

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

*In the matter of*

Restoring internet Freedom

WC Docket No. 17-108

**REPLY COMMENTS OF THE  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

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**REPLY COMMENTS OF THE  
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CCIA respectfully submits these reply comments in the above-referenced proceeding. In its initial comments, CCIA sought to bring to the Commission's attention major flaws in the *Notice of Proposed Rulemaking (NPRM)*.<sup>2</sup> The Commission is willfully turning a blind eye to the bigger picture of how its actions would dramatically alter the Internet ecosystem by relying on two flawed studies that claim to show a decline in BIAP capex directly resulting from the *Open Internet Order (OIO)*.<sup>3</sup> CCIA maintains that this reasoning is naïve and that changing course primarily on this scant evidence would be a severe dereliction of the Commission's duty to the public. Furthermore, the Commission's perceptions of its authority, as described in the *NPRM*, are similarly deeply flawed. The Commission should not take such a selective reading of the *OIO*, for the *NPRM* incorrectly seems to think that the Commission was wrong in its predictive judgments in the *OIO*. In fact, contrary to the Commission's current beliefs and memory of the *OIO*, the Commission in the *OIO* actually accounted for and predicted a possible, short-term decline in BIAP capex. Adopting this *NPRM* will only exacerbate legal uncertainty

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<sup>1</sup> 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>.

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

<sup>3</sup> *In re Protecting and Promoting the Open Internet (OIO)*, 30 FCC Rcd. 5601 (2015).

and threaten the vitality of the Internet. CCIA renews its call for the Commission to abandon this harmful and unnecessary proceeding.

## **I. Introduction and Summary.**

The Commission must keep strong, enforceable, nondiscrimination rules. This *NPRM* is not the way to do it. The *NPRM* would fundamentally change the dynamics of the Internet. The practical effect of this *NPRM* is that without the rules as promulgated in the *Open Internet Order*, and upheld just last year by the D.C. Circuit in *USTelecom*,<sup>4</sup> Internet users would no longer be afforded protections if their broadband Internet access provider (BIAP) decided to block, throttle, or otherwise discriminate against lawful content. The D.C. Circuit in *Verizon* described the fears of what could arise if there were no open Internet rules and BIAPs were free to discriminate and arbitrarily charge tolls on end users and edge providers.<sup>5</sup> With this *NPRM*, those fears would become reality because the Commission would abdicate its authority to oversee the most transformative communications network in human history, the Internet.<sup>6</sup>

The *NPRM* makes it clear that the Commission intends to overturn the *OIO* and makes little attempt to substitute the *OIO*'s enforceable, judicially approved rules with anything of substance. To accomplish its goal, the Commission relies on one metric from two dubious studies that purport a decline in investment by the nation's largest BIAPs as a direct result of the *OIO*.<sup>7</sup> The Commission's supposed purpose with the *NPRM* is to promote investment in broadband infrastructure. While this would be a noble goal that CCIA supports, in reality this *NPRM* would put at risk the Internet ecosystem and the tremendous economic growth and

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<sup>4</sup> U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n (*USTelecom*), 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017).

<sup>5</sup> *Verizon v. Fed. Commc'ns Comm'n*, 740 F.3d 623 (D.C. Cir. 2014) (“[B]roadband providers might prevent their end-user subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers’ access to certain edge providers, either as a means of favoring their own competing content or services or to enable them to collect fees from certain edge providers”).

<sup>6</sup> *See generally* 47 U.S.C. § 151 (2012) (designating the Commission as the agency of the Federal government that oversees communications networks).

<sup>7</sup> *NPRM* at ¶ 3 (“Investment in broadband networks declined. Internet service providers have pulled back on plans to deploy new and upgraded infrastructure and services to consumers.”).

innovation it has spurred. Part of the problem is that though the *NPRM* professes concern about the effects that regulation can have on investment, in reality it is not considering at all how reclassification would affect the vast Internet ecosystem. The Commission appears to be singularly focused on the short-term decisions of the twelve biggest BIAPs, without considering the effects its decision would have on the entire U.S. economy.<sup>8</sup> In reality, if the *NPRM* were approved, the Commission would have abdicated its authority, leaving nothing but uncertainty in its wake.

Businesses desire certainty when they make decisions, including investment decisions. In reality, just like most major Commission decisions, a final order based on the *NPRM* will be challenged in court. A Federal Appeals Court would review this order in late 2018 at the earliest. This would unnecessarily prolong this issue and continue the back-and-forth between the Commission and the courts on the question of an open Internet that has occurred for the past decade. CCIA urges the Commission to focus its attention and resources on more productive ventures that will actually help investment in broadband infrastructure and benefit consumers.

## **II. The Record Demonstrates that Strong, Enforceable, Nondiscrimination Rules Ensure an Open Internet, Provide Certainty, and Encourage Investment.**

### **A. *NPRM* Supporters Proffer Many Misleading and Unsubstantiated Claims.**

Proponents of the *NPRM* now claim that BIAPs are “deeply engrained [with] commitment to Internet freedom.”<sup>9</sup> Furthermore, they assert that “no problems arose in [the pre-2015] unregulated environment revealing any need for common-carrier style regulation.”<sup>10</sup>

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<sup>8</sup> See Comments of Congressman Frank Pallone, Jr., et al., WC Docket No. 17-108 (filed Aug. 4, 2017), at ii [hereinafter Comments of Congressional Democrats] (asserting that the *NPRM* “single-mindedly concentrates on one issue to the exclusion of all others: the raw dollars spent on network deployment” instead of considering other national priorities).

<sup>9</sup> Comments of NCTA - The Internet & Television Association, WC Docket No. 17-108 (filed July 17, 2017), at 51.

<sup>10</sup> Comments of AT&T Services, Inc. WC Docket No. 17-108 (filed July 17, 2017), at 13.

These claims on their face are false and elide the history of the net neutrality issue.<sup>11</sup> Without enforceable rules, BIAPs have no reason not to block, throttle, or discriminate against competitor services.

*1. Recent BIAP Claims of Supporting Net Neutrality are Disingenuous.*

Bewilderingly, some of the largest BIAPs, and loudest opponents of the *OIO*, have recently started claiming that they have always agreed with net neutrality. In July 2017, AT&T belatedly “joined” the national Day of Action despite pushing to repeal the nondiscrimination rules for which activists were advocating.<sup>12</sup> AT&T’s Bob Quinn, Senior Executive Vice President of External and Legislative Affairs, wrote, “We agree that no company should be allowed to block content or throttle the download speeds of content in a discriminatory manner.”<sup>13</sup> Yet, months prior, another AT&T executive, Vice President of Federal Regulatory, Hank Hultquist, enunciated his belief that the *USTelecom* decision outlines a circumstance in which BIAPs could block, slow, or speed up Internet traffic—the same exact activities forbidden in the *OIO*.<sup>14</sup>

Continuing this doublespeak, Comcast, in its comments in this proceeding advocated for the Commission to relinquish its ability to enforce bright-line, open Internet rules, yet claimed that Comcast will, “continue to support the principles of ensuring transparency and prohibiting

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<sup>11</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (“In 2007 several subscribers to Comcast’s high-speed Internet service discovered that the company was interfering with their use of peer-to-peer networking applications.”)

<sup>12</sup> Harper Neidig, *AT&T Joins Net Neutrality Demonstration Despite Pushing for Repeal of FCC Rules*, THE HILL (July 11, 2017 1:04 PM), <http://thehill.com/policy/technology/341471-att-joins-net-neutrality-demonstration-despite-pushing-for-repeal-of-fcc>.

<sup>13</sup> See Bob Quinn, *Why We’re Joining the ‘Day of Action’ in Support of an Open Internet*, AT&T Public Policy (July 11, 2017),

<https://www.attpublicpolicy.com/consumer-broadband/why-were-joining-the-day-of-action-in-support-of-an-open-internet/> (“We agree that no company should be allowed to block content or throttle the download speeds of content in a discriminatory manner. So, we are joining this effort because it’s consistent with AT&T’s proud history of championing our customers’ right to an open internet and access to the internet content, applications and devices of their choosing.”).

<sup>14</sup> See Hank Hultquist, *The Surprising (to me) Narrowness of the D.C. Circuit’s Title II Decision*, AT&T Public Policy (May 31, 2017), <https://www.attpublicpolicy.com/consumer-broadband/the-surprising-to-me-narrowness-of-the-d-c-circuits-title-ii-decision/> (“Wow. ISPs are not only free to engage in content-based blocking, they can even create the long-dreaded fast and slow lanes so long as they make their intentions sufficiently clear to customers.”).

blocking, throttling, and anticompetitive paid prioritization, as we have previously.”<sup>15</sup> Further, in this proceeding, NCTA, the trade association for the cable industry, claims it has “reaffirm[ed] [its] longstanding commitment to core open internet principles that ensure that all consumers can enjoy free and unimpeded access to the lawful internet content of their choosing,”<sup>16</sup> and it supports the notion that BIAPs “should not degrade lawful Internet traffic or consumers’ use of non-harmful devices.”<sup>17</sup> Yet, NCTA argues for repeal of the Commission’s *ex ante* rules because they are “invasive” and may cause a “drag on investment.”<sup>18</sup>

2. *Assertions that BIAPs are Faithful to Open Internet Principles in the Absence of Commission Enforcement are Misleading and Divorced from Reality.*

Previous Commission actions demonstrate how BIAPs, such as AT&T and Comcast, have acted to limit Internet openness and that they would do so again if the Commission abdicates its authority as proposed in the *NPRM*. For example, in 2008, Comcast was caught interfering with subscriber’s peer-to-peer file-sharing communications, such as BitTorrent, without valid justification and without disclosing its actions.<sup>19</sup> In 2009, AT&T restricted subscribers from accessing DISH’s Slingbox, a lawful third-party application, over its 3G mobile wireless network.<sup>20</sup> In 2012, AT&T blocked FaceTime on Apple devices and only allowed them

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<sup>15</sup> Comments of Comcast Corp., WC Docket No. 17-108 (filed July 17, 2017), at 53.

<sup>16</sup> Comments of NCTA, WC Docket No. 17-108, at 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 37.

<sup>19</sup> *Comcast Network Management Practices Order*, 23 FCC Rcd 13028, 13028, 13055–56, ¶¶ 1, 47–48 (2008); see *Comcast Corp. v. Fed. Comm’n Comm’n*, 600 F.3d 642, 652-53 (D.C. Cir. 2010) (“On the merits, the Commission ruled that Comcast had ‘significantly impeded consumers’ ability to access the content and use the applications of their choice,’ and that because Comcast ‘ha[d] several available options it could use to manage network traffic without discriminating’ against peer-to-peer communications, its method of bandwidth management ‘contravene[d] . . . federal policy.’”) (quoting *Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028, 13033-50, 13054, 13057, 13052, ¶¶ 12-40, 43-44, 49 (2008)).

<sup>20</sup> Reply Comments of DISH Network, LLC, GN Docket No. 09-191 (Nov. 4, 2010), at 7 (“In reality, it took nine months of regulatory scrutiny and pressure from the public and DISH for AT&T to ‘work with’ DISH so that AT&T subscribers could access their Slingbox offerings over the wireless network.”).

on new phones if customers agreed to buy shared data plans.<sup>21</sup> In 2014, Comcast throttled speeds while negotiating with Netflix over streaming access,<sup>22</sup> yet Comcast now claims to have “pledged to maintain the same consumer-friendly practices regardless of how BIAS is classified.”<sup>23</sup> Again, in 2015, the Commission took action against AT&T for not disclosing to consumers that unlimited data packages came with slower speeds than advertised.<sup>24</sup> These harms, among many others, were extensively discussed and referenced in the *OIO*,<sup>25</sup> yet, AT&T,<sup>26</sup> Comcast,<sup>27</sup> and NCTA<sup>28</sup> claim that no problems arose when BIAS was classified under Title I.

3. *The Commission is Abdicating its Authority to Police Anticompetitive and Discriminatory Conduct.*

NCTA now claims a “longstanding commitment to core open internet principles” dating back to the “four internet freedoms” espoused by its current chairman, and former Commission

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<sup>21</sup> Cecelia Kang, *AT&T lifts FaceTime restrictions on Apple iPhones*, WASH. POST (Nov. 8, 2012), [https://www.washingtonpost.com/blogs/post-tech/post/atandt-lifts-facetime-restrictions-on-apple-iphones/2012/11/08/cbec36de-29de-11e2-b4e0-346287b7e56c\\_blog.html?utm\\_term=.c4dac158ff53](https://www.washingtonpost.com/blogs/post-tech/post/atandt-lifts-facetime-restrictions-on-apple-iphones/2012/11/08/cbec36de-29de-11e2-b4e0-346287b7e56c_blog.html?utm_term=.c4dac158ff53).

<sup>22</sup> See Steven Musil, *Netflix Reaches Streaming Traffic Agreement with Comcast*, CNET (February 23, 2014 10:03 AM), <https://www.cnet.com/news/netflix-reaches-streaming-traffic-agreement-with-comcast/> (“The deal ends a dispute that saw average Netflix streaming speeds decline on the cable giant's network by nearly 30 percent in the past couple of months.”); see also John Brodtkin, *Netflix performance on Verizon and Comcast has been dropping for months*, ARS TECHNICA (Feb. 10, 2014 4:30 PM), <https://arstechnica.com/information-technology/2014/02/netflix-performance-on-verizon-and-comcast-has-been-dropping-for-months/> (“Comcast also dropped for four straight months, from 2.11Mbps in September to 1.51Mbps in January.”).

<sup>23</sup> Comments of Comcast Corp., WC Docket No. 17-108, at 40.

<sup>24</sup> See, e.g., Press Release, *FCC Plans to Fine AT&T \$100 Million for Misleading Consumers About Unlimited Data Plans, Violating Transparency Obligations*, FCC (June 17, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333877A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333877A1.pdf) (fining AT&T Mobility \$100 million for allegedly “severely slow[ing] down the data speeds for customers with unlimited data plans and . . . fail[ing] to adequately notify its customers. . . .”)

<sup>25</sup> See generally *OIO*, GN Docket No. 14-28.

<sup>26</sup> Comments of AT&T, WC Docket No. 17-108, at 14 (“This regulatory history illustrates a simple point: the Title II rules that the pro-regulation advocates claim are essential to an open Internet were not even adopted until more than 16 years into the broadband era and have been in effect for only two years.”).

<sup>27</sup> Comments of Comcast Corp., WC Docket No. 17-108, at 40 (“For one thing, the plain fact that broadband providers remained faithful to consensus open Internet principles throughout the many years that BIAS was classified as an information service—and have pledged to maintain the same consumer-friendly practices regardless of how BIAS is classified—belies any notion that Title II is somehow necessary to safeguard those principles.”).

<sup>28</sup> Comments of NCTA, WC Docket No. 17-108, at 40 (“NCTA’s members and other broadband providers have enshrined open Internet principles in existing policies and business practices.”).



Chairman, Michael Powell.<sup>29</sup> However, the practical effect of NCTA’s rhetoric and this *NPRM* would take the Internet ecosystem back to an era where the Commission could not enforce the “no blocking, no throttling, and no anticompetitive paid prioritization” rules that NCTA now claims to support.<sup>30</sup> NCTA and its ilk seem to forget that the D.C. Circuit plainly said that the Commission could not enforce such a policy statement against NCTA’s biggest member Comcast.<sup>31</sup>

The Commission acted decisively in 2015, recognizing the need for basic, common sense regulations to properly disincentivize BIAPs from engaging in anticompetitive and discriminatory conduct. If the *NPRM* were adopted, the situation regarding the Commission’s authority to police BIAP blocking, throttling, and discrimination would essentially revert back to the period before *Comcast Corp. v. FCC*. At that time, BIAS, by almost any means, was classified under Title I. However, then-Chairman Powell still felt it was necessary for the Commission to do something about Internet freedom, so he issued the 2005 Internet Policy Statement. When it came to light that Comcast was blocking BitTorrent, the Commission condemned this practice and sought to use its ancillary jurisdiction, concluding that Comcast’s actions violated the principles set forth in the Internet Policy Statement.<sup>32</sup> The D.C. Circuit later overruled the Commission in *Comcast* because the Commission lacked authority to enforce a policy statement as a rule.<sup>33</sup> This case is most analogous to what would happen if the *NPRM* were adopted because the Commission would no longer be able to use its authority under Title II. The D.C. Circuit has already found that the Commission cannot simply issue a policy statement

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<sup>29</sup> *Our Comments to the FCC on Restoring Internet Freedom*, NCTA – THE INTERNET & TELEVISION ASSOCIATION (July 18, 2017), <https://www.ncta.com/platform/public-policy/our-comments-to-the-fcc-on-restoring-internet-freedom/>.

<sup>30</sup> *Id.*

<sup>31</sup> *See Comcast*, 600 F.3d at 651-53 (distinguishing a previous instance where the Commission relied on a policy statement because it was in conjunction with an expressed delegation of authority).

<sup>32</sup> *Id.* at 645-46.

<sup>33</sup> *See id.* at 651-53 (distinguishing the case at hand from previous instances where the Commission relied on policy statements in conjunction with express delegation of authority).

on no blocking, throttling, or discrimination and then try to enforce it when a BIAP engages in that activity. If the *NPRM* were adopted, BIAPs would essentially have free rein to engage in anti-discriminatory behavior without fear of real enforcement. The Commission would have severely limited ability to police BIAPs if they decide they no longer want to abide by their “deeply engrained [] commitment to Internet freedom.”<sup>34</sup>

**B. The Record Shows the Commission’s “Bright-Line” Rules Ensure a Stable Internet Ecosystem, Spurring Innovation and Economic Growth.**

*1. Allegations that “Bright-Line” Rules Create “Regulatory Uncertainty” are Divorced from Reality.*

As CCIA demonstrated in its initial comments, bright-line rules stabilize the Internet ecosystem by setting enforceable guidelines for BIAPs to follow, while providing confidence and assurances to consumers that they are getting the service for which they are paying.<sup>35</sup> Comcast’s allegations that the *OIO* brought “enormous regulatory uncertainty” are simply not true.<sup>36</sup> The D.C. Circuit provided certainty in *USTelecom* when it upheld the *OIO*’s rules. Maintaining bright-line, nondiscrimination rules ensures the free flow of Internet traffic by forcing BIAPs to follow common sense, rules of the road. Indeed, the Commission’s light touch approach with significant forbearance in the *OIO* have helped new media companies like MLB Advanced Media, which noted that the rules “are consistent with the Commission’s goals of minimizing regulatory burdens and uncertainty.”<sup>37</sup>

However, the Commission’s proposed action in the *NPRM*, backed by the largest BIAPs, would only create greater legal uncertainty and uncertainty for consumers and businesses that rely on open access to the Internet. For example, thousands of Internet-enabled startups rely on an open Internet. Investors backing these businesses have done so with the expectation that

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<sup>34</sup> Comments of NCTA, WC Docket No. 17-108, at 51.

<sup>35</sup> Comments of the Computer & Communications Industry Association (CCIA), WC Docket No. 17-108 (July 17, 2017), at 8-10.

<sup>36</sup> Comments of Comcast Corp., WC Docket No. 17-108, at 9.

<sup>37</sup> Comments of MLB Advanced Media, L.P., WC Docket No. 17-108 (July 17, 2017), at 2-3.

consumers would be able to access those startups without being blocked, throttled, or charged unnecessary and outrageous fees from BIAPs.<sup>38</sup> Rolling back these bright-line nondiscrimination rules will result in the exact regulatory uncertainty that BIAPs appear to be so worried about, deter investment, and bring harm to the wider Internet ecosystem.

2. *The Internet Ecosystem is Thriving Under the OIO's "Bright-Line" Rules.*

The Record shows that the Internet ecosystem is thriving. Between 2007 and 2012 alone, the Internet sector increased its total number of employees by 107 percent to create nearly three million jobs.<sup>39</sup> Overall, the Internet industry annually contributes \$966 billion in economic activity, or over six percent of the national GDP.<sup>40</sup> The Commission's ability to impose bright-line rules bolsters this growth.<sup>41</sup> Concrete rules against blocking, throttling, and discrimination promote the virtuous cycle of innovation and investment as well as providing market stability. This facilitates investment into the Internet ecosystem and brings certainty to businesses and consumers alike.

In general, business startups rely heavily on and benefit greatly from an open and affordable Internet. The value of this sector cannot be overemphasized, considering virtually all new net jobs are created by startups.<sup>42</sup> Further, much of the growth in the Internet ecosystem can be specifically attributed to Internet-enabled startups.<sup>43</sup> These businesses disrupt the status quo, challenge dominant incumbents, and bring fresh and innovative ideas to the marketplace.

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<sup>38</sup> Comments of Engine, WC Docket No. 17-108 (filed July 17, 2017), at 6.

<sup>39</sup> Stephen Siwek, *Measuring the US Internet Sector*, INTERNET ASSOCIATION at 7 (2015), available at <http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>.

<sup>40</sup> *Id.* at 5.

<sup>41</sup> See Comments of Engine, WC Docket No. 17-108, at 4 (“By allowing anyone with a computer and a good idea to build a company and reach a global audience, the Internet has sparked a new industrial revolution led by hundreds of thousands of small entrepreneurs disrupting industries and challenging dominant incumbents.”).

<sup>42</sup> See Comments of Engine, WC Docket No. 17-108, at 4 (citing John Haltiwanger et al, *Who Creates Jobs? Small Versus Large Versus Young*, 95 REV. OF ECON. & STAT. 347, 350 (2013) (referencing tabl. 1)).

<sup>43</sup> See *id.* (“Startups are driving the development of the next wave of innovative technologies—from virtual reality to artificial intelligence to the Internet of Things—that will reshape the economy in the coming years.”).

Many of the key players in the Internet ecosystem would not have succeeded if BIAPs were allowed to engage in blocking or content discrimination. Etsy,<sup>44</sup> LendUp,<sup>45</sup> General Assembly,<sup>46</sup> and many others, have publicly commented that *de facto* net neutrality has been a pillar of Internet innovation and economic growth. This is because early stage startups often operate on minimum investments just long enough to produce a viable product.<sup>47</sup> Most small, online businesses do not have the capital to pay fees for the fast or toll lanes that BIAPs would be able to impose if the *NPRM* were approved. BIAPs could unfairly hurt small businesses and startups if there were no open Internet rules by blocking competing sites that they do not own or in which they do not have a financial interest, discriminating against content and services that they do not own or produce, charging consumers more or using different pricing mechanisms if consumers want to access sites that are not affiliated with that BIAPs, or prioritizing preferred applications or media (including their own). These practices have a real effect that will harm businesses. Even slower load times can significantly hinder small businesses that rely on the Internet to sell products to customers, for if that startup's site loads slowly, users are more likely to switch and visit a competitor's site or give up.<sup>48</sup>

This *NPRM*, if approved, would provide no effective, enforceable nondiscrimination rules. BIAPs could effectively block out these Internet-enabled businesses. CCIA hopes the

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<sup>44</sup> See Comments of Etsy, Inc., WC Docket No. 17-108 (filed July 17, 2017), at 2 (“Etsy would not exist without net neutrality.”); Comments of Etsy, Inc., GN Docket No. 14-28 (filed July 8, 2014), at 5 (“[Etsy’s] business model would not have worked under [a Title I-based net neutrality regime lacking ex ante rules], which would have allowed more established e-commerce companies to negotiate individualized, differentiated arrangements and pay for priority access to consumers.”).

<sup>45</sup> See Comments of LendUp, GN Docket No. 14-28 (filed Aug. 5, 2014) at 5-6 (“These deals [between ISPs and edge providers] would certainly come at a high price—a price we could not afford even with the most generous investment, but which our competitors might have purchased to exclude us.”).

<sup>46</sup> See Comments of General Assembly, GN Docket No. 14-28 (filed July 1, 2014), at 4 (“General Assembly would not have been founded if the FCC’s proposed rules were in effect [when we launched].”).

<sup>47</sup> See generally *How To: Invest in Startups*, SEEDINVEST, available at <https://www.seedinvest.com/academy/how-to-invest-in-startups> (last visited Aug. 9, 2017).

<sup>48</sup> See Comments of Engine, WC Docket No. 17-108, at 9 (citing research that found “three out of five [users] say that poor performance will make them less likely to return’ and two of five said ‘they’d likely visit a competitor’s site next.”); Comments of reddit, Inc., GN Docket No. 14-28 (filed July 15, 2014), at 5 (“Even if the slow lane is, absolutely speaking, pretty fast, so long as it is slower than the fast lane, people will be deterred from using reddit. It’s well-documented that seemingly inconsequential differences in loading times deter users; users visit a website less often if it loads 250 milliseconds slower than a competitor’s.”).

Commission will seriously consider how entrepreneurship would be adversely affected if the Commission can no longer prevent BIAPs from distorting competition due to their incentives as gatekeepers.

### **III. Allegations Regarding Investment Declines are Premature, Unfounded, and Conflict with BIAPs' Assertions to Their Investors.**

Supporters of the *NPRM*, while relying primarily on researchers frequently aligned with BIAPs, forecast a turbulent future for broadband investment.<sup>49</sup> AT&T claims that a growing body of empirical research (which AT&T has funded) confirms that “overregulation” has depressed broadband investment in recent years.<sup>50</sup> However, this research only shows mere correlation, and as AT&T concedes, “correlation does not equal causation.”<sup>51</sup> Further, Comcast claims the decline in the pace of broadband investment already negatively impacted broadband networks across the country.<sup>52</sup> Yet, NCTA’s advocacy in this proceeding contradicts this assertion. Despite frequent rhetoric from AT&T, Comcast, and others that the *OIO* is the direct cause of declining BIAP investment, in an appendix to NCTA’s comments, Prof. Bruce Owen, former chief economist at the White House Office of Telecommunications Policy and former chief economist of the U.S. Department of Justice’s Antitrust Division, admits that “quantifying the impact of the Title II order (sic) at this early date is challenging.”<sup>53</sup>

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<sup>49</sup> See Comments of AT&T, WC Docket No. 17-108, at Econ. Decl. at 53-56, ¶¶104-109 (“As discussed below, available empirical evidence generally supports the predictions of economic theory that Title II regulation will depress investment. We reach this conclusion despite the Title II Order’s claim that investment did not decline after the Commission’s earlier attempt to regulate the Internet in the 2010 Order.”).

<sup>50</sup> See Comments of AT&T, WC Docket No. 17-108, at 54 (“As explained in the Economists’ Declaration (¶¶104-09), a proper analysis of the available evidence shows a reduction in relevant capital spending during the period immediately following adoption of the *Title II Order*.”).

<sup>51</sup> *Id.*

<sup>52</sup> Comments of Comcast Corp., WC Docket No. 17-108, at 33.

<sup>53</sup> See Comments of NCTA, WC Docket No. 17-108, “Internet Service Providers as Common Carriers: Economic Policy Issues” by Bruce M. Owen, at 9 (“One difficulty is specifying the ‘counterfactual’—that is, the world as it would have been but for the imposition of Title II status.”).

**A. The Record Contains Numerous Examples of BIAPs Asserting Conflicting Claims Before the Commission and Their Investors.**

While Comcast's Comments claim Title II had a negative impact on investment in broadband networks,<sup>54</sup> neither Title II nor the *OIO* were cited as significant factors in its capital expenditure decisions in its 2016 Annual Report.<sup>55</sup> Evidence gathered from BIAP filings to the SEC, however, contradicts claims of declining BIAP investment.<sup>56</sup> In filings from 2013 to 2016, BIAPs reported, under oath, that investment increased by 5.3 percent, or \$7.3 billion.<sup>57</sup> Similarly, in the two years since the *OIO* was passed, capital investments by publicly traded ISPs actually increased five percent compared to the two years before the *OIO*.<sup>58</sup>

Some of the loudest *NPRM* proponents are some of the nation's largest BIAPs, whose executives frequently tell their investors a very different story regarding Title II compared to what they tell the Commission. The numbers they report to the SEC and their investors tell the real story. In December 2016, Charter's CEO told investors plainly, "Title II, it didn't really hurt us; it hasn't hurt us."<sup>59</sup> Comcast noted in its 2017 Form 10-K Annual Report, where it is also required by law to make truthful disclosures,<sup>60</sup> that the company's capital expenditures in its

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<sup>54</sup> Comments of Comcast Corp., WC Docket No. 17-108, at 33.

<sup>55</sup> Comcast Corp., Annual Report (Form 10-K) (Feb. 3, 2017), available at <http://www.cmcsa.com/secfiling.cfm?filingID=1193125-17-30512> 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.").

<sup>56</sup> Comments of CCIA, WC Docket No. 17-108, at 19-20.

<sup>57</sup> 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/>.

<sup>58</sup> S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era*, FREE PRESS (May 2017) at 4, <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

<sup>59</sup> John Brodtkin, *Title II hasn't hurt network investment, according to the ISPs themselves* ISPs continue to invest and tell investors that net neutrality hasn't hurt them, ARS TECHNICA (May 16, 2017), <https://arstechnica.com/information-technology/2017/05/title-ii-hasnt-hurt-network-investment-according-to-the-isps-themselves/>.

<sup>60</sup> 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

cable communications segment increased from \$6.16 billion in 2014, to \$7.04 billion in 2015, to \$7.6 billion in 2016 – a 7.9 percent increase from 2015 to 2016.<sup>61</sup> Indeed, Comcast plans to invest more in 2017, focusing “on continued investment in scalable infrastructure to increase network capacity; increased investment in line extensions primarily for the expansion of business services; and the continued deployment of wireless gateways, our X1 platform, and cloud DVR technology.”<sup>62</sup> 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%.”<sup>63</sup> 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%.”<sup>64</sup>

Similarly, despite AT&T’s rhetoric, it reported in its Form 10-K for 2016 that its capex increased about twelve percent from \$20 billion in 2015 to \$22.4 billion in 2016.<sup>65</sup> Regarding Title II, CenturyLink told the SEC and its investors in its Form 10-K: “At this time, we cannot

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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 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); *See, e.g.*, Comcast, Annual Report (Form 10-K) (Feb. 3, 2017), *available at* <http://www.cmcsa.com/secfiling.cfm?filingID=1193125-17-30512> at Exhibit 31.1 (providing the certification of Brian L. Roberts, Comcast Chief Executive Officer); *id.* at Exhibit 31.2 (providing the certification of Michael J. Cavanagh, Comcast Chief Financial Officer).

<sup>61</sup> Comcast 2017 Annual Report Form 10-K, *supra* note 55, at 64.

<sup>62</sup> *Id.*

<sup>63</sup> *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](http://files.shareholder.com/downloads/CMCSA/4688695966x0x939776/9E61E036-413A-4E2C-BF76-ACCE38F457FA/Comcast_1Q17_Earnings_Call_Transcript.pdf).

<sup>64</sup> *Id.*

<sup>65</sup> AT&T Inc., Annual Report (Form 10-K) (Feb. 17, 2017) At 1, *available at* <https://otp.tools.investis.com/clients/us/atnt/SEC/sec-show.aspx?Type=html&FilingId=11869124&CIK=0000732717&Index=10000>.

estimate the impact this may have on our business.”<sup>66</sup> However, CenturyLink explained that they will have to continue making “significant capital expenditures” to meet growing demand.<sup>67</sup> Indeed, CenturyLink announced last year that it would purchase a major competitor, Level 3 Communications, for \$34 billion.<sup>68</sup>

Even NCTA’s own website proclaims that “since 1996, Cable has invested over \$250 billion in capital infrastructure” alongside a graphic showing investment increase from 2014 to 2016.<sup>69</sup> Yet, in this proceeding, NCTA alleges that “the chilling effects of Title II already have begun to be felt in the form of decelerating broadband network investment”<sup>70</sup> while also asserting that “quantifying the impact of the Title II order at this early date is challenging.”<sup>71</sup> The sheer number of competing and conflicting claims made by *NPRM* supporters warrants extreme skepticism by the Commission.

**B. Allegations that Title II Depressed Capital Expenditures Do Not Comport with the Realities of How Businesses Make Capex Decisions.**

While BIAPs, just like businesses in any other industry, take into account the regulatory environment when making investment decisions, it is unreasonable to claim Title II alone depressed capital expenditures in 2016.<sup>72</sup> The D.C. Circuit in *USTelecom* affirms this point, highlighting 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

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<sup>66</sup> CenturyLink, Inc., Annual Report (Form 10-K) (Feb. 22, 2017) at 12, *available at* <https://www.sn1.com/Cache/c38194555.html#sA9FB0003C95D5159BF6D413BB5B7C9C9>.

<sup>67</sup> *Id.* at 9 (“[W]e anticipate that continued increases in broadband usage by our customers will require us to make significant capital expenditures to increase network capacity or to implement network management practices to alleviate network capacity shortages.”).

<sup>68</sup> Press Release, CenturyLink, CENTURYLINK TO ACQUIRE LEVEL 3 COMMUNICATIONS (Oct. 31, 2016), <http://ir.centurylink.com/file/Index?KeyFile=36467109>.

<sup>69</sup> *Industry Data*, NCTA – THE INTERNET & TELEVISION ASSOCIATION, <https://www.ncta.com/industry-data> (last visited Jul. 17, 2017).

<sup>70</sup> Comments of NCTA, WC Docket No. 17-108, at 2.

<sup>71</sup> *See supra* note 53.

<sup>72</sup> Comcast, Annual Report (Form 10-K), *supra* note 55 at 42; *see* Comments of AT&T, WC Docket No. 17-108, at 53 (“These concerns [regarding capex decisions] are heightened by the prospect of ‘regulatory creep.’”).



form of regulation.”<sup>73</sup> AT&T claims that any rational BIAP will “think twice before investing in innovative business plans.”<sup>74</sup> In reality, companies use many methods of capex decisionmaking.<sup>75</sup> A popular method is the net present value (NPV) approach, which subtracts the cost of the investment from the investment’s future net cash flow for each period of an investment.<sup>76</sup>

#### **IV. The NPRM Would Leave Nothing but Uncertainty in its Wake.**

If the *NPRM* were passed, the nondiscrimination rules from the *OIO* would no longer exist, and the Commission would have abdicated its authority under Title II to promulgate rules against blocking, throttling, and discrimination – authority that was upheld just one year ago by the D.C. Circuit. The *NPRM* has sought comment on what would be left.<sup>77</sup> According to the D.C. Circuit in *Comcast, Verizon, and USTelecom*, not much.

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<sup>73</sup> *USTelecom*, 825 F.3d at 48 (quoting *OIO* at ¶ 412).

<sup>74</sup> Comments of AT&T, WC Docket No. 17-108, at 53.

<sup>75</sup> 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), 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.”).

<sup>76</sup> 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: the company may hold significant debt that it feels it should address instead of long-term capital projects; it may allocate more money to dividends for shareholders, especially if the shareholders demand more immediate benefits for their investments; it may decide that the project is just too expensive; or, 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. See Comments of CCIA, WC Docket No. 17-108, at 22 (citing 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](https://www.unc.edu/~salemi/Econ006/Irving_Fisher_Chaper_1.pdf).

<sup>77</sup> *NPRM* at ¶ 50, Sec. IV.

**A. The Federal Trade Commission Cannot Effectively Enforce BIAS Nondiscrimination Rules.**

Some commenters have suggested that the Federal Trade Commission could fill the void.<sup>78</sup> The staff of the FTC argues that if the *NPRM* passed, it “would also restore the FTC’s ability to protect broadband consumers under its general consumer protection and competition authority.”<sup>79</sup> Unfortunately, the FTC does not provide much clarity as to how that might happen if the *NPRM* were to pass.

Presently, the question of the FTC’s jurisdiction over BIAPs is fraught. The Federal Trade Commission Act exempts common carriers from FTC jurisdiction,<sup>80</sup> and the 9th Circuit’s current ruling in *FTC v. AT&T Mobility* holds that this exemption to FTC enforcement is status-based, rather than activities-based.<sup>81</sup> Most major BIAPs provide common carrier telephony services in addition to Internet access, and will thus remain outside of FTC jurisdiction. Therefore, even if the FCC successfully re-reclassifies BIAPs through this proceeding, absent new case law or Congressional action, the FTC’s enforcement capabilities against BIAPs will remain in serious doubt and subject to future challenges.

Even setting aside the question of jurisdiction, much of the FTC staff’s comment focuses on its ability to address data security and privacy issues raised by the practices of BIAS provider following adoption of the *NPRM*:

[A] BIAS provider that makes commitments—either expressly or implicitly—regarding its privacy or data security practices, and fails to live up to such commitments, would risk violating the FTC Act. Moreover, even absent such statements, a BIAS provider that fails to take reasonable precautions to protect the

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<sup>78</sup> See, e.g., Comments of NCTA, WC Docket No. 17-108, at Sec. II.A.; Comments of U.S. Chamber of Commerce, WC Docket 17-108 (July 17, 2017), at 8.

<sup>79</sup> Comments of Thomas B. Pah, Fed. Trade Comm’n Bureau of Consumer Protection, Acting Director, et al., WC Docket No. 17-108 (July 17, 2017), at 2 [hereinafter Comments of FTC Staff].

<sup>80</sup> Fed. Trade Comm’n Act, 15 U.S.C. § 45(a)(2) (2012).

<sup>81</sup> See *Fed. Trade Comm’n v. AT&T Mobility, L.L.C.*, 835 F.3d 993, 2016 U.S. App. LEXIS 15913 (9th Cir. 2016), *rehearing en banc granted*, 2017 U.S. App. LEXIS 8236 (9th Cir. 2017).

privacy or security of consumer data may violate the unfairness prohibition of the FTC Act.<sup>82</sup>

True, the FTC has a long history of using Section 5 of the FTC Act to protect consumers from unfair or deceptive acts and practices in data security and privacy.<sup>83</sup> However, that is only a sliver of the much larger debate surrounding the protection of consumers and innovators on an open Internet. The FTC staff fail to adequately address its abilities to use its Section 5 authority and its authority over unfair methods of competition via the Sherman Act to enforce rules that ban the practices of blocking, throttling, and discrimination, which are at the core of this long-running debate.<sup>84</sup> Furthermore, the FTC assumes that BIAPs would make express or implicit commitments regarding privacy or data security. If the *NPRM* passed, there would be nothing requiring that a BIAP make such commitments.

With respect to its Section 5 powers, the FTC's ability to police deception on the part of BIAPs relies on commitments made by BIAPs to consumers in their terms of service. Of course, with clear and sufficient notice, the BIAPs can change these terms unilaterally without running afoul of the FTC Act's ban on deception.<sup>85</sup> In a few cursory paragraphs, the FTC staff contend that the agency's antitrust authorities under Sections 1 and 2 of the Sherman Act are sufficient to address exclusionary or discriminatory behavior on the Internet.<sup>86</sup> However, the FTC staff provide few pre-2015 examples of any pro-competitive enforcement action in the Internet and telecommunications space outside of merger reviews,<sup>87</sup> even though the *OIO*'s record is replete with evidence of BIAPs' economic incentives to engage in anticompetitive practices with respect

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<sup>82</sup> Comments of FTC Staff, WC Docket No. 17-108, at 13.

<sup>83</sup> *See id.*; *see generally* Privacy and Security, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/privacy-and-security>.

<sup>84</sup> *See* Comments of FTC Staff, WC Docket No. 17-108, at 13 ("Moreover, even absent such statements, a BIAS provider that fails to take reasonable precautions to protect the privacy or security of consumer data may violate the unfairness prohibition of the FTC Act.").

<sup>85</sup> *See* Comments of Terrell McSweeney, Commissioner, Fed. Trade Comm'n., WC Docket No. 17-108 (July 17, 2017), at 4 [hereinafter "Comments of FTC Commissioner McSweeney"].

<sup>86</sup> Comments of FTC Staff, WC Docket No. 17-108, at 26.

<sup>87</sup> *Id.* at 27.

to other providers, the edge, and end users.<sup>88</sup> This may be because, as highlighted by FTC Commissioner McSweeney in her own comments in this proceeding, the FTC’s antitrust enforcement authorities may not be capable of appropriately accounting for the non-economic reasons for open Internet policies, and *ex post* enforcement cannot adequately detect and prevent instances of anticompetitive harm in networks.<sup>89</sup>

As FTC staff note, the goal of antitrust laws is to “foster a state of affairs in which output is maximized, price is minimized, and consumers are entitled to make their own choices.”<sup>90</sup> With respect to open Internet policies, economic outcomes are not the only significant regulatory consideration. The Internet is an unparalleled platform for communication, which is defined by users’ ability to access the content of their choosing and express themselves via their preferred services. *Ex post* enforcement by an agency focused on the economic harms of anticompetitive behavior would likely fail to account for other considerations that facilitate consumers’ choice in how they express themselves or access expressive content. Just as important, identifying instances of BIAPs blocking or interfering with users’ expression after it occurs does not change the fact that the users have been harmed. There is no easy remedy after the fact—speech that has been chilled cannot be microwaved.

Similar problems arise when examining the FTC’s ability to address the harms suffered by innovators whose services have been blocked, throttled, or discriminated against, if they are detected at all. While *ex ante* open Internet rules provide notice of acceptable conduct in advance and allow the small, innovative enterprises that take advantage of Internet access to be confident that their services will reach a wide, diverse audience of users, the same cannot be said for a world of *ex post* enforcement.

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<sup>88</sup> *OIO* at ¶ 78.

<sup>89</sup> Comments of FTC Commissioner McSweeney, WC Docket No. 17-108, at 6.

<sup>90</sup> See Comments of FTC Staff, WC Docket No. 17-108, at 24 (citing HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 339 (5th ed. 2015)) (internal quotations omitted).

The FTC must demonstrate that it is able to readily detect anticompetitive behaviors in the marketplace for digital services in the first place. In fact, the FTC has recently argued that it can be “costly, difficult, and time consuming to detect and document” anticompetitive discrimination on networks.<sup>91</sup> Discriminatory conduct is difficult to discern when a range of factors can affect users’ ability to experience content or access services. Even if the FTC detects and puts an end to a BIAPs hypothetical practice to favor its own subsidiary’s offering over that of an upstart entrant to a service market, the missed opportunities suffered by the startup before detection could irreparably damage its ability to successfully compete with the BIAP’s offering or engage enough users to reach long-term viability.

**B. After the *NPRM*, the Commission’s Options Would Be Limited as the D.C. Circuit Explained in *Comcast*, *Verizon*, and *USTelecom*.**

If the *NPRM* passed, the Commission would no longer have strong authority to write and enforce nondiscrimination rules. Chairman Pai has said that he would like to have nondiscrimination rules, but the *NPRM* questions whether they are even necessary.<sup>92</sup> Assuming *arguendo* that after the *NPRM*, the Commission still wants to impose nondiscrimination rules, its options would be very limited.

Perhaps the Commission could make a policy statement outlining rules that BIAPs should follow in transporting traffic across their networks. These would be rules of the road or best practices for BIAPs, and consumers would be aware that these are the guidelines for how BIAPs will treat their traffic. But, when consumers found that a BIAP was arbitrarily blocking their ability to reach certain sites, the Commission tried to enforce such a policy and failed.<sup>93</sup>

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<sup>91</sup> See, e.g., *Comment of the Staff of the Federal Trade Commission*, FERC Docket No. RM17-8-000, at 3-4 (Apr. 10, 2017), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-staff-federal-trade-commission-federal-energy-regulatory-commission-concerning-reform/v170004\\_ferc\\_interconnection\\_ftc\\_staff\\_comment.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-federal-trade-commission-federal-energy-regulatory-commission-concerning-reform/v170004_ferc_interconnection_ftc_staff_comment.pdf).

<sup>92</sup> *NPRM* at ¶ 70.

<sup>93</sup> *Comcast*, 600 F.3d at 644 (“The Commission may exercise this ‘ancillary’ authority only if it demonstrates that its action — here barring Comcast from interfering with its customers’ use of peer-to-peer networking

Perhaps the Commission could find other sources of authority in the Communications Act in sections avoiding Title II. The *NPRM* goes to great lengths relying on two studies to claim that its *OIO* “has put at risk online investment and innovation, threatening the very open Internet it purported to preserve.”<sup>94</sup> Presumably after this *NPRM*, the Commission could act on the issue nondiscrimination of network traffic to promote the goal of promoting investment in broadband infrastructure. But, when the Commission tried to argue that its nondiscrimination rules were justified by its goals of promoting broadband network infrastructure, which increases capacity to meet consumer demand, which is growing because consumers are spending more and more time online, which is motivated by the innovation of edge providers and their ability to reach consumers, the Commission failed.<sup>95</sup>

## **V. The *NPRM* Elides the Commission’s History and Misinterprets its Authority.**

### **A. Internet Use and Economic Activity Exploded in the Late ‘90s When the *Advanced Services Order* Was in Effect.**

As described in CCIA’s initial comments, the *NPRM* represents a careful misreading of Commission precedent. Despite recounting most of the important decisions in the Commission’s history with the Internet, the *NPRM* makes no mention of the 1998 *Advanced Services Order*.<sup>96</sup> This is important, because in that decision, just two years after the 1996 Act, the Commission classified Internet access service over technologies like DSL under Title II: “We conclude that advanced services are telecommunications services.”<sup>97</sup> Proponents of the *NPRM* tend to espouse

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applications — is ‘reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.’ The Commission has failed to make that showing.”) (citation omitted).

<sup>94</sup> *NPRM* at ¶ 4.

<sup>95</sup> See *Verizon*, 740 F.3d at 628 (“[E]ven though the Commission has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the *Open Internet Order*.”).

<sup>96</sup> See Comments of CCIA, WC Docket No. 17-108, at 6-7.

<sup>97</sup> *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability (*Advanced Services Order*), 13 FCC Rcd. 24,012, at ¶ 35 (1998).

the view that the *OIO* was unique as if Title II had never been applied to Internet access service. The D.C. Circuit explained in *Verizon* that given the fact that the Commission had a “long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet [, . . .] one might have thought, as the Commission originally concluded . . . (in the *Advanced Services Order*), that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously.”<sup>98</sup> The *Advanced Services Order* is an important part of the Commission’s history because during the late 90s and early 2000s when it was in effect, the Internet was a catalyst for tremendous economic growth, entrepreneurship, and investment in network infrastructure. A key reason for this growth was the fact that ISPs were not allowed to arbitrarily prevent users from access the lawful content they desired.

**B. The *NPRM* Misreads the Commission’s Authority.**

In its initial comments, CCIA detailed how the Commission has misread the *OIO*; in particular, the *NPRM* claims a mandate to re-reclassify BIAS because two dubious studies have concluded that Title II or the specter thereof were the direct cause of declines in BIAP capex. The Commission understanding and rationale are simply wrong.

*1. CCIA and Others Have Shown that the Singer and Ford Studies are Disputable.*

Hal Singer’s claims in this proceeding are even more dubious because just few months after the *OIO*, he made similar claims; however, Free Press’ analysis from September 2015 shows that Singer’s premature assessments then are just as wrong as they are now.<sup>99</sup> Indeed,

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<sup>98</sup> *Verizon*, 740 F.3d at 638-39 (citation omitted).

<sup>99</sup> 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).”).

other recent studies, using filings to the SEC from 2013-14 to 2015-16, have shown that ISP investment increased 5.3 percent or \$7.3 billion during that time.<sup>100</sup> One need not look any further than NCTA’s website, which proclaims 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.<sup>101</sup> The Commission should also take into account comments from forty smaller ISPs that noted net neutrality rules have actually helped investment.<sup>102</sup>

2. *The NPRM Overlooks and Misrepresents the Commission’s Predictions in the OIO.*

The *NPRM* claims that the Commission must re-reclassify BIAS under Title I because the *OIO*’s classification of BIAS under Title II caused a decline in BIAP investment. However, CCIA reiterates that the Commission’s predictions in the *OIO* have not proven erroneous.<sup>103</sup> The *NPRM* claims that the Commission’s “predictions” made two years ago in the *OIO* were “mistaken and have not been borne out by subsequent events”<sup>104</sup> because the Singer and Ford studies claim that ISP capex has decreased 5.6 percent and that the “threat of reclassification” to Title II decreased investment in the range of 20-30 percent or \$30-40 billion per year. As argued in CCIA’s initial comments, the Commission is wrong in its memory and telling of what the previous Commission predicted in the *OIO*.<sup>105</sup> CCIA raises this point again because it is truly troubling that the Commission would base a major regulatory action on such an incomplete

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<sup>100</sup> 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/>.

<sup>101</sup> *Industry Data*, NCTA – THE INTERNET & TELEVISION ASSOCIATION, <https://www.ncta.com/industry-data> (last visited Jul. 17, 2017).

<sup>102</sup> 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>; *see also* 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> (reporting that 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.”)

<sup>103</sup> Comments of CCIA, WC Docket No. 17-108, at Sec. III.A.

<sup>104</sup> *NPRM* at ¶ 53.

<sup>105</sup> Comments of CCIA, WC Docket No. 17-108, at Sec.IV.



retelling of its previous action on the same issue. The Commission in this proceeding must take note that in the *OIO* it acknowledged opposing views on the potential effect of the *OIO* on investment:

*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.*<sup>106</sup>

Indeed, the *NPRM* quotes *USTelecom* gives it “highly deferential standard” to the agency’s predictive judgments regarding the investment effects of reclassification, yet immediately after that sentence in *USTelecom*, 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”.<sup>107</sup> This is important because it is counter to what the *NPRM* now claims.

The Commission cannot now claim that its predictions in the *OIO* “were mistaken and have not been borne out by subsequent events,”<sup>108</sup> for the Commission actually envisaged that broadband capex “could create investment-chilling regulatory burdens and uncertainty” but that “any effects are likely to be short term”.<sup>109</sup> 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”.<sup>110</sup> Indeed, the Commission must to provide “a

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<sup>106</sup> *OIO* at ¶ 410 (emphasis added) (“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.”); see also *USTelecom*, 825 F.3d at 707.

<sup>107</sup> *NPRM* at ¶ 53 n. 128 (citing *Fox Television* and *Mary V. Harris Found. v. Fed. Comm’n’s Comm’n*, 776 F.3d 21, 24-25 (D.C. Cir. 2015); *Id.* at ¶ 53 n. 129 (quoting *USTelecom*, 825 F.3d at 707 quoting *OIO* at ¶ 410).

<sup>108</sup> *Id.*

<sup>109</sup> *USTelecom*, 825 F.3d at 707 (quoting *OIO* at ¶ 410).

<sup>110</sup> *Fox Television*, 556 U.S. at 515.

reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>111</sup> By pursuing the course proscribed in the *NPRM*, the Commission is disregarding factual findings and predictive judgments it made in the *OIO*, which it now seeks to overturn.

3. *The NPRM Misconstrues the Commission’s Authority to Re-reclassify BIAS.*

The Commission does not have “more than ample latitude to revisit [its] approach” from the *OIO*.<sup>112</sup> CCIA reiterates that the Commission was not wrong in its predictive judgment of broadband investment, so the Commission does not “need to reconsider”<sup>113</sup> the *OIO*. The *NPRM* cites *Aeronautical Radio*, yet in that case, the D.C. Circuit noted that its “decision . . . [was] controlled by the limited standard of review applicable to the question at hand” – arbitrary and capricious review,<sup>114</sup> and it concerned a new spectrum allocation and coordination system that was “still at the pre-operational stage”.<sup>115</sup>

Indeed, the Commission also proffers *American Family Ass’n*<sup>116</sup> quoting *Bechtel II*,<sup>117</sup> to bolster its argument that the *NPRM* is necessary because the Commission has “a correlative duty to evaluate its policies over time to ascertain whether they work”.<sup>118</sup> CCIA reiterates that “over time” does not give the Commission “more than ample latitude” and a “need to reconsider” the *OIO* merely two years after it went into effect.<sup>119</sup> *American Family Ass’n* involved Commission

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<sup>111</sup> *Id.*; see also *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (U.S. 2016) (providing further analysis of *Fox Television*).

<sup>112</sup> *NPRM* at ¶ 53.

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> *Aeronautical Radio*, 928 F.2d at 444-45 (quoting 5 U.S.C. § 706(2)(A)).

<sup>115</sup> *Id.* at 444.

<sup>116</sup> *American Family Ass’n*, 365 F.3d at 1166.

<sup>117</sup> *Bechtel v. Fed. Comm’n Comm’n (Bechtel II)*, 10 F.3d 875, 880 (D.C. Cir. 1993).

<sup>118</sup> *NPRM* at ¶ 53 n. 134.

<sup>119</sup> Comments of CCIA, WC Docket No. 17-108, at Sec. III.C.ii.

actions that occurred over the course of five decades.<sup>120</sup> Neither *American Family Ass’n* nor *Bechtel II* give the commission such “ample latitude” because *Bechtel II* concerned a policy that traced its roots back to 1947,<sup>121</sup> and the *NPRM’s Bechtel II* quote refers to a policy statement – not a rulemaking. The Commission should be very aware of the distinction because the *Bechtel I* court (the predecessor of *Bechtel II*) quoted *Pacific Gas Elec. v. FPC*, in which the D.C. Circuit declared that a rulemaking has the force of law while a policy statement does not.<sup>122</sup>

## **VI. The Commission Must Take into Account the Full Range of Comments in this Proceeding.**

### **A. The Commission Must Consider the Broader Internet Ecosystem – Not Just One Metric from Two Studies.**

As CCIA discussed previously, the Commission rests its case for re-reclassification in the *NPRM* on two dubious studies. As explained in comments submitted by House Democrats on the Energy and Commerce Committee: “[Congress] did not intend the agency to cherry pick data points to support predetermined conclusions.”<sup>123</sup> The Commission seems focused on the short-term investment decision of the twelve largest BIAPs, yet it gives almost no consideration to consumers, businesses, and institutions that depend on Internet access – everyone else. A number of commenters from a wide range of industries have expressed support for the *OIO* rules. For example, MLB Advanced Media stated that “the Rules should be maintained” and that they

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<sup>120</sup> See *id.* (concerning rules from a 2001 *Rehearing* of an 2000 *Order*, based on an *FNPRM* from 1998, that was based on an *NPRM* from 1992 that sought comment on a system devised in 1965 to allocate noncommercial educational (NCE) broadcast licenses) (citations omitted).

<sup>121</sup> See *Bechtel II*, 10 F.3d at 877 (citing *Homer Rodeheaver*, 12 F.C.C. 301, 307 (1947)).

<sup>122</sup> *Pacific Gas Electric Co. v. Fed. Power Comm’n*, 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.”)

<sup>123</sup> Comments of Congressional Democrats, WC Docket No. 17-108, at 2.

“are consistent with the Commission’s goals of minimizing regulatory burdens and uncertainty.”<sup>124</sup>

The *NPRM* threatens future innovation, the next wave of technology, and it poses a serious risk to future investment in the Internet ecosystem overall. The Commission simply does not take into account the effects that the *NPRM* would have on the broader Internet ecosystem: “The proposal also disregards the impact the Commission could have on jobs. Small businesses create more than half of the jobs in the country. Moreover, in this time of technological transition, Americans are increasingly using the Internet to take classes, train for new opportunities, and apply for jobs. Without net neutrality, many of the resources people use today could slow down or even stop.”<sup>125</sup>

If the *NPRM* passes, there will be no rules preventing BIAPs from arbitrarily blocking, throttling, discriminating or charging fees for fast lanes. This will severely threaten the permissionless innovation that has been a hallmark of the Internet, upending the status quo and stifling the ability of innovators and startups to compete because they may not have sufficient resources to pay a BIAP or the BIAP could arbitrarily decide it wants to cut off a potential competitor.

**B. CCIA Hopes the Commission has Not Prejudged the Facts and Will Honor the Necessity of a Fair and Open Rulemaking Process.**

Chairman Pai testified before Congress that instead of re-reclassifying by issuing a declaratory ruling that the *OIO* rules would be “null and void”, “we wanted to have a full and fair notice and comment process to ensure that we heard those voices,” meaning voices that could be opposed to declaring the *OIO* rules “null and void”.<sup>126</sup> CCIA takes the Chairman at his

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<sup>124</sup> Comments of MLB Advanced Media, WC Docket No. 17-108, at 2-3.

<sup>125</sup> Comments of Congressional Democrats, WC Docket No. 17-108, at ii.

<sup>126</sup> House Committee on Energy and Commerce, Testimony of FCC Chairman Ajit Pai, Hearing on Oversight and Reauthorization of the Federal Communications Commission, 115th Cong. (Jul. 25, 2017),

word and hopes he will. Chairman Pai also testified that he could be swayed by “economic analysis that shows credibly that infrastructure investment has increased dramatically” and that he would “take seriously” “credible evidence” from parts of the Internet ecosystem and consumer that without open Internet rules “there’s no way that they would be able to thrive -- that America’s overall internet economy would suffer”.<sup>127</sup> Similarly, Commissioner O’Rielly testified at the same hearing that “substantive comments” with “economic analysis” and “real evidence of harm” to consumers could influence him, yet he said many comments so far “were empty and devoid of any value in [his] opinion.”<sup>128</sup> However, statements made by Chairman Pai and Commissioner O’Rielly at the public unveiling of the *NPRM* cast doubt on whether this can truly be an open, fact-gathering proceeding. Chairman Pai at that event explained how when he dissented against the *OIO*, he “voiced [his] confidence that the Title II Order’s days were already numbered.”<sup>129</sup> He closed his speech saying, “Make no mistake about it: this is a fight that we intend to wage and it is a fight that we are going to win.”<sup>130</sup>

While it is important that the Commission and its Commissioners engage the public in debate about policy issues, CCIA hopes that in this proceeding, given the long-running history of this issue, the Commission will not have prejudged the facts before coming to its ultimate decision. The efficacy of the notice and comment process depends on the confidence that the public can be heard by rulemakers and that those rulemakers will practice neutral decisionmaking informed by all sides.<sup>131</sup>

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<https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-and-reauthorization-federal-communications-commission>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Ajit Pai, Chairman, Fed. Commc’ns Comm’n, Remarks at the Newseum “The Future of Internet Freedom” (Apr. 26, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0427/DOC-344590A1.pdf?utm\\_campaign=Newsletters&utm\\_source=sendgrid&utm\\_medium=email](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0427/DOC-344590A1.pdf?utm_campaign=Newsletters&utm_source=sendgrid&utm_medium=email).

<sup>130</sup> *Id.*

<sup>131</sup> See *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) (“A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues.”); *United States v. Chem. Found., Inc.*, 272

## **VII. Conclusion.**

The Internet has been an unparalleled engine of incredible economic growth, facilitating innovation and free speech. By overturning rules that were upheld by the D.C. Circuit just last year,<sup>132</sup> the Commission's proposed action in the *NPRM* would put that in serious danger. CCIA maintains its long-held belief that there should be clear, meaningful, and enforceable rules to prevent BIAPs from unfairly discriminating against Internet traffic and preventing end users from accessing the lawful content and services of their choosing. 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 Commission should not base its decision on preconceived ideas backed up by two limited and dubious studies. CCIA urges the Commission to not continue down this path.

August 28, 2017

Respectfully submitted,

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U.S. 1, 14-15, (1926); Nat'l Nutritional Foods Ass'n v. Food and Drug Admin., 491 F.2d 1141, 1145-46 (2d Cir.), cert. denied, 419 U.S. 874, 95 S.Ct. 135 (1974).

<sup>132</sup> *USTelecom*, 825 F.3d at 698.