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## Interests of the Commenters

Judicial Watch, Inc.<sup>1</sup> and the Allied Educational Foundation<sup>2</sup> (the “commenters”) are broadly concerned that the current net neutrality regulations will degrade the functioning of a communications platform that provides tremendous civic and economic benefits to those who use it. As a “bonus,” the regulations will also destroy enormous amounts of national wealth – a matter of equal concern to the commenters. The FCC’s adoption of the net neutrality regulations was a politically-corrupted decision<sup>3</sup> which will do far more to increase the wealth of Washington DC power-brokers and lobbyists than it will to protect consumers. The FCC is an independent regulatory agency designated by Congress to apply expert industry and technical knowledge to ensure the smooth function of communications markets in a nonpartisan way. But the prior Commission ignored its own expert opinion that heavy regulations would harm the internet,<sup>4</sup> and it did so to appease the former President’s agenda for battling the opposition party

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<sup>1</sup> Judicial Watch, Inc. (“Judicial Watch”) is a nonpartisan 501(c)(3) educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files briefs and prosecutes litigation to advance its public interest mission on matters it believes are of public importance.

<sup>2</sup> The Allied Educational Foundation (“AEF”) is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files briefs in various legal proceedings to advance its purpose.

<sup>3</sup> Dissenting Statement of [then] Commissioner Ajit Pai, *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (“[The net neutrality order] is not only a radical departure from the bipartisan, market-oriented policies that have served us so well for the last two decades. It is also an about-face from the proposals the FCC made just last May. So why is the FCC changing course?... Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so... This isn’t how the FCC should operate. We should be an independent agency making decisions in a transparent manner based on the law and the facts in the record. We shouldn’t be a rubber stamp for political decisions made by the White House.”).

<sup>4</sup> Gautham Nagesh and Brody Mullins, “Net Neutrality: How White House Thwarted FCC Chief,” *Wall Street Journal* (Feb. 4, 2015) (“People familiar with [former FCC Chairman Wheeler’s] thinking say he didn’t want to regulate broadband companies in the same way that phone companies are regulated. Mr. Wheeler also wanted to leave some room for broadband providers to explore new business models, including accepting payments from content providers. That could allow broadband companies to offer free or cheap services.”), available at <https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>.

while cementing his legacy via regulatory accomplishment.<sup>5</sup> These net neutrality rules are a far-left, base-appeasing federal power grab. The regulations as written are certain to increase the amount of rent-seeking behavior already present in a usually smoothly functioning industry.<sup>6</sup> As industry players position themselves to curry favor with federal bureaucrats possessed of far-reaching adjudicatory powers, internet innovation, investment, and consumers will all suffer.<sup>7</sup>

More narrowly, the internet is of critical importance to Judicial Watch's and AEF's ability to communicate with their members and provide content to the public in satisfaction of their nonprofit educational missions. As the internet has evolved, so have the commenters' ability to produce media and communicate with their supporters in new and innovative ways, such as live streaming video. These advances in communications capabilities were made possible because the government left the internet unregulated for 20 years, allowing it to grow and flourish. The new FCC net neutrality policies impose overly-restrictive federal prohibitions on business and technology innovations by internet network operators (comprising the "core" of the internet). These restrictions will in turn deprive internet content providers like Judicial Watch and AEF (the "edge" of the network) of the benefits of future innovations that would allow them to more effectively deliver information and news to their subscribers – whatever

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<sup>5</sup> *Id.* ("After Republicans gained their Senate majority, Mr. Obama took a number of actions to go around Congress, including a unilateral move to ease immigration rules. Senior aides also began looking for issues that would help define the president's legacy. Net neutrality seemed like a good fit.") available at <https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>.

<sup>6</sup> See Comcast Corp. Letter to FCC Wireline Competition Bureau, GN Docket No. 09-191 (Nov. 30, 2010) (discussing Level 3's attempts to threaten Comcast into lowering its peering rates for Netflix traffic by issuing a press release claiming the rates violate open internet principles), available at <https://ecfsapi.fcc.gov/file/7020921811.pdf>.

<sup>7</sup> Gerald R. Faulhaber, THE ECONOMICS OF NETWORK NEUTRALITY, Regulation, Winter 2011-2012 at 24 ("Regulation ... opens wide opportunities for regulatory rent-seeking, in which firms seek market advantage via regulation, rather than via serving customers well. When regulators are open for business, firms understand that pleasing / manipulating the regulators is far more important than innovating, investing, and pleasing customers. It is precisely because regulators have *not* been open for business on the Internet that it has been such an innovative and successful enterprise.") (quoting Gerald Faulhaber and Christiaan Hogendorn, THE MARKET STRUCTURE OF BROADBAND TELECOMMUNICATIONS, Journal of Industrial Economics, Vol. 48, No. 3, (2000)), available at <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2012/6/v34n4-4.pdf>.

those innovations may be.<sup>8</sup> Policies which reduce or eliminate incentives for broadband providers to expand network capacity or make more efficient use of existing capacity will inevitably lead to a slowing in internet network capacity growth, which will in turn delay or foreclose the development of more bandwidth-intensive applications and content delivery innovations.<sup>9</sup> If the current net neutrality rules had been in place 20 years ago, today Judicial Watch and AEF would likely be communicating with their supporters via plain text Usenet messages. The depth and breadth of the commenters' communications with their members and supporters would have been dramatically reduced. The existing net neutrality rules will therefore injure the commenters and similar organizations, and the Commission should repeal them.

### **Summary of Argument**

Judicial Watch and AEF urge the Commission to repeal the existing open internet regulations and reclassify broadband internet as an information service. There is almost no controversy that the internet should remain open, and virtually no one of any political stripe opposes the idea that everyone should be able to access the entire internet, or that everyone should be able to use the internet to communicate freely with others. Neither the government nor any private company should prevent such openness, and this commonly held value should be protected.

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<sup>8</sup> Hal Singer, THREE WAYS THE FCC'S OPEN INTERNET ORDER WILL HARM INNOVATION, Progressive Policy Institute, p. 4 (May 2015) ("Other real-time applications include high-definition ("HD") voice service and holographic video streaming used for virtual reality, both of which require prioritization by ISPs... ISPs should be able to negotiate reasonable compensation for such service..."), available at <http://www.progressivepolicy.org/wp-content/uploads/2015/05/2015.05-Singer-Three-Ways-the-FCCs-Open-Internet-Order-Will-Harm-Innovation.pdf>.

<sup>9</sup> Chris Fedeli, CARPOOL LANES ON THE INTERNET: EFFECTIVE NETWORK MANAGEMENT, 26 Comm. Lawyer 1, at 31 (Jul. 2009) ("The Internet could evolve to require stricter technical protocols for levels of integrity and performance needed for delivery of high speed and real-time applications like online gaming, and its still mostly science-fiction cousin, virtual reality. Rather than the FCC dictating an Internet that serves a few specific functions... the FCC's rules should allow network operators to accommodate the kinds of functions next generation Internet users may want."), available at [https://www.americanbar.org/content/dam/aba/publishing/communications\\_lawyer/fedeli.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/fedeli.authcheckdam.pdf).

Nevertheless, the prior FCC was not content to merely protect internet openness. Rather than adopt simple rules towards that end, the prior FCC adopted a raft of economic regulations that serve little purpose other than to bring a thriving and successful industry to heel, placing it under the control of federal regulators. This was a simple power grab, taking decisionmaking authority away from entrepreneurial businesses and putting it in the hands of the FCC. If allowed to stand, these economic regulations will do tremendous harm to a rapidly evolving internet economy that continues to grow and expand.

The current FCC must separate preserving the open nature of the internet – which is what we usually mean by “net neutrality” – from economic regulation of an entire industry, which is what the last Commission did in the guise of “net neutrality.” The prior Commission’s internet regulations and statutory reclassification of broadband providers breaks one of the cardinal rules of market regulation: do not regulate to solve a problem that can be better solved by the normal operation of market pressures and demands. Allowing a commercial market to flourish between broadband providers and “edge providers” of internet content and applications allows all parties to reach reasonable agreements for the delivery of traffic so that they can both give their customers exactly what they want – fast and immediate access to *any* content of their choosing. Preserving openness does not require banning such market activity, nor does it require strict government control over network management practices. Federal and state antitrust regulators already provide a backstop if markets begin to fail, and the federal government should not further inject itself in a way that undermines a successful industry. No new regulations are needed, and nothing more than light rules should even be considered.

## Argument

### 1. Classifying Broadband Internet as a Public Utility Telephone Service is a Regulatory and Public Policy Disaster

The *Title II Order* was both a failure of technology policy as well as a failure of economic policy.<sup>10</sup> Even ignoring the technical question of information storage and retrieval, everything about the modern broadband internet dictates that the better reading of Section 153 is that broadband is properly treated as a lightly regulated Title I information service, not a Title II public utility telephone service.<sup>11</sup>

The modern internet economy does not closely resemble that of the telephone network, which was never used for both one-to-one communications and mass media communications on this scale. The economics of networks that primarily serve a one-to-one purpose and those that also serve a one-to-many model are dramatically different.<sup>12</sup> Indeed, the internet's variable-use nature is what makes it such a priceless economic asset, as services and applications can start out with a small audience and then can scale to become global. This is also what makes the internet invaluable to civic life as “the most participatory form of mass speech yet developed.”<sup>13</sup> Any regulations for the internet must therefore be flexible enough to accommodate all its distinct uses without damaging any part of it. Given these dramatic differences between the internet and the telephone network, it is questionable that Congress would have intended the internet to fall into the definition of “telecommunications service” for regulatory purposes.

Similarly, the broad question of what will best preserve the “virtuous circle” of internet innovation and investment – heavy regulation or light regulation – is one the prior FCC answered

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<sup>10</sup> *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (“*Title II Order*”).

<sup>11</sup> 47 U.S.C. § 153(24) and (53).

<sup>12</sup> See Christopher S. Yoo, NETWORK NEUTRALITY OR INTERNET INNOVATION?, *Regulation*, Vol. 33, No. 1, pp. 28, (Spring 2010) (discussing dissimilar network economic effects of telephone networks and broadcast television networks), available at <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2010/2/regv33n1-6.pdf>.

<sup>13</sup> *Reno v. ACLU*, 521 U.S. 844, 863 (1997).

wrongly.<sup>14</sup> Whatever legal flexibility the Commission had to regulate broadband providers as Title II common carriers, the policy of doing so was flawed and harmful. A natural experiment from history demonstrates this. The AT&T phone monopoly prior to deregulation showed few technological innovations in the network itself for fifty years, and even caused the delay of fiber optic cable deployment.<sup>15</sup> Conversely, the innovation in the past 20 years under a deregulated internet regime has been enormous.

If you want to kill innovation in an industry, regulate it heavily. The prior FCC's *Title II Order* will turn the once vibrant broadband internet economy into the public electric utility or water works systems – a reliable government granted monopoly with facilities and capabilities frozen in time. It may be appealing for some to believe that regulating broadband just like we regulate electricity and water is a good idea; after all, people's electricity and water usually work and the rates are reasonable. The difference – as explained more thoroughly in section 2. below – is the *sine qua non* of the modern internet is constant innovation and improvement, and the need for increased bandwidth and capacity infrastructure must continue to rapidly expand if the innovation is to continue.

The FCC should find that broadband internet services are best classified as information services governed under Title I of the Communications Act.<sup>16</sup> The FCC already has the authority

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<sup>14</sup> *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014) (broadband investment and innovation “would benefit both from the preservation of the ‘virtuous circle of innovation’ created by the Internet’s openness and the increased certainty in that openness engendered by the Commission’s rules.”); *see also* Chris Fedeli, CARPOOL LANES ON THE INTERNET: EFFECTIVE NETWORK MANAGEMENT, 26 Comm. Lawyer 1, at 32 (Jul. 2009) (network management innovations encourage edge innovations in the same way that fast-track highway lane technology “created the virtuous circle that ultimately increased carpooling...”), available at [https://www.americanbar.org/content/dam/aba/publishing/communications\\_lawyer/fedeli.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/fedeli.authcheckdam.pdf).

<sup>15</sup> Kenneth Labich and Kate Ballen, *Was Breaking Up AT&T a Good Idea?*, Fortune Magazine, Jan. 2, 1989 (“Divestiture has clearly accelerated the pace of some crucial new communications developments. One major example: fiber optics...”) available at [http://archive.fortune.com/magazines/fortune/fortune\\_archive/1989/01/02/71446/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/1989/01/02/71446/index.htm).

<sup>16</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-985 (2005).



to *lightly* regulate under Title I, if it so chooses.<sup>17</sup> While it was once considered beneficial for the FCC to “fill in the gaps” of the statute to encourage technological growth,<sup>18</sup> the *Title II Order* demonstrates that abuse of this agency power carries equal amounts of economic danger.

## **2. The FCC’s Public Utility Regulations Risk Enormous Harm to the Internet**

In addition to being wrong as a matter of statutory interpretation, the public utility classification and its associated common carrier regulations are virtually certain to be a disaster for the internet in the long run. The prioritization ban and the general internet conduct standard in particular will reduce future internet innovation and investment.

The FCC’s decision to outlaw the market for internet traffic prioritization will inflict considerable long-term damage if not repealed. The paid prioritization ban crucially undermines potential future investment in the core of the network, which happens to be essential to innovation at the edges. Similarly, by limiting network management with its restrictive internet conduct rule, the *Title II Order* will further freeze innovation at both the core and the edge of the internet network – despite attempting to freeze innovation at the core only.

These regulations have already reduced infrastructure investment in the mere two years they have been on the books (while a federal appeal was pending). Even notwithstanding this reduction, the better question is whether network investment *would have been much greater* since 2015 *absent* the new regulations. It is a virtual certainty the 2015 regulations will reduce investment far more in the future should they remain law. Indeed, a bare minimum of analysis shows that the regulations are overwhelmingly likely to do harm over the long run given what we know about network technology and network economics. All of this is sufficient to support

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<sup>17</sup> *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014).

<sup>18</sup> *World Commc’ns, Inc. v. FCC*, 35 F.2d 1465, 1468 (1984) (“in a fast-moving field of technology... a reviewing court owes particular deference to the expert administrative agency’s policy judgments and predictions...”).

repeal of the regulations along with reversal of the common carrier classification.<sup>19</sup> While the commenters propose that all of the 2015 regulations be repealed, the ban on paid prioritization and the “unreasonable interference” internet conduct standard are especially pernicious and deserve separate discussions.

#### A. The Prioritization Ban Will Slow Infrastructure Investment and Raise Consumer Costs

The prioritization ban prevents broadband providers and edge providers from entering business arrangements to speed delivery of traffic. This rule prevents broadband providers from recovering the costs of network expansion from those web services putting the greatest demand on the network for that expansion.<sup>20</sup> The ban will result in less capital for network capacity expansion, which means slower network expansions, which in turn will result in longer wait times before the next innovative, bandwidth-intensive edge application can reach market scale. Far from preserving the virtuous circle of innovation, the prioritization ban therefore will send the internet into a downward spiral.

In adopting this rule, the FCC failed to seriously evaluate the importance of a two-sided market for broadband internet, which draw vastly more capital into the broadband economy

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<sup>19</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513, 514 (2009) (agency must “examine the relevant data and articulate a satisfactory explanation for its action,” but there is “no basis in the Administrative Procedure Act or in [Supreme Court] opinions for a requirement that all agency change [to prior regulations] be subjected to more searching review...”); see also *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must only consider Congressional intent and all the important aspects of the problem, base its decision on evidence, and apply its expertise to withstand review).

<sup>20</sup> Christopher S. Yoo, NETWORK NEUTRALITY OR INTERNET INNOVATION?, Regulation, Vol. 33, No. 1, pp. 29, (Spring 2010) (“The two-sided market analysis reveals the potential drawbacks of preventing network providers from charging differential prices. As a general matter, pricing flexibility makes it easier for network providers to recover the costs of building additional bandwidth. ... Conversely, preventing network providers from exercising pricing flexibility with respect to content and application providers would simply increase the proportion of the network costs that providers must recover directly from end users. This simultaneously raises the prices paid by consumers and decreases the likelihood that the capital improvements will ever be built.”), available at <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2010/2/regv33n1-6.pdf>.

through ordinary market pressures and self-interested behavior.<sup>21</sup> Furthermore, the Commission did not seriously consider whether its fears of anticompetitive conduct outweighed the clear economic harm of this regulation.<sup>22</sup>

Internet users want and need to access certain internet services fast, and services that become popular will be in great demand. To continue to grow the internet, broadband providers must be able to adapt to consumer demand by drawing in capital to expand capacity when necessary, not only to accommodate the last set of last great applications but also to accommodate the next set of new, innovative applications as well.

Outlawing a market in traffic delivery speed also kills incentives for edge providers to develop further technological innovations of their own:

[P]ricing for extra speed would incentivize edge providers to innovate in technologies that enable their material to travel faster (or reduce latency or jitter) even in the absence of improved ISP technology.... Thus paid prioritization would yield finely tuned incentives for innovation exactly where it is needed to relieve network congestion. These innovations could improve the experience for users, driving demand and therefore investment.<sup>23</sup>

In imposing its prioritization ban, the FCC failed to sufficiently analyze these issues, and failed to analyze how a two-sided market can serve as an even better price control system than federal

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<sup>21</sup> Justin (Gus) Hurwitz, TWO SIDES OF THE INTERNET'S TWO-SIDEDNESS: A CONSUMER WELFARE PERSPECTIVE, Perspectives from FSF Scholars, Vol. 8, No. 25 (Sept. 30, 2013) (...there is something missing from the [net neutrality] discussion so far: why do we care if a market is two-sided? Because in most two-sided markets, the purveyor of the intermediary goods that the two sides are consuming – that is, the owner of the nightclub, the HMO provider, the OS developer, or the broadband ISP – sets different prices for each side of the market in order to maximize the value of the market.”), available at [http://freestatefoundation.org/images/Two\\_Sides\\_of\\_the\\_Internet\\_s\\_Two-Sidedness\\_-\\_A\\_Consumer\\_Welfare\\_Perspective\\_092713.pdf](http://freestatefoundation.org/images/Two_Sides_of_the_Internet_s_Two-Sidedness_-_A_Consumer_Welfare_Perspective_092713.pdf)

<sup>22</sup> *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 766 (D.C. Cir. 2016) (Williams, J. dissenting) (“the Commission adopted a flat prohibition [on prioritization], paying no attention to circumstances under which specific varieties of paid prioritization would (again, assuming market power) adversely or favorably affect the value of the internet to all users. In the absence of such an evaluation, the Order’s scathing terms about paid prioritization, used as a justification for the otherwise unexplained switch in interpretation of § 201(b), fall flat.”).

<sup>23</sup> *United States Telecom Ass'n v. FCC*, 825 F.3d at 763 (Williams, J. dissenting).

regulations.<sup>24</sup> Allowing a two-sided market to flourish is more effective than regulation for keeping consumer prices low even in true monopoly provider cases, which broadband internet is likely not, given the ubiquity of wireless broadband.<sup>25</sup>

B. The “Internet Conduct” Standard for Network Management Will Undermine Innovation at the Network Core, Which in Turn Will Thwart Innovation at the Edge

The FCC should eliminate its catchall “internet conduct” regulation. To begin with, this rule is just a roving license for the Commission to retroactively declare any network management technology or practice illegal – along with almost any other business practice of a broadband provider. Any attempt at enforcement of such a rule is an arbitrary-and-capricious lawsuit waiting to happen.<sup>26</sup>

The internet conduct rule chills broadband providers’ ability to adopt new network management policies, which virtually ensures that edge providers will use network bandwidth less efficiently. It gives the FCC a flexible standard to judge what is and is not reasonable network management on a case-by-case basis, which means innovation at the core of the network grinds to a halt and the internet becomes a “mother may I” economy at the center of the network. This in turn means bandwidth efficiencies are created more slowly, and therefore various edge

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<sup>24</sup> Justin (Gus) Hurwitz, TWO SIDES OF THE INTERNET’S TWO-SIDEDNESS: A CONSUMER WELFARE PERSPECTIVE, Perspectives from FSF Scholars, Vol. 8, No. 25 (Sept. 30, 2013) (“...the Open Internet rules, by preventing Verizon from charging firms like Google and Netflix for access to its network, prevent this market from behaving like a two-sided market.... [T]here is little reason to believe *a priori* that the Open Internet rules’ prohibition on charging content providers is optimal. To the contrary, the economic literature suggests that the Open Internet rules can have a negative effect on the value created by the Internet, and that allowing broadband ISPs to charge content providers can benefit consumers and increase infrastructure investment.”), available at [http://freestatefoundation.org/images/Two\\_Sides\\_of\\_the\\_Internet\\_s\\_Two-Sidedness\\_-\\_A\\_Consumer\\_Welfare\\_Perspective\\_092713.pdf](http://freestatefoundation.org/images/Two_Sides_of_the_Internet_s_Two-Sidedness_-_A_Consumer_Welfare_Perspective_092713.pdf)

<sup>25</sup> See e.g. Bernie Arnason, *Will 5G Enable Wireless Replacement of Home Broadband and Disrupt FTTH?*, Telecompetitor, May 26, 2016 (“This latest wireless generation promises broadband speeds that are comparable to existing FTTH and cable broadband services...”), available at <http://www.telecompetitor.com/will-5g-enable-wireless-replacement-home-broadband-disrupt-ftth/>.

<sup>26</sup> See e.g. *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

providers must wait longer before capitalizing on increased bandwidth availability to reach customers. Again, the circle of innovation and investment slowly grinds to a halt.

Similarly, placing prior restraints on broadband providers' technological innovation will also dramatically reduce incentives for the *edge providers* themselves to develop technologies for efficient transmission of data.<sup>27</sup> Preserving the cycle of internet growth and investment requires innovation at both the edge and the core of the network. If the core remains an unchanging public utility where network management innovations are subject to federal approval, the edge should not bother developing the next generation of more bandwidth-intensive applications because the core will never be able to transmit them effectively – nor will broadband providers have any incentive to make the needed improvements. In this regard, the 2015 *Title II Order* ultimately commits the same mistake as both the 2010 *Open Internet Order*<sup>28</sup> and the 2008 *Network Management Order*.<sup>29</sup> The main difference was that in 2015, the FCC was willing to do even more damage to the internet economy with extensive public utility regulations that ultimately achieve the same result – throttling innovation at the network's core.<sup>30</sup>

### **3. New Regulations are Unnecessary, but at a Minimum Only Limited, Light-Touch Net Neutrality Rules Should Even be Considered**

Commenters Judicial Watch and the Allied Educational Foundation propose that the FCC repeal all of its Part 8 regulations, especially the rules governing blocking, throttling, paid

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<sup>27</sup> Chris Fedeli, CARPOOL LANES ON THE INTERNET: EFFECTIVE NETWORK MANAGEMENT, 26 Comm. Lawyer 1, at 31-32 (Jul. 2009) (“By allowing such practices, network operators can increase speed of traffic delivery based on how much of an effort the traffic itself... makes to ease congestion through steps they can take at little cost. This is a highly efficient network management principle and applies fully to the question of Internet network management.”), available at [https://www.americanbar.org/content/dam/aba/publishing/communications\\_lawyer/fedeli\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/fedeli_authcheckdam.pdf).

<sup>28</sup> *In re Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010).

<sup>29</sup> *In re Reasonable Network Management et al.*, 23 FCC Rcd. 13028 (2008).

<sup>30</sup> See Chris Fedeli, CARPOOL LANES ON THE INTERNET: EFFECTIVE NETWORK MANAGEMENT, 26 Comm. Lawyer 1, at 30 (Jul. 2009) (“Under the *BitTorrent Order* regime, before traffic can be managed in any way different from the TCP/IP-based rules the Commission must approve it, and anything that is not explicitly approved is deemed prohibited.”), available at [https://www.americanbar.org/content/dam/aba/publishing/communications\\_lawyer/fedeli\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/fedeli_authcheckdam.pdf).

prioritization, the internet conduct standard, formal complaints, and advisory opinions.<sup>31</sup> These regulations present the wrong framework for encouraging broadband deployment and ensuring internet openness. Reasonable rules of the road for the internet do not require the FCC to turn itself into Internet Court, and nor should the FCC become the network management review board.

The greatest stated fears of advocates for economic regulations – regulations which go far beyond simple net neutrality or open internet protections – are already addressed by antitrust law. Indeed, even most of the *potential* or imagined future violations of net neutrality principles are already illegal under antitrust laws, including acts like website blocking,<sup>32</sup> charging monopoly rents,<sup>33</sup> collusion between industry players,<sup>34</sup> and unfair competition.<sup>35</sup> The existing antitrust laws can already be enforced against broadband providers by the Justice Department, the Federal Trade Commission, and the 50 State Attorneys General.<sup>36</sup> There are plenty of

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<sup>31</sup> 47 C.F.R. § 8.1 *et seq.*

<sup>32</sup> Hon. Maureen K. Ohlhausen, ANTITRUST OVER NET NEUTRALITY: WHY WE SHOULD TAKE COMPETITION IN BROADBAND SERIOUSLY, Colo. Tech. LJ, Vol. 15.1, p. 145 (2016) (“the Sherman Act opposes conduct that, by restricting competition, denies consumers any benefits that they desire and would otherwise obtain.”), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1054963/ohlhausen\\_cotechjournal.pdf](https://www.ftc.gov/system/files/documents/public_statements/1054963/ohlhausen_cotechjournal.pdf).

<sup>33</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272-73 (2d Cir. 1979).

<sup>34</sup> Robert H. Lande and Howard P. Marvel, THE THREE TYPES OF COLLUSION: FIXING PRICES, RIVALS, AND RULES (2000), Wisconsin Law Review, Vol. 2000, No. 941, p. 944, available at <http://www.antitrustinstitute.org/files/112.pdf>.

<sup>35</sup> Alden Abbott, YOU DON’T NEED THE FCC: HOW THE FTC CAN SUCCESSFULLY POLICE BROADBAND-RELATED INTERNET ABUSES, Heritage Legal Memorandum No. 154 (May 20, 2015), available at <http://www.heritage.org/government-regulation/report/you-dont-need-the-fcc-how-the-ftc-can-successfully-police-broadband>.

<sup>36</sup> William E. Kovacic, THE DIGITAL BROADBAND MIGRATION AND THE FEDERAL TRADE COMMISSION: BUILDING THE COMPETITION AND CONSUMER PROTECTION AGENCY OF THE FUTURE, 8 J. Telecomm. & High Tech. L. 1, 21 (2010) (state attorneys general could coordinate with federal antitrust agencies to divide up responsibility for policing internet market power abuses), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/digital-broadband-migration-and-federal-trade-commission-building-competition-and-consumer/2010digital-broadband.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/digital-broadband-migration-and-federal-trade-commission-building-competition-and-consumer/2010digital-broadband.pdf)

antitrust cops on the beat to address abuses of market power, and there is no demonstrated need to add the FCC.<sup>37</sup>

If the Commission does decide to “repeal and replace” by issuing new regulations, those rules must be non-intrusive, and must not result in economic harm like the prior rules. The Commission has the power to regulate *lightly* under Title I of the Communications Act.<sup>38</sup> While there is no practical policy need for such rules, the Commission may wish to end the intractable nature of the net neutrality debate and assuage the public’s fears of corporate conspiracies and censorship. If the Commission embarks on this path, the commenters urge the FCC to only adopt simple and non-intrusive regulations for the sake of allaying fears that broadband providers will discriminate against certain political views, or that they will conspire with edge providers to prevent future internet startups from competing with Google and Facebook (or their own vertical services).

Light-touch regulations have been a specialty of the FCC for years until the recent era, and duplicating those successes should not be difficult.<sup>39</sup> For example, the FCC could adopt a streamlined version of the no blocking or throttling rule, but only prohibiting anticompetitive or viewpoint-discriminatory blocking or throttling from its uncurated “complete internet” service offering. Similarly, the definition of reasonable network management could be revised to exclude only practices with an anticompetitive or viewpoint-discriminatory purpose, otherwise

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<sup>37</sup> *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 765-766 (D.C. Cir. 2016) (Williams, J. dissenting) (citing Department of Justice conclusion that “antitrust is up to the task of protecting consumers from vertical contracts that threaten competition” in internet markets, and the Federal Trade Commission’s “nuanced assessment” analyzing “ISP incentives to discriminate and not to discriminate under conditions of market power” and “varieties of paid prioritization, assessing their risks and benefits.”).

<sup>38</sup> *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014); *see also* 47 U.S.C §§ 151, 1302 (mandates to ensure communications are available to all, remove barriers to infrastructure investment, and encourage broadband deployment).

<sup>39</sup> *See* Chris Fedeli, CARPOOL LANES ON THE INTERNET: EFFECTIVE NETWORK MANAGEMENT, 26 *Comm. Lawyer* 1, at 29-31 (Jul. 2009) (discussing successful results of FCC’s repeal of service and usage restrictions for terrestrial wireless and satellite spectrum licenses, leaving pragmatic rules in place), available at [https://www.americanbar.org/content/dam/aba/publishing/communications\\_lawyer/fedeli.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/fedeli.authcheckdam.pdf).

allowing business considerations in network management. This will allow broadband providers to invoke safe harbor by establishing and uniformly applying published, reasonable network management rules for web traffic on their networks. It also removes the presumption that most network management changes will be made for nefarious, censorial, or anticompetitive purposes, as the previous FCC apparently believed.

Furthermore, rather than formal complaint proceedings for alleged unlawful blocking or throttling, the presumption should be that a technical issue is causing the slowing or non-appearance of a website – not that political motives are at play. To facilitate this, the FCC could appoint one or more internet standards-setting organizations as administrators to resolve blocking or throttling disputes in the first instance, as the Commission already does in the wireless interference context with groups like the Enterprise Wireless Alliance or APCO. With the presumption that any alleged blocking or throttling is technical in nature and will be resolved informally, the rule is no longer a public utility command-and-control prohibition of the kind thrown out by the *Verizon* court.<sup>40</sup> This rule should eliminate the fear of broadband companies censoring political views.

Critics may object that any sound network management practices implemented for business reasons (such as to improve service to customers) could also cause some websites to load more slowly than others. While this is true, there is an enormous difference between a broadband provider preventing customers from viewing the American Communist Party website due to political disagreement, and the American Communist Party's livestream HD video downloading slowing due to a broadband provider's capitalist cost-based network management

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<sup>40</sup> *Verizon v. FCC*, 740 F.3d at 651-658.



practices. The open internet means all should have the opportunity to participate in the marketplace of ideas, not that all should be guaranteed equal success in that market.

Another possible light-touch rule: require notice to the FCC after a broadband provider ceases any offering of a “complete internet” service. While no broadband provider should ever have to seek pre-approval to stop offering that service, the FCC could require notice within 30 days *after* service stops. If there is evidence that the broadband provider’s decision was not based on high costs and low market demand, but rather was anticompetitive or viewpoint-discriminatory in purpose, the FCC could either initiate a proceeding or make a referral to the appropriate antitrust enforcement authority. Even a rule allowing the FCC to order a broadband provider to restore its complete internet service offering would likely withstand scrutiny without the need to invoke common carriage.<sup>41</sup> While it is unlikely that any broadband provider will find the market for complete internet service evaporating any time soon, such a rule would eliminate fears of big broadband conspiring with big tech to strangle the internet startup market.

Another example: the FCC could issue a regulation stating that if a broadband provider dedicates a certain percentage of its network capacity to non-prioritized, equal-treatment “general” web traffic, that provider is deemed to be acting pro-competitively and consistently with the principles of net neutrality and the open internet. This kind of guidance-oriented regulation could alleviate fears that broadband providers might bandwidth-starve their complete internet offering or selectively charge high prioritization prices for reasons of viewpoint discrimination. Simultaneously, the rule will give broadband providers an option to minimize their antitrust exposure across 50 states. This will reduce both legal uncertainty for broadband providers and uncertainty in the marketplace for subscribers and edge providers, thereby

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<sup>41</sup> See *e.g. Turner Broadcasting v. FCC*, 520 U.S. 180 (1997) (*Turner II*).

preserving an open internet while allowing broadband providers to continue to innovate and experiment.

The point of these examples is to illustrate that it is possible to issue rules protecting an open internet without wreaking economic havoc and halting internet innovation. The commenters reiterate that the open internet is already adequately protected by existing antitrust law. The Commission should only issue rules if doing so will end the net neutrality debate and associated legal proceedings until Congress acts. If consensus on harmless regulations is achievable, sparing the public another ten years of litigation and rulemakings over net neutrality may have value in and of itself.

### **Conclusion**

For the foregoing reasons, the Commission should properly classify broadband internet as an information service and should repeal its existing net neutrality regulations.

Respectfully submitted,

*s/ Chris Fedeli* \_\_\_\_\_

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