Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF
THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These reply comments are offered in response to comments submitted in this proceeding that offer unjustified calls for harmful, stringent regulation of broadband Internet services or that offer unsupportable rationales for the Commission's authority to impose such regulations. The principal points raised in these reply comments are: (1) the Commission should *not* impose any new regulatory burdens in the form of net neutrality mandates on wireless broadband services; (2) the Commission should refrain from restricting or discouraging "paid prioritization" arrangements that offer potential benefits to consumers; (3) aside from the severe adverse consequences as a matter of policy addressed in our initial comments, reclassifying broadband Internet access as a Title II common carrier service is legally problematic; and (4) the Commission's proposals for regulating broadband Internet services are constitutionally problematic.

[*] These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

The continuing growth and dynamism of the "wireless ecosystem" would be severely threatened by applying net neutrality regulation in any form to wireless providers, including the Title II classification now urged by some commenters. Most of the innovative and in-demand components of the wireless ecosystem have never been subject to regulatory restraints. And wireless broadband Internet service has *never* been subject to Title II. Yet certain commenters have called for subjecting wireless broadband Internet services to Title II regulation that is considerably more heavy-handed than the Commission's Title II regulation of wireless narrowband voice services.

The Commission's *Mobile Services Order* (1994) deemed wireless voice services non-dominant "[b]ecause non-dominant carriers lacked market power to control prices." As such, they were considered "presumptively unlikely to discriminate unreasonably." Of course, the non-dominant status of wireless broadband providers is even more evident than was the case twenty years ago for wireless voice providers. According to the Commission's *Sixteenth Wireless Competition Report* (2013), as of October 2012, 97.8% of the population is served by 2 or more wireless broadband service providers, 91.6% by 3 or more, and 82% by 4 or more. Neither the Commission's *Open Internet Order* (2010) nor its *Notice of Proposed Rulemaking* (2014) offer any evidence of market power in the wireless segment of the broadband services market or any threat of harm to consumers of wireless broadband services.

These competitive conditions in the wireless broadband services market render completely unjustifiable various commenters' call for the Commission to now treat network data traffic "discrimination" by wireless broadband service providers as *per se* unreasonable or at least presumptively unreasonable. Technical constraints faced by wireless broadband providers in meeting high-speed, high data traffic demands by consumers also counsel against the

Commission imposing new regulatory mandates on wireless broadband services. The *Open Internet Order*'s acknowledgment that wireless broadband networks face "operational constraints that fixed broadband networks do not typically encounter" remains true, if not more so, today. Wireless broadband service providers must address technical challenges posed by spectrum scarcity, network capacity, device integration, and surging data traffic demand. According to the Cisco mobile data forecast for 2013–2018, global wireless data traffic will increase nearly 11-fold by 2018. It forecasts "a compound annual growth rate (CAGR) of 61 percent from 2013 to 2018." Accommodating surging wireless data traffic requires continued market freedom to pursue innovative network management solutions, not regulation of markets.

So, the Commission emphatically should reject the unfounded calls for it to impose any net neutrality regulations on wireless providers. But, assuming for the sake of argument that it wrongly takes a pro-regulatory position, the Commission should adopt a "commercially reasonable" multi-factor analytical standard that reflects competitive market realities. It should also be consistent with the *Mobile Services Order*'s policy regarding wireless voice services. That is, a "commercial reasonableness" standard should presume wireless broadband network management practices foster competition and benefit consumer welfare. And it should permit that presumption to be rebutted only by actual evidence of anticompetitive conduct.

The welfare of consumers should be the focus and deciding criterion for Commission broadband policy. What economists call "two-sided" market transactions offer likely benefits to consumers of broadband Internet services. The Commission should therefore reject calls by commenters for regulatory restrictions of "paid prioritization" transactions that potentially benefit consumers. Two-sided pricing might well prove beneficial to consumers and edge providers alike, if broadband Internet service providers possessed the freedom – which other

participants in a competitive marketplace possess – to experiment with various pricing models that reflect relative cost and value considerations.

A Commission-imposed regulatory regime, which in the name of preventing "discrimination" in effect would enforce the subsidization of heavier users by lighter users and thereby deter investment in facilities, would by no means necessarily be consumer-friendly. Such a regulatory regime would restrict an ISP's freedom to charge an edge provider for the use of the ISP's facilities as its customers access the edge provider's content and applications – even though the edge provider might willingly agree to pay the ISP for some form of premium access, such as ensured faster delivery. And it would by no means be consumer-friendly for lower-income persons who may prefer to forego faster or otherwise premium services in exchange for more affordable services.

Furthermore, regulatory prohibitions on network discrimination would amount to straightjackets on ISPs, preventing them from experimenting with new business models or service variations to spur or meet changing consumer demands. Likely pro-consumer innovative service offerings recently announced by AT&T, Sprint, and T-Mobile – which give consumers access to social networking, music, or other special applications at no cost to their data plans or for a small set fee – reinforce the need for the Commission to continue its policy of keeping wireless broadband Internet services free from network management and evolving business model regulatory restrictions. Those same innovations also make the case for a broader policy commitment to ensure marketplace freedom for all broadband ISPs.

Taking into account the absence of any apparent market power or likely consumer harm, the preferred approach is for the Commission to reject calls for regulatory prohibitions or policies that discourage two-sided market transactions such as paid prioritization. Antitrust

authorities could address any anticompetitive concerns that arise. Failing that, to the extent the Commission adopts some form of network management regulation, it should adopt a "commercial reasonableness" standard flexible enough to readily accommodate ISPs' differentiation of offerings. And it should presume that paid prioritization or other two-sided transactions involving broadband ISPs and edge providers benefit consumers. The burden of producing evidence of market power or consumer harm should rest on parties challenging such transactions.

Some commenters have made misguided calls for the Commission to subject all broadband Internet services to the same Title II public utility regulatory regime, which would have disastrous consequences for the Internet's dynamism. But Title II reclassification of broadband Internet access services – that is, classifying them as common carriers – also poses significant legal problems. Title II reclassification by the Commission would not likely survive a judicial challenge.

In defending its prior decision to classify broadband Internet services as information services – thereby removing them from the ambit of Title II regulation – the Commission concluded that, from a consumer's perspective, the transmission component of an information service is integral to, and inseparable from, the overall service offering. This functional analysis of ISPs' service offerings was the principal basis upon which the U.S. Supreme Court upheld the Commission's Title I classification determination in *NCTA v. Brand X* (2005).

In *Brand X*, the Court declared: "The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how

Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance...."

The Commission will have difficulty offering persuasive reasoning in support of an abrupt about-face on a point of established Commission policy that it successfully litigated all the way up to the Supreme Court. Having already resolved in the first instance the question of "the factual particulars of how Internet technology works and how it is provided," the Commission would now be hard-pressed to even reasonably argue opposite factual particulars. The integrated, inseparable nature of ISPs' service offerings – from a functional standpoint and from a consumer's perspective – has not changed since the *Brand X* decision. If anything, sophisticated network features and functions are even more integrated than in 2002 or 2005.

Constitutional problems also plague the Commission's proposals to impose net neutrality mandates on broadband Internet services. By characterizing broadband ISPs as "conduits of speech," the Commission's *Open Internet Order* attempted to push broadband Internet access services outside the scope of First Amendment protection. The *Open Internet Order* also tried to downplay the editorial decisionmaking of broadband ISPs, reducing it to a level of constitutional insignificance. Courts have recognized that First Amendment protections for editorial judgments about content apply with respect to newspapers and to modern mass media technologies. To the extent the Commission seeks to follow the approach urged by certain commenters in this proceeding and to re-adopt those aspects of the *Open Internet Order*, the Commission will place its new regulations on false foundations that run contrary to First Amendment protections.

A federal court will *not* readily allow an administrative agency to shrink the scope of constitutionally protected activity in order to regulate it. It will look past the Commission's relabeling attempt and look instead at the regulation's burden on speech and editorial activity.

Regulation that limits or infringes on broadband ISPs' editorial judgments – to the extent that such regulation dictates whether or to what extent broadband Internet service providers can or cannot block, filter, or otherwise decide what sort of content can travel through their networks – is constitutionally suspect. Yet the Commission's proposed new regulatory framework includes significant restrictions on editorial judgments by broadband ISPs.

Importantly, the First Amendment is a limit on government's power over private conduct. It is not a grant of power for government to regulate speech activity. The Commission's claims that it can impose net neutrality regulation in the name of promoting speech values likely will be rejected by a federal court since such claims turn the First Amendment on its head.

Lacking any substantial government interest to support its regulation, the Commission will have serious difficulty showing that a regulatory approach that outright prohibits data prioritization or other network management practices or places the burden on broadband ISPs of justifying such practices does not "burden substantially more speech than is necessary." The Commission could instead require a showing of anticompetitive conduct before engaging in regulatory intervention. The Commission could also clearly place the burden of proof on complainants alleging rule violations. But the Commission is proposing a more open-ended approach that gives the government expansive powers over speech in the Internet marketplace.

Absent the demonstration of any existing market power problem or likely consumer harm from broadband network management practices, the surest way for the Commission to ensure the broadband Internet services market's vibrancy and to avoid another legal setback is to refrain from yet another attempt to impose onerous regulations on broadband Internet services.

II. The Commission Should Not Impose Net Neutrality Mandate Burdens on Wireless Broadband Services

The continuing growth and dynamism of the "wireless ecosystem" would be severely threatened by new regulations, including the Title II classification now urged by some commenters. The reality is that most innovative and in-demand components of that ecosystem have never been subject to regulatory restraints. Wireless operating systems, content, applications and other data services such as text messaging are not directly subject to either Title I or Title II. Most of those services are likely beyond the Commission's jurisdiction.

Wireless broadband Internet service has *never* been subject to Title II. The Commission's *Wireless Broadband Order* declared wireless broadband Internet access service to be a Title I "information service" in significant part, to provide regulatory certainty to spur technological growth and deployment.[1] The explosive wireless broadband Internet service market has benefited from the certainty provided by light-touch regulatory treatment under Title I. But that regulatory certainty is now threatened by the proposed nondiscrimination and other mandates that would accompany reclassification of wireless broadband Internet service.

Certain commenters have called for subjecting wireless broadband Internet services to Title II regulation that is more heavy-handed than the Commission's Title II regulation of wireless voice services.[2] A brief review of Commission precedent sheds light on the unnecessarily stringent set of controls such commenters have called for and why the Commission should reject any Title II treatment of wireless broadband services.

The Commission's Title II policies for wireless voice originated with its *Mobile Services Order* (1994). There the Commission reiterated the logic of its *Competitive Carrier* docket decisions that "[b]ecause non-dominant carriers lacked market power to control prices and were

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[1] *Declaratory Ruling* ("*Wireless Broadband Order*"), Appropriate Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd 5901, 5909-10, ¶ 22 (2007).

[2] *See, e.g.*, Comments of Public Knowledge, *et al*., GN Docket No. 14-28, *et al*., at 23-30 (July 15, 2014); Comments of the Open Technology Institute at The New America Foundation and the Benton Foundation, GN Docket No. 14-28, *et al*., at 27-63 (July 14, 2014).

presumptively unlikely to discriminate unreasonably the Commission adopted for them a policy of forbearance from certain regulations."[3] Extending that logic to wireless voice service, the Commission granted forbearance relief to wireless carriers from several Title II provisions by classifying "commercial mobile service providers" as "non-dominant." Because wireless voice providers are classified as non-dominant carriers, any "discrimination" by them is treated as presumptively reasonable.

But commenters now call on the Commission to treat "discrimination" by wireless ISPs as *per se* unreasonable or at least presumptively unreasonable.[4] This despite the fact that wireless ISPs are undoubtedly non-dominant in terms of today's broadband marketplace. According to the Commission's *Sixteenth Wireless Competition Report* (2013), as of October 2012, 97.8% of the population is served by 2 or more wireless ISPs, 91.6% by 3 or more, and 82% by 4 or more.[5] In its *Open Internet Order*, the Commission offered no evidence of market power in the wireless segment of the broadband services market or any threat of harm to consumers of wireless broadband services. Same as before, the Commission's *Notice* presented no evidence of market power or likely consumer harm regarding wireless broadband network management practices. The abundance of consumer choice for wireless broadband services that the Commission has recognized in its *Report* renders such scenarios unlikely in the extreme. Given these competitive market conditions and absent factual evidence of anticompetitive conduct concerns, the Commission should preserve existing marketplace freedom for wireless innovation. That means

[3] *Second Report and Order*, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, 9 FCC Rcd 1411, 1416 (1994).
[4] *See, e.g.*, Comments of New America Foundation, at 25; Comments of Public Knowledge, at Comments of Free Press, GN Docket No. 14-28, at 47-53 (July 17, 2014).
[5] *Sixteenth Report*, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Services, Including Commercial Mobile Services, WT Docket No. 11-186, at 210, ¶ 332 (released March 21, 2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-34A1.pdf.

rejecting calls by commenters to impose network management regulations on wireless broadband services.

Technical constraints faced by wireless broadband providers in meeting high-speed, high data traffic demands by consumers also counsel against the Commission imposing new regulatory mandates on wireless broadband services. The Commission's acknowledgment in its *Open Internet Order* (2010) that wireless broadband networks face "operational constraints that fixed broadband networks do not typically encounter" remains true to this day.[6] As a paper by wireless technology experts Dr. Jeffrey H. Reed and Dr. Nishith Tripathi – submitted to the Commission in this proceeding – explains, technical challenges facing wireless networks include:

- scarcity of spectrum,
- dynamic radio channel conditions,
- the need to share radio resources among numerous users and user services with different Quality of Service (QoS) requirements,
- mobility,
- vast variability in loading due to both variations in user density per area and variations in usage and data rates,
- inherently complex process of network capacity growth, and
- integration of devices and network technologies with widely different data use and application capabilities.[7]

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[6] *Report and Order* ("*Open Internet Order*"), Preserving the Open Internet, GN Docket No. 09-91, *et al*. (released December 23, 2010), at ¶ 94-95, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf. *See also Notice of Proposed Rulemaking*, Protecting and Promoting the Open Internet, GN Docket No. 14-28 at 56, para. 159 (May 15, 2014) ("In evaluating the highly dynamic landscape for mobile wireless broadband Internet access, we recognize that there are technological, structural, consumer usage, and historical differences between mobile wireless and wireline/cable networks"); *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf; *id*. ("cellular wireless networks are shared networks…with limited resources typically shared among multiple users"); *id*. at 55, ¶ 157 ("[t]he manner in which the principles apply to mobile Internet access raises challenging questions, particularly with respect to the attachment of devices to the network and discrimination with regard to access to content, applications, and services, subject to reasonable network management"); *id* at 55, para. 157 ("mobile wireless networks are not as far along in the process of transitioning to IP-based traffic as wireline networks").

7 Dr. Jeffrey H. Reed and Dr. Nishith D. Tripathi, "Net Neutrality and Technical Challenges of Mobile Broadband Networks," at 4 (September 4, 2014) (submitted by CTIA, Protecting the Open Internet, GN Docket No. 14-28, et al. (September 4, 2014)), available at: http://apps.fcc.gov/ecfs/document/view?id=7521827714.

Although calls for wireless broadband networks to be subjected to new regulation may stem, in part, from concerns for technological neutrality,[8] these technical challenges unique to wireless networks warrant heightened concern for preserving marketplace freedom for wireless. Of course, a more proper concern for neutral treatment of different technologies counsels against imposing *any* burdensome network management regulation on any platform.

Importantly, the technical challenges for wireless broadband networks recognized by the Commission and also pointed out by Reed and Tripathi must be addressed amidst surging data traffic demand. According to the *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2013–2018*,[9] "Global mobile data traffic will increase nearly 11-fold between 2013 and 2018." It forecasts wireless data traffic growth "at a compound annual growth rate (CAGR) of 61 percent from 2013 to 2018, reaching 15.9 exabytes per month by 2018."[10] Spurred on by increasing wireless access to video content, and enabled by cloud technology, 4G network capabilities, smartphones, and tablets, the accommodation of such surging wireless data traffic requires continued freedom to pursue innovative network management solutions.

So, the Commission emphatically should refrain from imposing any new regulations on wireless providers. However, to the extent the Commission wrongly rejects this position and does impose new regulations, it should adopt a "commercially reasonable" multi-factor analytical standard that presumes wireless broadband network management practices to be reasonable. Such a standard can incorporate factors the Commission adopted in its *Data Roaming Order* (2011).[11] As explained in the Free State Foundation's initial comments in this

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[8] *See, e.g.*, Comments of New America Foundation, at 27, *et. seq*.
[9] *Id.* (February 5, 2014), available at: http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.html.
[10] *Id.*
[11] *Second Report and Order* ("*Data Roaming Order*"), Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile-data services, WT Docket No. 05-265 (April 7, 2011), upheld by *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

proceeding,[12] a commercial reasonableness standard should be calibrated to the dynamic and competitive conditions in the marketplace. This implies the use of deregulatory presumptions. "In other words, in light of the conceded technological dynamism and multiplatform competition that exists in the broadband marketplace, the proper approach for the Commission would be to presume that, absent clear and convincing evidence of market failure and consumer harm, the broadband ISPs' practices, including practices relating to the prioritization of services, are commercially reasonable."[13] The Commission should presume wireless broadband service providers are behaving in ways that foster competition and benefit consumer welfare, but permit that presumption to be rebutted by actual evidence of anticompetitive conduct.

Whereas a set of deregulatory presumptions matches the conditions of the broadband Internet services marketplace – including the wireless broadband Internet market segment – any commercial reasonableness standard that fails to presume wireless broadband network practices are reasonable fails to reflect technological and competitive realities in the market. Furthermore, a Title II approach that presumes that traffic prioritizing or other network management practices of wireless broadband ISPs are unreasonable or unjustly discriminatory would be even more disconnected from market realities. Any departure from the federal light-touch policy toward wireless services will result in regulatory burdens and uncertainties that will be detrimental to wireless innovation.

III. The Commission Should Refrain from Restricting or Discouraging "Paid Prioritization" Arrangements That Offer Potential Benefits to Consumers

Consumer welfare should be the focus and deciding criterion for competition policy. What economists call "two-sided" market transactions offer likely benefits to consumers of

[12] Comments of the Free State Foundation, GN Docket No. 14-28, at 16-18 (July 15, 2014), available at: http://apps.fcc.gov/ecfs/document/view?id=7521680052.
[13] *Id*. at 17.

broadband Internet services. The Commission should reject calls by commenters to impose regulatory restrictions on "paid prioritization" transactions that potentially benefit consumers.[14]

Two-sided pricing might well prove beneficial to consumers and edge providers alike, if broadband Internet service providers possessed the freedom – which other participants in a competitive marketplace possess – to experiment with various pricing models that reflect relative cost and value considerations. For example, it is well established that certain edge providers are responsible for generating outsized amounts of web traffic. If broadband Internet service providers were free to charge edge providers fees that reflected at least some of the outsized usage generated by them – and the associated costs imposed on ISPs' networks – this would mean that lighter users would not be forced, in effect, to subsidize those entities that generate much heavier use of the Internet providers' facilities.

A Commission-imposed regulatory regime, which in the name of preventing "discrimination" would enforce the effectual subsidization of heavier users by lighter users and thereby deter investment in facilities, would by no means necessarily be consumer-friendly. Such a restrictive regulatory regime constrains an ISP's freedom to charge an edge provider for the use of the ISP's facilities as its customers access the edge provider's content and applications – even though the edge provider might willingly agree to pay the ISP for some form of premium access, such as ensured faster delivery, in order to deliver a satisfactory consumer experience. And it would by no means be necessarily consumer-friendly for lower-income persons who may prefer to forego faster or otherwise premium services in exchange for the opportunity to choose more affordable services.

Furthermore, regulatory prohibitions on network discrimination would restrict ISPs' experimentation with new business models or service variations that may, in fact, meet changing

[14] *See, e.g.*, Comments of Public Knowledge, at 109-110.

consumer demands. To the detriment of consumers, regulatory straightjackets impede the innovation that normally occurs when businesses are free to differentiate their services. In this case, innovation would be impeded if regulatory restrictions discouraged ISPs from differentiating their services, leaving them, to a meaningful extent, all "stuck in the same boat."

The marketplace freedom in which competing wireless broadband providers operate has helped foster innovative and potentially consumer welfare-enhancing types of product choices applications. For example:

- Under AT&T's sponsored data plan, data charges on AT&T wireless service resulting from eligible uses are billed directly to the sponsoring company, rather than to the AT&T subscriber. The sponsored data plan operates in a fashion similar to the long-familiar 1-800 numbers that allow telephone customers to call toll-free, with the sponsor of the 800 number paying for the call.[15]

- "For about $12, Sprint Corp. will soon let subscribers buy a wireless plan that only connects to Facebook. For that same price, they could choose instead to connect only with Twitter, Instagram or Pinterest—or for $10 more, enjoy unlimited use of all four. Another $5 gets them unlimited streaming of a music app of their choice."[16]

- "T-Mobile US Inc. will let customers listen to several popular music services without counting it toward their data use, giving up a potential revenue source to bolster its subscriber base. The country's fourth-largest wireless carrier said it is going to waive data charges when subscribers use services like Spotify, Pandora and Rhapsody."[17]

These likely pro-consumer innovative service offerings reinforce the need for the Commission to continue its policy of keeping wireless broadband Internet services free from network management and operational regulatory restrictions. But those same innovations also make the case for a broader policy commitment to ensure marketplace freedom for all broadband ISPs.

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[15] *See* AT&T, Press Release: "AT&T Introduces Sponsored Data for Mobile Data Subscribers and Businesses" (January 6, 2014), available at: http://www.att.com/gen/press-room?pid=25183&cdvn=news&newsarticleid=37366&mapcode=consumer|mobile-devices.
[16] Ryan Knutson, "Sprint Tries a Facebook-Only Plan," *Wall Street Journal* (July 30, 2014).
[17] Thomas Gryta, "T-Mobile Will Waive Data Fees For Music Services," *Wall Street Journal* (June 18, 2014).

According to some Title II regulation proponents, all applications and content must be treated exactly in the same way – that is to say, with perfect "neutrality." In this view, it is a violation of network regulatory principles for Sprint to offer a low-budget plan that allows subscribers to connect only to Facebook and not to Myspace, or for T-Mobile to offer a plan that "zero-rates" data usage for certain popular music services but not for other music sites, or, say, popular poetry sites. Such an inflexible version of net neutrality, espoused most fervently by those who insist Internet providers must be classified as common carriers under "Title II" of the Communications Act is at odds with consumers' interests. A strictly neutral or non-discriminatory Internet – neutral in the sense of prohibiting all product differentiation and innovation along the lines of the Sprint and T-Mobile wireless plans – would be detrimental to consumer welfare.

Under certain market conditions, particular practices of Internet service providers, including wireless broadband providers, *possibly* might present competitive concerns that *could* harm consumers. But in the context of the current competitive marketplace, such concerns are much more hypothetical than real. In the present environment, if the next Google or next Facebook has an application or content site that is truly attractive to consumers, that entity most likely will be able to secure the financing and other backing that will allow it to compete. Indeed, the reality is that in order for the "next Google" or the "next Facebook" to compete against those well-entrenched giants, the putative new entrant might well be looking to negotiate some arrangement with a service provider that will give it a fighting chance of competing with the entrenched giants by differentiating itself.

Taking into account the absence of any apparent present market failure and consumer harm, the preferred approach would be for the Commission to reject calls for regulatory

prohibitions or policies that otherwise discourage two-sided market transactions such as paid prioritization deals. Antitrust authorities could instead investigate and address any anticompetitive concerns that arise. Failing that, to the extent the Commission moves forward to adopt some form of network management regulations, the preferred approach then would be adoption of a "commercial reasonableness" standard with enough flexibility to accommodate ISPs' differentiation of offerings. It should presume that paid prioritization or other two-sided transactions involving broadband ISPs and edge providers benefit consumers, placing the burden of producing evidence of market power or consumer harm on parties challenging such transactions.

IV. Reclassifying Broadband Internet Access as a Title II Common Carrier Service Is Legally Problematic

Some commenters have made misguided calls for the Commission to subject broadband Internet services to the same Title II public utility regulatory regime that applied to last century's POTS ("plain old telephone") service and to railroads.[18] For reasons set out in our initial comments to the Commission in this proceeding, we believe such an approach is unjustified in light of competitive conditions in the broadband marketplace and very unsound as a matter of public policy for promoting innovation. There is a long history demonstrating that Title II regulation represses investment and innovation and limits consumer choice.

But Title II reclassification of broadband Internet access services – that is, classifying them as common carriers – also poses significant legal problems. Consequently, Title II reclassification by the Commission would not likely survive a judicial challenge. The Commission should therefore reject such a course and avoid a Title II legal debacle.

[18] *See, e.g.*, Comments of Free Press; Comments of New America Foundation, at 22-27; Comments of Public Knowledge, at 60-80.

Under established administrative law principles, a federal agency may change its mind about prior policy choices and make different policy choices. But that an agency merely changed its mind is insufficient to avoid being deemed arbitrary and capricious by a court of law. An agency that jettisons existing policy precedents and instead pursues a different policy must at least provide a well-reasoned explanation for such a change. Counting the number of banging on pots and pans by protesters outside the Commission's doors, for example, is not likely to suffice as a reasoned explanation. Neither is expressing the Commission's frustration at already having been twice rebuffed for its alternative regulatory theories by the U.S. Court of Appeals for the D.C. Circuit.

The main reason the Commission's case for sustaining a Title II challenge would be problematic is this: In defending its decision to classify broadband Internet services as information services – thereby removing them from the ambit of Title II regulation – the Commission concluded that, from a consumer's perspective, the transmission component of an information service is integral to, and inseparable from, the overall service offering. This functional analysis of ISPs' service offerings was the principal basis upon which the U.S. Supreme Court upheld the Commission's Title I classification determination in its landmark decision in *NCTA v. Brand X* (2005).[19]

In *Brand X*, Justice Clarence Thomas's opinion for the Court declared: "The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance...."[20]

[19] 545 U.S. 967.
[20] 543 U.S. at 991.

As a matter of administrative law, so-called *Chevron* deference is typically given to agency decisions. But contrary to certain commenters,[21] invoking *Chevron* deference does not relieve the Commission of the need to provide persuasive reasoning in support of an abrupt about-face on a point of established Commission policy that it successfully litigated all the way up to the Supreme Court. Having already resolved in the first instance the question of "the factual particulars of how Internet technology works and how it is provided," the Commission would now be hard-pressed to now demonstrate – or at least reasonably argue – that those factual particulars are now the opposite of what they once were. The claim by some commenters that no facts are necessary for the Commission to change course appears to be a stretch,[22] given the importance of those "factual particulars" to the Commission's conclusion and to the Supreme Court's upholding of that conclusion. Rather, the technologically fact-specific nature of the Commission's policy suggests that at least some kind of change in factual circumstances is a necessary component to any conceivably reasonable explanation for a change in policy.

The integrated, inseparable nature of ISPs' service offerings – from a functional standpoint and from a consumer's perspective – has not changed since the Supreme Court's *Brand X* decision. If anything, the sophisticated network management practices observed by the Commission in its *Open Internet Order* and in its *Notice* are suggestive of ISPs' service offerings being even more integrated than in 2002 or 2005. There is no basis in the record for the Commission to now reasonably explain how it is changing its mind about the proper classification based on changed consumer perceptions of the service offerings' functionality.

V. The Commission's Proposals for Regulating Broadband Internet Services are Constitutionally Problematic

[21] *See, e.g.*, Comments of Public Knowledge, at 97. *See also* Comments of Free Press, at 83-87.
[22] *See, e.g.*, Comments of Public Knowledge, at 102. *See also* Comments of Free Press, at 83-87.

Constitutional problems also plague the Commission's proposals to impose net neutrality regulations on broadband Internet services. Although Fifth Amendment regulatory takings issues are implicated by the Commission's proposed regulations,[23] here we focus on the First Amendment issues raised by the *Notice* but effectively overlooked in many comments.[24]

By characterizing broadband ISPs as "conduits of speech," the Commission's *Open Internet Order* attempted to push broadband Internet access services outside the scope of First Amendment protection.[25] The *Open Internet Order* thereby tried to downplay the editorial decisionmaking of broadband ISPs, reducing it to a level of constitutional insignificance. To the extent the Commission seeks to follow the approach urged by certain commenters in this proceeding and to re-adopt those aspects of the *Open Internet Order*, the Commission will place its new regulations on false foundations that run contrary to First Amendment protections.

A federal court will *not* readily allow an administrative agency to shrink the scope of constitutionally protected activity in order to regulate it. Any Commission attempt to escape constitutional scrutiny by relabeling speech and editorial activities that it seeks to restrict as mere transmission is therefore misguided. A federal court will look past the Commission's relabeling attempt and look instead at the regulation's burden on speech and editorial activity.

Private actors, including persons acting in association through media corporations, possess freedom of speech rights in making editorial judgments about whether and what sorts of contents are delivered through their respective speech communication mediums. Courts have

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[23] For a critique of the rules established under the *Open Internet Order* based on Takings Clause jurisprudence, *see* Daniel A. Lyons, "The Coming Fifth Amendment Challenge to Net Neutrality Regulation," *Perspectives from FSF Scholars*, Vol. 5, No. 20 *(July 30, 2010), available at:* http://www.freestatefoundation.org/images/The_Coming_Fifth_Amendment_Challenge_to_Net_Neutrality_Regulation.pdf.

[24] *See Notice*, at ¶ 159. For a critique of the rules established under the *Open Internet Order* based on the First Amendment's Freedom of Speech Clause, 16-21, see Comments of the Free State Foundation, GN Docket No. 09-191, *et al*., at 16-21(January 14, 2010), available at: http://apps.fcc.gov/ecfs/document/view?id=7020369639.

[25] *See Open Internet Order*, at 78, ¶ 141.

recognized that First Amendment protections for editorial judgments about content apply with respect to newspapers.[26] They also apply to those engaged in editorial and other speech activities using modern mass media technologies such as cable TV companies.[27] Rulings by two federal district courts have treated broadband ISPs as deserving of free speech protection from government restrictions.[28]

It follows that regulation that limits or infringes on broadband ISPs' editorial judgments is constitutionally suspect to the extent that such regulation dictates whether or to what extent broadband Internet service providers can or cannot block, filter, or otherwise decide what sort of content can travel through their networks.

The Commission's proposed new regulatory framework includes significant restrictions on editorial judgments by broadband ISPs. Those restrictions include general prohibitions on the blocking or degrading of content.[29] ISPs are thereby prohibited from giving discriminatory, preferential treatment to certain types of content over others, depending on its source and the content message.[30] These rules are subject to exceptions, including where the FCC concludes it is reasonable to block or degrade certain types of content that consumers would not likely want, including spam or viruses.[31] But as Commissioner McDowell pointed out in his statement dissenting from the *Open Internet Order*: "[W]hat are acts such as providing quality of service (QoS) management and content filters if not editorial functions?"[32]

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[26] *See, e.g., Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974).
[27] *See, e.g.*, *Turner Broadcast Systems, Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).
[28] See *Illinois Bell Telephone Co. v. Village of Itasca*, 503 F. Supp. 2d 928 (N.D. Ill. 2007); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).
[29] *See Notice*, at ¶¶ 94-109.
[30] *See Notice*, at ¶¶ 94-109. *See also Notice*, at 113-116.
[31] *See Notice*, at ¶ 61.
[32] *Open Internet Order* ("Dissenting Statement of Commissioner Robert M. McDowell"), at 26.

Once First Amendment scrutiny is applied, the Commission's net neutrality regulatory restrictions on broadband ISPs' network practices will most likely be found unconstitutionally burdensome. Absent any evidence of market failure or consumer harm problems, the Commission will have difficulty establishing any "substantial" government interest being furthered by its regulation. Importantly, the First Amendment is a limit on government's power over private conduct — and not a grant of power for government to regulate speech activity. This means the Commission's claims that it can impose net neutrality regulation in the name of promoting speech values will be rejected by a federal court because such claims simply turn the First Amendment on its head.[33]

Lacking any substantial government interest to support its regulation, the Commission will have serious difficulty showing that a regulatory approach that outright prohibits data prioritization or other network management practices or places the burden on broadband ISPs of justifying such practices does not "burden substantially more speech than is necessary." It is easy to name a number of ways by which the Commission could limit the reach of its proposed regulation. For instance, the Commission could require a showing of anticompetitive conduct before engaging in regulatory intervention. But to date the Commission has instead adopted an open-ended approach that gives it expansive powers over the Internet marketplace. The Commission could also clearly place the burden of proof on complainants alleging rule violations. But here again the Commission has proposed requiring broadband ISPs to justify their actions by rebutting the claims of complainants who simply make a *prima facie* showing of alleged violations of the Commission's regulation.

In sum, whatever justification the FCC may have had to regulate Ma Bell as a "conduit for speech" during last century's analog age, or subjecting broadcasters to a Fairness Doctrine

[33] *See Notice*, at ¶ 159*; Order*, at 80, ¶ 146.

that required balanced presentations, there is no justification in today's digital age, with its abundance of media outlets and diversity of viewpoints, for infringing the First Amendment rights of broadband ISPs.

VI. Conclusion

In considering the *Notice* proposing new regulations for broadband Internet services, the Commission should act consistent with the views expressed herein.

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