Reply Comments of

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In the Matter of

Protecting and Promoting the Open Internet

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In this proceeding, the Federal Communications Commission ("FCC" or "Commission") attempts once again to develop and implement enforceable rules to protect and promote the open Internet.[3] To that end, the Commission has proposed a number of rules,[4] and various sources of legal authority in which those rules might be grounded.[5] TechFreedom and the International Center for Law and Economics (ICLE) filed both legal[6] and policy[7] comments during the first round of this proceeding in July, and we appreciate the opportunity here to file reply comments in order to clarify arguments raised in our earlier comments as well as to address some of the arguments raised by other commenters.

The Problems with Title II

Any new rules issued by the Commission should not be based on Title II. For the reasons we explained in our comments, we believe re-opening Title II would be a disaster in ways that Title II proponents do not seem to understand – or, at least, have not been willing to seriously discuss.

First, subjecting broadband to Title II would not even allow the FCC to do the one thing the D.C. Circuit's *Verizon* decision clearly bars the FCC from doing under Section 706: banning "paid prioritization."[8] In fact, to the contrary, "reclassifying" broadband under Title II would require the FCC not merely to authorize paid prioritization, but to set tariffed prices for it! As George Ford and Lawrence Spiwak explain in their recent Phoenix Center white paper, "Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service" (attached hereto as Exhibit A):

> reclassification turns edge providers into "customers" of Broadband Service Providers. This new "carrier-to-customer" relationship (as opposed to a "carrier-to-carrier" relationship) would then require all BSPs … to create, and then tariff, a termination service for Internet content under Section 203 of the Communications Act. Critically, this termination service would be separate and apart from any carrier-to-carrier agreements to deliver traffic. Because a tariffed rate cannot be set arbitrarily, and since a service cannot be generally tariffed at a price of zero, reclassification would require all edge providers (not their carriers)—as customers of the BSP—to make direct payments to the BSPs for termination services. That is, all content providers, whether Netflix or a church website (or its host company), would be on the hook to pay every broadband service provider a positive termination fee.[9]

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[3] Protecting & Promoting the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 (May 15, 2014) ["NPRM"], *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0515/FCC-14-61A1.pdf.
[4] *See id.* at ¶¶ 63-139, Appendix A.
[5] *See id.* at ¶¶ 142-59.
[6] Protecting and Promoting the Open Internet, *Legal Comments of TechFreedom & ICLE*, GN Docket No. 14-28 (July 17, 2014) [*Legal Comments*], *available at* http://www.laweconcenter.org/images/articles/tf-icle_nn_legal_comments.pdf.
[7] Protecting and Promoting the Open Internet, *Policy Comments of TechFreedom & ICLE*, GN Docket No. 14-28 (July 17, 2014) [*Policy Comments*], *available at* http://www.laweconcenter.org/images/articles/icle-tf_nn_policy_comments.pdf.
[8] *See* Verizon v. FCC, 740 F.3d 623, 655-59 (D.C. Cir. 2014) [*Verizon*].
[9] George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, PHOENIX CENTER POL'Y BULL. NO. 36 (Sept. 2014), *available at* http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf.

While many have insisted that Title II allows the FCC to ban paid prioritization, we can find only one attempt to actually defend this position: Public Knowledge, in two pages of its comments in this proceeding, repeats the arguments it made in 2010.[10] Our comments explain why Public Knowledge's reliance on *Carterfone* is inapt: at most, *Carterfone* would justify a no-blocking rule.[11] The FCC precedent PK points to, *Computer II*, does at least pertain to non-discrimination rules, but, if anything, *Computer II* highlights the difficulty of attempting to enforce structural separation between distinct "layers," for much the same reasons Tim Wu himself has warned against.[12]

Second, the Commission cannot simply "reclassify" broadband in the sense that that term has been used by Title II proponents; the FCC can only re-open the interpretation of the key definitions of the 1996 Telecommunications Act. That, in turn, will cast doubt on the regulatory status of many web services — not just broadband. We explained this problem at length in our comments, and will not rehash them here. In a recent column (Exhibit B), Jeff Pulver, founder of several VoIP companies who successfully petitioned the FCC to classify VoIP as a Title I information service back in 2004,[13] warns:

> The madness of applying Title II means declaring everything telecom. It requires an entirely new standard and ends 60 years of precedent underlying the telecom versus information services distinction. The Federal Communication Bar Association may not see a problem, but I can attest I have no idea how to judge the difference between IP transmission and IP services for the purposes of my next startup. I will not be able to explain it to investors, because the line exists entirely in the mind of whoever happens to be Chairman of the FCC. Applying Title II to IP networks creates a new Federal Computer Commission with authority to weigh in on everything connected to an IP network, in other words — everything.[14]

Third, Title II proponents invariably assert that any problems created by Title II can be solved by the FCC through various forbearance proceedings.[15] The fact that even Title II proponents generally want the FCC to forbear from nearly all of Title II speaks volumes about what a poor fit Title II is for Internet services. But as a legal and practical matter, forbearance is an illusion. An increasingly activist FCC has made forbearance almost impossible to justify: In 2010, the FCC denied forbearance to Qwest in the Phoenix market,[16] rejecting the standard it had articulated in its 2005 order granting forbearance to

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[10] Protecting and Promoting the Open Internet, *Comments of Public Knowledge et al.*, GN Docket No. 14-28, at 102-04 (July 15, 2014), *available at* http://bit.ly/1qfsJk9.

[11] *Legal Comments* at 18-19.

[12] *Legal Comments* at 19-21.

[13] Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, *Memorandum Opinion and Order*, WC Docket No. 03-45 (Feb. 12, 2004), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-04-27A1.pdf.

[14] Jeff Pulver, *Fear and Loathing as Telecom Policy*, HUFFINGTON POST (Aug. 6, 2014), *available at* http://www.huffingtonpost.com/jeff-pulver/fear-and-loathing-as-tele_b_5654881.html (declaring Mr. Pulver's VoIP service "to be an unregulated information service" and "neither a 'telecommunications service' nor 'telecommunications' as those terms are defined in the Communications Act of 1934, as amended").

[15] *See, e.g.*, Protecting and Promoting the Open Internet, *Comments of Free Press*, 39-46 (July 17, 2014) [*Comments of Free Press*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521701227 (describing how the FCC can use forbearance to make a Title II approach a "highly deregulatory policy framework").

[16] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the

Qwest in the Omaha market[17] and instead insisting on an impossibly high standard for defining a degree of competition adequate to allow forbearance.

In the market in which net neutrality is to operate, between broadband service providers and edge providers, the FCC has declared that broadband providers have a "terminating monopoly." In this market, the FCC would not be able to forbear at all from the most burdensome aspect of Title II: The FCC setting a price, which cannot be zero, through tariffs, that every edge provider must pay to broadband providers for carrying their traffic—as George Ford & Lawrence Spiwak explain in another recent Phoenix Center Paper, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers* (attached hereto as Exhibit C).[18]

More generally, with respect to how other provisions of Title II would apply to broadband or how Title II would apply to Internet services other than broadband, it is not clear that the FCC can lower the high bar it has set for granting forbearance without its rejiggering of the forbearance standard to suit is whims being declared arbitrary and capricious in court.[19] Even if the FCC could forbear, it's not likely to do so — lest a future Republican FCC use forbearance to gut the Telecom Act. And of course those talking about "Title II Lite" today would fight forbearance in practice. Even if possible, forbearance would become a political football and a tool for the FCC to pressure companies to do things the FCC could not legally require. The FCC has a long history of abusing such leverage.

If not Title II, then What?

As we explained in our Legal Comments, we do not believe that Section 706 is, *pace* the D.C. and Tenth Circuits, actually an independent grant of authority.[20] The FCC's 2010 re-interpretation to this effect gives the Commission carte blanche to regulate not merely net neutrality and not only broadband, but *any* form of communication in any way that the Commission asserts will promote broadband, provided that whatever "regulating methods" it invents do not violate a specific provision of law (or, of course, the Constitution). And state regulatory commissions would apparently possess the same vast power.[21]

It is absurd to think that Congress buried this staggering elephant of unchecked discretion into 182 words of an act that runs over 47,000 words. It is absurd to think that Congress intended Section 706 to confer such broad power didn't bother to place this key language in the Communications Act, but instead left it in a free-standing provision that was not even codified as a separate section of the U.S.

Phoenix, Arizona Metropolitan Statistical Area, *Memorandum and Order*, WC Docket No. 09-135, 25 FCC Rcd 8622 (June 22, 2010), aff'd, Qwest v. FCC, 689 F.3d 1214 (10th Cir. 2012).

[17] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order*, FCC 05-170, 20 FCC Rcd 19415 (Dec. 2, 2005), aff'd Qwest v. FCC, 482 F.3d 471 (D.C. Cir. 2007)

[18] George S. Ford & Lawrence J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, PHOENIX CENTER FOR ADVANCED LEGAL & ECON. PUB. POL'Y STUD., 12-16 (Sept. 13, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstraturnict_id=2418675.

[19] 5 U.S.C. § 706(2)(A).

[20] *Legal Comments* at 62-91.

[21] 47 U.S.C. § 1302(a).

code until 2008[22] — all without any discussion in the Congressional record, save for a brief allusion in the Senate Commerce Committee report to this section as a "fail-safe." And it is particularly absurd to think that Congress intended Section 706 to give the FCC the power to create essentially a new Communications Act alongside the one it wrote, given that Congress *removed* a provision of the Senate legislation (which would have been Section 707) that would have granted the FCC power roughly analogous to that now claimed by the FCC under Section 706 but far more explicitly (to "terminate or modify" any provision of the Act).[23]

Whether or not intended by Congress, and whether or not any court will ever strike down this re-interpretation under *Chevron*, this is not a power that *any* regulator (the FCC or any state PUC) should be trusted with. The FCC's 1998 interpretation of Section 706 was the only possible correct one: not a grant of authority but a Congressional command for the FCC to use its many other powers for a specific purpose, a very large thumb on the scales of the decisions the Commission must make, and a hook for *mandamus* actions to compel the agency to act if it makes a negative finding under Section 706(b). It was a mistake for the FCC to re-interpret Section 706. And yet, the FCC cannot now close Pandora's Box; it can only ask Congress to do so — by requesting legislation.

Congress has specifically ordered the FCC to request new legislation when appropriate. Section 4 of the Communications Act (which defines the structure, basic powers and operations of the Commission) specifically orders the FCC to make an annual report to Congress, including "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable[.]"[24]

It has become fashionable in Washington to mock the legislative process, to dismiss Congress as incapable of producing legislation — never mind that that is how our system of government is supposed to work, or that Congress has, in fact, produced legislation requested by the Commission. Most recently, the FCC requested, and Congress enacted, legislation giving the FCC authority to conduct incentive auctions.[25]

The single most remarkable fact about the decade-long debate over net neutrality is that the FCC has never formally requested specific legislative authority. With a stroke of the President's pen, the endless battle over the FCC's authority in this area could end. The FCC, long mired in political strife over this issue, both within the agency and without, could finally move on to focus on things like… actually encouraging the deployment on a reasonable and timely basis of broadband to all Americans. A realistic legislative compromise would give the FCC clear, but narrowly tailored, authority to police core net neutrality concerns while forever barring application of Title II to the Internet, restoring the FCC's 1998

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[22] Originally codified as a note accompanying 47 U.S.C. § 157, Section 706 was not codified as a separate provision until passage of the Broadband Data improvement Act in 2008. *See* Pub. L. No. 110-385, § 103, 122 Stat. 4096 (2008), *available at* http://uscode.house.gov/statutes/pl/110/385.pdf; *see also* Tejas N. Narechania, *Federal and State Authority for Network Neutrality and Broadband Regulation*, STAN. TECH. L. REV. (Mar. 5, 2014), *available at* http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2404996.

[23] *See Legal Comments* at 81–84.

[24] *See* Communications Act of 1934, Pub. L. No. 73-416, § 4(k)(4), 48 Stat. 1064, 1066 (1934) (codified at 47 U.S.C. § 154(k)(4)).

[25] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6001–6703, 126 Stat. 201–255 (2012), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf.

interpretation of Section 706, and clearing actual regulatory barriers to private broadband deployment at all levels of government.

But what should the FCC do in the interim? The worst option would be to re-open Title II. If the FCC decides it must issue new rules, it should base them on Section 706. No matter how absurd the FCC's re-interpretation of Section 706, it has been upheld under *Chevron*. At a minimum, Section 706 can provide a bridge to legislation. It should not, however, become an excuse for Congress to "kick the can down the road"— which is why any new rules based on Section 706 should be accompanied by a clear request from the FCC for new authority. The two actions would not be mutually inconsistent: the FCC need not concede anything about the potential legal vulnerability of Section 706. It need not mention Section 706 at all. But it could simply say that Section 706 confers broader authority than necessary.

Some who share our concerns about the overbreadth of Section 706 have claimed that Title II would be a less dangerous basis for net neutrality rules than Title II. This is a non-sequitur. First, using Section 706 as the basis for new net neutrality rules will not significantly increase the dangers posed by Section 706, because the basic problem is the FCC's 2010 re-interpretation. Even if the FCC were to base new net neutrality rules entirely on Title II, the FCC could just as easily use Section 706 to regulate privacy, cybersecurity or anything else the FCC asserts relates to broadband deployment.

Second, conversely, invoking Title II will not cabin the FCC's discretion because the FCC will retain all the discretion it has claimed under Section 706 — except to the degree that Title II offers a specific protection to a Title II carrier. In short, invoking Title II creates a new set of problems, while the problems raised by the FCC's re-interpretation of Section 706 will exist whether or not the FCC uses 706 to justify net neutrality rules.

Besides grounding any new rules issued in Section 706 and requesting new authority from Congress, there are three things the FCC could do to expedite development of a legal framework for addressing net neutrality that will prove durable, capable to address real harms, and yet flexible enough to ensure that regulation does not inadvertently harm consumers.

First, the FCC should write the Order not merely to explain the new rules it issues as an expert agency offering the minimal degree of "reasoned explanation" necessary to satisfy the standards of legal review under the Administrative Procedure Act. Instead it should make the case to Congress that the rules issued by the agency deserve to be enshrined in statute in some form. Most of all, this means engaging in more economic analysis, such as proposed by Commissioner Ajit Pai:

> So what is the way forward? Here's one suggestion. Just as we commissioned a series of economic studies in past media-ownership proceedings, we should ask ten distinguished economists from across the country to study the impact of our proposed regulations and alternative approaches on the Internet ecosystem. To ensure that we obtain a wide range of perspectives, let each Commissioner pick two authors. To ensure accuracy, each study should be peer reviewed. And to ensure public oversight, we should host a series of hearings where Commissioners could question the authors of the studies and

> the authors of those studies could discuss their differences. Surely the future of the Internet is no less important than media ownership.[26]

Second, the FCC should call on industry to develop a code of conduct through a multi-stakeholder process that would be enforceable by the FCC under Section 706, as well as by the Federal Trade Commission under its general Section 5 authority over deception (which allows the FCC to hold companies to self-regulatory commitments). This process could be built into new rules by creating a safe harbor program akin to the Children's Online Privacy Protection Act (COPPA), which would give both industry and civil society groups an incentive to engage in such a process. Importantly, the drafting of such a code could inform the deliberative legislative processes.

Finally, the FCC should call on Congress not merely to issue legislation, but, specifically, to immediately create a Telecommunications Law Modernization Commission, an expert body modeled on the Antitrust Law Modernization Commission, which could expedite and enhance the legislative process by producing bipartisan consensus proposals.

[26] Dissenting Statement of Cmr. Ajit Pai on NPRM at 5, *available at* http://www.fcc.gov/article/fcc-14-61a5.