Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Protecting and Promoting the Open Internet	)	GN Docket 14-28
	)	
	)	
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COMMENTS OF AT&T SERVICES, INC.

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March 21, 2014

TABLE OF CONTENTS

INTRODUCTION AND EXECUTIVE SUMMARY

The D.C. Circuit's remand in *Verizon*[1] requires the Commission to fine-tune its net neutrality rules, at least insofar as they apply to fixed broadband Internet access services.[2] As a result of *Verizon*, any nondiscrimination requirement must be narrowly tailored to address only true threats to Internet openness that emerge from the record developed in this proceeding. But this required tailoring will in no way undermine the rules' intended purpose. To the contrary, with the modest changes described below, the Commission's new rules would more fully and directly promote the goal of a free and open Internet that catalyzes innovation and investment. In short, the Commission should follow the court's directive and permit ISPs "to make individualized decisions, in particular cases, whether and on what terms to deal" with edge providers,[3] without any common-carrier-like constraints on the outcomes of those dealings. At the same time, the Commission can prohibit *commercially unreasonable* conduct that deters investment in advanced telecommunications capability by stifling the openness of the Internet.

That more targeted and flexible approach would be consistent not only with *Verizon* but also with the approach that the D.C. Circuit blessed in *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012), in upholding the Commission's *Data Roaming Order*.[4] The D.C. Circuit upheld that Order precisely because, at least on its face, it permitted providers to negotiate customer-specific offerings with no requirement that those offerings be generally available.

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1 *See generally Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (reviewing Report and Order, *Preserving the Open Internet et al.*, 25 FCC Rcd 17905 (2010) ("*Open Internet Order*")).

2 These comments focus solely on how the Commission should proceed with respect to the no-blocking and nondiscrimination rules applicable to fixed broadband services. We do not address here the separate no-blocking rule for mobile broadband.

3 *Verizon*, 740 F.3d at 651.

4 *See* Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011) ("*Data Roaming Order*").

Here, too, the Commission must allow ISPs the flexibility to engage in individualized negotiations with edge providers, subject to the proviso that an ISP not engage in commercially unreasonable conduct.

Such an approach not only would be lawful under binding precedent; it also would make abundant policy sense. In fact, allowing individualized negotiations in the mine run of cases would promote many of the same goals that the net neutrality rules are designed to further. For example, broad net neutrality rules are often justified as necessary to protect fledgling edge providers and those who seek to bring innovative new applications to market. But permitting individualized arrangements with ISPs often would *benefit* smaller, innovative edge providers by enabling them to overcome more established players' large capital investments in physical infrastructure. And empowering edge providers and ISPs to negotiate whether and on what terms to deal would promote the public interest in other ways as well. Empirical studies in a variety of contexts have shown that vertical arrangements are much more likely to promote competition than hinder it. And in the Internet space, allowing ISPs to recover some of their network costs directly from edge providers would benefit consumers by decreasing the cost of broadband service. And this, in turn, would increase the demand for broadband Internet access, spurring ISPs to deploy more and faster broadband infrastructure. Permitting individualized deals also would promote the development of cutting-edge network features (and with them, innovative applications that use those features) because ISPs could recover the costs of such network upgrades directly from the edge providers that make use of them. Finally, such rules also would enable ISPs and edge providers to efficiently determine which innovative new applications require quality-of-service enhancements that only ISPs can deliver.

Importantly, allowing ISPs to differentiate among edge providers in commercially reasonable ways would not prevent the Commission from addressing conduct that truly threatens an open Internet, should such conduct occur. To the contrary, *Verizon* requires only that any new rules be narrowly tailored and focused on situations that present real threats to Internet openness. To ensure that its new rules are consistent with this directive, the Commission should ground them in facts, not speculation, and common sense reality, not rhetoric.

It is also important that any new rules balance the need for flexibility in addressing particular actions with the benefits of regulatory certainty. As the Commission has long recognized, regulatory uncertainty is the enemy of investment and thus is antithetical to the broadband deployment objectives of section 706.[5] Accordingly, the more clarity and guidance the Commission provides in advance, the better. To that end, the Commission should establish a safe harbor for non-exclusive arrangements entered into with unaffiliated providers of Internet content, services, or applications. ISPs have neither the incentive nor ability to harm Internet openness in derogation of section 706 goals in these circumstances, and subjecting them to case-by-case regulatory scrutiny would unnecessarily impede efficient and pro-consumer arms-length commercial dealings. For arrangements that do not fall within that safe harbor, the Commission should employ a case-by-case analysis that examines the competitive effects, if any, of the arrangement, as well as other factors similar to those contained in the *Data Roaming Order*. In conducting this case-by-case analysis, the Commission should evaluate each arrangement or practice independently through a fact-specific and data-driven approach that appropriately weighs both the benefits *and the costs* of interfering with a particular negotiated arrangement.

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[5] 47 U.S.C. § 1302.

That approach would be consistent with the Commission's rules in other areas, such as program access, where it assesses vertical arrangements on their unique facts, only condemning those arrangements that are shown to be harmful to the public interest. It would also be in line with modern antitrust doctrine and with basic regulatory best practices, which recognize that regulations always introduce competitive distortions and unintended consequences, and which therefore limit government intervention to situations in which private arrangements inflict identifiable harm.

The balance of these comments is organized as follows. Part I discusses the D.C. Circuit's opinion in *Verizon* and the options that remain open to the Commission following that decision. In particular, we outline the legal basis for a targeted approach to regulation of fixed broadband Internet access services that proscribes only "commercially unreasonable" discrimination and that allows ample room for individualized dealing. Part II lays out AT&T's specific proposal, including the safe harbor that would apply to certain arrangements and the factors that the Commission should consider when evaluating whether arrangements falling outside the safe harbor are "commercially unreasonable." And Part III discusses why the Commission should adopt AT&T's proposal. In Part III.A, we explain why allowing individualized dealings between ISPs and edge providers makes abundant policy sense. And in Part III.B, we explain why flexible and targeted net neutrality rules comport with principles governing related areas of the law and with regulatory best practices more generally.[6]

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[6] In these comments, AT&T proposes changes to only the rules applicable to fixed broadband providers. Because the D.C. Circuit found that the *Open Internet Order* did not sufficiently disaggregate the antidiscrimination rule applied to fixed broadband providers from the no-blocking rules applied to fixed and mobile providers, the court held that the no-blocking rules, like the antidiscrimination rule, did not leave sufficient room for individualized bargaining and therefore violated the statutory prohibition on common-carrier treatment. *Verizon*, 740 F.3d at 657-58. Arguably, the no-blocking rule for mobile broadband did not impose common-carrier

DISCUSSION

I. *VERIZON* ALLOWS THE COMMISSION TO ADOPT TARGETED NET NEUTRALITY RULES THAT PROMOTE BOTH A FREE AND OPEN INTERNET AND BROADBAND INVESTMENT

Although *Verizon* struck down the Commission's net neutrality rules, it also provided clear instructions on how to modify those rules so that they do not unlawfully impose common-carrier requirements on information services. By following the court's guidance, the Commission can ensure a free and open Internet that promotes broadband investment without running afoul of section 153(51) of the Communications Act.

In its *Open Internet Order*, the Commission imposed various requirements on broadband Internet access providers designed to protect and preserve the open Internet. First, the Order required both fixed and mobile broadband providers to disclose certain network management practices, performance characteristics, and terms and conditions of their broadband services.[7] Second, the Order prohibited fixed broadband providers from blocking lawful content, applications, services, or non-harmful devices, and it barred mobile broadband providers from blocking lawful websites or applications that compete with the provider's own voice or video telephony services.[8] Finally, the rules banned fixed broadband providers from "unreasonabl[y] discriminating in transmitting lawful network traffic."[9] The Commission made clear that both the nondiscrimination and no-blocking obligations contained exceptions for "reasonable network

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regulation insofar as it was limited in scope, prohibiting blocking only of access to lawful websites and applications that competed with an ISP's video and voice telephony services, and was unaccompanied by a separate nondiscrimination requirement. *See Open Internet Order*, 25 FCC Rcd at 17959-61 ¶¶ 99-103. The mobile no-blocking rule thus focused on situations where an ISP theoretically might have an incentive to act in a commercially unreasonable fashion, while otherwise leaving room for individual negotiations. *See* Part II, *infra*.

7 *Open Internet Order*, 25 FCC Rcd at 17906 ¶ 1.

8 *Id.*

9 *Id.*

management," which the Commission defined to allow broadband providers "flexibility to experiment, innovate, and reasonably manage their networks."[10] The Commission also limited the rules' application to the transmission of traffic as part of a mass-market broadband Internet access service,[11] made clear that such services did not include "Internet backbone services,"[12] and expressly disavowed any intent to regulate "paid peering arrangements."[13]

In *Verizon*, the D.C. Circuit upheld the Commission's authority under section 706 to regulate broadband Internet service providers in ways that "encourage the deployment of broadband telecommunications capability." *Verizon*, 740 F.3d at 634 (citing 47 U.S.C. § 1302(a), (b)). At the same time, the court reaffirmed that the Commission may not use any of its powers "in a manner that contravenes any specific prohibition contained in the Communications Act," *id.* at 649, including the command that "[a] telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). And because the Commission has rightly concluded that broadband ISPs provide "information services" and not "telecommunications services,"[14] it may not, as the court held, regulate such providers as common carriers, including under section 706.

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10 *Id.* at 17955-56 ¶ 92.

11 *Id.* at 17932 ¶ 44.

12 *Id.* at 17933 ¶ 47.

13 *Id.* at 17944 ¶ 67 n.209.

14 *See, e.g.*, Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al.*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order*"), *aff'd*, *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *see also* Comments of AT&T, *Framework for Broadband Internet Service*, GN Docket 10-127 (filed July 15, 2010) ("AT&T Title II Reclassification Comments"). In discussing this classification, the court incorrectly stated that the Commission had, at one time, classified Internet access as a telecommunications service. *Verizon*, 740 F.3d at 630-31. While the Commission once classified stand-alone DSL *transport* service as a telecommunications service, it has never broadly classified Internet access itself as such. *See Cable Modem Order*, 17 FCC Rcd at 4825 ¶ 43.

Verizon, 740 F.3d at 650. The court went on to set aside the *Open Internet Order*'s no-blocking and nondiscrimination rules as prohibited "common carrier" regulations. *See id.* at 655-59.

The main question following *Verizon* is therefore what constitutes an impermissible common-carrier regulation. Synthetizing prior decisions, the D.C. Circuit explained in *Verizon* and in *Cellco* that common-carrier obligations include any obligation that "force[s] [a] carrier to offer service indiscriminately and on general terms." *Cellco*, 700 F.3d at 547; *see also, e.g.*, *NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("[T]o be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve[.]"). Thus, the essence of common-carrier status is a limit on a provider's ability to treat customers on an individualized basis. *See, e.g.*, *NARUC*, 525 F.2d at 641 ("[A] carrier will not be a common carrier where [it] … make[s] individualized decisions, in particular cases, whether and on what terms to deal.").

In determining whether a given regulation amounts to compelling a provider to hold its services or facilities out indiscriminately for public use—and thus is an impermissible common-carrier obligation—the Supreme Court's decision in *Midwest Video II* is instructive. That case involved a generally applicable requirement that cable television systems over a certain size provide a certain number of channels for use by the public at either no fee or a regulated fee. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 693-94 (1979) ("*Midwest Video II*"). The rules also stripped cable operators of any discretion regarding who could use the channels, what could be transmitted over them, and on what terms. *Id.* at 693. The Court found that, in adopting such rules, the Commission had "relegated cable systems, *pro tanto*, to common-carrier status." *Id.* at 700-01. As the Court explained, "cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis"; cable operators "are prohibited from determining or influencing the content of access programming"; and the rules "delimit[ed] what operators may

charge for access and use of equipment." *Id.* at 701-02. The rules thus "plainly impose common-carrier obligations on cable operators." *Id.* at 701.

At the same time, *Midwest Video II* clarified that not all forms of "openness" obligations would amount to prohibited common-carrier regulation, distinguishing the Supreme Court's prior decision in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *Southwestern Cable* involved, among other things, a Commission requirement that CATV systems transmit to their subscribers the signals of any station into whose service area the CATV system had brought a competing broadcast signal. *Id.* at 166. That targeted requirement was among a number of rules the Commission had adopted out of fear that the carrying of distant broadcast signals by CATV operators would imperil local broadcasters. *Id.* at 175. As the Supreme Court explained in *Midwest Video II*, the carriage requirement at issue in *Southwestern Cable*, unlike that in *Midwest Video II* itself, "did not amount to a duty to hold out facilities indifferently," but was rather "limited to remedying a specific perceived evil"—namely, the perceived threat to local broadcasters—and therefore did not run afoul of the prohibition on treating cable system providers as common carriers. *Midwest Video II*, 440 U.S. at 707 n.16; *see also Verizon*, 740 F.3d at 656 ("[T]he *Southwestern Cable* regulation imposed no obligation on cable operators to hold their facilities open to the public generally, but only to certain specific broadcasters *if* and *when* the cable operators acted in ways that might harm those broadcasters." (emphasis added)).

The D.C. Circuit's recent decision in *Cellco* similarly illuminates the limits on the Commission's authority under the Communications Act. *Cellco* involved the Commission's *Data Roaming Order*, which generally "require[d] facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially

reasonable terms and conditions,"[15] a requirement the Commission believed would "help[] provide consumers with greater competitive choices." *Data Roaming Order*, 26 FCC Rcd at 5422 ¶ 20. At the same time, however, the Commission expressly permitted providers to negotiate the terms of their roaming agreements on an "individualized basis" and to offer arrangements "on commercially reasonable terms and conditions tailored to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms." *Id.* at 5433 ¶ 45. The Commission further specified that conduct that "unreasonably restrains trade" would not be commercially reasonable, *id.*, and outlined a number of factors to aid future determinations regarding reasonability, including "the level of competitive harm" and "benefits to consumers," *id.* at 5445 ¶ 68. In upholding the rules, the D.C. Circuit emphasized that the data roaming regulations "le[ft] substantial room for individualized bargaining and discrimination in terms" and endowed providers with "considerable flexibility … to respond to the competitive forces at play in the mobile-data market," subject only to a loose commercial reasonability backstop. *Cellco*, 700 F.3d at 548. Importantly, the court also found that, although the rules were lawful on their face, the Commission might apply them in an unlawful manner if it policed providers' discretion too closely and in a manner that amounted to imposing a de facto "common carriage obligation." *Id.* at 549.

Emerging from these cases are a number of principles that must guide any new rules the Commission crafts in responding to the D.C. Circuit's remand. Most importantly, any such rules must allow broad room for individualized negotiations among ISPs and edge providers, with no presumption that ISPs must treat like customers alike absent a clear justification for treating them differently. Closely policing individual negotiations as a general matter would effectively

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15 *See Data Roaming Order*, 26 FCC Rcd at 5411 ¶ 1.

amount to applying Title II nondiscrimination obligations to ISPs. Instead, individualized negotiations that result in different terms among even similarly situated parties should be treated as presumptively lawful unless there is a factual showing that the action poses a threat to Internet openness and the virtuous cycle of innovation and investment that such openness promotes.

More specifically, the Commission should follow the courts' lead and adopt an appropriately narrow rule that is grounded on fact-based, real world record evidence, and that proscribes only "commercially unreasonable" practices. The Commission should approach whether an action is commercially reasonable by first focusing on those situations that pose a particular threat to Internet openness and the objectives of section 706, and then applying the factor-based analysis described below (*see* Part II, *infra*). Such an approach, by concentrating on specific threats to Internet openness while preserving market choices in the majority of cases, would, as in *Southwest Cable*, represent a targeted response to a specific concern. And it would, as in *Cellco*, allow individual contracting parties flexibility in the mine run of cases to reach tailored agreements without fearing Commission enforcement actions. Finally, as explained in Part III below, this approach also would further the Commission's twin goals of promoting a free and open Internet and stimulating investment in broadband infrastructure. Indeed, for the reasons detailed below, it would advance those goals *far better* than the broader rules vacated in *Verizon*.

II. ANY NEW NONDISCRIMINATION RULE SHOULD TARGET ONLY "COMMERCIALLY UNREASONABLE" ACTIONS THAT THREATEN INTERNET OPENNESS AND THE VIRTUOUS CYCLE OF INNOVATION AND INVESTMENT

To comply with *Verizon*, the Commission need not substantially revise the text of the nondiscrimination rule that the court struck down. While the old rule prohibited fixed broadband providers from "unreasonably discriminat[ing] in transmitting lawful network traffic over a

consumer's broadband Internet access service,"[16] the new rules could simply ban "commercially unreasonable discrimination in the transmission of lawful network traffic over a consumer's broadband Internet access service."[17] As it did in the *Data Roaming Order*, however, the Commission should explain that the commercial reasonability requirement does not amount to a Title-II-like obligation to treat like providers alike except where there is a special justification for treating them differently.[18] Instead, the commercial reasonability standard should allow broad room for individualized negotiations among providers leading to different terms in different cases, subject only to a prohibition on actions that *in fact harm Internet openness and by extension, the virtuous cycle of innovation and investment*.

A. The Commission Should Adopt a Safe Harbor for Certain Arrangements That Promote the Purpose of Section 706

In deciding whether an action is commercially unreasonable, the Commission should adopt a safe harbor for practices that, as a category, do not threaten the open Internet. Specifically, the Commission should clarify that any new prohibition on discrimination does not apply to non-exclusive arrangements entered into with unaffiliated providers of Internet content, services, or applications. This safe harbor would not only be consistent with cases delineating the breadth of common carrier regulation, but with section 706 itself insofar as it would offer greater predictability in the application of the Commission's rules.

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16 47 C.F.R. § 8.7.

17 As the old rules were, any new such prohibition must be subject to a reasonable network management exception. *See Open Internet Order*, 25 FCC Rcd at 17951-56 ¶¶ 80-92 (discussing exception).

18 As the Commission acknowledged in the *Data Roaming Order*, under the commercially reasonable standard, the "actual provisioning of [services] under those arrangements and any practices in connection with such arrangements will be subject to individually negotiated contract[] provisions, unlike a common carrier obligation under Sections 201 and 202 of the Act." 26 FCC Rcd at 5445-46 ¶ 68.

First, the safe harbor outlined above finds strong support in the law, and in particular the Supreme Court's directives in *Southwestern Cable* and *Midwest Video II*. In those cases, the Court made clear that the Commission may adopt targeted responses to particular threats without being deemed to have imposed common carrier regulation, but that broad restrictions on individualized dealings cross the line. *See* Part I, *supra*. The safe harbor test proposed here is consistent with that jurisprudence. In situations in which an ISP is neither favoring its own content, applications, or services nor providing a service on an exclusive basis, there is no risk of commercially unreasonable discrimination that would constitute a threat to Internet openness in derogation of the goals of section 706. To the contrary, ISPs have neither the incentive nor the ability to engage in such conduct when they are offering services on a non-exclusive basis to third parties with which they are not affiliated.

Such a safe harbor also would advance the core goal of section 706—namely, investment in broadband infrastructure[19]—by reducing the regulatory uncertainty surrounding any new net neutrality rules. The Commission recognized the investment-deterring effects of such uncertainty in the *Open Internet Order* itself.[20] Indeed, an inability to predict how openness obligations will apply to all types of negotiated arrangements would have a demonstrable chilling effect on carriers' investment incentives. When a provider is choosing whether to deploy new facilities or services, it needs to be able to make an accurate judgment regarding

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[19] 47 U.S.C. § 1302(b) (stating that the Commission "shall take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market"); *id.* § 1302(a) (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .").

[20] *Open Internet Order*, 25 FCC Rcd at 17929-30 ¶ 42 & n.137; *see also Cable Modem Order*, 17 FCC Rcd at 4840 ¶ 73 (noting "the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market").

what the regulations allow, so that it can weigh the expected costs and benefits of its investment. Where a regulation is potentially overbroad and enforcement risks are difficult to calculate, a prudent provider will, on the margins, be less likely to invest, undermining the very goal section 706 seeks to advance.[21] A safe harbor that permits a provider to enter into at least a limited class of pro-consumer arrangements without facing regulatory scrutiny would therefore inject needed clarity into the provider's investment decisions and make that provider on balance more likely to invest.

B. The Commission Should Evaluate Arrangements Outside the Safe Harbor Through a Case-by-Case, Data-Driven Analysis

Where the safe harbor does not apply, the Commission should specify the factors that it will apply in determining whether an arrangement is "commercially unreasonable." If, *and only if*, based on the record developed in the forthcoming rulemaking proceeding, those factors reveal a demonstrable harm to the free and open Internet should the Commission intervene in dealings between ISPs and edge providers. The most important such factor should be whether the action would have anticompetitive effects—*i.e.*, whether it poses a threat to Internet openness by foreclosing competition among providers of lawful content, applications and services over the Internet. At the same time, the Commission should clarify that it is not concerned with arrangements—such as those described in Part III below—that fall outside of the safe harbor but benefit consumers, promote openness, and incentivize broadband investment.

The Commission also could recognize that other factors may be relevant in individual cases. Such factors may include:

- how broadly available a given offering is;

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[21] *See* AT&T Title II Reclassification Comments at 2-5 (discussing investment deterring effects of regulatory uncertainty).

- whether the broadband ISP has responded to requests for negotiations regarding similar or related transmission offerings from other customers of its service;
- whether the ISP has engaged in a pattern of stonewalling; and
- whether the terms on which the transmission is offered are so unreasonable as to be tantamount to a refusal to deal.

In addition to listing the factors that will generally inform its analysis as to whether a transmission arrangement is commercially reasonable, the Commission should make clear that its determinations in all cases will be fact-based and data-driven. Even when one or more factors suggests cause for concern, the Commission should evaluate dealings between ISPs and edge providers using a case-by-case approach that appropriately weighs both the benefits *and* the costs of interfering with a specific arrangement.

Finally, the Commission must be careful to apply any factors it announces in a manner that is consistent with *Verizon* and the cases that delineate the boundaries of common carriage. As the D.C. Circuit found in *Cellco*, applying factors in such a way that amounts to a backdoor common-carriage requirement would be unlawful—for example, if the Commission were to apply a presumption that all similarly situated edge providers should be treated the same way absent some special justification. *See Cellco*, 700 F.3d at 549. Again, to escape treating ISPs as common carriers and thereby contravening the Communications Act and *Verizon*, the Commission must accept that individualized treatment is the norm, not the exception.

III. AN APPROACH THAT TARGETS ONLY "COMMERCIALLY UNREASONABLE" ARRANGEMENTS WILL BEST ACHIEVE THE PURPOSE OF SECTION 706

The targeted approach described above is not only compelled by *Verizon*, but also would advance the goals of Internet openness, innovation, and infrastructure investment better than the broad-based ban on differential treatment that was struck down in *Verizon*. That is because, as

AT&T has explained in prior comments,[22] allowing contracting flexibility redounds to the benefit of edge providers and consumers alike, and it spurs network investment by broadband ISPs.

Indeed, adopting a more narrowly cabined nondiscrimination rule for fixed broadband Internet access services would parallel the approach taken in other areas outside the common-carrier context. For example, in the context of program access and retransmission consent, and of course in the *Data Roaming Order* upheld in *Cellco*, the Commission has rightly forsworn any intent to scrutinize the terms of individual deals unless there is a specific reason, based on the particular facts and circumstances, for concern. And in antitrust, voluntary agreements among parties are not treated as unlawful unless there is a specific demonstration of harm or the action is of a very narrow type for which such harm is all but assured. The Commission should follow a similar course here.

A. A Targeted Approach Focusing on Specific Threats to Internet Openness Makes Abundant Policy Sense

Allowing individualized dealings between ISPs and edge providers is sound policy for a number of reasons. By enabling smaller edge providers to negotiate special arrangements for the handling of their traffic, flexible net neutrality rules will empower start-ups to compete more effectively against more entrenched and well-heeled rivals. And by enabling ISPs to recover the costs of network upgrades not just from consumers but also from the edge providers whose applications benefit from such upgrades, flexible rules also will promote deployment of additional broadband infrastructure and improved features. They also will reduce the cost of

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[22] *See, e.g.*, Comments of AT&T, *Preserving the Open Internet et al.*, GN Docket No 09-191 *et al.* (filed Jan. 14, 2010) ("AT&T 2010 Comments"); Reply Comments of AT&T, *Preserving the Open Internet et al.*, GN Docket No 09-191 *et al.* (filed Apr. 26, 2010); Comments of AT&T, *Broadband Industry Practices*, WC Docket No. 07-52 (filed June 15, 2007).

broadband service for consumers, facilitating greater adoption. Finally, such rules will enable edge providers and ISPs to efficiently determine which innovative new applications need the quality-of-service enhancements that only ISPs can deliver. For these and the other reasons discussed below, sound policy supports the adoption of targeted net neutrality rules that proscribe only "commercially unreasonable" discrimination.

1. Allowing Individualized Dealings Would Help Small Edge Providers

Applying a more targeted nondiscrimination requirement to fixed broadband ISPs would in no way undermine the goal of a free and open Internet. Rather, such a rule would in fact promote greater diversity in the Internet ecosystem.

Platform owners such as broadband ISPs have no reason to inefficiently discriminate against new and innovative products and services.[23] Indeed, ISPs' incentives actually run in the opposite direction. By supporting innovation on their platforms, broadband providers make those platforms more valuable to end users in the long run, enabling ISPs to reap far greater economic benefits over time. In particular, a platform provider free from retail price regulation—as all broadband providers are today—will normally have incentives to deal evenhandedly with independent providers of complementary applications, because anti-consumer discrimination in the applications market would simply devalue the platform and

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[23] *See, e.g.*, William J. Baumol, *et al.*, AEI-Brookings Joint Center, *Economists' Statement on Network Neutrality Policy* 2 (2007), http://www.brookings.edu/views/papers/litan/200703jointcenter.pdf; Declaration of Gary S. Becker & Dennis W. Carlton at 12 (attached to Comments of Verizon, *Preserving the Open Internet et al.*, GN Docket No. 09-191 *et al.* (filed Jan. 14, 2010)) ("Becker & Carlton Declaration"); J. Gregory Sidak & David J. Teece, *Innovation Spillovers and the "Dirt Road" Fallacy: The Intellectual Bankruptcy of Banning Optional Transactions for Enhanced Delivery Over the Internet*, 6 J. Comp. L. & Econ. 521, 566 (2010); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 Geo. L.J. 1847, 1888-89 (2006); Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech. 85, 104 (2003).

would not enable the provider to earn any profits it could not otherwise earn for the underlying platform itself.[24] As Nobel Prize-winning economist Gary Becker and Dennis Carlton have explained, "discrimination by broadband access providers that limits access to content usually reduces the amount that consumers are willing to pay for broadband access services. That is, consumers are willing to pay more for access to more content and, as a result, broadband access providers face disincentives for restricting access to Internet content."[25] In fact, that incentive to maximize available content would exist even if the broadband market were *un*competitive as a general matter. As it is, however, any broadband access provider that prevents innovative new content and applications from using its platform would inflict considerable harm on itself given that most consumers could switch to a different provider that does not engage in such self-defeating behavior.[26]

Some net neutrality proponents nonetheless claim that expansive nondiscrimination rules are necessary to ensure that small, start-up edge providers can reach end users in a way that enables them to compete with established providers.[27] Without this ability, they claim, the next innovative application—even the next Google or Netflix or Facebook—may never see the light of day. That argument is conceptually flawed and factually specious.

As an initial matter, the Commission's focus should be on promoting innovation in the Internet ecosystem as a whole and not on shielding individual competitors *per se*. As FCC General Counsel Jonathan Sallet recently stated, regulation should protect "[n]ot competitors, but

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24 *See, e.g.*, Farrell & Weiser, *supra* note 23, at 104; *see also* Yoo, *supra* note 23, at 1888-89.

25 Becker & Carlton Declaration at 12.

26 *Id*.

27 *See, e.g., Open Internet Order*, 25 FCC Rcd at 17920-21 ¶ 26.

competition."[28] In no other area of the economy does the government *ban* voluntary market transactions (here, for example, quality-of-service enhancements) specifically in order to prevent those with superior resources from offering better services to their own customers. Far from it; there are myriad ways in which entities with superior resources are free to use those resources to enhance the quality of, or lower the price of, their products and services. For example, companies with greater assets may be able to fund superior research and development, obtain more patent licenses, procure higher quality raw materials or other inputs, reduce costs through vertical integration or volume purchases, pay more for marketing or advertising, or offer higher salaries to attract the best employees. No one would ever claim that the federal Government should intercede to prevent these or other uses of resources in order to preserve "a level playing field."[29] And of course, the Commission itself has recognized not only that its mission is to protect competition and not individual competitors, but also that "the competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for this process to work."[30] In short, the theoretical basis of this rationale for a strict nondiscrimination rule is thoroughly unsound and anathema to a market economy.

So too is its factual premise—namely, that a strict nondiscrimination rule is needed to prevent harm to small edge providers. Indeed, allowing broad room for individualized dealings

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[28] Prepared Remarks of Jon Sallet at 4, Acting General Counsel, FCC, Nat'l Press Club, Mar. 12, 2014, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0312/DOC-326033A1.pdf.

[29] Or, as Professors Farber and Katz have put it: "No one would propose that the U.S. Postal Service be prohibited from [charging more for] Express Mail because a 'fast lane' mail service is 'undemocratic.' Yet some current proposals would do exactly this for Internet services." David Farber & Michael Katz, *Hold Off on Net Neutrality*, Wash. Post, Jan. 19, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/18/AR2007011801508.html.

[30] Report and Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5892 ¶ 60 (1991).

between ISPs and edge providers likely will *help* small edge providers in the majority of cases. To understand why that is so, it is important to recognize that the Internet is not now, and has never been, a "neutral" place where different edge providers compete on an equal playing field. Quite to the contrary, the largest edge providers—including but not limited to content "hyper giants" such as Google and Facebook[31]—already use their economic power to provide services to their customers that place them at a distinct advantage vis-à-vis smaller providers. And limiting ISPs' ability to deal individually with edge providers would do nothing to address any such inequality. In fact, it almost certainly would make it worse.[32]

The poster child for expansive net neutrality rules is the small entrepreneur working in a garage or low-rent office space. But that entrepreneur's larger and richer rivals already can and do use their economic power to advantage themselves in ways that broad net neutrality rules aimed at ISPs do nothing to address. In fact, many of today's leading edge providers have themselves evolved into "global delivery networks" with an unprecedented combination of transmission capacity, processing power, and data storage.[33] These networks represent enormous capital investments that already allow certain edge providers to serve their customers more effectively and at faster speeds than rivals lacking such resources.

And even mid-size edge providers that cannot deploy such facilities take steps to get a leg up on competitors in the delivery of their content. For example, they may partner with "Content

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31 *See* Arbor Networks, *Two-Year Study of Global Internet Traffic Will be Presented at NANOG47*, Oct. 13, 2009, http://www.arbornetworks.com/news-and-events/press-releases/2009-press-releases/1810-two-year-study-of-global-internet-traffic-will-be-presented-at-nanog47 (describing "'hyper giants' like Limelight, Facebook, Google, Microsoft and YouTube" that "now generate and consume a disproportionate 30% of all Internet traffic").

32 For a fuller discussion, see AT&T 2010 Comments at 20-41.

33 Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 Ind. L. Rev. 767, 780 (2012).

Delivery Networks" (or "CDNs"), which distribute and store copies of content on servers at multiple locations across the Internet and thus enable end users to gain access to that content more quickly and reliably than in a conventional "unicast" arrangement, where each end user must communicate directly with a single centralized server.[34] Although Google and a number of other large Internet companies self-provision their own CDNs, many application and content providers outsource this functionality by hiring third-party CDN providers such as Akamai, Limelight, Level 3, and AT&T.[35] As one such provider explains: "A top-ranked CDN strategically places its server farms near the Internet's most important peering points. This allows your customers to enjoy the best possible experience when they are using your web-based applications. Lower latency and no lag time means happier users, who will be more likely to tell their friends about a great website they found."[36] The bottom line is that, all else held equal, end users have better experiences in their interactions with CDN-equipped content providers than with content providers that do not use CDN functionality. This in turn means that well-funded content and application providers that can afford to purchase (or self-provision) CDN services have a substantial advantage over less-well-funded rivals in the battle to bring end users top-quality Internet experiences. For that reason, rules limiting ISPs' ability to deal individually with edge providers would do little to make the Internet more "neutral." Rather, they would allow larger, better funded edge providers to maintain an advantage in delivering services to their end-users.

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34 *See, e.g.*, *id.* at 786 (explaining that CDNs allow applications to gain "faster access to the customer's screen" through "local caching").

35 *Id.* at 780.

36 *See* CacheFly Blog, http://blog.cachefly.com/2013/10/08/web-based-applications-serving-rich-media-will-thrive-with-a-cdn/.

One way to improve the lot of smaller edge providers would be to permit individualized deals between ISPs and content providers. Limits on paid prioritization and other specialized offerings benefit providers that have established market dominance by building out their own capital-intensive CDNs. But such limits hurt other edge providers that wish to compete through alternative business plans. In particular, they harm content and application providers that view prioritization arrangements with ISPs as an efficient alternative to CDN functionality. And those edge providers are likely to include the majority of small start-ups that net neutrality rules are designed to benefit. Simply put, innovators working out of a garage cannot afford to put servers in every wire center, like Netflix can. Instead, smaller companies normally prefer to expend their scarce resources on opex rather than capex, and such providers may well find it beneficial to pay for a superior level of service from the terminating ISP. And even those edge providers that prefer to rely on conventional CDNs will likely see their costs for such services decline in the face of competition from ISPs. In sum, limiting "optional business-to-business transactions for [quality of service] would," far from helping, actually "serve as an entry barrier" for smaller edge providers.[37]

And there are other ways that fledgling edge providers would benefit from flexible net neutrality rules. Such a regime would empower upstarts to differentiate their products from those of more established competitors through individualized arrangements with ISPs. For example, in 2002, when it was still a relative newcomer competing with entrenched rivals, Google paid for prime placement of its search service on various ISPs' portals, including AOL's.[38] Other applications seeking to unseat established competitors have pursued similar

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[37] Sidak & Teece, *supra* note 23, at 543.

[38] Hazlett & Wright, *supra* note 33, at 796.

strategies.[39] Banning or limiting these arrangements in the name of helping small providers would thus achieve precisely the opposite result in many cases, entrenching larger rivals at the expense of innovative new enterprises. As Howard Shelanski, now head of the Office of Information and Regulatory Affairs, has explained:

> [A]ccess quality may be an important way for new competition in some services to differentiate themselves from incumbents. Established applications providers have little interest in defending against entrants on new competitive dimensions. The "neutral" status quo may therefore be of competitive advantage to applications incumbents while denying a competitive tool to new innovators from the edge.[40]

In short, banning discrimination by ISPs or materially limiting their ability to transact with edge providers on an individualized basis cannot be justified as a means of protecting small edge providers. To the contrary, flexible net neutrality rules are more likely to empower smaller competitors to flourish in the marketplace.

2. Enabling ISPs to Negotiate with Edge Providers Would Reduce the Costs of Broadband for Consumers and Promote Increased Broadband Adoption

Allowing ISPs to experiment with different pricing structures and impose charges on edge providers also would lead to pricing innovation that redounds to the benefit of consumers. Conversely, by artificially restricting a broadband provider's ability to recover network costs from application and content providers, the Commission would impose upward pressure on the rates paid by ordinary broadband customers.[41]

Like newspapers and travel agents, broadband providers operate in a classic "two-sided" marketplace. Such two-sided markets involve a platform intermediary (like a newspaper) that

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39 *Id.*

40 Howard A. Shelanski, *Network Neutrality: Regulating with More Questions Than Answers*, 6 J. on Telecomm. & High Tech. L. 23, 28 (2007).

41 *See* Declaration of Marius Schwartz at 18 (attached to AT&T 2010 Comments as Exh. 3) ("Schwartz Declaration").

links two separate groups (for example, readers and advertisers). Broadband providers similarly serve as an intermediary between end users and edge providers, and like any other participant in a two-sided market, they must look to one side—or both—for cost recovery. Different two-sided marketplaces feature a wide variety of efficient cost-recovery schemes, hammered out through the free play of market forces.[42] Today, for example, many broadband providers recover essentially all of the costs of residential access networks from fees imposed on the subscribers to those networks. But this traditional cost-recovery model will become increasingly unsustainable as networks continue investing billions to accommodate the network demands imposed by bandwidth-intensive applications that are used extensively by only limited subsets of subscribers.

By limiting broadband providers' ability to enter into a range of agreements with application providers for enhanced service quality, rules that restrict dealings between ISPs and edge providers impede pricing innovation and force ISPs to recover *from consumers alone* all of the network costs of accommodating increasingly bandwidth-intensive applications. Indeed, proponents of net neutrality have sometimes acknowledged that a strict nondiscrimination rule could lead to higher prices for ordinary residential subscribers. Such a rule would be, in the words of Tim Wu, "a subsidy to the creative and entrepreneurial at the expense of the passive and consumptive"—*i.e.*, ordinary American consumers.[43] That outcome not only would be inefficient and inequitable, but also would particularly hurt those consumers who are low-income or who simply would prefer to pay low rates for basic broadband connectivity and do not wish to use quality-of-service-needy, bandwidth-intensive applications in the first place. And as prices for broadband service go up, adoption of broadband services will fall. There should be no

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42 *See id.* at 17.

43 Robin S. Lee & Tim Wu, *Subsidizing Creativity Through Network Design: Zero-Pricing and Net Neutrality*, 23 J. Econ. Perspectives 61, 67 (2009).

illusions about this fundamental trade-off. Conversely, by allowing ISPs to negotiate directly with edge providers, the Commission could both decrease the costs of broadband service for average consumers and increase the rates of broadband adoption.

3. Flexible Net Neutrality Rules Would Spur ISPs to Invest in Broadband Infrastructure and New Service Features

Allowing ISPs to negotiate tailored deals with edge providers also would maximize ISPs' incentives to invest in and deploy broadband infrastructure, which is the touchstone for any exercise of the Commission's section 706 authority. For one thing, by spurring innovation and reducing consumer prices in the manner described above, individualized arrangements naturally raise the demand for broadband services, thus making network expansion more attractive.[44] In addition, the ability to experiment with different pricing structures that generate revenues from edge providers as well as end users would provide greater incentives for ISPs to invest and innovate in a number of different ways. For example, if a new service (for example, an advanced streaming HD video service) requires upgrades to the core network, enabling broadband providers to recover some of the costs of those upgrades from the content providers that use them will increase ISPs' incentives to make the upgrades in the first place. And this, again, will promote the virtuous cycle that enables the development of innovative new services while at the same time spurring network infrastructure investment.[45] By contrast, "limitations on charging for prioritization and enhancements could skew investments away from 'smart' functionalities (*e.g.*, in routers), functionalities that promote the goals of public safety, national security, and other goals desired by the Commission."[46] That would not be good public policy.

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44 *See Verizon*, 730 F.3d at 634.

45 *See* Gary Becker *et al.*, *Net Neutrality and Consumer Welfare*, 6 J. of Comp. L. & Econ. 497, 518-19 (2010).

46 Schwartz Declaration at 13.

4. Allowing Individualized Dealings Would Promote Efficiency and Stimulate the Development of New Products and Services

Finally, individualized dealings between ISPs and edge providers will make it easier for ISPs to determine which specific applications may require specialized handling and enable deployment of innovative new services by content providers of all sizes. More specifically, granting ISPs broad discretion to provision specialized quality of service ("QoS") enhancements according to individually tailored arrangements hammered out in the marketplace would promote the development of new products and services that depend on QoS guarantees in order to function or that can perform better with such guarantees. It is well recognized that latency and jitter can devalue performance-sensitive content while leaving non-performance-sensitive content unharmed. Allowing ISPs the flexibility to offer QoS provisioning to services that actually need it would therefore provide important benefits to providers of those services and their customers. As with any other market where scarce goods must be efficiently allocated to their most valued uses, price signals are essential to the success of any prioritization scheme.[47] If a particular level of prioritization could be had simply by demanding it from the ISP, then—under a familiar tragedy-of-the-commons dynamic—every user would demand high priority, with the consequence that no packets would receive any meaningful priority. Price signals provide the only feasible means of efficiently identifying high value, latency-sensitive products that need to be prioritized in order to realize their full worth for consumers. And as AT&T has explained in prior comments,[48] the most efficient and only workable solution may be to charge the providers of performance-sensitive, high-bandwidth applications themselves, who are the parties that will know the most about the particular QoS needs of their individual applications

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47 *See id.* at 11-12.

48 *See* AT&T 2010 Comments at 139-40.

and which network techniques are best suited to meet those needs. Importantly, such a solution requires flexibility for ISPs and individual edge providers to work out specialized terms that are tailored to the needs of the edge provider in question and that price such services efficiently. Without such flexibility, services that require unique specialized treatment may never see the light of day.[49]

Some advocates of more expansive regulation have argued that once broadband providers are allowed to strike individual deals for the prioritization of *some* latency-sensitive traffic, they will have the incentive and ability to consign *all other* traffic "to the digital equivalent of a winding dirt road."[50] That concern, however, is deeply misplaced.[51] Broadband providers—including both cable providers and ILECs, as well as new entrants such as Google Fiber—are in fact investing tens of billions of dollars to increase Internet access speeds, including by deploying next-generation technologies specifically in order to gain a leg up on rivals.[52] Providers would not be investing those sums, or competing on that basis, if it were commercially viable to consign their own customers to a "dirt road." Indeed, if Broadband Provider X began degrading its best-effort Internet access platform to favor its "prioritized" content, such that most applications and content loaded more slowly on X's network than on its rivals' Internet access

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49 *See, e.g.*, Becker & Carlton Declaration at 27 (explaining that "a variety of differentiated services may result in benefits to consumers but may be inconsistent with net neutrality rules" and that "the adoption of restrictions on network operations and business models can inhibit the development of services that might otherwise be developed in the future").

50 *See, e.g.*, Lawrence Lessig & Robert W. McChesney, *No Tolls on the Internet*, Wash. Post, June 8, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html; *see also Open Internet Order*, 25 FCC Rcd at 17921-22 ¶ 29.

51 *See* AT&T 2010 Comments at 127.

52 *See* Anna-Marie Kovacs, *Telecommunications Competition: The Infrastructure-Investment Race* 35-37 (Oct. 2013), http://internetinnovation.org/images/misc_content/study-telecommunications-competition-09072013.pdf; Associated Press, *Google Aims to Provide Broadband in 34 More Cities*, Feb. 19, 2014, *available at* http://www.cnbc.com/id/101428947.

platforms, customers would begin switching to those rivals en masse. The rivals would encourage consumers to do precisely that by running advertisements emphasizing the poor performance on Broadband Provider X's network. For that matter, application and content providers themselves would likewise be free to broadcast their preference for X's rivals right on their homepages for all traffic bound for X's current customers. In short, there is nothing to this concern. Rather, allowing ISPs and edge providers to freely negotiate for service enhancements will bring innovative new services and applications to the Internet ecosystem.

B. A Targeted Rule Would Be in Harmony with Other Rules Sharing a Similar Purpose and with Regulatory Best Practices

Adopting a case-by-case approach that focuses on specific threats to Internet openness, innovation, and investment also makes abundant sense from a broader regulatory perspective. In a variety of contexts, academics and regulators have agreed that private market transactions should be presumptively lawful unless there is a demonstrated harm to which government action is specifically addressed. These principles are reflected in the FCC's own rules, modern antitrust doctrine, and regulatory best practices.

FCC Precedent. The revised program access rules provide a good example of the type of narrowly tailored regulation that is appropriate in the net neutrality context. Those rules enforce statutory prohibitions on "activities that inhibit competition in video programming," codified at 47 U.S.C. § 548.[53] Under the rules, the Commission applies far more scrutiny to special agreements between cable operators and video programmers that are *vertically integrated* or otherwise affiliated—that is, those particular situations in which cable operators are likely to have the incentive and ability to inflict harm on competition. And even in that context, the *2012 Program Access Order* allowed the per se ban on exclusive contracts for satellite cable and

[53] *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1308 (D.C. Cir. 2010).

satellite broadcast programming between a cable operator and cable-affiliated program vendor to sunset.[54] At the same time, the Commission has recognized that "there may be certain region-specific circumstances where vertically integrated cable operators may have an incentive to withhold satellite-delivered programming from competitors" and has adopted a "case-by-case approach" to deal with "competitively harmful conduct" by vertically integrated operators "in a more targeted, less burdensome manner." *Id.* at 12619 ¶ 21. And the Commission has recognized that *even* "exclusive contracts" between operators and affiliated content-providers "do not always harm competition and can have procompetitive benefits." *Id.* at 12620 ¶ 21. Thus, the Commission requires such harm to be demonstrated in a case-by-case complaint process that places the burden of proof on the complainant. *Id.* at 12640-41 ¶ 53.

The Commission's retransmission consent rules, which among other things require "good faith" negotiations by television broadcast stations that provide retransmission consent, also provide a useful example. There, the Commission has recognized that it should not engage in "detailed substantive oversight" of retransmission consent negotiations, and it has therefore declined to police the individual terms negotiated by private parties as a general matter.[55] At the same time, the Commission has recognized that "any effort to further anti-competitive ends through the negotiation process would not meet the good faith negotiation requirement."[56] The rules thus represent a narrowly tailored exception—based on specific competition concerns—to

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54 Report and Order, *Revision of the Commission's Program Access Rules et al.*, 27 FCC Rcd 12605, 12607 ¶ 1 (2012).

55 First Report and Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445, 5448 ¶ 6 (2000).

56 *Id.* at 5448 ¶ 8.

the general principle that private parties are generally free to contract with each other as they wish.[57]

Antitrust. Adopting a targeted approach focusing on situations in which harm is most likely also accords with modern antitrust law, which views voluntary commercial agreements as efficient except when there is a specific demonstration of the type of competitive harm on which antitrust is focused. For example, even conduct by a monopolist is not condemned by the antitrust laws unless it "harm[s] the competitive *process*," not merely "one or more *competitors*," *and* the conduct has a demonstrated "anticompetitive effect." *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001). Similarly, antitrust law has moved away from per se rules in all but a handful of very narrow circumstances.[58] Per se rules, like broad net neutrality rules, presume that certain conduct is harmful as a matter of law. Those rules are now reserved for a narrow range of situations that are rarely if ever procompetitive (for example, horizontal price fixing). *See, e.g., Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886, 895 (2007) (per se rules should be restricted to situations that "'always or almost always tend to restrict competition and decrease output'" (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988)). That is because, as the Supreme Court has stated, per se rules "can be counterproductive" and "can increase the total cost of the antitrust system by prohibiting procompetitive conduct[.]" *Id.* And vertical arrangements— like those between ISPs and edge providers—are overwhelmingly likely to be procompetitive, especially where the parties lack any theoretical incentive to act anti-competitively, and rules that limit such arrangements ex ante

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57 *Id.* at 5453 ¶¶ 19-20.

58 *See* Christopher S. Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?*, 1 International J. of Communication 493, 503-04 (2007).

are therefore inherently suspect.[59] For that very reason, per se treatment of vertical arrangements under the antitrust laws is extinct.[60] That same principle should apply in the net neutrality context.

Regulatory best practices. Adopting tailored net neutrality rules that apply only in cases where there is a demonstrated harm to Internet openness, innovation, or broadband investment also is in line with regulatory best practices. President Obama's cost-benefit executive order, for example, states that each agency should "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs" and "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives."[61] Applying regulations where there is no demonstrated need for them is inconsistent with that advice and could lead to unintentionally stifling innovation, distorting the competitive marketplace, and other harms that would ultimately be felt by consumers. As the FTC has warned about regulation of broadband Internet access services:

> Policy makers also should carefully consider the potentially adverse and unintended effects of regulation in the area of broadband Internet access before enacting any such regulation. Industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare-reducing in the long term, particularly in terms of product and service innovation. Further, such regulatory

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59 Hazlett & Wright, *supra* note 33, at 815-16 (quoting Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Lit. 629, 680 (2007)) ("[F]aced with a vertical arrangement, the burden of evidence should be placed on competition authorities to demonstrate that that arrangement is harmful before the practice is attacked."); *id.* at 809 (noting "near[] uniform recognition that vertical contracting practices are more likely to help than harm consumers").

60 Yoo, *supra* note 58, at 509.

61 *See* Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011); *see also* Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 11, 2011) (exhorting independent agencies to follow same principles).

> schemes inevitably will have unintended consequences, some of which may not be known until far into the future. Once a regulatory regime is in place, moreover, it may be difficult or impossible to undo its effects.[62]

Instead, the FCC should adopt a system of smart regulation similar to that advocated in a recent paper by former FCC Chairman Reed Hundt and Gregory L. Rosston, which would involve giving "clear guidance" to regulated parties while simultaneously paying great attention to the "actual facts of any dispute," condemning practices only where they are demonstrated to be harmful.[63] It would also be consistent with what Chairman Wheeler has stated is his own regulatory philosophy, which involves the Commission being "extremely circumspect" in its approach, using its "tools in a fact-based, data-driven manner," and always asking "what, *if any*, action (including governmental action) is needed to preserve the future of network competition."[64]

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In sum, there are no legal or policy grounds for broad net neutrality rules that view individually tailored treatment of edge providers skeptically as a general matter. Instead, the Commission should focus on those situations where harm to the open Internet, innovation, and investment is most likely to occur. And as discussed in Part II above, even in those situations, the Commission should intervene only on a case-by-case basis as guided by the particular facts and circumstances at issue.

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62 FTC, *Staff Report: Broadband Connectivity Competition Policy*, at 11 (2007), http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.

63 *See* Reed E. Hundt & Gregory L. Rosston, *Articulating a Modern Approach to FCC Competition Policy*, 66 Fed. Comm. L.J. 71, 95-96 (2013).

64 Prepared Remarks of FCC Chairman Tom Wheeler at 3-4, Ohio State University, Dec. 2, 2013, http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1202/DOC-324476A1.pdf.

CONCLUSION

The Commission should embrace the opportunity presented by the D.C. Circuit's remand in *Verizon* by adopting the policies outlined above.

Respectfully submitted,

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March 21, 2014