

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
Restoring Internet Freedom) WC Docket No. 17-108

COMMENTS OF ACT | THE APP ASSOCIATION

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COMMENTS OF ACT | THE APP ASSOCIATION

I. INTRODUCTION AND STATEMENT OF INTEREST

ACT | The App Association (App Association) respectfully submits its views in response to the Federal Communications Commission’s (Commission) Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.¹ The App Association supports the Commission’s efforts to ensure an open and vibrant internet environment that facilitates competitiveness within the digital ecosystem across network and edge levels.

The App Association represents more than 5,000 small and medium-sized app development companies and technology firms across the globe that drive the \$143 billion app economy.² In a world where mobile technologies have been adopted faster than any other innovation in human history, the dynamic app ecosystem continues to produce innovative solutions that leverage mobile technologies to drive global digital commerce.

¹ *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking (2017) found here: https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1.pdf (NPRM).

² http://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf.

II. AS THE COMMISSION MOVES BACK TO A TITLE I REGULATORY APPROACH, IT MUST AVOID THE ISSUES ENCOUNTERED UNDER ITS TITLE II REGULATORY FRAMEWORK

Our members rely on the free flow of data to deliver products and services to customers around the globe. The App Association recognizes the Commission’s consideration to reverse its 2015 ruling that changed the classification of “broadband service” from and “information service” to a “telecommunications service.”³ This reclassification imposed a new regulatory framework for service providers, ultimately impacting entities reliant on service providers, including edge providers, and began an intense debate regarding the scope and application of the Commission’s authority. The App Association raised concerns with various Commission proposals in the aftermath of the Title II reclassification, specifically those that sought to regulate the network edge.⁴ The App Association welcomes the Commission’s proposal in the NPRM to establish clarity for small business app developers, thus, ensuring they continue innovating within the vibrant internet ecosystem. This proceeding will allow the Commission to implement market-based policies to spur infrastructure investment, innovation, and a competitive marketplace for consumers.

The Commission has the opportunity to resolve several jurisdictional issues by clarifying its role in ensuring an open internet. These include the following:

³ See NPRM at para. 23; see also, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

⁴ E.g., ACT | The App Ass’n, Comment, DA 16-1405 (2017).

A. The Internet Conduct Rule’s Impact on Pro-Consumer Network Management Practices

The *Title II Order*’s Internet Conduct Rule mandated a strict prohibition on “throttling” data and paid prioritization.⁵ However, several instances have shown that these prohibitions, particularly in a wireless context, are not practical or feasible. For example, this mandate sparked a debate as to whether the rules prevented service providers from offering zero-rating, or “free data,” plans.⁶ This model provides mobile network operators, mobile virtual network operators, or internet service providers (ISP) the option not to charge end users for data used on specific applications or internet services on their network, in either a limited or metered data plan.⁷ The Commission initially praised these plans as pro-consumer and committed to monitor their use and impact on consumers.⁸ Later, the Commission issued conflicting letters to various members of Congress, indicating a change in approach that opposed free data plans.⁹ These steps by the Commission introduced significant legal uncertainties for service providers, as well as the edge providers that utilize free data plans to grow and support jobs.

⁵ *Title II Order*, para. 151-152.

⁶ Alex Howard, *Zero Rating Poses a Conundrum for Net Neutrality Advocates Around the World*, TechRepublic (Jan 23, 2015, 7:31 AM) <http://www.techrepublic.com/article/zero-rating-poses-a-conundrum-for-net-neutrality-advocates-around-the-world/>.

⁷ Wall Street Journal, *5 Things About Zero-Rating*, Blog (Nov. 1, 2016, 7:36 PM) <https://blogs.wsj.com/briefly/2016/11/01/about-zero-rating/>.

⁸ *Title II Order*, para. 339-40.

⁹ Tom Wheeler, Chairman, FCC, Letters to Congress (2017) http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf.

The App Association believes the current rules affecting free data plans pose potential harm to our members by preventing wireless carriers, and potentially edge providers, from utilizing free data models and future innovative pro-consumer approaches to network traffic management.¹⁰ We have explained to the Commission that these restrictions would be premature, especially considering the Commission’s initial commitment to evaluate the impact of free data plans on consumers and conduct data-driven analysis to determine whether a full prohibition was necessary before taking further action.¹¹ The App Association also recommended that the Commission maintain oversight of wireless carriers operating under a “reasonableness” standard to prevent anticompetitive behaviors and concrete consumer harms.¹²

The Commission has an opportunity to clarify its support for innovative pro-consumer approaches to network management that uphold a new approach to internet freedom and innovation. We recommend the Commission undertake thorough data-driven analysis before prescribing any remedial measures, particularly if they broadly prohibit specific market strategies.

¹⁰ ACT | The App Ass’n, *Ex Parte*, GN Docket 14-28 (2016) <https://ecfsapi.fcc.gov/file/60001690735.pdf>.

¹¹ *See id.* at p. 2.

¹² *See id.*

B. The *Title II Order's Ex Ante* Analysis Introduced Inconsistencies and Uncertainties to Consumer Privacy Regulation and Expectations

Building upon its Title II reclassification, the Commission implemented new consumer privacy policies in 2016.¹³ However, we do not believe the Commission fully considered the implications of this decision for small business innovators. The Broadband Privacy Rules added ambiguity to the Federal Trade Commission's (FTC's) well-established responsibility and role in protecting consumer privacy. To provide needed clarity, we believe:

1. The Commission Should Base Privacy Decisions on Data-Driven Evidence

The App Association supports the Commission's efforts to provide consumers with more transparency, choice, and security within data privacy.¹⁴ We have significant concerns with the Commission's asserted role as an internet privacy regulator, especially without adequate consideration of potential downstream consequences or justification for this responsibility.¹⁵

The Commission's former Broadband Privacy Order was based on an assumption that ISPs have greater access to broadband customer information than others within the internet ecosystem. However, this assumption has been objectively disputed, and often called an error and conjecture.¹⁶ Furthermore, the Commission implemented a more restrictive approach to end user data collection than that of the FTC, which threatened to stifle the necessary data sharing

¹³ *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911 (2016) (Broadband Privacy Order).

¹⁴ ACT | The App Ass'n, Reply to Petitions of Reconsiderations, WC Docket No. 16-106 (2017).

¹⁵ *See id.*

¹⁶ *See* Oracle Petition for Reconsideration, WC Docket No. 16-106 (2016).

that allows app developers to provide their services to consumers around the globe. Moreover, the Commission's Broadband Privacy Order did not *prove* consumer harm, nor did it adequately evaluate the costs and burdens of its regulations, particularly on small businesses, as required under the Regulatory Flexibility Act.¹⁷ As we discuss below, the Commission's former privacy regime developed a "one size fits all" approach to a select portion of the internet ecosystem that did not appreciate the myriad distinct requirements companies' privacy policies imposed on consumers due to the diversity of their respective services.

We believe the Commission has a golden opportunity to restore order to consumer internet privacy by taking a data-driven and evidence-based approach. We are encouraged by the Commission's proposals and congressional interest¹⁸ in the NPRM, and strongly encourage the Commission to promulgate rules based on proven consumer harm, not *ex ante* assumptions. This proceeding is preeminent in setting the privacy regulatory format for industry and consumers alike; with that in mind, the Commission's rules should incorporate the above-referenced considerations moving forward.

¹⁷ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-12).

¹⁸ *Congress Strikes Down FCC Privacy Rules*, Lexology (2017) <http://www.lexology.com/library/detail.aspx?g=260ba4a0-3cd4-4c3f-b709-9519aed38c30>

2. *The Commission Should Restore the Federal Trade Commission's Ability to Protect Consumer Privacy*

The Title II classification complicated the FTC's central role in consumer privacy. When the Commission reclassified broadband services as telecommunications services, it effectively deemed broadband providers as common carriers—a category that falls outside the purview of the FTC's jurisdiction.¹⁹ This is largely due to the 9th Circuit's determination that the common carrier exemption in Section 5 of the FTC Act is “status” based as opposed to “activities” based.²⁰ This decision effectively stripped the FTC of its privacy authority over an entire section of the internet economy, introducing significant legal uncertainty regarding privacy-related responsibilities of ISPs and downstream app developers. This NPRM offers an opportunity to undo this harmful decision, and the App Association supports the reversion of broadband services to its Title I classification with respect to consumer privacy protections.

The App Association believes that the FTC has a well-established and extensive consumer privacy record. As an enforcement agency, the FTC has the authority to stop “unfair or deceptive” acts or practices in commerce.²¹ This gives the agency the flexibility to stop privacy practices where they diverge from consumer expectations without freezing innovation through onerous rules. We are encouraged by Chairman Pai and Acting FTC Chairman Ohlhausen's joint statement outlining their respective roles and responsibilities within broadband privacy,²² and we

¹⁹ 5 U.S.C. § 45(a)(2).

²⁰ *FTC v. AT&T Mobility, LLC*, 835 F.3d 993 (9th Cir. 2016).

²¹ *See* 5 U.S.C. § 45(a).

²² Joint Statement of FCC Chairman Pai and Acting FTC Chairman Ohlhausen on Protecting Americans' Online Privacy (Mar. 1, 2017), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0301/DOC-343702A1.pdf.

applaud this coordinated approach to establish clear rules of the road for both Commissions' respective jurisdictions as it relates to consumer privacy. Furthermore, we believe that this docket presents an opportunity for both agencies to clarify and restore the FTC's jurisdiction over these matters. This type of action would be immensely valuable to App Association members, and remove a significant hurdle to investment and innovation.

III. THE COMMISSION SHOULD REITERATE ITS COMMITMENT NOT TO REGULATE SMALL APP DEVELOPERS

The App Association strongly urges the Commission to uphold its commitment to stay within the parameters of its regulatory purview and avoid regulation of small app developers.²³ However, should the Commission formally decide to regulate the network edge, we believe it should consider the analytical framework established in *Chevron v. NDRC*²⁴ to determine whether it has *any* jurisdictional discretion to do so. As we discussed in our previous comments, the App Association expressed concern with the steps taken by the Commission in the aftermath

²³ E.g., *In the Matter of Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Request*, RM-11757, Order (2015) https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1266A1_Rcd.pdf (reaffirming the Commission's commitment to not regulate the edge).

²⁴ 467 U.S. 837, 42-43 (1984) (holding that courts should give deference to administrative agencies so long as the particular agency: "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

of its reclassification effort, such as the issuance of a Public Notice (PN) requesting comment on the Commission's authority over 911 apps.²⁵

The App Association is pleased that the Commission made no proposals regarding small app developers, or network edge regulation in this NPRM. However, we believe it is vital for the Commission to restate its commitment not to regulate nascent app developers.

IV. THE COMMISSION'S NEW RULES SHOULD UPHOLD PRINCIPLES OF INTERNET FREEDOM

In 2004, then-FCC Chairman Michael Powell outlined key principles of internet freedom in a speech at the Silicon Flatirons Symposium in Boulder, Colorado.²⁶ In this speech, Chairman Powell advocated for regulatory humility to advance broadband infrastructure, increase broadband speeds, and support innovation. His speech also highlighted consumer empowerment and consumers' essential role in regulatory analysis.²⁷ Chairman Powell described broadband networks as "impressive generators of economic growth, innovation[,] and empowerment."²⁸

²⁵ See ACT | The App Ass'n, Comment, DA 16-1405 (2017); see also *Public Safety and Homeland Security Bureau Seeks Comment on Request of the National Association of State 911 Administrators to Address Issues Related to 911 Applications for Smartphones*, Public Notice, DA 16-1405 (rel. Dec. 19, 2016).

²⁶ Michael Powell, Chairman, FCC, *The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age* (2004) https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf (Powell Principles Speech).

²⁷ See *id.*

²⁸ See *id.* at p. 2.

Chairman Powell also stated that “consumers are entitled to internet freedom,”²⁹ which consisted of four primary tenets. He argued that consumers should be free to use the internet to:

- 1) access any legal content of their choosing;
- 2) run apps of their choice;
- 3) attach to any devices to the network within their homes; and
- 4) receive meaningful information regarding their service plan.³⁰

The App Association believes these principles encapsulate the spirit of an open and free internet ecosystem and encourage the Commission to incorporate these principles into its rules to ensure consumers are protected and companies are able to innovate. We believe these goals require the Commission to exercise regulatory humility, and act only after it has demonstrated a concrete consumer harm. These values will support a thriving internet ecosystem both now and throughout 5G deployment.

V. THE COMMISSION’S PATH FORWARD FOR BROADBAND SERVICES: SMALL BUSINESS OPPORTUNITY AND INNOVATION

We agree with the Commission’s argument that legal clarity on key areas of communication, especially within network management practices, directly correlates to infrastructure investment,³¹ and most importantly, creates opportunities for small businesses to succeed. App developers will benefit from the timely deployment of robust 5G wireless network

²⁹ *Id.* at p. 5.

³⁰ *See* Powell Principles p. 5.

³¹ Roslyn Layton, *Which Open Internet Framework is Best for Mobile App Innovation*, Aalborg University, p. 204-211 (2017) http://vbn.aau.dk/files/255922611/PHD_Roslyn_Layton_E_pdf_rettet.pdf.

infrastructure, which will ultimately enable the creation and competition of innovative edge services in the market. The deployment of 5G technology will require at least a \$130 billion investment in fiber infrastructure alone to adequately support broadband competition, rural coverage, and wireless densification.³² Therefore, economics is a significant factor in ensuring investment in the vital infrastructure on which our members rely, and we believe the Commission's rules should explore all options to facilitate said investment.

VI. THE COMMISSION'S RULES SHOULD FACILITATE AND PROMOTE A COMPREHENSIVE STRATEGY FOR COMPETITION AND GROWTH

The Commission's decisions in this NPRM will have a direct impact on the investments driving the deployment of 5G infrastructure on which our country's future jobs and economy depend. Some innovations within this space have already begun, and noteworthy examples of 5G deployments include:

- AT&T announcing 5G Evolution plans, which would pave the way for faster speeds for AT&T wireless customers in over 20 major metro areas by the end of 2017.³³ Already implemented in selected areas of Austin, Texas, AT&T wireless customers with a Samsung Galaxy S8 or S8+ can access faster 5G Evolution internet speeds. AT&T also offers twice the speeds for its 4G LTE network, which can be accessed by customers on almost all AT&T data plans with a Samsung Galaxy S8 or S8+ device.³⁴

³² Deloitte, *Communications Infrastructure Upgrade: The Need for Deep Fiber*, White Paper (July 2017) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-5GReady-the-need-for-deep-fiber-pov.pdf>.

³³ AT&T: http://about.att.com/story/5g_evolution_to_over_20_metros_in_2017.html.

³⁴ *See id.*

- Verizon unveiled a 5G pilot program to provide “super-fast” wireless services in 11 U.S. cities earlier this year.³⁵ In partnership with Samsung and Ericsson, Verizon offered free trials to select customers in “Ann Arbor, MI; Atlanta, GA; Bernardsville, NJ; Brockton, MA; Dallas, TX; Denver, CO; Houston, TX; Miami, FL; Sacramento, CA; Seattle, WA; and Washington, DC in the first half of the year.” As part of the program, Verizon built out several hundred cell sites with 5G transmitters capable of reaching several thousand customer homes and businesses.³⁶ In their pre-commercial trials last December, Verizon and Samsung successfully demonstrated data transfers of multi-gigabit per second speeds at distances of up 1,500 feet. The trials utilized 28 GHz frequency airwaves for service to fixed points, like a home router, and Verizon plans to test 5G mobile service later this year.
- Microsoft has partnered with Mid-Atlantic Broadband Communities, B2X, and the Tobacco Region Revitalization Commission to provide a Homework Network to school children in rural and underserved Charlotte and Halifax Counties. The largest of its kind in North America, this project extends wireless broadband from local schools to students’ homes using TV White Spaces (TVWS) equipment.³⁷ On the international front, Microsoft partnered with the Kenyan government and a telecom to deliver internet using TVWS spectrum to remote villages in Kenya that previously lacked both internet and electricity.³⁸

While 5G innovation is in its infancy, the Commission must engage in a sensible, light-touch regulatory approach with a strong emphasis on economic analysis to bring its benefits to a broader consumer base. The App Association is encouraged by the Chairman’s focus on cost-benefit analyses as an integral part of the Commission’s decision-making process.³⁹ The Chairman’s April remarks at the Hudson Institute criticized the Commission’s recent lapse in the

³⁵ Aaron Pressman, *Verizon Testing Super Fast 5G Internet with Customers in 11 Cities*, Fortune (Feb. 22, 2017) found here: <http://fortune.com/2017/02/22/verizon-testing-5g-11-cities/>.

³⁶ *See id.*

³⁷ Rural Broadband Strategy, Microsoft (2017) <https://msblob.blob.core.windows.net/ncmedia/2017/07/Rural-Broadband-Strategy-Microsoft-Whitepaper-FINAL-7-10-17.pdf>.

³⁸ *See id.*

³⁹ Remarks of FCC Chairman Ajit Pai at the Hudson Institute, *The Importance of Economic Analysis at the FCC* (Apr. 5, 2017) found here: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0405/DOC-344248A1.pdf.

bipartisan tradition of conducting cost-benefit analysis when developing legal rules,⁴⁰ and we support the Commission's attention to this issue.

A. The Commission Should Allow Innovators to Leverage TV White Spaces as Part of Its 5G Strategy

Providing industry with more unlicensed bands can assist the successful deployment of 5G infrastructure, and we urge this NPRM to support increased innovation within unlicensed spectrum. Unlicensed bands will play a key role in the success of 5G networks, and the Chairman should consider it as a viable solution to promote infrastructure buildout and IoT. While this proceeding addresses the challenges to 5G deployment in the long-term, we believe the Commission can take important steps to promote greater connectivity in the short-term, including the resolution of several pending matters related to unused TVWS spectrum bands.

Leveraging the TVWS bands will augment mobile broadband access for rural communities across America, helping to bridge the digital divide and facilitate IoT capabilities in the 5G ecosystem. We strongly believe robust wireless connectivity enabled by TVWS bands will ensure the vitality of the innovative app developer community and broader 5G economy.

As the Commission is aware, TVWS can cover vastly larger expanses than traditional wi-fi routers, which is why the Commission proposed it as a solution to bring broadband to unserved rural areas. In 2010, the Commission stated access to TVWS “enable[s] more powerful public [i]nternet connections...with extended range, fewer dead spots, and improved individual speeds;”

⁴⁰ *See id.*

and ameliorates overly-congested wireless networks (a phenomenon typically referred to as “spectrum crunch”).⁴¹ We understand that the vital need for broadband access in rural communities was at the heart of the Commission’s decision to open unlicensed TVWS spectrum. We applaud the Commission’s actions to ensure these remote communities did not fall through the cracks of the digital divide.

In 2015, the Commission continued its mission to increase rural connectivity through TVWS bands when it promulgated rules opening the 600 MHz guard bands, duplex gap, and Channel 37 band,⁴² citing the impressive reach of TVWS technology without the traditional constraints of costly wireline or wireless deployments.⁴³ The Commission distinguished the extraordinary capabilities TVWS bands have to “provid[e] high data throughput service to unserved or under-served areas of the country at relatively low cost.”⁴⁴ The App Association agrees that TVWS technologies should serve as a cornerstone solution to promote broadband access to rural and remote communities and to address two critical issues in spectrum management: access to wireless broadband for rural areas and spectrum crunch mitigation.

⁴¹ *In the Matter of Unlicensed Operation in the TV Broadcast Bands, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 04-186 & ET Docket No. 02-380, Second Memorandum Opinion and Order, 10 FCC 174 (2010).

⁴² *In the Matter of Amendment of Part 15 of the Commission’s Rules for Unlicensed Operations in the Television Bands, Repurposed 600 MHz Band, 600 MHz Guard Bands and Duplex Gap, and Channel 37, and Duplex Gap, and Channel 37 and Amendment of Part 74 of the Commission’s Rules for Low Power Auxiliary Stations in the Repurposed 600 MHz Band and 600 Mhz Duplex Gap*, ET Docket No. 14-165 & GN Docket No. 12-268, Rep. & Ord., 30 FCC Rcd. 9551 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-99A1_Red.pdf [TVWS R&O].

⁴³ *See id.* (advocating that “[t]he fixed devices that are being deployed today are typically used to provide backhaul services for Internet connectivity offered by wireless internet service providers (WISPs), schools and libraries.”)

⁴⁴ TVWS R&O, para. 1.

Although the United States has made great strides in bridging the digital divide, we agree with Chairman Pai that more work remains to be done.⁴⁵ Considering its excellent frequency characteristics and ability to cover vast areas, TVWS must be an essential component of the Commission's efforts.

Moreover, maintaining and opening more TVWS bands aligns with the Chairman's goal of increasing competition in the internet service provider market. In 2014, Chairman Pai praised the value of unlicensed TVWS bands to wireless internet service providers (WISPs), an ecosystem he describes as "flush with innovation." In fact, he congratulated WISP innovators on developing "TV white space solutions that help[ed] WISPs extend their reach."⁴⁶ Furthermore, the Chairman recognized that the WISP industry relies heavily on unlicensed spectrum, some of which utilize TVWS bands,⁴⁷ and even endorsed the idea of providing more unlicensed spectrum to assist entrepreneurs.⁴⁸

The App Association believes the Chairman should allow innovators to use unlicensed spectrum, namely the TVWS bands, to facilitate greater competition in the broadband marketplace. Doing so will bring the huge benefits of TVWS to small business innovators,

⁴⁵ Ajit Pai, Chairman, FCC, Remarks at the Fed. Comm'n's Comm'n (Jan. 24, 2017), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0124/DOC-343184A1.pdf.

⁴⁶ Ajit Pai, Commissioner, FCC, Remarks at WISPapalooza (Oct. 15, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329969A1.pdf [hereinafter WISPAPALOOZA SPEECH].

⁴⁷ Joan Engbretson, *Despite Uncertainty, Wireless ISPs Plan to Use TV White Spaces*, TELECOMPETITOR.COM (May 21, 2012, 1:00PM), <http://www.telecompetitor.com/despite-uncertainty-wireless-isps-plan-to-use-tv-white-spaces/>; see also, Press Release, Carlson Wireless Technologies, Carlson and Neul launch first commercially available white space radio system created for WISPs (Mar. 12, 2012), at <http://www.carlsonwireless.com/press-releases/carlson-neul-launch-first-commercially-available-white-space-radio-system-created-wisps/>.

⁴⁸ Pai Speech, at p. 2 (stating I believe the FCC should be on the side of entrepreneurs like WISPs, and that means in part being in favor of unlicensed spectrum.”).

internet service providers seeking improved signal coverage, and rural communities seeking basic internet connectivity.

VII. CONGRESSIONAL ACTION IS IMPERATIVE TO ESTABLISH BROADBAND PRINCIPLES

The Supreme Court has settled whether the Commission can define a “telecommunications service,”⁴⁹ but Congress must still establish a legal roadmap for broadband services. In less than a decade, broadband regulation has moved from Title I⁵⁰ to Title II,⁵¹ and may move back again. Rapid changes between titles create legal uncertainties that hurt investments and innovation, industry and consumers; thus, ultimately illustrating the need for Congress to act.

We believe the impracticality of properly assigning broadband to a regulatory scheme under the current statutory framework stems from the ever-evolving nature of the internet ecosystem. Today’s internet is vastly different from the one introduced in 1992, rendering the silos established in the Telecommunications Act of 1996 arbitrary and outdated. The growing disconnect between interpretations within the Commission’s *Stevens Report*⁵² and various court

⁴⁹ *Nat’l Cable and Telecomm Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

⁵⁰ *In the Matter of Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010).

⁵¹ *Title II Order*.

⁵² *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11520, para. 39 (1998) (coming to the conclusion that there is a clear congressional intent for making broadband services distinct from telecommunications services by incorporating judicial precedent into the term “information services” under *U.S. v. AT&T* 552 F. Supp. 131, 227 (D.D.C. 1982) as an assurance to prevent telecom monopolies from grabbing hold of the internet).

interpretations⁵³ of congressional intent is a clear call for Congress to clarify the role of the Commission in internet regulation.

While we believe the Commission can address many of the issues we have outlined, Congress still has an important role to play, and we urge Congress to incorporate the Powell Principles in any statutory regime.⁵⁴ We are committed to working with Congress, and the Commission, to shape a new, durable statutory framework for broadband that will support dynamic growth and innovation throughout the app ecosystem, and beyond.

⁵³ *E.g.*, *Verizon v. FCC*, 740 F.3d 623 (2014) (writing “although regulation of broadband internet providers certainly involves decisions of great “economic and political significance,” *Brown & Williamson*, 529 U.S. at 160, 120 S.Ct. 1291, we have little reason given this history to think that Congress could not have delegated some of these decisions to the Commission. To be sure, Congress does not, as Verizon reminds us, “hide elephants in mouseholes.” *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). But FCC regulation of broadband providers is no elephant, and section 706(a) is no mousehole.”).

⁵⁴ *Supra.* Sec. III.

VIII. CONCLUSION

The App Association hopes the Commission take these views articulated above in its consideration for this proceeding.

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