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

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

REPLY COMMENTS OF INTERNET INNOVATION ALLIANCE

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Reply Comments of Internet Innovation Alliance

I. EXECUTIVE SUMMARY

To protect the innovation that has been a hallmark of the Internet ecosystem and to advance the overall mission of broadband deployment, the Commission should rely on its authority, reaffirmed by the *Verizon* court, under Section 706 of the Telecommunications Act of 1996 rather than on a radical proposal to reverse decades of Commission precedent and practice by reclassifying broadband services under Title II. Selective forbearance would pose serious legal and practical difficulties. Section 706 – the text of which speaks of the need to promote investment – presents the better alternative to protect the open Internet, protect consumers, and promote innovation.

The Commission did its job well in 2010; now, with the endorsement of the *Verizon* court, the Commission's authority under Section 706 is clear, while reclassification would deter investment and likely lead to years of further litigation, further depressing investment. European regulatory experience, as well, shows that heavy-handed regulation harms broadband investment. In sharp contrast, the experience of the cable industry shows that light touch regulation spurs investment. We join with those business leaders throughout the broadband ecosystem who urge

the Commission who oppose Title II, an antiquated regulatory framework designed for the era of monopoly telephone service, on the vibrant, competitive broadband Internet of today.

II. INTRODUCTION

On behalf of the Internet Innovation Alliance (IIA)[1], we appreciate the opportunity to submit Reply Comments to the Federal Communications Commission's ("FCC" or "Commission") proceeding on protecting and promoting the Open Internet, in particular regarding the competing merits of protecting the Open Internet through both the Commission's existing authority under Section 706 of the Communications Act of 1934 (the "Act")[2] and the option of reversing decades of precedent and practice by reclassifying broadband Internet access services as 'telecommunications services' subject to Title II of the Act.[3]

As our name implies, our core mission is to protect the innovation that has been a hallmark of the Internet ecosystem, in order to continue its rapid and robust evolution and deployment. All commenters presumably share the goal of rapidly advancing the overall mission of broadband deployment and adoption set forth by the Commission in its National Broadband Plan.[4] The continued success – and the future innovation – of our current Internet ecosystem, however, is seriously threatened by the proposal to reclassify broadband Internet access services under Title II. Indeed, it is hard to think of an action that would pose a greater threat to

[1] The Internet Innovation Alliance is a broad-based coalition of business and non-profit organizations that aims to ensure every American, regardless of race, income or geography, has access to the critical tool that is broadband Internet. The IIA seeks to promote public policies that support equal opportunity for universal broadband availability and adoption so that everyone, everywhere can seize the benefits of the Internet—education to health care, employment to community building, civic engagement and more. *Available at* http://www.internetinnovation.org/.

[2] Pub. L. No. 104-104, 110 Stat. 56; 47 U.S.C. § 1302(a), (b).

[3] 47 U.S.C. § 201(a) et seq.

[4] Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 37 (rel. Mar. 16, 2010) (*National Broadband Plan*), at xi.

innovation and continued growth of the Internet than the proposal to reverse existing and sound precedent by reclassifying broadband Internet access under Title II of the Act.

III. THE PARADOX OF RELYING ON ANTIQUATED "TITLE II" REGULATION AND FCC's FORBEARANCE AUTHORITY TO ADVANCE A VIBRANT AND ROBUST OPEN INTERNET IN THE 21st CENTURY.

We previously noted, in a different proceeding, the paradox created by organizations who purport to be consumer friendly and pro-broadband Internet, yet "express a preference for extending 20th century regulatory policies to new technologies, irrespective of whether or not the regulations make sense in a highly competitive 21st century telecommunications marketplace in which consumers rely on various alternative technologies that are far more robust than the antiquated telephone network."[5]

This paradox reappears in the Open Internet proceeding but with greater consequence to the nation's ability to achieve the goal of ubiquitous high-speed broadband deployment to all Americans. The FCC's IP transition effort mainly focuses on how best to protect potentially vulnerable or hard-to-reach consumers that remain reliant on voice telephony, while strongly supporting a transition that seeks to promote the widespread deployment of next-generation broadband technology. In this proceeding, various commenters that proclaim the virtues of broadband deployment actually support the agency's proposal to potentially graft monopoly-style regulation designed for antiquated telephone service onto the vibrant Internet[6], which is

[5] Comments of Internet Innovation Alliance, (filed August 7, 2013) , in *Technology Transitions Policy Task Force*, GN Docket 13-5, at 3 (internal citation omitted).
[5] Comments of the Internet Innovation Alliance, (filed Jan. 25, 2013), in *Comment Sought on the Technological Transition of the Nation's Communications Infrastructure*, GN Docket 12-353
[6] *See, e.g.*, Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 14-61 (rel. May 15, 2014) ("*2014 NPRM*"). Comments of Ad Hoc Telecommunications Users Committee, at i ("[T]oday's broadband Internet access is a 'telecommunications service' as Congress defined that term in Title II."); Comments of Center for Democracy & Technology, at 9 ("There is a strong argument that Internet access service, as it is offered and understood in today's marketplace, meets the statutory definition of "telecommunications service."); Comments of Consumer Federation of America, at 6 (Title II authority should be used both for "classifying new telecommunications services as Title II services" and "reclassifying broadband Internet access service as a telecommunications service."); Comments of Free Press, at 75 ("The Commission's

digital in nature, comprehensive in its extent, and competitive in reality. Taking this path would ultimately harm the American consumer, because any action that would subject broadband Internet access services to Title II regulation would deter investment in newer, better, faster, and more robust next-generation broadband infrastructure necessary to offer consumer increased choices, better services, and new applications.

In arguing for Title II regulation, several commenters reference selective application of the FCC's forbearance authority as an elixir to avoid the many unintended consequences associated with this approach.[7] To apply forbearance, however, one must embrace the fact, that by definition, it can only arise after jurisdiction has been asserted and regulation imposed. As commenters note, questions regarding which Title II regulations are waived and which entities would or would not receive forbearance relief will feed marketplace confusion and likely trigger a blizzard of forbearance petitions – most if not all of which would be fully justified – but result in diverting the Commission's time and resources away from other critical matters (*e.g.*, the IP transition, and the spectrum auction).[8]

In addition, if the Commission were to follow an approach, suggested in the NRPM,[9] not to provide forbearance from sections 201 and 202, it would then be hard to predict how this or a future Commission would apply those vague and broad statutory provisions in a broadband

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Classification Decisions Were A Change of Course, Based on Incorrect Assumptions and Inaccurate Predictions, and Must Be Revisited to Account For Changed Circumstances"); Comments of Public Knowledge, Access Sonoma Broadband, and Benton Foundation, at 2 (commenters "urge the Commission to adopt bright line open internet protections grounded in a firm legal basis. This means classifying broadband internet access as a Title II telecommunications service").

[7] *See, e.g.*, Comments of Consumer Federation of America, at 84 ("Reclassification of broadband would require proceedings to determine what will be regulated and how, including a blizzard of forbearance requests from network owners."); Comments of AARP, at 41 ("the FCC should reclassify and implement a policy of forbearance"; Comments of Center for Democracy & Technology, at 15 ("[i]t would be essential to couple Title II classification with forbearance from most provisions of Title II."); Comments of CompTel, at 4 ("the Commission can use its forbearance authority to the extent necessary to avoid any potential regulatory overreach involved with Title II reclassification.")

[8] *See generally Technology Transitions Policy Task Force*, GN Docket 13-5; *In the Matter of Amendment of the Commission's Rules with Regard to Commercial Operations in the 1695-1710 M MHz, 1755-1780 MHz, and 2155-2180 MHz Bands*, Report and Order, GN Docket No. 13-185 (March 31, 2014), *available at* http://www.fcc.gov/document/fcc-sets-stage-auction-65-mhz-spectrum-mobile-broadband-0

[9] *See, e.g. NPRM*

world. As one commenter noted, under those circumstances, uncertainty regarding what conduct would be prohibited would require ISPs "…to assess litigation risk, whenever, among other things, they engage in new anti-piracy measures, network-management techniques or commercial arrangements with any content provider or other "person, class of persons, or locality. And the same would be true of the other entities that necessarily would be swept within Title II by the Commission's reclassification decision."[10]

Title II proponents also generally fail to acknowledge the administrative and legal burdens associated with the Commission's oversight of the forbearance process.[11] In denying Qwest's petition for forbearance of certain wireline regulations in 2010, the agency significantly increased the burdens on parties seeking forbearance by raising its evidentiary standard for relief.[12] On review,[13] the Tenth Circuit affirmed the FCC's policy shift and new forbearance standard, yet warned that "goalpost-moving * * * does not reflect an optimal form of administrative decision making."[14] In light of the *Verizon* court upholding the FCC's policy change regarding its assertion of authority under Section 706,[15] it is extremely unlikely that another court would endorse a continued see-saw in regulatory requirements that would result if the Commission were to alter its existing standards for the forbearance process yet again. At bottom, the Tenth Circuit's decision underscores the already-strong likelihood that a Commission decision in favor of reclassification, and any petitions for forbearance arising thereunder, would be subject to years of administrative review and litigation that will serve only to reduce investment in next-generation broadband networks at a time they are sorely needed.

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[10] *See* AT&T Comments at 65.
[11] See supra, n. 7.
[12] *See Petition of Qwest Corp.* for Forbearance Pursuant to 47 U.S.C. S 160 (c) in the Phoenix, Arizona Metro. Statistical Area, Memorandum Opinion and Order, FCC 10-113 at paras. 21, 46, 58-61 25 FCC Rcd. 8622 (2010).
[13] *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1228-29 (10th Cir. 2012).
[14] *See* Id. at 1227-28.
[15] *Verizon v. FCC*, 740 F. 3d 623 (DC Cir. 2014)(reviewing Order, *Preserving the Open Internet et al., 25 FCC Rcd* 17905 (2010) ("Open Internet Order").

The potential for greater regulatory uncertainty created by the forbearance process further undercuts the rationale to pursue reclassification under Title II of the Act. Instead, such uncertainty would stifle innovation and dampen investment resulting in delay of broadband network deployment by network operators and dash the Commission's hopes for a rapid advancement towards the broadband future.

IV. SECTION 706 PRESENTS A BETTER ALTERNATIVE TO PROTECT THE OPEN INTERNET, PROTECT CONSUMERS, AND PROMOTE INNOVATION

"As the Commission itself has recognized through the launching of this proceeding, it must act to restore those rules that were disturbed by the Court's decision . . . [.]"[16] According to the agency,[17] the "small costs of imposing" those rules have in fact been "outweighed by the positive effect on network investment from the preservation of the openness that drives the virtuous circle, as well as the increased certainty in continued openness under the rules."[18] Access to private capital for investment in broadband networks has grown. Moreover, under the 2010 rules the nation witnessed a period of continued exponential growth in the digital app economy, video over broadband, and VoIP; the swift rise of tablet computing; and the rise of mobile e-commerce. In January, the well-respected Pew Center noted that 87 percent of Americans now use the Internet, up 8 percent from 2010, marking another "explosive adoption" of Internet usage.[19] Such independent data confirms the Commission's own finding that "the remarkable increases in investment and innovation seen in recent years—while the rules were in

[16] Statement of Chairman Tom Wheeler, Protecting and Promoting the Open Internet NPRM, GN Docket No. 14-28, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0515/DOC-327104A2.pdf
[17] Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 14-61 (rel. May 15, 2014).
[18] Id. at ¶27.
[19] Susannah Fox & Lee Rainie, The Web at 25 in the U.S. 4, Pew Research Internet Project (2014) http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf

place—appear to have borne out much of the Commission's view. Both within the network and at its edges, investment and innovation have flourished while the open Internet rules were in force."[20]

Comments filed in this proceeding demonstrate broad agreement on the need for agency action to restore the rules that were disturbed by the court's decision in *Verizon v. FCC*[21] and the need to create an environment that provides certainty for continued investment in the Internet ecosystem.[22] The FCC must now decide between two very different paths—use of Section 706 under the Commission's authority or a radical reclassification under Title II— to retain an environment that preserves its Open Internet policy goals and provides the groundwork to

[20] NPRM, supra n. 15 at ¶29 (internal citation omitted).
[21] *Verizon v. FCC*, supra, n. 13.
[22] See, e.g., Comments of Akamai, at 9-10 (internal citation omitted) ("A key factor contributing to this investment and innovation has been the relaxed regulatory environment in which the Internet ecosystem historically has been allowed to operate. While the original principles of Internet freedom—freedom to access lawful content, freedom to use applications, freedom to attach personal devices to the network, and freedom to obtain service plan information—remain valid and must be protected, imposing an additional regulatory overlay could slow innovation. Thus the Commission should act in this space with caution and humility. One significant concern is that new regulation can create uncertainty. In particular, vague or unclear regulatory requirements could stymie rather than encourage innovation. And aggressive assertions of authority can lead to litigation uncertainty and force industry into regulatory limbo. A second concern is that an unnecessarily regulatory framework could discourage continued investment in broadband infrastructure. . . . any slowing of investment in the underlying networks will make it more difficult for providers, like Akamai, to deploy innovative services and handle the vastly increasing volume of Internet traffic. Indeed, all players in the Internet ecosystem must work in tandem to provide consumers with the capabilities they demand. Without new investment in networks, the existing incentives to further innovate on those networks will diminish."); Comments of AT&T, at 1 ("For more than a decade, investment and innovation flourished throughout the Internet ecosystem despite the absence of any net neutrality rules. During that time, broadband Internet access providers poured more than a trillion dollars into next-generation networks capable of providing advanced services. That network investment paved the way for an explosion in content, applications, and services delivered over advanced networks. This remarkable growth in investment and innovation continued even after the Commission adopted net neutrality rules in 2010, in part because those rules successfully balanced concerns about Internet openness with the need to maintain incentives for Internet service providers to continue investing in advanced networks. The Commission should do nothing in this proceeding to upset that balance. Instead, the Commission should adopt targeted and flexible rules based largely on the 2010 model and thus promote continued investment and innovation by broadband and edge providers alike."); Comments of Charter, at 10 ("the "virtuous cycle" of continuous investment and innovation has been able to develop and flourish in this environment of self- and market-based regulation."), at 13 ("a climate of regulatory predictability and substantial private investment. Trying to fit broadband under the Commission's Title II authority would upend this climate, creating a prolonged period of legal uncertainty that would dampen investment and ultimately harm consumers."), at 15 ("Changing the rules midstream to classify broadband service as a "telecommunications service" under Title II would inequitably frustrate the expectations that informed these investments, while exposing broadband providers to a substantial range of new legal and regulatory risks that disincentivize further investment."); Comments of Communications Workers of America and National Association for the Advancement of Colored People, at 1 ("Preserving an open and free Internet consistent with the need to promote job-creating investment and closing the digital divide in our nation's high- speed networks is critical to safeguard our nation's economic, social, and democratic fabric and future."), at 2 ("the Commission must ensure that its Open Internet rules do not have the unintended consequence of dampening the private investment needed to build the next-generation broadband networks that will bring our nation's broadband capability up to global standards and create and maintain jobs."), Comments of Mobile Future at 7 ("The Commission should not impose new rules that would increase uncertainty and stifle innovation and investment, absent evidence that competitive constraints are not working effectively."), at 12 ("Now is not the time to start restricting providers' flexibility in ways that would discourage the must needed investment and innovation to achieve this goal.").

advance future broadband growth or begin anew under a different and more intrusive regulatory paradigm.

Reliance on Section 706 to protect consumers and ensure an Open Internet is a superior choice to the overbroad, utility-style regulatory framework of Title II.[23] The Commission did its work well in 2010; its rules found the proper balance between necessary regulation to advance goals such as consumer protection and the imperative of attracting new investment to broadband to ensure further deployments of ever-faster systems in today's reality of a highly competitive broadband market in which consumers have many choices of when and how to access broadband. Indeed, Section 706(a) speaks explicitly of "remov[ing] barriers to infrastructure investment."[24]

More importantly, reliance on Section 706 has already won the *Verizon* court's stamp of approval. The Commission may assert this authority today with confidence. The court's language could not be clearer:

> The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for the specific rules at issue here—that they will preserve and facilitate the "virtuous circle" of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence.[25]

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[23] "The D.C. Circuit's ruling in January of this year upheld our determination that we need rules to protect Internet openness, and upheld our authority under Section 706 to adopt such rules, even while it found that portions of the 2010 Open Internet Order were beyond the scope of our authority. In response, I promptly stated that we would reinstate rules that achieve the goals of the 2010 Order using the Section 706-based roadmap laid out by the court. That is what we are proposing today. * * * My preference has been to follow the roadmap laid out by the D.C. Circuit in the belief that it was the fastest and best way to get protections in place." Statement of Chairman Tom Wheeler, Protecting and Promoting the Open Internet, GN Docket No. 14-28, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0515/DOC-327104A2.pdf

24 47 U.S.C. § 1302(a)

25 Verizon v. FCC, at 628.

Broadband's future is much brighter given the *Verizon* court's affirmation of the FCC's authority and its direct reference to the agency's own work in promoting the "'virtuous circle' of innovation that has driven the explosive growth of the Internet." Only through innovation and continued "explosive growth" can the Nation meet the ambitious goals set forth in the National Broadband Plan and realize the benefits derived from the 21st century digital economy. This important national policy goal makes clear that that the Commission's decision in this proceeding should fall squarely in favor of Section 706 authority alone.

Yet some commenters choose to ignore the Commission's historic reliance on the "virtuous circle" policy[26] and its readily-available authority under Section 706 to effectuate that policy and instead press for radical proposals for regulating the broadband Internet much more aggressively and directly.[27] They appear to believe that an antiquated regulatory framework from the 1930s, designed to control monopoly telephone service, its prices, terms of service, entry and exit from the marketplace, and other aspects of business operations is appropriate for modern 21st century competitive, high-speed broadband services and infrastructure. Furthermore, advancing outmoded Title II regulations may have broader harmful implications for the Internet ecosystem beyond Internet Service Providers, if the Commission were to apply the definition of 'telecommunications service' more broadly to include services "offered" by other edge providers.

V. RECLASSIFICATION WOULD DETER INVESTMENT THROUGHOUT THE BROADBAND ECOSYSTEM

It is our hope that this consideration alone would lead the Commission to an easy decision in favor of asserting its authority under Section 706 and rejecting reclassification under

[26] See *Open Internet Order* at paras. 117,123.
[27] See supra n. 6.

Title II. Our comments, however, also focus on the dangers to investment and innovation if the agency were to adopt a comprehensive regulatory regime under Title II.

Despite the central role of private investment in the deployment of our nation's broadband networks and its delivery of significant social, civic, and economic benefits, certain commenters[28] assert that saddling new regulations on broadband would somehow not deter private investment on which the Internet ecosystem depends.

Free Press, for instance, boldly declares that

> We can say with extreme confidence that a return to Title II would not harm broadband investment because we lived through a period of time when Title II was applied across the industry. The historical data shows that the period of time following the implementation of the 1996 Act produced the greatest level of investment in the telecom industry that this country has ever seen. And most of that investment came from the companies subjected to the full force of the law. If Title II were bad for investment or business, that would show up in the data during this period. It doesn't.[29]

Free Press' reading of history, however, is both incomplete and inaccurate as to both the facts and the law.

No disagreement exists on one point: the period immediately following enactment of the 1996 Telecommunications Act – the first comprehensive reform of telecommunications regulation in six decades – was indeed an era of great ferment and hope in the telecommunications industry. Fed by a policy of "managed competition" that encouraged and prioritized wholesale access to last mile facilities, in the late 1990s and early 2000s many newly-formed competitive local exchange carriers (CLECs) invested billions of dollars in mainly non-last mile fiber facilities to compete for access to incumbent last-mile connections to mainly

[28] *See, e.g.*, Comments of AARP, at vii ("Reclassification will support Internet innovation and broadband investment.")
[29] Comments of Free Press, at 5-6, *available at* http://apps.fcc.gov/ecfs/document/view?id=7521701405

business end user customers – by one measure nearly as much as gross investment from ILECs.[30] Much of this investment, however, sadly proved uneconomic as faulty business models and redundant facilities were quickly exposed as investment capital retreated after the dot-com bubble of the late 1990s.

Free Press appears to limit its analysis to a short time period when the initial hope of "managed competition" policies rapidly inflated investment levels. In reality, misguided regulation helped contribute to investment quickly returning to pre-1996 Act levels.

Robust investment did not recover until after the Commission deregulated deployment of new fiber and packet-switch facilities in 2003 and later forbore from the separate unbundling requirements in Section 271 of the Act,[31] in order to encourage investment and deployment of next-generation networks.[32] The hallmark of those rules are a light-touch regulatory regime, not the heavy hand of regulation now being proposed for broadband under Title II.

Broadband investment under the FCC's post 2003 light-touch regime soared. Former FCC Chief Economist Leslie Marx developed[33] a chart highlighting the interplay between the miles of optical fiber installed in the U.S. and the level of the NASDAQ Composite Index (an appropriate comparison given how many CLECs chose to list their securities on the NASDAQ market). The chart shows high levels of investment at the peak of the dot-com bubble, falling investment thereafter, and investment climbing steadily (with a dip during the financial crisis of

[30] "The empirical evidence connecting competition to telecom investment is striking. During 1996-2000, over a third of gross investment was done by the CLECs even though their revenue was only one fifteenth that of the ILECs. In 2000, at the peak of the investment boom, CLECs invested $25 billion, which almost matched the $27 billion of gross ILEC investment." Kevin A. Hassett and Laurence J. Kotlikoff, The Role of Competition in Stimulating Telecom Investment, (Oct. 2002) (internal footnote omitted), available at http://internetinnovation.org/images/misc_content/study-telecommunications-competition-09072013.pdf, citing to Dale Jorgensen, "Information Technology and the U.S. Economy," 91 *American Economic Review* (March 2001), 1-32.

[31] Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. S 160(c), 19 FCC Rcd 21496 (2004).

[32] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978 (2003).

[33] Leslie Marx, "Commissioner Pai's Principles," (July 31, 2012), available at http://sites.duke.edu/marx/category/telecom/broadband/

the last decade) in the period *after* the Commission began its policy of regulatory forbearance under the *Triennial Review Order* in 2003.

Marx's chart helps demonstrate the telecom investment story in the period following enactment of the Act. Similarly, as Professor Anna-Maria Kovacs of Georgetown University noted in a recent study,[34] that from 2006 to 2011, incumbent local exchange network operators invested $154 billion in their networks, while cable operators invested $81 billion over the same period.[35]

Also, at first glance, Free Press' investment data appear significant, yet under scrutiny one quickly realizes an apparent sleight of hand. Specifically, Free Press offers high level aggregated investment data that fails to note whether those capital dollars were allocated to incumbent telephone provider facilities and services subject to Title II regulations or to their various facilities and enterprises not subject to regulation.

In contrast, Dr. Kovacs in her study divides total network operator investment into two parts: investment in the broadband networks of the future and investment in older, TDM-based networks. During the late 1990s, much investment was made in the backbone facilities not subject to Title II, and many operators continued to derive significant revenue (supported by significant capital expenditures) on services such as long distance telephony that even now remain clearly within the scope of Title II consistent with Congress' intent in the Act.[36] Nor (at the Commission's explicit decision) were separate ISP affiliates of covered telephone network

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[34] Anna-Maria Kovacs, "Telecommunications competition: the infrastructure-investment race," *available at* http://internetinnovation.org/images/misc_content/study-telecommunications-competition-09072013.pdf.

[35] Id. at 20, citing to Robert C. Atkinson, Ivy E. Schultz, Travis Korte, and Timothy Krompinger, **Broadband in America**, 2d Edition, May 2011, table 5, at 42.

[36] *See* Jonathan Lee, "Free Press' Mistaken (and Misleading) Theory on Title II and Investment)Pt. 1), TeleComSense.com, Sept. 2, 2014, available at http://www.telecomsense.com/2014/09/free-presss-mistaken-and-misle.php (Free Press tracks capex for a number of telecom carriers over time. But, by using aggregate enterprise capex, Free Press is primarily tracking capex for *Title II services in all relevant periods*. Notwithstanding the regulatory classification of one residential service, the majority of the revenue produced by these firms' networks still comes from Title II services (e.g., both AT&T and CenturyLink reported record numbers of residential broadband customers in 2Q 2014, but this service only comprised ~16.5% of total firm revenues for both firms).')

operators subject to Title II as well. It is simply inaccurate, therefore, to credit Title II with the explosion in investment that occurred after enactment of the Act.

Title II, therefore, did not provide a "virtuous" capital trajectory given that the great bulk of investment in the broadband Internet ecosystem – and unquestionably *all* of the investment from "edge" and cable companies – occurred within a competitive and significantly less regulatory environment. The Clinton Administration wisely began the path toward a policy of treating broadband as an information service rather than as a telecommunications service in part because of its desire to spur the "competitive development of the enhanced-services industry."[37] Despite that history, Free Press and other commenters nevertheless continue to believe that reversing that decision nearly twenty years later will somehow lead to greater investment. The virtuous circle, which depends on private investment, will be advanced only by a decision to proceed with the Commission's authority under Section 706 rather than by a reclassification of broadband services under Title II.

More broadly, history is also witness to how a light-touch regulatory environment extended across all sectors of the broadband ecosystem has benefitted consumers through the deployment of new modern broadband networks – wireline, wireless, and cable. Light-touch regulatory environments have led directly to the cross-platform facilities-based competition for voice, video, and Internet services that American consumers enjoy today.

Moreover, rather than embrace rules crafted under a Section 706 framework designed to ensure an Open Internet, proponents of a more regulatory burdensome, outmoded, and inflexible Title II approach fail in this proceeding to identify any actual existing harms in the broadband marketplace that necessitate imposing a severe regulatory framework on the provision of broadband throughout the nation.

[37] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, at para. 46 (1998).

VI. EUROPEAN REGULATORY POLICIES DEMONSTRATE THAT BURDENSOME REGULATION DETERS BROADBAND INVESTMENT

The European broadband experience is a helpful guide for the FCC as it considers how best to preserve an Open Internet here at home. Once the world's leader in broadband deployment, Europe relinquished its leadership position when it embarked on a path toward heavy-handed regulation that deterred broadband investment and deployment. The lessons of this experience provides valuable insight as to why our nation's decision makers should resist from experimenting with Title II regulation for broadband networks and services here.

Christopher Yoo at the University of Pennsylvania Law School's Center for Technology Innovation recently released a paper[38] that identifies the sharp contrast in broadband deployment between the U.S. and Europe and the experiences of U.S. and European consumers. According to his work, fully 82% of U.S. consumers enjoy access to next-generation networks (defined as speeds over 25 Mbps); for Europe, the comparable figure is 54%.[39] In rural areas, the U.S. again leads in access, 48% to 12%.[40] Next generation wireless broadband (LTE) is available to 86% of Americans but only 27% of Europeans.[41]

Given these figures and the contrast between deployment of advanced broadband services in the U.S. and Europe, the ultimate conclusion of the report is as unsurprising as it is dramatic: U.S. broadband network operators invest more than *double* per household than Europe does: $562 here and $244 in Europe.[42] Similar data are presented in a study by Copenhagen Economics in a study of telecommunications infrastructure investment.[43]

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[38] Christopher S. Yoo, "U.S. v. European Broadband Deployment: What Do the Data Say?," *available at* https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment (June 2014). "Europe" is defined in the study as the member states of the European Union, plus Iceland, Norway, and Switzerland.
[39] Id. at 4.
[40] Id. at 5.
[41] Id. at 8.
[42] Id. at 13.
[43] Martin H. Thielle and Dr. Bruno Basilisco, "Europe Can Catch Up With the U.S.: A Contrast of Two Contrary Broadband Models," *available at*

The key difference between U.S. and European regulation of broadband, of course, is that the European Union broadband policies are built on extensive, public utility-style regulation, including wholesale unbundling requirements. As Yoo writes,

> Europe has relied on regulations that treat broadband as a public utility and focus on promoting service-based competition, in which new entrants lease incumbents' facilities at wholesale cost (also known as unbundling). The U.S. has generally left buildout, maintenance, and modernization of Internet infrastructure to private companies and focused on promoting facilities-based competition, in which new entrants are expected to construct their own networks. Regression analysis indicates that the U.S. approach has proven more effective in promoting NGA [next-generation network] coverage than the European approach.[44]

With lower investment, the European approach necessary leads to significantly less ambitious broadband goals than those the Commission seeks for American consumers and the American economy. As Dr. Kovacs wrote earlier this year, the contrast is stark (emphasis added):

> However, the *goals* of the EU's Digital Agenda lag U.S. *achievements*. The target for the EU for 2013 was universal coverage at one Mbps, achieved with the help of satellite for three million people who live in rural areas. The target coverage for 100 percent of Europeans by 2020 — that's right, by 2020 — is 30 Mbps, and for 50 percent is 100 Mbps. Europe is 54 percent of the way to its 30 Mbps goal, and two percent of the way to its 100 Mbps goal. In 2013, one million Europeans used LTE.[45]

The European experience demonstrates how a Title II-like regime would inhibit the United States from achieving the deployment and ubiquitous broadband adoption goals set out in the National Broadband Plan. Following Europe would force us to modify or reduce our ambitious

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http://www.copenhageneconomics.com/Files/Filer/Publikationer/Europe%20can%20catch%20up%20with%20the%20US%20-%20A%20contrast%20of%20two%20contrary%20broadband%20models.pdf (June 2013).

[44] Yoo, *op cit.* n. 31, at i.

[45] Anna-Maria Kovacs, "The Internet is not a rotary phone," *Re/code*, May 12, 2014, *available at* http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/ .

broadband deployment goals and accept the associated harms to consumers and to the economy as a whole that would result. That price is too high to pay.

The regulatory structure a nation chooses directly affects availability and quality of broadband. The light-touch regulatory model the Commission wisely adopted at the dawn of the Internet era has brought greater investment in broadband, greater adoption of broadband, and faster speeds for broadband. In September 2013, the European Commission noted that "Telecoms networks are the foundation of the wider digital economy. Every sector now depends on connectivity. This means today's telecoms sector is holding back the rest of the economy. Networks are too slow, unreliable and insecure for most Europeans; telecoms companies often have huge debts, making it hard to invest in improvements. We need to turn the sector around so that it enables more productivity, jobs and growth."[46]

If we decide to regulate broadband as a Title II service, a future FCC may deliver similar remarks someday as the United States falls behind as a result of declining broadband investment such as Europe has experienced. And yet Free Press and other commenters somehow think that switching to a European model of regulation through reclassification under Title II will bring greater investment. The data prove that investment would stagnate, as it has it Europe, and the United States would fall behind in the global race toward a 21st century digital economy made possible by fast, reliable, and ubiquitously available broadband.

VII. THE CABLE BROADBAND EXPERIENCE PROVES THAT LIGHT-TOUCH REGULATION DRIVES INVESTMENT

We can better understand the positive impact of light-touch regulation to advance broadband deployment by also observing the progress of cable networks here at home. Investment in cable broadband has provided a competitive alternative for voice and Internet

[46] "Commission adopts regulatory proposals for a connected Continent," *available at* http://europa.eu/rapid/press-release_MEMO-13-779_en.htm.

services for consumers across the nation.

The Commission, in its 2002 *Cable Modem Order*, classified cable modem service as an "information service" not subject to the onerous provisions of Title II.[47] As the *Verizon* court noted, cable broadband providers "were entirely exempt from Title II regulation."[48] The Commission took this action, as it stated at the time, as one "of a series of actions, designed to promote widespread broadband access."[49] Its expectations have come true. An analysis by Georgia State University[50] showed that cable industry capital investment was high during the dot-com boom from 1999 to 2001, lowered in the aftermath of the dot-com bust, but in 2004 grew steadily to 2007 (the end year of the study). National Cable and Telecommunications Association figures[51] show a total of $213 billion invested since enactment of the Telecommunications Act in 1996, with the vast majority of that investment following the *Cable Broadband Order* show that strong cable investment has continued since the *Open Internet Order* in 2010. This is consistent with the strong levels of investment we have seen across all broadband technologies since the *Open Internet Order*; for instance, the light touch "regulatory framework has also helped facilitate over 90 billion dollars in investment by providers in advanced wireless networks since 2010, and billions more in investment by application providers, vendors, and device manufacturers."[52]

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[47] *See Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, 17 FCC Rcd 4798 ("Cable Modem Order") (affirmed by the U.S. Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

[48] *Verizon v. FCC*, supra n.13, at 9.

[49] Federal Communications Commission, "FCC Classifies Cable Modem Service as "'Information Service,'" March 14, 2002, *available at* http://transition.fcc.gov/Bureaus/Cable/News_Releases/2002/nrcb0201.html.

[50] Steve Corley, et al., "Cable Industry Analysis," n.d., available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC0QFjAC&url=http%3A%2F%2Fwww.rdhawan.com%2Femba%2FClass08%2FCable_Tv.ppt&ei=Njr7U7rqOc2cyASO4IKIDA&usg=AFQjCNFcyss5iQFwKPJHgQiRopbJ8exCKA.

[51] *See*, National Cable and Telecommunications Association, "Setting the Record Straight on Broadband Investment," *Platform*, May 13, 2014, available at https://www.ncta.com/platform/public-policy/setting-the-record-straight-on-broadband-investment/#.U3JUf4ARs94.twitter

[52] Comments of CTIA, at 3, citing to Robert Roche and Liz Dale, *CTIA's Wireless Industry Indices, Annual Wireless Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry*, rel. June 2014, at p. 96, Table 29.

VIII. LEADERS ACROSS THE INTERNET INDUSTRY AGREE THAT SECTION 706 IS THE CLEAR CHOICE TO PRESERVE INVESTMENT

The debate over the 2010 *Open Internet Order*, and that in the current proceeding, have been highly contentious with strong passions expressed on all sides and dire warnings about the future of the Internet. The earlier proceeding led to extended litigation, and reclassification of broadband services under Title II could easily lead to extended administrative battles and litigation as well.

Given the strong passions that all parties demonstrate in the cause to preserve an Open Internet, the Commission should pause and consider what is truly at stake in this proceeding. *All* concerned parties, including IIA, fully accept the Commission's determination that matters concerning such areas as consumer protection, universal service, privacy, security, and reliability are appropriate for regulation in this and other contexts.[53] Those subjects are not at issue in this proceeding; the question is *how* the Commission will exercise its appropriate jurisdiction in these areas. The Commission already possesses ample authority, affirmed by the *Verizon* court, under Section 706 to address threats to openness by adopting its proposed "commercial reasonableness" standard and adjudicating any complaints that arise under a "case-by-case" approach. No sufficient rationale has been offered by commenters to push the agency toward adopting utility-style regulation for broadband providers (and, potentially, edge companies) to achieve this basic goal. Commenters who suggest otherwise operate from a mistaken premise.

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[53] See FCC, Commissioner Mignon L. Clyburn, Statement Re: Technology Transitions Policy Task Force Trials, May 10, 2013, p. 1; FCC, Commissioner Jessica Rosenworcel, Statement Re: Technology Transitions Policy Task Force Presentation, December 12, 2013, p. 1.; FCC, Commissioner Ajit Pai, "Two Paths to the Internet Protocol Transition," Remarks at the Hudson Institute, March 7, 2013, p. 6; FCC, Chairman Thomas E. Wheeler, *Statement Re:Technology Transitions GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Connect America Fund, WC Docket No. 10-90; Structure and Practices of the Video Relay Service Program, CG Docket No. 10-51; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123; Numbering Policies for Modern Communications, WC Docket No. 13-97*, January 30, 2014, p. 1; *see also* James W. Cicconi, "Public Knowledge's White Paper on the IP Transition: A common sense framework," AT&T Public Policy Blog, June 24, 2013; available at http://www.attpublicpolicy.com/fcc/public-knowledges-white-paper-on-the-ip-transition-a-common-sense-framework.

The issue before the FCC is not whether to "regulate" or "not regulate"; it is whether and how to continue pursuing the current light-touch regulatory regime under which the Commission may use its Section 706 powers as warranted or whether to adopt an intrusive regime of *ex ante* regulation designed for an era of monopoly telephone regulation.

Only private investment, not *ex ante* regulation, will achieve the nation's ambitious broadband goals and help support the hundreds of thousands of jobs already in the digital economy. As the Commission's "virtuous circle" policy reflects, investment is a critical factor to consider in adopting regulatory and policy decisions regarding deployment of new technologies. Private investment, in turn, is encouraged only when investors have certainty in knowing their investments will be secure and not subject to sudden changes in regulation. Years of regulatory uncertainty will not foster investment nor secure the path to the broadband future.

In this regard, an earlier submission in this proceeding, from Cisco CEO John Chambers, is particularly noteworthy.

> By keeping the heavy hand of Title II regulation out of the Internet, the FCC has encouraged huge investment in Internet infrastructure. Indeed, over $60 billion per year is spent to improve broadband networks of all types. Cisco's Visual Networking Index demonstrates the enormous explosion of Internet traffic that U.S. networks currently handle and that U.S. networks are starting to become world class again. Our research indicates, for instance, that almost 50% of the world's LTE subscribers are in the United States – a clear result of investment encouraged by sound FCC policy.
>
> If Title II regulation is brought to broadband Internet access services, investment in new infrastructure will be severely hamstrung. New, innovative services may not be brought to market because entrepreneurs fear telecommunications regulation. The competitiveness of our nation will be threatened because, in a global world, investment and jobs will move to countries that encourage innovation.
>
> I am passionate about this issue because it is crucial to the future of the Internet. Will we have rules that only seek to protect innovation on the edge of the network by imposing onerous regulation on the core of the network? Or will we take a balanced approach that encourages innovation everywhere in the Internet ecosystem while protecting consumers

> and competition? I strongly urge the FCC to take the balanced approach as it deliberates on this important proceeding.[54]

We agree with Chambers; our focus should be on the question of the balanced approach. We believe the FCC found the right balance in 2010 and that it may once again find the right balance, with the clear endorsement of the Federal courts, by asserting its authority under Section 706. In contrast, Title II is decidedly *un*balanced, tilting the Internet sharply towards a very different, regulatory model.

Similar sentiments were expressed in a letter to the Commission[55] signed by the Chief Executive Officers of 28 American corporations representing a wide range of entities within the Internet ecosystem that noted their strong desire to work with the Commission to:

> seek out a path forward together. All affected stakeholders need and want certainty and an end to a decade of legal and political wrangling. All parts of the Internet community should be focused on working together to develop next-generation networks, applications, and services that will be critical to our global competitiveness and enhance opportunities for all Americans. Yet, those demanding the Title II common carrier approach are effectively compelling years—if not decades—of endless litigation and debate. The issues at stake would include not simply regulating the Internet under Title II, but also which specific provisions of the monopoly-era statute apply to modern broadband networks. Collectively, we would face years more of uncertainty and, as a result, an economy deprived of the stable regulatory framework needed to promote future investment, innovation and consumer choice.

We again strongly agree. One path before us leads to (at best) bureaucratic challenges, litigation and uncertainty that would dampen investment and stop innovation in its tracks; the other leads to an even greater expansion of the innovative path that has brought modern, competitive broadband networks to hundreds of millions of Americans and that is poised to deliver the full promise of next-generation networks, with attendant benefits for the American economy.

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[54] See *Ex parte* Letter from John T. Chambers, Chairman and Chief Executive Officer, Cisco Systems to FCC Chairman Thomas Wheeler, GN Docket No.14-28, http://apps.fcc.gov/ecfs/document/view?id=7521124140 (May 13, 2014).

[55] See *Ex parte* Letter signed by 28 Chief Executive Officers to FCC Chairman Thomas Wheeler, GN Docket No.14-28, : http://apps.fcc.gov/ecfs/document/view?id=7521123455 (May 13, 2014).

IX. CONCLUSION

The choice seems simple. As we noted earlier, [56] in our analogy to the Commission's work on the important transition to IP networks. That analogy is not merely theoretical or even based on the respective policy preferences of commenters but is grounded in cold, hard facts. Unduly burdensome regulation depresses investment in broadband and thus, at best, leads to stasis rather than progress in communications. Just as we enthusiastically agree with the Commission on the importance of the transition to all-digital networks, now, the question is which policy – reliance on Section 706 or an unprecedented reclassification of broadband – will best advance that transition. No agency can repeal the laws of economics. The economy cannot afford an experiment with Title II regulation. By deterring investment in broadband and miring the Commission in potentially hundreds of requests for forbearance from Title II regulation – easily avoided by asserting jurisdiction under Section 706 – reclassification would not only harm the broadband Internet but delay other important goals of the Commission and national telecommunications policy, goals that are critical to American competitiveness in the 21st century digital economy.

Respectfully Submitted,

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[56] Supra, at 3.

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