BE JUSTIFIED ON OTHER GROUNDS

A. There is Uniform Support for A Free and Open Internet.

The record before the Commission in this proceeding, as in the immediately preceding Open Internet rulemaking, demonstrates uniform and overwhelming support for a free and open Internet.[54] There is also overwhelming support for adherence to the core precepts contained in former FCC Chairman Powell's Internet "Four Freedoms" and the Commission's 2005 Internet Policy Statement.[55] The only serious debate is over how best to achieve that in a manner that promotes innovation and investment by all sectors of the Internet ecosystem in a fair and

[54] *See, e.g.*, CTIA Comments at 2-3; Akamai Comments at 5; Netflix Comments at 1; Congressional Progressive Caucus Comments at 1; OTI Comments at 7-10; CALinnovates Comments at 5-6; State Attorneys General Comments at 2-4 (filed Jul. 19, 2017); Comcast Comments at 2; AARP Comments at 1; ITI Comments at 3; Chamber of Commerce Comments at 7; National Multicultural Organizations Comments at 1; CDT Comments at 1; Voices Coalition at 2-3 (filed Jul. 19, 2017); AT&T Comments at 1; ITTA Comments at 2.

[55] *See* Remarks of Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for Industry*, prepared for Silicon Flatirons Symposium, Boulder, CO (Feb. 8, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, ¶ 4 (2005) ("Internet Policy Statement"). *See, e.g.*, NCTA Comments at 4-6 (the four freedoms have evolved into the following four tenets that are widely embraced today: (i) transparency; (ii) no blocking; (iii) no throttling; (iv) no anticompetitive paid prioritization); ACT Comments at 9-10 (Internet freedom consists of four primary tenets; consumers should be free to (i) access any legal content of their choosing; (ii) run apps of their choice; (iii) attach any devices to the network within their homes; (iv) receive meaningful information about their service plan); Amazon Comments at 2-3 (the four freedoms translated into rules by the 2015 Open Internet Order serve an important foundation for protecting consumers and creating certainty for edge providers); Cisco Comments at 6 (consumer ability to "'access and use the content, applications and devices of their choice,'" through light-handed regulation is critical to preserving free and open Internet environment); EFF Comments at 1, 4-6 (four freedoms and Internet Policy Statement provided substance for 2010 and 2015 Open Internet rules, which represented the best net neutrality protections for consumers); ESA Comments at 9-10 (substance of Internet Policy Statement aimed at ensuring services operated in neutral manner); Frontier Comments at 5-6 (core principles of Internet freedom are no blocking, throttling and transparency); T-Mobile Comments at 2 (Commission should "reaffirm its commitment to basic network neutrality principles akin to those articulated by Chairman Powell and set out in the 2005 Internet Policy Statement, subject to common-sense exceptions in cases of customer-selected practices, reasonable network management, and the like).

balanced way. Simply put, the Commission's imposition of asymmetric utility-style regulation on only one sector in the multi-dimensional Internet ecosystem in 2015 was neither fair nor balanced nor remotely necessary to address any actual threats to Internet openness posed by ISPs.[56]

The record was clear then, as it is today, that given the enormous level of industry consensus that an open Internet is one where Internet service providers do not block, throttle or censor lawful content and are transparent with consumers, the Commission could craft an adequate set of "Net Neutrality" protections using its Section 706 authority. It did not need to take the extra and enormously damaging step of reclassifying broadband Internet access as a Title II telecommunications service. And it certainly did not need to so primarily, if not wholly, in order to provide a legal basis for flatly prohibiting a practice theretofore unseen in the marketplace – paid prioritization[57] – that is widely acknowledged as a theoretical matter to have both pro- and anti-competitive and consumer effects.[58] The decision to reclassify and impose

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[56] Moreover, by targeting only ISP incentives and abilities to harm Internet openness with asymmetric open Internet rules, the Commission's asymmetric rules distorted market incentives and accentuated Internet content providers' abilities and incentives to threaten ISPs more constrained in their behaviors by regulation to respond through market-based mechanisms. *Protecting and Promoting the Open Internet*, GN Docket Nos. 14-28 and 10-127, Comments of the American Cable Association at 23 (filed Jul. 17, 2014) ("ACA 2014 Open Internet Comments"), William Lehr, MIT, *The Mistake of One-Sided Open Internet Policy* at 21-22 (attached as Exhibit A) ("Lehr Paper").

[57] *See Protecting and Promoting the Open Internet,* Notice of Proposed Rulemaking, 29 FCC Rcd 5561, ¶ 147 (2014) ("2014 Open Internet NPRM") (acknowledging that Commission could not use its Section 706 authority to prohibit paid prioritization).

[58] Comcast Comments at 55-57, 61-63 (paid prioritization can have many compelling applications for telemedicine and other services; "There is simply no sound rationale for a blanket prohibition on all paid prioritization arrangements, particularly when certain forms of prioritization … can be pro-competitive and otherwise beneficial…."); CTIA Comments at 2 ("The Title II Order's categorical prohibitions do not account for pro-competitive and pro-consumer offerings…."); NCTA Comments at 5-6 ("Even Chairman Wheeler recognized the benefits of certain forms of prioritization."); Free State Foundation Comments at 50-55 (paid prioritization benefits consumers and should be permitted under Commission rules absent specific findings of harm under a standard of commercial reasonableness on a case by case basis); Theodore R. Bolema, *Allow Paid Prioritization on the Internet for More, Not Less, Capital Investment*, FREE STATE FOUNDATION at 3 (May 1, 2017), http://www.freestatefoundation.org/images/Allow_Paid_Prioritization_on_the_Internet_for_More,_Not_Less,_Capital_Investment_050117.pdf (explaining that "[v]arious forms of paid prioritization arrangements can be found in many different industries" and that "these pricing arrangements have not worked to

common carrier regulation on broadband Internet access service in order to adopt "bright line" Net Neutrality rules was simply regulatory overkill.

B. The "Gatekeeper" Theory Cannot Justify Title II Regulation of ISPs.

The Commission justified its reclassification decision by positing that, as a matter of fact, ISPs, regardless of size or the level of competition they face, function as "gatekeepers" between end users and edge providers and that reclassification would permit it to most effectively check this gatekeeper power by using the authority vested in it by Congress to regulate common carriers under Title II.[59] The record in this proceeding amply supports ACA's contention that the 2015 Open Internet Order's "gatekeeper" theory was ill-conceived and economically irrational, particularly as applied to smaller ISPs.[60] In their comments, pro-Title II advocates do little more than rehash the gossamer-thin rationales provided by the Commission in the 2015 Open Internet Order supporting its reliance on the gatekeeper theory and offer little, if any, probative new economic analysis or empirical evidence that ISPs as a whole have either the incentive or ability to act as gatekeepers vis-à-vis Internet edge providers.[61]

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exclude those who do not pay for prioritization, and more typically lead to lower prices and better services for the most cost-conscious customers").

[59] 2015 Open Internet Order, ¶¶ 80, 356. The Commission cited this finding as a reason to refrain from forbearing from application of Sections 201 and 202 and its imposition of new rules. *Id.*, ¶¶ 104-109, 205.

[60] *See, e.g.,* AT&T Comments at 31-34; Verizon Comments at 39; Verizon Comments, Economic Analysis at 29-37; Comcast Comments, Economic Appendix at 16-18; CTIA Comments at 4; Fiber Broadband Association Comments at 3-7; Free State Foundation Comments at 26-28 ("broadband ISPs have no economic incentive or ability to benefit economically from blocking, throttling, or otherwise unreasonably discriminating against content since, according to the Commission's own report data, 99% of American consumers enjoy a choice among competing mobile and fixed broadband ISPs;" switching costs are nowhere near as high as claimed and ISPs fight fiercely via advertising to get consumers to switch); USTelecom Comments at 17-23; Oracle Comments at 2-4; Mayo Comments at 2-4; TPI Comments at 3, 7.

[61] *See, e.g.*, Internet Association Comments at 19-21 (ISPs are gatekeepers, as the FCC has explained, because once a consumer chooses an ISP, edge providers can only reach that consumer through that ISP; edge providers are particularly susceptible to ISPs' gatekeeper power because consumers may not realize that their ISP is throttling or otherwise discriminating against an edge provider); INCOMPAS Comments at 22-41 (ISPs have both market power and gatekeeper power in local markets because consumers lack choice and in the separate upstream market for distribution of content over residential broadband connections that competes with their own MVPD offerings; FCC and DOJ have recognized

As USTelecom astutely observes, the record before the Commission in the 2014 rulemaking provided ample basis to conclude that ISPs' supposed "gatekeeper" position did not give them any power to engage in unwanted conduct and therefore did not support reclassification or otherwise justify the 2015 regulations or any "one-size fits all" conclusion about harmful, blanket gatekeeper control.[62] In addition to the economic and empirical evidence submitted by ACA in the 2014 rulemaking refuting application of the "gatekeeper" theory to smaller ISPs,[63] in their submissions, several other commenters also refuted the notion that ISPs maintain "terminating access monopolies" giving them the ability to leverage their interactions with third-parties.[64]

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this in the context of merger proceedings); OTI Comments at 14 (zero rating is an example of ISPs attempting to monetize their gatekeeper role in new ways); Public Knowledge Comments at 75-77 (broadband ISPs are gatekeepers who possess a terminating access monopoly vis-à-vis edge providers who have no other way to reach that consumer; does not always require a regulatory compulsion to pay and that gatekeeper power); AdHoc Comments at 9-14 (competition in the Internet access market cannot counteract the ISP's terminating access monopoly because ISPs can still discriminate in delivery or exploit their monopoly by demanding fees from content providers); EFF Comments at 10-12 (ISPs are gatekeepers with respect to their customers' access to information).

[62] USTelecom Comments at 17-23.

[63] ACA 2014 Open Internet Comments at 22-26 ("for edge providers, not all ISPs are created equal and some due to their sheer scale and extent of their relationships with edge providers matter more than others"); Letter from Randy Darwin Tilk, Utility Manager, Alta Municipal Broadband Communications, et al., to The Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28 and 10-127 at 1 (filed Feb. 10, 2015) ("43 Muni ISPs Member Letter") ("As smaller ISPs, none of us individually has the market power to compel payments for unblocking, non-discriminatory treatment or paid prioritization services because we serve too few Internet subscribers to matter to edge providers…."); Letter from Roy Baker, President, ACCESS Cable Television, Inc., et al., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127 at 1 (filed Feb. 19, 2015) ("59 Small ISPs Letter") ("It would be utterly useless to try to engage in such [discriminatory] practices given we're so small compared to popular edge providers, like Netflix."); Letter from Robert J. Dunker, Owner/President, Atwood Cable Systems, et al., to The Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28 and 10-127 at 1 (filed Feb. 17, 2015) ("24 Small ISPs Letter") (smaller ISPs have no reason to block or discriminate among edge providers, nor do they possess the ability to harm or compel payments).

[64] USTelecom Comments at 19-20, *citing* Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 and 14-28 at 7 (filed Feb. 2, 2015) ("AT&T Feb. 2, 2015 Letter"); *Protecting and Promoting the Open Internet; Framework for Broadband Internet Services*, Reply Comments of AT&T Services, Inc., GN Docket Nos. 10-127 and 14-28 at 100 (filed Sept. 15, 2014); Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 and 14-28; *attaching* Andres V. Lerner & Janusz A. Ordover, *The "Terminating Access Monopoly" Theory and the Provision of Broadband Internet Access* (filed Jan. 15, 2015); *Protecting and Promoting the Open Internet; Framework for Broadband Internet Services*, Reply Comments of the National Cable &

The record confirms that continued reliance on ISPs' purported roles as Internet "gatekeepers"[65] would be misguided for at least two principal reasons: (i) ISPs do not have "terminating access monopolies" that cause market failures with respect to Internet edge providers and (ii) ISPs do not categorically seek to protect their legacy video services by choking off end user access to third-party services and therefore do not, on that basis, pose a continuing threat to online video distributors or other Internet edge providers.

First, the economic literature overwhelming demonstrates that the vertical gatekeeper theory is inapplicable to broadband Internet access markets because ISPs do not have terminating access monopolies with their subscribers giving them the ability to leverage Internet edge providers by either favoring one over another or extracting terminating access charges.[66] As AT&T observes, the mere fact that a network provider has retail customers that rely on it to connect them to content does not give the provider any special bargaining clout when

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Telecommunications Ass'n, GN Docket Nos. 10-127 and 14-28 at 35 (filed Sept. 15, 2014); Letter from Kathryn A. Zachem, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127 and 14-28 at 4 (filed Jan. 30, 2015).

[65] *See, e.g.*, INCOMPAS Comments at 25, 38-41; Public Knowledge Comments at 73-77, 110-11; EFF Comments at 24-26; OTI Comments at 7, 14, 42; Free Press Comments at 36, 68, 204.

[66] Comcast Comments, Economic Appendix at 16-18 (threat of BIAS providers leveraging their alleged "gatekeeper" is not a legitimate concern); NCTA Comments, Owen Paper at 7 ("There is simply no evidence of pervasive market power in today's broadband marketplace…."); AT&T Comments, Economists Declaration at 34-36 (assertions in the Title II Order that broadband providers are "terminating access monopolies" are incorrect); Fiber Broadband Association Comments at 3-7 (shrinking MVPD margins have robbed MVPDs of incentive to harm over-the-top video services and are more likely to be charged for content delivered than to charge for delivery and therefore cannot be said to have "'terminating monopolies"); Verizon Comments at 39, Economic Analysis at 29-37 ("gatekeeper" framework does not apply where effective competition for broadband Internet access exists, and is inapplicable to the provision of wireless BIAS or to areas with effective wireline broadband competition); CTIA Comments at 4 (data and other indicia of competition belie the Title II Order's misguided and unproven assumption that mobile broadband providers are "gatekeepers"). *See also* Jonathan E. Nuechterlein and Christopher S. Yoo, *A Market-Oriented Analysis of the "Terminating Access Monopoly" Concept* (Nov. 29, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/894663/151129nuechterleinyooarticle.pdf ("Terminating Access Monopolies Paper") (observing that the FCC employed the related "gatekeeper" theory in its 2015 Open Internet Order and concluding that the terminating access monopoly phenomenon, strictly understood, does not itself generally threaten market failures except in very limited circumstances that are not present in the market for broadband Internet access service).

negotiating with third parties over access to customers, nor does it create "monopoly" or "gatekeeper" power warranting a regulatory intervention.[67] Rather, "the conditions that historically gave rise to terminating access monopoly concerns in telecom market – which were actually the *result* of regulatory intervention – do not apply" to broadband Internet access markets.[68] As AT&T notes, they do not apply, *inter alia*, because (i) "terminating access monopolies" are market distortions rather than market failures that result from the Commission's imposition of an "access charge" regime requiring long distance voice providers to interconnect and terminate their traffic to local exchange networks at tariffed rates in a manner invisible to end users that are inapplicable to the ISP-edge provider relationship where leveraging by ISPs would be visible to consumers and therefore trigger responses; (ii) there is evidence of MVPDs paying for content rather than charging content providers for access to their subscribers just as broadband ISPs frequently pay backbone providers for transit, effectively paying to enable their own customers' access to content, thus suggesting the lack of a terminating access monopoly rather than its presence; and (iii) rather than having only one path to an ISP's network, there are a variety of paths into any provider's network, including the ready availability of transit as an alternative to direct interconnection, keeping any ISP from exercising monopoly power over access to its customers.[69] In addition to economic analysis refuting the gatekeeper theory, USTelecom also notes that there is much general evidence suggesting that no such ISP

[67] AT&T Comments at 34.

[68] AT&T Comments, Economists Declaration at 6, ¶ 18.

[69] *Id*. at 34-36, ¶¶ 65-70; Terminating Access Monopolies Paper at 26-32 (terminating access monopoly problems arose where competitive local exchange carriers were able to charge local distance carriers uneconomic terminating access charges to reach particular voice customers of the local carriers and the long distance carriers had no way to pass those excess charges along to that local carrier's customers; outside the access charge regime, consumer facing network providers like MVPDs and broadband ISPs are more likely to be paying for content or interconnection than charging for them); Verizon Comments, Economic Analysis at 29-37 ("gatekeeper" framework does not apply where effective competition for broadband Internet access exists); TPI Comments at 3 (concerns about anticompetitive use of the gatekeeper role are largely misplaced, as even a monopolist has incentives to provide access when it is efficient to do so, and deny access only when access is inefficient).

gatekeeper role exists, including the fact that financial markets value edge providers much more highly than broadband providers and that edge providers dominate online advertising markets.[70] Accordingly, the record before the Commission in the instant proceeding confirms even more strongly the bankruptcy of the "gatekeeper" theory as a basis for imposing common carrier regulation on ISPs.

Second, with respect to smaller ISPs in particular, pro-Title II advocates misconceive ISP incentives to prevent end user access to online video and vastly overestimate their abilities to extort interconnection fees for delivering online content to their subscribers.[71] Public Knowledge, for example, maintains that gatekeeper power can vary based on the size of the ISP but is always present, even with respect to the smallest ISPs, because an online video provider, for example, has no choice but to connect through the ISP chosen by a particular end user to access that customer.[72] As discussed below, even apart from the incorrect assumption that Internet consumers today access the Internet solely via the network of one ISP for all their Internet connectivity,[73] ISPs have no economic ability to profit from impairing their subscribers' access to popular edge providers and the view that all ISPs, no matter how small, wish to keep

[70] USTelecom Comments at 17-18. It also notes that the Commission even acknowledged that there was "'some disagreement among commenters'" as to the ability of ISPs to exert significant leverage due to their "gatekeeper" status. *Id*. at 18.

[71] *See* ACA Comments at 31-36 (detailing lack of incentive and ability of smaller ISPs to degrade their own customers' Internet experience and extort payment from Internet edge providers or favor one over another in return for payments).

[72] Public Knowledge Comments at 75-76.

[73] *See* ACA 2014 Open Internet Comments at 23 (large video programmer edge providers, for example, do not depend solely or even principally on the Internet to reach their audiences and "many of their target customers are 'multi-homed' with more than one option for accessing programming), Lehr Paper at 13-17, 21-22 (critiquing viewing Internet as two-sided market when it exhibits characteristics of multi-sided market in which edge providers have many choices for reaching target audiences and customers may be single- or multi-homed); OTI Comments at 106-108 (consumers rely on both mobile carrier and wireline networks for connectivity, often moving seamlessly between the two); Internet Association Comments at 31-32 (consumers today rely heavily on both wired and wireless broadband subscriptions).

their MVPD subscribers from accessing online video content to protect the margins on their own video service is laughable.[74]

ACA agrees with NCTA's analysis of the fundamental flaws in the "gatekeeper" theory as an economic justification for imposing common carrier regulation on broadband ISPs – in today's competitive environment, they simply have no economic ability to profit from engaging in harmful conduct impairing the quality of their own subscribers' Internet experience.

> As NCTA has noted in the past, today's Internet ecosystem is dominated by a number of "hyper-giants" with growing power over key aspects of the Internet experience—including Google in search, Netflix in online video, Amazon in e-commerce, and Facebook in social media. If an ISP were to threaten to block or degrade access to these or other sites, such a strategy would be self-defeating and immediately provoke a hostile reaction from consumers. Indeed, it is more likely that these large edge providers would seek to extract payment from ISPs at some point in the future. And on the issue of prioritization in particular, it remains unclear whether any possible prioritization functionality would even be desirable for edge providers.
>
> In light of these marketplace realities, it is not analytically useful—or even accurate—to characterize ISPs as "gatekeepers" or "terminating access monopolies" warranting particularly to invasive regulation . . . .[75]

The presumption that smaller ISPs are fighting consumer access to over-the-top video, is also simply incorrect. Smaller ISPs recognize that consumer video preferences are changing and are actively pursuing new ways to offer more video choices on more consumer devices, increasingly teaming up with both online on-demand and streaming video services. For

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[74] *See* Fiber Broadband Association Comments at 5-6 (as a result of soaring retransmission consent fees and related demand for "marquee" programming, mid-size and smaller MVPDs have rapidly shrinking margins for their multichannel video product and many have been exiting – or would like to exit – this business); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, Eighteenth Report, DA 17-71, ¶ 72 (rel. Jan. 17, 2017) ("SNL Kagan maintains that video revenue increases have failed to keep up with increased costs and the result has been failing video margins (i.e., revenue minus cost divided by revenue). At the end of 2015, video margins were just over 10 percent, down from 15 percent in 2014, and 20 percent in 2013."). For smaller MVPDs, who pay approximately 30 percent more than larger MVPDs for video programming content, margins are much less and have even turned negative. *See, e.g.*, "ACA: Rising Video Programming Costs A Drag on Broadband Deployment," American Cable Association (Mar. 9, 2015), *available at* http://www.americancable.org/node/5229.

[75] NCTA Comments at 52-54.

example, numerous mid-size ACA members are partnering with TiVo and Roku to allow them to integrate online and linear video services to provide subscribers with a seamless video experience.[76] Moreover, rather than threatening over-the-top providers with competitive harm, smaller MVPDs are fighting to even get the attention of online video distributors like Netflix for purposes of entering into mutually beneficial caching arrangements that would improve the end user Netflix experience and lower ISPs transport costs.[77] Along the same lines, to offer their

[76] *See, e.g.*, Daniel Frankel, *Pennsylvania's Service Electric becomes the 18th tier 2 MSO to sign on to TiVo whole-home solution*, FIERCECABLE (Aug. 2, 2017, 9:43 a.m.), http://www.fiercecable.com/cable/pennsylvania-s-service-electric-becomes-18th-tier-2-mso-to-sign-to-tivo-whole-home-solution (TiVo said it has now partnered with 18 tier 2 cable companies in the U.S., including the National Cable Television Cooperative, which represents more than 800 small operators; the integration of online video services like Netflix and YouTube into TiVo's operating system, allows customers to access their favorite digital programming services, as well as cable service assets like VOD, without changing video source inputs); Daniel Frankel, *Alaska's GCI deploys Evolution Digital's TiVo-powered hybrid eBox set-tops*, FIERCECABLE (Nov. 16, 2016, 11:46 a.m.), http://www.fiercecable.com/cable/alaska-s-gci-deploys-evolution-digital-s-tivo-powered-hybrid-ebox-set-tops (GCI will deploy Evolution Digital's TiVo-enabled eBox hybrid set-tops to subscribers in select regions; GCI follows WOW!, which has made eBox the centerpiece of its "Swivel" video platform; Mediacom Communications, Advanced Cable Communications and several NCTC-member cable operators have also signed to deploy the IP-capable device); Gary Arlen, *Small Cable Operators Seek Out OTT Partnerships*, MULTICHANNEL NEWS (Apr. 3, 2017, 8:00 a.m.), http://www.multichannel.com/small-cable-operators-seek-out-ott-partnerships/411887 ("with subscription video-on-demand services 'driving a resurgence of customer expectations' of the video experience, the National Cable Television Cooperative is continuing to search for distribution deals that link over-the-top services with its member cable companies;" NCTC's Rich Fickle "indicated they ranged from major movie and entertainment packagers — which would suggest Netflix, YouTube or Amazon — to more specialized services, either by ethnicity or language, political programming or possible comedy or travel content, including programming prepared for Sony's PlayStation Vue virtual MVPD service."); Craig Leddy, *Cable & OTT: Do We Hear Wedding Bells?*, LIGHT READING (Jul. 3, 2014), http://www.lightreading.com/video/ott/cable-and-ott-do-we-hear-wedding-bells-/a/d-id/709734 ("Cable's new attitude toward OTTs was exemplified by John Childress, director of product management-residential for WideOpenWest (WOW), during the Light Reading Cable Next-Gen Technologies & Strategies Conference in March. Childress advocated an aggregated user experience in which consumers can easily access linear, video on demand (VoD), digital video recorder (DVR) and OTT content across various devices. 'Do we fight it [OTT] or embrace it?' he asked. 'For us, it's how to embrace it and pull that experience into a linear and VoD experience.'"); Special Report, *Cable operators embrace over-the-top video, but studios thwart Netflix, Hulu options*, FIERCECABLE, *available at* http://www.fiercecable.com/special-report/cable-operators-embrace-over-top-video-but-studios-thwart-netflix-hulu-options (operators featuring OTT options are taking a variety of approaches).

[77] Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 and 10-127 at 4 (filed Feb. 2, 2015) ("ACA Feb. 2, 2015 Ex Parte") (describing how efforts by smaller ISPs such as Shenandoah Telecommunications Company, Jackson Energy Authority, and Cedar Falls Utilities to even discuss entering into mutually-beneficial settlement-free caching arrangements such as Netflix's Open Connect can be difficult and, in some cases, ultimately unsuccessful).

multichannel video subscribers a more diverse range of options, many smaller ISP/MVPDs have deployed innovative new set-top boxes that provide customers with access to over-the-top services alongside their pay-TV offerings. These new set-top boxes offer subscribers a consistent TV experience combining a feature-rich user interface with a market leading content experience, while supporting whole-home and multi-screen experiences. Smaller MVPDs have made this possible by developing strategic partnerships with companies such as TiVo and Arris, often in tandem with their buying cooperative, the National Cable Television Cooperative.[78] While the "gatekeeper" concept may have some economic significance in narrowly defined circumstances, it does not automatically equate to market power or a need for common carrier regulation of every ISP, regardless of size or the level of competition in the marketplace. For this reason, ACA agrees with commenters calling for the Commission to expressly disavow use of the "gatekeeper" theory in determining whether compelled common carrier status is necessary and appropriate.[79]

Instead, any market imbalances in the Internet ecosystem should be put through the filter of a traditional market power analysis to determine where demonstrable market power lies

[78] Smaller ISP/MVPDs that have partnered with TiVo or have adopted Arris' Moxi platform include Armstrong Cable, Atlantic Broadband, Midcontinent Communications, Cable One, RCN, Grande Communications, WOW!, Buckeye CableSystem, and Shentel. *See* "TiVo to provide Armstrong's next-gen video platform," FIERCECABLE (Sept. 10, 2014) *available at* http://www.fiercecable.com/story/tivo-provide-armstrongs-nextgen-video-platform/2014-09-10; "TiVo gains 295,000 cable subs in Q3 2013," FIERCECABLE (Nov. 27, 2013) *available at* http://www.fiercecable.com/story/tivo-gains-295000-cable-subs-q3-2013/2013-11-27; "Midcontinent deploys TiVo whole home experience in South Dakota," FIERCECABLE (Apr. 8, 2013) *available at* http://www.fiercecable.com/story/midcontinent-deploys-tivo-whole-home-experience-southdakota/2013-04-08; "TiVo adds Buckeye to its portfolio of small and mid-sized MSO partners," FIERCECABLE (Feb. 11, 2016) *available at* http://www.fiercecable.com/story/tivo-adds-buckeye-its-portfoliosmall-and-mid-sized-mso-partners/2016-02-11; "Cable One to deploy TiVo DVR software," FIERCECABLE (Nov. 27, 2012) *available at* http://www.fiercecable.com/story/cable-one-deploy-tivo-dvr-software/2012-11-27; "WOW! Launches Whole Home Solution," FIERCECABLE (Feb, 1, 2012), *available at* http://www.fiercecable.com/press-releases/wow-launches-arris-whole-home-solution.

[79] AT&T Comments at 34.

and what an appropriate regulatory response should be.[80] It is highly unlikely that, for any 21st century Internet market failures revealed by such an analysis, common carrier regulation as conceived in the late 19th century would provide the right remedy. In any event, ACA again maintains that to the extent anything resembling "gatekeeper" power is to be considered by the Commission, it must be done in a holistic fashion by examining all sources of gatekeeping power among information service providers, including Internet edge providers.[81]

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[80] *See* MCTV Comments at 6 (large powerful Internet edge providers operate as the sole gatekeepers for access to information and entertainment services and have the market power to engage in anticompetitive practices vis-à-vis smaller ISPs, and have used that power to the detriment of ISPs and their subscribers); Oracle Comments at 3-4 ("The prior Commission's focus only on traditional broadband provider ignores the largest and most dominant internet players from a consumer perspective. Edge providers such as Google are more central to the internet experience than any ISP, and thus wield significant negotiating power, especially when serving as a platform for third-party apps and services.;" consumers return to edge services when on different networks; edge "switching costs can be higher than the broadband-provider switching costs identified in the *Title II Order*"). *See also* Fiber Broadband Association Comments at 4-6 (analogizing the "real world" evidence of MVPD "platform provider" paying upstream broadcasters retransmission consent fees to deliver broadcast signals to pay-TV subscribers but lacking any leverage to temper rising prices to the inability of any ISP to successfully leverage its customers' access to the "Frightful Five" of giant Internet edge providers which dominate provision of upstream Internet content); Farhad Manjoo, *Tech's 'Frightful 5' Will Dominate Digital Life for Foreseeable Future*, NEW YORK TIMES (Jan. 20, 2016), https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html ("Together the Five compose a new superclass of American corporate might…Their wealth stems from their control of the inescapable digital infrastructure on which the rest of the economy depends – mobile phones, social networks, the web, the cloud, retail and logistics, and the data and computing power required for future breakthroughs.").

[81] *See* ACA Comments at 69-72 ("should the Commission determine that the benefits of having enforceable Net Neutrality rules would outweigh their costs, it should fashion its rules so that they apply to ISPs and edge providers alike" to constrain the ability of giant edge providers wielding enormous economic and market power to selectively block traffic from, or engage in anticompetitive actions against, smaller ISPs); ACA 2014 Open Internet Comments at 8-26, 47-53 (explaining why large powerful Internet edge providers can function as "gatekeepers" for their highly demanded content and applications; why asymmetric regulation of only ISPs distorts marketplace functions so that rules to protect Internet openness should be applied with equal force to all Internet actors capable of blockages or anticompetitive activity; and how Internet edge providers fit the definition of information service providers). Since ACA first brought this matter to the Commission's attention in 2014, Internet edge provider "gatekeeper" power has only intensified, and is receiving significant attention. *See, e.g.,* Jonathan Taplin, *Google Doesn't Want What's Best for Us*, NEW YORK TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/12/opinion/sunday/google-tech-diversity-memo.html?emc=eta1 ("Google processes more than three billion search queries a day. It has altered our notions of privacy, tracking what we buy, what we search for online — and even our physical location at every moment of the day. Every business trying to reach mass-market consumer demand online knows that Google is the gatekeeper. The fact that it is a monopoly, with an almost 90 percent share of the search advertising business, is a given that we have all come to accept. It's Google's world; we just live in it."); Betsy Morris and Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition From Startups*, WALL STREET JOURNAL, (updated Aug. 9, 2017), https://www.wsj.com/articles/the-new-copycats-how-

C. Title II Classification Cannot be Justified on Grounds Unrelated to Protecting the Open Internet.

Several commenters defend retention of the Title II classification for broadband Internet access service because it allows the Commission to address unrelated policy issues such as the scope of pole attachment protections, universal service contributions, disabilities access and privacy.[82] These concerns, however worthy on their own terms, are far-afield from the putative purpose of the Open Internet rulemaking, which was to protect and promote an open Internet, and cannot provide a valid justification for the telecommunications service classification of broadband Internet access service, given the enormous costs imposed by the Title II decision.[83]

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facebook-squashes-competition-from-startups-1502293444?utm_content=buffer5e8df&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer ("Silicon Valley is dominated by a few titans, a development that's fundamentally altering the nature of America's startup culture. While it's as easy as ever to start a company, it is getting harder to grow fast enough and big enough to avoid getting either acquired or squashed by one of the behemoths."); Sapna Maheshwari, *As Amazon's Influence Grows, Marketers Scramble to Tailor Strategies*, NEW YORK TIMES (Jul. 31, 2017), https://www.nytimes.com/2017/07/31/business/media/amazon-advertising.html (discussing how more people live large portions of their lives in Amazon's ecosystem which is becoming "more of a dominant force in brand discovery" and must be taken into account by ad agencies); Steven Pearlstein, *Is Amazon getting too big?*, WASHINGTON POST (Jul. 28, 2017), https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html?utm_term=.491db5393612 (discussing limitations of antitrust law "to deal with high-tech industries, which naturally tend toward winner-take-all competition," the unique position Amazon has attained in the infrastructure of online commerce and the fact that financial markets are pricing its stock as if it is going to be a monopolist); Robert Neubecker, *Can the Tech Giants Be Stopped?*, WALL STREET JOURNAL (Jul. 14, 2017), http://online.wsj.com/public/resources/documents/print/WSJ_-C001-20170715.pdf (discussing how Google, Facebook, and Amazon are poised to wreak havoc in the service economy as they did in creative economy by using their dominance in artificial intelligence).

[82] *See, e.g.*, OTI Comments at 37-42 (abandoning Title II would leave Americans vulnerable to privacy abuses and exacerbate the digital divide by jeopardizing the Lifeline subsidy program); Free Press Comments at 71-73 (the Commission's clear authority for subsidizing standalone broadband through the Lifeline program and protecting broadband privacy will be jeopardized by returning to a Title I classification); Voices Coalition Comments at 53-67 (Title II authority is critical to the provision of stand-alone Lifeline broadband service, protecting broadband privacy and maintenance of access to telemedicine); Public Knowledge Comments at 73-74 (common carriage system for broadband creates spillover effects that benefit the economy, including economic equality and social values like free expression).

[83] *See Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 32 FCC Rcd 3459, ¶¶ 270-85 (2017) (rejecting calls for compelled common carriage in the

As ACA and others have noted, regulatory classification is first and foremost a factual matter – whether the characteristics of the service fit the terms of the statutory definition at issue.[84] Policy matters come into play, but it is well established that in the absence of identified market power as a prerequisite for potentially compelling common carriage, the Commission cannot impose common carrier regulation to achieve policy objectives alone.[85] In its initial comments, ACA detailed the reasons why the Title II classification for broadband Internet access was wrong as a matter of fact and law.[86] ACA's position on these matters is well supported in the record.[87] Given the lack of statutory "fit" for broadband Internet access service under Title II, the

absence of market power findings; even if the Commission can compel common carriage "based on other public interest considerations" it must weigh whether public interest benefits outweigh the costs).

[84] ACA Comments at 43-52 (as the Commission had repeatedly recognized, the service characteristics of broadband Internet access service always and necessarily combine computer processing, information provision and computer interactivity with data transport and best fit within the definition of information services); CTIA Comments at 34-40; CenturyLink Comments at 14-28; USTelecom Comments at 30-36.

[85] ACA 2014 Open Internet Comments at 57 ("Regulatory policy may *guide* an exercise of regulatory authority, but the Commission's ability to make purely policy choices is constrained by the words of the Act."); National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976) (rejecting portions of an FCC order concerning special mobile radio systems "which imply an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve."); Sw. Bell Tel. Co. v. FCC, 19 F.3d 1475 (D.C. Cir. 1994) (overturning an FCC attempt to regulate the provision of dark fiber by requiring phone companies to provide dark fiber under tariff on a common carrier basis). *See also* ADTRAN Comments at 12 (classification of broadband Internet access service should be driven by the nature of the service, which is clearly an "information service"); CTIA Comments at 33, *citing* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967, 991 (2005) ("Brand X") (classification of broadband services rests first and foremost on factual particulars of how Internet technology works and is provided).

[86] ACA Comments at 3-40, 41-56.

[87] *See, e.g.*, AT&T Comments at 59-90 (the text, structure, history of the Communications Act compel an information service classification; any broadband ISP offers the "capability" of interacting with stored data on the Internet within the plain meaning of the statutory definition and also offers consumers computer processing and data-service capabilities of its own as integral parts of Internet access); CenturyLink Comments at 15-28 (the "findings of the *Cable Modem Order* regarding the proper classification of BIA service were correct and nothing has materially changed since 2002 regarding BIA service relative to its use for access to third party services or anything else that warrants a change in regulatory classification;" if anything, BIA services are even more clearly characterized today as the provision of information processing (as opposed to transmission) than they were in 2002"), Appendix 2, Declaration of Phillip Bronsdon at 2-20 (describing how the technical attributes of broadband Internet service fit the statutory definition of an information service; broadband Internet access service "integrates a range of information processing, retrieval, storage, and other functionalities that go far beyond mere transmission"), Appendix 1, Declaration of Dane Folster at 2 (CenturyLink, like other ISPs, markets its broadband Internet access service to compete on the basis of various enhanced functionalities as well as on speed and price; "while

absence of identified market power and the enormous costs involved, there is no lawful basis for maintaining the Title II classification.

D. The Commission Has Authority Under Section 706 to Adopt Baseline Net Neutrality Rules Should It Determine Them Necessary.

Most commenters agree that Section 706 authorizes the Commission to adopt a baseline set of Net Neutrality rules should it find them necessary to protect the open Internet in this proceeding,[88] notwithstanding the preference of some for continued reliance on the Commission's Title II authority.[89] This interpretation of Section 706, upheld by the *Verizon*

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some of the specific focuses have changed and evolved over time, the relative prominence of speed as a focus in CenturyLink marketing efforts has not materially changed over time since 2000"); CTIA Comments at 33-42 (from the perspective of the end user, the features of broadband Internet access as a finished product render it an integrated information service rather than a pure transmission service; "the 2015 majority erred in finding that functionalities such as caching and the use of the domain name system ('DNS') did not transform broadband Internet access from mere transmission into something else" as these features "add functionalities and consumer value in ways that go well beyond facilitating basic transmission"), Exhibit A, Declaration of Peter Rysavy, Rysavy Research, ¶ 4 (routing is not merely transmission; the very transmission of data on the Internet today involves the processing of information, and in some cases, transformation of packets); Comcast Comments at 12-25 (broadband Internet access should be classified as an information service due to its factual particulars; the host of information-proceeding features are integrated into the BIAS offering, include not only DNS and caching, but also Dynamic Host Configuration Protocol ("DHCP") as well as security features including spam filtering, malware monitoring and remediation and distributed denial-of-service ("DDoS") protection); NCTA Comments at 13-27 (classifying broadband Internet access service as an information service represents the best interpretation of the Communications Act; the service is a "quintessential" "information service" under the Act and is fundamentally distinct from the "telecommunications service" envisioned by the Act).

[88] *See* Cox Comments at 25-28; NCTA Comments at 57; NTCA Comments at 15-17; ACLP Comments at 6; AT&T Comments at 101-106; Comcast Comments at 57-63; Verizon Comments at 18; Mobile Future Comments at 22; National Multicultural Organizations Comments at 13-17; NARUC Comments at 7; R Street Comments at 15-17. *But see, cf.,* Free State Foundation at 34-37 (Section 706 does not provide the FCC with an independent source of authority to regulate broadband Internet access services, as prior FCC precedent and court cases have concluded); Arielle Roth (Hudson Institute) Comments at 1 (interpreting Section 706 as broad grant of regulatory authority over the Internet is inconsistent with exhortations in Section 230(b) to preserve the free market for Internet and other interactive computer services, which Congress noted had flourished with minimum government regulation).

[89] *See* Free Press Comments at 38 (it is pointless and likely fruitless for the FCC to attempt to refashion open Internet rules under Section 706 or a different authority in light of the D.C. Circuit's line of interpretation of FCC authority under that provision); EFF Comments at 21-22 (Title II is a more bounded and predictable authority for light-touch net neutrality protections than ancillary authority or Section 706); OTI Comments at 22 (Section 706 alone is insufficient to craft enforceable net neutrality rules); Data Foundry Comments at 31 (Section 706 does not provide solid legal authority for the FCC to retain the current rules outside of Title II); Mozilla Comments at 5 (Title II is the best approach for creating enforceable rules); Vimeo Comments at 4, 26-32 (Section 706 does not provide an independent source of authority for the rules; revoking the Title II classification will strip the FCC of the authority needed to

court, was left undisturbed in the *USTelecom* decision.[90] It is worth noting that many proponents of Net Neutrality regulation for ISPs agree that Section 706 provides the Commission with at least some affirmative authority to adopt rules to protect the open Internet, and several agree it provides adequate authority.[91] It is also worth noting that not all proponents

constrain broadband ISP behavior); AARP Comments at 14-15 (FCC will not be able to support a no-blocking rule without Title II); Access Now Comments at 11 (Section 706 authority will not allow the FCC to impose comprehensive anti-discrimination regulation).

[90] *See* Verizon v. FCC, 740 F.3d 623, 637-38 (D.C. Cir. 2014) ("As Verizon argues, this language [Section 706(a)] could certainly be read as simply setting forth a statement of congressional policy, directing the Commission to employ 'regulating methods' already at the Commission's disposal in order to achieve the stated goal of promoting 'advanced telecommunications' technology. But the language can just as easily be read to vest the Commission with actual authority to utilize such 'regulating methods' to meet this stated goal. As the Commission put it in the *Open Internet Order*, one might reasonably think that Congress, in directing the Commission to undertake certain acts, 'necessarily invested the Commission with the statutory authority to carry out those acts;'" with regard to Section 706(b), the D.C. Circuit concluded it was reasonable to believe Congress "contemplated that the Commission would regulate this industry" bounded "both by the boundaries of its subject matter jurisdiction and the requirement that any regulation be tailored to a specific statutory goal of accelerating broadband deployment."); *USTelecom*, 825 F.3d at 733-34 ("Our decision in that case considered three rules from the 2010 Open Internet Order: an anti-blocking rule, an anti-discrimination rule, and a transparency rule. *See id*. at 633. We determined that section 706 vests the Commission 'with affirmative authority to enact measures encouraging the deployment of broadband infrastructure' and that the Commission had 'reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic.' . . . In doing so, we also found that the Commission's justification for those rules — 'that they will preserve and facilitate the `virtuous circle' of innovation that has driven the explosive growth of the Internet' — was reasonable and supported by substantial evidence. . . .'").

[91] *See, e.g.*, Akamai Comments at 12-16 (FCC has authority under Section 706 and other provisions to regulate broadband Internet access services once it is reclassified as an information service within the guidelines established by Verizon court); ESA Comments at 14-18 (FCC retains legal authority under Section 706 and other statutory provisions to adopt enforceable open Internet rules); INCOMPAS Comments at 63-65 (preservation of bright line Net Neutrality rules does not depend on use of all of the substantive provisions of Title II; Section 706 authorizes the Commission to adopt the general conduct standard and exercise oversight over interconnection); CompTIA Comments at 4-7 ("The evidence has shown that the tech industry can thrive and the internet can remain open regardless of whether BIAS is classified as an information service or a telecommunications service;" "While the D.C. Circuit overturned the FCC's no-blocking and no-discrimination rules under Sec. 706 of the Telecommunications Act, it did not foreclose the Commission's ability to pass new such rules in the future, even if BIAS remained an information service."); CWA Comments at 4 (Title II is only one option; another is to ground no blocking and anti-discrimination rules on Section 706, using a commercial reasonableness standard). *See also* Public Knowledge Comments at 62-63 (disagrees with NPRM view that Section 706 is merely hortatory, noting the D.C. Circuit has rejected this line of reasoning).

of maintaining enforceable Net Neutrality rules insist that the Commission do so using its Title II authority; rather they appear agnostic as to the legal basis for such rules.[92]

To the extent the Commission determines that the benefits of having enforceable Net Neutrality rules would outweigh their costs, the record shows a high level of consensus around baseline protections consisting of no blocking, no throttling, subject to reasonable network management, and transparency from ISPs, industry groups and Internet edge providers alike, as well as a fair amount of consensus that anticompetitive paid prioritization should not be tolerated.[93]

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[92] *See, e.g.*, Amazon Comments at 6-8 (enforceable *ex ante* rules protecting the open Internet and extending to interconnection arrangements are needed to address incentives and abilities of broadband ISPs to discriminate against unaffiliated content previously identified by the Commission); Internet Association Comments at 25-31 (clear and enforceable *ex ante* rules are needed to preserve a free and open Internet that include no blocking or throttling, no paid prioritization, no unreasonable interference/disadvantage and transparency and disclosure); Netflix Comments at 2 ("Netflix supports enforceable rules that promote an open Internet: free from blocking, throttling, paid prioritization on the last mile and at the points at which a broadband provider's network connects to the Internet."); Microsoft Comments at 10-21 (retention of the Commission's three bright line Net Neutrality rules, the General Conduct standard, oversight of interconnection arrangements and the transparency rule for both fixed and mobile broadband is important to promoting innovation and investment by Internet edge providers); Nominum Comments at 4-9 (as a supplier of DNS software and application supplier, Nominum supports "a framework that protects against blocking and throttling and adopts a transparency regime that provides meaningful disclosure" together with a flexible framework when it comes to reasonable network management practices).

[93] *See, e.g.*, ACA Comments at 69; AT&T Comments at 101-106 (the Commission has authority under Section 706 to adopt targeted measures promoting broadband deployment that prohibit blocking and throttling, subject to flexible reasonable network management standard and a transparency requirement so long as the Commission does not impose a flat ban on all paid prioritization without running afoul on the prohibition against imposing common carrier status pursuant to the blueprint laid out by the *Verizon* court); Comcast Comments at 52-63 (the Commission could effectuate consensus on open Internet protections by adopting revised bright line rules under Section 706 consistent with the D.C. Circuit's analysis that include transparency, no blocking, no throttling, and no anticompetitive paid prioritization); Cox Comments at 26-27 (the Commission could establish Net Neutrality rules under Section 706 with relatively modest changes to the bright line rules initially adopted in 2010, and would have reasonable arguments in support of reinstating the prohibitions contained in the 2015 bright line rules against blocking and throttling as well as prohibiting anticompetitive paid prioritization by leaving some "room for individualized bargaining"); ITI Comments at 4-7 (bright line prohibitions on blocking and throttling for competitive reasons are in the public interest, as is a transparency rule and a prohibition against anticompetitive paid prioritization); Sprint Comments at 1-12 (an appropriate balance can be achieved through simplification and clarification of the existing rules, including eliminating the vague and overbroad Internet conduct standard, adopting a more flexible view of what constitutes reasonable network management and simplifying the Commission's transparency requirements); Verizon Comments at 18

E. Any Remaining Legal Uncertainty Is Best Addressed by Congress.

Should the Commission determine *ex ante* rules are needed but that it lacks adequate authority to adopt them under Section 706 or any other provision of the Communications Act, ACA agrees with the observations of numerous commenters that the answer is for Congress to enact new, bipartisan legislation clarifying the Commission's authority and establishing a stable and appropriate regulatory framework to ensure an open Internet.[94] After nearly 20 years of analysis, debate, working papers, Commission actions, decisions, reversals, and litigation, the best long-term approach is for Congress to resolve any remaining doubts about the scope of the Commission's authority over Internet services, the appropriate regulatory classification for broadband Internet access service, and the composition of any *ex ante* "rules of the road." In the meantime, it is imperative that the Commission undo its harmful Title II classification

(the Commission can adopt open Internet rules "curbing some problematic practices" pursuant to Section 706 so long as it refrains from imposing common-carrier regulations on information service providers).

[94] *See, e.g.*, ACLP Comments at 3, 29 (Congress should undertake to not only address net neutrality but also a comprehensive update of telecommunications laws); ACT Comments at 16-17 (congressional action is imperative to establish broadband principles); CALinnovates Comments at 9-11 (only Congress can provide long-term certainty, and new legislation should be required to establish clear guidelines that ensure the Internet is kept open without stifling uncertainty); CompTIA Comments at 6 ("Ideally, Congress will pass legislation to provide a legal classification for BIAS that fits better than either telecommunications or information service…."); Cox Comments at 3 (best way to safeguard openness while promoting continued investment and innovation is for Congress to enact legislation that enshrines a narrowly tailored, light-touch regulatory framework for BIAS); Free State Foundation Comments at 62 (Congress must enact new legislation if the Commission concludes that it needs authority over broadband because the Commission lacks authority to impose Net Neutrality rules under Section 706 or otherwise); ITI Comments at 3 (congressional action would be the best course of action to provide clarity and certainty); LGBT Tech Comments at 2-3 (only way to ensure a fair broadband playing field is through congressional statutory action); NARUC Comments at 4 (it might be more efficient for Congress to step in and mandate principles and enforcement); National Multicultural Organizations Comments at 4-7 (bipartisan solution from Congress is the best way to preserve and promote an open Internet); National Newspaper Publishers Association Comments at 2 (Congress should step in and pass a permanent law to keep the Internet open, encourage investment and deployment to close the digital divide, and ensure no company or industry is given special treatment); NCTA Comments at 66-77 (most durable and effective way to establish enforceable open Internet requirements would be for Congress to act); Oracle Comments at 6 (Congress must act to clarify the law and reflect technology and consumer experience and enact legislation); Verizon Comments at 5 (best answer is that Congress takes on this issue once and for all); WIA Comments at 11 (to best and permanently preserve the open Internet, Congress should take bipartisan action to codify general open Internet principles to which there is general agreement).

decision, restore the information service classification for broadband Internet access service, and eliminate without replacement the Internet General Conduct standard.[95]

IV. ADDITIONAL STEPS THE COMMISSION CAN TAKE TO ENSURE AN APPROPRIATE AND STABLE LIGHT-TOUCH REGULATORY FRAMEWORK UNDER TITLE I

Achieving the objective of a free and open Internet in a manner conducive to investment and innovation by all participants in the Internet ecosystem requires the Commission to take additional steps that go beyond revoking the telecommunications service classification, eliminating the Internet General Conduct standard, and, if necessary, adopting an appropriately tailored set of Net Neutrality protections.[96] ACA supports the recommendations of other commenters that the Commission must (i) expressly establish the primacy of federal law with respect to broadband Internet access service regulation by preempting state and local laws that attempt to regulate this service and conflict with federal goals; (ii) establish regulatory parity for fixed and mobile broadband Internet access services; and (iii) exercise its forbearance authority as a prophylactic measure to ensure regulatory stability.

A. The Commission Should Expressly Assert the Primacy of Federal Jurisdiction Over Regulation of Broadband Internet Access Service and Preempt Inconsistent State and Local Regulation.

The NPRM sought comment on how classifying broadband Internet access service as an interstate information service would impact jurisdiction.[97] In response, several commenters requested that the Commission follow the suggestion of Commissioner O'Rielly to expressly

[95] *See, e.g.*, USTelecom Comments at ii ("A lasting congressional solution is needed, but, in the interim, the Commission must undo the harm caused by the underlying [2015 Open Internet] order."); Cisco Comments at 14-16 (the Commission must protect consumers and investment here and now by reversing the 2015 Open Internet Order's "problematic prophylactic reclassification" and seriously overhauling its open Internet protections).

[96] The NPRM asked about "further steps the Commission should take to maximize facilities-based investment and competition." NPRM, ¶ 49.

[97] *Id.*, ¶ 69.

establish the primacy of federal law with respect to regulation of broadband Internet access services and preempt conflicting state and local laws that attempt to regulate the service.[98] ACA agrees. Being subject to potentially conflicting obligations with respect to broadband Internet access service by 50 states and thousands of localities would be ruinous for smaller ISPs, and could potentially impair the Commission's ability to achieve its goals of maximizing facilities-based broadband investment and competition. Broadband Internet access service is indisputably an interstate service and the Commission can and should exert the primacy of federal law in this area and preempt state and local regulation inconsistent with the framework it establishes in this proceeding.

1. A patchwork of conflicting obligations would be harmful.

The Commission must prevent a patchwork quilt of conflicting state-level obligations from being imposed on broadband ISPs. ACA agrees with NCTA that in "reestablishing a uniform federal framework for BIAS that is designed to promote Internet investment and innovation, the Commission should reaffirm its ability and intention to preempt state and local laws or other regulations, in whatever form they are imposed, that would undermine or stand as an obstacle to the accomplishment of this federal policy" and cautions that failing to do so would leave ISPs "forced to comply with a patchwork of overlapping and potentially conflicting obligations absent federal preemption."[99] NCTA catalogs several such actions, including the attempts by states to establish their own broadband speed measurement regimes that directly conflict with existing federal transparency obligations established by the Commission. These

[98] *See* NPRM, Statement of Commissioner Michael O'Rielly ("If the Commission decides that [broadband Internet access] is an interstate information service, then states and localities should be foreclosed from regulation it, as some states are currently attempting to do with new broadband privacy laws, fees, approval processes, and other requirements."); *see, e.g.*, NCTA Comments at 63-68; Comcast Comments at 78-82; Verizon Comments at 21-23; CTIA Comments at 54-57.

[99] NCTA Comments at 63-64.

efforts led NCTA and USTelecom to ask the Commission to reaffirm the primacy of its regulation in this area by declaratory ruling.[100]

The attempts by states to enforce their own version of broadband speed reporting metrics offers a cautionary tale as to what ISPs could face if states and localities are left unconstrained in their ability to regulate other aspects of the provision of broadband Internet access service. As ACA explained in its comments supporting the NCTA-USTelecom Petition, ACA members would face unmanageable compliance and litigation costs if the standard for accurately measuring and disclosing broadband speeds were different in each of the 50 states than it is at the federal level.[101] Defending against such enforcement actions would result in significant out-of-pocket costs to ISPs, particularly those like the majority of ACA members who lack in-house counsel, and would be especially burdensome and disruptive for smaller providers with limited staff and resources.[102] Just the risk of such actions means a provider must ensure that it has adequate reserve funds set aside, which may mean deferring investments or deployment. These risks and costs are multiplied for smaller providers serving multiple states because, as ACA explained, such providers, especially those with a single headend facility, could find themselves subject to a burdensome patchwork of differing standards for speed disclosures across many states for the same service offering, which would cause substantial costs for operators and confusion for consumers.[103] The risk and costs of such dis-uniformity would be exponentially greater if states and localities are left free to regulate at will other

[100] *Id*. at 64; *Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, Petition for Declaratory Ruling of USTelecom and NCTA – The Internet & Television Association, CG Docket No. 17-131 (filed May 15, 2017). *See also* CompTIA Comments at 3, 5 (in the absence of FCC rules, states are likely to attempt to pursue broadband regulation through legislation as they did in the wake of congressional disapproval of the Commission's broadband privacy rules).

[101] *Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, Comments of the American Cable Association at 7-9 (filed June 16, 2017) ("ACA Broadband Speed Comments").

[102] *Id*.

[103] *Id*. at 9.

aspects of broadband Internet access service, such as rates, terms, conditions and reasonable network management practices in a manner that is inconsistent with the framework established by the Commission in this proceeding.

2. Broadband Internet access is an inherently interstate service.

ACA further agrees that there should be no doubt as to the jurisdictional status of broadband Internet access service as an interstate and international service offering.[104] As CTIA observes, the Commission has previously and repeatedly held that broadband Internet access is an inherently interstate and international service, and did so most recently in the 2015 Open Internet Order.[105] The Commission has also previously made clear in that Order that states would be bound by its forbearance determinations and stated its "firm intention to exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme" it had adopted.[106] This same principle should apply with regard to any framework for broadband Internet access service the Commission imposes in this proceeding.

3. The Commission has and should exercise its authority to preempt inconsistent state and local regulation.

ACA also agrees that the Commission has the authority to preempt state and local regulations that conflict with a national policy of non-regulation and should exercise that

[104] *See, e.g.*, CTIA Comments at 54-55 (the Commission has previously recognized that BIAS is inherently an interstate and international offering); Cox Comments at 35-36; Comcast at 78-79; Ericsson Comments at 12-13; NCTA Comments at 65-66; T-Mobile Comments at 25-27; Verizon Comments at 21-22.

[105] CTIA Comments at 54-55; *citing GTE Telephone Operating Cos, GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 19 (1998); Cable Modem Declaratory Ruling, ¶ 59; Wireless Broadband Order, ¶ 28; 2015 Open Internet Order, ¶ 431.

[106] CTIA Comments at 55; 2015 Open Internet Order, ¶¶ 432-33.

authority.[107] Given the recent proclivities of some state and local officials to regulate aspects of the provision of broadband Internet access services noted in the record, it is important that the Commission go further in this proceeding to proactively guard against a balkanized scheme of broadband Internet regulation that contravenes its policy goals by asserting its exclusive jurisdiction over broadband Internet access.[108] As Verizon suggested, "the Commission should be clear that in returning to the longstanding light-touch regulatory approach and reversing Title II classification, it is not abnegating federal jurisdiction to promote the deployment of broadband or leaving any regulatory gap for state regulators to fill."[109] Further, the Commission should, as Comcast suggests, "expressly preempt any state or local laws that attempt – on their face or in their application – to regulate ISPs in their provision of BIAS" while leaving unaffected certain generally applicable consumer protection authority such as state laws preventing fraudulent behavior.[110] Doing so would be fully consistent with Commission and judicial precedent in this area with respect to preemption of state regulation of enhanced services (precursor to information services),[111] regardless of whether the Commission chooses to impose bright line

[107] *See, e.g.*, CTIA Comments at 54-58 (the Commission should be clear about precluding state public utility regulation of broadband Internet access service); Charter Comments at 12; Alaska Communications Comments at 6-7.

[108] *See, e.g.*, CTIA Comments at 57; NCTA Comments at 65 (the Commission has ample grounds to clarify that inconsistent state and local efforts to regulate BIAS are preempted).

[109] Verizon Comments at 22.

[110] Comcast Comments at 79-80. Comcast further recommends that the preemption exercised "should cover all economic, public-utility or conduct regulations, including those styled as consumer protection regulations that have the specific purpose or effect of constraining how ISPs provide BIAS and what ISPs do with respect to their BIAS networks." *Id*. at 80. ACA agrees that the Commission should preempt specific state and local regulation of how broadband Internet access service is provided and how ISP networks are managed.

[111] *See* California v. FCC, 39 F.3d 919, 933 (9th Cir. 1994) (upholding Commission's preemption of state laws that would conflict with the Commission's goal of promoting a mass market for enhanced services for small customers where Commission demonstrated that compliance with conflicting state and federal laws would in effect be impossible); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) et al.*, Report and Order, 104 F.C.C.2d 958, ¶ 343 (1986) (explaining that the Commission "preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings"); City of New York v. FCC, 486 U.S. 57, 64 (1988) (upholding ability

behavioral rules or rely on other regulating methods to protect the open Internet.[112] As Comcast notes, the courts have upheld federal preemption "when the federal government decides to interpose truly light-touch regulation as opposed to heavy-handed regulation – or even when the agency declines to impose any affirmative regulation at all."[113] For this reason, Free Press's argument that Congress did not grant the Commission preemption authority over state regulation of information services misses the point.[114] It is not necessary for Congress to have expressly granted the Commission preemption authority for the Commission to determine that its actions with respect to interstate information services "occupy the field" and therefore have preemptive effect on state and local requirements that impermissibly encroach on its exclusive jurisdiction.[115]

Leaving ISPs, particularly smaller ISPs, vulnerable to a tremendously burdensome patchwork quilt of conflicting state and local requirements and obligations would stand in the way of the accomplishment of the Commission's aims in this proceeding to establish a regulatory framework conducive to investment and innovation in the provision of Internet services. For this reason, the Commission should make expressly clear to states and localities

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of federal agencies to determine their regulation is exclusive and preempt state efforts to regulate the same area).

[112] *See* CTIA Comments at 56-57 ("Nothing in the Act precludes the Commission from asserting exclusive jurisdiction over broadband Internet access;" federal authorities may preempt to preclude conflicting federal and state overt policies as well as techniques for achieving a common end); Cox Comments at 36 (the Commission may preempt even if its new framework does not entirely occupy the field with respect to BIAS offerings in the case of conflicting state or local regulation that stands as an obstacle to the accomplishment and execution of the full purposes of its objectives); Comcast Comments at 80-82 (the courts have upheld Commission preemption of state regulation of "enhanced services" – precursors to information services – to ensure that if regulation were required, it would be done at the federal level).

[113] Comcast Comments at 82, *citing*, *e.g.*, Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983); Minn. Publ. Utils. Comm'n v. FCC, 483 F.3d 570, 580 (8th Cir. 2007).

[114] Free Press Comments at 56.

[115] *See Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶¶ 22-32 (2004), *aff'd sub nom*. Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007).

that its regulatory framework for broadband Internet access, whatever its contours, has occupied the field and displaces any inconsistent regulatory actions with respect to the provision of broadband Internet access service and the management of these networks at the state and local levels.[116]

B. The Commission Should Establish Regulatory Parity for All Broadband Internet Access Service Providers.

The NPRM questioned whether, to the extent the Commission keeps or modifies any of the existing rules, it should treat mobile broadband differently from fixed broadband.[117] This inquiry drew an overwhelmingly negative response from commenters. In the wide range of calls for regulatory parity for fixed and mobile broadband open Internet protections, there is significant unanimity from many commenters otherwise on sharply opposite sides with respect to the Commission's proposals in this proceeding.[118] ACA fully supports comparable treatment for fixed and mobile broadband Internet access service providers under the Commission's rules so that any open Internet protections benefit consumers using fixed and mobile broadband Internet connections alike.

When it first imposed open Internet rules in 2010, the Commission, citing operational constraints and the relatively nascent position of mobile broadband in the marketplace, applied the no-blocking rule differently to mobile broadband providers than to fixed, limited its scope

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[116] *See* Cox Comments at 37 ("Of particular import, to the extent the Commission determines that refraining from regulation would serve the public interest, such a deregulatory federal policy should have the same preemptive effect as any affirmative regulatory requirements."); CTIA Comments at 55 (the Commission should make clear that states and localities are barred from engaging in public utility regulation of broadband Internet access service, not only where their regulations expressly conflict with federal law but also where they purport to supplement federal goals or advance federal aims).

[117] NPRM, ¶ 95.

[118] *See, e.g.*, Comcast Comments at 83-86; Cox Comments at 28-30; NCTA Comments at 59-63; Microsoft Comments at 18-19; Vimeo Comments at 26 (the rules should apply equally despite the greater competition in the mobile wireless marketplace); OTI Comments at 99-108; Amazon Comments at 7-8; ESA Comments at 13; Internet Association Comments at 31-32; ITTA Comments at 1-2 (to the extent the Commission retains or modifies any Internet openness rules, they should apply equally to fixed and mobile broadband providers).

only to preventing blocking consumers from accessing lawful websites or blocking applications that compete with the provider's voice or video services, and excluded mobile broadband from the unreasonable discrimination rule.[119] In the 2015 Open Internet Order, the Commission found substantial changes in the mobile broadband marketplace warranted imposing "the same set of Internet openness protections to both fixed and mobile networks."[120] The changes in mobile broadband market position and improvements in mobile broadband technology cited by the Commission two years ago as supporting parity of treatment have only accelerated, as several commenters have noted.[121] ACA agrees with the observation of Comcast that "[t]here is no sound basis in 2017 to adopt different regulatory frameworks for fixed and mobile broadband services (just as there was not in 2015)" as consumers care equally about how fixed and mobile broadband platforms meet their Internet connectivity needs.[122] As Comcast, OTI and others note, any technological differences in mobile network performance that could warrant differential

[119] *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶¶ 93-95 (2010) ("2010 Open Internet Order"), *aff'd in part, vacated and remanded in part sub nom*., Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) ("Verizon") (mobile broadband services are "an earlier-stage platform than fixed broadband," presenting "special considerations").

[120] 2015 Open Internet Order, ¶¶ 88-101.

[121] *See, e.g.*, Cox Comments at 29-30 (increasingly, consumers are using smartphones as their primary means to access the Internet; Pew Research in 2016 found 12 percent of American adults access the Internet only using a mobile device, representing a substantial year-over-year increase); NCTA Comments at 59-61 (citing, *inter alia*, the fact that 4G LTE wireless technology, which essentially launched high-performance mobile broadband capable of allowing users to stream high-definition video, etc. is available today to 99.7% of Americans and that wireless providers are already touting the even higher speeds achievable by "ultra-fast 5G wireless"); OTI Comments at 101-102 (concurrent with substantial changes in smartphone adoption and network speed, network capacity and total mobile data traffic has continued to surge, growing 41 percent in the U.S. in 2016; mobile data traffic in 2021 is projected to be the equivalent of 12 times the volume of the entire U.S. Internet in 2025 and since the Commission noted how mobile data traffic had "'exploded'" to 3.23 extabytes in 2013, the number has already more than doubled to 7.2 extabytes per month by the end of 2016).

[122] Comcast Comments at 83-84. *See also* ITTA Comments at 1-2 ("There is no principled basis for treating fixed and mobile broadband providers differently."); CenturyLink Comments at 36-37 (there are no legal, technical, economic and/or policy reasons to distinguish between fixed and mobile broadband services and it would be arbitrary and capricious to regulate one platform differently from the other).

application of open Internet protections could be handled through flexible application of the "reasonable network management" exception.[123]

Importantly, parity of treatment is warranted to avoid creating unwarranted marketplace distortions and to align with consumers' expectations. Mobile broadband Internet access is not only increasingly fast, it is increasingly competitive with fixed Internet broadband access for a growing segment of the population.[124] It is a fundamental precept of regulatory law that competitors in a single market should be subject to a uniform set of rules.[125] It is for this reason that the Commission, after determining that cable modem service should be classified as a lightly-regulated information service, acted quickly to take action to classify broadband Internet access over wireline, power line and wireless facilities as information services.[126] Continued

[123] Comcast Comments at 85; OTI Comments at 4, 110-13; ITTA Comments at 2.

[124] Microsoft Comments at 19-21; Voices Coalition Comments at 68-69; OTI Comments at 105 ("The data show that low-income communities and communities of color continue to disproportionately rely on mobile broadband in lieu of fixed broadband to connect to the internet."); Vimeo Comments at 26 ("Half of Vimeo.com's visitor traffic comes from a mobile device.").

[125] *See, e.g.*, *Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, First Order on Reconsideration and Second Report & Order, 18 FCC Rcd 1342, ¶ 80 (2003) (extending the cable inside wiring rules to other video providers in order to "promote regulatory parity and enhance competition").

[126] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶¶ 2, 7 (2002); *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14862, ¶ 12 (2005); *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service,* Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶ 9 (2006); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶¶ 18, 22–26 (2007).

observance of this precept is especially warranted where mobile and fixed connectivity is increasingly used interchangeably by consumers who, as OTI describes, "toggle back and forth between fixed and mobile networks in order to optimize trade-offs between connectivity, speed, and cost."[127] The fact that mobile and fixed broadband Internet services are converging from a consumer perspective factored into the decision of the panel majority in *USTelecom* to uphold the Commission's Title II reclassification of both fixed and mobile services.[128] Nor do relative levels of competition counsel application of a different regulatory regime for mobile as opposed to fixed broadband Internet access service providers.[129] Bifurcating access to the Internet by

[127] OTI Comments at 107 ("As a wireline network extension, Wi-Fi is not only offloading roughly 80 percent of all mobile device data traffic, it is also fueling new hybrid network business models – such as Republic Wireless, Comcast's XFINITY Mobile and Charter's Spectrum WiFi – that offer the promise of increasing inter-platform innovation and competition."). The convergence of fixed and mobile broadband was also noted by the D.C. Circuit in *USTelecom v. FCC* in support of the Commission's determination that mobile broadband Internet access should be reclassified as a telecommunications service together with fixed broadband. *See USTelecom*, 825 F.3d at 723 ("If a consumer loses her Wi-Fi connection for some reason while accessing the internet—including, for instance, if she walks out the front door of her house, and thus out of Wi-Fi range—her device could switch automatically from a Wi-Fi connection to a mobile broadband connection. If mobile broadband were classified as a private mobile service, her ongoing session would no longer be subject to common carrier treatment. In that sense, her mobile device could be subject to entirely different regulatory rules depending on how it happens to be connected to the internet at any particular moment—which could change from one minute to the next, potentially even without her awareness.").

[128] *See USTelecom*, 825 F.3d at 723 (agreeing with the Commission's determination that parity of treatment was necessary to avoid a "statutory contradiction in the treatment of mobile broadband provides further support for its reclassification" to not only "assure consistent regulatory treatment of mobile broadband across Titles II and III, but it also assures consistent regulatory treatment of mobile broadband and fixed broadband, in furtherance of the Commission's objective that '[b]roadband users should be able to expect that they will be entitled to the same Internet openness protections no matter what technology they use to access the Internet'").

[129] The NPRM notes that several mobile providers opposing application of the broader rules in 2015 argued that competition for mobile broadband service adequately restrained the behavior of mobile ISPs, and asks if that contention is correct in today's marketplace. NPRM, ¶ 95. ACA agrees with OTI's observation that the "comparative degree of competition in the fixed and mobile markets for BIAS is neither a relevant nor a sound basis for establishing a divergent regulatory framework for open internet consumer protections." OTI Comments at 109. ACA disagrees, however, with OTI's further suggestion that there is a lack of effective competition in either fixed or mobile broadband markets to constrain anti-competitive or anti-consumer behavior. As described in ACA's initial comments, its member companies face competition from at least one and in many cases several fixed broadband providers. ACA Comments at 31, 36; Kyle Declaration, ¶ 3; Sjoberg Declaration, ¶ 13; Hickle Declaration, ¶ 7; Timcoe Declaration, ¶ 4.

more heavily regulating fixed broadband while giving mobile broadband Internet a competitive advantage through less regulation would harm, rather than promote, platform competition and network investment. Regulatory disparity would also defeat consumer expectations, as the Commission observed in the 2015 Open Internet Order.[130] The Commission's goal in this proceeding to safeguard consumers' ability to access and effectively use the lawful content, applications, services and devices of their choice on the Internet will, as ITTA notes, "be diminished if the 'rules of the road' vary based on the technology used to gain access to the Internet."[131]

C. The Commission Should Exercise Forbearance from All Title II Common Carrier Regulation of Broadband Internet Access Service as a Prophylactic Measure.

The Commission explored the impact of restoration of the information service classification on the forbearance structure it had previously adopted in the NPRM, asking whether it should maintain and extend forbearance from even more provisions of Title II as a way of further ensuring that its decision in this proceeding "will prove to reduce regulatory burdens."[132] In its comments, ACA called for the simultaneous exercise of additional forbearance from Sections 201, 202, 207 and 208 as well as from the Internet General Conduct standard should the Commission, for any reason, abandon its lead proposal to revoke the Title II classification and leave the Internet General Conduct standard in place.[133] ACA also supports calls for the Commission to proactively extend the 2015 Open Internet Order's forbearance rulings as a prophylactic measure to ensure certainty and to conditionally forbear from all Title II

[130] 2015 Open Internet Order, ¶ 92 ("Broadband users should be able to expect that they will be entitled to the same Internet openness protections no matter what technology they use to access the Internet.").

[131] ITTA Comments at 2.

[132] NPRM, ¶ 64.

[133] ACA Comments at 39, n.125.

regulation of broadband Internet access service to address any and all contingencies.[134] As AT&T explains, conditional forbearance from all Title II regulation would be a "belt and suspenders" measure to "address the contingency that a court or future Commission might seek to reinstate the Title II Order and the self-executing regulatory consequences of a 'telecommunications service' classification."[135] Doing so would provide important interim protections for ISPs, particularly smaller ISPs, on whom the costs of regulatory uncertainty fall the hardest. The Commission should grant this additional, conditional forbearance relief to alleviate any remaining regulatory uncertainty and ensure, to the greatest extent possible, a stable regulatory environment conducive to ISP broadband investment and innovation.

V. CONCLUSION

Having set itself upon a proper course with the NPRM, the Commission now has before it copious record evidence supporting action on its lead proposal to roll-back the application of Title II regulation and restore its light-touch regulatory approach under Title I, and it should proceed forthwith. In the event the Commission determines, however, that its existing statutory authority is insufficient to support adoption of any open Internet protections it finds necessary, the answer cannot be retention of the misguided and harmful Title II classification for broadband Internet access service. Rather, the answer is to assist Congress in its efforts to craft legislation to establish lasting, workable ground rules for the Internet ecosystem that will "'incentivize the

[134] *See, e.g.*, CenturyLink Comments at 31-32; AT&T Comments at 99-101.

[135] AT&T Comments at 99. ACA further agrees with AT&T that Section 10 forbearance is appropriate because common carrier regulation is: (i) not necessary to ensure that the charges or practices of ISPs are just and reasonable and not unjustly or unreasonably discriminatory; (ii) not necessary for the protection of consumers; and (iii) consistent with the public interest, and that the Commission has the authority to grant such "'conditional' forbearance from common carrier regulation even while finding that such regulation is legally precluded because broadband Internet access is an information service immune from common carrier treatment." *Id*. at 99-100; 47 U.S.C. § 160(a)(1)-(a)(3); AT&T Inc. v. FCC, 452 F.3d 830 (D.C. Cir. 2006). *See also* Fiber Broadband Association Comments at 7-14 (analysis of prices for broadband Internet access from 2011 to 2017 shows declining prices and increasing supply or quality in both rural and urban areas, the "hallmarks of a functioning market," where government intervention is not warranted).

huge investments needed to connect Americans, while keeping the internet open and protecting consumer privacy.'"[136]

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[136] Press Release, House Energy & Commerce Committee, #FullCmte to Hold Hearing with Leading Edge Providers and ISPs to Ground Rules for Internet (Jul. 25, 2017) (quoting Committee Chairman Greg Walden), https://energycommerce.house.gov/news/fullcmte-hold-hearing-leading-edge-providers-isps-ground-rules-internet/. *See* John Eggerton, *ISP, Edge Groups Talk Net Neutrality Legislation*, MULTICHANNEL NEWS (Aug. 10, 2017), http://www.multichannel.com/news/congress/isp-edge-groups-talk-net-neutrality-legislation/414531 (discussions included updates to earlier no blocking, no throttling or paid prioritization legislation; "with paid prioritization language that was flexible enough not to be a blanket prohibition, only prohibiting 'anti-competitive' or discriminatory paid prioritization).