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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 8

WC Docket No. 14-28, FCC 14-61

Protecting and Promoting the Open Internet

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Communications Commission initiates a rulemaking seeking public comment on how best to protect and promote an open Internet following the D.C. Circuit Court of Appeals' remand of portions of the Commission's 2010 Open Internet Order, 76 FR 59192 (Sept. 23, 2011). In this document, among other things, we propose enhancements to the transparency rule, adopting the text of the no-blocking rule from the Open Internet Order with a revised rationale, and creating a separate screen that requires broadband providers to adhere to an enforceable legal standard of commercially reasonable practices. The proposed rules and the comment process that follows will help the Commission determine the right public policy to ensure that the Internet remains open.

DATES: Submit comments on or before July 15, 2014. Submit reply comments on or before September 10, 2014. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by WC Docket No. 14-28, by any of the following methods:

- Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

FOR FURTHER INFORMATION CONTACT: Kristine Fargotstein, Competition Policy Division, Wireline Competition Bureau, at (202) 418-2774 or by email at Kristine.Fargotstein@fcc.gov. To submit Paperwork Reduction Act (PRA) comments, send an email to PRA@fcc.gov. For further information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Les Smith at (202) 418-0217.

SUPPLEMENTARY INFORMATION:

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
    - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
    - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
    - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Synopsis

In this Notice of Proposed Rulemaking (NPRM), we address the D.C. Circuit Court of Appeals' remand of portions of the Commission's 2010 Open Internet Order and seek comment on the right public policy to ensure that the Internet remains open.

I. INTRODUCTION

1. The Internet is America's most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment. As a "general purpose technology," the Internet has been, and remains to date, the preeminent 21st century engine for innovation and the economic and social benefits that follow. These benefits flow, in large part, from the open, end-to-end architecture of the Internet, which is characterized by low barriers to entry for developers of new content, applications, services, and devices and a consumer-demand-driven marketplace for their products. As the Commission explained in its 2010 Open Internet Order, the Internet's open architecture allows innovators and consumers at the edges of the network "to create and determine the success or failure of content, applications, services and devices," without requiring permission from the broadband provider to reach end users. As an open platform, it fosters diversity and it enables people to build communities.

2. We start with a fundamental question: What is the right public policy to ensure that the Internet remains open? This Notice of Proposed Rulemaking (NPRM), and the comment process that follows, will turn on this fundamental question.

3. Today, there are no legally enforceable rules by which the Commission can stop broadband providers from limiting Internet openness. This NPRM begins the process of closing that gap, by proposing to reinstitute the no-blocking rule adopted in 2010 and creating a new rule that would bar

commercially unreasonable actions from threatening Internet openness (as well as enhancing the transparency rule that is currently in effect).

4. The goal of this proceeding is to find the best approach to protecting and promoting Internet openness. Per the blueprint offered by the D.C. Circuit in its decision in Verizon v. FCC, the Commission proposes to rely on Section 706 of the Telecommunications Act of 1996. At the same time, the Commission will seriously consider the use of Title II of the Communications Act as the basis for legal authority. This Notice seeks comment on the benefits of both Section 706 and Title II, including the benefits of one approach over the other. Under all available sources of legal authority (including also Title III for mobile services), the Commission seeks comment on the best ways to define, prevent and punish the practices that threaten an open Internet. We emphasize in this Notice that the Commission recognizes that both Section 706 and Title II are viable solutions and seek comment on their potential use.

5. It is important to always remember that the Internet is a collection of networks, not a single network. And that means that each broadband provider can either add to the benefits that the Internet delivers to Americans—by maintaining Internet openness and by extending the reach of broadband networks—or it can threaten those benefits—by restricting its customers from the Internet and preventing edge providers from reaching consumers over robust, fast and continuously improving networks. This is a real threat, not merely a hypothetical concern.

6. In its 2010 Order, the Commission found that providers of broadband Internet access service had three types of incentives to limit Internet openness. First, broadband providers may have economic incentives to block or disadvantage a particular edge provider or class of edge providers. Second, broadband providers may have incentives to increase revenues by charging edge providers for access or prioritized access to the broadband provider's end users. In particular, excessive fees could reduce edge provider entry, suppress innovation, and depress consumer demand. Third, if providers could profitably charge edge providers they would have an incentive "to degrade or decline to increase the quality of service they provide to non-prioritized traffic."

7. Those threats are even more important today because Americans and American businesses have become even more dependent on the Internet. For example, according to the Pew Research Internet Project, as of January 2014, 87 percent of Americans used the Internet, compared to 14 percent in 1995. And it is a critical route of commerce, supporting an e-commerce marketplace that now boasts U.S. revenues of $263.3 billion.

8. Of particular concern are threats to American innovation. In "the end-to-end architecture, different economic actors can independently choose their innovation projects." Innovation is the chief driver of American economic growth, which means that all Americans lose if the opportunity to innovate is curbed. For example, an economic study originally released in February 2012 and updated in July 2013 reported that the app economy is responsible for roughly 752,000 jobs in the United States, which is an increase from zero in 2007 when the iPhone was introduced. But equally important are the jobs that could be—but might not be—created if edge innovation and investment were to be chilled by doubt that the Internet will remain open or, even worse, if openness were defeated.

9. Although the Commission has emphasized for almost a decade the importance of legally enforceable standards, the United States Court of Appeals for the District of Columbia Circuit has twice invalidated the Commission's attempts, most recently in Verizon v. FCC, decided this January. It is in the absence of these protections for the open Internet that the Commission must act to ensure that new legally enforceable rules are put in place. That is a gap that must be closed as quickly as possible.

10. The remainder of the NPRM proceeds as follows. First, we generally propose to retain the definitions and scope of the 2010 rules. Second, we tentatively conclude that the Commission should enhance the transparency rule that was upheld by the D.C. Circuit so that the public and the Commission have the benefit of sunlight on broadband provider actions and to ensure that consumers and edge providers—indeed, the Internet community at large—have the information they need to understand the services they are receiving and to monitor practices that could undermine the open Internet. Third, we tentatively conclude that the Commission should adopt the text of the no-blocking rule from the Open Internet Order with a revised rationale, in order to ensure that all end users and edge providers can enjoy

the use of robust, fast and dynamic Internet access. Fourth, and where conduct would otherwise be permissible under the no-blocking rule, we propose to create a separate screen that requires broadband providers to adhere to an enforceable legal standard of commercially reasonable practices, asking how harm can best be identified and prohibited and whether certain practices, like paid prioritization, should be barred altogether. Fifth, we propose a multi-faceted dispute resolution process to provide effective access for end users, edge providers, and broadband network providers alike and the creation of an ombudsperson to act as a watchdog to represent the interests of consumers, start-ups, and small businesses. Sixth, and finally, we ask how either Section 706 or Title II (or other sources of legal authority such as Title III for mobile services) could be applied to ensure that the Internet remains open.

II. BACKGROUND

11. Today's NPRM rests upon over a decade of consistent action by the Commission to protect and promote the Internet as an open platform for innovation, competition, economic growth, and free expression. At the core of all of these Commission efforts has been a view endorsed by four Chairmen and a majority of the Commission's members in office during that time: That FCC oversight is essential to protect the openness that is critical to the Internet's success. In recognition of this, the Commission has demonstrated a steadfast commitment to safeguarding that openness.

12. In 2004, former Chairman Michael Powell first articulated basic guiding principles for preserving Internet freedom in an address at Silicon Flatirons. Chairman Powell recognized that "consumers' hunger for an ever-expanding array of high-value content, applications, and devices" fueled investment in broadband networks as the "impressive generators of economic growth, innovation, and empowerment." He explained that "ensuring that consumers can obtain and use the content, applications and devices they want . . . is critical to unlocking the vast potential of the broadband Internet."

13. A year later, reinforcing Chairman Powell's guidance, the Commission unanimously approved the Internet Policy Statement setting forth four general Internet policy principles intended "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet." Specifically, subject to "reasonable network management," the principles entitle consumers to

(1) "access the lawful Internet content of their choice;" (2) "run applications and use services of their choice, subject to the needs of law enforcement;" (3) "connect their choice of legal devices that do not harm the network;" and (4) enjoy "competition among network providers, application and service providers, and content providers."

14. The Commission incorporated these open Internet principles in a series of merger proceedings. In 2005, the Commission conditioned approval of the SBC/AT&T and Verizon/MCI mergers on the merged entities' compliance with the Internet Policy Statement. Although the Commission did not adopt any formal open Internet conditions on the Adelphia/Time Warner/Comcast transactions, the Commission made clear that its Internet Policy Statement "contains principles against which the conduct of Comcast [and] Time Warner . . . can be measured." So too, in 2006, the Commission accepted the AT&T and BellSouth commitment to "maintain a neutral network and neutral routing in [the merged entity's] wireline broadband Internet access service," as a formal condition of the merger. Likewise, in the 2011 Comcast-NBCU merger, the Commission adopted the commitments of the merged entity to not "prioritize affiliated Internet content over unaffiliated Internet content . . . [or] treat affiliated network traffic differently from unaffiliated network traffic" as well as to comply with the Commission's open Internet rules, regardless of the effect of "any judicial challenge" affecting those rules.

15. The Commission likewise incorporated openness principles for mobile services, adopting an open platform requirement for licensees in the Upper 700 MHz C Block in 2007. Specifically, the rules require Upper 700 MHz C-Block licensees to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choice for Upper 700 MHz C-Block networks, provided those devices and applications meet all applicable regulatory requirements and comply with reasonable conditions related to management of the wireless network (i.e., do not cause harm to the network). Further, the Commission prohibited Upper 700 MHz C-Block licensees from disabling features or functionality in handsets where such action is not related to reasonable network management and protection, or compliance with applicable regulatory requirements.

16. Also in 2007, the Commission unanimously adopted the Broadband Industry Practices Notice of Inquiry, explaining that vigilance and a willingness to act were necessary to keep the Internet open. The Broadband Industry Practices Notice specifically sought comment on whether the Internet Policy Statement should be amended or expanded.

17. Meanwhile, the Commission applied open Internet principles in the context of particular enforcement proceedings. Just before the Commission adopted the Internet Policy Statement, the Enforcement Bureau had entered into a consent decree with Madison River Communications, a telephone company and provider of digital subscriber line (DSL) service, arising from complaints by Vonage that Madison River was blocking ports that were typically used by Vonage customers to make Voice over Internet Protocol (VoIP) telephone calls. The consent decree required Madison River to stop blocking VoIP ports and refrain from otherwise inhibiting customers from using the VoIP applications of their choice.

18. In 2007, several parties filed complaints with the Commission alleging that Comcast was interfering with its customers' use of peer-to-peer applications in violation of the Internet Policy Statement. Such applications allow users to share large files directly with one another without going through a central server, but also can consume significant amounts of bandwidth. In response, Comcast asserted that its conduct was a reasonable network management practice necessary to ease congestion. The Commission disagreed and, in a 2008 Order, concluded that the company's practice "contravene[d] . . . federal policy" by "significantly imped[ing] consumers' ability to access the content and use the applications of their choice." As the Commission explained, Comcast's "practice unduly squelch[ed] the dynamic benefits of an open and accessible Internet," harm that was further compounded by Comcast's failure to disclose its practice to its customers. In the Comcast Order, the Commission asserted ancillary jurisdiction under Title I of the Communications Act and concluded that it could resolve the dispute through adjudication rather than rulemaking.

19. Comcast challenged that decision in the D.C. Circuit, arguing (among other things) that the Commission lacked authority to prohibit a broadband Internet service provider from engaging in

discriminatory practices that violate the four principles the Commission announced in 2005. On April 6, 2010, the D.C. Circuit granted Comcast's petition for review and vacated the Commission's enforcement decision. As to Section 706 of the Telecommunications Act of 1996, the court noted that the agency had previously interpreted Section 706 as not constituting a grant of authority and held that the Commission was bound by that interpretation for purposes of the case.

20. While the Comcast case was pending, the Commission issued a Notice of Proposed Rulemaking seeking comment on whether the Commission should codify the four principles stated in the Internet Policy Statement, plus proposed nondiscrimination and transparency rules, all subject to reasonable network management.

21. In December 2010, the Commission released the Open Internet Order, adopting three basic rules grounded in the Commission's prior decisions and broadly accepted Internet norms. First, the Order imposed a transparency rule, requiring both fixed and mobile providers to "publically disclose accurate information regarding the network management practices, performance, and commercial terms" of their broadband Internet access service. The rule specified that such disclosures be "sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings." Second, the Order adopted anti-blocking requirements. The rule barred fixed providers from blocking "lawful content, applications, services, or non-harmful devices subject to reasonable network management." It prohibited mobile providers from blocking "consumers from accessing lawful websites," as well as "applications that compete with the provider's voice or video telephony services," subject to "reasonable network management." Third, the Order adopted an anti-discrimination rule for fixed providers, barring them from "unreasonably discriminat[ing] in transmitting lawful network traffic," subject to "reasonable network management."

22. Verizon challenged the Open Internet Order in the D.C. Circuit on several grounds. It argued that the Commission lacked statutory authority to adopt the rules, that the blocking and non-discrimination rules violated the Communications Act by imposing common carriage regulation on an

information service, that the Order was arbitrary and capricious, and that the rules violated the First and Fifth Amendments to the U.S. Constitution.

23. On January 14, 2014, the D.C. Circuit ruled on Verizon's challenge to the Open Internet Order. As discussed further below, the court upheld the Commission's reading that Sections 706(a) and (b) of the Telecommunications Act grant the Commission affirmative authority to encourage and accelerate the deployment of broadband capability to all Americans through, among other things, measures that promote competition in the local telecommunications market or remove barriers to infrastructure investment. The court further held that the Commission could utilize that Section 706 authority to regulate broadband Internet access service. It concluded that the Commission had adequately justified the adoption of open Internet rules by finding that such rules would preserve and facilitate the "virtuous circle" of innovation, demand for Internet services, and deployment of broadband infrastructure and that, absent such rules, broadband providers would have the incentive and ability to inhibit that deployment. The court therefore rejected Verizon's challenge to the transparency rule. However, the court struck down the "anti-blocking" and "anti-discrimination" rules, explaining that the Commission had chosen an impermissible mechanism by which to implement its legitimate goals. Specifically, the court held that the Commission had imposed per se common carriage requirements on providers of Internet access services. Such treatment was impermissible because the Commission had classified fixed broadband Internet access service as an information service, not a telecommunications service, and had classified mobile broadband Internet access service as a private mobile service rather than a commercial mobile service. The court remanded the case to the Commission for further proceedings consistent with its opinion.

24. Today, we respond directly to that remand and propose to adopt enforceable rules of the road, consistent with the court's opinion, to protect and promote the open Internet. As the above history demonstrates, our action builds on the foundation begun under Chairman Powell, continued under Chairmen Martin and Genachowski, and reinforced by a decade of Commission policy.

III. DISCUSSION

A. The Continuing Need for Open Internet Protections

1. An Open Internet Promotes Innovation, Competition, Free Expression, and Infrastructure Deployment

25. In the Open Internet Order, the Commission reiterated the conclusion underlying its prior policies—that the Internet's openness promotes innovation, investment, competition, free expression and other national broadband goals. The Commission also found that the Internet's openness is critical to its ability to serve as a platform for speech and civic engagement and can help close the digital divide by facilitating the development of diverse content, applications, and services. Further, the Order found that the benefits of Internet openness—increased consumer choice, freedom of expression, and innovation—applied to end users accessing the Internet using mobile services as well as fixed services.

26. In the Open Internet Order, the Commission specifically found that the Internet's openness enabled a "virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses." For example, the Commission explained that innovative streaming video applications and independent sources of video content have spurred end-user demand, which, in turn, has led to network investments and increased broadband deployment. By contrast, the Commission reasoned, "[r]estricting edge providers' ability to reach end users, and limiting end users' ability to choose which edge providers to patronize, would reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure." As discussed further below, the Commission found that, despite the advantages of the virtuous circle, broadband providers have short-term incentives to limit openness, generating harms to edge providers and users, among others. Thus, the risk of broadband provider practices that may reward them in the short term but over the long run erode Internet openness threatens to slow or even break the virtuous circle—chilling entry and innovation by edge providers, impeding competition in many sectors, dampening

consumer demand, and deterring broadband deployment—in ways that may be irreversible or very costly to undo. Also, innovation that does not occur due to lack of Internet openness may be hard to detect.

27. The Open Internet Order acknowledged that there were tradeoffs to consider in adopting the 2010 rules. The Commission concluded, however, that any small costs of imposing the rules were outweighed by the positive effect on network investment from the preservation of the openness that drives the virtuous circle, as well as the increased certainty in continued openness under the rules.

28. The D.C. Circuit held that "the Commission [had] more than adequately supported and explained its conclusion that edge provider innovation leads to the expansion and improvement of broadband infrastructure." The court also found "reasonable and grounded in substantial evidence" the Commission's finding that Internet openness fosters the edge provider innovation that drives the virtuous circle.

29. We believe that these findings, made by the Commission in 2010 and upheld by the court, remain valid. If anything, the remarkable increases in investment and innovation seen in recent years—while the rules were in place—appear to have borne out much of the Commission's view. Both within the network and at its edges, investment and innovation have flourished while the open Internet rules were in force.

30. According to a June 2013 report by the White House Office of Science and Technology Policy, for example, nearly $250 billion in private capital has been invested in U.S. wired and wireless broadband networks since 2009. USTelecom reports that broadband capital expenditures have risen steadily, from $64 billion in 2009 to $68 billion in 2012. Wireline providers alone invested $25 billion in 2012. And venture capital financing of "Internet-specific" businesses has doubled in the past four years, from $3.5 billion in 2009 to $7.1 billion in 2013. Annual investment in U.S. wireless networks grew more than 40 percent between 2009 and 2012, from $21 billion to $30 billion, and exceeds investment by the major oil and gas or auto companies.

31. Whole new product markets have blossomed in recent years, and the market for applications has both diversified and exploded. A total of $8.33 billion has been raised since 2007 on mobile media ventures, a majority of the funds ($4.7 billion) to companies that provide software services, including mobile Web development, carrier-backend software, app development, and cloud-based services in the United States. In April 2010, Apple released the first version of the iPad, which launched the tablet market. The number of tablet users in the United States has increased from 9.7 million in 2010 to almost 70 million by the end of 2012, and is projected to grow to more than 160 million (approximately 50 percent of the U.S. population) by 2016. In 2013, over $1 billion in venture capital funding was invested in mobile media startups, and overall app use in 2013 posted 115 percent year-over-year growth. According to CTIA, in 2012 there were more than 20 independent non-carrier mobile application stores, offering over 3.5 million apps for 14 different operating systems. The Wall Street Journal reported in March 2013 that Apple and Google each offered about 700,000 apps, and that application sales were approaching $25 billion.

32. Finally, we have seen tremendous growth in the online voice and video markets. The number of hours Americans spend watching video over the Internet has grown 70 percent since June 2010. Between 2010 and 2013, revenues from online video services grew 175 percent, from $1.86 billion to $5.12 billion. Real-time entertainment (that is, programming that is viewed as it is delivered, such as video streamed by Netflix and Hulu) grew from 42.7 percent of the downstream fixed access traffic at peak time (generally 8:00 p.m. to 10:00 p.m.) in 2010 to 67 percent of the downstream fixed access traffic at peak time by September 2013. VoIP usage has similarly continued to increase. The number of global over-the-top mobile VoIP subscribers increased by 550 percent in 2012.

33. We have also, however, witnessed a growing digital divide that threatens to undo the work of the Commission's open Internet policies. As certain cities get connected with fiber or other technologies capable of providing broadband speeds of 25 Mbps up to 1 Gigabit, rural America and even some parts of urban America are falling farther and farther behind. Recent data suggest that a majority of Americans living in urban areas (64 percent) have access to at least 25 Mbps/10 Mbps service, while only

a substantial minority of Americans residing in rural areas (only 21 percent) have access to that same 25 Mbps/10 Mbps service. We are similarly concerned as to whether advanced networks are being deployed to all Americans in urban areas, as the construction of new networks, especially competitive networks, is an outcome that must be encouraged.

34. In light of developments in the Internet ecosystem since 2010, we wish to refresh the record on the importance of protecting and promoting an open Internet. We seek comment on the current role of the Internet's openness in facilitating innovation, economic growth, free expression, civic engagement, competition, and broadband investment and deployment. Particularly, we seek comment on the role the open Internet rules have had in investment in the broadband marketplace—networks and edge providers alike. We are similarly interested in understanding the role that the open Internet may play in the promotion of competition or in identifying barriers to infrastructure investment that an open Internet may eliminate or lessen. We also seek comment on the role that the open Internet has for public institutions, such as public and school libraries, research libraries, and colleges and universities.

35. Additionally, we seek comment on the impact of the openness of the Internet on free expression and civic engagement. For example, the percentage of Americans who use the Internet reached 87 percent in 2014—an increase of 8 percent from 2010, the year in which the Open Internet Order was adopted—marking "explosive adoption" that has had "wide-ranging impacts on everything from: the way people get, share and create news . . . the way they learn; the nature of their political activity; their interactions with government; the style and scope of their communications with friends and family; and the way they organize in communities." In light of the important role that the Internet now plays as a vehicle for communication of all sorts—both for consumers and content providers—how should we consider the potential impact on social and personal expression of an Internet whose openness was not protected? For example, would there be particular impacts on political speech, on the ability of consumers to use the Internet to express themselves, or on the Internet's role as a "marketplace of ideas" that serves the interests of democracy in general, serving even the interests of those Americans who listen

even if they do not actively speak? Are there other ways in which we should understand free-expression interests and whether they may be impaired by a lack of openness?

36. At the same time, we are mindful of the possible tradeoffs the Commission recognized at the time it adopted the Open Internet Order. When it adopted the rules in 2010, the Commission's primary focus was on the market between broadband providers and their end-user subscribers. The record contained no evidence of U.S. broadband providers engaging in pay-for-priority arrangements, in which the broadband provider would agree with a third party to directly or indirectly prioritize some traffic over other traffic to reach the provider's subscribers. As such, the Commission found that such arrangements would be a "significant departure from historical and current practice."

37. In the years since, this second side of the market—between broadband providers and edge providers or other third parties—has gotten increasing attention. In its arguments challenging the Order, Verizon expressed interest in pursuing commercial agreements with edge providers to govern the carriage of the edge providers' traffic. We also note that such arrangements between broadband and edge providers have begun to emerge. In January 2014, for example, AT&T launched a new sponsored data service, in which an edge provider enters an agreement with AT&T to sponsor and pay for data charges resulting from eligible uses of the sponsor's content by an AT&T mobile subscriber.

38. We seek comment on the potential for, and development of, new business arrangements in the market between broadband providers and edge providers. What does the multi-sided market look like, and what are its effects on Internet openness? Do some types of broadband and edge provider arrangements (or aspects of such arrangements) raise greater concerns about Internet openness than others?

2. Broadband Providers Have the Incentive and Ability to Limit Openness

39. The Open Internet Order found that broadband Internet providers had the incentives and ability to limit Internet openness, and that they had done so in the past. And the D.C. Circuit found that the Commission "adequately supported and explained" that absent open Internet rules, "broadband

providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment." As discussed further below, we seek to update the record to reflect marketplace, technical, and other changes since the 2010 Open Internet Order was adopted that may have either exacerbated or mitigated broadband providers' incentives and ability to limit Internet openness. We seek general comment on the Commission's approach to analyzing broadband providers' incentives and ability to engage in practices that would limit the open Internet, as well as more targeted comment as addressed below.

40. As noted above, the Commission has pursued policies to safeguard Internet openness for over a decade. Thus, while the number of existing cases has been relatively few, we believe this to be primarily due to the fact that the Commission has had policies in place during the period in question that it has been ready to enforce. This is different from the experience under the European legal framework, which for the most part has not contained rules or policies prohibiting blocking and discriminatory practices like the Commission's open Internet regulatory policies. In the absence of such rules and policies, commenters note more instances of broadband providers engaging in some level of restriction in Europe than the Commission has witnessed in the United States under its open Internet policies. The European Parliament voted to adopt net neutrality rules in April 2014 that will now be considered by the 28 European Union Member States in order to become binding regulation. To date, among European countries only the Netherlands and Slovenia have net neutrality regulations. For example, a survey conducted by the Body of European Regulators for Electronic Communications (BEREC) shows that European Internet service providers reported engaging in specific restrictions such as traffic degradation as well as blocking and throttling when accessing "specific applications (such as gaming, streaming, e-mail or instant messaging service) and, to a much lesser extent, when [accessing] specific content and application providers." We seek comment on this analysis and ask whether there is some other explanation to account for this phenomenon.

41. We also note that concerns related to the open Internet rules and norms have continued to occur. For example, in 2012, the Commission reached a $1.25 million settlement with Verizon for

refusing to allow tethering apps on Verizon smartphones, based on openness requirements attached to Verizon's Upper 700 MHz C-Block license. In the same year, consumers also complained when AT&T refused to permit Apple's FaceTime iPhone and iPad application to use its mobile network, restricting its use to times when the end user was connected to Wi-Fi and thus to another broadband provider, although the Commission did not conclude whether such a practice violated our open Internet principles. We seek identification of, and comment on, actions taken by broadband providers—both domestically and internationally—since the adoption of the Open Internet Order that have threatened or could potentially threaten the Internet's openness. How should such incidents inform how we craft our rules on remand?

a. Economic Incentives and Ability

42. In the Open Internet Order, the Commission found that providers of broadband Internet access service had multiple incentives to limit Internet openness. The Order concluded that the threat of broadband provider interference with Internet openness would be exacerbated by—but did not depend on—such providers possessing market power over potential subscribers in their choice of broadband provider. However, the Commission found that most residential customers have only one or two options for wireline broadband Internet access service, increasing the risk of market power, and found the future of mobile Internet access service as a competing substitute remained unclear. Moreover, the Commission emphasized that customers may incur significant costs in switching from one provider to another, thus creating "terminating monopolies" for content providers needing high-speed broadband service to reach end users.

43. The D.C. Circuit found that the Commission's assessment of broadband providers' incentives and economic ability to threaten Internet openness was not just supported by the record but also grounded in "common sense and economic reality." It affirmed the Commission's conclusions that vertically integrated broadband providers have incentives to interfere with competitive services and that broadband providers generally have incentives to accept fees from edge providers. And the court cited with approval the Commission's conclusion that a broadband provider would be unlikely to fully account for the harms resulting from such practices. The court also upheld the agency's conclusion that such

incentives could "produce widespread interference with the Internet's openness in the absence of Commission action." Finally, the court agreed that the Commission need not engage in a market power analysis to justify its rules, explaining that broadband providers' ability to block or disadvantage edge providers depended on "end users not being fully responsive to the imposition of such restrictions," not on "the sort of market concentration that would enable them to impose substantial price increases on end users."

44. We seek to update the record underlying the Open Internet Order's conclusion that broadband providers have incentives and the economic ability to limit Internet openness in ways that threaten to weaken or break the virtuous circle. How have changes in the marketplace or technology since 2010 affected broadband providers incentives and economic ability to engage in such practices? To what extent do broadband providers today have economic incentives and mechanisms to block or disadvantage a particular edge provider or class of edge providers? To what extent do vertically integrated providers have particularized incentives to discriminate—on price, quality, or other bases—in favor of affiliated products? What are broadband providers' incentives to increase revenues by charging edge providers for access or prioritized access to the broadband provider's end users? Are there features of the Internet ecosystem that facilitate or impede a broadband provider's ability to internalize the harms caused by practices that limit openness? Are there justifications for charging fees to edge providers that were not present in 2010? We seek comment on these and other economic incentives and abilities that broadband providers may have to limit openness.

45. We generally seek comment on what economic tools broadband providers utilize to manage traffic on their networks. Broadband providers may address traffic management through commercial terms and conditions on end users, such as pricing for different levels of throughput or through the use of "data caps." To what extent and in what ways do broadband providers use such tools to manage traffic, such as by excluding certain content from such an end user data cap? Might these tools be used to exploit market power or reduce competition?

46. In addition, we seek comment on end users' ability to switch providers if a particular broadband service does not meet their needs. What is the extent of switching costs, and how do switching costs affect the incentives and economic ability of providers to limit Internet openness? As discussed in the Open Internet Order and affirmed by the D.C. Circuit, both edge providers seeking access to end users and end users seeking access to edge providers are subject to the gatekeeper effect of a retail broadband provider. Absent multi-homing, an end user has only one option to reach a given edge provider's content. To reach any given end user, an edge provider must ensure that it or its broadband provider can reach the end user's broadband provider. Terms and conditions, price, or lack of other broadband providers, among other factors, can raise switching costs to the point where switching is inefficient, infeasible, or even impossible. We seek comment on these conclusions. To what extent do consumers face significant switching costs in choosing to change broadband access providers? Which services, if any, are most vulnerable to a broadband provider's market power because of the inability to effectively reach subscribers through other means? To the extent that such switching costs exist, to what extent, if any, are they exacerbated by additional factors, such as the difficulty consumers may have in effectively monitoring the extent to which edge providers have difficulty reaching them, the number of effective substitutes a consumer may have among broadband providers, or the impact of bundled pricing and switching costs attached to the purchase or use of bundled services, such as a combined offering of broadband access along with video services and voice telephony? Would all likely alternatives have similar incentives to limit openness, possibly for a different set of services? We also seek comment on an end user's ability to switch broadband providers in response to specific broadband provider practice, for example a broadband provider's decision to charge an edge provider to reach the customer. Are switching costs relevant to an edge provider's interaction with a broadband provider and, if so, how? Finally, what are the implications when consumers have no ability to switch providers because there is only one provider offering service to the consumer's location?

47. We also seek comment on the state of competition in broadband Internet access service, and its effect on providers' incentives to limit openness. We seek comment on the appropriate view of

whether broadband services with substantially different technical characteristics are competitive substitutes. For example, how should we regard the ability of DSL service with speeds of, for example, 3 Mbps downstream and 768 kbps upstream to constrain conduct by a provider of high-speed broadband with speeds of, for example, 25 Mbps downstream and 3 Mbps upstream (or higher)? How should we regard the geography of broadband competition? From an end user's point of view, do national practices or market shares have any impact on edge providers, without regard to the definition of a geographic market?

48. In the fixed broadband context, we have seen evidence of limited choice between broadband providers in many areas of the country. As the speed threshold increases to 6 Mbps downstream and 1.5 Mbps upstream, the number of households that are located in census tracts with at least three providers that report serving customers at those higher speeds dips down to a mere 34 percent. In many areas of the country, with respect to fixed Internet access, consumers may have only limited options, i.e., one or two fixed providers available. We seek comment on the extent to which commercial practices differ in places where consumers have only one choice of a wireline broadband provider, two choices, or more than two choices. We therefore also seek comment as to whether increased spectrum availability and technological developments in the mobile broadband marketplace, e.g., growth in 4G/ LTE availability, would affect the market power of fixed broadband providers.

49. We further seek general comment on our approach towards analyzing broadband provider incentives. Under the Commission's reading, which the court upheld, our Section 706 authority is not predicated on a finding of market power, specifically, that broadband providers need not be found to be "benefiting from the sort of market concentration that would enable them to impose substantial price increases on end users." Nor do we believe that the open Internet concerns described above solely arise in markets where broadband providers possess market power over subscriber prices. We recognize, however, that the presence or absence of market power—over broadband subscriptions, over end users once they have chosen a broadband provider, and over content providers who wish to reach those end users—may inform an understanding of a broadband provider's behavior in the Internet marketplace and

its incentives to engage in practices that limit Internet openness. Thus, we seek comment on whether the Commission should engage in a market power analysis with respect to broadband providers and, if so, how we should go about that analysis.

50. We further seek comment on whether there are other economic theories that the Commission should consider to better understand and assess broadband providers' incentives to engage in practices that affect the Internet's openness. For example, do broadband providers have an incentive to extract rents from upstream services whose price significantly exceeds the marginal cost of delivering those services to an additional customer? Are there positive network effects from widespread adoption of broadband services by consumers that we should recognize? Do edge providers that incur significant sunk costs in the delivery of their output face "lock-in" problems if they become dependent on a particular pathway to their current or potential users? In the absence of open Internet protections, would those edge providers face uncertainty that would hamper their ability to attract capital? Does the trend towards the caching of content closer to end users either increase such lock-in problems or, separately, limit the number of pathways by which an edge provider's output can effectively reach current or potential end users? We seek comment on whether and how other theories and new evidence may supplement or supplant the original Open Internet Order analysis.

b. Technical Ability

51. The Open Internet Order likewise found that broadband providers have the technical ability to limit Internet openness. As the Order explained, increasingly sophisticated network management tools enable providers to identify and differentiate the treatment of traffic on their own broadband Internet access service networks. We recognize that broadband providers also have the ability to impact traffic and congestion in ways that go beyond the management of traffic within their networks. In particular, we understand that broadband providers also manage traffic in the context of their relationships with other autonomous networks. For example, traffic and congestion may be affected by interconnection arrangements for the exchange of Internet traffic between two networks as well as CDN-type arrangements in which third parties place equipment in or adjacent to the providers' network. As

discussed in Section III.B, the rules we propose today reflect the scope of the 2010 Open Internet Order, which applied to broadband provider conduct within its own network. The D.C. Circuit agreed, finding "little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic." We seek comment on this general conclusion and on how this ability to impose restrictions on edge providers and end users has increased or decreased with further developments in technology or business practices since the Open Internet Order. We also seek comment on provider abilities that were not identified in the Open Internet Order or elsewhere in this NPRM, including identifying the particular ability and its relevance to this proceeding. For example, one commenter has expressed concern about broadband providers offering prioritized service in a manner that may harm rural or minority end users. Is it technically feasible for a broadband provider to block or degrade based on the location or neighborhood of the end user? Is it likely that it would do so? If so, how should our rules address this concern?

52. We seek comment on broadband providers' ability to limit Internet openness through management of traffic on their own networks and limitations imposed on their end users. Providers generally have the ability to manage traffic and congestion on their own networks and have developed a number of techniques to do so. For example, a provider can use technical methods like packet classification, admission control and resource reservation, rate control and traffic shaping, as well as packet dropping and packet scheduling to identify and manage traffic on its network. Such techniques may provide additional ability to discriminate in a way that is largely opaque to edge providers and end users. We note that other forms of discrimination in the Internet ecosystem may exist, but such conduct is beyond the scope of this proceeding. We seek comment on the technical tools broadband providers can and do use to manage traffic on their networks.

53. The Open Internet Order found that providers had in fact used their ability to limit openness, citing several instances where broadband providers had been subject to Commission enforcement proceedings for violating open Internet norms. In the Order, the Commission cited the Madison River case, the Comcast-BitTorrent case, as well as various mobile wireless Internet providers'

refusal to allow customers to use competitive payment applications, competitive voice applications, and remote video applications. The Commission also noted other allegations of blocking or degrading peer-to-peer traffic, but did not determine whether those specific practices violated open Internet principles. The D.C. Circuit noted these examples along with the Commission's as persuasive justification for adopting open Internet rules.

B. Scope of the Rules

54. The rules adopted in the Open Internet Order applied to "broadband Internet access service," which was defined as:

> A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

The Order defined "mass market" to mean a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries, including services purchased with support of the E-rate program.

55. The Verizon decision upheld the Commission's regulation of broadband Internet access service pursuant to Section 706 and did not disturb this aspect of the Open Internet Order. Thus, the definition of "broadband Internet access service" remains a part of the Commission's regulations. We tentatively conclude that we should retain this definition without modification. We seek comment on that conclusion. The court in Verizon also stated that, apart from the service provided to end users, "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge

providers' 'carriers.'" We seek comment on whether this should be identified as a separate service and, if so, how we should define that service and what the regulatory consequences are, if any, of that definition.

56. We also seek comment on the following issues that arise in connection with the scope of the application of the rules we propose today.

57. Specifically Identified Services. The Open Internet Order excluded certain categories of services from the definition of broadband Internet access service, such as dial-up Internet access service and multichannel video programming, the latter of which the Commission understood not to meet the definition of "provid[ing] the capability to transmit data to and receive data from all or substantially all Internet endpoints." We tentatively conclude that we would maintain this approach, but seek comment on whether we should change this conclusion.

58. Enterprise Services. The Open Internet Order excluded enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements. Similarly, the Open Internet Order excluded virtual private network services, hosting, or data storage services. The Commission explained that such services "typically are not mass market services and/or do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints." We also note that our rules apply only as far as the limits of a broadband provider's control over the transmission of data to or from its broadband customers. The Open Internet Order also established that the rules did not apply to: (1) edge provider activities, such as the provision of content on the Internet; and (2) premise operators, entities like coffee shops or bookstores, which offer Internet access services to their patrons. We tentatively conclude that we would maintain this approach, but seek comment on whether we should change this conclusion.

59. Internet Traffic Exchange. The Open Internet Order explained that its rules did not apply beyond "the limits of a broadband provider's control over the transmission of data to or from its broadband customers." In other words, the Order applied to a broadband provider's use of its own network but did not apply the no-blocking or unreasonable discrimination rules to the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any

other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection. Thus, the Order noted that the rules were not intended "to affect existing arrangements for network interconnection, including existing paid peering arrangements." We tentatively conclude that we should maintain this approach, but seek comment on whether we should change our conclusion. Some commenters have suggested that we should expand the scope of the open Internet rules to cover issues related to traffic exchange. We seek comment on these suggestions. For example, how can we ensure that a broadband provider would not be able to evade our open Internet rules by engaging in traffic exchange practices that would be outside the scope of the rules as proposed?

60. Specialized Services. In the Open Internet Order, the Commission recognized that broadband providers may offer "specialized services" over the same last-mile connections used to provide broadband service. The Commission stated that these services can benefit end users and spur investment, but also noted the potential for specialized services to jeopardize the open Internet. Due to these concerns, the Commission stated that it would monitor these services, but that its rules would "not prevent broadband providers from offering specialized services such as facilities-based VoIP." We tentatively conclude that we should maintain this approach and continue to closely monitor the development of specialized services to ensure that broadband providers are not using them to bypass the open Internet rules or otherwise undermine a free and open Internet. We seek comment on this tentative conclusion. How can we ensure that the specialized services exception is not used to circumvent our open Internet rules? In addition, should specialized services be addressed within the scope of the "commercially reasonable" rule either as a safe harbor or among the factors for consideration? Should the Commission define "specialized services"? The Open Internet Order did not formally define "specialized services," but described them as "services that share capacity with broadband Internet access service over providers' last-mile facilities." By contrast, the net neutrality rules that the European Parliament voted to adopt in April 2014 included a specific definition for "specialized services" as "an electronic communications service optimised for specific content, applications or services, or a combination thereof, provided over logically distinct capacity, relying on strict admission control, offering functionality

requiring enhanced quality from end to end, and that is not marketed or usable as a substitute for internet access service."

61. Reasonable Network Management. Although the Open Internet Order's definition of broadband Internet access service did not itself address reasonable network management, the concept was incorporated into each of the 2010 rules. Specifically, the transparency rule "does not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices." The 2010 no-blocking rule was made expressly subject to "reasonable network management." And the unreasonable discrimination rule expressly provided for reasonable network management, which was defined as follows: "A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service." The Commission further concluded that it would "develop the scope of reasonable network management on a case-by-case basis." We tentatively conclude that we should continue the same approach. We seek comment on this conclusion as applied to an enhanced transparency rule, our re-adoption of the no-blocking rule, and the proposal to adopt a "commercially reasonable" standard. How can we ensure that the ability of providers to engage in reasonable network management is not used to circumvent the open Internet protections implemented by our proposed rules?

62. Mobile Services. The Open Internet Order also adopted definitions for "fixed" and "mobile" Internet access service. It defined "fixed broadband Internet access service" to expressly include "broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, . . . fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services." It defined "mobile broadband Internet access service" as "a broadband Internet access service that serves end users primarily using mobile stations." The impact of this distinction varied by rule. The transparency rule applies equally to both fixed and mobile broadband Internet access service. The no-blocking rule applied a different standard to mobile broadband Internet access services, and mobile Internet access service was excluded from the unreasonable discrimination rule. We tentatively

conclude that we should maintain the same approach in today's NPRM. We seek comment on this approach, which is discussed in more detail in the context of each of the proposed rules below. We recognize that there have been significant changes since 2010 in the mobile marketplace, including how mobile providers manage their networks, the increased use of Wi-Fi, and the increased use of mobile devices and applications. We seek comment on whether and, if so, how these changes should lead us to revisit our treatment of mobile broadband service. Specifically, we seek comment below on whether the no-blocking rule should continue to distinguish between fixed and mobile broadband and whether, under the commercially reasonable rule, mobile networks should be subject to the same totality-of-the-circumstances test as fixed broadband. In addition, how should the definitions of "fixed" and "mobile" services be applied to a fixed broadband provider's commercially deployed Wi-Fi service that is made available to the provider's fixed broadband customers? How should such changes affect our treatment of reasonable network management for mobile providers? Similarly, how should we treat mobile services that are deployed and/or marketed as express substitutes for traditional telecommunications or broadband services? Finally, have there been changes in technology or the marketplace for the provision of satellite broadband Internet access service that should lead the Commission to reassess how its rules should apply to such services?

C. Transparency Requirements to Protect and Promote Internet Openness

1. The 2010 Transparency Rule

63. In the Open Internet Order, the Commission concluded that effective disclosure of broadband providers' network management practices, performance, and commercial terms of service promotes competition, innovation, investment, end-user choice, and broadband adoption. To that end, the Commission adopted the following transparency rule:

> A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers

to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

64. The Commission determined that the best approach to implementing the transparency rule was to allow broadband providers flexibility, while providing guidance concerning effective disclosure. The Commission stated that "effective disclosures will likely include" information concerning "some or all" of the following topics: (1) network practices, including congestion management, application-specific behavior, device attachment rules, and security measures; (2) performance characteristics, including a general description of system performance (such as speed and latency) and the effects of specialized services on available capacity; and (3) commercial terms, including pricing, privacy policies, and redress options. In 2011, the Commission's Enforcement Bureau and Office of General Counsel issued advisory guidance to further clarify compliance with the transparency requirements regarding point-of-sale disclosures, service descriptions, security measures, and the extent of required disclosures, while noting that "these particular methods of compliance are not required or exclusive; broadband providers may comply with the transparency rule in other ways."

65. The D.C. Circuit's decision in Verizon v. FCC upheld the transparency rule, which remains in full force, applicable to both fixed and mobile providers. In today's NPRM, we inquire as to ways that the transparency rule can be improved, taking into account changes in the nature of the provision of broadband services since 2010. We believe we have ample authority not only for our existing transparency rule, but also for the enhanced transparency rule we propose today, whether the Commission ultimately relies on Section 706, Title II, or another source of legal authority. We seek comment on whether and how—if at all—the source of the Commission's legal authority relied upon to adopt other open Internet rules would affect the authority or authorities that provide the strongest basis for any improvements to the transparency rule or otherwise would inform how we define the goal of transparency in general.

2. Enhancing Transparency to Protect and Promote Internet Openness

66. "Sunlight," as Justice Brandeis has explained, "is . . . the best of disinfectants." If designed correctly, disclosure policies are among the most effective and least intrusive regulatory measures at the Commission's disposal. Applied here, the Commission continues to believe that access to accurate information about broadband provider practices encourages the competition, innovation, and high-quality services that drive consumer demand and broadband investment and deployment. The transparency rule thereby reflects the "virtuous circle" that, in the long term, unites the interests of end users, edge providers, and the broader Internet community. As the Commission explained in the Open Internet Order, disclosures under the rule: (1) help end users make informed choices regarding the purchase and use of broadband services and increase end users' confidence in broadband providers' practices; (2) ensure that edge providers have access to broadband providers' network information necessary to develop innovative new applications and services; and (3) inform the Internet community and the Commission about broadband providers' practices and conduct that could impact Internet openness. In today's NPRM, we seek comment on the effectiveness of the existing transparency rule and on whether and, if so, how the rule should be enhanced to meet its goals with respect to end users, edge providers, the Internet community, and the Commission.

67. Today, we seek general comment on how well the Commission's existing transparency rule is working. We are especially interested in comments that describe the current operation, benefits, and shortcomings of the existing rule, how broadband providers are complying with it, and how we should measure such compliance. We note that an informal review of broadband provider disclosures conducted by Commission staff found that the majority are providing some form of disclosure statements, but that many do not appear to provide all the information the rule was designed to disclose. We are also mindful that the additional rules we propose today to protect Internet openness consistent with the D.C. Circuit's decision may place even greater importance on the extent to which information about broadband providers' practices is disclosed to end users, edge providers, and the Commission. Taking all of that into account, we tentatively conclude that we should enhance the transparency rule to improve its

effectiveness for end users, edge providers, the Internet community, and the Commission. We seek comment on this tentative conclusion and on what burdens or compliance issues may be associated with this approach, including for smaller providers.

68. Tailored disclosures. In the Open Internet Order, the Commission stated that broadband providers may be able to satisfy the transparency rule through use of a single disclosure, and therefore did not require different types of disclosures to different parties such as individual end users, edge providers, the broader Internet community, and the Commission. We have concerns that a single disclosure may not provide the required disclosures in a manner that adequately satisfies the informational needs of all affected parties. For example, some recent research suggests that consumers have difficulty understanding commonly used terms associated with the provision of broadband services. Edge providers, however, may benefit from descriptions that are more technically detailed. We therefore tentatively conclude that it would be more effective to require broadband providers to more specifically tailor disclosures to the needs of these affected parties. We seek comment on this tentative conclusion, on the nature of the disclosures that should be tailored, and on what burdens or compliance issues, if any, may be associated with more targeted disclosures.

a. Transparency to End Users

69. Since the Commission adopted the transparency rule, we have received hundreds of complaints from consumers suggesting that, under the rule, broadband providers may not be providing end user consumers the accurate information they need and have a right to receive. Our analysis of consumer complaints received since the transparency rule took effect shows a significant number of consumer complaints about provider speeds, charges, and other commercial practices that the rule was designed to disclose. In some cases, however, it is difficult to discern whether the consumer's frustration is with slow speeds or high prices generally, or instead with how the service as actually provided differs from what the provider has advertised. Of particular concern to many consumers is that the speed of their service falls short of the advertised speed. Many consumers complain that they have been charged amounts greater than advertised rates, including fees and charges beyond basic rates. We have also

received a number of consumer complaints raising questions about the source of slow or congested services. Consumers have also reported surprise at broadband providers' statements about slowed or terminated service based on consumers' "excessive use." Other consumers report confusion about how data consumption is calculated for purposes of data caps.

70. We seek comment on the extent to which the existing transparency rule is effectively informing end users. We are interested both in what information broadband providers are disclosing to end users and how that information is being disclosed. In addition, we seek comment on the incentives and ability of broadband providers to provide service at lower quality or higher prices than their subscribers expected when they enrolled, and on the incentives and ability of subscribers to choose other options if their broadband providers fail to live up to these expectations. If a subscriber is locked in to a particular provider, how can transparency rules bring the performance of that provider up to the subscriber's expectations?

71. In light of the consumer complaints discussed above, we also consider enhancements to the existing rule with respect to the content, form, and method of broadband providers' disclosures to end users.

72. Content and Form of Disclosure. We seek comment on whether there are ways to make the content and format of disclosures more accessible and understandable to end users. With respect to content, should the Commission require the disclosure of specific broadband provider network practices, performance characteristics (e.g., effective download speeds, upload speeds, latency, and packet loss), and/or terms and conditions of service to end users (e.g., data caps)? We are particularly interested in whether there are network practices, performance characteristics, or commercial terms relating to broadband service that are particularly essential but not easily discoverable by end users absent effective disclosure. With respect to format, both academic research and the Commission's experience with consumer issues have demonstrated that the manner in which providers display information to consumers can have as much impact on consumer decisions as the information itself. We therefore seek comment on best practices for displaying and formatting relevant disclosures for end users, including any potential

costs and burdens to broadband providers. For example, the Open Internet Advisory Committee (OIAC) has proposed the use of a standardized label for Internet service that includes basic information such as performance speed (i.e., upload and download speed), price (i.e., monthly fee averaged over three years), and usage restrictions (i.e., any points at which the applicable terms of service change, including data usage caps and any charges, speed reductions, or other penalties for exceeding a cap) that consumers can use to comparison shop for service. Are there lessons we can learn regarding effective disclosure practices from independent consumer research or disclosure in other approaches to standardized labels? Should the information be made available in a machine-readable format, such as XML, that might allow the Commission, industry associations, or other organizations to easily access and synthesize information for consumers?

73. Network Practices. With respect to data caps, should we require disclosures that permit end users to identify application-specific usage or to distinguish which user or device contributed to which part of the total data usage? Should we require disclosure of any type of traffic exempted from any data caps, and how end users can find their current consumption levels? Should we require that disclosures explain any restrictions on tethering for mobile devices? Should the Commission expand its transparency efforts to include measurement of other aspects of service such as packet loss, packet corruption, latency, and jitter in addition to upstream and downstream speed? Should the Commission require the reporting of actual achieved results for each category? If providers offer different tiers of service to their end users, should providers be required to make disclosures by tier? What should be the required timing of any such disclosures? Is it important that network practices be disclosed in advance of their implementation?

74. Method of Disclosure. The Transparency Compliance PN advised broadband providers that they can comply with the point-of-sale disclosure requirement by, for instance, "directing prospective customers at the point of sale, orally and/or prominently in writing, to a web address at which the required disclosures are clearly posted and updated." We seek comment on whether that approach is adequate or whether the Commission should consider alternative approaches.

b. Transparency to Edge Providers

75. As noted above, the Commission also adopted the transparency rule to ensure that broadband providers would disclose sufficient information to permit "content, application, service, and device providers to develop, market, and maintain Internet offerings." Some commenters have suggested that current disclosures provide insufficient information for edge providers. We seek comment on how the existing transparency rule is working and how we can enhance its effectiveness with respect to edge providers. Should we view some categories of edge providers, such as start-up companies, as having distinct needs and, if so, what would be the implications for an enhanced transparency rule?

76. We also seek comment on the extent to which the transparency rule does, or should, disclose useful information to providers who seek to exchange traffic with broadband provider networks. In other words, should we view transit, CDN, or other providers engaged in Internet traffic exchange as a class of persons whose interests are similar to those of edge providers who wish "to develop, market, and maintain Internet offerings," perhaps because they may have such edge providers as their customers? For instance, many edge providers utilize the services of an intermediary CDN, such as Akamai, EdgeCast, Limelight, or Level 3, or cloud service providers such as Amazon, Microsoft, or RackSpace, which provide the servers upon which the applications run and also interconnect directly with broadband providers. Other edge providers bypass these networks and interconnect directly with broadband providers through peering arrangements. Some edge providers, such as Google or Amazon, may act both as content providers for their own services and as CDNs or cloud service providers for other services. We seek comment on whether these subgroups have distinguishable needs for information that could be provided through disclosure and, if so, what kind of information would be most useful.

c. Transparency to the Internet Community and the Commission

77. The Common Interests of End Users, Edge Providers, and the Broader Internet Community. We seek comment on the extent to which the existing transparency rule fully reflects the "virtuous circle" that, in the long term, unites the interests of end users, edge providers, the broader Internet community, and the Commission. Are there ways to enhance the transparency rule to further

facilitate the virtuous circle? What other disclosures might encourage and improve the deployment of broadband in the United States?

78. We also seek comment—relevant to all stakeholders—on whether and, if so, how the Commission should enhance the existing transparency rule to ensure the effectiveness of, and compliance with, the other rules we propose in today's NPRM. For example, to ensure the effectiveness of the no-blocking rule proposed below, should the Commission mandate that broadband providers disclose—in a more rigorous and consistent way—the expected performance end users can expect from their broadband service? To improve information about broadband provider practices for end users, edge providers, and the broader Internet community, we tentatively conclude that broadband providers must disclose in a timely manner to consumers, edge providers, and the public (and, of course, the Commission) when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or "best effort" service as distinct from any priority service.

79. Measuring Broadband Performance. The Open Internet Order requires broadband providers to disclose accurate information regarding network performance for each broadband service they provide. The accuracy and availability of such network performance information is a common linchpin for end users, edge providers, and all stakeholders in the Internet community. As noted in the Order, the Commission launched a broadband performance measurement project called "Measuring Broadband America" (MBA) to accurately measure key performance metrics, including baseline connection speed and latency. To satisfy their obligations under the transparency rule, all of the 12 largest fixed broadband providers chose to participate in the measurement program. Last year the Commission expanded its MBA program to include mobile broadband by releasing a Mobile Broadband Speed Test App, an open-source, crowdsourcing program to assess mobile broadband network performance nationwide. The app measures mobile broadband and Wi-Fi network performance and delivers to consumers an in-depth view of key metrics related to their mobile broadband experience. We seek comment on the effectiveness of this approach for providing consumers with useful information

regarding the performance of both fixed and mobile broadband networks. We seek comment on whether participation in MBA should continue to satisfy the requirement that actual speeds be disclosed. Are there areas of this program that can be improved to provide more useful information to consumers?

80. More generally, are there more efficient or more comprehensive ways to measure network performance metrics, including for broadband providers not participating in MBA? For example, could the ability to measure and report network performance be included in the end user's own network modem or residential gateway? Do such functionalities currently exist, or are they in development? Are there academic or other external research organizations that could assist the Commission in collecting and analyzing information about traffic, congestion, and other features of the Internet? Should the Commission mandate the use of monitoring devices, like those used in MBA? How can performance metrics most accurately measure the actual download and upload speeds a consumer can expect to experience, rather than "up to" speeds or "last-mile" performance? Should the Commission look to an external advisory group to aid in the development and feasibility of performance metrics and measurement?

81. Congestion. The Open Internet Order highlighted the value of providing end users with information about the sources of congestion that might impair the performance of edge-provider services. As the Open Internet Order explained, "it is often difficult for end users to determine the causes of slow or poor performance of content, applications, services or devices." At the same time, the Commission recognized that "congestion management may be a legitimate network management purpose." But the Commission also emphasized the importance of the disclosure to end users of "descriptions of congestion management practices" including "indicators of congestion" and "the typical frequency of congestion."

82. Since the 2010 Open Internet Order, some have suggested that sources of congestion that impact end users may originate beyond the broadband provider's network or in the exchange of traffic between that network and others. An end user's inability to ascertain the source of congestion could lead to confusion, for example, to the filing of an unjustified complaint against a broadband provider (if the source of the congestion were elsewhere) or a mistaken decision by the end user to purchase additional

bandwidth to improve performance (again, if the source of congestion were elsewhere). Edge providers and other stakeholders also have expressed a need for greater information about network congestion.

83. In light of these concerns, we tentatively conclude that we should require that broadband providers disclose meaningful information regarding the source, location, timing, speed, packet loss, and duration of network congestion. We seek comment on this tentative conclusion, including on how to implement it in a practical manner that provides meaningful information to end users, edge providers, and other stakeholders without causing undue burden on broadband providers. For example, should the information to be disclosed be based upon a sampling taken at given points in time, and if so, what would be an appropriate interval for such sampling? We note that Cogent has made suggestions about enhancements to the transparency rule along these lines and proposing specific means of implementation, upon which we seek comment. In making the foregoing tentative conclusion and seeking comment on how to implement it, we emphasize that we are positing that the public would be served by additional information concerning the existence and duration of congestion, regardless of its cause, so that there is greater understanding of the impact of that congestion on the performance of a broadband provider's network, if any. We do not, however, propose to expand the scope of the open Internet rules in any fashion to regulate traffic exchange, though, as noted above, we ask for public input on this tentative conclusion.

d. Transparency for Mobile Broadband

84. The Commission currently applies the same transparency requirement to both fixed and mobile providers, reasoning that end users need a clear understanding of "network management practices, performance, and commercial terms, regardless of the broadband platform they use to access the Internet." We seek comment on how we should assess the effectiveness of the existing rule in the mobile broadband context. For example, most mobile broadband plan offerings have generally had lower data usage limits than those offered for fixed broadband services. Accordingly, do mobile broadband subscribers have an enhanced need to understand, monitor, and more flexibly adjust their mobile data usage needs than the fixed broadband users?

85. We seek comment on whether and, if so, how enhancements to the transparency rule should apply to mobile broadband network providers. Would the enhanced transparency requirements described herein, or others, help meet the information needs of mobile broadband device and application developers as well as the needs of end users? How can we make sure that the disclosure requirements discussed above are appropriate and effective for mobile broadband in view of the many operational factors that may influence performance of mobile broadband networks, including the mobile access technology, the weather, the distance to the serving cell site, the number of users in a cell site, and device capability? Should the nature of disclosure to customers of wireless networks be different if the wireless service is provided by a network as an explicit substitute for copper-based, traditional service, including voice and DSL?

e. Burdens of Enhanced Transparency on Broadband Providers

86. We seek comment on the extent to which adopting enhanced transparency requirements would create particular burdens in either the fixed or the mobile broadband environment and whether and how such burdens would affect the pace of innovation, investment, and growth. How can we achieve the public benefits of enhanced disclosure requirements without imposing unreasonable burdens on the broadband providers? Are there ways to minimize the costs and burdens associated with any enhanced disclosure requirements? Are there ways the Commission or industry associations could reduce any such burdens, for example through the use of a voluntary industry standardized glossary, or through the creation of a dashboard that permits easy comparison of the policies, procedures, and prices of various broadband providers throughout the country?

3. Compliance and Enforcement

87. In the Open Internet Order, the Commission noted that a key objective of the transparency rule is to enable the Commission to collect information necessary to assess, report, and enforce the open Internet rules. As discussed further below, we seek comment on how the Commission can best design a process for enforcing the transparency rule that provides certainty, flexibility, and access for all affected parties. Should the Commission permit individuals to report possible

noncompliance with our open Internet rules anonymously or take other steps to protect the identity of individuals who may be concerned about retaliation for raising concerns? We propose that the consequences of a failure to comply with our transparency rule should be significant and include monetary penalties. We seek comment on the most effective methods to ensure ongoing compliance with the transparency rule. How can we ensure that these disclosure requirements are as effective and effectively enforced as disclosure requirements in other areas of the law, such as disclosures to the Securities and Exchange Commission? Should the Commission require broadband providers to certify that they are in compliance with the required disclosures, particularly if the current flexible approach is amended to require more specific disclosures? Should we also require broadband providers to submit reports containing descriptions of current disclosure practices? If so, should we modify our existing process for protecting the confidentiality of competitively sensitive information?

88. We also seek comment on whether the Commission can better promote transparency through its own outreach and reporting mechanisms. Should the Commission establish and make public a list of those broadband providers that block or otherwise limit certain types of traffic? Should the Commission collect and publish information on pay-for-priority arrangements? In what timeframe should the Commission require providers to report such changes in their traffic management policies to the Commission? We invite comment on the merits of these options, and any other suggestions commenters may deem relevant, to ensure full compliance with the transparency rule, including identification of any regulatory burdens this might entail for broadband providers.

D. Preventing Blocking of Lawful Content, Applications, Services, and Nonharmful Devices

89. We believe that, as the Commission found in the Open Internet Order, "the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness and to competition in adjacent markets such as voice communications and video and audio programming." The D.C. Circuit acknowledged the validity of this policy rationale for the no-blocking rule adopted in the Open Internet Order, but vacated the rule because

it found that the Commission had failed to provide a legal rationale under which the prohibition would not impermissibly subject broadband providers to common carriage regulation. To address the ongoing concerns with the harmful effects that blocking of Internet traffic would have on Internet openness, we propose to adopt the text of the no-blocking rule that the Commission adopted in 2010, with a clarification that it does not preclude broadband providers from negotiating individualized, differentiated arrangements with similarly situated edge providers (subject to the separate commercial reasonableness rule or its equivalent). So long as broadband providers do not degrade lawful content or service to below a minimum level of access, they would not run afoul of the proposed rule. We also seek comment below on how to define that minimum level of service. Alternatively, we seek comment on whether we should adopt a no-blocking rule that does not allow for priority agreements with edge providers and how we would do so consistent with sources of legal authority other than Section 706, including Title II. See infra Section III.F. For example, to the extent the Commission relies on Title II, would Sections 201(b) and 202(a) of the Act compel a different result than provision of a minimum level of service? See 47 U.S.C. 201(b) (prohibiting unjust or unreasonable "charges, practices, [or] classifications"); 47 U.S.C. 202(a) (prohibiting "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services").

90. It is important to understand the relationship between the proposed no-blocking and commercial reasonableness rules. Although the proposed no-blocking rule only establishes a minimum level of service, and thus allows room for individualized negotiations, the proposed commercial reasonableness rule separately applies to any and all conduct, including by asking whether paid prioritization can be barred outright and by asking whether to bar practices that harm competition, consumers, and the free exercise of speech.

1. The 2010 No-Blocking Rule

91. 2010 Open Internet Order. In the Open Internet Order, the Commission adopted a no-blocking rule to preserve the openness that was and remains a core expectation of end users. The Open Internet Order noted that a no-blocking principle had been broadly accepted since its inclusion in the

Commission's 2005 Internet Policy Statement, and the Internet Policy Statement itself reflected expectations and practices of how the Internet should and did work. A more limited variation of the rule applied to mobile broadband providers, due to the operational constraints that affect mobile broadband services, the rapidly evolving nature of the mobile broadband technologies, and the generally greater amount of consumer choice for mobile broadband services than for fixed.

92. D.C. Circuit Opinion in Verizon v. FCC. The D.C. Circuit struck down the no-blocking rule after finding that the Commission had failed to provide a legal justification that would take the rule out of the realm of impermissible common carriage. The court stated that it was "somewhat less clear" whether the no-blocking rule constituted per se common carriage regulation than whether the antidiscrimination rule did. Nonetheless, the court concluded that the no-blocking rule, at least as described in the Open Internet Order, required broadband providers to serve edge providers indiscriminately. The no-blocking rule thereby imposed per se common carriage rules and thus violated the Communications Act's prohibition on the imposition of common carrier obligations on providers of information services.

93. The court intimated that the no-blocking rule could pass scrutiny, however, if broadband providers could engage in individualized bargaining while subject to the rule. The court reasoned that "if the relevant service that broadband providers furnish is access to their subscribers generally, as opposed to access to their subscribers at the specific minimum speed necessary to satisfy the anti-blocking rules, then these rules, while perhaps establishing a lower limit on the forms that broadband providers' arrangements with edge providers could take, might nonetheless leave sufficient 'room for individualized bargaining and discrimination in terms' so as not to run afoul of the statutory prohibitions of common carrier treatment." Such a practice would allow for individualized bargaining where providers would not be required "to hold themselves out to serve all comers indiscriminately on the same or standardized terms." If the Commission's no-blocking rule allowed individualized bargaining above the minimum level of service necessary, then the rule might not create per se common carriage obligations. The court noted that although the Commission had asserted this interpretation of the rule at oral argument, the court

could not consider it as a possible basis for upholding the rule because the Commission had not advanced this position in the Open Internet Order.

2. Proposal to Adopt a No-Blocking Rule

94. We continue to believe that safeguarding consumers' ability to access and effectively use the lawful content, applications, services, and devices of their choice on the Internet is an essential component of protecting and promoting the open Internet. Therefore, we tentatively conclude that we should adopt the text of the rule that the Commission adopted in the Open Internet Order, which provided:

> A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management. Consistent with the 2010 rule, the phrase "content, applications, services" in the proposed rule for fixed broadband service "refers to all traffic transmitted to or from end users of a broadband Internet access service, including traffic that may not fit cleanly into any of these categories."
>
> A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

95. We believe this to be the public policy that will best serve Internet openness. While maintaining this rule text, we propose to make clear that the no-blocking rule would allow individualized bargaining above a minimum level of access to a broadband provider's subscribers—the revised rationale the court suggested would be permissible rather than per se common carriage—but, also consistent with the court's analysis, separately subject such practices to scrutiny under the commercially reasonable practices rule (or its equivalent). We believe that by preserving end users' ability to access the Internet

content of their choice, reinstating a no-blocking rule would increase demand for broadband services and thus increase investment in broadband network infrastructure and technologies. We seek comment on the proposed no-blocking rule and its potential effect on broadband investment and deployment, including whether and under what circumstances broadband providers have incentives to block content. We also seek comment on possible approaches other than adopting the text of the 2010 rule. Should we modify the text of the rule to explicitly address the minimum level of access required, as discussed below?

96. Alternatively, we seek comment on whether we should adopt a no-blocking rule that either itself prohibits broadband providers from entering into priority agreements with edge providers or acts in combination with a separate rule prohibiting such conduct. As discussed below, the record in this proceeding reflects numerous public concerns about the potential for priority agreements to harm an open Internet. How could we address such concerns in the context of the no-blocking rule? If the Commission were to proceed down this alternative path, how should the Commission define "priority"? Are "priority" agreements broader than "pay-for-priority," possibly including the exchange of consideration other than money? Are there other arrangements between broadband providers and edge providers that have the potential to harm Internet openness and should be addressed within the no-blocking rule? Commenters should address the legal bases and theories, including Title II, that the Commission could rely on for such a no-blocking rule, and how different sources of authority might lead to different formulations of the no-blocking rule.

3. Establishing the Minimum Level of Access under the No-Blocking Rule

97. As noted above, the D.C. Circuit suggested that the Commission's 2010 no-blocking rule could be interpreted as requiring broadband providers to "furnish . . . access to their subscribers generally" while "establishing a lower limit on the forms that broadband providers' arrangements with edge providers could take"—and that under that interpretation the rule might not impose common carrier status on broadband providers. Consistent with the court's ruling, we tentatively conclude that the revived no-blocking rule should be interpreted as requiring broadband providers to furnish edge providers with a minimum level of access to their end-user subscribers. Such actions, permissible under the no-

blocking rule, would, of course, be separately subject to the proposed commercially reasonable practices standard set out below. We tentatively conclude that our proposed no-blocking rule would allow broadband providers sufficient flexibility to negotiate terms of service individually with edge providers, consistent with the court's view that we must permit providers to "adapt . . . to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms." In this regard, we view the operation of the no-blocking rule separate from any other impact on broadband providers that might arise from application of the legal standard, factors, and dispute resolution framework discussed below. We reiterate that, as discussed further below, under the proposed rules contained herein such individualized arrangements for priority treatment would be subject to scrutiny under the proposed commercial reasonableness rule and prohibited under that rule if they harm Internet openness. We seek comment on these tentative conclusions.

98. Requiring this minimum level of access under the no-blocking rule will ensure that all users have access to an Internet experience that is sufficiently robust, fast, and effectively usable. This includes both end-user consumers and edge providers of all types and sizes, including those content providers who do not enter into specific arrangements with broadband providers. In short, our approach will enable consumers to access the content, services, and applications they demand and ensure that innovators and edge providers have the ability to offer new products and services. We seek comment on this analysis.

99. Under the approach described by the D.C. Circuit, "broadband providers [would] have no obligation to actually provide an edge provider with the minimum service necessary to satisfy the rules," because they could instead "deliver all edge providers' traffic" in a manner that exceeds that minimum, and they would then be free to "negotiate separate agreements with each individual edge provider" and also to "charge similarly-situated edge providers completely different prices for the same service." We note that a broadband provider's discretion in setting rates could be constrained to some degree by the commercially reasonable standard and dispute resolution framework discussed below, if adopted by the Commission. As we explain below, that proposed standard would not constitute per se common carriage.

Are there alternative approaches that, consistent with the Verizon decision, would avoid per se common carriage? Are there forms of price discrimination that, even if appropriate under the no-blocking rule, should be separately subject to the commercial reasonableness rule or its equivalent?

100. We also seek comment on how, consistent with this interpretation, we should define or clarify the minimum level of access required by the rule, or otherwise define what provider conduct would constitute "blocking" under the rule. In our view, a defined minimum level of access provides assurances both to end users, by helping them understand the potential uses of their service, and to edge providers. Such assurances should enhance consumer demand, which drives investment both in the network and at the edge.

101. We also seek comment on how "minimum level of access" should be defined to provide the robust, fast, and effectively usable access discussed above. Should we define the minimum level of access from the perspective of end users, edge providers, or both? Should the minimum level of access be dynamic, evolving over time, and if so, how can that flexibility be incorporated into the rule? In the following paragraphs, we describe in alphabetical order several possible options by which we may define a minimum level of access under the no-blocking rule. We seek comment on these options and on any approaches by which the Commission should define the minimum level of access. For each of these potential options, we seek comment on its advantages and disadvantages, on its legal sustainability under Verizon, and on how effective it would be at protecting the open Internet, including the ease or difficulty with which violations can be identified and remedied. We seek comment on how the Commission should implement, monitor compliance with, and enforce the rule, under each of the options described. For each option, we also seek comment on whether the minimum level of access should be reflected in providers' disclosures under an enhanced transparency rule. Under any of these options, we seek comment on how the minimum level of access should be measured. Should the Commission measure technical parameters, based on a sample, focusing on speed, packet loss, latency, or other factors? Where in the network should such measurement take place to ensure an accurate measure of the broadband provider's performance? Finally, we recognize that from time to time a provider may be unable to provide such a minimum level

of access temporarily for a variety of reasons. Aside from complete outages (which are not the subject of this NPRM), we note that in some cases inadvertent action or circumstances outside a provider's control may cause a subset of traffic to be blocked. For example, if a connection with one of several peering partners is severed, some Internet traffic may seem unacceptably slow while other traffic appears normal. Alternatively, a provider engaged in reasonable network management (such as blocking the source of a distributed denial of service attack) may inadvertently block other traffic due to a transcription error. If steps are taken in a timely manner to correct such problems, we would not anticipate considering such action to violate a no-blocking rule. We seek comment on how the Commission should distinguish such temporary inadvertent failures from intentional or prolonged blocking, including whether the Commission should consider exempting incidents of blocking that last for less than a specified amount of time.

102. Best Effort. One way to define a minimum level of access is as a requirement that broadband providers apply no less than a "best effort" standard to deliver traffic to end users. For any particular type of Internet traffic, best-effort delivery would represent the "typical" level of service for that type of traffic—in effect, routing traffic according to the "traditional" architecture of the Internet. Broadband providers would be free to negotiate "better than typical" delivery with edge providers, and would be prohibited (subject to reasonable network management) from delivering "worse than typical" service in the form of degradation or outright blocking. We seek comment on this potential approach. Would "best effort" be measured against the technical capacity of a particular broadband provider's network capacity and characteristics?

103. Minimum Quantitative Performance. Another way to define a minimum level of access is through specific technical parameters, such as a minimum speed. To the extent that commenters believe that the Commission should promulgate a rule that establishes specific technical parameters for the required minimum level of access, what should those parameters be? Should they identify specific speeds of service, or would it be preferable to identify specific problems that a minimum level of service would avoid (such as preventing latency and jitter for services that tolerate them poorly)? Would the Commission need to differentiate between different broadband access technologies? While this approach

would provide greater certainty than other approaches, a specific technical definition of minimum access could become outdated as available broadband network technologies change and available broadband speeds improve. How frequently would we need to revisit a specific technical definition of minimum access to ensure that it keeps up with advances in broadband service?

104. An Objective, Evolving "Reasonable Person" Standard. Another approach to defining a minimum level of access to broadband providers' end users is to think of it as the level that satisfies the reasonable expectations of a typical end user. We might think of this as a "reasonable person" standard of access. For example, a typical end user may reasonably expect the ability to access streaming video from any provider, place and receive telephone calls using the VoIP service of the end user's choosing, and access any lawful web content. Under this approach, a broadband provider that satisfies these and other reasonable expectations would be in compliance with the no-blocking rule. One possible advantage of this approach to defining minimum access is flexibility: the absence of a specific technical definition means that the standard for compliance can evolve as the expectations in the marketplace change without further Commission action. On the other hand, this approach may create less certainty than other approaches might and could be more difficult to enforce. We seek comment generally on a "reasonable person" standard for defining minimum access, and in particular, how this standard could be crafted to be sufficiently objective and predictable to provide certainty to broadband providers and edge providers.

4. Application of the No-Blocking Rule to Mobile Broadband

105. As noted above, the 2010 no-blocking rule applied differently to mobile broadband providers than to fixed, and today's NPRM would maintain that approach. The previous rule prohibited mobile broadband providers from blocking consumers from accessing lawful websites or blocking applications that compete with the provider's voice or video telephony services. We propose to adopt the same approach as in the 2010 obligation, which would prohibit mobile broadband providers from blocking lawful web content as well as applications that compete with the mobile broadband providers' own voice or video telephony services, subject to reasonable network management. We seek comment on this proposal.

106. In addition, we seek comment on whether it would serve the public interest to expand the rule's scope to include reasonable access to all applications that compete with the mobile broadband Internet access provider's other services, not just those that compete with voice or video telephony services, subject to reasonable network management practices. Should the application of the no-blocking rule to mobile broadband providers turn on whether mobile service was marketed to consumers as a substitute for a fixed telecommunications service previously offered by the provider or its affiliate? How would treating mobile broadband differently from fixed broadband affect consumers in different demographic groups, including those who rely solely on mobile broadband for Internet access? How should the Commission consider applying a no-blocking rule to facilities-based mobile providers versus resellers?

107. We also seek comment on whether and how we should define a minimum level of access in the context of the proposed no-blocking rule for mobile broadband, or otherwise clarify what constitutes "blocking," and whether that definition should be different for mobile broadband than for fixed. For each of the approaches discussed above to define a "minimum level of access," we seek comment on any particular benefits or difficulties that such approach would present.

108. We recognize that there have been substantial mobile marketplace changes and developments since 2010, including the increased use of Wi-Fi technology, and seek comment on whether and how such changes should impact our no-blocking rule for mobile broadband. We seek comment on the extent to which we should take into account the increasing provision of Wi-Fi by broadband providers, and the growing use of Wi-Fi by end users for the off-load of wireless broadband, as we consider the application of the no-blocking rule to mobile broadband services.

5. Applicability of the No-Blocking Rule to Devices

109. The 2010 no-blocking rule prohibited fixed broadband providers from blocking non-harmful end-user devices, and the rule we propose today would do the same. We seek comment on how this treatment of non-harmful devices fits into the Verizon court's interpretation of the rule. Should the

ability to attach non-harmful devices to broadband service be included among the reasonable end-user expectations listed above, or should we analyze non-harmful devices differently?

E. Codifying an Enforceable Rule to Protect the Open Internet That Is Not Common Carriage Per Se

110. Separate and distinct from the no-blocking rule, we believe that establishing an enforceable legal standard for broadband provider practices is necessary to preserve Internet openness, protect consumers, and promote competition. While the D.C. Circuit vacated the Commission's rule prohibiting "unreasonable discrimination" by fixed broadband providers on the theory that it "so limited broadband providers' control over edge providers' transmissions that [it] constitute[d] common carriage per se," the court underscored the validity of the "commercially reasonable" legal standard the Commission used in the data roaming context and the court upheld in Cellco.

111. Today, we tentatively conclude that the Commission should adopt a revised rule that, consistent with the court's decision, may permit broadband providers to engage in individualized practices, while prohibiting those broadband provider practices that threaten to harm Internet openness. Our proposed approach contains three essential elements: (1) an enforceable legal standard of conduct barring broadband provider practices that threaten to undermine Internet openness, providing certainty to network providers, end users, and edge providers alike, (2) clearly established factors that give additional guidance on the kind of conduct that is likely to violate the enforceable legal standard, and (3) encouragement of individualized negotiation and, if necessary, a mechanism to allow the Commission to evaluate challenged practices on a case-by-case basis, thereby providing flexibility in assessing whether a particular practice comports with the legal standard. We seek comment below on the design and justification of this rule.

112. Alternatively, we also seek comment on whether the Commission should adopt an alternative legal standard to govern broadband providers' practices. How can we ensure that our proposed rule sufficiently protects against harms to the open Internet? How would the rule we propose today change if the Commission were to rely on Title II (or other sources of legal authority) to adopt rules

to protect and promote Internet openness? We seek comment on how the goal of the proposed rule—to prevent those broadband provider practices that limit Internet openness—could best be achieved.

1. The 2010 No Unreasonable Discrimination Rule

113. 2010 Open Internet Order. The Commission adopted a no unreasonable discrimination rule to prevent fixed broadband providers from engaging in harmful conduct when transmitting lawful network traffic over a consumer's broadband Internet access service. The rule stated, "A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination." The antidiscrimination rule prohibited fixed broadband providers from unreasonably discriminating against network traffic subject to reasonable network management. Unlike the transparency and no-blocking rules the Commission adopted in 2010, the no unreasonable discrimination rule did not apply to mobile broadband Internet access service providers.

114. D.C. Circuit Opinion in Verizon v. FCC. The D.C. Circuit vacated the antidiscrimination rule because it found that the rule improperly relegated fixed broadband providers to common carrier status. This violated the statutory ban on common carrier treatment of information service providers because the Commission had classified broadband providers "not as providers of 'telecommunications services' but instead as providers of 'information services.'" The court disagreed with the Commission's interpretation to the contrary, finding that by compelling fixed broadband providers to serve all edge providers who provided content, services, and applications over the Internet without unreasonable discrimination, the rule compelled those providers to hold themselves out "to serve the public indiscriminately"—thus treating them as common carriers.

115. In making its determination, the court relied on its previous decision in Cellco, where it upheld the Commission's data roaming requirements against a common carrier challenge. The court suggested that had the Commission shown that the "no unreasonable discrimination" standard adopted in the Open Internet Order differed from the "nondiscrimination" standard applicable to common carriers,

the rule might have withstood judicial review similar to the data roaming rule at issue in Cellco. This is because the rule in Cellco "expressly permit[ted] providers to adapt roaming agreements to 'individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.'" The court went on to suggest that, unlike the data roaming rules at issue in Cellco, which listed specific factors to consider in a case-by-case determination of whether a data roaming provider's conduct and offerings were commercially reasonable based on the totality of the circumstances, the Open Internet Order did not attempt to "ensure that [the] reasonableness standard remains flexible." The D.C. Circuit suggested that a rule preventing certain types of conduct by broadband providers might be acceptable, given the manner in which the Commission has classified broadband providers, if the Commission articulated a discrete, flexible standard that prohibited practices that could reasonably be understood to harm Internet openness, while allowing individualized broadband provider practices, akin to the "commercially reasonable" standard adopted by the Commission in the data roaming context.

2. Proposed Elements of an Enforceable Legal Rule

a. Prohibiting Only Commercially Unreasonable Practices

116. Sound public policy requires that Internet openness be the touchstone of a new legal standard. Accordingly, we tentatively conclude that the Commission should adopt a rule requiring broadband providers to use "commercially reasonable" practices in the provision of broadband Internet access service. Our proposed approach is both more focused and more flexible than the vacated 2010 non-discrimination rule. It would prohibit as commercially unreasonable those broadband providers' practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects. At the same time, it could permit broadband providers to serve customers and carry traffic on an individually negotiated basis, "without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms," so long as such conduct is commercially reasonable. The D.C. Circuit explained that such an approach distinguished the data roaming rules at issue in Cellco from

common carrier obligations. We seek general comment on this approach, and more targeted comment below.

117. With respect to this approach in general, we tentatively conclude that it should operate separately from the no-blocking rule that we also propose to adopt. In other words, the presence or absence of the no-blocking rule would have no impact on the presence or absence of the "commercially reasonable" standard, and vice versa. This would mean that conduct acceptable under the no-blocking rule would still be subject to independent examination under the "commercially reasonable" standard. We seek comment on this approach.

118. The core purpose of the legal standard that we wish to adopt, whether the "commercially reasonable" standard or another legal formulation, is to effectively employ the authority that the Verizon court held was within the Commission's power under Section 706. In essence, the court upheld the Commission's judgment that (1) Section 706 grants substantive power to the Commission to take actions, including removing barriers to infrastructure investment and promoting competition in telecommunications markets, that will promote the deployment of broadband networks; (2) the Commission was within its authority to conclude that the "virtuous circle" can be adversely impacted by broadband network practices that, over the long term, depress end user demand, which then threatens broadband deployment; and (3) threats to the open Internet, such as limitations on users to access the content of their choice or speak their views freely, are therefore within the authority of the Commission to curb. In selecting a legal standard, the Commission not only wishes to avoid subjecting broadband networks to common carriage per se, it also wishes to choose a legal standard whose valid adoption renders unnecessary the adjudication of any question other than whether the adopted legal standard has been violated. This is the distinction between the authority to adopt a standard and its subsequent application. It is axiomatic that an as-applied challenge to a rule would invalidate an application of the rule, but the rule itself may otherwise remain broadly applicable. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985). Thus, assuming the rule is facially sustained by a reviewing court, the Commission would not be required to re-litigate its underlying determination that adoption of the rule will

promote deployment. 47 U.S.C. 1302(b). Because the commercially reasonable practices rule requires a determination that an entity did not act in a commercially reasonable manner, the inquiry is, then, not whether the Commission has authority to adopt the regulation, but whether the Commission may enforce the regulation in a particular set of circumstances. See Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1146 (10th Cir. 2007) (holding that an as-applied challenge is limited to testing "the application of [a regulation] to the facts of a plaintiff's concrete case"). For example, the D.C. Circuit determined that the Commission's data roaming rule—the legal standard adopted—was facially valid and within the Commission's authority, but that the application of that standard could still be subject to subsequent challenge. See Cellco, 700 F.3d at 548.

119. Are there alternative legal standards, whether in analogous contexts or otherwise identified by commenters, that the Commission should consider? Is there an existing standard that would serve a similar purpose to what we propose here and that would prevent the harms to Internet openness? If so, how, and if not, what would any differences be? Could the Commission modify its approach to "reasonable network management" in ways that would establish a more flexible legal standard that would not constitute common carriage per se? Commenters advocating alternative legal standards should explain why they are preferable, both in terms of the substantive requirements of the alternative standard (such as how they would address providers' conduct, offerings, and practices) and its implementation (such as whether and how it may permit individualized decision-making), and how they would protect an open Internet. And, as to the "commercially reasonable" standard or any other, we seek comment on whether there are sources of law or practice the Commission should rely upon in explaining the meaning and application of that standard.

120. We also seek comment on how a rule requiring broadband providers to engage in commercially reasonable practices with respect to delivery of traffic to and from end users should apply in circumstances in which no individualized negotiation occurs between the edge provider and the broadband provider. To cite just a few of many possible examples, consider a start-up VoIP service, a politically oriented website with an audience of fewer than 100 unique visitors per day, a social

networking application narrowly focused on a particular demographic, or peer-to-peer communications among individuals. Not all of those actors may seek to enter into a contract with a broadband provider; they may simply wish to reach its subscribers. We seek comment on the impact of this difference on the selection and/or application of the general legal standard.

121. As an alternative to our proposed approach, we seek comment on whether the Commission should adopt a different rule to govern broadband providers' practices to protect and promote Internet openness. As mentioned above, a number of parties have expressed concerns about the effect of pay-for-priority agreements on Internet openness. How can the Commission ensure that the rule it adopts sufficiently protects against harms to the open Internet, including broadband providers' incentives to disadvantage edge providers or classes of edge providers in ways that would harm Internet openness? Should the Commission adopt a rule that prohibits unreasonable discrimination and, if so, what legal authority and theories should we rely upon to do so? If the Commission ultimately adopts a Title II approach, how should the Commission define the rule in light of the requirements under Sections 201 and 202 of the Act?

b. Factors to Guide Application of the General Legal Standard

122. Similar to the Commission's approach in the data roaming context, we propose to identify factors the Commission can use to administer the proposed commercially reasonable practices standard. We recognize that there are significant differences between the open Internet and the data roaming contexts, including a broader range of open Internet practices at issue and a greater diversity of parties affected by such practices. Thus, while we look to our data roaming approach for guidance, we propose to develop factors specific to the open Internet context. These pre-defined factors would provide guidance to encourage commercially reasonable individualized practices and, if disputes arise, provide the basis for the Commission to evaluate whether, taking into account the totality of the circumstances on a case-by-case basis as discussed below, a particular practice satisfies the enforceable legal standard.

123. We seek comment on this approach and what factors the Commission should adopt to ensure commercially reasonable practices that will protect and promote Internet openness. We discuss

below several categories of factors, noting that there is considerable overlap between these categories, and that they are not mutually exclusive. As with the data roaming rule, we tentatively conclude that a review of the totality of the circumstances should be preserved through the creation of a "catch all" factor designed to ensure that rules can be applied evenly and fairly in response to changing circumstances and that all users have an Internet experience that affords them access to a minimum level of service sufficient to protect and promote an open Internet. Further, we seek comment on providers' experiences with the "commercially reasonable" practices standard in the data roaming context, and on how such experiences might inform our thinking as we develop the "commercially reasonable" practices standard for the open Internet.

124. Impact on Present and Future Competition. The Commission has previously observed that unfair competitive advantages can jeopardize innovation on the edge and impair otherwise lawful delivery of products and services. For that reason, we seek comment on how we should construct factors in applying the commercially reasonable legal standard to assess the impact of broadband provider practices on present and future competition. We understand this competition inquiry to extend beyond an application of antitrust principles to include, for example, the predicted impact of practices on future competition.

125. To what extent should such competition-oriented factors focus on market structure and the extent of competition in a given market? For example, should we consider factors that the Commission has used in case-by-case adjudications under Section 628(b) of the Act, which proscribes certain "unfair methods of competition" by cable operators and certain programming vendors? Are there other competition-oriented standards in other contexts (including those outside of telecommunications) that we should look to for guidance?

126. We propose that the competitive factors should also examine the extent of an entity's vertical integration and/or its relationships with affiliated entities. For example, broadband providers sometimes offer an affiliated streaming video service over their broadband network in competition with many other third-party broadband and edge providers' services. How can we ensure that competition is

not harmed in such situations? We note that the no-blocking rule as applied to mobile Internet access service specifically prohibits broadband providers from blocking "applications that compete with the provider's voice or video telephony services." And the Commission looked to a similar restriction to address harms raised by the Comcast-NBCU transaction. In light of such concerns, we propose to adopt a rebuttable presumption that a broadband provider's exclusive (or effectively exclusive) arrangement prioritizing service to an affiliate would be commercially unreasonable. We seek comment on this proposal.

127. More generally, we seek comment on the use of rebuttable presumptions as a tool to focus attention on the likely impacts of particular practices. What source or law, either within the Communications Act or in other statutes, would help us craft the creation and use of rebuttable presumptions? Are there particular rebuttable presumptions that should be used, for example, dealing with some or all forms of exclusive contracts, or particularized degradation of services?

128. How can the Commission ensure that parties are acting in a commercially reasonable manner without foreclosing the creation of pro-competitive opportunities through certain forms of price discrimination or exclusivity agreements? Should we develop factors modeled in part after those that the Commission uses in determining whether an exclusive contract between a vertically integrated cable operator and cable-programming vendor would serve the public interest? Should the Commission adopt a rebuttable presumption that broadband provider conduct that forecloses rivals (of the provider or its affiliates) from the competing marketplace is commercially unreasonable?

129. Impact on Consumers. In addition to the competitive factors, the Commission proposes to adopt factors to examine the extent to which broadband providers' practices could harm consumers. In the Open Internet Order, the Commission looked to, among other things, the extent of transparency and end-user control in assessing whether a practice is unreasonably discriminatory. We believe these factors would likewise be relevant to assessing whether a practice is commercially reasonable. What continued role does the existing or enhanced transparency rule have in ensuring that consumers are receiving correct information from broadband providers and not being misled?

130. We believe that consumers of broadband access service should have the ability to exercise meaningful choices. How can we factor consumer choice into our analysis of what is commercially reasonable? Should the Commission look for guidance to Section 628 of the Act, which makes it unlawful for cable operators and their affiliated satellite cable programming vendors to engage in "unfair or deceptive acts or practices" with certain purposes and effects?

131. Impact on Speech and Civic Engagement. The open Internet serves as a critical platform for speech and civic engagement. As noted above, the ability of citizens and content providers to use this open platform to communicate with one another and express their views to a wide audience at very low costs drives further Internet use, consumer demand, and broadband investment and deployment. We therefore propose to adopt a factor or factors in applying the commercially reasonable standard that assess the impact of broadband provider practices on free exercise of speech and civic engagement.

132. Technical Characteristics. We also propose to examine the relevant technical characteristics associated with broadband providers' practices. In the Data Roaming Order, 76 FR 26199 (June 6, 2011), for example, the Commission looked to the technical characteristics of the service at issue, including the technical feasibility of a requested service as well as the technical compatibility of providers' networks. We seek comment on how the Commission should consider such technical characteristics in assessing whether a broadband provider's practice is commercially reasonable. The application of the legal standard to satellite Internet access service presents one example. How should the Commission account for the technical differences between satellite and terrestrial broadband services when examining commercially reasonable behavior for satellite broadband providers?

133. "Good Faith" Negotiation. The Commission has imposed good faith negotiation requirements in a variety of contexts. For example, the Commission explicitly requires television broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent agreements in good faith. The Commission also mandated good faith negotiations for dealings between certain spectrum licensees. Would adopting a similar framework for evaluating negotiations between parties in the open Internet context serve the public interest, convenience, and necessity? How

should such a "good faith" test be applied where parties do not seek to enter into contractual relationships with each other?

134. Industry Practices. How, if at all, should the fact that conduct is an industry practice impact the application of the "commercially reasonable" rule? What should be treated as an "industry practice"? For example, should that term be limited to express standards adopted by standards-setting organizations or similar entities? If so, should the make-up or processes used by such a standards-setting organization be considered? If not, how should the existence of an "industry practice" be effectively established for purposes of the application of the "commercially reasonable" rule, and how should the Commission best evaluate potential harms to competition arising from coordinated conduct in a market with a limited number of participants?

135. Other Factors. We seek comment on any additional factors the Commission should consider in assessing whether a particular practice or set of practices by a broadband provider is commercially reasonable, given the importance of preventing harms to an open Internet. Are there other factors that the Commission adopted in the Data Roaming Order that we should incorporate here? How can the Commission best include a factor to capture special or extenuating circumstances to ensure that it can take into account the totality of the circumstances, particularly given the rapid evolution of the Internet marketplace and technology?

c. Case-by-Case Evaluations for Commercial Reasonableness

136. As discussed, we tentatively conclude that we will adopt a case-by-case approach, considering the totality of the circumstances, when analyzing whether conduct satisfies the proposed commercially reasonable legal standard, or another legal standard ultimately adopted. We believe that, in conjunction with the factors listed above, this approach will provide the advantage of certainty and guidance to broadband providers and edge providers—particularly smaller entities that might lack experience dealing with broadband providers—while also allowing parties flexibility in their individualized dealings. We seek comment on whether there is another avenue or mechanism we should use when evaluating commercial reasonableness.

3. Potential Conduct That Is Per Se Commercially Unreasonable

137. In Southwestern Cable, the Supreme Court concluded that a Commission requirement that cable systems carry local broadcast signals did not constitute common carriage even though the Commission's rule applied to all cable systems in defined circumstances. As the Supreme Court later noted, that holding "was limited to remedying a specific perceived evil [that] did not amount to a duty to hold out facilities indifferently for public use." In Verizon, the D.C. Circuit likewise explained that the Southwestern Cable regulation "imposed no obligation on cable operators to hold their facilities open to the public generally, but only to certain broadcasters if and when cable operators acted in ways that might harm those broadcasters." Thus, consistent with Supreme Court precedent and the Verizon decision, the Commission may be able to identify specific practices that do not satisfy the commercially reasonable legal standard. For example, we note that the data roaming rule upheld by the D.C. Circuit's Cellco decision states that "[c]onduct that unreasonably restrains trade . . . is not commercially reasonable." Similarly, the Commission recently concluded that certain joint activities between certain television stations, which are not regulated as common carriers, in the negotiation of retransmission consent fees are a per se violation of the requirement of "good faith" negotiation. Are there any practices that, consistent with the Verizon court's reasoning, could be viewed as per se commercially unreasonable?

138. Some have suggested that the Commission go even beyond the requirements of the Open Internet Order to impose flat bans on pay-for-priority service. We seek comment on these suggestions, including whether all pay-for-priority practices, or some of them, could be treated as per se violations of the commercially reasonable standard or under any other standard based on any source of legal authority. We emphasize that Section 706 could not be used to reach some conduct under this judicially recognized approach to circumvent the principle that the proposed rules will not, in any circumstances, constitute common carriage per se. If the Commission were to ultimately rely on a source of authority other than Section 706 to adopt a legal standard for broadband provider practices, such as Title II, we seek comment on whether and, if so, how we should prohibit all, or some, pay-for-priority arrangements, consistent with our authority, to protect and promote Internet openness.

4. Potential Safe Harbors

139. Similar to the approach of identifying practices ex ante that would not satisfy the commercially reasonable legal standard, the Commission may be able to identify specific services that would be treated separately from the application of the commercially reasonable legal standard. We seek comment on this approach and how the services below should be considered under such an approach.

140. Application to Mobile Broadband. The Commission chose not to apply its no unreasonable discrimination rule to mobile broadband providers in 2010 based on considerations including the rapidly evolving nature of mobile technologies, the increased amount of consumer choice in mobile broadband services, and operational constraints that put greater pressure on the concept of reasonable network management for mobile broadband services. We have tentatively concluded that we will continue that approach in the proposed rules. Alternatively, should the Commission account for different characteristics of mobile service as a factor in its application of the commercially reasonable standard, subject to mobile providers' reasonable network management? How would maintaining our previous approach for mobile broadband affect end users across different demographic groups, including end users who rely solely on mobile broadband for Internet access?

141. Non-exclusive, non-affiliated agreements. AT&T has suggested that the Commission exclude from its review of particular practices any agreement between a broadband provider and an edge provider if the agreement is not exclusive and if the edge provider is not an affiliate of the broadband provider. AT&T explains that subjecting broadband providers to case-by-case scrutiny in such cases "would unnecessarily impede efficient and pro-consumer arms-length commercial dealings." We seek comment on whether this approach should be adopted to limit the scope of the commercially reasonable standard and whether it could be made consistent with the protections afforded by the rule.

F. Legal Authority

142. In this NPRM, we propose to adopt rules to protect and promote the open Internet. For the reasons set forth below, we believe we have ample authority to do so. We propose that the

Commission exercise its authority under Section 706, consistent with the D.C. Circuit's opinion in Verizon v. FCC, to adopt our proposed rules. We also seek comment on the nature and the extent of the Commission's authority to adopt open Internet rules relying on Title II, and other possible sources of authority, including Title III. Additionally, we seek comment on the Commission's authority under any of the legal theories discussed below to address any transition or implementation issues associated with any open Internet rules adopted in this proceeding, such as the effect on existing agreements.

1. Section 706

143. We seek comment on our authority under Section 706. 47 U.S.C. 1301 et seq. We interpret Sections 706(a) and (b) as independent and overlapping grants of authority that give the Commission the flexibility to encourage deployment of broadband Internet access service through a variety of regulatory methods, including removal of barriers to infrastructure investment and promoting competition in the telecommunications market, and, in the case of Section 706(b), giving the Commission the authority to act swiftly when it makes a negative finding of adequate deployment. The rules we propose today would be authorized by Sections 706(a) and (b) because they would "encourage the deployment" of advanced telecommunications capability by promoting competition in the telecommunications market and removing barriers to infrastructure investment. We also seek comment on the relevant differences between Sections 706(a) and (b) and how, if at all, those differences should impact our exercise of authority here. There are significant differences between the authorities granted in each provision. For example, while both Section 706(a) and (b) permit the Commission to enact measures that promote competition in the telecommunications market, Section 706(b) permits the Commission to act by promoting competition in the "telecommunications market" while Section 706(a) limits the Commission to promoting competition in the "local telecommunications market." Also, while Section 706(a) gives the Commission general authority to encourage the deployment of broadband regardless of findings under Section 706(b), Section 706(b) gives the Commission authority to take "immediate action."

144. To the extent that we rely on our authority under Section 706(b), we seek comment on how we should treat the existence of and the findings in the Commission's Broadband Progress Reports for the purposes of this proceeding. Could and should the Commission incorporate findings that satisfy Section 706(b) in this proceeding? Finally, we seek comment on the extent to which the disparity between metropolitan areas and rural deployment of broadband or within metropolitan areas should impact our conclusions as to whether advanced telecommunications capability is being reasonably and timely deployed.

145. We also seek comment on how to construe the specific terms and definitions in Section 706. For example, "advanced telecommunications capability" is defined "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." It is clear that broadband Internet access service is such "advanced telecommunications capability," but we also seek comment on what other broadband-enabled services may fall within the definition of "advanced telecommunications capability." Should the Commission interpret the term "advanced telecommunications capability" to require that certain practices accompany a broadband provider's deployment to ensure that end users receive "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications?" In addition, we note that Congress did not define "deployment." We believe Congress intended this term to be construed broadly, and thus, consistent with precedent, we have interpreted it to include the extension of networks as well as the extension of the capabilities and capacities of those networks.

146. In Section 230(b) of the Communications Act, Congress also set forth statutory "polic[ies] of the United States": to "promote the continued development of the Internet," to promote "technologies which maximize user control over what information is received" over the Internet, and to "preserve the vibrant and competitive free market that presently exists for the Internet, unfettered by Federal or State regulation." We continue to believe the Commission's interpretation of Section 706 is

bolstered by these congressional policies. We seek comment on how the Commission should read Section 230(b) in exercising its Section 706 authority.

147. We also seek comment generally on how the court's decision in Verizon v. FCC should inform our exercise of legal authority. The D.C. Circuit upheld the Commission's interpretation of its authority under Section 706, concluding that the factual predicate that the Commission had laid justifying its regulations was reasonable and that such a factual predicate was reasonably linked to the Commission's exercise of authority. However, because the court determined that the Commission's no-blocking and anti-discrimination rules impermissibly regulated broadband providers as common carriers, the court vacated those rules, and remanded for further proceedings consistent with the opinion. We seek comment generally on how the court's Verizon decision should impact our exercise of authority here. Are there principles raised in Judge Silberman's separate opinion concurring in part and dissenting in part that are relevant to our exercise of authority as to the new rules proposed, or upon which we otherwise seek comment, here?

2. Title II

148. We seek comment on whether the Commission should rely on its authority under Title II of the Communications Act, including both (1) whether we should revisit the Commission's classification of broadband Internet access service as an information service and (2) whether we should separately identify and classify as a telecommunications service a service that "broadband providers . . . furnish to edge providers." For either of these possibilities, we seek comment on whether and how the Commission should exercise its authority under Section 10 (or Section 332(c)(1) for mobile services) to forbear from specific obligations under the Act and Commission rules that would flow from the classification of a service as telecommunications service.

149. Title II—Revisiting the Classification of Broadband Internet Access Service. In a series of decisions beginning in 2002, the Commission has classified broadband Internet access service offered over cable modem, DSL and other wireline facilities, wireless facilities, and power lines as an information service, which is not subject to Title II and cannot be regulated as common carrier service. In 2010,

following the D.C. Circuit's Comcast decision, the Commission issued a Notice of Inquiry (2010 NOI) that, among other things, asked whether the Commission should revisit these decisions and classify a telecommunications component service of wired broadband Internet access service as a "telecommunications service." Specifically, the Commission sought comment on whether to classify as a telecommunications service "Internet connectivity," which it defined as "the functions that 'enable [end users] to transmit data communications to and from the rest of the Internet.'" The docket opened by the 2010 NOI remains open. To ensure that it remains current, we hereby direct the Wireline Competition Bureau to issue a public notice to refresh the record in that proceeding including the inquiries contained herein. The Commission also asked whether it should similarly alter its approach to wireless broadband Internet access service, noting that Section 332 requires that wireless services that meet the definition of "commercial mobile service" be regulated as common carriers under Title II. In response, the Commission received substantial comments on these issues. We now seek further and updated comment on whether the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service (or components thereof). How would such a reclassification approach serve our goal to protect and promote Internet openness? What would be the legal bases and theories for particular open Internet rules adopted pursuant to such an approach? Would reclassification and applying Title II for the purpose of protecting and promoting Internet openness impact the Commission's overall policy goals and, if so, how?

150. What factors should the Commission keep in mind as it considers whether to revisit its prior decisions? Have there been changes to the broadband marketplace that should lead us to reconsider our prior classification decisions? To what extent is any telecommunications component of that service integrated with applications and other offerings, such that they are "inextricably intertwined" with the underlying connectivity service? Is broadband Internet access service (or any telecommunications component thereof) held out "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public?" If not, should the Commission compel the offering of such functionality on a common carrier basis even if not offered as such? For mobile broadband Internet

access service, does that service fit within the definition of "commercial mobile service"? We also note that on May 14, 2014, Representative Henry Waxman, Ranking Member of the Committee on Energy and Commerce of the U.S. House of Representatives, sent a letter to Chairman Wheeler proposing an approach to protecting the open Internet whereby the Commission would proceed under Section 706 but use Title II as a "backstop authority." We seek comment on the viability of that approach.

151. Title II—Classification of the Broadband Providers' Service to Edge Providers. Separate from the reclassification of "broadband Internet access service," we seek comment on how the Commission should consider broadband providers' service to edge providers and whether that service (or some portion of it) is subject to Title II regulation. As mentioned above, in Verizon, the D.C. Circuit stated that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers.'" We understand such service to include the flow of Internet traffic on the broadband providers' own network, and not how it gets to the broadband providers' networks. The Commission in the Open Internet Order understood the 2010 rules to regulate "broadband Internet access service," which the Commission classified as an information service. That service, however, is by definition a "mass-market retail service" providing the capability to send and receive data from "all Internet end points." Does the "service" contemplated by the court between broadband providers and edge providers fit that definition? We seek comment on whether and, if so how, the Commission should separately identify and classify a broadband service that is furnished by broadband providers' to edge providers in order to protect and promote Internet openness.

152. Some have made proposals suggesting that the Commission could apply Title II to such services to achieve our open Internet objectives. For example, on May 5, 2014, Mozilla filed a petition requesting that the Commission (1) recognize remote delivery services in terminating access networks; (2) classify these services as "telecommunications services" under Title II of the Act; and (3) forbear from any "inapplicable or undesirable provisions of Title II" for such services. Mozilla states that, unlike the end-user facing broadband services the Commission has classified as information services, the Commission has not classified the service that broadband Internet providers to remote endpoints,

particularly to entities not in privity with the broadband provider. These services, Mozilla argues, can and should be classified as telecommunications services, subject to whatever Title II regulations the Commission deems appropriate. Similarly, academics from Columbia University have submitted an alternate proposal to classify Internet-facing services that a broadband provider offers. This theory would split broadband Internet access service into two components: first, the subscriber's "request [for] data from a third-party provider; and second, the content provider's response to the subscriber." The proposal would classify the latter "sender-side" traffic, sent in response to a broadband provider's customer's request as a telecommunications service, subject to Title II. According to the proposal, this is a stand-alone offer of telecommunications—transmission between points specified by the end-user. We seek comment on these proposals and other suggestions for how the Commission could identify and classify such services and apply Title II to achieve our goals of protecting and promoting Internet openness.

153. Title II—Forbearance. If the Commission were to reclassify broadband Internet access service as described above or classify a separate broadband service provided to edge providers as a "telecommunications service," such a service would then be subject to all of the requirements of the Act and Commission rules that would flow from the classification of a service as a telecommunications service or common carrier service. Should the Commission take such an approach, we seek comment on the extent to which forbearance from certain provisions of the Act or our rules would be justified in order to strike the right balance between minimizing the regulatory burden on providers and ensuring that the public interest is served. For mobile broadband services, we seek comment on whether and how the Commission should apply Section 332(c)(1) in addition to Section 10 forbearance.

154. In the 2010 NOI, the Commission contemplated that, if it were to classify the Internet connectivity component of broadband Internet access service, it would forbear from applying all but a handful of core statutory provisions—Sections 201, 202, 208, and 254—to the service. In addition, the Commission identified Sections 222 and 255 as provisions that could be excluded from forbearance, noting that they have "attracted longstanding and broad support in the broadband context." We received considerable comment in that proceeding and seek further and updated comment. Commenters should list

and explain which provisions should be exempt from forbearance and which should receive it in order to protect and promote Internet openness. Commenters should also detail which services should receive forbearance, list the provisions from which they believe the Commission should forbear, and provide justification for the forbearance. Commenters should also define the relevant geographic and product markets in which the services or providers should receive forbearance.

155. For mobile broadband services, we also seek comment on the extent to which forbearance should apply, if the Commission were to classify mobile broadband Internet access service as a CMRS service subject to Title II. The 2010 NOI also asked whether the Commission could and should apply Section 332(c)(1) as well as Section 10 in its forbearance analysis for mobile services. We received considerable comment in that proceeding and seek further and updated comment here.

3. Other Sources of Authority

156. Title III. We further seek comment on the Commission's authority to adopt open Internet rules for mobile broadband services under Title III of the Communications Act. The Supreme Court has found that Title III endows the Commission with "expansive powers" and a "comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest.'" Section 303 of the Act, in particular, authorizes the Commission to exercise its authority as "the public interest, convenience, and necessity requires" to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class," and to establish obligations, not inconsistent with law, as may be necessary to carry out the provisions of the Act. It further directs the Commission to "generally encourage the larger and more effective use of radio in the public interest." Likewise, Section 316 of the Act authorizes the Commission to adopt "new conditions on existing licensees" when taking such action will "promote the public interest, convenience, and necessity." The Commission may exercise this authority on a license-by-license basis or through a rulemaking, even if the affected licenses were awarded at auction.

157. We find that these provisions provide authority for the Commission to adopt open Internet rules for mobile broadband service providers. Particularly, we find that it is within our authority

to "prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class," consistent with what the "public interest, convenience, and necessity requires" to apply open Internet rules to mobile broadband service providers. We seek comment on this interpretation of our Title III authority.

158. Other Sources of Authority. We seek comment on other sources of authority that the Commission may utilize to underpin the adoption of these rules. For example, the Open Internet Order delineated a number of arguments for authority under a variety of statutory provisions. We also seek comment on the theory that the Commission may underpin open Internet rules by using its discretion to define the scope of common carriage. In addition, we seek comment on the Commission's authority to adopt rules under the World Trade Organization's Basic Agreement on Trade in Telecommunications. We seek comment on the efficacy of those, and other justifications for the rules we propose adopting here.

4. Constitutional Considerations

159. Finally we seek comment on other legal limitations and barriers to adoption of the rules we propose today, including First Amendment and Due Process considerations. In the Open Internet Order, the Commission concluded that "broadband providers typically are best described not as 'speakers,' but rather as conduits for speech," and that the open Internet rules therefore did not implicate broadband providers' First Amendment rights. The Commission also found that even if the rules "did implicate expressive activity, they would not violate the First Amendment" because they would advance an important government interest—"ensur[ing] the public's access to a multiplicity of information sources and maximiz[ing] the Internet's potential to further the public interest"—without burdening "'substantially more speech than is necessary.'" We seek comment on these findings. We do not anticipate constitutional, statutory, or other legal barriers to adopting the rules we propose today, but we nonetheless seek comment on these matters. Are there modifications we could make to the proposals we make today that would avoid constitutional questions?

G. Other Laws and Considerations

160. The Open Internet Order provided that the open Internet rules did not alter broadband providers' rights or obligations with respect to other laws or safety and security considerations. The Commission further established that the rules did not prohibit broadband providers from making reasonable efforts to address transfers of unlawful content and unlawful transfers of content. We tentatively conclude that this continues to be the correct approach in light of the rules proposed in today's NPRM. We therefore propose to retain these regulations without modification. We seek comment on this tentative conclusion.

H. Enforcement and Dispute Resolution

1. Background

161. The Open Internet Order allowed parties to file informal complaints pursuant to Section 1.41 of the Commission's rules and promulgated a set of formal complaint rules. The formal complaint rules give the Commission flexibility to shift the burden of proof or production where appropriate and to structure and streamline the process to the extent possible. Due to the technical nature of potential disputes, however, the Open Internet Order stressed the importance of direct negotiations and consultation with independent technical bodies in hope that parties would be able to resolve disputes before availing themselves of the complaint processes. Thus, the policy of the Commission has been to encourage the filing of informal, rather than formal, complaints, and thus it was not surprising that the Commission did not receive any formal complaints following the adoption of the Open Internet Order. As noted above, the Commission has received many informal complaints from consumers alleging violations of the Open Internet Order. In addition, the Commission takes notice of public commentary and events, which may lead the Enforcement Bureau to initiate its own investigation. We seek comment on the efficiency and functionality of the complaint processes adopted in, and used pursuant to, the Open Internet Order.

2. Designing an Effective Enforcement Process

162. The Verizon decision and our earlier data roaming rules provide a blueprint for the creation of a dispute resolution process to govern the rules we propose today to protect and promote the open Internet. Of course, there are significant potential differences between the data roaming and open Internet environments. For example, in Cellco, the D.C. Circuit considered a circumstance in which an identified party, a wireless carrier, would desire to enter into a business arrangement with another identified party, another wireless carrier. The rule at issue was designed to create circumstances that both incented individualized bargaining and, in specific circumstances, curbed the limits of such negotiation where necessary to serve the public interest. A similar circumstance could arise in the open Internet context, if for example, an app developer wished to enter into a contractual arrangement with a broadband provider. But it is just as possible that the entity that feels aggrieved by an alleged violation of an open Internet rule does not seek a direct contractual relationship with a broadband provider. That could arise, for example, if a website is blocked or if an edge provider feels that it is being harmed by differential treatment afforded by a broadband provider to its own affiliate. For this reason, the dispute resolution mechanism adopted by the Commission to enforce our proposed open Internet rules should be designed to operate between parties that do not necessarily desire to enter into a binding agreement.

163. We tentatively conclude that an effective institutional design for the rules proposed in today's NPRM must include at least three elements. First, there must be a mechanism to provide legal certainty, so that broadband providers, end users and edge providers alike can better plan their activities in light of clear Commission guidance. Second, there must be flexibility to consider the totality of the facts in an environment of dynamic innovation. Third, there must be effective access to dispute resolutions by end users and edge providers alike. We seek comment on these elements. Are there others that should be considered? Should any be eliminated? What forms of dispute resolution would be the best strategy to implement "data-driven decision-making"?

164. We believe we have ample legal authority to design an effective enforcement and dispute resolution process, whether the Commission ultimately relies on Section 706, Title II, or another source

of legal authority. We seek comment on whether and how, if at all, the source of the Commission's legal authority would affect our dispute resolution and enforcement proposals.

a. Legal Certainty

165. The Commission has a responsibility to provide certainty, guidance, and predictability to the marketplace as we protect and promote the open Internet. The most important form of guidance is, of course, the adoption by the Commission of a particular legal standard in the forthcoming rulemaking. As with the "commercially reasonable" standard employed in our data roaming rule, the purpose of such a legal standard is allow broadband providers, end users, and edge providers to measure broadband-provider conduct against a known rule of law, both prospectively and retroactively. Under the existing rules, formal complaints would also result in Commission orders that would both decide a specific complaint and provide useful guidance on the application of our proposed open Internet rules—particularly in those cases where the adjudicated set of facts is representative of a larger industry practice. What other forms of guidance would be helpful? For example, is there value in establishing a business-review-letter approach similar to that of the Antitrust Division of the Department of Justice, whereby entities concerned about certain practices under the new rules may ask the Commission for a statement of its current enforcement intentions with respect to that conduct and by which the Commission would publish both the request for review and its response? If adopted, would it make sense to have such a prospective review process be administered jointly by the Enforcement Bureau and the Office of General Counsel, or should such prospective reviews be considered by the full Commission? Should such guidance be binding or non-binding? How might petitions for declaratory ruling be helpful?

166. Non-Binding Staff Opinions. Are there other mechanisms by which the Commission can provide guidance before broadband providers initiate practices that are within the scope of the open Internet rules? For example, the Commission could designate certain staff to offer parties non-binding views on the likelihood that a particular practice by a broadband provider is commercially reasonable or commercially unreasonable (assuming that were the applicable legal standard ultimately adopted). The Commission has some experience with this non-binding, advisory approach to interpretation of its rules.

While this type of informal guidance from staff is not binding, it may provide parties with helpful information as they consider whether and how to resolve a dispute privately and outside of the complaint process. Should we establish a similar process for helping parties anticipate issues or resolve disputes that might arise under our proposed open Internet rules? If so, should the non-binding guidance be made public in any way, or should it provide a confidential basis for early consultation? We emphasize that these sorts of non-binding processes would always be in addition to, and not in lieu of, the right of parties to seek binding determinations from the Commission through the formal or informal complaint process, declaratory rulings, or other mechanisms we adopt to resolve disputes and allegations of violations of our open Internet rules.

167. Enforcement Advisories. Another type of guidance can come in the form of enforcement advisories. For example, the Enforcement Bureau and the Office of General Counsel issued an enforcement advisory in 2011, providing additional insight into the application of the transparency rule. Is it helpful to have these bureaus issue such advisories periodically where issues of potential general application come to, or are brought to, their attention? Should such enforcement advisories be considered binding policy of the Commission, or merely a recitation of staff views?

b. Flexibility

168. Our process for promoting and protecting Internet openness through the rules we propose today must be flexible enough to account for the totality of circumstances, including Internet evolution and innovation from all sources over time. In the Open Internet Order, the Commission stated that it would make certain determinations on a case-by-case basis. The Commission also stated in the Data Roaming Order that it would determine whether the terms and conditions of a proffered data roaming arrangement were commercially reasonable on a case-by-case basis, taking into consideration the totality of the circumstances. Based on the Commission's precedent in using this decision-making process, we tentatively conclude that we will adopt a similar case-by-case analysis and consider the totality of the circumstances to consider alleged violations of our proposed open Internet rules. Such an approach would, for example, allow the Commission to consider any sources of innovation when analyzing

whether conduct meets the legal standard ultimately adopted by the Commission. Moreover, this approach helps to ensure that, as new circumstances exist, the Commission and interested parties will be advantaged by a culture of learning that, drawing on the strengths of common-law reasoning, reflects the experiences of the present, as well as the logic of the past. We seek comment on whether the combination of a certain legal standard and a case-by-case approach provides the best means of both providing guidance and cabining administrative discretion, while ensuring that a system of dispute resolution is both focused on facts and founded on the strengths of common-law reasoning.

169. Fact Finding Processes. In implementing either an informal or formal complaint process, how should the Commission structure its fact-finding processes? What level of evidence should be required in order to bring a claim? Are there other circumstances where initial pleading standards or burdens of production should be either higher or lower? In general, what is the showing required for the burden of production shift from the party bringing the claim to the other party in a dispute? Should interim relief be available? Should the process permit parties to seek expedited treatment of claims and, if so, under what circumstances?

c. Effective Access to Dispute Resolution

170. To be effective in protecting and promoting Internet openness, the process for enforcing the rules we propose today must be accessible to a diverse array of affected parties. As noted above, the Open Internet Order contemplated informal and formal complaints but did not include any alternative mechanisms for either providing guidance beforehand or resolution in the wake of a challenge to an existing practice. But, as also noted above, the rules proposed in today's NPRM will operate in an environment in which a complaining party may not have sought, or may not even want, to enter into a contractual arrangement with a broadband provider. Moreover, the ability of edge providers to effectively access a dispute resolution is important to the administrative effectiveness of any legal regime that the Commission might adopt. To what extent should the structure of edge provider market segments impact the kind of regime that the Commission adopts? For example, although 17 broadband access providers accounted for about 93 percent of U.S. retail subscribers in 2013, near the end of that year there were

almost 900 app developers that each served more than one million active users globally. And app developers as a group may be quite a bit smaller than broadband providers; one estimate in 2013 calculated that 65 percent of app developers garner less than $35,000 per year. Moreover, individuals are themselves quite capable of serving as edge providers, for example aspiring musicians who upload videos to sites such as YouTube.

171. How can a dispute resolution system be best structured to account for individuals and small businesses that may not have the same legal resources and effective access to the Commission as broadband providers? We propose to create an ombudsperson whose duty will be to act as a watchdog to protect and promote the interests of edge providers, especially smaller entities. Should initial pleading or procedural requirements be adopted that make access to Commission processes by individuals or small businesses less cumbersome?

3. Complaint Processes, Enforcement, and Additional Forms of Dispute Resolution

172. Complaint Processes. We tentatively conclude that the same three means by which the Commission focused on potential open Internet violations after the adoption of the Open Internet Order, namely self-initiated investigation, informal complaints, and formal complaints, should be used as well to enforce any new open Internet rules. We seek comment on this tentative conclusion. Are there ways we can improve our informal complaint process to make it easier to access and more effective, especially for consumers and small businesses with limited resources? For example, should the Commission create a separate Open Internet complaint category for consumers filing informal complaints under the open Internet rules? Should the Commission permit individuals to report possible noncompliance with our Open Internet rules anonymously or take other steps to protect the identity of individuals who may be concerned about retaliation for raising concerns?

173. Enforcement. We tentatively conclude that enforcement of the transparency rule and any enhanced transparency rule that is adopted in this proceeding should proceed under the same dispute mechanisms that will apply to the proposed no-blocking rule and the legal standard for provider practices

ultimately adopted by the Commission. We also tentatively conclude that violations of the rules would be subject to forfeiture penalties, as appropriate, under the Act. We seek comment on these tentative conclusions.

174. Additional Forms of Dispute Resolution—Alternative Dispute Resolution. In addition to the Commission processes noted above to provide guidance, flexibility, and access, we seek comment on whether additional dispute resolutions should be adopted. Should we adopt measures to require or encourage disputes over the legality of broadband provider practices to be resolved through alternative dispute resolution processes, such as arbitration? Would such an approach be sufficiently accessible to smaller edge providers, or would a different dispute resolution process be more appropriate? Are there any legal considerations, limitations, or concerns that the Commission should consider with adopting an alternative dispute resolution procedure, including arbitration or mediation by a third party? For example, under the Alternative Dispute Resolution Act, an agency "may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit." 5 U.S.C. 575(a)(3). We note, however, that this restriction does not prevent the Commission from requiring parties to submit to third-party arbitration so long as the arbitration is subject to de novo review by the Commission. We note that under our informal dispute resolution procedures, Commission staff can mediate disputes if parties voluntarily request such a process. During such mediations, for instance, the staff may ask parties to submit their best offers to facilitate negotiations. We also can adopt specific rules to determine appropriate remedies and rapid resolution of formal complaints, including a requirement that parties provide their best and final offers to help Commission staff determine an appropriate remedy if a violation of the rule is found. We seek comment on the benefits and costs of such an approach in this context.

175. Additional Forms of Dispute Resolution—Multistakeholder Processes. We also seek comment on whether a multistakeholder approach to the enforcement of our proposed open Internet rules would work in this context, in whole or in part. For example, should the Commission provide an initial forum for discussion and thereafter encourage stakeholders, should they so choose, to independently develop standards that they consider to meet the governing legal standards? Such standards might then be

shared with the Commission for consideration, or the stakeholders might publicize their proposed standards and encourage industry to use them as best practices. If the Commission employed a model similar to that of NTIA's multistakeholder privacy process, are there lessons we can learn from that experience? How can a multistakeholder process best further the goals of providing guidance, flexibility, and access?

176. Additional Forms of Dispute Resolution—Technical Advisory Groups. We also seek comment on whether and how the Commission should incorporate the expertise of technical advisory groups into a new open Internet framework in a manner that could serve the goals of providing guidance, flexibility and access. For example, should we invite the Open Internet Advisory Committee (OIAC), the Broadband Internet Technical Advisory Group (BITAG), the Internet Engineering Task Force (IETF), or the North American Network Operators Group (NANOG) to recommend to the Commission or public more generally industry best practices or other codes of conduct that would either serve as presumptive safe harbors and/or help determine whether a broadband provider is in compliance with our open Internet rules? Or, rather than asking industry groups and other interested parties to play a role ex ante, should the Commission instead ask them generally, or specific groups in particular, to weigh in on specific disputes once they are brought to the Commission's attention? We seek comment generally on how the inclusion of advisory groups might strengthen the open Internet framework and reduce the burdens of compliance. Similarly, we seek comment on the potential value of allowing providers to opt into voluntary codes of conduct or other suggested best practices that may serve as presumptive safe harbors.

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

177. This document contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see

44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

B. Initial Regulatory Flexibility Analysis

178. As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this NPRM, of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM indicated on the first page of this document. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

C. Ex Parte Rules

179. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of

electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

D. Contact Person

180. For further information about this rulemaking proceeding, please contact Kristine Fargotstein, Competition Policy Division, Wireline Competition Bureau, at (202) 418-2774.

V. ORDERING CLAUSES

181. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 4(i)-(j), 303 and 316 of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 152, 154(i)-(j), 303, 316, 1302, that this Notice of Proposed Rulemaking IS ADOPTED.

182. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM). The Commission requests written public comment on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration

(SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.

A. Need for, and Objectives of, the Proposed Rules

2. With this NPRM, the Commission is directly responding to the remand by the U.S. Court of Appeals for the D.C. Circuit in Verizon v. FCC of portions of the Commission's 2010 Open Internet Order and proposing enforceable rules to protect and promote the open Internet. The NPRM seeks comment on a variety of issues relating to the Commission's stated objective of protecting and promoting an open Internet. The Internet's openness promotes innovation, investment, competition, free expression and other national broadband goals. It is also critical to the Internet's ability to serve as a platform for speech and civic engagement and can help close the digital divide by facilitating the development of diverse content, applications, and services. The Commission has specifically found that the Internet's openness enables a "virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses." However, as the Commission has previously found, broadband providers have both the incentive and ability to limit Internet openness. As discussed in the NPRM, the Commission is seeking comment on proposed open Internet rules that will protect against the harms identified in the 2010 Open Internet Order, while fostering all sources of innovation on the collection of networks known as the Internet. The NPRM asks for comment in a variety of specific areas and sets forth proposals in the following six key areas: scope of the proposed rules, enhancement of the existing transparency rule, a no-blocking rule, an enforceable rule designed to protect the open Internet that is not per se common carriage, the best source of legal authority for protection of Internet openness and an enforcement and dispute resolution process.

3. First, the NPRM proposes to retain the same definitions and scope as the 2010 rules. The NPRM seeks comment, however, on whether the Commission should change the scope of the proposed rules as applied to the following: specifically identified services, enterprise services, Internet traffic exchange, specialized services, and mobile services. The NPRM also proposes to interpret "reasonable

network management" under the same framework adopted in the 2010 Open Internet Order and seeks comment on developing the scope of "reasonable network management" on a case-by-case basis under the proposed rules.

4. Second, the NPRM proposes enhancements to the Commission's existing transparency rule, which was upheld by the D.C. Circuit. The NPRM seeks comment on whether disclosures of broadband providers' network management practices, performance, and terms and conditions that are specifically tailored to the needs of affected parties would better ensure that consumers, edge providers, and the Internet community at large have the information they need to understand the services they are receiving and to monitor practices that could undermine the open Internet than the existing rule The NPRM seeks comment on the burdens of enhanced transparency on broadband providers and specifically asks if there are ways to minimize these potential costs and burdens.

5. Third, the NPRM proposes adopting the text of the no-blocking rule from the 2010 Open Internet Order, with a revised rationale, in order to ensure that all end users and edge providers can enjoy the use of robust, fast and dynamic Internet access. To address the ongoing concerns with the harmful effects that blocking of Internet traffic would have on Internet openness and to competition in adjacent markets, the NPRM seeks comment on a draft no-blocking rule that would allow individualized bargaining above a minimum level of access to a broadband provider's subscribers, which the D.C. Circuit suggested would be permissible and take the rule out of the realm of common carriage regulation. The NPRM proposes a variety of ways to establish a minimum level of access under the proposed no-blocking rule and seeks comment on those interpretations. Alternatively, the NPRM seeks comment on whether the Commission should adopt a no-blocking rule that either itself prohibits broadband providers from entering into priority agreements with edge providers or acts in combination with a separate rule prohibiting such conduct. Additionally, consistent with the 2010 Open Internet Order, the NPRM proposes to apply the proposed no-blocking rule differently to mobile broadband providers than to fixed broadband providers and seeks comment on that approach.

6. Fourth, where conduct would otherwise be permissible under the no-blocking rule, the NPRM proposes a separate rule that requires broadband providers to adhere to an enforceable legal standard of commercially reasonable practices. The NPRM tentatively concludes that the Commission should adopt a revised rule that, consistent with the court's decision, may permit broadband providers to engage in individualized practices, while prohibiting those broadband provider practices that threaten to harm Internet openness. The Commission's proposed approach contains three essential elements: (1) an enforceable legal standard of conduct barring broadband provider practices that threaten to undermine Internet openness, providing certainty to network providers, end users, and edge providers alike, (2) clearly established factors that give additional guidance on the kind of conduct that is likely to violate the enforceable legal standard, and (3) encouragement of individualized negotiation and, if necessary, a mechanism to allow the Commission to evaluate challenged practices on a case-by-case basis, thereby providing flexibility in assessing whether a particular practice comports with the legal standard. The NPRM proposes that the concept of reasonable network management would be treated separately from the application of the commercially reasonable practices legal standard and seeks comment on this approach. The NPRM asks how harm can best be identified and prohibited and whether certain practices, like paid prioritization, should be barred altogether. The NPRM also seeks comment on whether the Commission should consider current technical characteristics, industry practices, and the impact on consumers, among other factors, when evaluating commercially reasonable practices.

7. Fifth, the NPRM proposes to rely on Section 706 of the Telecommunications Act of 1996 as the source of authority for the proposed rules. It seeks comment, however, on the best source of authority for protecting Internet openness, whether Section 706, Title II of the Communications Act of 1934, as amended, and/or other sources of legal authority such as Title III of the Communications Act for wireless services. With respect to the prospect of proceeding under Title II, the NPRM seeks comment on whether and how the Commission should exercise its authority under Section 10 of the Act—or Section 332(c)(1) for mobile services—to forbear from specific Title II obligations that would flow from the classification of a service as telecommunications service.

8. Sixth, the NPRM proposes a multi-faceted dispute resolution process to provide effective access for end users, edge providers, and broadband network providers alike and the creation of an ombudsperson to act as a watchdog to represent the interests of consumers, start-ups and small businesses. The NPRM seeks comment on the level of flexibility needed for such approaches and, specifically, how the Commission can ensure that the process is accessible by end users and edge providers, including small entities. The NPRM also proposes that should the Commission ultimately adopt one of the proposed dispute mechanisms, then enforcement of the existing transparency rule and any enhancements to that rule would proceed under the same manner as enforcement of the Commission's other proposed open Internet rules if adopted.

B. Legal Basis

9. The legal basis for any action that may be taken pursuant to the NPRM is contained in Sections 1, 2, 4(i)-(j), 303, and 316, of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 152, 154(i)-(j), 303, 316, 1302,

C. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

10. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act. A small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

1. Total Small Entities

11. Our proposed action, if implemented, may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory

small entity size standards. First, nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA. In addition, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2007 indicate that there were 89,476 local governmental jurisdictions in the United States. We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small.

2. Internet Access Service Providers

12. The actions proposed in the NPRM would apply to broadband Internet access service providers. The 2011 Economic Census places these firms, whose services might include Voice over Internet Protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications facilities (e.g., cable and DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. These are also labeled "broadband." The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. These are labeled non-broadband. The most current Economic Census data for Wired Telecommunications Carriers are 2011 data, and the most current Economic Census data for All Other Telecommunications are 2007 data, which are detailed specifically for ISPs within the categories above. For the first category, the data show that 3,372 firms operated for the entire year, of which 2,037 had nine or fewer employees. For the second category, the data show that 1,274 firms operated for the entire year. Of those, 1,252 had annual receipts below $25 million per year. Consequently, we estimate that the majority of ISP firms are small entities.

13. The ISP industry has changed since these definitions were introduced in 2007. The data cited above may therefore include entities that no longer provide Internet access service and may exclude entities that now provide such service. To ensure that this IRFA describes the universe of small entities that our action might affect, we discuss in turn several different types of entities that might be providing Internet access service. We note that, although we have no specific information on the number of small entities that provide broadband Internet access service over unlicensed spectrum, we include these entities in our Initial Regulatory Flexibility Analysis.

3. Wireline Providers

14. Incumbent Local Exchange Carriers (Incumbent LECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers. Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

15. Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. In addition, 72 carriers have reported that they are Other Local Service Providers. Of

the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and other local service providers are small entities that may be affected by our proposed action.

16. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

17. Interexchange Carriers. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 359 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

18. Operator Service Providers (OSPs). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

4. Wireless Providers – Fixed and Mobile

19. The broadband Internet access service provider category covered by this NPRM may cover multiple wireless firms and categories of regulated wireless services. Thus, to the extent the wireless services listed below are used by wireless firms for broadband Internet access services, the proposed actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

20. Wireless Telecommunications Carriers (except Satellite). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to 2007, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. For the category of Wireless Telecommunications Carriers (except Satellite), data for 2011 show that there were 784 firms operating that year. Of these 784 firms, an estimated 749 have 500 or fewer employees and 35 have more than 500 employees. Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of wireless firms are small.

21. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The Commission auctioned geographic area licenses in the WCS service in 1997. In the auction, seven

bidders won 31 licenses that qualified as very small business entities, and one bidder won one license that qualified as a small business entity.

22. 1670–1675 MHz Services. This service can be used for fixed and mobile uses, except aeronautical mobile. An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

23. Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

24. Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks. On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22. Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

25. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses. On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71. Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses. On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78. Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.

26. Specialized Mobile Radio Licenses. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

27. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

28. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard. We assume, for purposes of this analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

29. Lower 700 MHz Band Licenses. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—"entrepreneur"—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA approved these small size standards. An auction

of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses. Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses. On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

30. In 2007, the Commission reexamined its rules governing the 700 MHz band in the 700 MHz Second Report and Order, 72 FR 48814 (Aug. 24. 2007). An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included, 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block. Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years) won 49 licenses. Thirty three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) won 325 licenses.

31. Upper 700 MHz Band Licenses. In the 700 MHz Second Report and Order, the Commission revised its rules regarding Upper 700 MHz licenses. On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block. The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

32. 700 MHz Guard Band Licensees. In 2000, in the 700 MHz Guard Band Order, 65 FR 17594 (Mar. 4, 2000), the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

33. Air-Ground Radiotelephone Service. The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), i.e., an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million. A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. These definitions were approved by the SBA. In May 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two

Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

34. AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3)). For the AWS-1 bands, the Commission has defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but proposes to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.

35. 3650–3700 MHz band. In March 2005, the Commission released a Report and Order and Memorandum Opinion and Order that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz). As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

36. Fixed Microwave Services. Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. They also include the Local Multipoint Distribution Service (LMDS), the Digital Electronic Message Service (DEMS), and the 24 GHz Service, where licensees can choose between common carrier and non-common carrier status. At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 135 LMDS

licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—i.e., an entity with no more than 1,500 persons. Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. For the category of Wireless Telecommunications Carriers (except Satellite), data for 2011 show that there were 784 firms operating that year. While the Census Bureau has not released data on the establishments broken down by number of employees, we note that the Census Bureau lists total employment for all firms in that sector at 245,875. Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of firms using microwave services are small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

37. Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.

After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

38. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

39. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,436 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 2,336 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category

of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2007, there were a total of 996 firms in this category that operated for the entire year. Of this total, 948 firms had annual receipts of under $10 million, and 48 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

5. Satellite Service Providers

40. Satellite Telecommunications Providers. Two economic census categories address the satellite industry. The first category has a small business size standard of $30 million or less in average annual receipts, under SBA rules. The second has a size standard of $30 million or less in annual receipts.

41. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." For this category, Census Bureau data for 2007 show that there were a total of 570 firms that operated for the entire year. Of this total, 530 firms had annual receipts of under $30 million, and 40 firms had receipts of over $30 million. Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

42. The second category of Other Telecommunications comprises, inter alia, "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems." For this category, Census Bureau data for 2007 show that there were a total of 1,274 firms that operated for the entire year. Of this total, 1,252 had annual receipts below $25 million per year. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

6. Cable Service Providers

43. Because Section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

44. Cable and Other Program Distributors. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2007, there were a total of 2,048 firms in this category that operated for the entire year. Of this total, 1,393 firms had annual receipts of under $10 million, and 655 firms had receipts of $10 million or more. Thus, the majority of these firms can be considered small.

45. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide. Industry data shows that there were 1,141 cable companies at the end of June 2012. Of this total, all but ten cable operators nationwide are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,945 cable systems nationwide. Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have

20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

46. Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

7. Electric Power Generators, Transmitters, and Distributors

47. Electric Power Generators, Transmitters, and Distributors. The Census Bureau defines an industry group comprised of "establishments, primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." According to Census Bureau data for 2011, there were 2,419 firms in this category that operated for the entire year. Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small,

with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 2,419 or fewer firms may be considered small under the SBA small business size standard.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

48. As indicated above, the NPRM seeks comment on possible enhancements to the Commission's existing transparency rule that may impose additional reporting, recordkeeping, or other compliance requirements on some small entities. While the NPRM tentatively concludes that the Commission should enhance the transparency rule to improve its effectiveness for end users, edge providers, the Internet community, and the Commission, the NPRM does not propose specific revisions to the existing transparency rule. As described above, the NPRM also seeks comment on a dispute resolution process that would, if adopted, potentially require small entities to respond to complaints or otherwise participate in dispute resolution procedures. One feature of the enforcement mechanism as discussed in the NPRM, includes a proposal to establish the role of an ombudsperson who would act as a watchdog to represent the interests of start-ups and other small entities in addition to consumers.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

49. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. We expect to consider all of these factors when we have received substantive comment from the public and potentially affected entities.

50. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the NPRM and this IRFA, in reaching its final conclusions and taking action in this proceeding.

51. We note, though, that the potential enhancements to the transparency rule, the proposed mechanism for individualized decision-making under the proposed enforceable legal standard of commercially reasonable practices, and various aspects of the proposed dispute resolution process all contemplate a certain amount of flexibility that may be helpful to small entities. For example, the Commission seeks comment on whether there are ways the Commission or industry associations could reduce burdens on broadband providers in complying with the proposed enhanced transparency rule through the use of a voluntary industry standardized glossary, or through the creation of a dashboard that permits easy comparison of the policies, procedures, and prices of various broadband providers throughout the country. We seek comment here on the effect the various proposals described in the NPRM, and summarized above, will have on small entities, and on what effect alternative rules would have on those entities. How can the Commission achieve its goal of protecting and promoting an open Internet while also imposing minimal burdens on small entities? What specific steps could the Commission take in this regard?

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

52. None

List of Subjects in 47 CFR Part 8

Cable television, Communications, Common carriers, Communications common carriers, Radio, Telecommunications, Telephone.

FEDERAL COMMUNICATIONS COMMISSION.

Marlene H. Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to revise Part 8 of Title 47 of the Code of Federal Regulations as follows:

PART 8 – PROTECTING AND PROMOTING THE OPEN INTERNET

Sec.

8.1 Purpose.

8.3 Transparency.

8.5 No blocking.

8.7 No commercially unreasonable practices.

8.9 Other laws and considerations.

8.11 Definitions.

8.12 Formal complaints.

8.13 General pleading requirements.

8.14 General formal complaint procedures.

8.15 Status conference.

8.16 Confidentiality of proprietary information.

8.17 Review.

Authority: 47 U.S.C. 151, 152, 154(i)-(j), 303, 316, 1302

§8.1 Purpose.

The purpose of this part is to protect and promote the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment.

§8.3 Transparency.

(a) A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services, in a manner tailored

(1) For end users to make informed choices regarding use of such services,

(2) For edge providers to develop, market, and maintain Internet offerings, and

(3) For the Commission and members of the public to understand how such person complies with the requirements described in §§ 8.5 and 8.7.

(b) In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall include meaningful information regarding the source, timing, speed, packet loss, and duration of congestion.

(c) In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall publicly disclose in a timely manner to end users, edge providers, and the Commission when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or "best effort" service as distinct from any priority service.

§8.5 No blocking.

(a) A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

(b) A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

§ 8.7 No commercially unreasonable practices.

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice.

§8.9 Other laws and considerations.

(a) Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety,

or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

(b) Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

§ 8.11 Definitions.

(a) Block. The failure of a broadband Internet access service to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers.

(b) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this part.

(c) Edge provider. Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

(d) End user. Any individual or entity that uses a broadband Internet access service.

(e) Fixed broadband Internet access service. A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services.

(f) Mobile broadband Internet access service. A broadband Internet access service that serves end users primarily using mobile stations.

(g) Reasonable network management. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

§8.12 Formal complaints.

Any person may file a formal complaint alleging a violation of the rules in this part.

§8.13 General pleading requirements.

(a) General pleading requirements. All written submissions, both substantive and procedural, must conform to the following standards:

(1) A pleading must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy should be pleaded fully and with specificity.

(2) Pleadings must contain facts that, if true, are sufficient to warrant a grant of the relief requested.

(3) Facts must be supported by relevant documentation or affidavit.

(4) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Each submission must contain a written verification that the signatory has read the submission and to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose appropriate sanctions.

(5) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority. Opposing authorities must be distinguished. Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(6) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(7) Parties seeking expedited resolution of their complaint may request acceptance on the Enforcement Bureau's Accelerated Docket pursuant to the procedures at § 1.730 of this chapter.

(b) Copies to be filed. The complainant shall file an original copy of the complaint, accompanied by the correct fee, in accordance with part 1, subpart G (see 1.1106) and, on the same day:

(1) File three copies of the complaint with the Office of the Commission Secretary;

(2) Serve two copies on the Market Disputes Resolution Division, Enforcement Bureau;

(3) Serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents for service of process, if available, on the same date that the complaint is filed with the Commission.

(c) Prefiling notice required. Any person intending to file a complaint under this section must first notify the potential defendant in writing that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(d) Frivolous pleadings. It shall be unlawful for any party to file a frivolous pleading with the Commission. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

§8.14 General formal complaint procedures.

(a) Complaints. In addition to the general pleading requirements, complaints must adhere to the following requirements:

(1) Certificate of service. Complaints shall be accompanied by a certificate of service on any defendant.

(2) Statement of relief requested.

(i) The complaint shall state the relief requested. It shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.

(ii) The complaint shall set forth all steps taken by the parties to resolve the problem.

(iii) A complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition or complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

(3) Failure to prosecute. Failure to prosecute a complaint, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice if it occurs prior to the adoption date of any final action taken by the Commission with respect to the initiating pleading.

(b) Answers to complaints. Unless otherwise directed by the Commission, any party who is served with a complaint shall file an answer in accordance with the following requirements:

(1) The answer shall be filed within 20 days of service of the complaint.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any party against whom a complaint is filed failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(3) Facts must be supported by relevant documentation or affidavit.

(4) The answer shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder, and state in detail the basis of that denial.

(5) Averments in a complaint are deemed to be admitted when not denied in the answer.

(c) Reply. In addition to the general pleading requirements, replies must adhere to the following requirements:

(1) The complainant may file a reply to a responsive pleading that shall be served on the defendant and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. Unless expressly permitted by the Commission, replies shall not contain new matters.

(2) Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein.

(3) Unless otherwise directed by the Commission, replies must be filed within ten (10) days after submission of the responsive pleading.

(d) Motions. Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(e) Additional procedures and written submissions.

(1) The Commission may specify other procedures, such as oral argument or evidentiary hearing directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party pending the hearing and the nature of any such temporary relief.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits.

(3) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(i) These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(ii) The schedule for filing any briefs shall be at the discretion of the Commission. Unless ordered otherwise by the Commission, such briefs shall not exceed fifty (50) pages.

(iii) Reply briefs may be submitted at the discretion of the Commission. Unless ordered otherwise by the Commission, reply briefs shall not exceed thirty (30) pages.

(f) Discovery.

(1) The Commission may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories, depositions, document production, or requests for admissions.

(2) The Commission may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, admissions, document production, or depositions. The Commission may hold a status conference with the parties, pursuant to § 8.15 of this part, to determine the scope of discovery, or direct the parties regarding the scope of discovery. If the Commission determines that extensive discovery is required or that depositions are warranted, the Commission may advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (g) of this section.

(g) Referral to administrative law judge.

(1) After reviewing the pleadings, and at any stage of the proceeding thereafter, the Commission may, in its discretion, designate any proceeding or discrete issues arising out of any proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the Commission shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Enforcement Bureau Chief, the Enforcement Bureau Chief shall not be deemed to be a party to a proceeding designated for a hearing before an administrative law judge pursuant to this paragraph (g).

(h) Commission ruling. The Commission (or the Enforcement Bureau on delegated authority), after consideration of the pleadings, shall issue an order ruling on the complaint.

§8.15 Status conference.

(a) In any proceeding subject to the part 8 rules, the Commission may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

(1) Simplification or narrowing of the issues;

(2) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;

(3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(4) Settlement of the matters in controversy by agreement of the parties;

(5) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;

(6) The need and schedule for filing briefs, and the date for any further conferences; and

(7) Such other matters that may aid in the disposition of the proceeding.

(b) Any party may request that a conference be held at any time after an initiating document has been filed.

(c) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(d) The failure of any attorney or party, following advance notice with an opportunity to be present, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

(e) During a status conference, the Commission may issue oral rulings pertaining to a variety of matters relevant to the conduct of the proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to take affirmative action, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the Commission.

§8.16 Confidentiality of proprietary information.

(a) Any materials filed in the course of a proceeding under this part may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in FOIA.

(b) Submissions containing information claimed to be proprietary under this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the opposing parties.

(c) Except as provided in paragraph (d) of this section, materials marked as proprietary may be disclosed solely to the following persons, only for use in the proceeding, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the proceeding and any support personnel employed by such attorneys;

(2) Officers or employees of the parties in the proceeding who are named by another party as being directly involved in the proceeding;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(d) The Commission will entertain, subject to a proper showing, a party's request to further restrict access to proprietary information as specified by the party. The other parties will have an opportunity to respond to such requests.

(e) The persons designated in paragraphs (c) and (d) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such

information, and shall not use the information in any activity or function other than the prosecution or defense of the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(f) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (c) and (d) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(g) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

§8.17 Review.

(a) Interlocutory review.

(1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the Commission's staff, including an administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and raised as an exception to a decision on the merits.

(i) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling.

(ii) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right.

(iii) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(b) Petitions for reconsideration. Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration

of a decision on the merits made by the Commission's staff should be filed in accordance with §§ 1.104 through 1.106 of this chapter.

(c) Application for review.

(1) Any party to a part 8 proceeding aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with § 1.115 of this chapter.

(2) Any party to a part 8 proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with §§ 1.276(a) and 1.277(a) through (c) of this chapter.

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