

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

In the Matter of)
)
Competition and Consumer Protection) Project No. P181201
in the 21st Century Hearings)

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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NCTA – The Internet & Television Association (“NCTA”) submits these comments in response to the Federal Trade Commission’s (“FTC’s”) June 20, 2018 Public Notice in the above-captioned proceeding.¹

INTRODUCTION

NCTA welcomes the FTC’s comprehensive review of the dynamic communications industry—the first undertaking of its kind since 2007, when the FTC issued its *Broadband Connectivity and Competition Policy Report*. Eleven years ago, that *Report* concluded that burgeoning competition and innovation in the rapidly evolving Internet marketplace warranted a cautious approach to broadband regulation and, in the absence of demonstrable consumer harm, a reliance on market forces to produce the best results for the American public.² That view was correct then and is even more demonstrably so today.

For instance, in 2007, the iPhone was introduced and revolutionized how and when Americans access the Internet; today, 83 percent of Americans access the Internet on mobile

¹ FTC, *Federal Trade Commission Announces Hearings on Competition and Consumer Protection in the 21st Century* (Jun. 20, 2018), available at https://www.ftc.gov/system/files/attachments/hearings-competition-consumer-protection-21st-century/hearings_announcement_1.pdf (“FTC Public Notice”).

² See FTC Staff Report, *Broadband Connectivity Competition Policy* 157 (June 2007) (“2007 Report”).

devices (over licensed CMRS networks and via extensive Wi-Fi networks),³ and as the nation transitions to next-generation 5G networks, the number of mobile Internet users (and mobile-*only* Internet users) will continue to increase. In 2007, Netflix had just introduced its streaming service after spending the first decade of its existence as a DVD and VHS rental company;⁴ today, Netflix has over 57 million streaming subscribers in the United States (more than twice as many subscribers as any other video distributor) and a total of approximately 130 million subscribers around the world.⁵ In 2007, Google was continuing to develop its digital advertising business, while Facebook was a bit player; today, the two companies together have a dominant share of sales in the digital advertising marketplace, and account for a huge majority of the growth of that market in 2017, with no other competitor cracking even five percent.⁶ The total market capitalization of the five largest Internet platform providers (Amazon, Apple, Facebook, Google, and Netflix) stands today at a staggering \$3.48 trillion;⁷ by comparison, the combined market capitalization of

³ See Andrew Perrin and Jingjing Jiang, *About a Quarter of U.S. Adults Say They Are ‘Almost Constantly’ Online*, PEW RESEARCH: FACT TANK (Mar. 14, 2018), available at <http://www.pewresearch.org/fact-tank/2018/03/14/about-a-quarter-of-americans-report-going-online-almost-constantly/>.

⁴ See Netflix, “Netflix Timeline,” <https://media.netflix.com/en/about-netflix> (last visited Aug. 20, 2018).

⁵ See Netflix, “2018 Quarterly Earnings: Second Quarter Earnings,” Financial Statements, <https://www.netflixinvestor.com/financials/quarterly-earnings/default.aspx> (last visited Aug. 20, 2018).

⁶ See Alexandra Bruell, *Rivals Chip Away at Google’s And Facebook’s U.S. Digital Ad Dominance*, *Data Show*, WALL STREET JOURNAL (Mar. 19, 2018), available at <https://www.wsj.com/articles/rivals-chip-away-at-googles-and-facebooks-u-s-digital-ad-dominance-data-show-1521457321>; Matthew Ingram, *Google and Facebook Account For Nearly All Growth In Digital Ads*, *Fortune* (April 26, 2017), available at <http://fortune.com/2017/04/26/google-facebook-digital-ads/>; Sarah Sluis, *Digital Ad Market Soars To \$88 Billion, Facebook And Google Contribute 90% of Growth*, *ADEXCHANGER* (May 10, 2018), available at <https://adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebook-and-google-contribute-90-of-growth/>.

⁷ Based on closing share prices as of August 8, 2018, the market capitalizations for the “big five” Internet platform providers are as follows: Apple (\$1 trillion); Amazon (\$920 billion); Google (\$872 billion); Facebook (\$534 billion); Netflix (\$151 billion).

the five largest Internet service providers (“ISPs”) by subscriber count is only *one-fifth* of that figure, or \$703 billion.⁸

Indeed, since the birth of the Internet, an astounding number of competitive communications platforms have emerged, including (but certainly not limited to) the examples below—none of which has ever been subject to intrusive forms of prophylactic regulation.⁹

- **All over-the-top video offerings, including:**



- **All instant messaging and online chat offerings, including:**



- **All social media offerings, including:**



- **All music streaming offerings, including:**



- **All non-PSTN voice/video offerings, including:**



- **All Internet Cloud offerings, including:**



⁸ Based on closing share prices as of August 8, 2018, the market capitalizations for the five largest ISPs by subscriber count as of August 9, 2018 are as follows: Comcast (\$161 billion); Verizon (\$218 billion); AT&T (\$235 billion); Charter (\$69 billion); CenturyLink (\$20 billion).

⁹ See FCC Commissioner Michael O’Rielly, “FCC Regulatory Free Arena,” June 1, 2018, *available at* <https://www.fcc.gov/news-events/blog/2018/06/01/fcc-regulatory-free-arena>.

It is against this backdrop that the FTC should undertake its reexamination of the communications marketplace—a remarkably dynamic arena warranting a holistic approach to regulatory policy and enforcement. At a minimum, there is plainly no reasonable basis in today’s marketplace for singling out ISPs for unique regulatory burdens. To the contrary, as discussed further below, recent experience suggests that large Internet platform providers pose a greater risk to Internet openness and consumer privacy than ISPs. Any such risks can best be addressed through a combination of market forces and an evenhanded application of the FTC’s well-established authority to pursue case-by-case enforcement where necessary to prevent deceptive or unfair business practices or anticompetitive conduct.

NCTA welcomes the opportunity to share its insights and expertise with the FTC. While NCTA supports the FTC’s topic selection for this proceeding and believes that all of them warrant careful attention to ensure a robust and fair regulatory framework for new communications and other new technologies in the 21st century, NCTA submits these comments to highlight four especially important points, pertaining to topics 2, 3, 4, and 10 in the Public Notice.

First, regarding topic 2,¹⁰ NCTA’s members operate in a substantially—and increasingly—competitive marketplace for broadband Internet access, video, and voice services. Scholarly reports and economic analyses demonstrate that the broadband marketplace has continued to be competitive and that broadband offerings are becoming increasingly robust and ubiquitous, and that will remain the case, particularly as wireless and wireline offerings further converge. Likewise, in the market for video services, NCTA’s cable operator members face robust competition from traditional multichannel video programming distributors (“MVPDs”) as well a

¹⁰ Topic 2 concerns “[c]ompetition and consumer protection issues in communication, information, and media technology networks.” FTC Public Notice at 3.

wide array of Internet-delivered video offerings from distributors such as Netflix, YouTube, Amazon Video, and Hulu. NCTA’s programmer members also face increasing competition from online platforms that create and distribute new formats of entertainment and original programming to compete with traditional networks for accolades and consumer attention. In the marketplace for voice services, the emergence and growth of Voice-over-Internet Protocol (“VoIP”) offerings have provided consumers powerful and readily accessible alternatives to traditional offerings. In short, the record of expanding output and growing competition in markets for voice, video, and data services is emblematic of a healthy marketplace and argues against the existence of any significant market failure warranting intrusive regulation specific to the broadband marketplace.

Second, regarding topics 2 and 3,¹¹ especially given the dynamic competitive environment, NCTA believes that the best approach is one grounded in Section 5 of the FTC Act and aimed at addressing demonstrated harms to competition and consumers based on well-established antitrust and consumer protection principles. Heavy-handed prophylactic regulation in this constantly evolving industry has been shown to stifle innovation and investment, and a chorus of expert observers—along with this Commission—have recognized that such economic prescriptions are generally inappropriate in such circumstances. This is especially so with respect to broadband Internet access service (“BIAS”), where there is no evidence of market failure or consumer harm. As the FTC recognized in the 2007 *Report*, and as the FCC recently reaffirmed,¹² ISPs have strong, market-based incentives not to engage in anti-competitive or other unreasonably discriminatory conduct. The transparency requirements imposed by the FCC—which are enforceable by the FTC

¹¹ Topic 3 concerns “[t]he identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring ‘platform’ businesses.” *Id.*

¹² *Restoring Internet Freedom*, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd 311 ¶ 168 (2018) (“*RIF Order*”).

under Section 5 of the FTC Act—add another protective layer. And the longstanding consumer protection and antitrust laws administered by the FTC are more than adequate to address any isolated harms that may arise, and enforcement of these laws will help ensure that the same standards are applied consistently to all Internet actors.

Third, regarding topic 4,¹³ the FTC should continue to pursue and utilize its flexible, technology-neutral approach to digital privacy and data security issues. The FTC has long been the nation’s lead cop on the beat in this arena and has a longstanding and well-understood framework for successfully protecting consumers. Going forward, that framework should advance a uniform approach to privacy and data security for all members in the Internet ecosystem, and should enable consumers to enjoy transparency, choice, and security with respect to how their privacy and data is handled. The application of national standards in a manner that is consistent across all Internet actors not only serves the important interest of protecting consumers regardless of the platform or service they use, but also promotes fair competition by avoiding the market distortions caused by sector-specific regulation. The FTC thus should also continue to ensure that its approach to privacy and data security issues remains technology-neutral and does not distort competition or cement the dominance of current market leaders.

Finally, regarding topic 10,¹⁴ the FTC should take steps to ensure that the Internet ecosystem is subject to a consistent framework that applies across the country, rather than allowing separate and conflicting regulatory approaches to net neutrality, privacy, data security, and the like to emerge on a state-by-state basis. The FTC’s 2007 *Report* appropriately underscored the

¹³ Topic 4 concerns “[t]he intersection between privacy, big data, and competition.” FTC Public Notice at 3.

¹⁴ Topic 10 concerns “[t]he interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices.” *Id.* at 6.

importance of “continued federal agency oversight . . . in this area,” and noted that “federal agencies are prepared to address issues that may arise in the broadband area.”¹⁵ Moreover, as discussed below, the FCC and the courts have repeatedly recognized that Internet services are inherently interstate,¹⁶ and that any attempts by states to regulate components thereof risk creating a patchwork of inconsistent and balkanized state and local laws that not only frustrate industry’s attempts to provide the consistent offerings and uniform treatment consumers want and, as a functional matter, in many cases such differing treatment across states may not even be possible. The FCC has recently issued a clear statement that state and local governments are broadly preempted from regulating BIAS in ways that differ from or are incompatible with the FCC’s own framework.¹⁷ The FTC should endorse and reinforce the FCC’s ruling by issuing guidance to state attorneys general and consumer protection authorities reaffirming that they are bound by FCC and FTC precedent in this arena.

DISCUSSION

I. NCTA’S MEMBERS OPERATE IN AN INCREASINGLY COMPETITIVE MARKETPLACE

Topic 2 of the FTC’s Public Notice appropriately seeks to refresh the agency’s understanding of today’s “communication, information, and media technology” marketplace.¹⁸ The broadband, video, and voice markets have undergone significant evolution in the past decade, and today are more competitive than ever before.

¹⁵ *2007 Report* at 161.

¹⁶ *RIF Order* ¶ 198.

¹⁷ *Id.*

¹⁸ FTC Public Notice at 3.

In the broadband marketplace, NCTA’s members face increasingly robust competition, as economic studies and agency findings demonstrate. Economists have written extensively in recent years and compiled empirical data showing that “the broadband Internet access marketplace is effectively competitive today and is becoming even more competitive, including due to wireless and wireline convergence.”¹⁹ In examining whether an industry is effectively competitive, it is important to analyze factors such as whether (1) consumers have a choice among vendors; (2) there is overt rivalry for consumers; (3) service providers have the ability to accommodate new customers; and (4) customers have the ability to switch between service providers.²⁰ In the case of fixed wireline broadband services like those offered by NCTA’s members, economists have found that all of these indicia are present.

First, FCC data on fixed broadband services reflect that consumers can choose between or among providers. In February 2018, the FCC reviewed the latest broadband deployment statistics and found that 98% of developed census blocks had at least two providers offering broadband service capable of delivering download speeds of 10 Mbps or greater and upload speeds of 1 Mbps or greater, and that 82% had at least three such providers.²¹ While competition is particularly

¹⁹ Declaration of Mark Israel, Allen Shampine & Thomas Stemwedel, ¶ 14, attached to Comments of AT&T, WC Docket No. 17-108 (July 17, 2017) (“Israel Paper”); *see also, e.g.*, Declaration of Andres Lerner & Janusz Ordoover, ¶ 37, attached to Comments of Verizon, WC Docket No. 17-108 (July 17, 2017) (“Lerner/Ordoover Paper”) (finding “effective competition” in wireline broadband markets and “significant competition between wireless broadband Internet access providers”); Declaration of Christian Dippon at 9, attached to Comments of Comcast, WC Docket No. 17-108 (July 17, 2017) (“Dippon Paper”) (“BIAS providers operate in an environment that is workably competitive.”).

²⁰ Israel Paper ¶ 27.

²¹ FCC, *Internet Access Services: Status as of December 31, 2016*, at 6, Figure 4 (Feb. 2018), *available at* <https://docs.fcc.gov/public/attachments/DOC-349074A1.pdf>. The FCC under former Chairman Wheeler unanimously adopted 10 Mbps/1 Mbps as the definition of “broadband” for purposes of allocating billions of dollars of federal “universal service” support to accelerate deployment of broadband services to unserved and underserved areas. *See Connect America Fund*, Report and Order, 29 FCC Rcd 15644 ¶ 17 (2014). The FCC did so based on findings that “[h]igh definition video requires 5 Mbps downstream,” and that 10 Mbps downstream would be more than sufficient to support “multiple users . . . relying upon the [same] broadband connection.” *Id.* While the FCC has separately adopted a benchmark of 25 Mbps/3 Mbps for

strong in urban areas, FCC data also show that rural consumers today have more options for obtaining broadband service than ever before, given the significant uptick in deployments of high-speed fixed and mobile broadband services in rural areas in just the past few years.²² And, in addition to more established providers, “competitive entry and expansion” by recent and potential fixed wireline entrants (such as Google Fiber) that have “the resources to ramp up [their] competitiveness” in new areas further “discipline[s] . . . the marketplace.”²³

Second, indicators of overt rivalry for consumers plainly are present in the BIAS marketplace, including steady improvements in the quality of the output provided and heavy expenditures on competitive advertising by fixed wireline BIAS providers. Economists have recognized that, in dynamic industries, “[c]ompetition in such markets may take the form of racing to introduce new or improved products, rather than cutting prices on existing products.”²⁴ In a market lacking effective competition, one would expect either little to no improvements in service

measuring the deployment of “advanced telecommunications capability” under Section 706 of the Telecommunications Act of 1996, the FCC has made clear that that benchmark is limited to the specific context of preparing those Section 706 reports and does *not* represent a form of market definition. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report, 30 FCC Rcd 1375 ¶ 1 n.1 (2015) (noting that “‘advanced telecommunications capability’ has a unique definition in [S]ection 706 that differs from the term ‘broadband’ in other contexts” and that the “discussion of broadband in this Report may not apply equally to discussions of broadband in other circumstances or in other proceedings”). Many experts and leading edge providers agree that broadband services meeting the 10 Mbps/1 Mbps threshold are sufficient to accommodate the typical consumer’s Internet needs. *See* Dippon Paper at 10; *see also, e.g.,* Netflix, “Internet Connection Speed Recommendations,” <https://help.netflix.com/en/node/306> (last visited Aug. 20, 2018) (“Netflix Speed Recommendations”) (stating that 5.0 Mbps download speed is “[r]ecommended for HD quality” streaming).

²² For instance, as of 2016, 83.9 percent of rural areas had access to fixed terrestrial broadband service at speeds of 10 Mbps/1 Mbps (up from 69 percent in 2012), and 70.1 percent of rural areas had access to mobile broadband services with a median speeds at that same level. *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 2018 Broadband Deployment Report*, FCC 18-10, ¶¶ 52, 57 (2018) (“2018 Broadband Deployment Report”).

²³ Dippon Paper at 9-10.

²⁴ Howard Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1692-93 (2013).

quality. Here, by contrast, BIAS providers have rapidly increased speeds without concomitant increases in prices—and indeed with prices *falling* on a per-Mbps basis—resulting in substantially greater value to consumers.²⁵ The following two charts illustrate this trend:

Table 1: Top Cable Broadband Speeds, 2007-2018

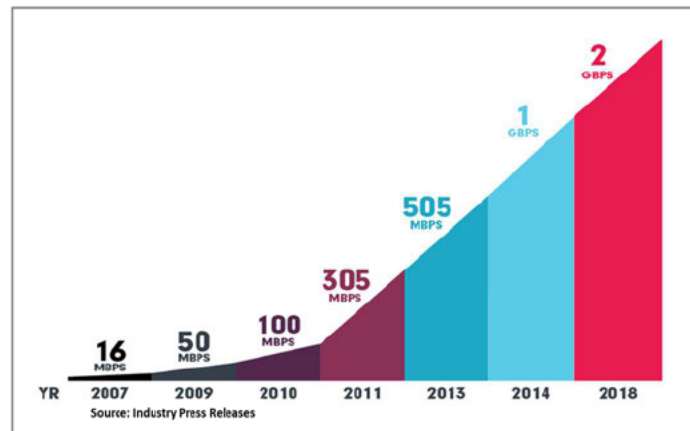
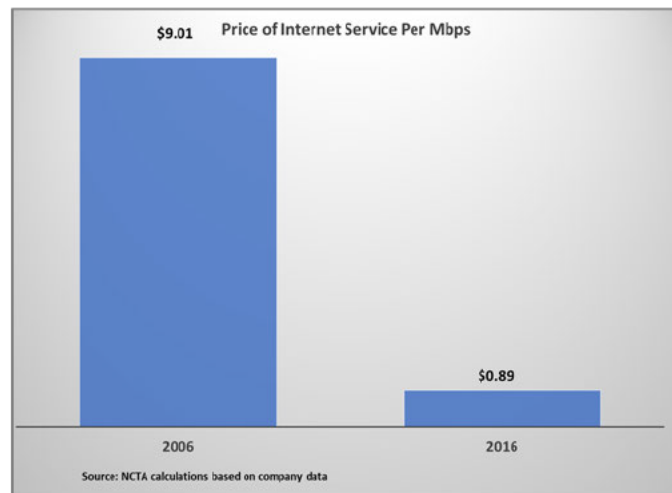


Table 2: Price-per-Mbps for Cable Broadband, 2006-2016



²⁵ See, e.g., FCC, *2016 Measuring Broadband America: Fixed Broadband Report*, Chart 3 (Dec. 2016) (showing average annual speed increases of 21 percent for DSL and 47 percent for cable over the course of surveys conducted from 2011-2015); see also Dippon Paper at 13 (“BIAS providers have been providing faster and faster bandwidth speeds at essentially flat prices (and declining prices as a function of \$/Mbps).”); see also U.S. Department of Agriculture and U.S. Department of Commerce, *Broadband Opportunity Council Report and Recommendations* (Aug. 20, 2015), at 4 available at https://obamawhitehouse.archives.gov/sites/default/files/broadband_opportunity_council_report_final.pdf

As further evidence of overt rivalry, BIAS providers also spend heavily on advertising, touting the speeds they offer, as well as their customer satisfaction ratings, in an effort to win customers from competitors. As noted by Drs. Israel, Shampine and Stemwedel, “[a]s a matter of economics, it would not be rational to spend [so] much on advertisements focused on differentiating offerings from competitors if there were not strong competition among providers for consumers.”²⁶

Third, service providers in this marketplace plainly have capacity to accommodate new customers. As noted above, ISPs are constantly investing in expanding their network footprints and enhancing capacity on existing networks, enabling them to carry more and more Internet traffic as they gain subscribers. Indeed, providers not only take on new customers in areas where they expand service; they also “actively compete to steal customers from one another”—a fact that “demonstrates that they have available capacity to serve those customers.”²⁷

Fourth, and relatedly, there is clear evidence that customers can and do switch between BIAS providers. A consumer survey in 2014 indicated that “consumers switch broadband providers frequently, with 17.6 percent switching in the prior 12 months, 33.1 percent switching in the prior 2 years, and 49.4 percent switching in the prior 4 years.”²⁸ Another survey showed that “71 percent of respondents said they would switch to a competing service” if their ISP were to block Internet content—thus providing a clear incentive never to engage in such conduct.²⁹ Further, the mere threat of switching often forces providers to reduce prices or improve offerings

²⁶ Israel Paper ¶ 47.

²⁷ *Id.* ¶ 48.

²⁸ Lerner/Ordoover Paper ¶ 69.

²⁹ *Id.* ¶ 70.

to retain customers.³⁰ The FCC has noted that wireline ISPs, even when facing a single competitor, have strong incentives to capture customers from its rival.³¹

This competitive atmosphere is similarly present for wireless broadband.³² Wireless service providers have made significant investments in their networks—around \$200 billion between 2010 and 2016—providing consumers with numerous high-quality options in the wireless marketplace.³³ As noted by the FCC, as of January 2017, at least four wireless BIAS providers covered approximately 92 percent of the U.S. population with mobile broadband services using at least 3G technology.³⁴ There are also new entrants providing wireless services, such as Comcast—whose Xfinity Mobile brand was introduced in April 2017 and rapidly attracted 200,000 subscribers in less than five months.³⁵ Both the number of wireless connections and average data usage per connection have been rising in recent years, providing further evidence of effective competition. The FCC recently found that the total number of mobile wireless subscriber connections grew by approximately five percent, from 378 million at the end of 2015, to 396 million at the end of 2016; at the same time, wireless data volumes increased approximately 42 percent, from 9.6 trillion Mb in 2015 to 13.7 trillion Mb in 2016.³⁶ Rivalry for customers is also

³⁰ Israel Paper ¶ 16.

³¹ *RIF Order* ¶ 126. The FCC further noted that competitive pressures often have spillover effects across a given provider, such that an ISP facing competition broadly, but not universally, will tend to treat customers that do not have a competitive choice as if they do. *See id.* ¶ 127.

³² Israel Paper ¶ 15 (stating that for wireless, “all of the commonly-used indicia of effective competition that economists typically look at are present”).

³³ *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Twentieth Report, WT Docket No. 17-69, FCC 17-126, ¶ 5 (2017) (“*2017 Mobile Wireless Competition Report*”).

³⁴ *RIF Order* ¶ 129.

³⁵ *See* Gerry Smith, *Comcast's New Wireless Service Hits 200,000 Subscribers*, Bloomberg, October 3, 2017, available at <https://www.bloomberg.com/news/articles/2017-10-03/comcast-is-said-to-reach-200-000-subscribers-with-xfinity-mobile>.

³⁶ *2017 Mobile Wireless Competition Report* ¶ 5.

plainly evident; existing wireless providers, as well as new entrants, compete fiercely to attract customers using aggressive pricing and promotions.³⁷ Providers' heavy promotion of unlimited data plans has also resulted in significant shifts of customers between carriers.³⁸ Indeed, roughly a quarter of wireless customers change wireless providers every year.³⁹ Additionally, as carriers have largely abandoned long-term contracts, consumers face low barriers for switching between carriers.⁴⁰

Moreover, “wireless and wireline services are rapidly converging, further increasing the number of competitive options available to consumers.”⁴¹ Dr. Christian Dippon has explained that “wireline and wireless serve as partial substitutes,” and, thus, “the actions of wireline companies . . . influence wireless companies and vice versa.”⁴² The effects of this convergence are readily apparent: the modern consumer connects to the Internet using an average of 7.7 connected devices, many of which are mobile.⁴³ Those mobile devices typically contain multiple antennas that allow them to dynamically switch from mobile broadband to WiFi connections without user intervention. And the imminent advent of 5G technology, with its far greater capacity,⁴⁴ will greatly accelerate this convergence. All four major wireless providers are investing heavily in this technology and

³⁷ See *id.* ¶ 50 (describing how “[s]ervice providers frequently revise their pricing plans to attract customers”); see also Israel Paper ¶ 35.

³⁸ Israel Paper ¶ 35.

³⁹ *Id.*

⁴⁰ *Id.* ¶ 39.

⁴¹ *Id.* ¶ 17.

⁴² Dippon Paper at 14.

⁴³ See Cisco, *The Zettabyte Era: Trends and Analysis*, at 7 (June 2017), available at <https://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/vni-hyperconnectivity-wp.pdf>.

⁴⁴ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, FCC 18-30, ¶ 1 (2018) (“*FCC Wireless Infrastructure Order*”) (“5G networks, with their massively increased throughput and reduced latency, will make possible once-unimaginable advances.”).

are either currently introducing or planning to introduce 5G networks in markets across the country.⁴⁵ Device manufacturers like Nokia have observed that “5G is accelerating earlier than . . . expected,”⁴⁶ and industry observers expect that 5G will be effectively “mainstream” by 2022.⁴⁷ The FCC is actively “focused on making additional low-, mid-, and high-band spectrum available for 5G services,” and has begun “working to eliminate unnecessary barriers to the efficient deployment of wireless infrastructure to support 5G.”⁴⁸ Thus, as Dr. Bruce Owen has noted, “[t]here is simply no evidence of pervasive market power in today’s broadband

⁴⁵ See, e.g., AT&T Press Release, *Charlotte, Raleigh, and Oklahoma City Next To Be Named To Get Mobile 5G Network This Year, Joining Dallas, Atlanta, and Waco* (July 20, 2018), http://about.att.com/story/5g_to_launch_in_more_us_cities_in_2018.html; Paul R. La Monica, *Verizon Names New CEO To Lead 5G Push*, CNN MONEY (June 8, 2018), <https://money.cnn.com/2018/06/08/news/companies/verizon-new-ceo-hans-vestberg/index.html> (reporting Verizon named its former CTO as its new CEO to accelerate its 5G rollout); Sprint Press Release, *Qualcomm, SoftBank and Sprint Announce Collaboration on 2.5 GHz 5G* (May 10, 2017), <http://newsroom.sprint.com/qualcomm-softbank-and-sprint-announce-collaboration-on-25-ghz-5g.htm> (announcing plans to roll out 5G in 2019); T-Mobile Press Release, *T-Mobile Building Out 5G in 30 Cities This Year . . . and That’s Just the Start* (Feb. 26, 2018), <https://www.t-mobile.com/news/mwc-2018-5g> (announcing plans to develop 5G network); see also Description of Transaction, Public Interest Statement, and Related Demonstrations, *Applications of T-Mobile US, Inc. and Sprint Corporation for Consent To Transfer Control of Licenses and Authorizations*, FCC Docket No. 18-197, at 58 (June 18, 2018) (stating that “[t]he combined [T-Mobile/Sprint] intends to directly and aggressively compete against conventional in-home wired broadband products” with its 5G network).

⁴⁶ Mike Dano, *Nokia CEO: 5G Accelerating Earlier than Expected, Creating ‘Some Near-Term Risk,’* FIERCEWIRELESS (July 31, 2017), <http://www.fiercewireless.com/5g/nokia-ceo-5g-accelerating-earlier-than-expected-creating-some-near-term-risk>.

⁴⁷ Ericsson, *Ericsson Mobility Report: On the Pulse of the Network Society*, at 2 (Nov. 2016), <https://www.ericsson.com/assets/local/mobility-report/documents/2016/ericsson-mobility-report-november-2016.pdf>; see also Statista, *The Next Frontier: 5G to Hit the Mainstream by 2022*, ECN MAGAZINE (May 31, 2017), <https://www.ecnmag.com/news/2017/05/next-frontier-5g-hit-mainstream-2022>.

⁴⁸ FCC, “Leading the World Toward a 5G Future,” <https://www.fcc.gov/5G> (last visited Aug. 20, 2018); see also *FCC Wireless Infrastructure Order* ¶ 5 (noting FCC’s efforts to cut certain “regulatory costs of deployment by 80 percent, trim months off of deployment timelines, and incentivize thousands of new wireless deployments—thus expanding the reach of 5G and other advanced wireless technologies to more Americans”).

marketplace.”⁴⁹ That is true in the fixed and wireless markets even when considered separately, and so is unquestionably the case when the sub-sectors are properly considered in tandem.

NCTA’s members also face substantial and growing competition in the video services marketplace—both in content creation and in video distribution. In the video distribution arena, NCTA’s cable operator members and other traditional multichannel video programming distributors (“MVPDs”) are subject to competition that is “more intense today than ever before.”⁵⁰ The FCC has found that 99 percent of consumers have access to three MVPD choices.⁵¹ In light of these findings, the D.C. Circuit recently upheld the FCC’s conclusion that cable providers generally face “effective competition” in video distribution throughout the country based on the steady growth of satellite MVPD offerings from DIRECTV and DISH.⁵² Other traditional MVPD offerings from telecommunications companies (*e.g.*, Verizon FiOS, AT&T U-verse) have continued to provide strong competition to cable and satellite video offerings.⁵³ And, of course, the most significant development in the video distribution marketplace in recent years has been the emergence and runaway success of non-traditional video streaming services that create and deliver content to subscribers over the Internet rather than through proprietary infrastructure.⁵⁴ These services include subscription video on-demand services (“SVODs”) like Netflix, YouTube,

⁴⁹ Declaration of Bruce Owen at 7, attached to Comments of NCTA, WC Docket No. 17-108 (July 17, 2017) (“Owen Paper”).

⁵⁰ *United States v. AT&T Inc.*, 2018 U.S. Dist. LEXIS 100023, at *29 (D.D.C. Jun. 12, 2018).

⁵¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568 ¶ 20 (2017) (“*2017 Video Competition Report*”).

⁵² *See NATOA v. FCC*, 862 F.3d 18, 21 (D.C. Cir. 2017).

⁵³ *See 2017 Video Competition Report* ¶ 21 (finding that 52.2 million households in the United States are served by at least one telecommunications video provider); *see also* Comments of NCTA – The Internet & Television Association, WC Docket No. 17-214, at 2 (Oct. 10, 2017) (“NCTA Video Competition Comments”).

⁵⁴ NCTA Video Competition Comments at 7-9.

Amazon Video, and Hulu. Each of these providers has millions of subscribers: Amazon has over 100 million Amazon Prime subscribers with access to Amazon Video globally, a majority of whom are in the U.S.;⁵⁵ Hulu has more than 20 million subscribers across its various tiers, including 800,000 live TV subscribers;⁵⁶ and Netflix alone, with over 57 million U.S. subscribers,⁵⁷ has more than twice the number of subscribers as any cable provider or other traditional MVPD in the country.⁵⁸ Additionally, “virtual MVPDs” such as SlingTV, PlayStation Vue, Hulu Live TV, and YouTube TV, all of which distribute linear channels and on-demand content to subscribers over the Internet, have entered the market in recent years and have attracted millions of subscribers of their own.⁵⁹ As devices that enable households to view alternatives to MVPD service have become ubiquitous and inexpensive,⁶⁰ an increasing number of households are “cutting the cord” (*i.e.*, discontinuing traditional MVPD service), “shaving the cord” (reducing their consumption of

⁵⁵ See Jason Del Ray, *What Amazon Prime’s 100 Million Milestone Doesn’t Show: The Battle to Keep Growing in the U.S.*, RECODE (Apr. 19, 2018), available at <https://www.recode.net/2018/4/19/17256410/amazon-prime-100-million-members-us-penetration-low-income-households-jeff-bezos>.

⁵⁶ See Steven Musil, *Hulu’s Live TV Service Hits 800K Subscriber Mark in First Year*, CNET.COM (May 30, 2018), available at <https://www.cnet.com/news/hulus-live-tv-service-hits-800k-subscriber-mark-in-first-year/>.

⁵⁷ See Paul Bond, *Netflix to Hit 90 Million U.S. Subscribers in 10 Years, Analyst Predicts*, HOLLYWOOD REPORTER (Jun. 27, 2018), available at <https://www.hollywoodreporter.com/news/netflix-hit-90-million-us-subscribers-ten-years-analyst-predicts-1123697>.

⁵⁸ By comparison, Comcast has 22.3 million video subscribers as of Q1 2018. See Rani Molla, *Netflix Is Now Worth More Than Comcast*, RECODE (May 23, 2018), available at <https://www.recode.net/2018/5/23/17386696/netflix-reed-hastings-comcast-worth-more>.

⁵⁹ *AT&T Inc.*, 2018 U.S. Dist. LEXIS 100023, at *19.

⁶⁰ These devices include the television itself; many manufacturers offer “smart” TVs that, when connected by Wi-Fi to a household’s Internet service, can select programming from an array of online service “apps.” Those services are also available using Google’s Chromecast, Apple TV, Amazon’s FireTV and FireStick, Sony’s PlayStation, Microsoft’s Xbox, and Roku’s streaming devices, some of which enable the casting of any video programming viewed on a mobile phone or tablet directly to the television screen. See NCTA Video Competition Comments at 8.

traditional MVPD services), or “avoiding the cord” (declining to use traditional MVPD services altogether).⁶¹ Today, online video represents a staggering 67 percent of Internet traffic.⁶²

Cable providers have responded to this changing landscape with their own innovative offerings, resulting in further benefits and increased choice for consumers. Cable operators have deployed new consumer interfaces for accessing cable services on traditional set-top boxes, and are increasingly enabling their subscribers to access their cable service on streaming devices, such as Chromecast, Roku, or AppleTV, while also enabling them to view online services such as Netflix and YouTube directly from their on-screen TV menu of services without the use of any of these devices.⁶³ Other benefits include visual program guides and voice remotes that consumers now routinely use to find and view or record the hundreds of real-time channels or thousands of programs available on-demand; these user-friendly services represent a major evolution from the menus of only a few years ago.⁶⁴ Cable customers can also watch programming on mobile devices using Wi-Fi in their homes or, in many cases, outside their homes, and can also record and download programming on their devices for offline viewing.⁶⁵

At the same time, the amount of video programming available to consumers has expanded geometrically over the years, and in today’s “golden age” of television, the market for the sale of video content is robustly competitive. Responding to evolving competition, content creators and distributors are spending billions of dollars on high-quality content—especially original and

⁶¹ As noted by the FCC, the interplay between traditional MVPDs and online alternatives is “wide-ranging, and may provide numerous benefits to customers.” *2017 Video Competition Report* ¶ 64.

⁶² Cisco VNI Complete Forecast Highlights at 3, available at https://www.cisco.com/c/dam/m/en_us/solutions/service-provider/vni-forecast-highlights/pdf/Global_2021_Forecast_Highlights.pdf.

⁶³ *Id.* at 9.

⁶⁴ *Id.*

⁶⁵ *Id.*

unique programming—in order to attract and retain viewers. Netflix, whose content budget is larger than that of any broadcast network, plans to spend \$8 billion in original content in 2018 and release over 80 films.⁶⁶ Amazon has said it will triple its library of original content, with plans to spend as much as \$5 billion on content in 2018.⁶⁷ Facebook and Apple each plan to spend \$1 billion on content this year.⁶⁸ And new “digital studios” are constantly entering the marketplace and competing with more established content providers.⁶⁹ As a result, the number of scripted original series on all platforms has more than doubled since 2010—growing from 216 that year to 487 in 2017—and on online video platforms alone, the number has jumped from 4 in 2010 to 117 in 2017.⁷⁰ All in all, competition in the video market is fiercer and more vibrant than ever.

NCTA’s members also participate in the market for voice services—primarily through the provision of innovative Voice-over-Internet-Protocol (“VoIP”) offerings—and VoIP providers have played a critical role in providing consumers with expanded competitive choice. More than

⁶⁶ See John Koblin, *Netflix Says it Will Spend Up to \$8 Billion on Content Next Year*, N.Y. TIMES (Oct. 16, 2017), available at <https://www.nytimes.com/2017/10/16/business/media/netflix-earnings.html>.

⁶⁷ See Alex Weprin, *Amazon Expected To Spend \$5 Billion on Video Content this Year*, DIGITAL NEWS DAILY (Feb. 23, 2018), available at <https://www.mediapost.com/publications/article/315055/amazon-expected-to-spend-5-billion-on-video-conte.html>.

⁶⁸ See Deepa Seetharaman, *Facebook Is Willing To Spend Big in Video Push*, WALL ST. J. (Sept. 8, 2017), available at <https://www.wsj.com/articles/facebook-is-willing-to-spend-big-in-video-push-1504863181>; Tripp Mickle, *Apple Readies \$1 Billion War Chest for Hollywood Programming*, WALL ST. J., (Aug. 16, 2017), available at <https://www.wsj.com/articles/apple-readies-1-billion-war-chest-for-hollywood-programming-1502874004>.

⁶⁹ See Sahil Patel, *New Video Distribution Options Set Off a Scramble by Digital Studios*, DIGIDAY (June 1, 2017), available at <https://digiday.com/media/entertainment-studios-face-more-competition-as-more-platforms-seek-shows/>.

⁷⁰ See Joe Otterson, *487 Scripted Series Aired in 2017, FX Chief John Landgraf Says*, VARIETY (Jan. 5, 2018), available at <https://variety.com/2018/tv/news/2017-scripted-tv-series-fx-john-landgraf-1202653856/>.

63 million Americans now subscribe to “interconnected” VoIP services,⁷¹ with millions more using “non-interconnected” services.⁷² The cable industry plays a key role in providing facilities-based VoIP services; as of March 2018, more than 31 million cable subscribers are taking advantage of interconnected VoIP service.⁷³ The benefits of technological innovation and competition in the delivery of VoIP technology have flowed directly to consumers in the form of a steady decline in prices for voice services, and this pattern will continue into the foreseeable future. And, of course, an increasing number of consumers now rely heavily on messaging apps like Snapchat, Facebook Messenger, and WhatsApp to communicate, often in lieu of using voice services.⁷⁴

Tremendous growth in the markets for broadband, video, and voice services has created an environment in each sector that is substantially competitive, and increasingly so. Consumers can choose between innovative service offerings in each market segment, and as technology continues to advance, competition to attract new customers will only increase.

⁷¹ Interconnected VoIP services are those that provide the ability to place calls to and receive calls from the traditional public switched telephone network, using a broadband connection and IP-compatible customer premises equipment. See 47 C.F.R. § 9.3.

⁷² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Voice Telephone Services: Status as of December 31, 2016*, at 2 (Feb. 2018), <https://docs.fcc.gov/public/attachments/DOC-349075A1.pdf>.

⁷³ See NCTA, *Cable’s Customer Base*, https://www.ncta.com/industry-data?share_redirect=undefined#colorbox=node-2800 (last visited Aug. 20, 2018).

⁷⁴ See, e.g., Maeve Duggan, *Mobile Messaging and Social Media 2015*, PEW RESEARCH (Aug. 19, 2015), available at <http://www.pewinternet.org/2015/08/19/mobile-messaging-and-social-media-2015/>.

II. A LIGHT-TOUCH APPROACH GROUNDED IN SECTION 5 IS THE APPROPRIATE POLICY PRESCRIPTION IN THE INCREASINGLY DYNAMIC COMMUNICATIONS MARKETPLACE

Topic 2 of the FTC’s Public Notice also asks about the “welfare effects of regulatory intervention,” with a particular focus on the “broadband internet access service business,”⁷⁵ while topic 3 asks similar questions about “markets featuring ‘platform’ businesses.”⁷⁶ The FTC’s enforcement of consumer protection and antitrust laws is sufficient to protect consumers and appropriately establishes common norms for all market participants. The federal government’s current policy of avoiding unnecessarily burdensome prophylactic regulation, as the FTC and FCC have affirmed, represents the best way to benefit consumers and promote investment and innovation. As the FTC noted in 2007, “[p]olicy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects on such welfare of potential conduct by broadband providers and the law enforcement structures that already exist.”⁷⁷ This remains true today; as a general matter, heavy-handed prophylactic regulation in the dynamic and increasingly competitive broadband marketplace, far from promoting consumer welfare, poses significant risks to innovation and investment. In contrast, a light-touch, case-by-case approach based on fact- and market-specific analysis of conduct and business arrangements has historically facilitated tremendous growth within the Internet ecosystem, to the enormous benefit of consumers. Market-based incentives, transparency requirements, and appropriate enforcement actions minimize the risk that BIAS providers, as well as other firms, will engage in anti-competitive or anti-consumer conduct.

⁷⁵ FTC Public Notice at 3.

⁷⁶ *Id.*

⁷⁷ *2007 Report* at 160.

The FTC’s fact-based enforcement of well-established antitrust and consumer protection requirements under Section 5—as opposed to prophylactic, sector-specific regulation grounded in hypothetical concerns—is the proper approach for the modern communications marketplace. As the FTC found in 2007, “[t]he FTC Act is sufficiently flexible to allow the FTC to enforce the antitrust and consumer protection laws in most industries, including those, such as broadband Internet access, involving new and ever-changing technologies,”⁷⁸ and the FCC has recently stated that this remains true today.⁷⁹ The FTC’s careful case-by-case analysis of the net effects of particular conduct on consumer welfare is more appropriate and effective than broad and intrusive regulatory schemes that can hamper innovation.⁸⁰ Indeed, this type of light-touch approach has allowed these markets to flourish, as discussed below. In the unlikely event that some future evidence of pervasive market failure emerges and thereby warrants increased regulation, the FTC should endorse consistent mandates that apply to all the players within the Internet ecosystem.

A. The Current Policy of Promoting Innovation Through Market Forces While Relying on Section 5 as a Backstop Represents the Best Fit for the Broadband Marketplace

Both the FTC and the Department of Justice have correctly recognized the need to avoid overbroad prophylactic regulations that can end up deterring beneficial, pro-competitive conduct. In its influential report on broadband policy issued more than a decade ago, the FTC underscored

⁷⁸ *2007 Report* at 161.

⁷⁹ *RIF Order* ¶¶ 140-146; *see also* Comments of Maureen K. Ohlhausen, Acting Chairman, FTC, WC Docket No. 17-108, at 8 (July 17, 2017) (“Ohlhausen RIF Comments”) (“Together, the developments over the past ten years demonstrate that the FTC was correct in its unanimous, bipartisan 2007 recommendation that regulators ‘proceed[] with caution before enacting broad, ex ante restrictions in an unsettled, dynamic environment.’ Today, there is still no evidence of sustained injury to consumers or to competition. Instead, the internet ecosystem has remained vibrant over the past decade.” (internal citation omitted)).

⁸⁰ *See* Ohlhausen RIF Comments at 12 (explaining that, “[i]n dynamic, innovative industries like internet services,” a case-by-case approach “mitigates the regulator’s knowledge problem and allows legal principles to evolve incrementally,” and also “focuses on actual or likely, specifically-pled harms rather than having to predict future hypothetical harms”).

“the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace.”⁸¹ The DOJ likewise has observed that the premature imposition of regulatory restraints on “dynamic and evolving” services like BIAS, absent any showing of harm, “can inefficiently skew investment, delay innovation, and diminish consumer welfare.”⁸² And as discussed further below, numerous economists and academics have sounded a similar warning over the imposition of prophylactic regulation in the broadband marketplace, noting that regulation beyond a light-touch, case-by-case approach grounded in well-defined consumer protection and antitrust standards can be a “problematic means of addressing a risk of occasional market failure because it can limit beneficial behavior.”⁸³

As a general matter, when making investment decisions, businesses consider all significant risks and returns. Other things equal, the introduction “of a new peril, particularly one that is uncertain and open-ended, reduces the attractiveness of any investment project.”⁸⁴ As a result, incumbent firms are deterred from investing in new capital projects, and new entrants lose the incentive to enter the market. Such regulation that deters entry can “create a vicious cycle whereby investment is undermined and competition does not develop, or does not develop as quickly or expansively as it otherwise would, thus perpetuating the market conditions that triggered regulation.”⁸⁵ This dynamic is especially problematic in the Internet ecosystem, where both wireline and wireless networks continue to undergo dramatic transformation through significant

⁸¹ *2007 Report* at 157.

⁸² Ex Parte Filing of the United States Department of Justice, WC Docket No. 07-52, at 2-3 (Sept. 6, 2007).

⁸³ Israel Paper ¶ 78.

⁸⁴ Owen Paper at 8-9.

⁸⁵ Declaration of Dennis Carlton & Bryan Keating at 16, attached to Comments of CALinnovates, WC Docket No. 17-108 (July 17, 2017).

investment; in fact, several wireline and wireless providers consistently rank among the top U.S. companies in terms of annual capital expenditures.⁸⁶

Heavy-handed, prophylactic forms of regulation are *particularly* problematic in dynamic industries, such as the broadband marketplace. As the FTC correctly found in 2007, heavy-handed regulation in the area of broadband Internet access may harm consumers in the short run and reduce consumer welfare in the long run, by decreasing product and service innovation.⁸⁷ Experts similarly have observed that, “[i]n dynamic industries, rapid technological change leads to frequent changes in competitive conditions so *ex ante* regulations quickly become inconsistent with the way the market and competition would desirably evolve,” and that “[i]n such cases, there may be significant efficiency losses.”⁸⁸ Because “no regulator knows the future of an industry as dynamic as the Internet ecosystem confidently enough to make such predictions . . . piling on additional regulatory uncertainty, no matter how well-intentioned, is likely to do more harm than good.”⁸⁹

Indeed, the FCC’s *RIF Order* documented various ways in which the imposition of heavy-handed common carrier obligations on ISPs between 2015 and 2017 substantially undermined innovation and investment in this marketplace. The FCC cited various instances where ISPs, including large ISPs with significant resources, had forgone or delayed innovative service offerings or business models and arrangements due to regulatory uncertainty.⁹⁰ Small ISPs and

⁸⁶ See, e.g., Michelle Di Iorio and Michael Mandel, *Investment Heroes 2016: Fighting Short-Termism*, *Progressive Policy Institute*, at 5 (Oct. 2016), available at <http://www.progressivepolicy.org/publications/investment-heroes-2016-fighting-short-termism/>.

⁸⁷ *2007 Report* at 160.

⁸⁸ Declaration of Robert Hahn ¶ 28, attached to Comments of CTIA, WC Docket No. 17-108 (July 17, 2017).

⁸⁹ Dippon Paper at 42.

⁹⁰ See *RIF Order* ¶ 99 (“Charter, for instance, has asserted that it has ‘put on hold a project to build out its out-of-home Wi-Fi network, due in part to concerns about whether future interpretations of Title II would allow Charter to continue to offer its Wi-Fi network as a benefit to its existing subscribers.’ Cox has also stated that it has approached the ‘development and launch of new products and service features with greater

new entrants faced disproportionate costs and burdens as a result of regulation.⁹¹ Indeed, these harms are not limited to ISPs; the regime “create[d] paralyzing uncertainty for app developers and other edge providers,’ as well as equipment manufacturers.”⁹²

The FCC’s *RIF Order* found that capital investment by broadband providers decreased in 2015—the year it imposed overly broad prophylactic regulation—and that was after seeing an increase every post-recession year up to 2014, when investment peaked.⁹³ Over the next two years, “the deployment of advanced telecommunications slowed dramatically,” as new deployments for fixed terrestrial broadband dropped 55 percent compared to the two years preceding the FCC’s 2015 order, while new deployments for mobile LTE broadband decreased 83 percent over the same time period.⁹⁴ In fact, even just the threat of Title II regulation was associated with a \$30-\$40 billion actual decline in investment in the U.S. Bureau of Economic Analysis’ “broadcasting and telecommunications” category between 2011 and 2015.⁹⁵

By contrast, a light-touch approach to the broadband marketplace has historically allowed investment and innovation to flourish, ultimately to the benefit of consumers. Under the FCC’s deliberate policy of minimal regulation and the FTC’s exercise of oversight pursuant to Section 5, the broadband market evolved rapidly, “[f]ueled primarily by private sector investment and innovation” with “limited” government oversight.⁹⁶ ISPs and edge providers made massive

caution’ due to the uncertainty created by the Title II classification. And while new service offerings can take a while to develop and launch, Comcast cites ‘Title II overhang’ as a burden that delayed the launch of its IP-based transmission of its cable service, due to a year-long investigation.”).

⁹¹ *Id.* ¶ 103.

⁹² *Id.* ¶ 249 (citation omitted).

⁹³ *Id.* ¶ 90.

⁹⁴ *2018 Broadband Deployment Report* ¶ 4.

⁹⁵ *RIF Order* ¶ 95.

⁹⁶ Comments of NCTA, WC Docket No. 17-108, at 28 (July 17, 2017) (“NCTA RIF Comments”) (quoting Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar Northern

investments that helped drive the Internet’s rapid growth; broadband providers invested over \$1.5 trillion of private capital in their networks between 1996 and 2015.⁹⁷ From 2004 to 2014, nearly a quarter of the world’s broadband investment occurred in the United States.⁹⁸ By contrast, the imposition of common-carrier-style regulations on ISPs in Europe resulted in broadband investment levels that between 2007 and 2012, were less than half of the level of broadband investment in the United States on a per household basis.⁹⁹

As a direct result of this investment, broadband in the United States became the fastest deploying technology ever known. The average cable broadband customer saw top speeds increase by 3,200 percent between 2005 and 2015.¹⁰⁰ At the same time, the price for broadband service, as measured on a per-Mbps basis, has decreased sharply in the United States in the last decade-plus.¹⁰¹ ISPs also have rapidly expanded their networks to bring higher speeds and more services to more Americans. As broadband networks improved and expanded, high-speed BIAS became affordable and accessible to vast swaths of the population and the Internet economy skyrocketed, resulting in innovative new services and products for consumers. As a whole, Silicon

California Chapter, San Francisco, CA, Jul. 20, 1999, at 4, available at <http://transition.fcc.gov/Speeches/Kennard/spwek924.doc>).

⁹⁷ *Id.*

⁹⁸ *Id.* at 28-29.

⁹⁹ See Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* 14 (June 2014), available at <https://www.law.upenn.edu/live/files/3352>.

¹⁰⁰ NCTA RIF Comments at 29.

¹⁰¹ See *supra* at 10, Table 2; see also, e.g., Broadband for America, “Leading America Into the Future,” at 1 (May 2017), available at <https://www.broadbandforamerica.com/wp-content/uploads/2017/05/International-Broadband-For-America-Comparison-Brochure.pdf> (presenting statistics showing that the “fastest American broadband speed tier is 660x faster than it was in 2002, but nominal prices have remained mostly flat, and the price per Mbps continues to drop”); see also, e.g., Comments of Comcast Corp., GN Docket No. 12-228, at 12 (filed Sept. 20, 2012) (explaining that, between 1996 and 2012, the speed of connections offered under Comcast’s standard broadband Internet service tier increased by approximately 900 percent, while the price that subscribers to this service pay per Mbps declined by at least 87 percent).

Valley saw a tremendous rise in investment; by the end of 2014, total venture capital funding for the Valley reached nearly \$20 billion—up from roughly \$6 billion in 2005.¹⁰² This staggering growth makes clear that the Internet ecosystem thrived for decades under a light-touch approach to the benefit of consumers.

The FTC thus should refrain from endorsing heavy-handed intervention in the broadband marketplace, including by making clear that prophylactic, prescriptive mandates are inappropriate and indeed counterproductive unless actual and widespread harms to consumers and competition are demonstrated. Critically, there is no evidence of such harms in the marketplace for broadband services. BIAS providers already have strong, market-based incentives not to engage in blocking, throttling, or similar conduct, and the best way to ensure that consumers are protected in the future is to continue to ensure transparency necessary to facilitate competition in the broadband marketplace, with the backstop of FTC enforcement pursuant to its Section 5 authority.

Leading academics and economists have explained that BIAS providers, facing effective competition, experience powerful market constraints that minimize any potential benefits they might receive from engaging in conduct detrimental to competition. For example, customers would observe and react to any attempts by ISPs to block or throttle specific content or any attempts to impose discriminatory charges on content providers.¹⁰³ Blocking content would reduce the value of a BIAS provider's service to customers, reducing the amount that customers would be willing to pay for the service. This is true even if the provider were a monopolist, but “because there almost always are other providers in the market, it would reduce the ISP's profits because

¹⁰² NCTA RIF Comments at 31.

¹⁰³ Israel Paper ¶ 67.

customers can switch to those alternative providers.”¹⁰⁴ Further, if a BIAS provider were to put restrictions on content providers, customers would have the incentive to switch providers and providers would face serious difficulties attracting new subscribers.¹⁰⁵ The FCC correctly recognized this dynamic in the *RIF Order*, explaining that, because “[t]he content and applications produced by edge providers often complement the broadband Internet access service sold by ISPs, and ISPs themselves recognize that their businesses depend on their customers’ demand for edge content,” it is “no surprise that many ISPs have committed to refrain from blocking or throttling lawful Internet content notwithstanding any Title II regulation.”¹⁰⁶

On top of these market-driven constraints, the FCC’s Transparency Rule provides an additional vital and well-functioning check on BIAS provider conduct. Under the FCC’s current rule, BIAS providers must publicly disclose accurate information regarding certain network management practices (including any blocking, throttling, affiliated prioritization, or paid prioritization in which they engage), performance characteristics (*i.e.*, a service description and disclosures about the impact of specialized services), and commercial terms (including price, privacy policies, and redress options).¹⁰⁷ Disclosures must be “sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings.”¹⁰⁸ As noted by the FCC, transparency “substantially reduces the possibility that ISPs will engage in harmful practices,

¹⁰⁴ Owen Paper at 3.

¹⁰⁵ Notably, the risk to ISPs is even greater in the current communications marketplace, where customers often subscribe to double, triple, or quadruple play packages. Thus, a subscriber who switches to another provider often switches for multiple services, thereby compounding the potential loss for an ISP.

¹⁰⁶ *RIF Order* ¶ 117.

¹⁰⁷ *Id.* ¶¶ 219, 221, 223.

¹⁰⁸ *Id.* ¶ 215.

and it incentivizes quick corrective measures by providers if problematic conduct is identified.”¹⁰⁹ And significantly, the Transparency Rule, in requiring honest and forthright disclosure of business practices and service offerings, works in synergy with the FTC’s Section 5 authority.¹¹⁰ Where a BIAS provider does not live up to its Transparency Rule promises, the FTC can take action, as it has historically done in the Internet arena.¹¹¹ The FTC and FCC have recently entered into a Memorandum of Understanding ensuring the FTC will remain vigilant in ensuring Internet service providers remain true to these promises, allowing for robust enforcement in the case of any unfair, deceptive, or otherwise unlawful conduct, on a case-by-case basis.¹¹²

The FCC similarly noted that transparency “amplifies the power of antitrust law” where needed to remedy behavior that harms consumers.¹¹³ Antitrust laws—including not only Section 5 but also the Sherman and Clayton Acts—are well-suited to address any open Internet concerns, in part because the antitrust regime applies to the entire Internet ecosystem and thereby does not “tilt[] the playing field against ISPs and caus[e] economic distortions by regulating only one side of the business transactions on the Internet.”¹¹⁴ Moreover, and as noted by Dr. Michael Katz, “antitrust enforcement does not typically create the industry-wide uncertainty” associated with a

¹⁰⁹ *Id.* ¶ 209.

¹¹⁰ *See* 15 U.S.C. § 45(a)(1).

¹¹¹ *See RIF Order* ¶ 141.

¹¹² *See* FTC-FCC Memorandum of Understanding (Dec. 2017), available at https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf.

¹¹³ *RIF Order* ¶ 244.

¹¹⁴ *Id.* ¶ 140; *see also* Comments of the Staff of the Federal Trade Commission, WC Docket No. 17-108, at 24 (July 17, 2017) (“FTC Staff RIF Comments”) (noting that Section 5’s unfair competition provision undergirds “a fact-based, flexible, and enforcement-focused approach built on the FTC’s significant experience in weighing potential anticompetitive effects against the procompetitive effects and efficiencies that drive business practices in fast-growing industries”); *id.* at 25 (“The competitive issues raised by the growth of the Internet and all of its subsidiary technologies are not new to antitrust law[.]”).

vague or prophylactic regulatory scheme, given the well-developed body of antitrust precedent that has developed over many decades.¹¹⁵ As FTC staff has explained,

For all these reasons, the FTC should take the opportunity presented by this reexamination of the broadband marketplace to confirm the wisdom and principles of a light-touch approach. Market-based incentives and the availability of consumer protection and antitrust enforcement under Section 5 constrain anti-competitive conduct, and the FCC’s Transparency Rule further promotes honest and forthright communication by BIAS providers. Within this framework, the FTC is well-positioned to continue to effectively protect consumers.

B. The FTC Should Endorse a Consistent Enforcement Approach for All Market Participants

In addition to avoiding overly prescriptive regulation, the government also should apply a consistent enforcement approach under Section 5 to all participants in the Internet ecosystem. Applying heightened scrutiny or obligations only to particular participants lacks a strong economic foundation, and risks distorting competition and creating economic inefficiency. Rather, the FTC can and should apply its enforcement authority under Section 5 of the FTC Act to facts as they arise, rather than to particular providers, to help ensure a level playing field in the Internet arena.

Recent history illustrates the fallacy of singling out particular providers or sectors (*e.g.*, “network” businesses or “platform” businesses) for disparate treatment. In a few recent instances, the FCC has experimented with forms of regulatory intervention that were not only highly invasive but also *asymmetric*, singling out ISPs. From the beginning, many recognized that ISPs had done nothing to warrant this especially negative treatment. When the FCC first tried to impose

¹¹⁵ Michael L. Katz, *Wither U.S. Net Neutrality Regulation?*, at 17-18 (May 15, 2016), available at <https://techpolicyinstitute.org/wp-content/uploads/2016/05/MLKatzWitherUSNetNeutralityRegulation.pdf>.

prophylactic regulations on ISPs, Judge Silberman expressed in “astonish[ment]” that “the [FCC] was able to locate only four examples” of alleged misconduct to support its approach.¹¹⁶ Judge Williams echoed that sentiment when the FCC shifted to an even more invasive Title II-based approach to BIAS regulation.¹¹⁷ In fact, the marketplace evidence discussed above supports the *opposite* conclusion. And when the FCC reclassified BIAS in its *RIF Order*, it explicitly recognized its past errors and the “paucity of concrete evidence of harms” underlying its past frameworks.¹¹⁸ Nor is there any structural basis for asymmetric regulatory treatment; economists and academics have concluded that the so-called “terminating access monopoly” construct developed in the telephone context is inapposite in the broadband context,¹¹⁹ and the FCC has reached a similar conclusion.¹²⁰ And as Professor Christopher Yoo and former FTC General Counsel Jonathan Nuechterlein have explained, even when it exists, “the terminating access monopoly phenomenon . . . does *not* itself generally threaten market failures except in very limited circumstances” that are not present here.¹²¹

¹¹⁶ See *Verizon v. FCC*, 740 F.3d 623, 664-65 (D.C. Cir. 2014) (Silberman, J., dissenting) (“That the Commission was able to locate only four potential examples of such conduct is, frankly, astonishing.”).

¹¹⁷ See *USTelecom v. FCC*, 825 F.3d 674, 761 (D.C. Cir. 2016) (Williams, J., dissenting) (“Judge Silberman’s observations about the episodes marshalled to support the precursor order . . . seem as applicable today as then.”).

¹¹⁸ *RIF Order* ¶ 116.

¹¹⁹ See also Lerner/Ordo Paper at ¶¶ 73-91 (explaining the inapplicability of the “gatekeeper” theory); Israel Declaration at ¶ 68 (“Not only are there no regulatory distortions to create terminating access monopoly concerns in broadband Internet access, but industry participants do not appear to behave as though broadband providers or firms in analogous situations have terminating access monopolies.” To the contrary, “broadband Internet service providers frequently pay backbone providers for transit, effectively paying to enable their own customers’ access to content.”).

¹²⁰ *RIF Order* ¶ 137.

¹²¹ Jonathan E. Nuechterlein & Christopher S. Yoo, *A Market-Oriented Analysis of the ‘Terminating Access Monopoly’ Concept*, 14 COLO. TECH. L.J. 21, 23 (2015) (emphasis added).

By contrast, concerns have been raised about the growing power over key aspects of the Internet exercised by a number of large Internet platform providers—including Amazon, Apple, Facebook, and Google. Each of these entities has a greater incentive and ability to discriminate against emerging online competitors (and thereby adversely affect the growth of broadband usage) than any BIAS provider.¹²² Most notably, each of these entities benefits tremendously from “network effects” built into their services; because the value of the service to a consumer is significantly derived from the number of consumers that use it, users often face a significant deterrent to switching services.¹²³ Emboldened by this dynamic and other factors, these large Internet platform providers have engaged in various forms of conduct in the Internet marketplace that are at odds with the standards of openness that they and other advocates have often sought to impose on ISPs through prescriptive regulatory mandates. In recent months, Google and Amazon have been accused of blocking or impeding access to each other’s services as part of the ongoing commercial spat between the companies.¹²⁴ A Mozilla engineer recently reported that Google’s redesign of YouTube causes loading to occur five times slower in Mozilla’s Firefox and

¹²² The market position and deregulated status of these entities also gives them advantages in the video marketplace, where traditional multichannel competitors must continue to operate under outmoded regulatory schemes.

¹²³ For example, Facebook is far more valuable than other social networks because more people use it, making it difficult for a consumer to justify switching to a competitive alternative that has fewer users and is, therefore, less valuable. See David Easley and Jon Kleinberg, *Networks, Crowds, and Markets: Reasoning about a Highly Connected World*, at 509, 527-28 (2010).

¹²⁴ Google pulled support for YouTube on Amazon’s Alexa-powered Echo Show device and stated that it would pull YouTube support for Fire TV devices as of January 1, 2018. Google’s justification for this was Amazon’s alleged failure to carry competing products like Chromecast and Google Home in its online store and its failure to support Prime Video on Google streaming devices. In turn, Amazon decried Google’s decision as “selectively blocking customer access to an open website.” See Mark Gurman, *Google Blocks YouTube Access from Amazon’s Streaming Devices*, BLOOMBERG (Dec. 5, 2017), available at <https://www.bloomberg.com/news/articles/2017-12-05/google-blocks-youtube-access-from-amazon-streaming-devices>.

Microsoft’s Edge browser than in Google’s Chrome browser.¹²⁵ Google also has been widely criticized for its practice of demoting competing edge providers in its search results, for which it was fined more than \$2.4 billion by the European Union in June 2017,¹²⁶ and for using its popular Android mobile operating system to block rivals, for which the European Union fined Google \$5 billion just last month.¹²⁷ Facebook and others have also been criticized for the “algorithmic bias” built into their platforms, which can interfere with consumer choice because these “algorithms that determine what you see on social media prioritize revenue over veracity.”¹²⁸ Even Internet entities with a less salient public presence have also been accused of, or have admitted to, anti-consumer conduct. For instance, backbone Internet provider Cogent Communications Holdings had an interconnection dispute with Sprint that temporarily resulted in a situation where certain Internet users could not access all Internet endpoints.¹²⁹ Cogent also admitted it created “at least two priority levels (a ‘fast lane’ and ‘slow lane’)” in 2014 that resulted in the deprioritization of Netflix traffic.¹³⁰

¹²⁵ Sean Keane, *Mozilla Engineer Says Google Slowed YouTube Down on Non-Chrome Browsers*, CNET.COM (July 26, 2018), available at <https://www.cnet.com/news/mozilla-exec-says-google-slowed-youtube-down-on-non-chrome-browsers/>.

¹²⁶ See Mark Scott, *Google Fined Record \$2.7 Billion in E.U. Antitrust Ruling*, N.Y. TIMES (June 27, 2017), available at <https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html>.

¹²⁷ See Foo Yun Chee, *Europe Hits Google with Record \$5 Billion Antitrust Fine, Appeal Ahead*, REUTERS (July 18, 2018), available at <https://www.reuters.com/article/us-eu-google-antitrust/europe-hits-google-with-record-5-billion-antitrust-fine-appeal-ahead-idUSKBN1K80U8>.

¹²⁸ See Tom Wheeler, *Using ‘Public Interest Algorithms’ To Tackle the Problems Created by Social Media Algorithms*, BROOKINGS INSTITUTION (Nov. 1, 2017), available at <https://www.brookings.edu/blog/techtank/2017/11/01/using-public-interest-algorithms-to-tackle-the-problems-created-by-social-media-algorithms/>.

¹²⁹ See, e.g., Scott Wooley, *The Day the Web Went Dead*, FORBES (Dec. 2, 2008), available at http://www.forbes.com/2008/12/01/cogent-sprint-regulation-tech-enter-cz_sw_1202cogent.html.

¹³⁰ Dan Rayburn, *Cogent Now Admits They Slowed Down Netflix’s Traffic, Creating a Fast Lane & Slow Lane*, STREAMINGMEDIABLOG.COM (Nov. 5, 2014), available at <https://www.streamingmediablog.com/2014/11/cogent-now-admits-slowed-netflixs-traffic-creating-fast-lane-slow-lane.html>.

The point is not that these providers should be subject to differential requirements or prophylactic regulation. Rather, the examples illustrate that the objective of the FTC’s enforcement regime should be addressing and deterring *actual* anti-competitive and anti-consumer conduct as it arises, under a consistently applied enforcement approach, rather than taking a more aggressive approach against one or another marketplace participant or segment based largely on hypothetical concerns about conduct that may one day materialize. In many instances, market forces and existing oversight mechanisms have resulted in relatively speedy resolutions of any issues without substantial harm to consumers. In the limited instances where market failure has emerged, the FTC’s Section 5 authority provides an important backstop, enabling the agency to bring enforcement actions applying well-established antitrust and consumer protection principles based on fact- and market-specific analysis of the conduct at issue. Indeed, authorities have taken appropriate action based on established antitrust principles, as the Google examples in the European Union demonstrate, and such enforcement actions have largely been sufficient to protect consumers, without the need for increased regulatory strictures. *In all events, however, there is simply no basis for imposing heightened, sector-specific rules on ISPs and not on other entities within the Internet ecosystem.*

III. THE FTC SHOULD CONTINUE TO PURSUE A TECHNOLOGY-NEUTRAL APPROACH TO ONLINE PRIVACY AND DATA SECURITY ISSUES TO PROTECT CONSUMERS AND PROMOTE COMPETITION

Topic 4 of the FTC Public Notice also raises several important questions about the “intersection between privacy, big data, and competition,” and the FTC’s role in ensuring that consumers are protected while innovation is allowed to flourish.¹³¹ The FTC has long been the nation’s foremost consumer protection agency and enforcer of privacy and data security

¹³¹ FTC Public Notice at 3.

protections, and its longstanding privacy and data security frameworks have successfully protected consumers and provided consistent standards that apply to all online parties collecting personal information. In NCTA’s view, the FTC has been an effective and “experienced cop on the [] beat.”¹³² It should continue to be the lead enforcer in this arena. Where necessary, the FTC has not hesitated to pursue enforcement action, with over 500 privacy and data security cases to date under its Section 5 unfair and deceptive acts and practices authority.¹³³ As FTC staff has noted, “[t]his body of cases covers both offline and online information and includes enforcement actions against companies large and small,”¹³⁴ where they allegedly failed to dispose of sensitive consumer data properly,¹³⁵ failed to secure consumers’ personal information,¹³⁶ engaged in deceptive online

¹³² *RIF Order* ¶ 2; see also Joint Statement of Acting Chairman Maureen K. Ohlhausen and Chairman Ajit Pai on Protecting America’s Online Privacy, at 1 (Mar. 1, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc> (“Ohlhausen/Pai Joint Statement”).

¹³³ See 163 Cong. Rec. at H2493 (Mar. 28, 2017) (statement of Rep. Flores) (noting that the FTC’s framework has generated “over 500 cases protecting consumer information [and] ensuring their online privacy”).

¹³⁴ FTC Staff RIF Comments at 4.

¹³⁵ See, e.g., *FTC v. Sequoia One, LLC*, 2015 WL 9462082 (D. Nev. Dec. 23, 2015) (enforcement action regarding dissemination of sensitive consumer information to parties with no legitimate need for the information).

¹³⁶ See, e.g., *FTC v. Ruby Corp et al.*, Case No. 1:16-cv-02438 (D.D.C.) (enforcement action regarding website that assured users their personal information was private but maintained weak data security features).

tracking of consumers,¹³⁷ spammed consumers,¹³⁸ installed spyware on consumers' computers,¹³⁹ violated Do Not Call obligations,¹⁴⁰ and various other forms of misconduct.

The FTC has been particularly active in policing consumer privacy and data protection in the high-tech arena. For example, in 2014 the FTC initiated administrative proceedings against social media company Snapchat, Inc., regarding the company's various deceptive claims about user privacy and the company's data collection, as well as the company's failure to secure data.¹⁴¹ In 2017 it initiated similar proceedings against laptop manufacturer Lenovo for pre-loading software on laptops that compromised security protections in order to deliver ads to consumers.¹⁴² And, that same year, it filed suit in federal court against ride-share company Uber Technologies, Inc. for deceiving consumers about its privacy and data security practices.¹⁴³ Most recently, in 2018, the FTC authorized a suit against electronic toy manufacturer VTech Electronics for collecting children's personal information without providing direct notice and obtaining parental consent.¹⁴⁴ And over the years, the FTC has established that it is up to the task of disciplining even the largest entities in this space, including settlements with Facebook (prohibiting

¹³⁷ See, e.g., *United States v. InMobi Pte Ltd*, Case No. 3:16-cv-3474 (N.D. Cal.) (enforcement action regarding software tracking location in thousands of child-directed apps without obtaining parent or guardian consent).

¹³⁸ See, e.g., *FTC v. Tachht, Inc., et al*, Case No. 8:16-cv-01397 (M.D. Fla.) (enforcement action against marketing operation that bombarded consumers with illegal spam for weight-loss products).

¹³⁹ See, e.g., *FTC v. MaxTheater, Inc.*, 2005 WL 3724918 (E.D. Wash. Dec. 6, 2005) (enforcement action regarding installation of spyware onto consumers' computers).

¹⁴⁰ See, e.g., *FTC v. J. William Enterprises, LLC*, 2017 WL 5157952 (M.D. Fla. Nov. 7, 2017) (enforcement action regarding calls made in violation of National Do Not Call Registry).

¹⁴¹ See *FTC, In the Matter of Snapchat, Inc.*, Docket No. C-4501.

¹⁴² See *FTC, In the Matter of Lenovo*, Docket No. C-4636.

¹⁴³ See *FTC v. Uber Technologies, Inc.*, Case No. 3:17-cv-00261 (N.D. Cal.).

¹⁴⁴ See *United States v. VTech Electronics*, Case No. 1:18-cv-00014 (N.D. Ill.).

misrepresentations regarding how the company maintains customer data privacy and security),¹⁴⁵ Twitter (prohibiting similar conduct),¹⁴⁶ and Apple (requiring \$32.5 million to be refunded for billing incurred by children on mobile apps without their parents' consent).¹⁴⁷ In short, the FTC has proven itself as an effective and trusted steward of consumer privacy and data security, even as technology and markets have evolved. And its balanced approach to safeguarding privacy while promoting innovation and new services in the digital economy has protected consumers and generated clear and familiar rules of the road for industry.

But while the FTC has taken a lead role on privacy and data security issues for the high-tech industry more broadly, it was temporarily precluded from doing so for ISPs by the FCC's 2015 classification of BIAS as a "common carrier" service under Title II of the Communications Act.¹⁴⁸ The FCC initially sought to fill the void it created by adopting privacy rules that would apply solely to ISPs,¹⁴⁹ though the FCC's ISP-specific rules never went into effect. The FCC's recent *RIF Order*, which reclassified BIAS as an "information service," has restored the FTC's privacy and data security authority over BIAS along with its authority to police all other entities collecting and handling consumer data online.¹⁵⁰ As the FCC affirmed, this restoration of FTC authority meant that regulation would revert to "the agency with the most experience and expertise" in these fields, and would better satisfy "[c]onsumer[] expect[at]ions" without

¹⁴⁵ See FTC, *In the Matter of Facebook, Inc.*, Docket No. C-4365.

¹⁴⁶ See FTC, *In the Matter of Twitter, Inc.*, Docket No. C-4316.

¹⁴⁷ See FTC, *In the Matter of Apple, Inc.*, Docket No. C-4444.

¹⁴⁸ *RIF Order* ¶¶ 306-310; see also 15 U.S.C. § 45(a)(2) (exempting "common carriers subject to the Acts to regulate commerce" from FTC jurisdiction).

¹⁴⁹ See *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016).

¹⁵⁰ *RIF Order* ¶ 181.

“imposing unnecessary or undue burdens on industry.”¹⁵¹ That is because the FTC’s privacy framework focuses on the sensitivity of the consumer data and companies’ promises about data collection, rather than on what type of entity collects or uses that data. Former Acting Chairman (now Commissioner) Ohlhausen and Chairman Pai have endorsed this as the best approach to protecting consumer privacy in the online world, explaining that “the best way [to protect online privacy of American consumers] is through a comprehensive and consistent framework.”¹⁵² “After all,” they noted, “Americans care about the overall privacy of their information when they use the Internet, and they shouldn’t have to be lawyers or engineers to figure out if their information is protected differently depending on which part of the Internet holds it.”¹⁵³

Going forward, as NCTA has explained in the past, privacy policy in the Internet arena should consist of four key pillars:

1. **Uniformity:** Consumers “expect information to be treated *consistently* across the Internet ecosystem and that their personal information will be subject to the same framework in all contexts,”¹⁵⁴ and they deserve a consistent, nationally uniform standard of online privacy and data security protection that applies to all entities collecting and

¹⁵¹ *Id.* ¶ 183; *see also* FTC Staff RIF Comments at 19 (“[H]aving one agency with jurisdiction over these entities would ensure consistent standards and consistent application of such standards. FTC staff believes that the same federally-enforced, consumer-focused privacy and data security approach should apply regardless of whether companies provide broadband services, data analytics, social media, or other so-called edge services. Accordingly, FTC staff encourages the FCC to adopt the proposed reclassification, thereby creating a level playing field for all companies operating in the Internet ecosystem.”).

¹⁵² Ohlhausen/Pai Joint Statement at 1.

¹⁵³ *Id.*; *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 27 FCC Rcd 10342 ¶ 154 (2012) (emphasizing that “consumers’ privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on [telephone] services”).

¹⁵⁴ *RIF Order* ¶ 183 (emphasis added).

handling their personal data online.¹⁵⁵ Moreover, consumers will benefit from the application of uniform national standards for protecting of their personal information across the Internet ecosystem, rather than being subject to a confusing set of inconsistent state-by-state regimes.¹⁵⁶

2. **Transparency:** Consumers deserve to have clear, comprehensible, accurate, and continuously available notifications that describe the customer information being collected, how that information will be used, and when that information will be shared with third parties.

3. **Consumer Choice:** Consumers should have easy-to-understand privacy choices based on the sensitivity of their personal data, how it will be used or disclosed, and the context of the consumer’s interaction with the business, consistent with the FTC’s existing privacy framework.

4. **Security:** Consumers should expect online companies to take reasonable measures to protect their information from unauthorized use, disclosure, or access, and to notify them when breaches occur.

In implementing these four pillars, consistent with these principles, the FTC has long recognized that privacy and data security regulation should be “technology neutral.”¹⁵⁷ Likewise, in the *RIF Order*, the FCC relied on Congress’s clear rejection of “sector-specific control of ISP privacy practices” in announcing that these matters would be returned to the jurisdiction of the

¹⁵⁵ See Progressive Policy Institute, Press Release, *Consumers Want One Set of Rules Protecting Their Information* (May 27, 2016), <http://www.progressivepolicy.org/press/press-releases/press-release-consumers-want-one-set-rules-protecting-information/> (conveying results of national poll finding 94% of Internet users seek uniform data privacy standards).

¹⁵⁶ See *infra* Section IV.

¹⁵⁷ See, e.g., *FTC Privacy Report* at 56.

FTC—which, as the FCC recognized, employs a “technology neutral approach to privacy regulation.”¹⁵⁸ Courts have noted that any asymmetrical treatment of similarly situated entities is inherently suspect,¹⁵⁹ and speaker-based distinctions in this context would also raise substantial First Amendment concerns.¹⁶⁰ To date, the evidence shows that “ISPs have neither comprehensive nor unique access to information about users’ online activity,” whereas “non-ISPs often have access to more and a wider range of user information than ISPs”¹⁶¹—particularly in the

¹⁵⁸ *RIF Order* ¶ 183. Congress similarly made clear that, in passing the Congressional Review Act resolution vacating the FCC’s sector-specific broadband privacy rules, it is the policy of the United States to avoid such discriminatory privacy regimes. *See* Pub. L. No. 115-22 (Apr. 3, 2017); *see also* 163 Cong. Rec. S1954 (daily ed. Mar. 23, 2017) (statement of Sen. Cornyn) (“The FCC privacy rules are just another example of burdensome rules that hurt more than they help and serve as another example of the Government’s picking winners and losers. They unnecessarily target internet service providers and, ultimately, make our internet ecosystem less efficient by adding more redtape.”).

¹⁵⁹ *See McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (“We remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment.”).

¹⁶⁰ *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569-70 (2011) (explaining “speaker-based” speech restrictions trigger “heightened judicial scrutiny”); *see also Verizon Northwest v. Showalter*, 282 F. Supp. 2d 1187, 1192 (W.D. Wash. 2003) (striking down state-level privacy regulations that applied to “only traditional landline carriers” and not “wireless carriers”).

¹⁶¹ Peter Swire, Justin Hemmings, & Alana Kirkland, *Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others*, Institute for Information Security & Privacy at Georgia Tech, at 4, WC Docket No. 16-106 (filed May 24, 2016). Indeed, ISPs’ business model is not based on monetizing personal data. Thus, the relationship with their customers instills strong incentives to earn and maintain their customers’ loyalty by protecting their data, and they have a long history of doing so. Both the FCC and FTC have previously agreed with this conclusion. In its 2002 CPNI rulemaking, the FCC recognized that providers with a pay subscription business, such as ISPs, have little incentive to risk those revenue streams by engaging in inappropriate privacy practices: “Because of commercial constraints required to ensure customer accountability, . . . the carrier with whom the customer has the existing business relationship has a strong incentive not to misuse its customers’ CPNI or it will risk losing its customers’ business.” *Implementation of Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 ¶ 37 (2002). The FTC has agreed with this principle, as its privacy framework calls for more flexibility and reliance on implied consent when the user has a relationship with the ISP or other provider and when the context of the data collection and use is consistent with that relationship (*e.g.*, an ISP customer likely expects that the ISP will market him or her other services like video, voice, home security, music, energy management, and other services, so privacy restrictions should

case of large platform providers like Google and Facebook that dominate the “big data” marketplace.¹⁶² And there is no basis to regulate ISPs more heavily when, in fact, those “big data” giants are the entities who present the most concerning privacy concerns today.¹⁶³

Going forward, federal policy should continue to ensure that all participants in the Internet ecosystem are subject to the same well-established standards consistently applied by a single agency: the FTC. A balanced, competitive, and technology-neutral approach to privacy and data security will continue to promote innovation and new services in the digital economy, and avoid unnecessary distortions that could undermine efforts to compete in the “big data” marketplace on equivalent terms.

IV. THE FTC SHOULD TAKE STEPS TO ENSURE THAT THE INTERNET ECOSYSTEM IS SUBJECT TO A UNIFORM NATIONAL FRAMEWORK

Finally, topic 10 of the Public Notice appropriately asks how best to “harmoniz[e]” oversight of the Internet ecosystem at the federal and state levels.¹⁶⁴ NCTA believes this is a vitally important task to ensure that businesses within the Internet ecosystem can operate with certainty while consumers are able to enjoy clear and consistent protections on net neutrality, privacy, data security, and other related matters nationwide. The FTC should ensure that the Internet is subject to uniform, consistent federal regulations, including by issuing guidance explicitly setting forth that inconsistent state and local requirements are preempted.

be reduced). FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 38-39 (2012) (“*FTC Privacy Report*”).

¹⁶² Indeed, as noted above, Facebook and Google together have a dominant share of the digital advertising market. *See supra* note 6 and accompanying text.

¹⁶³ *See, e.g.*, Ryan Nakashima, *Google Tracks Your Movements; Like it or Not*, ASSOCIATED PRESS (Aug. 14, 2018), available at <https://apnews.com/828aefab64d4411bac257a07c1af0ecb> (reporting that Google maps tracks users’ locations even when instructed not to).

¹⁶⁴ FTC Public Notice at 6.

For decades the Internet has been recognized as a “jurisdictionally interstate service.”¹⁶⁵ Whereas for traditional telephone services the Communications Act and the FCC’s regulations have established a “dual state and federal regulat[ory] scheme,”¹⁶⁶ it is widely recognized that “communications over the Internet [a]re very different.”¹⁶⁷ When using the Internet, “end user[s] may communicate with multiple destination points, either sequentially or simultaneously,” and, “[a]lthough these destinations are sometimes intrastate . . . a substantial portion of Internet traffic involves accessing interstate or foreign websites.”¹⁶⁸ And, as a jurisdictionally interstate service, BIAS has repeatedly been recognized as subject to exclusive federal jurisdiction.¹⁶⁹

It is critical that the FTC maintain this understanding and ensure that state enforcement agencies exercise their competition and consumer protection authority *only* in a manner that does not conflict with specific requirements under federal law or broader federal policy objectives in the broadband context. While states are not altogether prohibited from taking enforcement action against ISPs under state laws prohibiting unfair practices and fraud, they must do so consistent with controlling federal law and policy governing the broadband marketplace. State-by-state regimes threaten to upset efforts to establish a uniform federal regulatory scheme and can wreak

¹⁶⁵ *RIF Order* ¶ 199 (“[I]t is well-settled that Internet access is a jurisdictionally interstate service.”); *see also, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 59 (2002); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 ¶ 16 (2004) (“[F]ederal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services.”).

¹⁶⁶ *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007) (“*MPUC*”).

¹⁶⁷ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 (1986).

¹⁶⁸ *Bell Atl. Tel. Co. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000).

¹⁶⁹ *N.Y. Tel. Co. v. FCC*, 631 F.2d 1059, 1064-66 (2d Cir. 1980); *MPUC*, 483 F.3d at 578.

havoc on businesses across the Internet ecosystem attempting to comply with separate and sometimes conflicting rules and principles across many different jurisdictions.¹⁷⁰

The FTC should issue guidance to state attorneys general and consumer protection agencies reaffirming that they are bound by FCC and FTC precedent in this arena. For example, the FTC may seek to model preemption statements based on the FCC's recent *RIF Order*, which powerfully reaffirmed federal supremacy and broadly preempted state and local efforts that would countermand federal law and policy concerning the regulation of BIAS providers. The FCC explained that “allowing state or local regulation of [BIAS] could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements.”¹⁷¹ Accordingly, it “preempt[ed] any state or local requirements that are inconsistent with the federal deregulatory approach [it] adopt[ed].”¹⁷² And the order made plain that states may not use “the guise of consumer protection” to incorporate BIAS rules through a regulatory back door.¹⁷³ A similar statement from the FTC is warranted to ensure uniform and consistent regulation.

The need for a uniform national framework extends to privacy and data security protections for online data as well. Balkanized privacy regulation that differs from state to state would only confuse consumers. For example, California's recently enacted California Consumer Privacy Act

¹⁷⁰ See *RIF Order* ¶ 200 (“Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance.”); see also, e.g., Comments of Richard Bennett at 3, WC Docket No. 17-108 (July 17, 2017) (“Actions by . . . regional [actors] inconsistent [with] the international structure of the Internet risk fragmenting the global Internet into ‘splinternets’ that threaten the overall integrity of the system.”).

¹⁷¹ *RIF Order* ¶ 194.

¹⁷² *Id.*

¹⁷³ See *RIF Order*, 33 FCC Rcd at 841 (statement of Commissioner O’Rielly).

of 2018 imposes numerous requirements that differ from, and even conflict with, federal law.¹⁷⁴ Moreover, a patchwork of state-level rules applying only to BIAS providers would undercut existing federal policy basing enforcement on what information is collected and how it is used, rather than on who is collecting the information. Any FTC guidance to state entities on the need to ensure consistency with FTC and FCC policy and precedent in the Internet arena thus should cover privacy and data protection issues as well.

¹⁷⁴ See Cal. AB 375, available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375.

CONCLUSION

NCTA supports the FTC's efforts to use a data-driven approach to refresh its understanding of the communications industry and welcomes the opportunity to work closely with the Commission to accomplish its objectives in this highly dynamic industry.

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