

the two years since the launch of the advisory opinion process reinforces our conclusion that the process is too uncertain and costly.<sup>912</sup> As such, we reject commenters' assertions to the contrary.<sup>913</sup>

**b. Paid Prioritization**

253. We also decline to adopt a ban on paid prioritization. The transparency rule we adopt, along with enforcement of the antitrust and consumer protection laws, addresses many of the concerns regarding paid prioritization raised in this record. Thus, the incremental benefit of a ban on paid prioritization is likely to be small or zero. On the other hand, we expect that eliminating the ban on paid prioritization will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition.<sup>914</sup> Thus, the costs (forgone benefits) of the ban are likely significant and outweigh any incremental benefits of a ban on paid prioritization.<sup>915</sup>

254. *Innovation.* We anticipate that lifting the ban on paid prioritization will increase network innovation, as the record demonstrates that the ban on paid prioritization agreements has had, and will continue to have, a chilling effect on network innovation generally, and on the development of high quality-of-service (QoS) arrangements—which require guarantees regarding packet loss, packet delay, secure connectivity, and guaranteed bandwidth—in particular.<sup>916</sup> As CTIA argues, the *Title II Order* implicitly recognized this point, but its insistence that these arrangements be treated as non-broadband Internet access data services reduced the flexibility of ISPs and edge providers, created uncertainty about the line between non-broadband Internet access data services and broadband Internet access services, and likely reduced innovation.<sup>917</sup> The record reflects that the ban on paid prioritization has hindered the

<sup>912</sup> See *infra* para.303; see also, e.g., Comcast Comments at 72-73; WISPA Comments at 68-69; ACA Reply at 17.

<sup>913</sup> See, e.g., OTI New America Comments at 61; Public Knowledge Comments at 123-25.

<sup>914</sup> For these reasons and because we find that eliminating the ban on paid prioritization arrangements could lead to lower prices for consumers for broadband Internet access service, we find that our action benefits low-income communities and non-profits, and we reject arguments to the contrary. Cf. Mayors Letter at 1; Letter from American Council on Education et al., to The Honorable Ajit Pai, Chairman, The Honorable Mignon Clyburn, Commissioner, The Honorable Michael O'Rielly, Commissioner, The Honorable Brendan Carr, Commissioner, and The Honorable Jessica Rosenworcel, Commissioner, FCC, WC Docket No. 17-108, at 2 (filed Dec. 7, 2017) (ACE et al. *Ex Parte*). We reject the argument that the benefits of our elimination of the paid prioritization ban must be “uniform across providers or geographic areas.” ACE et al. *Ex Parte* at 2. This is an unnecessarily high and rigid threshold. The public—including low-income communities—benefits, and that is enough.

<sup>915</sup> See *infra* paras. 319-321.

<sup>916</sup> See Cause of Action Comments at 3-4; R Street Comments at 23; Theodore R. Bolema, *Allow Paid Prioritization on the Internet for More, Not Less, Capital Investment*, Perspectives from FSF Scholars at 3 (May 1, 2017) (asserting that ban hurts edge providers in new industries which may require a high level of end-to-end reliability); Free State Foundation Comments at 52 (“The benefits from video phone calls and video streams, for example, are reduced when data traffic congestion causes transmission delays. Paid prioritization agreements that provide Quality-of-Service guarantees could enhance the attractiveness and value of these services. Indeed, innovative edge providers have expressed willingness to pay broadband ISPs for some form of premium access, such as ensured faster delivery, in order to deliver a satisfactory consumer experience.”); CTIA Comments at 14 (“Particularly in the mobile wireless market, [the flat ban] may undermine future broadband offerings that enhance consumer welfare.”); AT&T Comments at 40-41; TIA Comments at 10-11 (“Capabilities such as remote health-care monitoring, health service delivery by mobile networks, and connected vehicle technologies will all require networks that can ensure a level of service quality that current networks cannot today fully support.”); Verizon Comments at 20-21; Comcast Comments at 55-57; Nokia Comments at 9-12.

<sup>917</sup> See CTIA Comments at 14-16 (asserting that “whereas this approach might exempt specific applications that the Commission can identify in advance as requiring QoS enhancement, it imposes severe limits and burdens on emerging QoS-enabled Internet access applications, which will be subject at best to grave uncertainty and at worst an outright ban on needed prioritization”); see also Nokia Comments at 9 (“From an engineering viewpoint, those

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