January 29, 2015

Edith Ramirez, Chairwoman
Julie Brill, Commissioner
Maureen K. Ohlhausen, Commissioner
Joshua D. Wright, Commissioner
Terrell McSweeny, Commissioner

cc: Deborah L. Feinstein, Director, Bureau of Competition
Francine LaFontaine, Director, Bureau of Economics
Marina Lao, Director, Office of Policy Planning
Jonathan E. Nuechterlein, General Counsel
Jessica Rich, Director, Bureau of Consumer Protection

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

We are professors of law, economics, business, communication, and political science with expertise in communications, competition, industrial organization economics and related fields. We support the adoption of Open Internet rules by the Federal Communications Commission (FCC), including a bright line ban on fees for any kind of preferential treatment ("paid prioritization"). To adopt such a ban, the FCC must reclassify broadband Internet access under Title II of the Communications Act and forebear from unnecessary regulation under that statute. We write to explain why a ban on paid prioritization under Title II, coupled with appropriate forbearance, would promote competition and other important values such as innovation, free speech, and economic growth.

We support the complementary roles of the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) in protecting an open Internet. Reclassification of broadband Internet access service as a telecommunications service could remove that service from FTC oversight. While Title II gives the FCC the authority necessary to effectively protect consumers of broadband Internet access service, consumers would benefit from continued FTC oversight as well. Therefore, we support repeal of the provision that exempts common carrier services from the FTC's jurisdiction. However, given that the FCC will be able to effectively protect consumers under Title II even in the absence of FTC jurisdiction, any efforts to repeal the common carrier exemption should not hold up the FCC's adoption of Open Internet Rules under Title II of the Communications Act.

Our letter responds to a recent letter to you from professors and scholars that incorrectly supposes that an FCC ban on paid prioritization under Title II would be inconsistent with sound competition policy.[1]

I. Competition Benefits of Prohibiting Paid Prioritization

A bright line ban on paid prioritization under Title II of the Communications Act, coupled with forbearance from large parts of Title II, would promote competition.

Rules banning paid prioritization would prohibit providers of broadband Internet access from charging edge providers for prioritized or otherwise enhanced access to their Internet access customers. By "paid prioritization" we mean payments from edge providers for priority, guaranteed bandwidth, or zero-rating (not counting an edge provider's traffic towards a user's monthly bandwidth cap), as well as any other technical or economic practice that gives edge providers that pay an Internet access provider an advantage over edge providers that do not pay.

The benefits to competition of prohibiting paid prioritization were recognized by the FCC, *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010), and accepted by the United States Court of Appeals for the D.C. Circuit as reasonable and grounded in substantial evidence, *Verizon v. Fed. Commc'n Comm'n*, 740 F.3d 623 (D.C. Cir. 2014), so can be sketched quickly here. (The court accepted the FCC's evidentiary basis for banning paid prioritization but found that the FCC had relied on an inadequate statutory basis for doing so. Reclassification and forbearance would solve that problem.)

The Internet is what economists call a "General Purpose Technology." It is a key technology, like the steam engine and the electric motor, that increases productivity economy-wide and drives an entire era of technological progress and economic growth.

The Internet's growth is propelled by a virtuous cycle of innovation. When new applications, content, and services are developed by edge providers, we use the Internet more, leading broadband providers to increase the speed and capacity of their networks, sparking the development of more and better applications, content, and services, faster networks, and so on.

A ban on paid prioritization will prevent broadband providers from slowing or breaking the virtuous cycle, particularly by chilling experimentation by emerging "garage entrepreneurs." If the next Facebook has to pay for an Internet fast lane, the

[1] Letter from Donald J. Boudreaux et. al to Chairwoman Ramirez and Commissioners Brill, Ohlhausen, Wright, and McSweeney (Dec. 8, 2014).

next Mark Zuckerberg might go into investment banking instead of creating the next big new thing on the Internet.

If allowed to charge edge providers for preferential access, broadband providers would have the incentive and ability to undermine the virtuous cycle in three competition-related ways. First, a broadband provider could harm competition by raising the costs of selected edge providers.[2] It might do that if an edge provider competes with the broadband provider's own current or planned offerings, or if it is paid to do so by the edge provider's rivals. Second, a broadband provider could exploit its gatekeeper position, or terminating monopoly, to impose excessive charges on edge providers for access or preferential access to the broadband provider's end users. Once an end user connects to the Internet through a broadband provider, the edge provider can interact with the end user only through the broadband provider selected by the end user. That relationship gives the broadband provider the ability to impose or negotiate excessive charges with most edge providers for access or preferential access to the broadband provider's Internet access subscribers, regardless of whether the broadband provider has market power over those subscribers.[3] Third, a broadband provider would have an incentive to degrade or decline to increase the quality of service provided to normal traffic, as by slowing capacity expansion, in order to push edge providers to pay for a technically superior service (e.g., prioritization or guaranteed bandwidth) and exploit its terminating monopoly more effectively.[4] Similarly, a broadband provider would have an incentive to set low monthly bandwidth caps in order to motivate edge providers to pay for exclusion from the bandwidth cap ("zero-rating").

Each of these threats to the virtuous cycle raises competition concerns. The first involves exclusionary conduct against targeted edge providers to exercise or maintain market power in a market for specific Internet content, applications or services. The second and third involve the exploitation of the market power over edge providers available to a terminating access monopolist to charge excessive prices to edge providers for access or preferential access to its subscribers. The letter from professors and scholars to which we are responding appears to allude to the first competition concern, but it ignores entirely the second and third competition problems.

An FCC ban on edge-provider payments for preferential access would address all three competition problems. By contrast, case-by-case antitrust enforcement after problems arise cannot address the second and third problem, and would address the first problem only in part.

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[2] 2010 Open Internet Order ¶¶ 21-23.

[3] 2010 Open Internet Order ¶ 24; van Schewick, *INTERNET ARCHITECTURE AND INNOVATION* 278-280 (MIT Press 2010).

[4] 2010 Open Internet Order ¶ 29; Nicholas Economides, *Why Imposing New Tolls on Third-Party Content and Applications Threatens Innovation and Will Not Improve Broadband Providers' Investment*, *in* NET NEUTRALITY: CONTRIBUTIONS TO THE DEBATE 87, 94 (Jorge Pérez Martínez ed., 2010).

An FCC rule banning paid prioritization would prevent market power arising from targeted exclusionary conduct, the first competition concern. Antitrust enforcement alone cannot fully address this problem because of the difficulty of proving an antitrust violation when the competitive harm arises from chilling potential competition and innovation by edge providers that are not yet a success or have not yet been imagined.

Antitrust cannot practically prevent the other two competition problems associated with paid prioritization: excessive access charges imposed by terminating monopolists and their incentive to degrade non-priority traffic or set low monthly bandwidth caps. That's because antitrust liability requires identifying anticompetitive conduct that creates or maintains market power. A firm's mere exploitation of market power through monopoly pricing or its decision not to invest in upgrading non-priority service or to impose low bandwidth caps would rarely satisfy this condition for antitrust enforcement. By relying on its broader public interest mandate, the FCC can prevent these competition problems by banning broadband provider charges for preferential access by edge providers.

There is no reason to suppose that a ban on paid prioritization will discourage broadband provider investment, and slow the virtuous cycle that way. The FCC's 2010 rule preventing paid prioritization was in place for more than two years, and continues to apply to Comcast under an FCC order, without any harm to broadband investment. Nor is there any evidence that past investments by broadband providers have been predicated on the expectation of charging edge providers for preferential access to end users.

Nor does a ban on paid prioritization disable the price system as a way to prevent Internet congestion from impeding high-value sites, so long as FCC rules allowing reasonable network management permit cost-based and application-agnostic congestion pricing to end users.[5] By contrast, if terminating monopolists are allowed to charge edge providers, they will have the incentive and ability to set prices well in excess of the costs that the traffic brings – which could not be policed after the fact without instituting an undesirable regulatory process for determining costs and prices.

In sum, we support a ban on paid prioritization on competition grounds. As explained in greater detail below, that ban must be instituted by rule and by the FCC, rather than under an antitrust theory alone. Such a ban will prevent excessive pricing by terminating monopolists, take away broadband provider incentives to degrade the quality of non-priority service or set low monthly bandwidth caps, and prevent the anticompetitive exclusion of targeted edge providers. This is the best approach for

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[5] Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 137-140 (2015), *available at* http://www.stanfordlawreview.org/sites/default/files/67_Stan_L_Rev_1_van_Schewick.pdf.

protecting the incentives of startups to experiment with new content, applications and services, and to protect the virtuous cycle of edge provider innovation and broadband investment.

II. Other Benefits of Prohibiting Paid Prioritization

Paid prioritization also threatens free expression and innovation – values that only the FCC can fully protect. While the FCC is tasked with promoting the public interest, antitrust law focuses more narrowly on preventing anticompetitive behavior that reduces competition and harms consumers. Antitrust law does not protect important non-economic values such as free expression and diversity, and, although the protection of innovation is a stated goal of antitrust policy, competition policy has at times struggled to incorporate innovation or dynamic efficiency concerns in its analysis.[6] As a result of these differences, U.S. antitrust law does not prohibit many forms of conduct that harm the values that Open Internet rules are designed to protect.[7] For example, U.S. antitrust law only addresses exclusionary conduct by a broadband Internet access provider against a specific application if the broadband provider itself (or one of its affiliates) participates in the market for that application.[8] Open Internet rules, by contrast, will prevent conduct or practices by broadband providers with respect to Internet content, applications and services even if the conduct could not easily be reached under the antitrust laws because the broadband provider itself did not compete with the affected application.

Speech values are central to the open Internet. Everything that occurs on the Internet is a two-way "conversation" between end-users: We speak to each other, exchange information, and participate in many different commercially significant and noncommercial activities.[9]

Paid prioritization threatens free expression, the diversity of voices, and civic engagement. Fees for preferential treatment may silence those who cannot afford the fees and, in any event, would make it more difficult for them to be heard. Those fees

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[6] Testimony of Tim Wu Before the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, "Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?" (June 20, 2014), *available at* http://judiciary.house.gov/_cache/files/bcecca84-4169-4a47-a202-5e90c83ae876/wu-testimony.pdf.
[7] van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 10, 16-18, 54-64; Wu, Antitrust testimony, *supra* note 6; Brett Frischmann, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 330-345 (Oxford 2012).
[8] van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 56-57.
[9] *See* Frischmann, INFRASTRUCTURE, *supra* note 7, at 334-45; Wu, Antitrust Testimony, *supra* note 6, at 1-3; van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 10, 16-18.

"may particularly harm noncommercial end users, including individual bloggers, libraries, schools, advocacy organizations, and other speakers."[10]

Paid prioritization also threatens to impede innovation, investment, and economic growth in ways that antitrust enforcement alone would not prevent. Charging edge providers for preferential treatment would be "a significant departure from historical and current practice," and "could raise barriers to entry on the Internet," especially for startup and "garage entrepreneurs" through both the fees themselves and the transaction costs "arising from the need to reach agreements with one or more broadband providers to access a critical mass of potential end users."[11] As the history of the Internet and the record of the FCC's current proceeding show, entrepreneurs and start-ups with little or no outside funding would not be able to pay these fees and would be unable to compete with those who can do so. Entrepreneurs with little or no outside funding have been important sources of innovation in the past, and, if not excluded by fees for access or preferential treatment, will continue to be important sources of innovation in the future.[12] For companies that can pay, such fees would increase the costs of innovation, reducing their incentives to innovate and invest.[13] Small businesses would face similar problems.

Even low fees for preferential treatment can chill speech and raise barriers to entry for start-ups, stifling the vibrant experimentation by low-cost innovators that drives innovation on the Internet. Thus, the harms from these fees are not limited to excessive fees or to discriminatory or exclusive offerings.

Antitrust enforcement cannot be relied upon to prevent the innovation and speech harms from fees for preferential treatment; an FCC rule prohibiting paid prioritization is required.

[10] 2010 Open Internet Order, ¶ 76; Remarks of Jack M. Balkin at FCC Workshop on Speech, Democratic Engagement, and the Open Internet, December 15, 2009, Preserving the Open Internet, GN Docket No. 09-191, Broadband Industry Practices, WC Docket No. 07-52 (Dec. 22, 2009), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020355385; Barbara van Schewick, *The FCC Changed Course on Network Neutrality. Here Is Why You Should Care*, STAN. LAW SCH. CTR. FOR INTERNET & SOC'Y BLOG (Apr. 25, 2014), http://cyberlaw.stanford.edu/blog/2014/04/fcc-changed-course-network-neutrality-here-why-you-should-care.

[11] 2010 Open Internet Order ¶¶ 24, 25-26, 76.

[12] van Schewick, INTERNET ARCHITECTURE AND INNOVATION, *supra* note 3, at 204-213, 207-210, 211-213, 290-293, 297-348, 355-356; Barbara van Schewick, Opening Statement at the FCC Workshop on Approaches to Preserving an Open Internet, at 1-6 (Apr. 28, 2010), *available at* https://www.law.stanford.edu/sites/default/files/publication/259136/doc/slspublic/schewick-statement-20100428.pdf; Barbara van Schewick, *The Case for Rebooting the Network-Neutrality Debate*, ATLANTIC (May 6, 2014), http://www.theatlantic.com/technology/archive/2014/05/the-case-for-rebooting-the-network-neutrality-debate/361809.

[13] 2010 Open Internet Order ¶¶ 26, 76; van Schewick, INTERNET ARCHITECTURE AND INNOVATION, *supra* note 3, at 278-280.

III. The Complementary Roles of the FTC and FCC

In the communications industries, the FTC and the FCC have complementary roles in preventing competitive harms and protecting consumers from deceptive and unfair conduct. One reason is jurisdictional: the FCC's authority under the Communications Act does not extend to every nook and cranny of the communications sector, and the FTC's enforcement authority does not reach services provided on a common carrier basis. Another is in focus: the FCC commonly proceeds by rulemaking (although it also engages in case-by-case adjudication); the FTC never relies on rulemaking in competition matters (although it has dormant competition rulemaking authority) and, in recent years, rarely does so in consumer protection matters. Finally, the FCC is tasked with protecting the public interest, which allows it to pursue a wide range of economic and non-economic goals such as promoting competition, innovation and free expression. By contrast, the FTC's role is limited to protecting competition and to protecting consumers against unfair and deceptive practices. Due to these differences, the FTC is unlikely to use rulemaking to prevent the three competitive problems from paid prioritization, when rulemaking is the only practical way to do so, and the FTC is unable to use rulemaking to address the additional problems paid prioritization causes for innovation and free speech.

The D.C. Circuit's recent *Verizon* decision makes clear that the FCC must reclassify broadband as a Title II telecommunications service in order to prohibit paid prioritization. Doing so would not lead to over-regulation: we would expect and encourage the FCC to regulate with a light touch under Title II through application of its forbearance authority. Since common carrier services are exempt from FTC jurisdiction, reclassification likely would remove broadband Internet access from FTC oversight. While Title II of the Communications Act allows the FCC to effectively protect consumers, consumers would benefit from allowing the FTC and FCC to work together, share their consumer protection expertise, and augment each other's resources, so we encourage Congress to repeal the provision that exempts common carrier services from FTC oversight. However, given that the FCC will be able to effectively protect consumers under Title II even in the absence of FTC jurisdiction, any efforts to repeal the common carrier exemption should not hold up the FCC's adoption of Open Internet Rules under Title II of the Communications Act.

Prohibiting paid prioritization by rule, as FCC reclassification and forbearance make possible, has a number of advantages over relying on after-the-fact adjudication by the FTC (or the Justice Department, or private plaintiffs) under the antitrust laws. As previously detailed, antitrust enforcement cannot prevent excessive access charges by terminating monopolists and their anticompetitive incentive to degrade non-priority traffic or keep monthly bandwidth caps low. It could not fully prevent competitive harms arising from targeted exclusionary conduct. Nor could it address the harms to innovation and free speech resulting from any fees for preferential treatment. In addition, a bright line rule against paid prioritization would provide clear guidance to broadband providers, entrepreneurs and their investors, reducing uncertainty that could reduce their incentives to invest, avoid the administrative costs and delay associated with case-by-case adjudication under the antitrust laws, and allow start-ups and other actors with few resources to take advantage of the rule's protections.[14] Startups and innovators have consistently called for bright line rules, arguing that they do not have the resources to pursue long and costly case-by-case proceedings at the FCC against some of the largest companies in the world. The costs, uncertainty, and duration of such proceedings would make them a useless remedy.[15]

We strongly support antitrust enforcement, but we recognize that in order to prevent broadband providers from harming competition, innovation and free speech, any sensible comparison of the costs and benefits of relying on FCC rulemaking versus FTC adjudication for doing so would favor prohibiting payments for preferential access by FCC rule.

IV. Conclusion

After years of high-profile debate about net neutrality, a University of Delaware study found that 81% of the public opposes "allowing Internet service providers to charge some websites or streaming video services extra for faster speeds."[16] The American people are right. Such payments would raise the costs of entry to new edge providers, make it more difficult for many speakers to be heard, allow broadband providers to impose excessive fees on edge providers that become successful, give broadband providers incentives to degrade the quality of non-priority service and impose low bandwidth caps, and facilitate the anticompetitive exclusion of disfavored edge providers. Broadband providers must be prevented from charging edge providers for preferential access in order to protect the virtuous cycle of Internet innovation and free speech.

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[14] *See* van Schewick, *Network Neutrality and Quality of Service*, *supra* note 5, at 69-83.

[15] Many commenters explained that the "commercial reasonableness" standard proposed by the FCC in its May 2015 Notice of Proposed Rulemaking would require litigation far too expensive and slow for startups; the proposed commercial reasonableness standard included relief for "harm to competition" that appeared to reflect an antitrust standard or be even more lax. *See*, e.g., comments by Y Combinator at 3, http://apps.fcc.gov/ecfs/document/view?id=7521383177 ("No startup has the funds and lawyers and economists to take on billion-dollar ISPs in an FCC action based on the vague legal standards in the proposal. Indeed, the startup ecosystem needs a bright-line, per se rule against discrimination."); Reddit at 8, http://apps.fcc.gov/ecfs/document/view?id=7521679127, ("We have no lawyers on staff, and we devote our resources solely to meeting the needs of our 100 million visitors. We do not have the resources to engage ISPs in a legal fight, with only a vague standard as our weapon, without any firm ground on which to stand. We need clear, bright-line rules.").

[16] Press Release, University of Delaware Center for Political Communication, National Survey Shows Public Overwhelmingly Opposes Internet "Fast Lanes" (November 10, 2014).

The FCC and FTC have complementary roles in protecting the Open Internet. The FCC should prohibit payments for preferential access by reclassifying broadband and forbearing from unnecessary regulation under Title II of the Communications Act. The FTC's consumer protection authority should be preserved by repealing the common carrier exemption from the FTC's jurisdiction, but any efforts to do so should not hold up the adoption of Open Internet rules.

Very truly yours,

(*Institutional Affiliations Provided for Identification Purposes Only*)

Mike Ananny	Assistant Professor of Communication & Journalism Annenberg School for Communication & Journalism University of Southern California Faculty Affiliate Science, Technology and Society University of Southern California
Jonathan Askin	Founder/Director, Brooklyn Law Incubator & Policy Clinic Faculty Chair and Innovation Catalyst, Center for Urban Business Entrepreneurship Brooklyn Law School
Patricia Aufderheide	University Professor School of Communication American University, Washington, DC
Jonathan B. Baker	Professor of Law American University Washington College of Law
Carliss Y. Baldwin	William L. White Professor of Business Administration Harvard Business School
Jack Balkin	Knight Professor of Constitutional Law and the First Amendment Yale Law School
Yochai Benkler	Berkman Professor of Entrepreneurial Legal Studies Harvard Law School

John Blevins	Associate Professor of Law Loyola University New Orleans College of Law
Michael W. Carroll	Professor of Law American University Washington College of Law
Peter C. Carstensen	Emeritus Professor of Law University of Wisconsin Law School
Ralph D. Clifford	Professor of Law University of Massachusetts School of Law
Ben Depoorter	Professor of Law Hastings College of the Law University of California
Nicholas Economides	Professor of Economics Stern School of Business New York University
Roger Allan Ford	Assistant Professor of Law University of New Hampshire School of Law
Brett Frischmann	Professor of Law and Director Cardozo Intellectual Property & Information Law Program Cardozo School of Law
Shubha Ghosh	Vilas Research Scholar and George Young Bascom Professor of Law University of Wisconsin Law School
Theodore L. Glasser	Professor of Communication Stanford University
Thomas J. Horton	Associate Professor of Law and Heidepriem Trial Advocacy Fellow The University of South Dakota School of Law
John B. Kirkwood	Professor of Law Seattle University School of Law
Raymond Ku	Professor of Law Director, Center for Cyberspace Law & Policy Case Western Reserve University

Christopher R. Leslie	Chancellor's Professor of Law University of California, Irvine School of Law
Lawrence Lessig	Roy L. Furman Professor of Law and Leadership Harvard Law School
Patrick Lin	Director, Ethics + Emerging Sciences Group Associate Professor, Philosophy Department California Polytechnic State University
Phil Malone	Professor of Law Director, Juelsgaard Intellectual Property and Innovation Clinic Stanford Law School
James May	Professor of Law American University Washington College of Law
Rob Reich	Professor, Political Science Stanford Unviersity
Neil M. Richards	Professor of Law, Washington University in St. Louis Affiliate Scholar, Stanford Center for Internet and Society
Jorge R. Roig	Associate Professor of Law Charleston School of Law
Pamela Samuelson	Richard M. Sherman Distinguished Professor of Law Berkeley Law School
Scott Shackelford	Assistant Professor Indiana University
Olivier Sylvain	Associate Professor Fordham University School of Law
Fred Turner	Associate Professor Dept. of Communication Stanford University
Barbara van Schewick	Professor of Law and (by Courtesy) Electrical Engineering Helen L. Crocker Faculty Scholar Director, Center for Internet and Society Stanford Law School

Eric von Hippel	T. Wilson Professor of Innovation Management MIT Sloan School of Management
Spencer Weber Waller	Professor and Director Institute for Consumer Antitrust Studies Loyola University Chicago School of Law
Tim Wu	Professor of Law Columbia University