Before the
Federal Communications Commission
Washington, D.C.

In the matter of Restoring internet Freedom	WC Docket No. 17-108

COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

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CCIA respectfully submits these comments in the above-referenced proceeding regarding the best way for the Commission to ensure that the Internet remains free, open, and an unparalleled engine of economic growth and free speech. CCIA, for over forty years, has been an advocate for open networks, competition, and free speech around the world. CCIA is deeply concerned that with this *Notice of Proposed Rulemaking* (*NPRM*),[2] the Commission is making a hasty decision, based on flimsy evidence, in order to pursue a politically-charged agenda that will create greater uncertainty and adversely affect the broader Internet ecosystem. The Commission essentially relies on two dubious studies to reverse the *Open Internet Order* (*OIO*),[3] which the D.C. Circuit upheld just over a year ago.[4] CCIA believes the Commission is wrong in its reasoning for pursuing re-reclassification of broadband Internet access service (BIAS). CCIA believes the Commission is wrong in its understanding of its own legal authority. The Commission's flip-flopping will actually exacerbate legal uncertainty and potentially adversely affect not only network investment, but also investment in other parts of the Internet ecosystem.

[1] CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA's members is available online at http://www.ccianet.org/members.

[2] *In the Matter of* Restoring Internet Freedom (*NPRM*), *Notice of Proposed* Rulemaking, WC Docket No. 17-108 (rel. May 23, 2017).

[3] *In re Protecting and Promoting the Open Internet* (*OIO*), 30 FCC Rcd. 5601 (2015).

[4] U.S. Telecom Ass'n v. Fed. Comc'ns Comm'n (USTelecom), 825 F.3d 674 (D.C. Cir. 2016).

Summary.

The central question of the Commission's Open Internet proceedings has been the extent to which BIAS providers (BIAPs) can treat Internet traffic differently depending upon the source.[5] Just last year, the D.C. Circuit upheld the Commission's most recent effort at ensuring Internet openness and preventing discrimination by BIAPs – the *OIO*.[6] Now, barely a year since the D.C. Circuit approved the *OIO*, and just over two years since its enactment by the Commission, this Commission has decided to reverse course. Although all three Commissioners and some of the biggest BIAPs claim to support the principles of net neutrality and Internet openness, this new Commission feels compelled to disregard the D.C. Circuit's year-old, authoritative decision. With these comments, CCIA maintains its long-held belief that there should be enforceable, open Internet rules and that the Commission's proposal in the *NPRM* would be a dramatic reversal that is unnecessary and based on a questionable premise and incorrect reading of D.C. Circuit precedent on the Commission's authority.

The *NPRM*, on its face, appears to be very concerned about the effects that regulation can have on investment, yet by pursuing this action, the Commission is not considering at all how re-reclassification could affect the vast Internet ecosystem and the burgeoning economic growth it has created. Relying on two overly-simplistic studies to justify re-reclassification of BIAS would not only be misleading, but it would also be a dereliction of the Commission's duty to consider the whole record that is developing through this notice and comment process. Instead of pursuing this *NPRM*, the Commission should consider how "re-reclassification" would affect not just the twelve biggest ISPs, but the entire economy. The Commission should consider overall investment, which would be threatened by abdicating its authority to ensure that network

[5] *See, e.g. USTelecom*, 825 F.3d at 689 ("For the third time in seven years, we confront an effort by the Federal Communications Commission to compel internet openness—commonly known as net neutrality—the principle that broadband providers must treat all internet traffic the same regardless of source.")

[6] *Id*.

providers abide by the so-called "net neutrality" principles of no blocking, no throttling, and no discrimination.

Inevitably, if the Commission does pursue the re-reclassification course upon which the majority seems set, the final order will be challenged in court as most major Commission decisions are, and open to revision thereafter. This will unnecessarily prolong this issue into late 2018 at the earliest. By re-reclassifying, the Commission is simply making the Internet a political football to be kicked back and forth based on whoever appoints the Chairman.

I. The Commission Must Keep Strong, Enforceable, Nondiscrimination Rules and Provide Certainty.

A. Despite Decades of Debate, the Constant Consideration has been the Need for Nondiscrimination Rules to Protect the Open Internet.

The Communications Act clearly designates the Commission as the agency of the Federal government that oversees communications networks.[7] For nearly six decades, depending on how the issue is viewed, the Commission has struggled with how to address its statutory obligation to ensure efficient operation of communications networks leading to what we know today as the Internet. Particularly since the emergence of the commercial Internet in the 1990s and the passage of the Telecommunications Act of 1996, the Commission and the D.C. Circuit have wrestled with the Commission's authority to oversee the Internet.[8]

The *NPRM* makes many misleading claims about the *OIO*; in particular, it claims that the *OIO* "represented a massive and unprecedented shift in favor of government control of the Internet."[9] This is rhetorical not factual. First, the only time the Internet was even remotely under "government control" was at the advent of one of the first packet-switched networks, Advanced Research Projects Agency Network (ARPANET), which was funded by the Advanced Research Projects Agency (ARPA) of the U.S. Department of Defense.[10]

Second, CCIA is concerned that in the *NPRM*, the Commission is eliding and misinterpreting some of its actions from two decades ago. A key part of Commission's history, which the *NPRM* elides,[11] is that the Internet was once classified under Title II until 2002. In the *NPRM*, the Commission highlights the "information services" interpretations in the *Stevens*

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[7] 47 U.S.C. § 151 (2012).

[8] *See, e.g. USTelecom*, *supra* note 5.

[9] *NPRM* at ¶ 3.

[10] *See generally* Barry M. Leiner et al., *Brief History of the Internet*, INTERNET SOCIETY, *available at* http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet (last visited July 17, 2017).

[11] *See NPRM* at ¶¶ 10-11 (jumping from a discussion of the *Stevens Report*, which CCIA contends should not be viewed as having precedential value, to a discussion of the 2002 *Cable Modem Order*, without mentioning the 1998 Advanced Services Order, which classified BIAS over DSL under Title II).

Report[12] and 2002 *Cable Modem Order*,[13] yet it omits the fact that just four months after the *Stevens Report*, the Commission, in the *Advanced Services Order*, formally declared: "We conclude that advanced services are telecommunications services."[14] Initially, when Internet access service was provided primarily over telephone lines, the Commission regulated this service under its Title II authority.[15] However, as BIAS became possible via other means, e.g. cable systems, beginning in 2002, the Commission began classifying BIAS via those other means as an "information service" under the less restrictive Title I.[16] The Commission, in the *Advanced Services Order*, defined "advanced services" as "wireline, broadband telecommunications services, such as services that rely on digital subscriber line technology (commonly referred to as xDSL) and packet-switched technology."[17] The D.C. Circuit explained that decision last year:

> The Commission first applied this ("information service" v. "telecommunications service") statutory framework to broadband in 1998 when it classified a portion of DSL service—broadband internet service furnished over telephone lines—as a telecommunications service. . . . According to the Commission, the transmission component of DSL—the phone lines that carried the information—was a telecommunications service.[18]

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[12] *In the matter of* Federal-State Joint Board on Universal Service (*Stevens Report*), *Report to Congress*, CC Docket No. 96-45 (rel. Apr. 10, 1998); *see NPRM* at ¶ 10 (quoting the *Stevens Report* as having "concluded that Internet access service was properly classified as an information service.").

However, the *Stevens Report* should not be viewed as having the precedential value that the Commission now claims. The *Stevens Report* was a response to Congress, in which Congress requested, under its most recent Appropriations Act, that the Commission deliver a report "on the Commission's implementation of certain provisions of the Telecommunications Act of 1996 regarding the universal service system."

[13] *In the Matter of* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities (*Cable Modem Order*), *Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185 CS Docket No. 02-52 (rel. March 15, 2002).

[14] *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability (*Advanced Services Order*), 13 FCC Rcd. 24,012, at ¶ 35 (1998).

[15] *See id*.

[16] *See* Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Services (*Brand X*), 545 U.S. 967 (2005) (determining that cable modem services were "information services").

[17] *Advanced Services Order* at ¶ 3 (citation omitted).

[18] *See USTelecom*, 825 F.3d 674, 691-92 (D.C. Cir. 2016); *see also* Verizon v. Fed. Commc'ns Comm'n, 740 F.3d 623, 630-31 (D.C. Cir. 2014) (quoting the *Advanced Services Order*: "Pursuant to the Act, and paralleling its prior practice under the *Computer II* regime, the Commission then classified Digital Subscriber Line (DSL) services—broadband Internet service furnished over telephone lines—as "telecommunications services.").

The commercial Internet was able to explode in popularity in the late 90s because phone companies – phone lines being the predominant means of accessing the Internet during that time – could not prevent third party ISPs, like AOL, from reaching customers.[19] This led to great economic growth, entrepreneurship, and investment in Internet companies as well as network infrastructure during that time.

In the *NPRM*, the Commission is using the *Stevens Report* to justify its proposal to reclassify BIAS as a Title I information service, yet the Commission, in its recitation of the history of BIAS classification, jumps from the *Stevens Report* to the 2002 *Cable Modem Order*[20] without mentioning the 1998 *Advanced Services Order*.[21] Strangely, the *NPRM* seems to have completely omitted the *Advanced Services Order*.

B. The Commission Needs to Keep the "Bright-Line" Rules of No Blocking, No Throttling, No Discrimination, and Transparency.

1. Bright-Line Nondiscrimination Rules are Central to a Thriving, Open Internet.

Despite classifying BIAS over cable under Title I in 2002, the Commission still noticed the importance of maintaining the key principles related to the free flow of traffic, unimpeded by the network provider. In 2004, then-Chairman, Michael Powell, now head of NCTA, the trade association for the cable industry, pronounced the "Four Freedoms" policy: "freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information."[22] However, such a policy

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[19] *See Verizon*, 740 F.3d 623, 630.

[20] *NPRM* at ¶¶ 10-11; *see also id*. at ¶ 38 ("Chairman Kennard first led the FCC in determining that Internet access service is an information service in the *Stevens Report*. Chairman Powell led the Commission to classify broadband Internet access service over cable systems as an information service in the *Cable Modem Order*.") (citations omitted).

[21] *See supra* note 18 (explaining the *Advanced Services Order*'s designation of Internet over DSL as a telecommunications service)

[22] Press Release, Fed. Commc'ns Comm'n, FCC Adopts Policy Statement: New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet (Aug. 5, 2005), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf; *NPRM* at ¶ 13.

statement was not enforceable when Comcast blocked BitTorrent. The D.C. Circuit said as much.[23] Though the Commission has recognized this part of its history,[24] it appears it has not learned its lesson because the current *NPRM* would essentially revert to 2004 with an Internet Policy Statement that would not be enforceable in court.

2. The Bright-Line Rules Facilitate Innovation and Economic Growth.

The *NPRM* questions whether net neutrality rules are necessary at all.[25] If the Commission has its way with the *NPRM*, there would be no incentive for BIAPs to *not* block, throttle, or charge more for accessing sites of the BIAPs' choosing. They would have less incentive to build networks that are capable of meeting all consumer demand in a nondiscriminatory way. CCIA maintains that nondiscrimination rules are essential for the Internet and our economy.

The Commission should recognize the practical effects of these rules – they foster competition and network investment, and they facilitate innovation. If there were no such "rules of the road" for the Internet, BIAPs would be free to charge tolls for reaching certain types of content and services online. Small businesses and startups generally do not have the financial resources for the fast lanes that a BIAP would be able to create under the *NPRM*. Nor do they have the bargaining power to negotiate more favorable terms with a large BIAP. They rely on the Internet to build their businesses, advertise their products and services and attract customers. The *NPRM* would impose not only financial costs on small businesses and innovators, it would also close off opportunities from them to grow.

Indeed, the practical effect of bright-line nondiscrimination rules is that they promote demand for the Internet and discourage artificial scarcity of supply, which in turn promotes

[23] Comcast Corp. v. Fed. Commc'ns Comm'n, 600 F.3d 642 (D.C. Cir. 2010).
[24] *NPRM* at ¶ 11, 13, 18.
[25] *Id.* at ¶ 70.

network buildout. A key example is Fastmetrics, a small ISP and business solutions provider in California, which saw revenue increase seventeen percent in 2016. The real-world effect of the *OIO* for Fastmetrics has been that "rules ensuring the fair treatment of Internet traffic have meant that those companies can't arbitrarily shut the company out of its networks."[26] The Commission should be helping small businesses and new entrants rather than pursuing policies that would threaten their ability to compete. In reality, the *NPRM* would lead to increases in BIAP pricing, a balkanization of the Internet, and it would threaten investment in the economy overall.

Bright-line nondiscrimination rules have facilitated innovation; for example, they have helped to facilitate the rise of over-the-top (OTT) video streaming services. Late last year, AT&T launched an over-the-top video (OTT) offering, DirecTV Now.[27] This streaming service offers programming from a wide variety of channels, but as a "skinny bundle" in contrast to the larger channel packages usually offered by cable companies. Customers just need to have an Internet connection, initiate a subscription to DirecTV Now, and then they can watch AT&T's TV programming on almost any device, whether on AT&T's own network or another BIAP's. This AT&T offering competes with other streaming OTT services like DISH Network's Sling TV and Sony's PlayStation Vue. Recently getting into the act, in May, Hulu, a joint venture between The Walt Disney Company, 21st Century Fox, Comcast, and Time Warner, launched a subscription service for under $40 per month that would offer live TV, a cloud DVR, as well as on-demand shows and movies.[28] Consumers have responded positively to these offerings because, compared to a traditional cable subscription, a consumer can subscribe to fewer

[26] Dominic Fracassa, *Bay Area Internet providers thriving in the era of net neutrality*, S.F. CHRON.. June 6, 2017, http://www.sfchronicle.com/business/article/Bay-Area-Internet-providers-thriving-in-the-era-11200806.php.

[27] David Lieberman, *AT&T Launching DirectTV Now with Introductory Offer of 100+ Channels for $35 a Month*, DEADLINE HOLLYWOOD (Nov. 26, 2016), https://deadline.com/2016/11/att-introduces-directv-now-1201860668/.

[28] Press Release, Hulu, Hulu Launches New Live TV streaming Service Adds Channels from Scripps Networks Interactive, (May 3, 2017), https://www.hulu.com/press/hulu-launches-new-live-tv-streaming-service-adds-channels-from-scripps-networks-interactive/.

channels for fewer dollars; in addition, typically they can access the services on many different devices like a streaming media player, laptop, tablet, and mobile phone.

Consumers can subscribe to these various offerings with confidence because their Internet provider is not allowed to block, throttle, or discriminate against a competitor's offerings. For example, without enforceable, bright-line, nondiscrimination rules, a DirecTV Now customer who has broadband from a BIAP that competes with AT&T could find that that BIAP provides a slower connection to DirecTV Now. Furthermore, if the BIAP has its own video streaming product that competes with DirecTV Now, that BIAP could deny access to DirecTV Now altogether if it decides it does not want to connect the customer to DirecTV Now. The BIAP could charge an unaffiliated entity inflated interconnection prices. It could also raise entry barriers for a competing BIAP by denying the competitor access to or inflating the costs for the BIAP's content. Without enforceable rules, a BIAP could easily discriminate against other entities that are competing with the BIAP's own websites and services.

II. The Commission's Reliance on a Supposed Decline in Broadband Investment is Deeply Flawed.

With the *NPRM*, the Commission has made a broad pronouncement about the entire Internet ecosystem by relying on one metric from two studies. The Commission begins the *NPRM* with a dire assessment of the two years that have passed since the *OIO*: "The Commission's *Title II Order* has put at risk online investment and innovation, threatening the very open Internet it purported to preserve."[29] Then, the Commission lays out its primary reason for reversing the *OIO*: "Investment in broadband networks declined. Internet service providers have pulled back on plans to deploy new and upgraded infrastructure and services to

[29] *NPRM* at ¶ 4.

consumers."[30] The Commission's reliance on one metric gleaned from two studies is flawed and inconsistent with the Commission's statements elsewhere.

A. The *NPRM*'s Dire Assessment of the Internet Ecosystem Contrasts Sharply with its Statements in Other Proceedings.

The Commission declared in another proceeding this year that "[b]y one assessment, the next generation of wireless broadband is expected to directly involve $275 billion in new investment, and could help create 3 million new jobs and boost annual GDP by $500 billion."[31] The Commission touted expectations for increased wireless investment, yet made no mention of Title II despite the Commission's overarching thesis from this *NPRM* that Title II has dramatically decreased broadband capex over the past two years. Instead, and more accurately, the Commission explains that "use of wireless broadband service and capacity has been growing dramatically, and such growth is widely expected to continue due to the increasing use of high-bandwidth applications like mobile streaming, the greater expected capacity of 5G connections, and the deployment of the Internet of Things (IoT)."[32] CCIA agrees with the Commission's assessments in the *Wireless Broadband NPRM* yet finds it difficult to reconcile them with the rhetoric in this *NPRM.* More specifically, Internet connectivity is crucial to our economy and global competitiveness, so as consumer demand continues to grow, broadband investment will continue to meet that demand.

For example, in the *NPRM*, the Commission has not considered the impact of the incredible financial outlays by many of the same twelve biggest ISPs in the recent spectrum auctions. By some accounts, the first-of-its-kind reverse incentive auction raised nearly $20

[30] *Id*.

[31] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (*Wireless Broadband NPRM*), *Notice of Proposed Rulemaking and Notice of Inquiry*, WT Docket No. 17-79 (rel. Apr. 21, 2017) at ¶ 1 (footnotes omitted).

[32] *Id*.

billion from carriers seeking 600 MHz spectrum licenses.[33] Indeed, at the conclusion of the auction in April 2017, Chairman Pai "celebrate[d]" its success.[34] Just two years ago, and a month before the *OIO* vote, the AWS-3 spectrum auction closed with nearly $45 billion – more than double what some had projected.[35] Commissioner O'Rielly lauded that auction's "successful outcome,"[36] and then-Commissioner Pai called it "a historic success" and that "[i]t will help the wireless industry meet exploding consumer demand. And it will broaden the American platform for wireless innovation, already the world's envy."[37] Spectrum is a key building block of mobile connectivity, which was affected by the *OIO*, yet in the *NPRM*, the Commission has not considered that carriers were willing to invest tens of billions of dollars two separate times over two years to enhance their networks.

B. The Commission's Reliance on Two Studies on BIAP Capex is Deeply Flawed.

The Commission's major piece of evidence justifying its need to roll back the *OIO* comes from a study by Hal Singer, a senior fellow at the George Washington Institute of Public Policy: "A recent study indicates that capital expenditure from the nation's twelve largest Internet service providers has fallen by $3.6 billion, a 5.6% decline relative to 2014 levels."[38] Then, it cites another study, from Dr. George S. Ford of the Phoenix Center, claiming that from 2011 to

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[33] Fed. Commc'ns Comm'n, *Broadcast Incentive Auction and Post-Auction Transition* (May 9, 2017), https://www.fcc.gov/about-fcc/fcc-initiatives/incentive-auctions; Colin Gibbs, *T-Mobile, Dish and Comcast Top Bidders in Incentive Auction While Verizon Looks On*, FIERCEWIRELESS (April 13, 2017, 2:41 PM), http://www.fiercewireless.com/wireless/t-mobile-dish-and-comcast-top-bidders-incentive-auction-while-verizon-looks.

[34] Fed. Commc'ns Comm'n, *Statement Of FCC Chairman Ajit Pai "On the Completion of the Incentive Auction and the Start of the Post-Auction Transition Period"* (April 13, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344399A1.pdf.

[35] Phil Goldstein, *It's Over: FCC's AWS-E Spectrum Auction Ends at Record $44.98B in Bids*, FIERCEWIRELESS (Jan. 29, 2015, 11:25 AM), http://www.fiercewireless.com/wireless/it-s-over-fcc-s-aws-3-spectrum-auction-ends-at-record-44-9b-bids.

[36] Fed. Commc'ns Comm'n, *Statement of Commissioner Michael O'Rielly on the Conclusion of the AWS-3 Auction* (Jan. 29, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0129/DOC-331769A1.pdf.

[37] Fed. Commc'ns Comm'n, *Statement of Commissioner Ajit Pai on the Completion of the AWS-3 Auction* (Jan. 29, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0129/DOC-331762A1.pdf.

[38] *NPRM* at ¶ 45 (citing Hal Singer, 2016 Broadband Capex Survey: Tracking Investment in the Title II Era (Mar. 1, 2017) https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era).

2015, "the threat of reclassification reduced telecommunications investment by about 20–30%, or about $30–40 billion annually."[39] CCIA urges the Commission to consider all of the evidence presented during this rulemaking process and not base its decision on two studies and one theoretical projection.

First, the Commission's, as well as Singer's and Ford's timelines are wrong. Singer and the Commission point to a supposed decline between 2014 and 2016; Ford believes that the "the threat of reclassification reduced telecommunications investment by about 20–30%, or about $30–40 billion annually."[40] The *Verizon* decision striking down most of the *2010 Open Internet Order*'s rules came down on January 14, 2014, and the Commission issued its *2014 Open Internet NPRM* on May 15, 2014.[41] Therefore, for the entirety of 2014, BIAPs were still operating under the Title I status quo. The *2014 Open Internet NPRM* sought comment on the best way to ensure Internet openness: "This Notice seeks comment on the benefits of both section 706 and Title II, including the benefits of one approach over the other."[42] The *OIO*, which ultimately reclassified BIAs under Title II was not approved until February 26, 2015, it was not released in final form until March 12, 2015, and it did not officially become law until June 2015. Although it is possible that, especially after November 2014, businesses anticipated Title II reclassification; Title II was not in effect until the second half of 2015.

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[39] *Id.* (*citing* George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2, (April 25, 2017), http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf).

[40] *Id*.

[41] *In the Matter of* Protecting and Promoting the Open Internet (*2014 Open Internet NPRM*), *Notice of Proposed Rulemaking*, GN Docket No. 14-28 (rel. May 15, 2014).

[42] *Id*. at ¶ 4.

1. By Non-Singer-Ford Measures, Broadband Capex Has Actually Increased.

Other recent studies show that based on ISP filings to the SEC, from 2013-14 to 2015-16, investment increased 5.3% or $7.3 billion.[43] Indeed, NCTA – The Internet & Television Association, the trade association for cable providers proclaims on its website that "since 1996, Cable has invested over $250 billion in capital infrastructure" with an accompanying graphic, showing investment continued to increase in 2014, 2015, and 2016.[44] As stated by the forty smaller ISPs, net neutrality rules have actually helped investment.[45] For example, Sonic of Santa Rosa, California "has doubled in size since 2015," and "Monkeybrains, a wireless Internet provider in San Francisco, has expanded both its customer base and its workforce by 25 percent in each of the last four years."[46] Indeed, then-Commissioner Pai and Hal Singer have been banging the drum about Title II's supposed effects on broadband investment since just few months after the *OIO*, and Free Press' analysis from September 2015 shows that they were as wrong then[47] in their premature assessments as they are now in their one-sided assertions.

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[43] Ellen Satterwhite, *Internet Association Debunks Claims that Strong Net Neutrality Protections Hurt Internet Investment*, District Dispatch (May 17, 2017), http://www.districtdispatch.org/2017/05/debunk-claim-net-neutrality-protections-hurt-investment/.

[44] *Industry Data*, NCTA – THE INTERNET & TELEVISION ASSOCIATION, https://www.ncta.com/industry-data (last visited Jul. 17, 2017).

[45] Letter from A Better Wireless, NISP, LLC et al. to Ajit Pai, Chairman, Fed. Commc'ns Comm'n (Forty ISPs Letter) (June 27, 2017), *available at* https://ecfsapi.fcc.gov/file/106271543602165/ISP%20letter%20to%20FCC%20on%20NN%2C%20Privacy%2C%20Title%20II.pdf.

[46] Fracassa, *supra* note 26.

[47] Free Press, *The Truth About ISP Industry Investment After the FCC Net Neutrality Vote*, (Sept. 10 2015), https://www.freepress.net/resource/107129/truth-about-isp-industry-investment-after-fcc-net-neutrality-vote ("In his Aug. 25 piece, Singer suggested that broadband investment was down because of the FCC's Title II reclassification decision. In cherry-picking numbers to make his case, he selectively cited capital spending figures by five large ISPs: AT&T, Verizon, Charter, Cablevision and CenturyLink. He did not discuss in depth spending at Comcast or Time Warner Cable, the nation's #1 and #3 largest providers of residential broadband (hint, perhaps this is because their spending was up by double-digit percentages).").

2. *The Real Capex Story is that Despite the Cable Modem Order and Other Title I Decisions Since 2002, BIAP Capex Has Never Been Even Close to the $110 Billion Heights in 2000 and 2001.*

In this *NPRM*, the Commission touts the supposed effect of the *OIO* and Title II reclassification on broadband provider capex by citing a USTelecom research brief about the *potential* impact of a Title II regime, comparing broadband investment in the U.S. to Europe.[48] That paper references USTelecom's statistics on U.S. broadband provider capex from 1996 to 2015,[49] which can also be found in another USTelecom research brief from December 2016, by the same author, claiming that wireline and overall network investment both decreased by $1 billion from 2014 to 2015.[50] Those figures and accompanying chart are particularly interesting because they show that broadband provider capex has been essentially flat since 2006 – never rising above $77 million (2014), and actually falling by $7 billion from 2008 to 2009. This $7 billion decline in investment from 2008 to 2009 is almost double the decline that the Commission and re-reclassification proponents like USTelecom ($3.6 billion from 2014 to 2016) see as necessitating this *NPRM*.

Looking to the earlier years in the USTelecom graph, it shows that broadband capex climbed every year from 1996 until its peak in 2000 at $118 billion. Capex declined the following year, 2001, to $111 billion, and it has never been close – not even to $80 billion since. Indeed, broadband capex dropped off precipitously from $111 billion in 2001 to $72 billion in 2002 and then further to $57 billion in 2003 and $58 billion in 2004. Neither this Commission nor Title I proponents have addressed why U.S. broadband provider capex collapsed after 2002,

[48] *NPRM* at ¶ 45 (citing Patrick Brogan, USTelecom, Utility Regulation and Broadband Network Investment: The EU and US Divide, Research Brief (Apr. 25, 2017), https://www.ustelecom.org/sites/default/files/documents/Utility%20Regulation%20and%20Broadband%20Investment.pdf).

[49] USTelecom, *Historical Broadband Provider Capex*, *available at* https://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex (last visited July 17, 2017).

[50] Patrick Brogan, *Broadband Investment Ticked Down in 2015*, USTelecom (Dec. 14, 2016), https://www.ustelecom.org/sites/default/files/Broadband%20Investment%20Down%20in%202015.pdf.

which was coincidentally when the Commission classified broadband over cable systems under Title I in the *Cable Modem Order*. Similarly, neither the Commission nor Title I proponents have explained why despite the *Cable Modem Order*'s leading to a series of Title I decisions, BIAP capex hovered around $70 billion from 2006 to 2012 and dropped to $64 billion in 2009. Following the logic of Singer, Ford, USTelecom, and the current Commission, if Title I is the key to BIAP capex, it is curious that since the *Cable Modem Order*, BIAP capex has never been even close to its $110 billion heights in 2000 and 2001.[51]

C. It is Naive and Misleading to Claim that the *OIO* is the Root Cause of Supposed BIAP Investment Declines.

Supporters of re-reclassification have frequently made assumptions and presented dubious findings in their advocacy that Title II reclassification is the reason that BIAP capex *may* have declined from 2014 to 2016. Ford has gone to great lengths to perpetuate this claim. In June, responding to analysis refuting his earlier claims, Ford sought to further prove his hypothesis that BIAP investment has declined by using the example of the AT&T-DirecTV merger of 2015: "Relative to expectations, since reclassification, AT&T has increased cash flow but reduced investment."[52] Comparing AT&T's actual 2016 capex to its 2014 capex plus DirecTV's pre-merger capex, Ford claimed, "the combination's capital spending is down $2.7 billion in nominal and $3.2 billion in real dollars."[53] His ultimate conclusion: "If you think this type of data is probative, then it offers a severe indictment of Net Neutrality regulation."[54]

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[51] Brief *Amici Curiae* of Computer & Communications Industry Association Amicus and Mozilla in Support of Respondents at 28-29, U.S. Telecom Ass'n v. Fed. Comc'ns Comm'n (USTelecom), 825 F.3d 674 (D.C. Cir. 2016). (No. 15-1063) (citations omitted).

[52] George S. Ford, *Below the Belt: A Review of Free Press and the Internet Association's Investment Claims*, PERSPECTIVES at 3 (June 20, 2017), http://www.phoenix-center.org/perspectives/Perspective17-06Final.pdf.

[53] *Id.*

[54] *Id.*

However, Ford takes an overly simplistic view that any sort of net neutrality regulation[55] was the prevailing – if not primary – cause of AT&T's capex decisions. Not only did he gloss over any decrease in capex that may have been attributable to the combination of two, distinct, huge companies operating multiple lines of business, but he also fails to account for or even mention what was going on with AT&T at the time – or the wireless industry, in general, as 4G LTE upgrades have largely been completed over the past few years. It has been widely noted that by the end of 2014, AT&T had mostly completed its 4G LTE upgrade.[56] Indeed, even Singer, the author of the other broadband capex study upon which the *NPRM* relies, felt it necessary to update one of his blog posts to clarify that AT&T's "Project VIP," which ended in 2014, "caused a boost in capex."[57] Singer sought to clarify: "But AT&T's guidance to investors in November 2012 was that capex would return to normal, 'pre-VIP levels.' AT&T's average capex from 2010-12 was $20.5 billion, which vastly exceeds the $17.3 to $17.8 billion range estimated above." However, Singer's clarification is flawed because he cites AT&T guidance from 2012 about predictions for two to three years ahead, yet actual investment in those two to three years could turn out to be different for a myriad of factors. In its SEC 10-K filing for yearend 2014, in which it is required by law to make truthful statements,[58] AT&T said, "We

[55] *See generally OIO* at Secs. II.D. and III (explaining the Commission's forbearance "from 30 statutory provisions and render[ing] over 700 codified rules inapplicable, to establish a light-touch regulatory framework tailored to preserving those provisions that advance our goals of more, better, and open broadband.").

[56] *See* AT&T, *AT&T 4G LTE Network Reaches More Than 300 Million People*, AT&T Newsroom (Sept. 4, 2014), http://about.att.com/story/att_4g_lte_network_expands_reach_to_more_than_300_million_americans.html ("AT&T's 4G LTE build out reached 300 million people months ahead of the yearend 2014 objective the company announced as part of its Project VIP plan in November 2012."); *see also* AT&T Inc. 2016 Annual Report (2017) *available at* https://www.att.com/Investor/ATT_Annual/2016/downloads/att_ar2016_completeannualreport.pdf ("In 2014, as we invested significantly to build out our wireless, fiber and IP networks, our dividend payout as a percentage of cash flows moved above our historic average. But in 2015 through 2016, our ratio moved back in line with our normal targeted levels, as we completed those major investment projects.").

[57] Hal Singer, *Tracing AT&T's Capital Expenditures Over Time* (Feb. 10, 2017, 8:15 PM), https://haljsinger.wordpress.com/2017/02/10/tracing-atts-capital-expenditure-over-time/.

[58] *See* Sarbanes-Oxley Act § 302(a)(2)-(3), Pub. L. 107–204, 116 Stat. 777 (codified at 15 U.S.C. § 7241) ("the principal executive officer or officers and the principal financial officer or officers . . . certify in each annual or quarterly report filed or submitted under either such section of this title that— . . . (2) based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were

expect our 2015 capital expenditures for our existing businesses to be in the $18,000 (million) range. Due to our completion of Project VIP, we anticipate lower capital spending in our Wireless and Wireline segments in 2015."[59] In sum, to bolster their flawed assertions about the effects of the *OIO*'s rules, both Ford and Singer have neglected critical details regarding AT&T's capex from 2014 to 2016.

Curiously, in Ford's June response, he did not conduct a similar analysis of Comcast's 2014-2016 capex.[60] An assessment of those expenditures is telling. Comcast's 2016 10-K, in which it is required by law to make truthful statements,[61] noted that the company's capital expenditures in its cable communications segment increased from $6.16 billion in 2014, to $7.04 billion in 2015, to $7.6 billion in 2016[62] – all years considered by Ford and Singer. Comcast, the largest BIAP in the country with about 24 million subscribers,[63] explained that the 7.9% increase from 2015 to 2016 was "primarily due to:

- an increased investment in line extensions, primarily for the expansion of our business services
- an increased investment in scalable infrastructure to increase network capacity
- the continued deployment of wireless gateways
- the continued deployment of our X1 platform, which is now available in all of the markets in which we operate, and our cloud DVR technology, which is now available in substantially all of our markets"[64]

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made, not misleading; (3) based on such officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report"); Failure of corporate officers to certify financial reports, 18 U.S.C. § 1350 (2012).

[59] AT&T, Annual Report (Form 10-K) (Feb. 20, 2015), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=113088&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTEwMDkxMTQzJkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVElPTl9FTlRJUkUmc3Vic2lkPTU3.

[60] Ford, *supra* note 52 at 3-4.

[61] *See supra* note 58; *see, e.g.*, AT&T, Annual Report (Form 10-K), *supra* note 59 at Exhibit 31.1 (providing the certification of Randall Stephenson, AT&T Chairman of the Board, Chief Executive Officer and President); *id*. at Exhibit 31.2 (providing the certification of John J. Stephens, AT&T Senior Executive Vice President and Chief Financial Officer).

[62] Comcast Corp., Annual Report (Form 10-K) (Feb. 3, 2017), *available at* http://www.cmcsa.com/secfiling.cfm?filingID=1193125-17-30512 at 64.

[63] Press Release, Leichtman Research Group, Inc. (LRG), ABOUT 190,000 ADDED BROADBAND IN 2Q 2016: *Top Broadband Providers Had Fewer Net Adds in 2Q 2016 Than in any Quarter in Years* (Aug. 16, 2016), http://www.leichtmanresearch.com/press/081616release.html.

[64] Comcast, Annual Report (Form 10-K), *supra* note 62 at 42.

Comcast explained further:

> Our most significant recurring investing activity has been capital expenditures in our Cable Communications segment, and we expect that this will continue in the future. . . . Cable Communications capital expenditures increased in 2016 and 2015 primarily due to increased investment in line extensions and increased spending in scalable infrastructure to increase network capacity, as well as continued spending on customer premise equipment related to the deployment of our X1 platform and wireless gateways.[65]

While it is true that Comcast, just like any other business, takes into account the regulatory environment when it makes capex decisions, clearly the specter of Title II did not depress its capex in 2016. Even when Comcast mentioned Title II or the *OIO* in its 10-K, it did not say whether either or both were significant factors in capex decisions for 2016.[66] Furthermore, in its earnings report for Q1 2017, Comcast's Chairman & CEO Brian Roberts said, "We are off to a fantastic start, our fastest in 5 years. In the first quarter, we increased revenue by 9% and EBITDA by over 10%."[67] Michael J. Cavanagh, Comcast's Senior EVP & CFO, added, "Consolidated capital expenditures increased 10.2% to $2.1 billion in the first quarter. At Cable Communications, capital expenditures increased 13% to $1.8 billion for the quarter, resulting in capital intensity of 13.8%."[68]

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[65] *Id*. at 64; *see also id*. ("*Capital expenditures for subsequent years will depend on numerous factors*, including acquisitions, competition, changes in technology, regulatory changes, the timing and rate of deployment of new services, the capacity required for existing services, and the timing of new attractions at our theme parks.") (emphasis added).

[66] *Id*. at 17 ("All of these regulations are subject to FCC enforcement and could give rise to third-party claims for damages or equitable relief. These requirements could adversely affect our business, although the extent to which they do so will depend upon the manner in which the FCC interprets and enforces them."); *id*. at 22 (discussing the Commission's 2016 privacy rules, which have now been rescinded via the Congressional Review Act); *id*.at 24 ("The FCC's reclassification of broadband Internet access services as Title II telecommunications services may cause or allow, directly or indirectly, some states and localities to impose various other taxes and fees on our high-speed Internet business.").

[67] *EDITED TRANSCRIPT CMCSA - Q1 2017 Comcast Corp Earnings Call*, THOMSON REUTERS STREETEVENTS (APRIL 27, 2017), *available at* http://files.shareholder.com/downloads/CMCSA/4688695966x0x939776/9E61E036-413A-4E2C-BF76-ACCE38F457FA/Comcast_1Q17_Earnings_Call_Transcript.pdf.

[68] *Id*.

Instead of analyzing Comcast's rationale for its capex, Ford took issue with Free Press and the Internet Association's use of a quote from Comcast's Michael Cavanaugh,[69] characterizing his comments as simply "boilerplate earnings-call banter."[70] Yet, Ford makes no effort to deny the fact that businesses make capex decisions based on a multitude of factors, not just regulations.

D. Companies Make Capex Decisions Based on a Myriad of Factors and Methods – Not Just the Possibility of Regulation.

In *USTelecom*, the D.C. Circuit highlighted the Commission's sound understanding (at the time) of investment decisions: "The Commission explained that 'the key drivers of investment are demand and competition,' not the form of regulation."[71] However, this Commission has now diverted from that understanding. The *NPRM* misses the point with its singular focus on the *OIO*'s effect on whether BIAP capex increased year-to-year. Neither the Commission, nor Singer, nor Ford has taken into account what capex really is and how companies decide how to spend their capital.

Capex refers to the amounts that a company spends to purchase or improve its fixed assets like machinery, equipment, computer systems, and buildings. Key to corporate decisionmaking on investments is consideration of the value that an investment creates for the company. Companies may use many methods of capex decisionmaking,[72] but a prevailing

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69 *Comcast (CMCSA) Q4 2016 Results - Earnings Call Transcript*, SEEKING ALPHA (Jane. 26, 2017), *available at* http://seekingalpha.com/article/4040405-comcast-cmcsa-q4-2016-results-earnings-call-transcript ("Through consistent investment and innovation, we offer the best broadband product on the market. We double the capacity of our network every 18 to 24 months. These investments enhance our competitive position, allowing us to continue to take advantage of opportunities to grow penetration and market share."); *see also* S.D. Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, FREE PRESS (May 2017), *available at* https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-IIera.pdf); Internet Association, *Net Neutrality and Your Internet Service Provider: An Investment Story*, YouTube Video (Posted June 7, 2017), *available at* https://www.youtube.com/watch?v=77k2tICj_H0).

70 Ford, *supra* note 52 at 4.

71 *USTelecom*, 825 F.3d at 48 (quoting *OIO* at ¶ 412).

72 Additional methods are the Internal rate of return (IRR), the profitability index, the payback period method, and the discounted payback period method, which can all lead to different results. *See* Sergei Vasilievich Cheremushkin, *Long-Term Financial Statements Forecasting: Reinvesting Retained Earnings* at 22 (Sept. 18, 2008),

indicator is the net present value (NPV) approach, which is taken by subtracting the cost of the investment from the investment's future net cash flows for each period of an investment.[73] Even if a company determines that a project has a positive NPV, there are many reasons why it may choose to defer or forego that project. For example, the company may hold significant debt that it feels it should address instead of long-term capital projects. A company may decide that it wants to allocate more money to dividends for shareholders, especially if the shareholders demand more immediate benefits for their investments. A company may decide that the project is just too expensive. Furthermore, a company may choose to invest in a project with a negative NPV, over a positive one, for any number of reasons, from expected future growth to a project that has greater social value to a pet project.

Timing of capex decisionmaking is also crucial. Capex affects short-term profits. A company may decide to wait a quarter or another year to build up more capital that could be spent later. A company may decide that in previous years it spent too much capital, or that it simply wants to let those projects run their course before taking on any new projects. A company may decide that it is in a comfortable position compared to its peers and can undertake the project at a later date. Decisions may be based on earnings thresholds or depreciation as some have predicted that "firms narrowly achieving earnings thresholds report lower capex for

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available at https://poseidon01.ssrn.com/delivery.php?ID=562116100073094031018093088066112005017000001037065088099112091029029006099103084023000001018010122038004027077109093025003014111020068012086009103127112013105068093000020124074078000072069111026073064025101114006108074127117106093118078087122069015&EXT=pdf ("Another valuation problem arises in the choice of the cash flows period. The project"s NPV and IRR will be very different if one assumes monthly cash flows vs. yearly cash flow. For positive-NPV projects the month-based evaluation gives much higher results than year-based forecast.").

[73] Typically, a positive NPV would mean that the project could be expected to add value for the company and its shareholders; that is, if the value of an investment exceeds its cost (also taking into account the time value of money), then it would be a good decision for the company to invest the capital required. Generally, a company seeking to maximize profits would choose an investment with a positive NPV because it would generate more profit than one with a negative or even lower NPV. *See* Irving Fisher, The Theory of Interest (Augustus M. Kelley Publishers 1974) (1930), *available at* https://www.unc.edu/~salemi/Econ006/Irving_Fisher_Chaper_1.pdf.

the same quarter relative to other firms."[74] As another example of timing, the country may be in the middle of an economic downturn or even a recession, which can decrease demand for a company's goods and services and the availability of outside capital that could fund capex. Notably, *none* of the foregoing considerations is entertained as having any possible role in the capex fluctuations to which Singer, Ford, and the *NPRM* point.

E. Capex Decisionmaking is More Complex than the *NPRM*, Singer, or Ford Believe.

Despite the multitude of reasons why companies may choose to invest or not take on capex projects, the Commission believes that the "these reduced (BIAP) expenditures are a direct and unavoidable result of Title II reclassification."[75] The Commission reasons that this is partly because "Internet service providers have finite resources, and requiring providers to divert some of those resources to newly imposed regulatory requirements adopted under Title II will, unsurprisingly, reduce expenditures that benefit consumers."[76] The Commission is not looking at the bigger picture. Building out a telecommunications network is highly capital intensive; it takes months and years of planning. As discussed above in Section II.D., carriers have to make a myriad of decisions regarding how they invest in their networks.[77]

It is simply a bizarre form of wishful thinking to believe that the *OIO* was the prime mover for AT&T's or any BIAP's supposed decreases in capex. Contrary to Ford's hypotheses

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[74] Thomas G. Canace & Leigh Salzsieder, *The Timing of Asset Purchases to Achieve Earnings Thresholds*, 28 J. MGMT. ACCOUNTING RESEARCH 81, 82 (2016).

[75] *NPRM* at ¶ 46.

[76] *Id*.

[77] *See, e.g.*, John Celentano, *U.S. Wireless CapEx Looking Up*, ABOVE GROUND LEVEL (April 2, 2015), http://www.aglmediagroup.com/u-s-wireless-capital-expenditures-looking-up/ ("Two main factors drive wireless network expansion: the number of devices on the air, and the amount of mobile data traffic that each device generates. Independent forecasts indicate dramatic growth in both of these drivers over the next several years. Capex funds the procurement of wireless network equipment and services that are delivered by hundreds of manufacturers, distributors, contractors and systems integrators. Capex buys base station radios, antennas, cables, mounting hardware, power, grounding, cabinets/shelters, towers, backhaul, core switching systems, DAS, small cells as well as capitalized engineering and installation. As long as capex holds up, equipment orders are strong and many people are employed in making, delivering, installing and maintaining the network. However, when capex slows down, or is interrupted abruptly as happened in the second half of 2014, then equipment orders stall and people lose their jobs.").

regarding the *OIO*'s effects, AT&T explained its capital expenditures to its investors in its 2016 annual report, saying that "[t]he amount of capital expenditures is influenced by demand for services and products, capacity needs and network enhancements. Our capital spending also takes into account existing tax law and does not reflect anticipated tax reform."[78] AT&T further explained its 2016 capex as follows: "The majority of our capital expenditures are spent on our wireless and wireline networks, our video services and related support systems. Capital expenditures, excluding interest during construction, increased $2,298 (million) in 2016. The increase was primarily due to DIRECTV operations, fiber buildout, and wireless network expansion in Mexico."[79] Though AT&T did mention in its Form 10-K for yearend 2014, filed in 2015 a week before the *OIO*, that "expenditures may also be influenced by regulatory considerations", it also said "[t]he amount of capital investment is influenced by demand for services and products, capacity needs and network enhancements."[80]

Unfortunately, there is a pattern in the rhetoric from some BIAPs regarding the effect of the threat of nondiscrimination obligations on their capex. Whenever the Commission has considered net neutrality rules, some BIAP executives have voiced loud opposition, claiming that reclassification would depress future investment.[81] However, as stated above, when they address the SEC or their investors, to whom they are required to make truthful statements,[82] they say the

[78] AT&T Inc. 2016 Annual Report (2017), *supra* note 56 at 33.

[79] *Id*.

[80] AT&T, Annual Report (Form 10-K), *supra* note 59.

[81] *See,e.g.*, Letter from AT&T, CC Docket No. 02-33 et al., at 2 (filed Aug. 16, 2002) (stating that AT&T opposed "reclassification of any wireline broadband service as an unregulated Title I service," and that Title I reclassification "was unnecessary to create broadband investment incentives" because the rules were "sufficiently flexible to fully compensate the Bell Companies for any new investment in facilities for the purpose of providing advanced services"); Letter from Broadband for America, GN Docket No. 14-28 (filed May 13, 2014) *available at* http://www.broadbandforamerica.com/sites/default/files/CEOLettertoFCC-5.13.14.pdf (explaining views of 24 broadband CEOs that reclassification "would greatly distort the future development of, and investment in, tomorrow's broadband networks and services").

[82] *See supra* note 58.

opposite.[83] For example, just a few weeks after it became clear that Chairman Wheeler favored reclassification under Title II, executives of some of the biggest BIAPs told investors and industry participants that reclassification would not adversely affect their companies' investment plans.[84]

Although capex is an important indicator, it should not be viewed as the ultimate arbiter of the success or failure of any regulatory scheme. Companies have many different reasons for investing or not investing, so even raw dollar amounts should not be dispositive.[85] Ford and his colleagues assume and continue to tell the Commission and the public that Title II reclassification, which had been debated since 2010 – or even all the way back to the *Computer Inquiries* – was the only reason that broadband capex may have declined since the *OIO*. Relying on such overly-simplistic claims for reclassification would not only be misleading, but it would also be a dereliction of the Commission's duty to consider the whole record that is developing through this notice and comment process.

F. The Commission has Not Considered Factors Other than Two Studies Purporting a Decline in Broadband Capex.

The Commission's economic arguments have a further, even more fundamental flaw: They wrongly focus on the supposed capex decline of the twelve biggest ISPs without considering the effects that BIAP discrimination would have on the broader economy. The

[83] *See, e.g.*, JP Morgan Global Technology, Media and Telecom Conference: Time Warner Cable, Inc. Management Discussion (May 19, 2010) (quoting Time Warner Cable's Chief Operating Officer Landell Hobbs, stating that proposed Title II classification "is a light regulatory touch. . . . So . . . yes, we will continue to invest."); Michelle Ow, *Top MSOs Weigh In on Reclassification*, SNL Kagan, May 12, 2010 (quoting Comcast CEO, a week after Genachowski's announcement, as stating "the government is not a big worry" and that he "expected the industry to continue to invest and innovate."); Niraj Sheth, *Verizon in Talks to License 4G Spectrum to Rural Carriers*, WALL ST. J., May 13, 2010 (stating that Lowell McAdam, then-CEO of Verizon Wireless "emphasized that the company had no plans to slow investment in its wireless broadband network as a result of the FCC's move.").

[84] *See* Brian Fung, *Comcast, Charter and Time Warner Cable all say Obama's net neutrality plan shouldn't worry investors*, WASH. POST, Dec. 16, 2014, https://www.washingtonpost.com/news/the-switch/wp/2014/12/16/comcast- charter-and-time-warner-cable-all-tell-investors-strict-net-neutrality-wouldnt-change-much/; Brian Fung, *Verizon: Actually, strong net neutrality rules won't affect our network investment*, WASH. POST, Dec. 10, 2014, https://www.washingtonpost.com/news/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/.

[85] *See supra* Sec. II.D.

Commission majority appears to have already made its decision without considering the dynamics of a myriad of marketplaces affected directly and indirectly by the greatest engine of economic growth, the Internet.

The Commission should pay closer attention to how discrimination by BIAPs would affect innovators and smaller companies. The *NPRM* requests comment "on how the classification of broadband Internet access service as a telecommunications service has impacted smaller broadband Internet access service providers"[86] particularly because the Commission believes that the reclassification in the *OIO* "impos[ed] significant regulatory costs on Internet service providers"[87] and that smaller BIAPs "lack the dedicated compliance staffs and financial resources of the nation's largest providers."[88] The Commission again misses the broader point that the action it has proposed in the *NPRM* merely compounds, rather than resolves, the issue of legal and regulatory uncertainty. The Commission professes concern about regulatory uncertainty, pointing to USTelecom, which identified "'regulatory uncertainty' as one of the causes of reduced investment" in 2015.[89] The Commission has recognized that "[r]egulatory uncertainty may have particularly significant effects on small Internet service providers, which may be poorly equipped to address the legal, technical, and financial burdens associated with an uncertain regulatory environment."[90] However, the Commission disregards the fact that, by its own proposed action in the *NPRM*, it is simply adding to the legal uncertainty of Internet freedom and ensuring that the open Internet debate will continue.

In this docket, nearly forty ISPs from across the country lay out one of the central problems of the *NPRM* and Commission's misunderstanding of this issue: "Without a legal foundation to address the anticompetitive practices of the largest players in the market, the

[86] *NPRM* at ¶ 47.
[87] *Id* at ¶ 48.
[88] *Id* at ¶ 47.
[89] *Id* at ¶ 48.
[90] *Id*.

FCC's current course threatens the viability of competitive entry and competitive viability."[91] These companies seek to connect communities, and they usually have to compete with the twelve biggest ISPs. However, if this *NPRM* succeeds, these smaller ISPs, who the Commission has stated bear a disproportionate burden in compliance costs,[92] would be affected most by the changing regulatory winds due to the new Commission's whims.[93] The Commission should also note that these smaller ISPs have explained that they "have encountered no new additional barriers to investment or deployment as a result of the 2015 decision to reclassify broadband as a telecommunications service and have long supported network neutrality as a core principle for the deployment of networks for the American public to access the Internet."[94]

III. The Commission's Re-Reclassification is Based on Misconceptions of its Authority.

"An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."[95]

– Justice Anthony Kennedy in *Fox Television*

The Commission rests its case for authority to re-reclassify BIAS on the ability of an agency to "reconsider" its actions if its past predictions "prove erroneous."[96] To carry out this re-reclassification plan, the Commission has declared that its "predictions" from the *OIO* were "erroneous"[97] because one (flawed) study claims that ISP capex has decreased 5.6% and another purported that the "threat of reclassification" to Title II decreased investment in the range of 20-

[91] Forty ISPs Letter, *supra* note 45

[92] *NPRM* at ¶ 47 ("lack the dedicated compliance staffs and financial resources of the nation's largest providers.").

[93] John Eggerton, *FCC's Pai Backs Congressional Clarification on Internet Authority,* Broadcasting & Cable(last visited July 13, 2017, 2:26 PM), http://www.broadcastingcable.com/news/washington/fccs-pai-backs-congressional-clarification-internet-authority/165377 (*quoting* Chairman Pai: "Because again as Commissioner O'Rielly pointed out we don't want the regulatory winds to keep shifting every four or eight years we want to provide some level of consistency to the marketplace so that consumers and companies alike can enjoy the digital revolution.").

[94] Forty ISPs Letter, *supra* note 45.

[95] Fed. Commc'ns Comm'n v. Fox Television Stations, 556 U.S. 502, 1824 (2009) (Kennedy, J. concurring).

[96] *NPRM* at ¶ 53 n. 131 (quoting Aeronautical Radio, Inc. v. Fed. Commc'ns Comm'n, 928 F.2d 428, 445 (D.C. Cir. 1991) and American Family Ass'n v. Fed. Commc'ns Comm'n, 365 F.3d 1156, 1166 (D.C. Cir. 2004)).

[97] *Id*.

30% or $30-40 billion per year.[98] The Commission believes that its "predictions and expectations" in the *OIO* "were mistaken"; therefore, "principles of administrative law give [the Commission] more than ample latitude to revisit [its] approach."[99] CCIA respectfully disagrees.

CCIA believes the Commission is wrong in its interpretations of its authority and principles of administrative law because A) the Commission's predictions in the *OIO* have not proven erroneous; B) even assuming *arguendo* that BIAP capex did decline in the two years since the *OIO* and that the decline was caused directly by the *OIO,* the Commission nevertheless made a predictive judgment in the *OIO* that BIAP investment could decline in the short-term, but that would not offset long-term benefit; and C) again assuming *arguendo* that BIAP capex declined in the two years since the *OIO* and that the decline was caused directly by the *OIO,* the Commission still misunderstands D.C. Circuit precedent on its ability to reconsider its regulatory actions.

A. The Commission's Predictions in the *OIO* Have Not Proven Erroneous.

1. The Commission is Wrong to Rely on Just Two Studies to Justify a Major Regulatory Action.

As stated before, the Commission has made it very clear that it believes the *OIO* and classification of BIAS as a Title II telecommunications service caused a decline in BIAP investment, and for this reason the Commission has to re-reclassify BIAS under Title I.

The *NPRM* points out that the Commission, in the *OIO*, "reached a different conclusion with respect to reclassification's impact on broadband investment."[100] In part of the *OIO* quoted by the D.C. Circuit, the Commission "found that 'Internet traffic is expected to grow substantially in the coming years,' driving investment; that Title II regulation had not stifled investment when applied in other circumstances; and that 'major infrastructure providers have

[98] *Id.* at ¶ 45.
[99] *Id.* at ¶ 53.
[100] *USTelecom*, 825 F.3d at 43.

indicated that they will in fact continue to invest under the [Title II] framework.'"[101] Not only did the Commission rest its *OIO* decision on the predictive judgment that Internet traffic would grow, but also that such growing demand would incentivize BIAPs to continue investing. Indeed, as mentioned above, some BIAPs, like Comcast – the biggest in the country – even increased their capex.

Under *Fox Television*, an agency "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[102] Here, just two years after the *OIO*, the Commission is taking the opposite approach and discarding enforceable nondiscrimination obligations, based on what it views to be a different set of facts (i.e. two studies). Therefore, the Commission will have to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[103] CCIA believes that reliance on two dubious studies that purport a decline in the capex of the twelve largest BIAPs would not be sufficient to justify reversing a regulatory regime enacted just two years prior and upheld by the D.C. Circuit just a year prior, especially where the *OIO*'s predictions about the Internet generally have been proven correct.

2. *In the OIO, the Commission Did Take into Account Title II Opponents' Concerns and Predicted a Possible, Short-Term Decline in BIAP Investment.*

The Commission, in the *NPRM*, appears to have forgotten what it wrote in the *OIO* two years ago. The *OIO* did make a predictive judgment that BIAP investment could decline in the

[101] *Id.* (citations omitted).
[102] *Fox Television,* 556 U.S. at 515.
[103] *Id.*; *see also* Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2126 (U.S. 2016) (providing further analysis of *Fox Television*).

short-term. In *USTelecom*, the plaintiffs argued that the *OIO* would "undermine" BIAP investment.[104] Those same petitioners seem to maintain that overall belief, and the new Commission now agrees with them.[105] Indeed, the new Commission now "believe[s] that the Commission's predictions and expectations regarding broadband investment and the nature and effects of reclassification on the operation of the marketplace were mistaken and have not been borne out by subsequent events."[106] However, the Commission took into account opponents' arguments and understood that in the short term broadband investment could decline. The D.C. Circuit, just last year in *USTelecom*, quoted part of the *OIO*, where the Commission took into account conflicting views on the *OIO*'s effect on investment: "We cannot be certain which viewpoint will prove more accurate, and no party can quantify with any reasonable degree of accuracy how either a Title I or a Title II approach may affect future investment."[107] The Commission continued:

> *Although we appreciate carriers' concerns that our reclassification decision could create investment-chilling regulatory burdens and uncertainty, we believe that any effects are likely to be short term and will dissipate over time as the marketplace internalizes our Title II approach*, as the record reflects and we discuss further, below. More significantly, to the extent that our decision might in some cases reduce providers' investment incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote.[108]

B. The *NPRM* Omits the Commission's Predictions in the *OIO* of Short-Term BIAP Investment Declines.

While the Commission is correct that an agency "is free to change its approach to interpreting and implementing a statute so long as it acknowledges that it is doing so and justifies

[104] *USTelecom*, 825 F.3d at 43.
[105] *NPRM* at ¶ 4.
[106] *Id.* at ¶53.
[107] *OIO* at ¶ 410.
[108] *Id*. (emphasis added); *see also USTelecom*, 825 F.3d at 707.

the new approach,"[109] in the *NPRM*, the Commission seems to misinterpret its previous predictions and the D.C. Circuit's analysis in *USTelecom*, which upheld the *OIO*. Assuming, *arguendo*, that BIAP capex declined in the two years since the *OIO* and that the decline was caused directly by the *OIO,* the Commission is still wrong in the *NPRM* because in the *OIO*, the Commission actually made a predictive judgment that BIAP investment could decline in the short-term.

In the *NPRM*, the Commission recognizes that the majority in *USTelecom* "applied a 'highly deferential standard' to the agency's predictive judgments regarding the investment effects of reclassification, and deferred to the Commission's 'evaluat[ion of] complex market conditions'".[110] Immediately after the "highly deferential standard" sentence in *USTelecom*, which the Commission in the *NPRM* uses to explain how the D.C. Circuit reviewed the Commission's "predictive judgements regarding the investment effects of reclassification," there is the sentence where the D.C. Circuit quotes the *OIO* saying that Title II "could create investment-chilling regulatory burdens and uncertainty" but that "any effects are likely to be short term".[111] Although the Commission is acknowledging that it is changing its approach in the *NPRM*, it is not acknowledging that it actually made a predictive judgment in the *OIO* that BIAP investment could decline in the short-term. Even if BIAP investment did decline, the Commission is still wrong in the *NPRM* because, in the *OIO*, the Commission anticipated a possible near-term decline in broadband investment.

The *NPRM* recognizes the D.C. Circuit's "'highly deferential standard' to the agency's predictive judgments regarding the investment effects of reclassification."[112] The *OIO* clearly understood and even predicted the possibility that broadband investment could decline. The

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[109] *NPRM* at ¶ 53 n. 128 (citing *Fox Television* and *Mary V. Harris Found. v. Fed. Commc'ns Comm'n*, 776 F.3d 21, 24-25 (D.C. Cir. 2015).
[110] *Id*. (footnote omitted).
[111] *Id*. at ¶ 53 n. 129 (quoting *USTelecom*, 825 F.3d at 707 quoting *OIO* at ¶ 410).
[112] *Id*.

D.C. Circuit highlighted this paragraph in its decision, saying "[t]his too is precisely the kind of 'predictive judgment[] . . . within the agency's field of discretion and expertise' that we do not second guess."[113] Therefore, if this issue were presented to the D.C. Circuit again solely on this predictive judgment, the court would again apply a "highly deferential standard" to the expert agency's analysis and predictive judgment in the *OIO*, which accounted for the possibility that reclassification could lead to some declines in BIAP's broadband investment.[114] In light of these statements from the *OIO*, it is puzzling how the Commission now asserts that it was "mistaken" in the *OIO* regarding its possible effects on BIAP investment.

C. The Commission has Misinterpreted D.C. Circuit Precedent.

D.C. Circuit precedent on the Commission's ability to reconsider its regulatory actions does not afford the Commission "more than ample latitude to revisit [its] approach" from the *OIO*.[115] The Commission justifies its action in the *NPRM* by claiming "D.C. Circuit precedent also recognizes, however, that should the Commission's predictions 'prove erroneous, the Commission will need to reconsider' the associated regulatory actions 'in accordance with its continuing obligation to practice reasoned decision-making.'"[116] First, the Commission does not "*need* to reconsider"[117] the *OIO* because, as stated above, the Commission was not wrong in its predictive judgment of broadband investment. Secondly, as stated above, CCIA does not believe that the Commission's proposed elimination of enforceable nondiscrimination protections could be characterized as "reasoned decision-making." More importantly, the Commission's reasoning is flawed regarding its current belief on when it should revisit its rules and pursue the exact opposite course.

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[113] *USTelecom*, 825 F.3d at 707. .

[114] *Id*. (quoting *EarthLink*, 462 F.3d at 12 "[a]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable." (internal quotation marks omitted).

[115] *NPRM* at ¶ 53.

[116] *Id*.

[117] *Id.* (emphasis added).

1. Aeronautical Radio *Does Not Provide the Commission "More than Ample Latitude" to "Reconsider" the OIO.*

The Commission proffers *Aeronautical Radio* as a case supporting the supposition that the Commission "will need to reconsider . . . [the *OIO*] in accordance with its continuing obligation to practice reasoned decision-making."[118] However, the full context of that quote and the case from which it came show that the Commission has misinterpreted its authority.

Aeronautical Radio concerned the Commission's decision to allow for shared use of spectrum between Aeronautical Mobile Satellite Service (AMSS(R)) and the newly-established, mobile satellite service (MSS). The Petitioner challenged this shared spectrum scheme for being inconsistent with the United States' obligations as a member of the International Telecommunication Union (ITU), regarding spectrum allocations for the L-Band in question, which were most recently agreed to in 1987.[119] Although the Commission at the time acknowledged the inconsistency, the D.C. Circuit "defer[red] to the Commission's belief that its allocation scheme [would] prove compatible with its international obligations" because of the Commission's experience and expertise in managing spectrum and international obligations.[120]

Context is key to the court's statements on the agency's "need to reconsider" and "continuing obligation to practice reasoned decision-making."[121] In *Aeronautical Radio*, the D.C. Circuit admitted that its "decision . . . [was] controlled by the limited standard of review applicable to the question at hand" – arbitrary and capricious review.[122] The Commission's "predictive judgment" in *Aeronautical Radio* concerned the reasonableness of such an allocation

[118] *Id.*.
[119] *Aeronautical Radio*, 928 F.2d at 443-44.
[120] *Id.* at 445 (explaining that the Commission is the U.S. "agency directly responsible for numerous international coordination efforts . . . [and] has first-hand experience to support its judgment concerning the feasibility of its allocation scheme.").
[121] *NPRM* at ¶ 53.
[122] *Aeronautical Radio*, 928 F.2d at 444-45 (quoting 5 U.S.C. § 706(2)(A)).

and feasibility of the consortium's[123] handling the MSS/AMSS(R) system as well as the ITU's non-interference restrictions. The court noted:

> Of course, because AMSC's system is still at the pre-operational stage, we cannot determine whether the Commission's sanguine view of the prospects of international coordination will prove correct. This is not due, however, to any impropriety on the part of the Commission; rather, it is a simple reality that no final judgment is possible absent completion of the coordination process, i.e., after interaction between actual licensees with concrete system proposals.[124]

The court afforded deference to the Commission because the system in question was "still at the pre-operational stage." The ITU's decisions on the L-Band occurred in 1987, four years before the D.C. Circuit decided this case. Indeed, given that the D.C. Circuit admitted that its "decision [was] controlled by [a] limited standard of review" on this particular question, *Aeronautical Radio* should not be read to giving the Commission the "more than ample latitude"[125] that Commission claims it does in the *NPRM*.

2. *"Over Time" Does Not Mean Two Years.*

The Commission also proffers *American Family Ass'n*[126] quoting *Bechtel II*,[127] to justify its belief that it has "more than ample latitude" and "need[s] to reconsider" the *OIO* because broadband capex has allegedly declined.[128] CCIA disagrees and will address each case accordingly.

American Family Ass'n involved rules affirmed in a 2001 *Rehearing*[129] of an 2000 *Order*,[130] based on an *FNPRM* from 1998,[131] based on an *NPRM* from 1992[132] that sought

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[123] The American Mobile Satellite Corporation ("AMSC").

[124] *Aeronautical Radio*, 928 F.2d at 444.

[125] *NPRM* at ¶ 53.

[126] *American Family Ass'n*, 365 F.3d at 1166.

[127] Bechtel v. Fed. Commc'ns Comm'n (*Bechtel II*), 10 F.3d 875, 880 (D.C. Cir. 1993).

[128] *NPRM* at ¶ 53 n. 131 (quoting *American Family Ass'n*, 365 F.3d at 1166 "[T]he FCC's 'necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would.'").

[129] *In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 16 FCC Rcd 5074 (2001).

comment on a system devised in 1965[133] to allocate noncommercial educational (NCE) broadcast licenses. The D.C. Circuit found that the state-wide educational network credit was nonarbitrary because the Commission made a "reasonable assumption,"[134] and it upheld the Commission's predictive judgment that "smaller and multi-state educational organizations will more easily qualify for the diversity credit".[135] The D.C. Circuit quotes *Bechtel II* to say that "[t]he Commission may well have a future obligation to reevaluate the point system if the empirical predictions and premises it used to justify the point system turn out to be erroneous."[136] However, the court did not provide any indication of how long "over time" would be; it simply said, "experience may establish that, contrary to the FCC's prediction, most multi-state and regional educational institutions will not be able to obtain diversity credits to compensate for the advantage the state-wide educational credit gives large single-state educational organizations."[137]

The facts in *Bechtel II*, however, show that the Commission does not have the justification it now claims in the *NPRM*. In *Bechtel II*, the court reviewed a policy that was almost three decades old.[138] Clearly, in the quote that the *NPRM* cites, the court was referring to how the Commission's predictive judgments played out "over time" of nearly thirty years, not two.

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[130] *In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *vacated in part,* Nat'l Pub. Radio, Inc. v. Fed. Commc'ns Comm'n, 254 F.3d 226 (D.C. Cir. 2001).

[131] *In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 13 FCC Rcd 21167 (1998).

[132] *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2669 GC Docket No. 92-52 (1992), https://ecfsapi.fcc.gov/file/1015760001.pdf.

[133] Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965).

[134] *American Family Ass'n,*, 365 F.3d at 1166.

[135] *Id.*; *see also id*. at 1160 (explaining that the diversity credit "favors applicants who do not own or control other stations near the area the license holder will serve." The Commission "adopted this criterion to foster broadcast diversity by allowing the local public to be served by different NCE licensees.").

[136] *Id*. at 1166.

[137] *Id*.

[138] *Bechtel II*, 10 F.3d at 881 ("[The Commission's] failure over a 28-year period to generate a shred of supporting evidence is rather telling.").

The case centered on predictive judgments made by the Commission regarding its "integration policy," preferring the integration of ownership and management of FM stations.[139] The court found evidence that the integration policy traced its roots back to 1947.[140] In 1989, the Commission denied petitioner's application for a commercial FM radio station, following the administrative law judge's and FCC's Review Board's denials, because petitioner "did not propose to integrate ownership and management."[141] The Commission claimed it was owed deference on the integration policy based on its "predictive judgments",[142] but the D.C. Circuit disagreed because "[d]espite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it."[143] The court then referred to petitioner's protestations that "the relevant predictions have now had almost three decades to succeed or fail. There comes a time when reliance on unverified predictions begins to look a bit threadbare."[144] Then, the court delivered the quote to which the *NPRM* now refers.

Furthermore, the *Bechtel II* quote refers to a policy statement – not a rulemaking. The *Bechtel II* quote actually comes from *Bechtel I*, decided the year before, concerning the same issue. Immediately preceding the quote that the Commission now uses to justify its approach in the *NPRM*, the *Bechtel I* court said the Commission's duty "to reconsider a settled policy or explain its failure to do so . . . is even more pressing when the policy is embodied not in a binding regulation issued after public notice and comment but in a general statement of policy such as the *1965 Policy Statement* at issue here."[145] The fact that *Bechtel I* involved a policy statement, not a rulemaking, is thus a critical distinction. They are very different, for as the D.C.

[139] *See id*. at 878-79 (explaining the integration policy).
[140] *See id*. at 877 (citing *Homer Rodeheaver,* 12 F.C.C. 301, 307 (1947)).
[141] *Id*.
[142] *Id*. at 880.
[143] *Id*.
[144] *Id*.
[145] Bechtel v. F.C.C (*Bechtel I*), 957 F.2d 873, 881 (D.C. Cir. 1992).

Circuit said in *Pacific Gas Elec. v. FPC,* which the *Bechtel I* court quoted, a rulemaking has the force of law while a policy statement does not.[146]

The Commission wants to uphold the "four Internet freedoms [] that consumers should have access to the content, applications, and devices of their choosing as well as meaningful information about their service, all without deterring the investment and innovation that has allowed the Internet to flourish,"[147] yet the *NPRM* questions whether the bright-line *OIO* rules are needed at all.[148] The Commission claims that it "has repeatedly found the need for a no-blocking rule on principle,"[149] that "[t]he no-throttling rule mirrors the no-blocking rule,"[150] and that it continues to support a transparency rule,[151] yet the *NPRM* advocates doing away with those rules from the *OIO*. The Commission cannot have its cake and eat it, too. The *NPRM* seems to support the principles of net neutrality, yet it does not acknowledge that without bright-line nondiscrimination rules, it would simply retread the paths where it has failed before.[152] Extolling an objective is not the same as providing a means for achieving that objective.[153]

IV. Conclusion.

The Internet has facilitated free speech, incredible economic growth, and innovation. The Commission's proposed action in the *NPRM* would put that all in serious danger. CCIA has long supported clear, meaningful, and enforceable rules to prevent BIAPs from unfairly

[146] Pacific Gas Electric Co. v. Fed. Power Comm'n (*PGE*), 506 F.2d 33, 38 (D.C. Cir. 1974) ("An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. ")

[147] *NPRM* at ¶ 71.

[148] *Id*. at ¶ 76.

[149] *Id*. at ¶ 80.

[150] *Id*. at ¶ 83.

[151] *Id*. at ¶ 89.

[152] *Comcast*, 600 F.3d 642; *Verizon*, 740 F.3d 623, 630.

[153] *See generally PGE,* 506 F.2d at 38-39 ("An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.").

discriminating against Internet traffic and preventing end users from accessing the lawful content and services of their choosing. Businesses need certainty and businesses and consumers need meaningful redress should abuses occur. CCIA urges the Commission to look at the entire picture as reflected in the record, not just preconceived positions or two limited and dubious studies. The Commission should abandon this unnecessary and harmful proceeding.

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Respectfully submitted,

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