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Richard A. Starr*

Net Neutrality: On Mobile Broadband Carriers and the Open Internet, the Commercially Reasonable Network Management Standard, and the Need for Greater Protection of the Open Internet

PART I: INTRODUCTION

Net neutrality is the idea that the internet should be open and free.[1] Supporters of net neutrality agree that entrepreneurs should have "the same chance to succeed as established corporations," and that the government should not allow Internet Service Providers ("ISPs") to restrict access to any website in order to make room for more advertisements.[2] However, one of the main problems historically faced by the Federal Communications Commission ("FCC") in deciding how to protect the open internet has been whether mobile broadband providers should be subject to the same regulations as traditional fixed broadband providers.[3] The FCC's 2010 *Open Internet Order* ("2010 Order") regulated how ISPs could manage data,[4] and ordered that mobile broadband service providers[5] could not block lawful internet

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1. *Net Neutrality: President Obama's Plan for a Free and Open Internet*, The White House (Nov. 10, 2014), http://www.whitehouse.gov/net-neutrality.

2. *Id.* ISPs are the entities that provide residential and commercial customers with the ability to connect through the internet via traditional telephone lines (dial-up), cable and DSL (broadband), or mobile broadband services. *What are Internet Service Providers?*, Comcast http://www.xfinity.com/resources/internet-service-providers.html (last visited Nov. 13, 2015).

3. *See infra* Part II.

4. Preserving the Open Internet, 76 Fed. Reg. 59,192 (Sept. 23, 2011) (to be codified at 47 C.F.R. pts 0 and 8). The order covered both "mobile" and "wireline" providers, which offer internet services to cellular and residential consumers, respectively.

5. *What are Internet Service Providers?*, *supra* note 3 (commenting that wireline broadband involves providing internet service via wired cable or DSL connections to a home or business customer).

content, must disclose the methods of network management and the commercial terms of service, and must manage broadband traffic without imposing unreasonable discrimination.[6] However, the 2010 Order did not apply the no unreasonable discrimination rule to mobile broadband networks because the mobile broadband market was more competitive and more rapidly evolving than the established wireline broadband networks.[7]

In 2014, the United States Court of Appeals for the District of Columbia ("DC Circuit") partially struck down the FCC's authority to promulgate the 2010 Order because some sections of the 2010 Order contravened express statutory mandates.[8] In response, FCC Chairman Tom Wheeler sought to revamp the Commission's stance on net neutrality.[9] The FCC subsequently released a Notice of Proposed Rulemaking ("NPRM"),[10] proposing to re-establish the anti-blocking provisions of the 2010 Order and implementing a "commercially reasonable" standard applicable to wireline broadband services. The NPRM sought comment on whether to regulate mobile broadband equally.[11] After receiving public comment, Chairman Wheeler announced in early February 2015 that the commission would vote on whether to reclassify all broadband services– both wired and mobile–under Title II of the Communications Act of 1934, or regulate the services upon an alternate legal foundation.[12] The Commission voted, and in April of 2015, the FCC promulgated its final rule ("2015 Final Order"), which classifies wired and mobile broadband services under Title II, but does not require compliance with all of the "utility-style" provisions.[13] Further, the 2015 Final Order maintains a "reasonable network management" standard for evaluating compliance with the new, stricter rules on a case-by-case basis.[14]

This comment defends the Commission's decision to regulate wired and mobile broadband services equally, a position that will only grow stronger as the world

6. Preserving the Open Internet, 76 Fed. Reg. at 59,192–93.

7. *Id.* at 59,192.

8. Verizon v. FCC, 740 F.3d 623, 659 (2014). Specifically, the *Verizon* court upheld the Commission's Transparency rule, but struck down the no unreasonable discrimination rule and anti-blocking provisions. *Id.*

9. Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules, FCC.GOV (Feb 19, 2014), http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules.

10. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,464 (proposed July 1, 2014) (to be codified as 47 C.F.R. pt. 8).

11. *Id.* at 37,448-49.

12. Tom Wheeler, *FCC Chairman Tom Wheeler: This is How we will Preserve Net Neutrality*, WIRED (Feb. 4, 2015), http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/.

13. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,742 (Apr. 13, 2015) (to be codified as 47 C.F.R. pts. 1, 8, and 20).

14. *Id.* at 19,752. The Commission also specifically points out that broadband services may be subject to enforcement of sections 201 and 202 of the Telecommunications Act on a case-by-case basis because they are now classified under Title II generally, but that these adjudications are not to be applied in a way that allows the Commission to adopt *ex ante* rate regulations. *Id.* at 19,810.

becomes more interconnected.[15] Additionally, this comment expands upon and defends the Commission's reasoning behind its rejection of the 2014 NPRM's commercially reasonable standard as a means of regulating network management practices.[16]

PART II: BACKGROUND ON NET NEUTRALITY

Though a new concept to many Americans,[17] net neutrality has become a critical rights issue as the debate over net neutrality places internet freedom at the forefront of our politics.[18] After the Court of Appeals for the DC Circuit struck down the major provisions of the FCC's 2010 Order,[19] the FCC proposed a new set of regulations as part of its 2014 NPRM.[20] After the 2014 NPRM, Americans were exposed to a great deal of information about net neutrality and what it means for consumers, as late night talk shows and blogs throughout the media provided widespread coverage of the issue.[21] As a result of this incredible attention, between May and September of 2014, the FCC received over 3.7 million comments on the NPRM.[22] The commentary in response to the FCC's 2014 NPRM also nearly unanimously supported a federal policy that adheres to basic net neutrality principles.[23] Indeed, President Barack Obama weighed in, explaining that the open internet "is essential to the American economy and increasingly to our very way of life."[24] Americans are deeply invested in the internet experience,[25] and know that without the protections of net neutrality, internet users could be forced to pay more for slower service.

A. The 2014 NPRM and 2015 Final Order

15. *See infra* Part IV.B.

16. *See infra* Part IV.C.

17. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141 (2003). Professor Wu coined the term "net neutrality" with this article.

18. *What is Net Neutrality?*, American Civil Liberties Union, https://www.aclu.org/feature/what-net-neutrality (last visited Dec. 13, 2015).

19. Verizon v. FCC, 740 F.3d 623, 659 (D.C. Cir. 2014).

20. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,448 (proposed July 1, 2014) (to be codified as 47 C.F.R. pt. 8).

21. Ben Brody, *How John Oliver Transformed the Net Neutrality Debate Once and for All*, Bloomberg (Feb. 26, 2015), http://www.bloomberg.com/politics/articles/2015-02-26/how-john-oliver-transformed-the-net-neutrality-debate-once-and-for-all.

22. Edward Wyatt, *Net Neutrality Comments to FCC Overwhelmingly One-Sided*, N.Y. Times (Sept. 18, 2014), http://bits.blogs.nytimes.com/2014/09/18/net-neutrality-comments-to-f-c-c-overwhelmingly-one-sided-study-says/. The 3.7 million comments received more than doubled the prior record of 1.4 million complaints the FCC received after Janet Jackson's "wardrobe malfunction" in the Super Bowl halftime show in 2004. *Id.*

23. *Id.*

24. *Net Neutrality: President Obama's Plan for a Free and Open Internet*, *supra* note 1.

25. *See infra* Part.IV.A.

In the 2014 NPRM, the FCC proposed that fixed broadband providers be allowed to charge content creators for access to faster internet lanes, but with three key provision comprising a "reasonable network management" standard.[26] First, the NRPM implemented a transparency rule requiring that ISPs share performance reports detailing internet speed and congestion and instances of blocking content.[27] Second, a no-blocking rule prohibited ISPs from outright blocking legal content for any reason.[28] Finally, the Commission's proposal banned "commercially unreasonable practices" that, considering a totality of the circumstances, "threaten to harm internet openness and all that it protects."[29] According to the Commission, these three rules were meant to establish "reasonable network management" standards to promote internet openness.[30] However, the commission exempted mobile broadband providers from the commercially unreasonable practices standard, consistent with its policy in the 2010 Open Internet Order.[31] The FCC based its reasoning for the decision on "the rapidly evolving nature of mobile technologies, the increased amount of consumer choice, and operational constraints" of mobile networks.[32] As the Commission has since reasoned, though, mobile and wired broadband should be on equal footing.

In its Final Order in April of 2015, the Commission overhauled its point of view, and decided to regulate wired and mobile broadband providers using the same legal standards.[33] Importantly, the FCC rejected the use of the commercially reasonable standard, but otherwise retained and even strengthened its stance on what constitutes reasonable network management practices.[34] In rejecting the commercially reasonable standard, the FCC focused on protecting the internet experience of consumers or edge providers rather than on evaluating the agreements between Internet Service Providers.[35] In lieu of the NRPM's "commercially reasonable practices" standard, the 2015 Order implemented a more

26. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,456, 37,462 (proposed July 1, 2014) (to be codified as 47 C.F.R. pt. 8). In the 2014 NPRM, the Commission recognized that the 2010 transparency rule, no blocking rule, and unreasonable discrimination rule would contribute to the development of the scope of reasonable network management. *Id.*

27. *Id.* at 37,456.

28. *Id.* at 37,448.

29. *Id.* at 37,464. This standard is also referred to as the commercially reasonable standard throughout this comment.

30. *Id.* at 37,456.

31. *Id.* at 37,466.

32. *Id.* at 37,460.

33. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (April 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20). The FCC discusses the fact that the significant increase in widespread use of mobile broadband networks requires equal application of the rules.

34. *Id.* at 19,758.

35. Indeed, the 2015 Order adopted an overall governing standard that "makes clear that the standard is not limited to whether a practice is agreeable to commercial parties." *Id.*

stringent standard of network management that prevents unreasonable interference or disadvantage that harms consumers and edge providers.[36]

The following synopsis of the net neutrality debate gives context to the reasoning behind the FCC's regulatory policies, why it supports regulating mobile and wireline broadband under the same framework, along with the stronger network management standard implemented in the Final Order.

B. The Basics of the Net Neutrality Debate

There are four major actors involved in the Net Neutrality debate: (1) backbone networks; (2) end users; (3) broadband providers; and (4) edge providers.[37] Backbone networks are comprised of multiple facilities across the country that transmit data over long distances through interconnected via fiber optic links and industrial–speed routers.[38] End users, such as residential consumers, get access to these networks through local access broadband providers like Verizon that operate the last mile of data transmission.[39] Finally, edge providers create or offer content or services on the internet/web.[40] Therefore, end users looking to view content on the web seek out edge providers that then break down that content into packets of information.[41] Those packets are then carried by the edge provider's local access broadband provider to the backbone network, where they are carried to the end user's local access broadband provider, whom then transmits the packets of information to the end user.[42] Those concerned about the FCC's commercially reasonable standard are worried about the relationship between broadband and edge providers, and argue that under the new standard, broadband providers could block end user access to edge providers, or slow down an end user's access to various content.[43]

C. Opposing Sides

Two popular opinions frame the net neutrality debate with regard to the standard for assessing a broadband network's compliance with open internet principles. Until the Final Order was issued in April of 2015, net neutrality advocates maintained that the commercially reasonable practices standard utilized in the 2014 NPRM was too loose a standard, and would give too much lee-way to mobile ISPs

36. *Id.* at 19,740.
37. Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).
38. Margaret Rouse, *Backbone Definition*, TechTarget, http://searchtelecom.techtarget.com/definition/backbone (last visited Dec. 13, 2015).
39. *Verizon*, 740 F.3d at 628–29.
40. *Id.* at 629.
41. *Id.*
42. *Id.*
43. *Id.*

to implement practices that could exclude content providers and restrict end user access to the open internet.[44] On the other hand, industry lawyers and other anti–neutrality advocates argue that network management rules are often inappropriate for the technological challenges commonplace in the mobile broadband industry.[45] As part of the FCC's efforts to balance these concerns, the 2015 Final Order rejects the commercially reasonable standard and instead requires "no unreasonable interference or unreasonable disadvantage to consumers or edge providers."[46] Part IV.A of this comment argues that the Commission properly decided to regulate mobile and fixed broadband providers in a manner that seeks to provide end users with substantially the same internet experience by creating a generalized network management standard that applies to both forms of internet service.[47] Part IV.B argues that the Commission properly rejected the commercially reasonable standard.[48] Part VI.C maintains that the Commission properly assessed the comments made pursuant to the 2014 NPRM in developing the no unreasonable interference/disadvantage standard announced in the 2015 Final Order, which provides a clear, enforceable directive to mobile broadband providers that focuses on the consumer's internet experience.[49]

PART III: LEGAL HISTORY

A. The Origin of Title II and Common Carrier Status

In 1892, the Supreme Court in *Interstate Commerce Commission v. Baltimore & Ohio Railroad Co.*[50] established the core directive that:

> *[T]he principles of the common law applicable to common carriers. . .demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the*

44. *Id. See also* Adam Bender, '*Open Access' Definitions Differ Among Carriers, Lobby Groups*, Comm. Daily, 2008 WLNR 421482 (Westlaw) (explaining that "open platform" is defined by the FCC as one that gives consumers the right to use any equipment, content, application, or service without discrimination by the carrier).

45. *See* Fran Berkman, *Title II is the Key to Net Neutrality–So What is it?*, DAILYDOT (May 20, 2014), http://www.dailydot.com/politics/what-is-title-ii-net-neutrality-fcc/.

46. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,740 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20). The new rule also includes guiding factors for applying the rule in the future on a case-by-case basis, to be discussed in more detail below.

47. *See infra* Part IV.A.

48. *See infra* Part IV.B.

49. *See infra* Part IV.C.

50. 145 U.S. 263 (1892).

> *particular station, and that their charges for transportation should be reasonable.*[51]

In response, Congress passed the Communications Act of 1934 ("1934 Act"),[52] which codified those common law principles.[53]

The 1934 Act has been at the epicenter of the net neutrality debate because it established both the FCC and modern common carrier principles.[54] In Title I of the 1934 Act, Congress set out the general provisions, and provided the FCC with regulatory power over all forms of electronic communication "so as to make available . . . to all people of the United States . . . a rapid, efficient . . . radio communications service with adequate facilities at reasonable charges False"[55] Mobile broadband services generally fell under Title I's Section 152(a) jurisdictional authority over "all interstate and foreign communications by wire or radio."[56]

In Title II of the 1934 Act, Congress codified common carrier law, and furnished the FCC with the authority to prevent common carriers from giving "undue or unreasonable preference of advantage to any person or class of persons."[57] For mobile broadband services, this meant that Title II afforded far greater and more explicit authority to the FCC to develop regulations that strictly prevent ISPs from charging edge providers for access to faster lanes of internet traffic. However, the FCC did not explicitly classify either mobile or wireline broadband internet services under Title II until the 2015 Final Order.[58]

By the mid-20th Century, court decisions and FCC proceedings narrowed the definition of the common carrier. First, in *National Association of Regulatory Utility Commissioners v. FCC*,[59] the Court of Appeals for the DC Circuit found "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently."[60] As communications technologies became more advanced, the FCC had to examine the differences between private and common carriers, and decide which common

51. *Id.* at 275.

52. 47 U.S.C. § 151 (1996). Importantly, the Communications Act of 1934 also replaced the Federal Radio Commission with the Federal Communications Commission.

53. Verizon v. FCC, 740 F.3d 623, 651 (D.C. Cir. 2014). The *Verizon* court explained that the duties of those who served the public were codified first in the 1887 Interstate Commerce Act, then the Manns-Elkins Act of 1910, and then in the Communications Act of 1934. *Id.*

54. *See* 47 U.S.C. §151 (1996).

55. *Id.*

56. 47 U.S.C. § 152(a) (1996).

57. 47 U.S.C § 202. (1996).

58. *See infra* Part II.B. This comment is meant to supplement discussions comparing the previous commercially reasonable standard to the newly announced Title II classification and unreasonable interference standard, and to strengthen the position of the Commission as it faces challenges to its most recent 2015 Final Order.

59. 533 F.2d 601 (D.C. Cir. 1976).

60. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (1976).

carriers would be subject to regulation. In doing so, the FCC, in the *Computer II* regime,[61] determined that "basic" services would be subject to Title II regulation as common carriers, while "enhanced" services would not.[62] "Basic" services were subject to common carrier regulation under Title II because they involve a "pure" transmission of information, and therefore could not engage in unjust or unreasonable discrimination in charges.[63] However, "enhanced" services required "computer processing applications" in order to encode and control subscriber information services.[64] Under the *Computer II* regime, mobile broadband services were viewed as enhanced information services exempt from Title II classification.[65] However, the 2015 Final Order defines mobile broadband as a commercial mobile service, allowing the Commission to regulate mobile broadband services under Title II broadband classification, and thereby sidestepping the *Computer II* regime's distinction between basic and enhanced services.[66]

However, the Telecommunications Act of 1996 ("1996 Act") and subsequent FCC rulings were a key turning point for the modern internet. In *Brand X*,[67] the Supreme Court upheld the FCC's designation of broadband services as information service providers, thereby excluding such providers from Title II regulation.[68] The first time the FCC explicitly endorsed regulating the various broadband providers under Title II was in February of 2015 with its NPRM, an endorsement codified in the 2015 Final Order.[69]

B. The 2014 NPRM Commercially Reasonable Standard vs. The 2015 Final Order Unreasonable Interference or Disadvantage Standard

The commercially reasonable standard from the 2014 NPRM was a tentative step toward the no unreasonable interference/disadvantage standard in the 2015 Final Order. The 2014 NPRM, prohibits broadband provider practices as commercially

61. Carolyn Malanga, *California v. Federal Communications Commission: Continuing the Struggle Between Section 151 and 152 of the Communications Act*, 40 CATH. U. L. REV. 893, 895, n.11 (1991). *Computer II* is the name given to the second inquiry taken by the FCC to determine the "nature and extent of the regulatory jurisdiction to be applied to data processing services; and whether, under what circumstances, and subject to what conditions or safeguards, common carriers should be permitted to engage in data processing." *Id*.

62. Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014).

63. *Id*. at 630.

64. *Id*.

65. Malanga, Carolyn, *California v. Federal Communications Commission: Continuing the Struggle Between Section 151 and 152 of the Communications Act*, 40 CATH. U. L. REV. 893, 898 (1991).

66. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,800 (proposed May 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, and 20). Commercial mobile services are entities recognized as common carriers under Title II, and are separate from private mobile services, which are not given such recognition. *Id*.

67. Nat'l Cable & Television Ass'n v. Brand X, 125 S. Ct. 2688 (2005).

68. *Id.* at 2691. The court noted that even though this designation seemed contrary to prior FCC policy, it was nonetheless a reasonable interpretation of the 1996 Act. *Id*.

69. *FCC Plans Strong Hand to Regulate Internet*, N.Y. TIMES (Feb. 4, 2015), http://www.nytimes.com/2015/02/05/technology/fcc-wheeler-net-neutrality.html.

unreasonable when, based on the totality of circumstances, allowing those practices would "threaten to harm internet openness and all that it protects."[70] The *Cellco Partnership v. FCC* court upheld the commercially reasonable standard as a valid exercise of the FCC's authority because it did not impose common carriage regulation upon the broadband carriers which, at the time, were not classified as common carriers.[71] There, the court first found that mobile data providers are not to be treated as common carriers under Title II.[72] *Cellco* also found that imposing a "commercially reasonable practices" standard was not beyond the FCC's regulatory authority because it was merely "consistent" with common carrier status, and did not "necessarily confer" that status upon mobile telephone companies.[73] Earlier in the decade, the same court had held in *Comcast Corp.* that the FCC could not point to any statutory authority for requiring that broadband providers adhere to open network management practices.[74] Therefore, by January of 2014 when the DC Circuit decided *Verizon v. FCC*,[75] the court had already come down against regulating broadband providers as common carriers. The *Verizon* court found that because FCC had exempted broadband providers from treatment as common carriers by classifying mobile broadband service as a private mobile service, the 1934 act expressly prohibited the Commission from nonetheless regulating them as such.[76] Because the court viewed the anti- blocking and anti- discrimination rules of the 2010 *Open Internet Order* as imposing per se common carrier obligations, the court vacated those requirements.[77]

Under the 2015 Final Order, however, the Commission rejected the commercially reasonable standard, and displaced the reasoning of the above decisions by designating mobile broadband providers not as a private mobile service, but instead as a commercial mobile service.[78] This allows the FCC to place both mobile and fixed broadband services under a no unreasonable interference/disadvantage standard through Title II, thereby replacing the

70. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,464, (proposed May 15, 2014) (to be codified as 47 C.F.R. pt. 8). As a result, this standard focuses on the practices of the broadband providers with an eye toward generally protecting internet openness. *Id.*

71. 700 F.3d 534, 545, 548–49 (2012). The court found *inter alia* that the commercially reasonable standard "ensures providers more freedom from agency intervention than the 'just and reasonable' standard applicable to common carriers." *Id.* at 548.

72. *Id.* at 538.

73. *Id.* at 547. *See also* FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (finding that, where Congress has expressly prohibited common carrier classification, FCC may not necessarily confer common-carrier obligations).

74. Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010).

75. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

76. *Id.* at 650. The court added that Section 706 of the Telecommunications Act does not offer sufficient statutory authority to classify broadband providers as common carriers. *Id.*

77. *Id.* at 659.

78. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,743 (Apr. 13, 2015) (to be codified in 47 C.F.R. pts 1, 8, and 20).

commercially reasonable standard proposed in the 2014 NPRM.[79] In full, the rule states that no broadband service provider shall

> *unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.*[80]

The Commission clarified this rule by also providing a set of factors to consider when adjudicating case-by-case claims of unreasonableness in order to "carefully balance the benefits of innovation against harm to end users and edge providers."[81] This new standard places the agency's focus more readily on the internet user's and edge provider's experience rather than on the adequacy of broadband provider practices regarding internet openness generally,[82] a key difference from the commercially reasonable standard.[83]

PART IV: ANALYSIS

Today, our world of mobile data is changing drastically. Even before the 2015 Final Order, FCC Chairman Tom Wheeler had publicly stated that new internet regulations will no longer give special treatment to mobile broadband providers and thereby infringe upon net neutrality principles.[84] Three observations support the chairman's statement and FCC's ultimate decision to remove the mobile exemptions. First, the mobile broadband industry's reasons for special treatment are no longer applicable in today's world of mobile data usage.[85] Second, the commercially reasonable standard offers no network management guidance to mobile broadband providers[86] Finally, through the comment process following the

79. *Id.* This standard, as mentioned, was adequate for entities designated private mobile carriers, but Commission implicitly recognized that in order to heighten the standard above commercially reasonable, mobile broadband networks should be designated as commercial mobile services, or as the functional equivalent of such. *Id.*

80. *Id.*

81. *Id.* at 19,756.

82. *See supra* note 70 and accompanying text.

83. *See supra* Part III.B.

84. Brian Fung, *Your Mobile Data Could be Soon Covered by Net Neutrality*, Wash. Post (Sept. 10, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/10/your-mobile-data-could-be-soon-covered-by-net-neutrality/. Chairman Wheeler also mentioned that the Commission might reclassify broadband carriers under Title II. *See* Brooks Boliek, Alex Byers & Bill Duryea, *The FCC Chair's Internet Pivot*, Politico (Feb. 2, 2015), http://www.politico.com/story/2015/02/tom-wheeler-net-neutrality-114785.html?hp=b1_c2.

85. *See supra* Part IV.A.

86. *See supra* Part IV.B; *see also* Boliek, Byers & Duryea, *supra* note 84.

2014 NPRM, the FCC was able to reach a far more promising regulatory approach to protecting the open internet. [87]

A. The FCC Correctly Chose to Place Mobile And Wired Broadband Services Under the Same Regulatory Framework Because Mobile Network Growth is Changing How We Regulate Network Access

Mobile networks across the United States have grown drastically. During the 2010 debate over net neutrality, less than 30 percent of Americans had a smartphone, and they were using them very differently than they are using them now.[88] In 2010, people in the U.S consumed an average of 350 megabytes of data per month compared to 1.2 gigabytes per month in 2013 (more than a 300% increase), when shared data plans emerged and more mobile devices came online.[89] Additionally, the FCC recognizes that today about 55 percent of internet traffic is "carried over mobile networks,"[90] and another source has noted that as early as 2013, 73.4% of mobile phone users accessed the internet through their devices.[91] The FCC agrees that the commercially reasonable standard and prior lack of regulatory oversight was designed to allow for the "flexibility" required by such a complex system of connections.[92] However, this complex system of mobile broadband networks demands the implementation of rules preservative of net neutrality precisely because of the potential for abuse inherent in system flexibility.[93] Given the prevalence of mobile internet access and the technical difficulties of managing a mobile network, there is little reason to believe that any network management rules should ignore net neutrality principles as applied to mobile industry practices. While the 2014 NPRM addressed some of the changes in the mobile data world, the 2015 Final Order finally recognizes that these network enhancements require mobile broadband regulations consistent with those applied to fixed networks.[94]

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87. *See supra* Part IV.C.

88. Stacey Higginbotham, *Why Google and the FCC are Bringing Mobile Back into the Net Neutrality Fight*, GIGAOM (Sept. 13, 2014), https://gigaom.com/2014/09/13/why-google-and-the-fcc-are-bringing-mobile-back-into-the-net-neutrality-fight/.

89. *Id.*

90. *Fact Sheet: Chairman Wheeler Proposes New Rules*, FCC (Feb. 4, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-331869A1.pdf.

91. *Statistics and Facts on Mobile Internet Usage*, STATISTA http://www.statista.com/topics/779/mobile-internet/ (last visited Dec. 13, 2015).

92. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,753 (April 13, 2015) (to be codified in 47 C.F.R. pts 1, 8, and 20).

93. Steve Lohr, *The Push for Net Neutrality Arose From Lack of Choice*, N.Y. TIMES, (Feb. 25, 2015), http://www.nytimes.com/2015/02/26/technology/limited-high-speed-internet-choices-underlie-net-neutrality-rules.html. Kevin Werbach of the University of Pennsylvania Wharton School of Business points out that because the technology used in mobile networks can change quickly, and so it is impossible to predict what the "competitive landscape might look like in several years." *Id.*

94. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,758 (Apr. 13, 2015) (to be codified in 47 C.F.R. pts 1, 8, and 20).

While the 2014 NPRM and past regulatory actions have given special treatment and exemptions to mobile broadband providers, the Commission made the proper choice in regulating mobile and fixed broadband services equally.[95] As the mobile internet has evolved to account for an ever greater percentage of our overall internet experience, the reasons for granting mobile broadband providers wider authority to escape strict regulations have dissipated. Even on a single smartphone, consumers simply switching between Wi-Fi and cellular data could be switching between networks subject to different network management standards.[96] Therefore, the FCC properly decided that mobile services should be regulated by the same net neutrality standards as fixed broadband services because the exponential growth of mobile data and bandwidth availability today leave no discernible experiential consumer differences between mobile and wireline broadband services.

B. The Commission Properly Rejected The 2014 NPRM's Commercially Reasonable Standard Because it Offers No Network Management Guidance To Mobile Carriers As to How to Protect the Open Internet.

The 2015 Final Order rejected the commercially reasonable standard espoused in the 2014 NPRM.[97] This section anticipates challenges to that decision and thereby expands the Commission's reasoning for doing so in three ways. First, the commercially reasonable standard is not an appropriate regulatory standard for internet regulation in general.[98] Second, the commercially reasonable standard does not provide sufficient guidance for traditional mobile industry practices.[99] Third, the commercially reasonable standard is inconsistent with net neutrality principles, and therefore negatively impacts competition and the end user experience.[100]

1. The commercially reasonable standard is not an appropriate regulatory standard for internet regulation in general

The commercially reasonable standard is, in fact, not a standard at all, but an open door for mobile broadband providers to restrict consumer access to the open internet. This is partly because the commercially reasonable standard is too broad,

95. *See id.*

96. Jeff Baumgartner, *WiFi Offload on the Rise: Study*, Multichannel News (Feb. 5, 2014), http://www.multichannel.com/news/distribution/wi-fi-offload-rise-study/260674 (pointing out that WiFi networks rely on wireline broadband connections).

97. Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,758.

98. *See infra* Part IV.B.1.

99. *See infra* Part IV.B.2.

100. *See infra* Part IV.B.3.

and not suitable for use in internet regulation.[101] Indeed, even applied to mobile carriers, the standard has received a good deal of push back.[102] When first applied in the data roaming context, wherein mobile carriers charge one another for using another company's network access towers, the commercial reasonable standard was not helpful.[103] There, T–Mobile suggested that the FCC issue a new standard for data roaming that judged commercial reasonableness in part by assessing whether the roaming charges were reasonable as compared to industry custom.[104] A standard meant to assess the "reasonableness" of direct contractual agreements is not an appropriate measure to determine the manner in which the broadband providers implementing those agreements will "affect internet openness" from the consumer's perspective.[105] While consumers should get what they pay for, none should have to pay for services that nonetheless fail to provide that user with access to the open internet.

2. The commercially reasonable standard does not provide sufficient guidance for traditional mobile industry practices.

The commercially reasonable standard would not provide sufficient network management guidance for either of two common mobile industry practices, while the no unreasonable interference standard would offer far more clarity. First, mobile broadband providers engage in a practice known as zero-rating, which negates, or zeroes-out data usage for consumers that utilize certain applications created by edge providers that engaged in individualized bargaining with the broadband provider.[106] Second, mobile broadband providers also engage in data throttling practices whereby broadband providers will reduce mobile network access to any users that, by some measure, use too much data in order to avoid

101. *See* Christopher Yoo, *Wickard for the Internet? Network Neutrality After Verizon v. FCC*, 66 Fed. Comm. L.J. 415, 437 (2014) (adding that the commercially reasonable standard has been applied to contractual unconscionability claims and has been used to assess health care contracts as well).

102. *See* Patrick Campbell, *T-Mobile petition seeks FCC guidance on data roaming*, Lexology (May 30, 2014), http://www.lexology.com/library/detail.aspx?g=db7cfc32-8ff3-41fd-9eb5-ff2ab58b878f.

103. *Id.*

104. *Id.* Specifically, T–Mobile asked that the FCC benchmark commercial reasonableness by determining: (1) whether wholesale roaming rates offered to retail competitors exceed relevant retail rates; (2) whether a wholesale roaming rate offered to a competitor "substantially exceeds the roaming rates charged to foreign carriers" whose customers roam in the U.S.; (3) whether a wholesale roaming rate exceeds the wholesale rate charged to mobile virtual network operators; and (4) how the proposed wholesale roaming rate compares to other competitively negotiated wholesale rates. *Id.* FCC did not accept this new definition, however. *Id.*

105. Am. Library Ass'n, *Reply Comments to the Notice of Proposed Rulemaking in the Matter of Protecting and Promoting the Open Internet* (Sept. 15, 2014), http://www.ala.org/offices/sites/ala.org.offices/files/content/Library-HigherEd%20NN%20Reply%20comments%20Final%20Sept%2015%202014.pdf.

106. Jeffrey Eisenach, NERA Econ. Consulting, The Economics of Zero Rating (2015), http://www.nera.com/content/dam/nera/publications/2015/EconomicsofZeroRating.pdf. As a result, consumers do not have to pay for the data used in accessing that content because the content provider has already paid the broadband provider for that access. *Id.*

higher transmission costs and slower network speeds across the board.[107] This analysis specifically addresses the FCC's proper decision to reject the less protective commercially reasonable standard in favor of the no unreasonable interference/disadvantage standard.[108]

In response to worldwide growth in mobile data networks, Facebook and Google have begun "zero-rating" programs, which eliminate a consumer's cost of using data to access a particular content provider, in emerging markets where access to the internet is achieved almost exclusively through mobile devices.[109] However, these practices would not be effectively regulated by a commercially reasonable standard. Because internet access can be limited in these parts of the world, these zero–rating programs often come along with consolidated use packages, which give consumers access to web sites like Facebook or Google to perform a wide variety of specific tasks such as search for jobs or conduct small business activities.[110] These consolidated use packages actually resemble earlier efforts in American network management practices to corner internet use to one brand of service, such as with CompuServe and America Online.[111] Notably, these experiments in "walled-in" broadband management eventually failed, in large part because the open internet won out by keeping low barriers to entry for incoming startups such as Google.[112]

In the U.S., zero-rating involves mobile broadband networks[113] allowing application content providers to offer services to end users without those users incurring data charges, effectively zeroing out that users' data usage.[114] Zero-rating is the mobile broadband industry's equivalent to paid prioritization in wired networks, where content providers like Netflix pay broadband networks for better

107. Mark Sullivan, *What Happens When You Get 'Throttled'*, PCWORLD, http://www.pcworld.com/article/251008/what_happens_when_you_get_throttled_.html (last visited Dec. 13, 2015).

108. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,758 (Apr. 13, 2015) (to be codified in 47 C.F.R. pts 1, 8, and 20).

109. Alicia Levine, *Facebook and Google's Race to Zero*, MEDIUM (Mar. 22, 2014), https://medium.com/@alicialev/facebook-and-googles-race-to-zero-7136fc3e5925.

110. *Id.*

111. Mathew Ingram, *Open vs. Closed: What Kind of Internet Do We Want?*, GIGAOM (Mar. 23, 2012), https://gigaom.com/2012/03/23/open-vs-closed-what-kind-of-internet-do-we-want/.

112. *Id. See also* Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,848 (Apr. 13, 2015) (to be codified in 47 C.F.R. pts 1, 8, and 20). While it is unclear whether the commercially reasonable standard under the 2014 NPRM would have provided sufficient protection against consolidated use packaging, the 2015 Final Order could place an effective ban on those practices as the Commission may likely view forcing consumers to access the internet through one content provider as "unreasonably interfer[ing]" with the end user's ability to "select. . . the lawful internet content of their choice." *Id.*

113. *See AT&T Sponsored Data*, http://www.att.com/att/sponsoreddata/en/index.html#fbid=HwHkXCEPyp_ (last visited Feb. 2, 2015).

114. Matthew Shears, *Net Neutrality, Zero- Rating & Development: What's the Data?*, CTR. FOR DEMOCRACY AND TECH., https://www.intgovforum.org/cms/wks2014/index.php/proposal/view_public/208 (last visited Dec. 13, 2015).

or faster access to customers.[115] Also known as sponsored data plans, zero rating hurts consumers because it allows providers to create artificial scarcity of choice and "corrupt the growth of online services."[116] While some observers have argued that certain mobile network blocking programs do not infringe upon net neutrality principles for mobile internet,[117] those arguments ignore the FCC's recent shift toward offering equal regulatory treatment for mobile wired and mobile broadband services.[118] Americans deserve a clearer, more stringent standard that does not wait until millions of consumers lose access to the open internet before doing anything to curb those practices.

As millions of mobile customers have discovered in recent years, some mobile broadband providers throttle or reduce end user access to mobile networks if a user exceeds a certain level of data usage.[119] In fact, Verizon began throttling those customers with unlimited data plans,[120] sparking concern among industry groups and the FCC.[121] Problematically for some broadband providers, the internet is experiencing a great deal of growth, and content providers like Netflix are hogging the bandwidth available to end users.[122] To ease that burden in the past, zero-rating and data throttling seemed to be good practices for mobile providers, and in some instances may have indeed preserved bandwidth for some mobile consumers.[123] However, the commercially reasonable standard focuses on evaluating whether a broadband provider's practices are commercially reasonable, and would not help evaluate the issue of why data throttling practices would be meaningful for consumer access, nor would it explain whether they comport with general neutrality principles of preserving the open internet.

115. Robert Bachle, *FCC Proposal Means Two Speeds for Ads Online Not Just Content*, ADAGE (Jan. 16, 2015), http://adage.com/article/digitalnext/paid-prioritization-threaten-net-neutrality/296623/.

116. Gautham Nagesh, *Mobile Networks Caught in the Open Internet Debate*, WALL ST. J. (Sept. 16, 2014), http://www.wsj.com/articles/net-neutrality-heats-up-again-over-mobile-data-1410905961.

117. David Kravets, *Holding FaceTime hostage is No Net Neutrality Breach*, WIRED (Oct. 22, 2012), http://www.wired.com/2012/08/facetime-net-neutrality-flap/.

118. Gautham Nagesh, *Mobile Networks Caught in the Open Internet Debate*, WALL ST. J. (Sept. 16, 2014), http://www.wsj.com/articles/net-neutrality-heats-up-again-over-mobile-data-1410905961 (discussing the FCC Chairman's recent proposal to subject mobile broadband to the proposed open internet rules).

119. Adriana Lee, *How All the Major US Carriers Throttle Your Mobile Data*, READWRITE (Aug. 5, 2014) http://readwrite.com/2014/08/05/verizon-unlimited-data-throttling-irks-fcc.

120. *Explanation of Video Optimization Deployment*, VERIZONMOBILE, http://www.verizonmobile.com/support/network-optimization/ (last visited Dec. 13, 2015).

121. Adriana Lee, *Thanks, Verizon! Now The FCC Is Asking All Carriers About Data Throttling*, READWRITE, (Aug. 8, 2014), http://readwrite.com/2014/08/08/fcc-verizon-data-throttling-att-sprint-tmobile.

122. Todd Spangler, *Netflix Bandwidth Usage Climbs to Nearly 37% of Internet Traffic at Peak Hours*, VARIETY (May 28, 2015), http://variety.com/2015/digital/news/netflix-bandwidth-usage-internet-traffic-1201507187/. For instance, Netflix actually accounts for nearly 37% of internet bandwidth usage during peak hours. *Id.*

123. *Explanation of Video Optimization Deployment*, VERIZONMOBILE, http://www.verizonmobile.com/support/network-optimization/ (last visited Dec. 13, 2015).

3. The commercially reasonable standard is inconsistent with net neutrality principles, and therefore negatively impacts competition and the end user experience

Some scholars predicted that the commercially reasonable standard would promote healthy competition among broadband companies by encouraging "strategic alliances" between content and broadband providers through individualized bargaining.[124] However, according to many of those scholars, strategic alliances involving zero-rating and geographic caching are only effective when practiced by firms with a small market share, and even that assumption rests on shaky reasoning.[125] Unfortunately the mobile broadband sector in the United States consists primarily of firms with a large market share.[126] The commercially reasonable standard fails to draw a line between what kinds of companies can engage in which commercial activities, and only asks courts on a case-by-case basis to determine, given the totality of the circumstances, whether an activity is "commercially reasonable."[127] Therefore, there is no way to ensure that only firms small enough to benefit market competition will engage in individualized bargaining to achieve strategic alliances with content providers.

Some scholars also believe that the commercially reasonable standard protects consumer interests because it recognizes cost sensitivities for end users, and that consumers are willing to give up flexibility for cost benefits.[128] However, this assumption relies on the idea that consumers are willing to be narrowed into choosing broadband or edge providers that have made specialized access dealings for that type of consumer.[129] Of course, this is not the recognized policy of the Executive branch or of the FCC.[130] Therefore, there is no reason to view the commercially reasonable standard as protective of consumer interests or innovations in broadband internet.

124. *See* Yoo, *supra* note 101 (arguing that when those managing technologies that can affect entire economies do not take full advantage of its market potential, "strategic alliances" such as those here are the best way to mitigate the resulting market failure).

125. Roslyn Layton, *Zero Rating: Who Bears the Cost of Bans?*, TECHPOLICYDAILY (Aug. 19, 2015), http://www.techpolicydaily.com/internet/zero-rating-cost-of-bans/.

126. Including Comcast, which comprises about one half of the mobile broadband market. *See* Jon Brodkin, *Comcast Now Has More Than Half of All US Broadband*, ARSTECHNICA (Jan. 30, 2015), http://arstechnica.com/business/2015/01/comcast-now-has-more-than-half-of-all-us-broadband-customers/.

127. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,470-471 (proposed July 1, 2014) (to be codified as 47 C.F.R. pt. 8).

128. *See* Yoo, *supra* note 101, at 449.

129. *Id.* at 440.

130. *See Net Neutrality: President Obama's Plan for a Free and Open Internet*, *supra* note 1; *see also Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules*, FCC.GOV (Feb. 19, 2014), http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules. Together, these policy statements recognize the consumer's right to choose between content providers through the open internet. *Id.*

C. Comments to the 2014 NPRM Properly Informed the Commission's Regulatory Approach in the 2015 Order

Even though the 2014 NPRM did not put forth regulatory standards sufficient to preserve net neutrality, the FCC had a great number of public comments to help determine what other regulatory options might better provide consumers with an open internet experience.[131] The "no unreasonable interference/disadvantage standard" is a result of the FCC's consideration of those comments, and properly addresses some of the problems with a commercially reasonable standard discussed above.[132]

One comment in particular, presented by the Center for Democracy and Technology ("CDT"),[133] proposed a standard for network management that optimizes the advantages of net neutrality principles and tempers power abuse among mobile broadband providers without stifling the kind of innovation and network efficiency that has brought the internet to where it is today.[134] The CDT maintains that a practice violates a standard "'consistent with internet openness' if substantial adoption of that practice would tend to undermine" internet subscriber access to lawful internet content, services and devices without interference, or developer access to content, devices, and internet uses without negotiate agreements.[135] The CDT's standard comports with and informs the 2015 Final Order because each are explicitly tailored to deal with problems arising in consumer and developer access to the open internet.[136] While the CDT's standard is useful in that it does not necessarily require Title II classification of broadband internet providers generally, the FCC's solution to use Title II strengthens its ability to enforce the higher standard.

More specifically, the CDT's standard falls in line with the *Verizon*, *Cellco*, and *Midwest Video* cases drawing a line in the sand between what constitutes common carrier regulatory practices and what does not.[137] Indeed, the court's decision in *Verizon* struck down the anti-discrimination rule, making room for implementation of the CDT standard, and still preserving net neutrality principles.[138] The *Verizon* and *Cellco* courts together establish that, absent common

131. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,756 (Apr. 13, 2015) (to be codified as 47 C.F.R. pts. 1, 8, and 20).

132. *Id.*

133. *See* Ctr. for Democracy and Tech., Comment Letter on Proposed Rule for Protecting and Promoting the Open Internet, (2014), https://d1ovv0c9tw0h0c.cloudfront.net/files/2014/09/FCC-Reply-Comments-Open-Internet.pdf.

134. *Id.* at 3.

135. *Id.*

136. *Id.* at 2–3.

137. *See supra* Part III.B.

138. *See supra* Part III.A.; *see also* Verizon v. FCC, 740 F.3d 623, 652, 659 (D.C. Cir. 2014); Cellco P'ship v. FCC, 700 F.3d 534, 545, 547 (D.C. Cir. 2012).

carrier classification under Title II, mobile broadband carriers must not be regulated in a manner that necessarily treats them as such, but may be regulated in a manner consistent with common carrier regulation.[139] The CDT's standard similarly does not rely on mobile broadband networks being designated a commercial mobile service under Title II's definition.

While the CDT standard offers a marked improvement over the commercially reasonable standard, the FCC's 2015 Final Order went further and classified broadband services generally under Title II.[140] This ruling allows the FCC to more vehemently deny broadband providers' efforts to discriminate against content providers that do not pay for greater access to end users on the network; exactly the kind of regulatory practice that was denied in *Verizon*.[141] Specifically, the 2015 Final Order implements a no blocking, no throttling, and no paid prioritization rules for both mobile and fixed broadband providers.[142] The 2015 Final Order addresses exactly what the commercially reasonable standard could not offer: "a known standard by which to determine whether new practices are appropriate or not."[143] Moreover, the FCC has implemented a new process by which it can field complaints from content providers and end users, giving quicker access to relief from anti-neutrality network management practices.[144] Finally, the FCC's 2015 Final Order leaves room for innovation and investment by allowing networks to continue setting rates for internet access,[145] perhaps contributing to the reason for the spike in stock values after the Chairman's announcement.[146]

PART V: CONCLUSION

The FCC properly rejected the commercially reasonable standard of the 2014 NPRM with regard to mobile broadband network management because it does not sufficiently balance net neutrality principles with the need for flexibility and marketplace innovation.[147] In fielding potential challenges to its 2015 Final Order, the Commission may consider the additional arguments presented here against reverting to a commercially reasonable

139. *See Verizon*, 740 F.3d at 659 (holding that the commission failed to establish that the anti-discrimination and anti- blocking rules do not impose per se common carrier obligations).

140. Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,738 (Apr. 13, 2015) (to be codified as 47 C.F.R. pts. 1, 8, and 20).

141. *Verizon*, 740 F.3d at 659; *see also* Boliek, Byers, & Duryea, *supra* note 84.

142. Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,740.

143. *Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet*, FCC.GOV (Feb. 4, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0204/DOC-331869A1.pdf.

144. *Id.*

145. *Id. See also* Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,738.

146. Joan McCarter, *Telecom Stocks Soar after Wheeler Announces Net Neutrality Proposal*, DAILY KOS (Feb. 5, 2015), http://www.dailykos.com/story/2015/02/05/1362569/-Telecom-stocks-soar-after-Wheeler-announces-net-neutrality-proposal.

147. *See supra* Part IV.

standard does not protect against the threat of common practices such as zero-rating and data throttling that shut out consumer access to the various networks.[148] Moreover, the standard does not foster the innovation and investment necessary to put the consumers' individual experience on equal footing across mobile and fixed platforms, as does the 2015 Final Order.[149] The FCC now faces challenges to its 2015 Final Order, however, and may defend its Order with the following.

First, mobile broadband providers should not be exempt from regulation that preserves net neutrality principles.[150] Every day, more and more Americans access the internet from a cellular device using mobile networks.[151] Second, even if the commercially reasonable standard originally offered by the FCC to cover fixed broadband providers were extended to mobile broadband providers, the regulatory program would not achieve the goal of regulating mobile broadband providers with concern for net neutrality principles.[152] Finally, the FCC has proposed a standard that achieves these goals without infringing upon innovative practices, or end user access to the open internet.[153] This standard is better because it specifically addresses the user's internet experience across the board, and is likely to result in more consistent policy in both fixed and mobile networks.[154]

Without appropriate regulatory policy that preserves end user access to the open internet, the internet as we know it would change forever. Concerned about this possibility, Americans have surely done their part to voice their opinions in dramatic fashion.[155] If the FCC is truly committed to protecting and preserving the open internet, they should defend the 2015 Final Order's decision to reject the commercially reasonable standard in favor of a more stringent no unreasonable interference/disadvantage standard.

148. *See supra* Part IV.B.
149. *See supra* Part IV.B.3.
150. *See supra* Part IV.A.
151. *See supra* Part IV.A.
152. *See supra* Part IV.B.
153. *See supra* Part IV.C.
154. *See supra* Part IV.C.
155. *See supra* Part II.