

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

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

**REPLY COMMENTS OF
PUBLIC KNOWLEDGE**

Harold Feld
Sherwin Siy
John Bergmayer
Michael Weinberg
Public Knowledge

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SUMMARY

The issues raised by various commenters in response to the Open Internet proceeding has outstripped the scope of the proceeding itself. Of the myriad topics discussed in the initial round of comments, Public Knowledge will briefly address four specific topics: the Commission's authority to implement the rules; the inapplicability of a First Amendment analysis of the rules as impinging upon free speech; the fact that the rules do not constitute a Fifth Amendment taking, and the need for the Commission to avoid approving practices based upon their stated intent to curb copyright infringement. In some cases, the topics are a necessary part of the discussion underlying this proceeding and the proposed rules; in others, the need to dispose of these topics comes more out of a necessity to debunk more fanciful arguments against Commission action.

These Reply Comments focus first on the nature of the Commission's ability to issue the proposed rules. The logical framework for this authority lies in Title II of the Communications Act, which provides the Commission with a certain, well-known, and delimited source of authority to protect consumers and the public interest from anticompetitive and discriminatory behavior on the part of broadband Internet access providers. The Commission can either reclassify all broadband Internet access services as Title II telecommunications services, or recognize that the underlying transmission components of broadband Internet access services are telecommunications services offered to customers separately. In either case, the existing doctrines and enforcement mechanisms surrounding Sections 201 and 202 of the Communications Act can serve as a basis for implementing the proposed rules.

Public Knowledge also disputes the curious proposition that regulation of broadband Internet access services violates the First Amendment right of free speech. Not only do the proposed rules fail to trigger a First Amendment analysis, the rules actively serve the interests of the First Amendment by protecting the openness of the Internet.

Likewise, arguments that the proposed rules constitute a Fifth Amendment taking are unavailing. Despite some commenters' attempts to apply the doctrines associated with physical takings to the proposed rules, no physical invasion, and thus no physical taking, is contemplated. Nor do the rules meet the requirements of a regulatory taking, as they are general in character, do not destroy the value of broadband Internet access, and do not interfere with investment-backed expectations.

Finally, Public Knowledge urges the Commission to resist attempts to draw it into the role of copyright adjudicator. Commenters who ask that the Commission classify copyright interdiction mechanisms as *per se* reasonable are asking the Commission to engage in an analysis that requires findings based upon the question of whether or not given uses of works are infringing or not under copyright law. Lacking the expertise and jurisdiction to make such determinations, the Commission should refrain from blessing entire categories of practices based solely upon those practices' stated intent, and not upon their mode of operation or impact on non-infringing speech.

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Public Knowledge submits these reply comments in the Commission’s *Notice of Proposed Rulemaking* (NPRM) in the above-captioned docket.¹

I. The Commission Should Ground its Authority over Broadband Internet Access in Title II of the Communications Act

The FCC must address the legal basis of its authority to promote an open Internet. Particularly, it must offer a firmer basis for its authority over broadband Internet access if it hopes to implement any of its broadband policies, including the Open Internet rules. To provide regulatory certainty, the FCC should choose the method that best avoids repetitious challenges to its ability to carry out its primary goal of advancing the public interest in electronic communications.

A. Title II is the Proper Regulatory Framework for Telecommunications Services Such as Broadband

¹ In the Matter of Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, FCC 09-93, 24 FCC Rcd. 13064, *hereinafter* “Open Internet NPRM” or “NPRM.”

Critics mischaracterize the suggestion that broadband Internet access service be regulated using Title II authority as using outdated regulations “designed for the monopoly telephone companies of 1934.”² Classifying broadband access service as a Title II service would not make broadband access a “public utility.”³ Even when the Commission required ILECs to tariff their wholesale DSL offerings, it did not treat retail or wholesale DSL as a “public utility.”⁴ Indeed, regulation of the telephone network under Title II facilitated the rapid growth of the Internet in the 1990s, as this framework assured that customers could access the ISPs of their choice, and not just the ISP preferred by the telecommunications carrier.⁵

Classifying non-integrated ISPs as relatively unregulated Title I services was appropriate when the underlying telecommunications service was subject to common carriage. This was the case with dial-up Internet access (Title II telephone telecommunications paired with Title I dial-up ISP) and with wholesale DSL (Title II DSL transport, Title I ISP). The operator of the telecommunications transport layer could

² Letter from NCTA, CTIA, USTA, TIA, ITTA, Verizon, AT&T, Time Warner, and Qwest to Julius Genachowski, Chairman, Federal Communications Commission, GN Docket No. 09-191, WC Docket No. 07-52, GN Docket No. 09-51, Feb. 22, 2010, at 5 (*Carrier Letter*).

³ See, e.g., Barbara Esbin, *R.I.P. Ancillary Jurisdiction; Hello Common Carriage*, THE PROGRESS & FREEDOM FOUNDATION BLOG, Jan. 15, 2010, http://blog.pff.org/archives/2010/01/rip_ancillary_jurisdiction_hello_common_carriage.html. *But see* Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 *Telecomm. Pol’y* 435, 436 (1994) (

One must distinguish the notion of common carriage from several other intertwined concepts that are frequently but inaccurately used as synonyms. A common carrier need not be a “public utility” or a “regulated monopoly,” and vice versa; for example, public buses operating as common carriers are usually neither utilities nor monopolies; conversely, public utilities in electricity provision are not usually common carriers.

). Noam also argues that “even if common carriage erodes, its neutrality principles still remain important for economic efficiency and free speech, and will have to be protected in other ways,” going on to describe a principle of neutral interconnection. *Id.* at 452. It is precisely these “other ways” that are under threat as a result of the challenges to the FCC’s ancillary authority.

⁴ See GTE Telephone Operating Cos., GTOC Tariff No. 1, *Memorandum Opinion & Order*, 13 FCC Rcd 22, 466 (1998); Bell Atlantic Telephone Cos., Bell Atlantic Tariff No. 1, *Memorandum Opinion & Order*, 13 FCC Rcd 23,667 (1998).

⁵ Jason Oxman, *The FCC and the Unregulation of the Internet* 16 (FCC Office of Plans & Policy, Working Paper No. 31, 1999), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

not engage in unjust or unreasonable discrimination, and this ensured that multiple, competitive ISPs could compete for customers' business. Most customers preferred an unfiltered, neutral Internet, and the marketplace delivered; those customers who wanted a more controlled experience could opt for that. Now, when the FCC no longer requires telecommunications transport to be offered separately from Internet service⁶ and there is therefore limited competition between access providers, the best way to assure that the public has access to an open communications network is for the FCC to classify the bundled service of telecommunications transport and Internet services as a Title II telecommunications service that is required to carry Internet traffic without unjust or unreasonable discrimination.

Carriers have suggested that Congress intended to remove common carriage obligations from last-mile telecommunications services when what was actually at issue was the regulatory treatment of competitive ISPs that were not bundled with the underlying last-mile telecommunications network.⁷ But Title II and the Communications Act as a whole do not have an expiration date. Congress wrote in broad terms precisely because it intended Title II to have broad applicability. The Act uses broad terms like "telecommunications," as opposed to narrower references like "telephony," to assure

⁶ Ironically, under *Comcast v. FCC* it may be (legally) simpler for the FCC to require unbundling and open access of Title I broadband providers, than for it to enact Open Internet regulations. See *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. 2010), slip op. at 13-14 (arguing that the Supreme Court's "dicta" that under Title I the FCC may require broadband providers to offer competitive ISPs access to their facilities is authoritative) (citing *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 US 967 at 1002 (2005)).

⁷ See Carrier Letter at 2. Though some saw the regulatory challenges that were ahead as services that traditionally had not been common carriage began offering telecommunications services, see Noam, *supra* note 3, at 442, it was generally assumed that access to the Internet involved a common carriage transport layer. Claims that "we never had" Title II broadband service, John Eggerton, *Q&A: Michael Powell: Title II Move Could Spark "War,"* MULTICHANNEL NEWS, Mar. 29, 2010, http://www.multichannel.com/article/450846-Q_A_Michael_Powell_Title_II_Move_Could_Spark_War_.php, are inaccurate since wholesale DSL was a Title II service prior to 2005. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14,853, ¶ 2 (2005); see *supra* note 4.

technological neutrality. If Congress intended to limit provisions of Title II to telephone service, it could have done so.

Some carriers also argue that classification of broadband Internet access services as telecommunications services would necessarily result in heavy-handed regulation, with onerous requirements for publishing rates, handling certain types of customer information, and other requirements of varying applicability to broadband Internet services. However, the Commission has the authority to exempt any telecommunications service from unnecessary regulations,⁸ contrary to the “all or nothing” arguments offered by some carriers.⁹

B. Title II Authority Gives the FCC Clear Authority But Does Not Remove Sensible Limitations on the FCC’s Power

As explained in *Comcast v. FCC*, the FCC has jurisdiction over broadband Internet access services because they are a form of “communication by wire or radio.”¹⁰ But it can only act within its jurisdiction in response to specific grants of statutory

⁸ 47 U.S.C. § 160. See also *Wireline Framework Order*, 20 FCC Rcd. 14,853, ¶ 90 (2005) (permitting wireline providers to offer broadband transmission services on a “permissive detariffing basis” without engaging in a separate forbearance proceeding under Section 10); Policy and Rules Concerning Rates for Dominant Carriers, *Second Report & Order*, 5 FCC Rcd. 6786, ¶¶ 35-36 (1990); Access Charge Reform, *First Report & Order*, 12 FCC Rcd. 15,982, ¶ 289 (1997) (similarly creating flexible regulatory regimes for other Title II services).

⁹ In addition to dismissing the FCC’s forbearance authority, Carriers have suggested that Title II classification of last-mile communications access implies that all information services (e.g., online retailers like Amazon) must be considered common carriers. *Carrier Letter* at 12. They cite for this irrelevant statements about non-integrated ISPs (see *supra* note 3 for discussion of this point) and arguments the Supreme Court rejected. See *Brand X*, 545 US at 994-98 (2005). Under the *Carrier Letter*’s view of the law, the Commission is compelled to classify a dial-a-joke line as a common carrier because it uses the telephone network, an odd take on the so-called “contamination theory.” While the Communications Act may fail to unambiguously define the word “offer,” and “the relevant definitions do not distinguish facilities-based and nonfacilities-based carriers,” *Brand X*, 545 US at 997, only *carriers* may ever be classified as common carriers, and then only if the Commission determines they are “offering ... telecommunications for a fee directly to the public.” 47 U.S.C. § 153(46); see also *Brand X*, 545 U.S. at 977.

¹⁰ 47 U.S.C. § 151.

authority, or using ancillary authority.¹¹ Its authority is further constrained by the requirements of the Communications Act and the Administrative Procedure Act (“APA”); recognition that the FCC has jurisdiction over a form of communications does not remove sensible agency constraints.

The FCC has recognized that broadband Internet access services, such as cable modem service, are mixed offerings of Title I “information services” and Title II telecommunications services. For nearly any reasonable action the FCC wishes to take with regard to broadband, it has specific authority under Title II that corresponds to actions regarding telecommunications services. In particular, the Open Internet rules would directly follow as a reasonable application of Sections 201 and 202.¹² Because the FCC has chosen to classify broadband services as a whole as “information services” despite their predominant telecommunications components, these specific grants of authority apply only through the mechanism of ancillary authority. As shown in *Comcast v. FCC*, the FCC’s ability to rely on ancillary authority is limited. It must tie each exercise of ancillary authority (i.e., each Order) back to a statute that contains specific directives (i.e., not a statute that is a mere statement of Congressional policy). Given that

¹¹ In the absence of express statutory authority, the Commission has authority to promulgate regulations to effectuate the goals and provisions of the Act if the regulations are “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under the Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (regulation of cable television systems was a valid exercise of ancillary jurisdiction). See also *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973). The terms “ancillary authority” and “ancillary jurisdiction” are both commonly used by the FCC, advocates, and the courts. As the DC Circuit explained, the Supreme Court has established a two-part ancillary authority test: (1) the subject of the regulation must be covered by the Commission’s general grant of jurisdiction under Title I of the Communications Act; and (2) the regulation must be reasonably ancillary to the Commission’s statutory responsibilities. *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005). See also *Southwestern Cable*, 392 U.S. 157, *United States v. Midwest Video Corp.*, 406 U.S. 649, (1972) (*Midwest Video I*), *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*). For clarity, and to distinguish the administrative law issue from the federal courts issue, see *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), commenters use the term “jurisdiction” to refer to the FCC’s subject matter jurisdiction, and “authority” to mean the agency’s power to act within its subject matter jurisdiction.

¹² 47 U.S.C. §§ 201, 202.

the Commission could have chosen (and could still choose) to classify broadband under Title II, it is at best challenging and at worst reckless to continue to rely on ancillary authority. While *Comcast v. FCC* does leave the FCC with the theoretical ability to regulate some aspects of broadband Internet access in the public interest using ancillary authority, the FCC should advance a statutory basis for broadband authority that does not require it to engage in complex and unproductive legal analysis for each of its orders, each time opening itself to avoidable challenge. In short, the FCC should classify broadband access as a Title II service.

C. By Using Its Authority over “Telecommunications Services” To Protect Broadband Consumers, the FCC Will Foreclose Future Challenges to Its Authority to Protect the Open Internet

There are two ways to more firmly ground the FCC’s authority to promote an open Internet: (1) The FCC can classify broadband Internet access as a Title II service, recognizing that “broadband Internet access” is a single telecommunications service that can be provided using different technologies, or (2) it can use its authority over the already-defined Title II elements of broadband platforms without revisiting the classification of the services as a whole. The first method is simpler while the second method is more surgical, but both have the same end.

1. First Method: Classify “Broadband Access” As Title II

In the Open Internet NPRM, the FCC for the first time defined “broadband Internet access” and “broadband Internet access service” as distinct and independent of

the transmission medium. The definitions of “broadband Internet access”¹³ and the definition of “broadband Internet access service”¹⁴ mirror the definition of “telecommunications service” in the Communications Act.¹⁵ Under the statutory interpretation set forth in the *Cable Modem Declaratory Ruling*,¹⁶ which hinges on the nature of the service “offered” to the public, the Commission should next determine – without regard to the nature of the platform¹⁷ – whether providers offer “broadband access service” as an integral part of a bundle of services or as the primary service offering to the customer.¹⁸ What is advertised to customers, and what they buy, is “Internet access,” not secondary information services such as DNS translation, web hosting, or some kind of “prioritized access.”

2. *Second Method: Assert Authority Over the Telecom Component And Require Providers To Offer This Aspect of the Service Separately.*

The *Cable Modem Declaratory Ruling* recognized an inherent “telecommunications component” in cable modem service, and that “the transmission of information to and from ... computers may constitute ‘telecommunications.’”¹⁹ Similar

¹³ Open Internet NPRM at 65 (“Internet Protocol data transmission between an end user and the Internet”) (part of the definition is a specific exclusion for ISPs that are already accessed over a Title II network: dial-up ISPs).

¹⁴ Id. (“Any communication service by wire or radio that provides broadband Internet access directly to the public, or to such classes of users as to be effectively available directly to the public.”).

¹⁵ 47 §153(46) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

¹⁶ Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798 (2002).

¹⁷ The D.C. Circuit has long recognized that the character of a communication service, and not the technical details of its transmission, determines whether it is a Title II service. *General Tel. Co. of Cal. v. F.C.C.*, 413 F.2d 390, 397, 401 n. 19 (1969).

¹⁸ The nature of the offer, not how parties choose to describe the offer, governs the analysis. *National Ass’n of Reg. Util. Com’rs v. FCC*, 525 F. 2d 630, 640-43 (D.C. Cir. 1976), hereinafter “NARUC I.”

¹⁹ *Cable Modem Declaratory Ruling* ¶¶ 39, 40.

logic underpins the other classification orders²⁰ and the courts have recognized that this inherent telecommunications component remains and provides a separate basis for jurisdiction.²¹ To the extent that services such as cable modem service already contain telecommunications services, Title II already applies to those services even without a formal “classification,” if the Commission decides to abandon the peculiar use of the word “offer” criticized by Justice Scalia in the *Brand X* decision²² and finds that these disparate, pre-existing telecommunications services are in fact already “offered” to consumers. As explained above, the “offer” to the consumer is primarily one of Internet access, which is a telecommunications service that connects one party to another, not an information service like LexisNexis or eBay. Information services like email accounts, DNS translation, or web hosting that may or may not be bundled together with a telecommunications service are incidental extras.

The Commission is well within its authority to revisit what constitutes an “offer” in this context. The Supreme Court has held that the word “offer” as used in the Communications Act is “ambiguous,”²³ and thus the reasonable reading given by Justice Scalia—that telecommunications services are in fact “offered” to consumers even when they are packaged with other services—is within the Commission’s power to adopt. To

²⁰ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853, ¶ 3 (2005) (“DSL Order”); *Appropriate Regulatory Treatment for Broadband Access to Internet Over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd. 5901, ¶ 1 (2007) (“Wireless Classification Order”); *United Power Line Council’s Petition For Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service As An Information Service*, 21 FCC Rcd. 13281, ¶ 1 (2006) (“BPL Classification Order”).

²¹ *Comcast v. FCC* slip op. at 13-14; *Am. Council on Educ. V. FCC*, 451 F.3d 226, 234-35 (2006).

²² See *Brand X*, 545 US at 1007 (2005) (Scalia, J. dissenting); see also *United States v. Brooklyn Terminal*, 249 US 296, 304 (1919) (whether a service is a common carrier is based on “what it does,” not what it’s called). If necessary, the FCC can justify any secondary effects on Title I elements that are contained within a Title II service as a whole, or on Title I services as a result of Title II regulation, using ancillary authority. But carriers cannot engage in regulatory arbitrage by layering Title I elements on top of an essentially Title II service, and most “Title I effects” are of no more import than, e.g., the effects on a Title I conference call service that result from its Title II regulation of intercarrier compensation. See *supra*, note 9.

²³ *Brand X*, 545 U.S. at 989.

satisfy the APA, the Commission need merely explain its actions (e.g., that by adopting a new understanding of “offer” it provides itself with the ability to protect consumers).²⁴

The fact that the Supreme Court has “endorsed” the Commission’s past understanding of the word “offer” is immaterial; as *Brand X* itself explains, if a statute entitled to agency construction is ambiguous, no court ruling that one particular reading is “reasonable” or even “best” binds an agency to that reading.²⁵

D. Sections 201 and 202 Enable the FCC to Implement the Goals of the Open Internet Rules

Under either of these methods, Title II provides the Commission with the necessary authority to implement the policies of the proposed rules. With the Commission’s authority firmly rooted in Title II, the rules can be strengthened, clarified, and simplified by basing them upon the requirements of Sections 201 and 202 of the Communications Act. Using these sections as a framework would obviate the need for certain provisions of the proposed rules, which otherwise might needlessly complicate adjudications and enforcement proceedings that are already provided for in the Title II framework.

²⁴ As the Supreme Court explained,

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance. . . . [O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810-11 (2009) (expressly overruling contrary DC Circuit opinion)(emphasis in original, citations omitted).

²⁵ *Brand X*, 545 U.S. at 980-86.

1. Sections 201 and 202 Provide Ample Statutory Basis for the Six Principles of the Open Internet Rules

Section 201 requires common carriers to “furnish communication upon any reasonable request therefore,” and prohibits “any charge, practice, classification, or regulation that is unjust or unreasonable.”²⁶ Section 202 prohibits “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services,” and also “any undue or unreasonable preference or advantage to any particular person, class of persons, or locality.”²⁷ These statutes provide ample authority for the six principles proposed in the NPRM. In fact, those six principles serve as manifestations of the Congressional intent expressed in Sections 201 and 202, guiding enforcement of those sections under the auspices of Section 208.²⁸

For example, broadband Internet access providers that violate the nondiscrimination principle will necessarily have violated Sections 201 and 202 by having engaged in unjust or unreasonable practices that unjustly or unreasonably gave preference to or disadvantaged a particular class of persons: namely, the users of particular lawful applications, services, or content. The other five principles offer more detailed guidance as to how Sections 201 and 202 apply in the context of broadband Internet access provision. By specifying the obligations of providers, all six principles indicate that failures to meet those obligations should be analyzed under the standards of sections 201 and 202 to see if the questioned practices, charges, or classifications are “unjust or unreasonable;” if they subject particular persons, classes of persons, or

²⁶ 47 U.S.C. § 201.

²⁷ 47 U.S.C. § 202(a).

²⁸ 47 U.S.C. § 208.

localities to preferences or disadvantages that are “undue or unreasonable;” or if they fail to furnish communications service upon reasonable request.

2. Basing Authority in Sections 201 and 202 Allows Simplification of the Proposed Rules

The robust framework of these statutes renders a number of problematic portions of the proposed rules redundant. In particular, the proposed principles all include the exception “subject to reasonable network management.” In the context of the preexisting language of Sections 201 and 202, the “reasonable network management” exception becomes superfluous. A reasonable practice of network management would simply be found to be either just or reasonable, and would be permitted as such. Eliminating this redundancy would lead to a greater certainty for providers, removing an additional layer of interpretation of what is and is not “reasonable.”

For example, relying upon the statutory standards for justness and reasonableness would prevent a new standard from being used to grant providers free rein to judge, on their own authority, what content was lawful or being lawfully transferred. An overly broad interpretation of reasonable network management could excuse behavior that, with a stated intent of preventing unlawful activity, actually discriminated against lawful content, applications, services, or devices. It is worth noting, however, that a Section 201/202 standard would not give network users carte blanche to engage in unlawful content, as legal prohibitions on unlawful content and transmissions would remain in full force. But it would also not give network providers carte blanche to use overbroad

methods to block content it believes may be illegal, leaving consumers helpless to stop them.²⁹

3. *Sections 201 and 202 Possess a Readily Available Enforcement Mechanism in Section 208.*

Another advantage to basing Commission authority in Sections 201 and 202 is that enforcement mechanisms need not be organized *de novo*. Enforcing the Open Internet rules would simply be a matter of aggrieved parties bringing complaints under Section 208. As an adjudicatory mechanism, Section 208 allows the Commission to make fact-based determinations of practices alleged to be violations, preventing the need for extensively detailed *ex ante* regulations. The standards of Sections 201 and 202, as explicated by the rules, would serve as sufficient notice against the sorts of practices prohibited by the principles.

For example, a scenario such as Comcast's blocking of the BitTorrent protocol would be an unjust and unreasonable practice or regulation as well as an unjust and unreasonable discrimination. The discriminatory nature of the practice, as well as its non-minimal intrusiveness,³⁰ would easily support a ruling against Comcast under Section 208. Other problematic practices could be similarly addressed. A carrier that blocked access to a legal website that generated more traffic than it would like would be subjecting classes of persons (the website and its readers) to unreasonable prejudice and engaging in an unreasonable practice, much like incumbent local exchange carriers that were found to be in violation of Sections 201 and 202 for engaging in self-help by

²⁹ *Cf. Sable Commc'ns California, Inc. v. FCC*, 492 U.S. 115 (1989), striking as insufficiently narrowly tailored FCC regulations that barred telephone services that transmitted indecent communications.

³⁰ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 FCC Rcd. 13,028, 13,051 (2008).

blocking particular users.³¹ Practices that degraded other users' service or allowed carriers to decide, regardless of user preference, which content, application, or service providers received priority, would be found to be unjust and unreasonable, lacking precedent for such discriminatory acts in Sections 201 and 202.

E. The FCC Can Expect to Be Challenged At Every Turn if It Continues to Rely on Title I

If the FCC chooses not to use its existing statutory authority over broadband directly, it may still rely on ancillary authority, just as it has the ability to adopt specific regulations in response to unique sets of circumstances, in accordance with a properly articulated theory of ancillary authority for the particular regulation. For instance, the FCC relied on ancillary authority to require retailers to post notices to consumers about the pending obsolescence of analog televisions,³² and should not have to wait for a specific Congressional directive to adopt a narrow measure targeted at achieving a clearly articulated Congressional aim in a one-of-a-kind circumstance. But *Comcast v. FCC* shows the relative riskiness of relying ancillary authority: no matter how well-reasoned the argument, a court may always find that a particular statute does not convey any real authority, or that a proposed regulation is not reasonably ancillary to carrying it out. This kind of complex legal reasoning is best left for unique or unusual circumstances, or as a

³¹ Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers, *Declaratory Ruling and Order*, 22 FCC Rcd. 11,629, ¶ 6 (2007) (“Specifically, Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.”) (citing Telecommunications Research and Action Center and Consumer Action v. Central Corporation et al., File Nos. E-88-104-108, *Memorandum Opinion and Order*, 4 FCC Rcd 2157, 2159 ¶ 12 (1989); Blocking Interstate Traffic in Iowa, FCC 87-51, *Memorandum Opinion and Order*, 2 FCC Rcd 2692 (1987)).

³² Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Second Report & Order*, 22 FCC Rcd. 8776, ¶¶ 15-20 (2007).

necessary backstop; it is impractical and inappropriate for the FCC's primary, day-to-day activities. While Public Knowledge supports regulations in the public interest using any lawful form of authority, the FCC must not tie its own hands in the name of short-term expediency.

1. *Comcast and Others Claim That Open Internet Rules are Statutorily Barred for Title I Services*

Comcast argued to the DC Circuit in *Comcast v. FCC* that in its view no regulation may ever be lawfully applied to broadband carriers under Title I if such regulation has any of the "hallmarks" of common carrier regulation.³³ In its view, the FCC can never articulate a basis for Open Internet rules over Title I broadband services; such rules are always flatly illegal. Thus, Comcast's claim that it "remains committed to the FCC's existing Open Internet principles, and we will continue to work constructively with this FCC as it determines how best to increase broadband adoption and preserve an open and vibrant Internet"³⁴ rings rather hollow. It has already argued that the FCC has no authority, and cannot have any authority, to preserve an open Internet as long as broadband is a Title I service. The simplest solution to Comcast's line of argument, of course, is to reclassify broadband Internet access as a Title II service.

Comcast's argument was not considered by the DC Circuit and is flawed for several reasons,³⁵ but it is non-trivial. Indeed, Justice Scalia hinted at this argument,

³³ See Opening Brief of Comcast Corp. at 52, *Comcast Corp. v. FCC*, No. 08-1291 (DC Cir. Jan. 8, 2010). (AT&T makes a similar argument, see Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52 at 209-10.) (dated January 14, 2010) *hereinafter* "AT&T Comments".)

³⁴ Press Release, Comcast, Comcast Statement on U.S. Court of Appeals Decision on Comcast v. FCC, Apr. 6, 2010, <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=984>.

³⁵ First, Comcast's argument relies on *Midwest Video II*, 440 U.S. at 705 n.15, which, as the DC Circuit recently explained, only prohibits the FCC from applying common carrier regulation on cable television providers as ancillary to its broadcast authority. *American Library Ass'n. v. F.C.C.*, 406 F.3d 689, 701 (D.C. Cir. 2005) ("because the Communications Act explicitly directed the Commission not to treat broadcasters as common carriers, the Court [in *Midwest Video II*] concluded that it was not reasonably

writing that there is “reason to doubt” that the FCC can “impose common-carrier-like requirements” on Title I services, “since § 153(44) specifically provides that a ‘telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.’”³⁶

The FCC can certainly expect to be challenged by aggrieved parties applying “the Comcast rule” if it attempts to implement parts of the Broadband Plan or its Open Internet rules using Title I. Any argument based on Section 153(44), however, can be bypassed by direct use of Title II authority.

2. *Title I Ancillary Authority Would Have to Be Separately Justified For Each Broadband Activity, and Would Lead to Repetitive Litigation*

In order to forestall questions about the legal basis of authority over broadband, AT&T and NCTA filed long memoranda detailing their theories of how Universal Service regulation of broadband may be lawful under Title I.³⁷ Even if the FCC were to

ancillary to the Commission's effective performance of its responsibilities relating to broadcast television for the Commission to impose common-carrier obligations on cable television systems.”) Thus, regulation of a Title I service as ancillary to Title II obligations would not run afoul of *Midwest Video II*. Comcast also argues that Section 153(44) blocks the Commission from applying any Open Internet rules on Title I services. However, this rationale does not apply when the Title I service is being regulated as it would be if it were a Title II service to begin with. See *infra* note [the footnote right below].

³⁶ *Brand X*, 545 US at 1014 n.7 (Scalia, J., dissenting). Like Comcast's argument, this doubt does not stand up to scrutiny. First, the provision in question is of narrow scope, applying only to telecommunications carriers, not to companies like Comcast that under the current formulation provide information services but not telecommunications services. Second, it is settled law that “‘a common carrier is such by virtue of his occupation,’ that is by the actual activities he carries on,” *National Ass'n of Reg. Util. Com'rs v. FCC*, 533 F.2d 601, 607-8, 621 (1976), (*NARUC II*) (statutes governing “common carriers” applicable even in a case where the FCC attempted to define the service as “non-common carriage”), is settled law. Applying this logic, the FCC may regulate any carrier that in fact provides “telecommunications services” as a “telecommunications carrier,” regardless of its current placement in the regulatory framework. Also, Comcast has not provided a basis for determining what kinds of regulations grounded in Title II are “hallmarks” of common carrier regulation and what kinds are not. For example, given the structure of Title II, it would appear that the requirement of carriers to “establish physical connections with other carriers,” 47 U.S.C. § 201(a), is more a “hallmark” of common carriage communications networks than nondiscrimination. But under the “Comcast rule” the FCC may not have the authority to resolve disputes about Internet interconnection—nor, perhaps, could it reform Universal Service, promote truth in billing, or advance other goals that find statutory support in Title II.

³⁷ AT&T Memorandum, GN Docket No. 09-51, Jan. 29, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020384662>; NCTA Letter and Memorandum, GN Docket No. 09-51, Mar. 1, 2010, <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020392510>.

adopt their reasoning with regard to Universal Service and it withstood court scrutiny, legal reasoning of similar or greater complexity will be required for the FCC to act in other areas of broadband. Indeed, as FCC General Counsel Austin Schlick observed,

[the *Comcast*] decision may affect a significant number of important [National Broadband] Plan recommendations... [including] recommendations aimed at accelerating broadband access and adoption in rural America; connecting low-income Americans, Native American communities, and Americans with disabilities; supporting robust use of broadband by small businesses to drive productivity, growth and ongoing innovation; lowering barriers that hinder broadband deployment; strengthening public safety communications; cybersecurity; consumer protection, including transparency and disclosure; and consumer privacy.³⁸

The FCC would be required to engage in lengthy ancillary authority analysis for each of its broadband initiatives,³⁹ cabined by *Comcast v. FCC*'s holding that statutes deemed to be "policy statements" cannot form the basis of ancillary authority.⁴⁰ Furthermore, all of this may be required to withstand difficult review.⁴¹

Even the same parties who, before any specifics are proposed, are happy to suggest that the FCC may have the ancillary authority to act in their favor on broadband matters may nonetheless challenge any specific FCC action they dislike. For example, NCTA has written that,

Depending on the details of the specific program, the Commission may find the necessary legal authority in section 254(h) or in other provisions of the Act.⁴²

³⁸ Austin Schlick, *Implications of Comcast Decision on National Broadband Plan Implementation*, BLOGBAND, Apr. 7, 2010, <http://blog.broadband.gov/?entryId=356610>.

³⁹ *NARUC II*, 533 F. 2d 601, 612 (D.C. Cir. 1976).

⁴⁰ *Comcast v. FCC* slip op. at 22.

⁴¹ Commenters have previously argued that *Chevron* deference is appropriate in ancillary authority questions because the issue is not of delegation of authority, see *American Library Ass'n. v. FCC*, 406 F. 3d 689, 699 (D.C. Cir. 2005) (No *Chevron* deference when an agency is acting beyond its delegated authority), since the FCC has jurisdiction over communication by wire and radio, but of interpretation of an ambiguous statute. See Brief for Intervenors Free Press, Public Knowledge, et al., *Comcast v. FCC* (D.C. Cir. 2009) (No. 08-1291) *Comcast v. FCC* does not address deference issues.

⁴² NCTA Letter and Memorandum at 2.

In other words, the FCC does not have authority to promote Universal Service *per se*. In NCTA's view, the FCC only has the authority to promote Universal Service programs it agrees with. Limits to the FCC's authority already exist in that an aggrieved party can allege that the APA has been violated in adopting a rule, or point to some other statutory violation. However, NCTA wishes to reserve to itself the additional ability to challenge the exercise of ancillary authority in cases where it disagrees with the "details of the specific program." As it later explains,

But if the Commission conducts further proceedings and is able to develop efficient, appropriately targeted programs to support broadband deployment and adoption, it has the necessary authority to adopt such programs without reclassifying broadband Internet access as a Title II service.⁴³

This theory greatly constricts an agency's scope of action. A challenge to agency authority may be appropriate in cases where the agency is going beyond the terms of its specific statutory grants, and must justify doing so. But broadband is treated as a Title I service only because of a decision the agency made, and can unmake. Congress has already granted the Commission the authority to regulate telecommunications services. A supercharged "APA-plus", where the usual level of *Chevron* deference available to agencies is limited or gone, is not an appropriate level of review for an agency's typical actions. For its day-to-day activities, the agency should be subject to the usual constraints of the APA (e.g., that it account for all the evidence and give reasoned explanations for its actions) and its organic statute. But if the FCC fails to ground its legal authority more firmly going forward, it can expect challenges to its authority each time it tries to update its regulations to reflect the new broadband-centric reality. The public deserves better than this legal brinksmanship.

⁴³ NCTA Letter and Memorandum at 9.

By relying on its existing Title II authority to protect an open Internet, the FCC will provide itself a firmer regulatory footing both in this proceeding and for all its broadband-related activities.

II. The Proposed Open Internet Rules Do Not Violate the First Amendment

Broadband access providers such as AT&T and Verizon assert that the Commission's proposed rules would violate their First Amendment rights.⁴⁴ The Commission previously addressed these arguments in the *Comcast Bittorrent Order*.⁴⁵ There, the Commission found that not only did Comcast fail to state a First Amendment claim, but also that Commission action to protect the openness of the Internet served the interests of the First Amendment.⁴⁶

A. The Proposed Rules Regulate the Functionality of the Network and Therefore do not Trigger a First Amendment Analysis

Unlike newspaper publishers, radio broadcasters, or even cable operators, broadband access providers do not exert editorial control over the content they deliver. No reasonable user ascribes the content she accesses via broadband to the broadband

⁴⁴ See, e.g. AT&T Comments at 235 (dated January 14, 2010); Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52 at 111 (dated January 14, 2010) *hereinafter* "Verizon Comments."

⁴⁵ *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management"*, File No. EB-08-IH-1518; WC Docket No. 07-52, Memorandum Opinion and Order, FCC 08-183 at fn. 203 (Aug. 20, 2008), *rev'd on other grounds* Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. Oct. 26, 2009) *hereinafter* "Comcast Bittorrent Order."

⁴⁶ *Id.* Notably, Comcast did not raise the First Amendment argument on appeal, despite pressing the argument vigorously below. See Brief of Petitioner Comcast Corporation, Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. Oct. 26, 2009); Brief of Respondent FCC, Comcast Corp. v. FCC, No. 08-1291 (D.C. Cir. Sep. 21, 2009).

access provider. Rather, as the Supreme Court has consistently held, a subscriber affirmatively seeks out content on his or her own initiative.⁴⁷ This is the service that providers sell when they offer “broadband access:” the ability to access desired content and run desired applications.⁴⁸ This broadband access service stands in sharp contrast with the offer of MVPD service, where providers explicitly distinguish themselves based on the availability of exclusive premium content.⁴⁹ Accordingly, broadband access providers are neither prevented from speaking⁵⁰ nor forced to carry the speech of others⁵¹ under the proposed rules.

Provisions relating to provider liability in the Communications Act and elsewhere buttress the conclusion that when broadband providers enable users to send and receive content, they are conduits for speech and not separate speakers themselves. Section 230 of the Communications Act⁵² and Section 512 of the Copyright Act⁵³ provide separate “safe harbors” for access providers unavailable to traditional speakers.

This long-standing treatment of broadband access providers as conduits for the speech of others cuts both ways. Congress shields providers from liability for the content

⁴⁷ See *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

⁴⁸ Almost all ISP advertising focuses on comparative “speed,” or the ability of a user to access the content of his or her choice as quickly as possible. See, e.g. FiOS vs. Cable (comparing Verizon FiOS speeds favorably to those of cable), <http://www22.verizon.com/Residential/FiOSInternet/FiOSvsCable/FiOSvsCable.htm>; Comcast High Speed Internet: Speed Comparison (comparing Comcast cable speeds favorably to those of DSL), <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/speedcomparison.html>. While most ISPs also offer additional services, these are offered *in addition* to broadband access. See, e.g. Comcast’s “valuable extras” including the “Norton Security Suite,” “SmartZone Communications Center” (email, voicemail, address book), Online Backup, and gateway site Comcast.net. <http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?lid=2LearnHSI&pos=Nav>. See also the Verizon FiOS offer “Included with your FiOS Internet comes free Verizon email, Wi-Fi access, 24/7 support, plus a free personal Web space to build your own blog, business site or Web page.” <http://www22.verizon.com/Residential/FiOSInternet/#features>.

⁴⁹ See, e.g. DirectTV’s NFL Sunday Ticket, exclusively providing subscribers access to a broadcast of all NFL games, not just those in the home market, www.directv.com/DTVAPP/content/sports/nfl.

⁵⁰ Cf. *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*).

⁵¹ Cf. *AT&T Corp. v. Portland*, 216 F.3d 871 (CA9 2000).

⁵² 47 U.S.C. § 230.

⁵³ 17 U.S.C. § 512.

that passes through their networks because the speakers, not the providers, control the content. Network operators cannot enjoy these protections grounded in a lack of control while simultaneously claiming a First Amendment right to edit the speech of others when convenient.

Congress provides these protections to broadband access providers because it recognizes, as does the public, that broadband access providers are not responsible for the entire contents of the Internet. The Internet is a public forum available to all comers. While customers rely on broadband access providers to *access* this forum, they no more ascribe what they find there to broadband access providers than patrons of a shopping center ascribe the views of political speakers in that shopping center to the shopping center itself, or riders of a bus ascribe the views they encounter at their destination to the bus company. As such, the rules simply do not impact the First Amendment rights of broadband access providers.⁵⁴

More broadly, common carriers are also granted wide-ranging protections for liability flowing from the information they transmit.⁵⁵ The key factor in determining common carrier status is to determine if “the operator offer[s] indiscriminate service to whatever public its service may legally and practically be of use.”⁵⁶ Broadband access providers easily fall within this definition, and therefore enjoy these traditional protections. As with the safe harbors cited above, these protections exist in recognition that it is those who send and receive the information, not the common carrier transporting

⁵⁴ See *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 87 (1980).

⁵⁵ For example, in all but the most extreme cases, common carriers are exempted from liability for transmitting a libel. See *O’Brien v. Western Union Telegraph Co.*, 113 F.2d 539 at 543 (1st Cir. 1940). Similarly, in many cases common carriers are not liable for infringements to copyright transmitted over their facilities. See 17 U.S.C. §111(a)(3).

⁵⁶ *NARUC I*, 525 F.2d at 642.

that information, who are ultimately responsible for it. If broadband access providers would prefer to avoid common carrier status and become responsible for the information they transport, providers should prominently advertise that they would negotiate access rates and terms individually as a private service. Currently the advertising of providers contains no such suggestion – service is offered as is and indiscriminately.⁵⁷

Finally, if the Commission were to determine that a First Amendment analysis was necessary, the rules do not infringe upon First Amendment rights because they are content neutral and narrowly tailored to advance a substantial government interest. In fact, the rules seek to assure “that the public has access to a multiplicity of information sources . . . a governmental purpose of the highest order.”⁵⁸

B. Broadband Access Providers Are Not Speakers for First Amendment Purposes

In its comments, AT&T, among others, asserts that broadband access providers are First Amendment speakers.⁵⁹ AT&T argues that broadband access providers “may include original content in their offerings; they may engage in the editorial organization of content; and they may provide tailored offerings aimed at certain subscriber groups.”⁶⁰ In support of this assertion, AT&T points to its own video services and home page.⁶¹ It is undeniable that in its role as video provider and home page provider, AT&T is a First Amendment speaker exerting editorial control over its offerings.

⁵⁷ See, e.g.

<http://www.comcast.com/Corporate/Learn/HighSpeedInternet/highspeedinternet.html?lid=2LearnHSI&pos=Nav>; <http://www.att.com/u-verse/explore/internet-landing.jsp>;
<http://www22.verizon.com/Residential/FiOSInternet/>.

⁵⁸ *Turner I* at 663.

⁵⁹ See *AT&T Comments* at 235.

⁶⁰ *Id.* at 235-36.

⁶¹ *Id.* at 236 fn. 517.

The proposed Open Internet rules make no attempt to regulate broadband access providers in their role as content providers and editors. In fact, the Open Internet rules make no attempt to regulate anyone in their roles as content providers or editors. Instead, the Open Internet rules regulate broadband access providers in their role as broadband access providers, *i.e.*, as conduits for the speech of others. While consumers may use AT&T's Internet service to access AT&T's web content, Internet access and Internet content are conceptually distinct.⁶² In fact, the Open Internet rules will guarantee that AT&T's web content offerings are available to all Internet subscribers no matter which broadband access provider that subscriber prefers to use.⁶³

This distinction is clear from how the two services are presented to the public. For example Verizon.net, the home page for Verizon Internet customers, contains a notice explicitly claiming copyright over the content of the page.⁶⁴ In contrast, the terms of service of Verizon Internet access explicitly disclaim any affiliation with the content transmitted over the network.⁶⁵ While the rules “would compel ISPs to carry the

⁶² For example, the National Broadband Plan focuses primarily on expanding Internet *access*, and is less concern on the need to foster the growth of Internet *content*.

⁶³ The distinction between Internet access and Internet content is one clearly and easily recognized by Congress in other contexts. For instance, hosts of Internet content, in order to take advantage of the safe harbor provisions of the Digital Millennium Copyright Act (DMCA), must take steps to remove infringing content once notified of its location on their sites. 17 U.S.C. § 512(c). By contrast, Internet access providers face no such takedown obligations, being considered mere conduits for material transmitted by others. 17 U.S.C. § 512(c).

⁶⁴ “Copyright 2010 Verizon All Rights Reserved” at <http://www.verizon.net/central/appmanager/portal/vzcentral>

⁶⁵ See, “Verizon Online – Policies – Terms Of Service,” § 11, *available at* http://www.verizon.net/policies/popups/tos_popup.asp:

5. You agree that Verizon assumes no responsibility for the accuracy, integrity, quality completeness, usefulness or value of any Content, advice or opinions contained in any emails, message boards, chat rooms or community services, Verizon Web Sites or in any other public services or social networks, and that Verizon does not endorse any advice or opinion contained therein, whether or not Verizon provides such service(s). Verizon does not monitor or control such services, although we reserve the right to do so. . . .

7. Websites linked to or from the Service are not reviewed, controlled, or examined by Verizon and you acknowledge and agree that Verizon is not responsible for any losses you incur or claims you may have against the owner of third party websites. The

messages of *all* content and application providers,”⁶⁶ they would not impact the ability of broadband access providers (or any other speaker) to select what content and applications are provided on their various web properties.

Broadband access providers do not claim editorial control over the content transmitted over their networks, and consumers do not associate everything they access through their broadband access provider with that broadband access provider. A consumer would rightfully assume that all content displayed on a broadband access provider’s home page is endorsed by that broadband access provider. However, no reasonable customer assumes that her broadband access provider endorses political candidates whose website the customer visits, third party content the customer accesses, or controversial viewpoints viewed or expressed online accessed via the broadband access provider.⁶⁷

The public understands that the Internet is a public forum. The rules do not compel a broadband access provider to affirm its belief in any content accessed via the Internet, and broadband access providers are free to publicly dissociate themselves from any online content by posting criticism on their own web sites. As a result, the rules impose no First Amendment burden on broadband access providers.⁶⁸

The Commission has recognized that the mere regulation of the technical functionality of a network does not trigger First Amendment analysis in other contexts. In announcing its Upper 700 MHz C Block rules, the Commission rejected a First

inclusion of any linked websites or content from the Service, including websites or content advertised on the Service, does not imply endorsement of them by Verizon.

⁶⁶ See AT&T Comments at 236.

⁶⁷ For example, Comcast customers who access ComcastSucks.org are unlikely to believe that Comcast supports or endorses the content on the site.

⁶⁸ See *PruneYard*, 447 U.S. at 88.

Amendment challenge by Verizon Wireless.⁶⁹ There, as it should now, the Commission recognized that its rules “regulate the functionality of the spectrum and the conduct of the licensee – activities that we believe are not sufficiently imbued with elements of communication to fall within the scope of the First Amendment.”⁷⁰

The Commission went on to note that Verizon Wireless’ challenge did not meet a burden of demonstrating that First Amendment scrutiny was warranted because the requirements “promote rather than restrict expressive freedom because they provide consumers with greater choice in the devices and applications they may use to communicate.”⁷¹

C. If Broadband Access Providers Are Considered First Amendment Speakers, the Open Internet Rules Withstand First Amendment Scrutiny

If the Open Internet rules are examined under the First Amendment, they survive applicable intermediate scrutiny.⁷² As the Commission noted in the *700 MHz Order*, quoting *Turner II*, a “content-neutral regulation will be sustained under the First

⁶⁹ *In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules; Implementing a National wide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010; Declaratory Ruling on Reporting Requirement under Commission’s Part 1 Anti-Collusion Rule*, WT Docket Nos. 06-150, 01-309, 03-264, 06-169, 96-86, 07-166; CC Docket No. 94-102; PS Docket No. 06-229, Second Report and Order, FCC 07-132 at ¶ 217 (Aug. 10, 2007) *hereinafter* “700 MHz Order.” The Commission reiterated this point in its Comcast Order. *Comcast Bittorrent Order* at fn. 203, *rev’d on other grounds, Comcast Corp. v. FCC*, No. 08-1291, (D.C. Cir. Apr. 6, 2010).

⁷⁰ *Id.* at 217 (internal citations and ellipses omitted).

⁷¹ *Id.*

⁷² AT&T itself rightly concedes that intermediate scrutiny would apply in this situation, citing *Turner Broadcasting System Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (*Tornillo*), and *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). *AT&T Comments* at 236.

Amendment if it advanced important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”⁷³

Taking the necessary steps to protect the public’s free speech rights is central to the First Amendment. As the Supreme Court stated:

“[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.”⁷⁴

1. The Open Internet Rules Are Content Neutral

The Open Internet rules apply universally to all lawful content, applications, and devices.⁷⁵ In 1994, the Supreme Court established the test for content neutrality: “the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”⁷⁶ As the proposed rules apply to all lawful content, applications, and devices, they are unrelated to any specific message being conveyed and make no reference to the

⁷³ *700 MHz Order* at 218.

⁷⁴ *Associated Press v. United States*, 326 U.S. 1, 20 (1945) Though this statement was made in the context of antitrust, it is eminently applicable to broadband access providers unique control over information flowing to consumers.

⁷⁵ *Open Internet NPRM* Appendix A

⁷⁶ *Turner I*, 512 U.S. at 642 (internal citations and ellipses omitted).

content. “[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.”⁷⁷

Unlike the rules considered in *Tornillo*, the Open Internet rules do not provide broadband access providers with an opportunity to “avoid controversy” by picking and choosing which types of speech to transmit.⁷⁸ Instead, just the opposite is true: broadband access providers must transmit all lawful speech and can avoid none.

2. *The Open Internet Rules Advance Important Governmental Interests Unrelated to the Suppression of Free Speech*

In introducing the Open Internet rules, the Commission pointed to a number of important government interests advanced, each related to promoting, not suppressing, free speech. By preserving an open Internet, the rules will help to empower “individuals and companies at the edge of the network to develop and contribute an immense variety of content, applications, and services,”⁷⁹ “preserve and promote advanced communications networks that are accessible to all Americans and that serve national purposes,”⁸⁰ “build on existing policies . . . that have contributed to the Internet’s openness,”⁸¹ and “maximize the Internet’s potential to further users’ interests and the public interest – including national priorities such as education, health care, and energy efficiency – by safeguarding the essential openness that has been a hallmark of the Internet since its inception.”⁸²

⁷⁷ *Turner I*, 512 U.S. at 643.

⁷⁸ *Tornillo*, 418 U.S. at 257.

⁷⁹ *Open Internet NPRM* 4.

⁸⁰ *Open Internet NPRM* 5.

⁸¹ *Open Internet NPRM* 14.

⁸² *Open Internet NPRM* 15.

As the Commission noted in the context of program access rules, Congress has expressly found that there “is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.”⁸³ The Open Internet rules, designed to assure that no discrimination can occur on the Internet, promote just that interest.

3. *The Open Internet Rules Do Not Burden Substantially More Speech Than Necessary To Further The Important Governmental Interests*

The Open Internet rules are narrowly tailored to assure that the Internet remains open to all speakers and innovators. They prevent vital intermediaries from blocking lawful content, applications, and devices that do not harm the network that users choose to utilize.⁸⁴ This is the only way to preserve an open Internet. The rules allow broadband access providers to take steps to assure the functionality of their networks through reasonable network management.⁸⁵ Exceptions are made for law enforcement, public safety, homeland security, and national security needs.⁸⁶ Notably, as with the rules applied to the 700 MHz C Block, the rules do not limit or prevent broadband access providers' ability to offer preferred devices, applications, and content via the Internet.⁸⁷

Furthermore, the rules are narrowly tailored to only apply to broadband access providers, those crucial final links between consumers and the Internet. By judiciously

⁸³ Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, 75 Fed. Reg. 9692 at 9705 (Mar. 3, 2010). The Commission’s program access rules were recently upheld, although the court did not directly consider this First Amendment issue. *See Cablevision Systems Corp.*, 570 F.3d 83.

⁸⁴ *Open Internet NPRM* Appendix A

⁸⁵ *Open Internet NPRM* Appendix A

⁸⁶ *Open Internet NPRM* Appendix A

⁸⁷ *See 700 MHz Order* at 219.

limiting the scope of its rules, the Commission has focused on the unique control that broadband access providers have over all data sent and received by consumers.

III. The Proposed Open Internet Rules Are Not Takings

Contrary to the insistence of commenters AT&T and Verizon, the Open Internet rules would not constitute a “taking” for Fifth Amendment purposes. The Fifth Amendment states that private property shall not be “taken for public use, without just compensation.”⁸⁸ While Verizon claims rules against content discrimination would “unquestioningly” take private property,⁸⁹ and AT&T claims that the “proposed rules would violate [the Fifth Amendment’s] command,”⁹⁰ the Supreme Court has explained that “[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁹¹ Thus, to answer whether the proposed rules constitute a taking requires more than an observation that they effect a regulation of property.⁹² This Section will show that the rules would not constitute a physical taking, or a *per se* regulatory taking—both types of government action that automatically trigger a need for compensation, without the need for further

⁸⁸ U.S. CONST. am. V. This is a “recognition of a preexisting power to take private property for public use, rather than a grant of new power,” *United States v. Carmack*, 329 U.S. 230, 241-42 (1946). Provided the government has the power to regulate in a particular area, it can take property for that purpose provided it pays compensation; that the taking must be for a “public use” is not an independent limitation on takings. See *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477-79 (2005) (while governments may not take property for purely private purposes, any non-pretextual public purpose is allowed); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) (“The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (even regulation for purely aesthetic reasons is a valid “public use” for takings purposes). Verizon’s tautological point that, if an agency action is unlawful, a taking made pursuant to that unlawful action is also unlawful, Verizon Comments at 122 (citing *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994)), is correct but irrelevant, because as explained in Section I the proposed Open Internet rules are squarely within the Commission’s authority.

⁸⁹ Verizon Comments at 119.

⁹⁰ AT&T Comments at 244.

⁹¹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁹² To the extent that the Open Internet rules cover wireless broadband providers, they do not involve “property” interests at all. 47 U.S.C. §304.

analysis. Then, applying the *Penn Central* factors, it will show that the rules do not constitute a regulatory taking.

A. Because the Rules Do Not Cause a “Physical Invasion,” They Do Not Constitute a Taking

Even if rules against content discrimination could be characterized as mandatory “carriage” of Internet traffic, contrary to the comments of AT&T and Verizon, the Open Internet rules do not require any kind of *physical* occupation of the property of broadband providers.

In addition to physical appropriation of property, a “permanent physical occupation” constitutes a taking.⁹³ The Supreme Court conceptualizes a regulation requiring physical invasion as a “paradigmatic taking” when the invasion is done directly by the government,⁹⁴ and as a *per se* **regulatory** taking when the government causes a property owner to “suffer a permanent physical invasion,”⁹⁵ *i.e.*, by a third party. The rules do not envision a direct physical invasion or appropriation by the government; therefore, there would be no “paradigmatic” taking. Because any “occupation” by third parties is not physical in character, neither is there a *per se* regulatory taking.

As the FCC held in 2007,⁹⁶ and as the Second Circuit affirmed last June,⁹⁷ even mandatory carriage of a television signal by a cable operator is not a physical act for the purpose of takings law. While Verizon is correct that electrons are in a sense “physical,”

⁹³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27 (1982).

⁹⁴ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)

⁹⁵ *Id.* at 538.

⁹⁶ Petition of WRNN License Company, *Memorandum Opinion and Order*, 22 FCC Rcd. 21,054, ¶ 8 (2007).

⁹⁷ *Cablevision Systems*, 570 F.3d at 98.

the law draws a distinction between matter and energy in takings claims.⁹⁸ This distinction eliminates AT&T's worry that "forcing providers to carry unwanted data on their physical facilities"⁹⁹ constitutes a physical taking, and moots the attempted analogies of the Open Internet rules to physical collocation requirements¹⁰⁰ and "permanent easement[s]."¹⁰¹

AT&T also argues that a regulation that requires it to purchase new network equipment constitutes a physical invasion. By this reasoning, any regulation requiring a business to purchase safety or pollution reduction equipment, for instance, is a "physical taking." This is not the law, and *Loretto* does not support this claim.¹⁰² *Loretto* states that some regulations can constitute a physical invasion, but "[s]o long as these regulations do not require the [property owner] to suffer the physical occupation of a portion of his [property] by a third party, they will be analyzed under the multifactor inquiry generally

⁹⁸ Even taking wave-particle duality into account, an electron is still undoubtedly "physical": electron mass is $9.10938215 \times 10^{-31}$ kg. Ignoring quantum effects, the "classical electron radius" is $2.8179402894 \times 10^{-15}$ m. National Institute of Standards, Fundamental Physical Constants, <http://physics.nist.gov/cgi-bin/cuu>. By contrast, a photon has zero mass. Verizon thus invites the Commission to draw a legal distinction between electric signals on copper wire, and massless electromagnetic radiation carried by optical cable. But there is no cause for doing so. Courts have indeed held, from time to time, that energy of one form or another (or indirect physical touching, e.g. through dust particles) is sufficiently physical to sustain a trespass cause of action. See, e.g., *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 n.6 (citing various California cases that held just that). The necessity of doing this is due to the ancient distinction between nuisance and trespass. Like trespass,

Nuisance is also a very old common law action. It is invoked when one landowner unreasonably interferes with the use and enjoyment of another's land. Unlike a trespass, it does not require an actual physical invasion. Invisible incursions, like foul smells, fumes, and electromagnetic energy, can constitute a nuisance.

R. J. Aalberts, P. Poon, & P. Thistle, *Trespass, Nuisance, and Spam: 11th century Common Law Meets the Internet*, COMMUN. ACM, vol. 50, no. 12, at 40, 43 (2007). Thus, in order to save a trespass action in cases where a nuisance action could not be held or would be insufficient, courts have focused on the physical effects of "invisible incursions." In takings cases, there is no need to engage in such strained reasoning, as the well-established regulatory takings doctrine exists to adjudicate claims with a debatable physical element. As the Second Circuit recently held, "[t]he amorphous nature of the alleged 'taking' suggests that the takings claim here [required carriage of electric signals by a cable provider] fits more comfortably within the Supreme Court's 'regulatory taking' analytical framework." *Cablevision Systems*, 570 F.3d at 98.

⁹⁹ AT&T Comments at 244.

¹⁰⁰ AT&T Comments at 245.

¹⁰¹ Verizon Comments at 119.

¹⁰² *Loretto* 458 U.S. 419.

applicable to nonpossessory governmental activity.”¹⁰³ To require that a property owner make an investment to comply with the law is not the same as to require that a property owner physically house a third party’s equipment.

For the reasons above, neither mandatory carriage of “unwanted” communications signals, nor the potential of having to make unplanned capital investments, are physical takings.

B. The Open Internet Rules Do Not Amount To a Regulatory Taking

Justice Holmes recognized that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁰⁴ The Court has since attempted to flesh out this doctrine. Although the government may “execute laws or programs that adversely affect recognized economic values,”¹⁰⁵ if “justice and fairness”¹⁰⁶ so require, a regulation may be considered a taking.¹⁰⁷ Analyses of when regulations should be considered takings are “ad hoc, factual inquiries... [but] the Court’s decisions have identified some factors that have particular significance.”¹⁰⁸

The Supreme Court has articulated three factors for determining whether there has been a regulatory taking: (1) the economic impact of the proposed regulation, (2) whether the regulation interferes with distinct investment-backed expectations, and (3) the

¹⁰³ *Id.* at 440.

¹⁰⁴ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹⁰⁵ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹⁰⁶ *Penn Cent. Transp. Co.*, 438 U.S. at 123.

¹⁰⁷ *Id.* at 127. The Court has recently clarified that whether a statute “substantially advances” an important public policy is irrelevant to whether a taking has occurred. *Lingle*, 544 U.S. at 539.

¹⁰⁸ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

character of the government regulation.¹⁰⁹ None of these factors militates in favor of finding that the Open Internet rules would be a taking.

I. The Rules Do Not Destroy the Value of Providing Broadband Internet Access

Because the economic impact of the proposed Open Internet rules is not severe, the rules do not constitute a taking.

In “extreme circumstances,”¹¹⁰ a government regulation may be “functionally equivalent to [a] classic taking....”¹¹¹ In these circumstances, the government effectively “ousts” the property owner, depriving him of all economic value of the property.¹¹²

Because the proposed rules do not eliminate the economic value of providing broadband Internet service, there has been no “ouster,” and no taking.

AT&T claims that the proposed rules amount to a taking of “several of its lines of business,” such as the “quality-of-service business.”¹¹³ This raises the “denominator problem.”¹¹⁴ What is the property interest at question? Although it is clear that there is a

¹⁰⁹ *Id.* at 124. See also John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171 (2005) for a clear guide to the Penn Central factors and their later clarification.

¹¹⁰ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985).

¹¹¹ *Lingle*, 544 U.S. at 539.

¹¹² *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). As a factor to be weighed, rather than a hard and fast rule, arguably the economic impact factor can be met by showing a very great economic harm that nonetheless leaves the owner with a “more than de minimis value.” *Animas Valley Sand and Gravel, Inc. v. Board of County Com’rs of County of La Plata*, 38 P.3d 59, 66 (Colo. 2001). The Open Internet rules do not meet even under this more liberal formulation, as they leave broadband Internet providers with a substantial line of business and the ability to recover their costs.

¹¹³ AT&T Comments at 247. AT&T’s comments suggest that the proposed Rules would deprive it of its “quality-of-service” line of business. However, the proposed Rules allow broadband Internet service providers to offer different levels of speed or capacity to different subscribers. What they do not permit, however, is for third parties to determine, regardless of subscribers’ preference, the speed or quality of those subscribers’ access. The only “service” prohibited is a narrow class of behavior already traditionally prohibited in the telecommunications business.

¹¹⁴ *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 889 n.6 (5th Cir. 2004); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 631-32 (2001) ((citing Frank I. Michelman, PROPERTY, UTILITY, AND FAIRNESS: COMMENTS ON THE ETHICAL FOUNDATIONS OF “JUST COMPENSATION” LAW, 80 HARV. L. REV. 1165, 1192 (1967))).

taking when an owner is deprived of all “economically viable use of his land,”¹¹⁵ the Supreme Court has stated that

Regrettably, the rhetorical force of our “deprivation of all economically feasible use” rule is greater than its precision, since the rule does not make clear the “property interest” against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.¹¹⁶

The balance of the law today suggests that the proper denominator is the “parcel as a whole,”¹¹⁷ with the provision of broadband Internet access service serving as the relevant “parcel as a whole” for takings analysis. Providing broadband Internet access is a profitable enterprise, and those profits do not depend on providers’ ability to engage in content discrimination, unreasonable network management, or the other unfair practices that the rules prohibit. Thus, while the rules prevent certain unfair practices, they do not deprive providers of the economic value of providing broadband. Under the rules, broadband providers remain free to preserve the integrity of their networks through just or reasonable practices, pass along the costs of capital expenditures to their customers, and earn a rate of return.

The rules do not cause a severe economic impact because they do not prevent providers from profitably offering broadband Internet access. Therefore, the Open Internet rules do not amount to a taking.

¹¹⁵ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹¹⁶ *Lucas*, 505 U.S. at 1016 n.7.

¹¹⁷ See *Keystone Bituminous Coal Assn. v. De Benedictis*, 480 U.S. 470, 497 (1987); *Rose Acre Farms, Inc. v. United States*, 559 F. 3d 1260, *aff’g* *Rose Acre Farms v. United States*, 373 F.3d 1177 (2004) (applying the Keystone rule).

2. *The Rules Do Not Interfere With Distinct Investment-Backed Expectations*

Because the rules do not interfere with any distinct, investment-backed expectations of broadband Internet access providers, they do not amount to a taking.

If an owner reasonably expects to put property to a certain profitable use, and backs up that expectation financially, the government may not interfere with that distinct, reasonable, investment backed expectation without just compensation.¹¹⁸ AT&T argues that it has an expectation of “freedom from common-carriage regulation” and that it has invested money with the expectation that “broadband Internet access services... would remain free of regulation.”¹¹⁹ It is not a taking to “interfere” with this kind of indistinct and unreasonable expectation. The prototypical example of an expectation that was sufficiently “distinct” for takings purposes is mining rights that were deprived of their economic value by state regulation.¹²⁰ Because the mining rights were specifically invested in for the purpose of mining, the Court held the regulation effected a taking.¹²¹ By contrast with this clear and distinct expectation, the Open Internet rules do not interfere with any specific investments that are separable from the investments needed for the provision of broadband Internet access generally.

The Supreme Court has rejected a *per se* “notice rule”—the argument that whenever a party invests in property, it may never challenge any regulations already in force.¹²² However, this rule does not mean that “the reasonable expectations of persons in a highly regulated industry are not relevant to determining whether particular regulatory

¹¹⁸ *Penn Central*, 438 U.S. at 127-28; *Palazzolo*, 533 U.S. at 617 (“reasonableness” qualifier).

¹¹⁹ AT&T Comments at 247.

¹²⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922).

¹²¹ *Id.*; see also *Penn. Cent. Transp. Co.*, 438 U.S. at 127-28.

¹²² *Palazzolo*, 533 U.S. at 626-630.

action constitutes a taking.”¹²³ Even distinct expectations are only protected if they are reasonable. If future regulation is reasonably likely, an expectation that it will not occur is unreasonable. The Federal Circuit has explained that three factors govern whether particular expectations are reasonable:

(1) whether the plaintiff operated in a “highly regulated industry;” (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have “reasonably anticipated” the possibility of such regulation in light of the “regulatory environment” at the time of purchase.¹²⁴

Applying these factors shows that an expectation that the Internet would “remain unregulated” is unreasonable. The communications industry is “highly regulated” when compared with other industries, and the widespread concern over the possibility of unreasonable discrimination by broadband providers put them on notice that there was a “problem” a later Commission might seek to solve. Furthermore, there was never a time when broadband providers could have reasonably expected to operate free of regulation designed to prevent unfair or anticompetitive acts. Shortly after the Supreme Court affirmed its authority¹²⁵ to decide whether to regulate broadband using either its authority over “information services” or its authority over “telecommunications carriers,”¹²⁶ the Commission issued a *Policy Statement*¹²⁷ which reiterated its commitment to continue to hold broadband providers to the same principles and standards that electronic

¹²³ *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (2001).

¹²⁴ *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (en banc). See also *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986), quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) (“Those who do business in... [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”). Additionally, some investments may be made at a discount with the expectation of future regulation. A party may not claim that there was a “taking” when it has suffered no loss of property.

¹²⁵ *Brand X*, 545 US 967.

¹²⁶ 47 U.S.C. § 143.

¹²⁷ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 14,986 (2005).

communications networks have been held to historically.¹²⁸ Prior to these events, cable broadband service was not formally regulated as an information service, and the Ninth Circuit held it to be a telecommunications service.¹²⁹ DSL broadband service was reclassified as an information service on the same day the *Policy Statement* took effect.¹³⁰ In short, the FCC put broadband providers on notice that, if it had to, it would act to protect consumers at the same time it formally classified them as less-regulated Title I services. Thus, an expectation that a Title I regime where broadband providers were free to discriminate based on content and engage in other unfair acts would “continue,” is unreasonable; in fact, such a regime never existed.

Because the Open Internet rules do not interfere with any distinct, reasonable, investment-backed expectations, they do not amount to a taking.

3. *The Open Internet Rules are General in Character*

Because the Open Internet rules are a “public program adjusting the benefits and burdens of economic life to promote the common good,”¹³¹ they are general in character and therefore not a taking.

While there have been “varying and contradictory definitions of the term ‘character,’”¹³² a program designed to benefit the public is not a taking because it applies to some and not others. As the Supreme Court has observed “[l]egislation designed to

¹²⁸ See generally Susan P. Crawford, *Transporting Communications*, 89 B.U. L. Rev. 871 (2009).

¹²⁹ *AT&T Corp. v. City of Portland*, 216 F. 3d 871(9th Cir. 2000).

¹³⁰ Both the *Policy Statement* and the *DSL Order*, 20 FCC Rcd. 14853 (2005), were released on September 23, 2005.

¹³¹ *Penn. Central Transp. Co.*, 438 U.S. at 124.

¹³² Echeverria, *supra* note 109, at 199. Echeverria argues that this factor has been asked “to carry too much weight.” *Id.* Most of definitions of “character” he discusses are either not controlling law, not relevant to the Open Internet rules (e.g., the extent to which a regulation interferes with the devisability of property) or (as in the question of whether a regulation is physical in character) have been addressed elsewhere in this Section.

promote the general welfare commonly burdens some more than others.”¹³³ Therefore, regulations that encompass “broadband Internet access providers” instead of all Internet services,¹³⁴ or all communications systems, are general in character, and this factor does not weigh in favor of finding that there was a taking.

Because no factors in the *Penn Central* analysis tend to show that there was a regulatory taking, and because there was no physical taking, the proposed Open Internet rules would not constitute a taking without compensation in violation of the Fifth Amendment.

IV. The Proposed Rules Should Neither Mandate Copyright Measures Nor Create Blanket Exceptions from the Open Internet Rules Based on Copyright Objectives

The initial comments of the Public Interest Commenters (of which Public Knowledge was a member) in this proceeding emphasized the need for the Commission to recognize the difference between the technical needs of reasonable network management and the policy-based needs of ensuring safe communications and compliance with the law.¹³⁵ This division is based in part on the need to prevent the Commission from adjudicating matters that are more clearly within the jurisdiction of other agencies or forums. In particular, there seems to be a general recognition among the courts¹³⁶ that the Commission should not be making copyright adjudications. For instance, any requirements by the Commission that networks use particular methods to combat

¹³³ *Penn Central. Transp. Co.*, 438 U.S. at 133.

¹³⁴ AT&T has called for “neutrality” regulations to be applied to entities that are not “carriers” of any kind, on the theory that if it must be regulated than everyone must be. *See* AT&T Comments at 196.

¹³⁵ *Comments of Public Interest Commenters*, GN Docket No. 09-191, WC Docket No. 07-52 at 35 (dated January 14, 2010).

¹³⁶ *Am. Library Assoc.*, 406 F.3d 689.

copyright infringement would functionally result in the Commission requiring the blocking of lawful speech. This is because any of the inevitable false positives in a copyright interdiction system would be lawful speech blocked by a carrier.

Despite this, some commenters seem to desire that the Commission excuse violations of the Open Internet rules should those violations be motivated by a desire to curb copyright infringement on broadband Internet services. These desires are misplaced, as they would undermine the Commission's restraint in matters outside its jurisdiction as well as the Commission's larger goal of preventing intentional and unintentional discrimination on the Internet. Proposals for copyright exceptions to the rules also invite the Commission to engage in extra-jurisdictional speculation on multiple levels. In order to grant particular practices of content management an exception from the rules, the Commission would necessarily have to determine what levels of false positives (in other words, the percentage or amount of non-infringing, lawful, legitimate communications blocked by the system) were acceptable. Even before making this intricate policy decision, the Commission would be faced with a more daunting task—in determining how many of the interdicted communications were infringing. Such a determination would require the Commission to judge which pieces of content were and were not copyright infringements—exactly the same determination that the Commission is, as many have noted, not well-placed to make.

For example, if a broadband Internet service provider were to implement a system that blocked the transmission of content that matched a database of copyrighted material, that system would, with near certainty, block some lawful transfers of content alongside

unlawful transfers of content,¹³⁷ in violation of the principle against blocking lawful content. A system that barred certain applications that had been used for both infringing and noninfringing purposes would violate the principle against blocking lawful applications and services. Both of these hypothetical systems would also, depending upon their effects, risk violating the nondiscrimination principle as well. If the scope of the violation is too large—that is, if too many lawful content transfers, or too many lawful applications are blocked, or if the practices result in too much discrimination—the Commission should not excuse it from application of the rules. In order to decide whether too much is being blocked or discriminated against, the Commission must first evaluate whether blocked content is infringing, or risk basing significant judgments on the mere assertions of different parties.

The Commission therefore should neither mandate particular copyright practices, nor provide *ex ante* exceptions to the Open Internet rules simply because a provider states a given intent for an otherwise prohibited practice. While measures that curtail unlawful transfers of content should not run afoul of the Open Internet rules, measures that actually do block, degrade, or otherwise interfere with lawful content, applications, services, or devices should not be excused from the rules on the stated intent of a provider. The inherent difficulties in making these decisions could easily lead to discriminatory or anticompetitive blocking or degradation masquerading as efforts to police infringement. Even good faith efforts to combat infringement can have unintended anticompetitive or

¹³⁷ As noted in the Public Interest Comments, copyrighted content can be transferred lawfully without authorization of the copyright holder in a wide variety of situations. Public Interest Comments at 57-59; *see also* Joint Comments of the Computer and Communications Industry Assoc. et al., GN Docket No. 09-191, WC Docket No. 07-52 (dated Jan 14, 2010).

discriminatory effects which, regardless of their intent, have negative effects on access to content, applications, and the Internet generally.

The Open Internet rules must protect the six principles against blocking, degradation, obfuscation, and discrimination, even if those measures are undertaken with good intent. Discrimination under facially neutral rules should remain prohibited so long as it has a discriminatory effect upon traffic.

CONCLUSION

Pursuant to the foregoing, Public Knowledge urges the Commission to exercise its authority to protect competition and consumers by preserving an open Internet, grounding its authority in Title II of the Communications Act. The proposed Rules, so grounded, would protect free speech and the rights of citizens without impinging upon any party's Constitutional rights. The Commission should also be wary of attempts to make it a forum for copyright disputes, either by making copyright determinations itself or asking for its approval in matters that require making such determinations.

Respectfully submitted,

Public Knowledge

By:

/s/ Harold Feld
Sherwin Siy
John Bergmayer
Michael Weinberg

Public Knowledge
1818 N. St. NW, Suite 410
Washington, DC 20036

(202) 861-0020