



December 8, 2014

Edith Ramirez, Chairwoman

Julie Brill, Commissioner

Maureen K. Ohlhausen, Commissioner

Joshua D. Wright, Commissioner

Terrell McSweeney, Commissioner

cc: Andrew I. Gavil, Director, Office of Policy Planning

Francine LaFontaine, Director, Bureau of Economics

Deborah L. Feinstein, Director, Bureau of Competition

Jessica Rich, Director, Bureau of Consumer Protection

Federal Trade Commission

600 Pennsylvania Avenue, NW

Washington, DC 20580

Dear Chairwoman Ramirez and Commissioners Brill, Ohlhausen, Wright, and McSweeney,

We are professors and scholars of law, business, economics, and public policy with expertise in communications, competition, innovation, industrial organization and related fields. We write to express our concerns regarding the Federal Communications Commission's ("FCC") apparent plans to prohibit paid prioritization and to reclassify broadband under Title II of the Communications Act.

In its competition advocacy, the Federal Trade Commission ("FTC") promotes consumer welfare by analyzing policies and offering alternatives to state and federal governmental agencies. Currently, the FCC is considering a new Open Internet Order<sup>1</sup> that would have considerable negative effects on consumers. In fact, the White House<sup>2</sup> and FCC Chairman Tom Wheeler<sup>3</sup> have suggested a further step: the reclassification of broadband ISPs as Title II common carrier services. The FTC should, as the FTC<sup>4</sup> (and Department of Justice<sup>5</sup>) has done in the past, urge the FCC to take an approach that promotes, rather than harms, consumer welfare.

Through litigation and agency guidance, antitrust law has evolved toward a consumer welfare standard, which employs empirical economic analysis of allegedly anticompetitive business

practices to protect consumers. The error-cost approach implicit in antitrust law and economics weighs

(1) the probability that a business arrangement is anticompetitive; (2) the magnitude of the social cost of errors in assessing the competitive virtue of the business arrangement, including both false positives (pro-competitive conduct is erroneously barred) and false negatives (anticompetitive conduct is falsely absolved); and (3) the administrative costs of implementing the alternative legal rules.<sup>6</sup>

In keeping with this approach, it is well-established that a *per se* rule should be applied only when a practice is very likely to harm competition severely, when pro-competitive uses are few, or when pro-competitive conduct is very unlikely to be deterred.<sup>7</sup> On the other hand, when conduct is ambiguous—because it could be either harmful or helpful to consumer welfare, depending on the circumstances—a *per se* rule is unwarranted. Rather, antitrust law analyzes such conduct on a case-by-case basis, employing a rule of reason to balance the potential costs and benefits of challenged conduct.<sup>8</sup>

The central competition concern with the FCC's proposed rules turns not on abstract notions of "net neutrality," but on the appropriate decision rule for assessing alleged harms. As FTC Commissioner Wright has noted:

None of this is to say that competition in broadband markets should be immune from the kind of scrutiny given to other areas of the economy. Indeed... it is at least theoretically possible that a broadband provider might enter into an arrangement that could potentially harm competition and consumers under certain circumstances. And...where there is sufficient evidence to show that such arrangements have been used anticompetitively to harm consumers, there should be a regulatory regime tasked with policing and prohibiting such arrangements. The critical question, however, is not whether anticompetitive arrangements should be barred...it is instead whether we can identify the best regulatory regime for addressing this concern.<sup>9</sup>

By reclassifying broadband under Title II in an effort to ban paid prioritization agreements included in service level agreements between ISPs and content providers, the FCC apparently plans to adopt what amounts to a *per se* ban on such agreements by truncating the factual analysis needed to condemn such agreements or by setting a presumption against paid prioritization that is, effectively, not rebuttable. But neither the record established by the FCC nor basic economics supports a *per se* ban.

As it did in 2007, the FTC should caution the FCC by warning the agency of the adverse effects of adopting *per se* restrictions on potentially pro-competitive conduct like paid prioritization.<sup>10</sup> As the net neutrality debate has shifted dramatically since 2007, the FTC should further caution

the FCC against applying *per se* rules where the rule of reason would be more effective, and against reclassifying ISPs as Title II common carriers. As FTC Commissioner Wright has noted,

[A]ntitrust law initially adopted and ultimately rejected—largely based upon the development of the economic and empirical literature discussed above—a categorical prohibition not unlike the one adopted by the Net Neutrality Order to various vertical restraints throughout its history.<sup>11</sup>

The FCC needs to hear this message from the FTC, one of nation’s top sources of expertise in competition law and of economic talent inside government.

## I. *Per Se* Versus Rule of Reason Analysis for Paid Priority on the Internet

As the Supreme Court noted in *Leegin*:

Resort to *per se* rules is confined to restraints...“that would always or almost always tend to restrict competition and decrease output.” To justify a *per se* prohibition a restraint must have “manifestly anticompetitive” effects, and “lack any redeeming virtue.”

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that “we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious....” And, as we have stated, a “departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than...upon formalistic line drawing.”<sup>12</sup>

Since *Leegin*, the antitrust laws have assessed all vertical restraints under the rule of reason in order to preserve the manifest benefits of such arrangements, while still enabling antitrust enforcers and courts to assess problematic agreements on a case-by-case basis. In other words, applying the rule of reason to vertical restraints (like potential paid prioritization deals between ISPs and content providers) appropriately reflects the error costs involved.

The Court’s vertical restraints jurisprudence reflects the clear economic consensus on applying an error-cost framework to vertical conduct.<sup>13</sup> As such, this logic should apply whether it is a court, the FTC, or the FCC that is applying the appropriate standard of review for vertical restraints. Moreover, this logic applies not only to antitrust law’s consumer welfare standard, but also to the FCC’s analogous (but broader) public interest standard. As the FTC has previously stated:

The fundamental principles of antitrust and consumer protection law and economics that we have applied for years are as relevant to the broadband industry as they are to other industries in our economy.<sup>14</sup>

The FCC's record is insufficient to support a categorical ban on paid prioritization (and its implementation by way of reclassification).<sup>15</sup> As the FTC noted in its 2007 Broadband Connectivity & Competition Policy Report:

Two aspects of the broadband Internet access industry heighten the concerns raised by regulation generally. First, the broadband industry is relatively young and dynamic, and... there are indications that it is moving in the direction of more competition. Second, to date we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers. Policy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects that potential conduct by broadband providers may have on such welfare.<sup>16</sup>

Despite two comment cycles since then, the FCC has failed to build a record that demonstrates that paid prioritization is so likely to harm competition (or the public interest more broadly) that it merits an outright ban. Thus, the FCC has no basis for imposing inflexible *per se* rules that would categorically ban all such conduct by ISPs. This is not a case where the potential risks would be so great and the potential harms so dire that extreme preventative measures are needed. Nor is this a case where, if certain conduct is permitted, it will be impossible for the FCC as a regulator to "unscramble the eggs" afterward. Rather, this is principally a debate about the allowable uses of certain established software protocols and pricing mechanisms.<sup>17</sup> The record is simply insufficient to support the unprecedented regulatory intervention apparently contemplated by the FCC.

Because priority arrangements could be motivated for efficiency reasons, a careful balancing of error costs cuts strongly in favor of a rule of reason. The FCC has not established that paid prioritization is among those few business practices that appropriately fall under a presumption of harm and thus merit *per se* treatment. As the FTC noted in 2007:

With respect to data discrimination, broadband providers have conflicting incentives relating to blockage of and discrimination against data from non-affiliated providers of content and applications. In the abstract, it is impossible to know which of these incentives would prove stronger for each broadband provider. Further, even assuming such discrimination were to take place, it is unknown whether the net effect on consumer welfare would be adverse. Likewise, it is not possible to know in the abstract whether allowing content and applications providers to pay broadband providers for prioritized data transmission will be beneficial or harmful to consumers.<sup>18</sup>

In particular, prioritization deals may help alleviate the effects of congestion and serve consumers in a variety of ways not yet imagined. For instance, edge providers and/or ISPs could use paid prioritization to:

- Minimize latency and jitter (which are of particular concern for online gaming, video conferencing, and other real-time applications, which have very different quality of service needs than, say, email or other applications more suitable for mere best-efforts service);
- Market via sponsored data/content (enabling content providers to subsidize data usage as a marketing device, a practice that has proven to be especially valuable in driving first-time adoption around the world);
- Reduce consumers' search costs (making it easier for consumers to find and learn about new entrants seeking to unseat a well-known incumbent);
- Facilitate joint marketing between ISPs and content providers (helping to overcome classic vertical divergence of interest in promotional expenditures); or
- Reduce end-user fees and/or enable beneficial price discrimination.

At the same time, although many net neutrality activists rail against the idea of getting "stuck in the slow lane," there are innumerable edge providers that would likely jump at the chance to have their traffic de-prioritized (at lower cost), because their services are time-insensitive (a.k.a. latency-robust). Slower delivery of these bits wouldn't matter much to their users, and the cost of delivering those bits would be lower than if they were in a "faster lane" of Internet traffic. For email hosts, backup services, software developers, or any startup company (not trying to live-stream video) looking to cut their transit costs, such an option would surely have at least some appeal. While it is commonly asserted that allowing some content providers to pay for prioritization would necessarily disadvantage others, the FCC simply has not substantiated this assertion.<sup>19</sup>

Most important, by banning paid priority outright the FCC would prohibit or deter a host of pro-competitive practices, many of which may be simply unrecognized or unknown today. As the FTC noted in its 2007 Report:

Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare-reducing in the long term, particularly in terms of product and service innovation. Further, such regulatory schemes inevitably will have unintended consequences, some of which may not be known until far into the future. Once a regulatory regime is in place, moreover, it may be difficult or impossible to undo its effects.<sup>20</sup>

## II. Toward an FCC Rule of Reason for Paid Prioritization

Of course, vertical contractual arrangements can also give rise to competitive foreclosure concerns.<sup>21</sup> But this does not mean that all of the potential consumer benefits should be ignored without analysis, as would happen under the FCC's proposed *per se* rules barring all paid prioritization.<sup>22</sup> This is particularly problematic here where, as the FCC admits, "[t]he record contained no evidence of U.S. broadband providers engaging in pay-for-priority arrangements, in which the broadband provider would agree with a third party to directly or indirectly prioritize some traffic over other traffic to reach the provider's subscribers."<sup>23</sup>

Although the antitrust laws may not capture all of the public interest concerns relating to potential discrimination on the Internet, the FCC can still borrow from the teachings of antitrust in designing the optimal framework to adjudicate discrimination complaints:

[T]he FCC's best way forward...is to adopt an antitrust-like framework. This framework would forbid Internet carrier actions that foreclosed competition. Because the focus would be on competitive effects and not on discrimination itself, an antitrust-like framework would differ from a nondiscrimination rule while addressing the FCC's underlying concerns. Moreover, such rules would more clearly fall within the D.C. Circuit's holding that FCC rules must remove "barriers to investment." The FCC is an appropriate institution for such rules, even though we already have two antitrust agencies (the DOJ and the FTC), because the FCC can use its expertise and agency standing to conduct appropriate inquiries and adopt appropriate (albeit hopefully limited) prophylactic rules.<sup>24</sup>

But even within a rule of reason, there is a spectrum of possible implementations depending, in significant part, on whether the initial burden of proof falls on the ISP or on the FCC (or content provider challenging a prioritization deal). Stated differently, regulators must choose whether paid priority should be presumed not to violate the standard (with the burden placed on the complainant to prove otherwise), or be presumed to violate the standard (with the burden placed on the ISP to prove otherwise).

For the same reasons we have discussed that counsel against adoption of a *per se* rule, the burden should be on the complainant; there is no basis for a presumption of harm from such potentially procompetitive conduct. At the same time, as a matter of administrative efficiency, an edge provider that is allegedly harmed by an ISP's conduct is in the best position to know whether it has been injured. This suggests that the edge provider (or the FCC itself, upon notification by a content provider) should bear the initial burden of showing that the conduct violates the FCC's standard.

At the same time, the burden of enforcing the rules need not fall on the injured party at all. Rather, the FCC's Enforcement Bureau can and does bring actions to enforce other FCC rules

on a regular basis, and, of course, any appeal from an FCC ruling in federal court would be brought by or against the FCC itself. The FCC could also intervene in a lawsuit brought by a private party.

### **III. The Dangers to Competition from Reclassification**

Besides allowing the FCC to weigh error costs effectively as the market for prioritization evolves, such a rule of reason would also be the most legally sound way for the FCC to address net neutrality concerns.

While it is not clear that even Title II would allow a rule banning all paid prioritization,<sup>25</sup> imposing Title II would create a host of additional problems, including dampening the incentive of ISPs to continue investing in the core of the network, chilling new entry into the broadband market, and potentially expanding common carrier regulation to interconnection, peering and even some “edge” services.<sup>26</sup> The likely result is that burdens not designed or intended for 21st century technology would apply, and broadband ISPs (and other companies swept into Title II) would be forced to comply with an onerous new regulatory regime and navigate immense uncertainty in the application of the law.

The proposed reclassification of broadband ISPs as Title II common carriers would result in the imposition of a plethora of outdated regulations, price controls, and other burdens on ISPs—all predicated on a presumption that the conduct at issue is either inherently harmful or so harmful as to outweigh possible benefits to consumers. But neither the FCC’s record nor simple economic analysis of the broadband industry supports such a presumption. The FCC desperately needs to incorporate cost-benefit analysis and the error-cost framework into any new rules it might issue — as well as into its choice of legal authority.

Perhaps most important, reclassification would remove the FTC’s consumer protection enforcement authority over any service deemed a common carrier:

The FTC Act gives the FTC broad authority with regard to both competition and consumer protection matters in most sectors of the economy...and the FTC has a general statutory mandate “to prevent persons, partnerships, or corporations,” from engaging in such prohibited methods, acts, and practices.

At the same time...the FTC’s enforcement authority under the FTC Act does not reach “common carriers subject to the Communications Act of 1934,” as amended. An entity is a common carrier, however, only with respect to services that it provides on a common carrier basis.<sup>27</sup>

Reclassifying broadband as a Title II telecommunications service would convert broadband ISPs into common carriers. Thus, as FTC Commissioner Ohlhausen has noted,

If broadband service is reclassified as a common carrier service under Title II, I think that would seriously call into question the ability of the FTC to bring those kinds of actions. So my concern is really not so much for the FTC, but for the loss to consumers—that they would lose out from having the FTC's active oversight.<sup>28</sup>

#### IV. Conclusion

In its 2007 Broadband Competition Report, the FTC adopted a sober, realistic assessment of both the costs and benefits of prioritization of data on the Internet, concluding that

Not every use of prioritization technologies is apt to have all of these positive or negative results. Policy makers considering whether to allow or restrict any or all usage of prioritization technologies should take into account the many and varied implications of such usage.<sup>29</sup>

This is precisely what a rule of reason would do (as much as *any* decision rule could): allow regulators to distinguish harmful from beneficial uses and to deter only the harmful ones.

We believe that some variant of the rule of reason approach proposed above is the only approach consistent with the law and economics literature derived from antitrust law and from the FTC's own experience. We urge the FTC to ask the FCC to adopt such an approach in any Open Internet rules it may issue and, at a minimum, to issue a Further Notice of Proposed Rulemaking seeking comment on, and rigorous economic analysis of, such an approach.

Very truly yours,

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<sup>1</sup> Notice of Proposed Rulemaking, In the Matter of Promoting and Protecting the Open Internet, FCC 14-61, GN Docket 14-28 (May 15, 2014), *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-14-61A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf) [hereinafter "NPRM"].

<sup>2</sup> *Net Neutrality: President Obama's Plan for a Free and Open Internet*, WHITE HOUSE PRESS RELEASE (Nov. 10, 2014), *available at* <http://www.whitehouse.gov/net-neutrality>.

<sup>3</sup> *FCC Chairman Tom Wheeler's Statement on President Obama's Statement Regarding Open Internet*, FCC PRESS RELEASE (Nov. 10, 2014), *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db1110/DOC-330414A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1110/DOC-330414A1.pdf).

<sup>4</sup> *See, e.g.*, Comment of the Federal Trade Commission, In the Matter of 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, GN Docket No. 14-126, *available at* [http://www.ftc.gov/system/files/documents/advocacy\\_documents/federal-trade-commission-comment-federal-communications-commission-regarding-privacy-security/140919privacybroadband.pdf](http://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commission-comment-federal-communications-commission-regarding-privacy-security/140919privacybroadband.pdf); Comment of the Federal

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Trade Commission, In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”), CG Docket No. 11-116, *available at* [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-federal-communications-commission-concerning-placement-unauthorized-charges-telephone.11-116-09-158-and-98-170/111227crammingcomment.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-federal-communications-commission-concerning-placement-unauthorized-charges-telephone.11-116-09-158-and-98-170/111227crammingcomment.pdf); Comment of the Federal Trade Commission, In the Matter of Petitions Seeking Rulings on Certain Definitions under the Telephone Consumer Protection Act of 1991 and its Related Rules, CG Docket No. 11-50, *available at* [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-federal-communications-commission-regarding-liability-telemarketing-calls-under.11-50/110516dishcehostar.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-federal-communications-commission-regarding-liability-telemarketing-calls-under.11-50/110516dishcehostar.pdf); Comment of the Federal Trade Commission, In the Matter of Empowering Parents and Protecting Children in a Evolving Media Landscape, MB Docket No. 09-194, *available at* [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-federal-communications-commission-matter-empowering-parents-and-protecting-children.09-194/v100006empowerparents.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-federal-communications-commission-matter-empowering-parents-and-protecting-children.09-194/v100006empowerparents.pdf).

<sup>5</sup> See In re Economic Issues in Broadband Competition a National Broadband Plan for Our Future, 2010 WL 45550, at \*11-12 (Jan. 4, 2010) (*Ex parte* Submission of Dep’t of Justice).

<sup>6</sup> Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 798 (2012), *available at* <http://iep.gmu.edu/wp-content/uploads/2012/12/Hazlett-Wright-LE-of-NN.pdf>.

<sup>7</sup> See, e.g., *Leegin Creative Leather V. PSKS*, 551 U.S. 877 (2007), *available at* <http://www.supremecourt.gov/opinions/boundvolumes/551bv.pdf#page=930>.

<sup>8</sup> Hazlett & Wright, *supra* note 6, at 798; see also Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 74 (2005).

<sup>9</sup> *Broadband Policy & Consumer Welfare: The Case for an Antitrust Approach to Net Neutrality Issues 6-7*, Remarks of Joshua D. Wright at the Information Economy Project’s Conference on US Broadband Markets in 2013 (Apr. 19, 2013), *available at* [http://www.ftc.gov/sites/default/files/documents/public\\_statements/broadband-policy-consumer-welfare-case-antitrust-approach-net-neutrality-issues/130423wright\\_nn\\_posting\\_final.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/broadband-policy-consumer-welfare-case-antitrust-approach-net-neutrality-issues/130423wright_nn_posting_final.pdf) [hereinafter “Wright Speech”].

<sup>10</sup> *Broadband Connectivity & Competition Policy* 9 (FTC Staff Report, Jun. 2007), *available at* <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf> (“We have provided an explanation of the conduct that the antitrust and consumer protection laws already proscribe and a framework for analyzing which conduct may foster or impede competition in particular circumstances. In evaluating whether new proscriptions are necessary, we advise proceeding with caution before enacting broad, ex ante restrictions in an unsettled, dynamic environment.”) [hereinafter “2007 FTC Broadband Report”].

<sup>11</sup> Wright Speech, *supra* note 9, at 14. See also Yoo, *Beyond Network Neutrality*, *supra* note 8, at 7

<sup>12</sup> *Leegin*, 551 U.S. at 886-87 (citations omitted).

<sup>13</sup> See, e.g., Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629 (2007); James Cooper, Luke Froeb, Daniel O’Brian & Michael de Vita, *Vertical antitrust policy as a problem of inference*, 23 INT’L J. INDUSTRIAL ORG. 639.

<sup>14</sup> 2007 FTC Broadband Report, *supra* note 10, at 11.

<sup>15</sup> It is also worth noting that allowing prioritization while banning payment would be similarly harmful. At minimum, such an approach would tend to result in an undersupply of beneficial prioritization. Moreover, the FCC has not answered the question of whether prioritization is harmful to begin with, nor explained why adding payment makes it so.

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<sup>16</sup> 2007 FTC Broadband Report, *supra* note 10, at 11. See also Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545 (2013).

<sup>17</sup> See, e.g., Richard Bennett, *Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate*, INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION (Sept. 2009), available at <http://www.itif.org/files/2009-designed-for-change.pdf>.

<sup>18</sup> 2007 FTC Broadband Report, *supra* note 10, at 10.

<sup>19</sup> Nearly everyone agrees that an effective ban on blocking—in the form of minimum quality guarantees, for example—is reasonable in this case. While there may, in fact, be situations where even blocking (analogous to exclusive dealing) is efficient, as long as the guaranteed minimum is set low enough (or at the point most likely to mimic what an antitrust foreclosure analysis would demand), a *per se* ban on blocking offers an administratively simple way to bolster the clear advantage of a rule of reason for prioritization over a *per se* rule. See ICLE & TechFreedom Policy Comments 46-48, In the Matter of Protecting and Promoting the Open Internet, GN Docket 14-28 (Jul. 17, 2014), available at [http://www.laweconcenter.org/images/articles/icle-tf\\_nn\\_policy\\_comments.pdf](http://www.laweconcenter.org/images/articles/icle-tf_nn_policy_comments.pdf); Timothy J. Brennan, *Network Neutrality or Minimum Quality? Barking Up the Wrong Tree—and Finding the Right One*, CPI ANTITRUST CHRONICLE (Mar. 2012) (2), at 4. It is clear, in fact, that blocking or throttling is subsumed in this analysis, as these are the primary means by which an ISP could degrade service as means of extracting surplus from an edge provider. Accordingly, these strategies need not be treated as *per se* violations of a standard—instead, they may be best understood as being presumptively in violation under the rule of reason. ISPs should be given an opportunity to offer evidence for why they engaged in blocking or throttling; absent compelling evidence, however, the conduct should be stopped.

<sup>20</sup> 2007 FTC Broadband Report, *supra* note 10, at 11.

<sup>21</sup> Wright Speech, *supra* note 9, at 8.

<sup>22</sup> See NPRM at ¶138.

<sup>23</sup> 2007 FTC Broadband Report, *supra* note 10, at ¶36.

<sup>24</sup> James B. Speta, *Unintentional Antitrust: The FCC's Only (and Better) Way Forward With Net Neutrality After the Mess of Verizon v. FCC*, 66 FED. COMM. L. J. 491, 501-02 (2014).

<sup>25</sup> See TechFreedom & ICLE Legal Comments 19-24, In the Matter of Protecting and Promoting the Open Internet, GN Docket 14-28 (Jul. 17, 2014), available at [http://www.laweconcenter.org/images/articles/tf-icle\\_nn\\_legal\\_comments.pdf](http://www.laweconcenter.org/images/articles/tf-icle_nn_legal_comments.pdf); George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, PHOENIX CENTER POLICY BULLETIN NO. 36 (Sept. 2014), available at <http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf>.

<sup>26</sup> See, e.g., Robert Litan & Hal Singer, *Outdated Regulations Will Make Consumers Pay More for Broadband*, at 1, PROGRESSIVE POLICY INSTITUTE (Dec. 2014), available at [http://www.progressivepolicy.org/wp-content/uploads/2014/12/2014.12-Litan-Singer\\_Outdated-Regulations-Will-Make-Consumers-Pay-More-for-Broadband.pdf](http://www.progressivepolicy.org/wp-content/uploads/2014/12/2014.12-Litan-Singer_Outdated-Regulations-Will-Make-Consumers-Pay-More-for-Broadband.pdf) (“[T]he average annual increase in state and local fees levied on U.S. wireline and wireless broadband subscribers will be \$67 and \$72, respectively. And the annual increase in federal fees per household will be roughly \$17. When you add it all up, reclassification could add a whopping \$17 billion in new user fees.... The higher fees would come on top of the adverse impact on consumers of less investment and slower innovation that would result from reclassification.”); Kevin A. Hassett & Robert J. Shapiro, *The Impact of Title II Regulation of Internet Providers On Their Capital Investments*, SONECON (Nov. 2014), available at [http://www.sonecon.com/docs/studies/Impact\\_of\\_Title\\_II\\_Reg\\_on\\_Investment-Hassett-Shapiro-Nov-14-2014.pdf](http://www.sonecon.com/docs/studies/Impact_of_Title_II_Reg_on_Investment-Hassett-Shapiro-Nov-14-2014.pdf).

<sup>27</sup> 2007 FTC Broadband Report, *supra* note 10, at 38.

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<sup>28</sup> *Communicators with Maureen Ohlhausen*, C-SPAN (Sept. 24, 2014), <http://www.c-span.org/video/?321665-1/communicators-maureen-ohlhausen>.

<sup>29</sup> 2007 FTC Broadband Report, *supra* note 10, at 92.