

FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of

Restoring Internet Freedom

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WC Docket No. 17-108

COMMENTS OF INTERNET ASSOCIATION

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## SUMMARY

After over a decade of debate and several attempts to adopt net neutrality protections, the Commission adopted enforceable light touch rules in 2015 including bright line rules restricting blocking, throttling, and paid prioritization of internet traffic by ISPs, a rule prohibiting unreasonable interference or disadvantaging of lawful internet traffic, and an enhanced transparency rule. Unlike the Commission's prior attempts at establishing protections for consumers seeking to access the lawful content and services and use the lawful devices of their choice, the Commission's 2015 rules were upheld entirely by the D.C. Circuit last year. Having clear, legally sustainable rules in place finally established rules of the road and provided legal certainty for ISPs, edge providers, and consumers alike. The Commission should maintain its existing net neutrality rules and must not weaken their firm legal basis.

As shown in studies by Internet Association and others, the evidence indicates that the 2015 rules have ensured the outcomes predicted in the Commission's 2015 Order – a growing cloud economy that has fostered profitable investments in broadband networks and faster speeds for broadband users, all to the benefit of American businesses and consumers.

Specifically, IA's research found the following (among other findings):

- There has been no demonstrable negative impact on broadband infrastructure investment, including no slowdown in investment in the U.S. compared to other OECD countries and no causal impact overall from the FCC policies on investment.
- Investment by network operators has continued to rise every year since 2009, before the FCC first adopted net neutrality rules in 2010, and

appears unaffected by the change in regulatory classification of BIAS in 2015.

- Broadband penetration continues to grow, just as it did prior to the FCC's 2015 Open Internet Order, with fixed broadband subscriptions up over 3.5 percent from June 2015 to June 2016 and wireless broadband subscriptions up 10 percent in the same period.
- Cable broadband speeds have doubled from 2014 to 2016 following the adoption of the current net neutrality rules and reclassification of BIAS.
- There is no demonstrable evidence of network operator industry harm, with aggregate corporate net income and equity for ISPs increasing steadily over the years, including after 2015.

Net neutrality is about not just investment by ISPs, but also investment by providers of edge-based apps and services and consumers of those services. Investment in the cloud economy has been booming since 2015. The economic data following the Commission's 2015 Order and net neutrality rules demonstrate that the Commission's analysis in its 2010 and 2015 Orders regarding maintenance of the virtuous circle of innovation and growth have remained true — clear rules of the road have given edge-based apps and services the certainty needed to attract investment and growth without being concerned about ISPs acting as gatekeepers, and the growth of these services has driven demand among consumers for faster and better broadband access, leading to continued growth in ISP investment and broadband subscriptions.

IA has consistently been in favor of clear net neutrality rules that protect consumers' ability to enjoy the unfettered ability to access the lawful content of their choice. After years of claims that net neutrality protections were not needed and challenges to past Commission attempts to enforce open internet protections or enact rules, there is broad consensus today among even ISPs that bright line open internet

protections are needed and that consumers should have unfettered access to an open internet. For example, Brian Roberts, Chairman and CEO of Comcast, has said that Comcast “strongly support[s] . . . the preservation of modern, strong, and legally enforceable net neutrality protections”, and Verizon has said that it supports net neutrality and that its “customers should be able to access internet content and services of their choice.” Meanwhile, numerous small, competitive ISPs from around the country have expressed support for the Commission’s 2015 rules.

Undoing the Commission’s 2015 Order, and even continuing to discuss reopening the settled open internet debate, will create significant uncertainty in the market and upset the careful balance that has led to the current virtuous circle of innovation in the broadband ecosystem. Weakening existing net neutrality rules or denying them a solid legal foundation will harm consumers and innovators alike. Now is not the time to create uncertainty in the most robust segment of the economy.

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Before the  
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**COMMENTS OF INTERNET ASSOCIATION**

Internet Association (“IA”)<sup>1</sup> hereby files these comments in response to the *Notice of Proposed Rulemaking* (“Notice” or “NPRM”) in the above-captioned proceeding,<sup>2</sup> urging the Commission to maintain its current open internet rules. The Commission’s 2015 Order adopting the current net neutrality rules is working, with increased investment across the cloud economy and the broadband economy more generally, and greater demand for broadband access thanks to the virtuous circle of innovation in the broadband market. The NPRM’s proposals would introduce significant uncertainty and would threaten the virtuous circle of innovation that has made the cloud economy the leading driver of economic growth in the U.S.

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<sup>1</sup> The Internet Association is the unified voice of the Internet Economy, and represents the world’s leading Internet companies including: Airbnb, Amazon, Coinbase, Doordash, Dropbox, eBay, Etsy, Expedia, Facebook, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Match Group, Microsoft, Monster, Netflix, Pandora, PayPal, Pinterest, Rackspace, Reddit, SalesForce, Snap Inc., Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber, Upwork, Yelp, Zenefits, and Zynga. More information is available at <https://internetassociation.org/>.

<sup>2</sup> *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) (“NPRM”).

After over a decade of debate and several attempts to adopt net neutrality protections, the Commission adopted enforceable light touch rules in 2015<sup>3</sup> including bright line rules restricting blocking, throttling, and paid prioritization of internet traffic by Internet Service Providers (“ISPs”), a rule prohibiting unreasonable interference or disadvantaging of lawful internet traffic, and an enhanced transparency rule.<sup>4</sup> Significantly, unlike the Commission’s prior attempts at establishing protections for consumers seeking to access the lawful content and services and use the lawful devices of their choice, the Commission’s 2015 rules were upheld entirely by the D.C. Circuit last year.<sup>5</sup> Having clear, legally sustainable rules in place finally established rules of the road and provided legal certainty for ISPs, edge providers, and consumers alike. Indeed, as discussed below, evidence indicates that the 2015 rules have ensured the outcomes predicted in the Commission’s 2015 Order — a growing cloud economy that has fostered profitable investments in broadband networks and faster speeds for broadband users, all to the benefit of American businesses and consumers.

IA has consistently been in favor of clear net neutrality rules that protect consumers’ ability to enjoy the unfettered ability to access the lawful content of their choice. After years of claims that net neutrality protections were not needed and challenges to past Commission attempts to enforce open internet protections or enact

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<sup>3</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, 30 FCC Rcd 5601 (2015) (“2015 Open Internet Order”).

<sup>4</sup> The Commission also asserted its authority to monitor and resolve internet traffic exchange disputes on a case-by-case basis. *Id.* at 5686-96, paras. 194-206.

<sup>5</sup> *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

rules, there is broad consensus today among even ISPs that bright line open internet protections are needed and that consumers should have unfettered access to an open internet. For example, Brian Roberts, Chairman and CEO of Comcast, has said that Comcast “strongly support[s] . . . the preservation of modern, strong, and legally enforceable net neutrality protections”<sup>6</sup>, and Verizon has said that it supports net neutrality and that its “customers should be able to access internet content and services of their choice.”<sup>7</sup> Meanwhile, numerous small, competitive ISPs from around the country have expressed support for the Commission’s 2015 rules.<sup>8</sup>

Undoing the Commission’s 2015 Order, and even continuing to discuss reopening the settled open internet debate, will create significant uncertainty in the market and upset the careful balance that has led to the current virtuous circle of innovation in the broadband ecosystem. Weakening existing net neutrality rules or denying them a solid legal foundation will harm consumers and innovators alike. Now is not the time to create uncertainty in the most robust segment of the economy.

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<sup>6</sup> Comcast Statement Supporting a Free and Open Internet, Apr. 26, 2017, at <http://corporate.comcast.com/comcast-voices/comcast-statement-supporting-a-free-and-open-internet>.

<sup>7</sup> Verizon Supports FCC Proposal to Remove Outdated Utility Regulation of Broadband, Apr. 26, 2017, at <http://www.verizon.com/about/news/verizon-supports-fcc-proposal-remove-outdated-utility-regulation-broadband> (quoting Kathy Grillo, Senior Vice President and Deputy General Counsel, Verizon).

<sup>8</sup> Letter from A Better Wireless, NISP, LLC and 40 other ISPs to Hon. Ajit Pai, Chairman, FCC, WC Docket No. 17-108 (June 27, 2017); *see also* Dominic Fracassa, *Bay Area Internet Providers Thriving in the Era of Net Neutrality*, June 6, 2017, at <http://www.sfchronicle.com/business/article/Bay-Area-Internet-providers-thriving-in-the-era-11200806.php>.



**I. THE NPRM FAILS TO ACCOUNT FOR THE VIRTUOUS CIRCLE OF BROADBAND INNOVATION UNDER WHICH THE CLOUD ECONOMY HAS FLOURISHED**

**A. The NPRM Ignores the Investment in the Thriving Cloud Economy That Derives From a Free and Open Internet**

Over the last two decades, the Internet has gone from something used by a select few on dial-up connections to an indispensable part of nearly everyone's daily lives with seemingly every device in the home being "always on." In today's cloud economy, a majority of the top 10 global companies by market capitalization owe much of their success to the growth of the Internet. Of course, the Internet enables hundreds of thousands of small businesses too, whether they are startups building apps or local restaurants or stores marketing themselves and selling to the local community and beyond. Reliable high-speed broadband access has become a necessity for almost every business around the country, leading to greater demand for broadband access, increased investment by ISPs, and increasingly faster broadband speeds.

In recent years, cloud-based services have touched almost every part of our lives – whether it is listening to music, storing files and photos, planning vacations or daily commutes, transferring money, buying groceries, ordering takeout, searching for a job, or managing personal finances. Meanwhile, cloud-based providers of software, platforms, and infrastructure have changed the way businesses operate by moving backend business operations and communications systems to the cloud, leading to fewer and more predictable capital costs. Considering the impact of Internet companies and the reliance of all businesses – and consumers – on the cloud, it is no exaggeration to say that the U.S. economy rests on the cloud.

The benefits of the cloud economy have not been limited to Silicon Valley or other coastal cities. Startups from all 50 states were among the signatories on a letter to Chairman Pai urging him to preserve the current net neutrality rules, noting that a free and open internet allows entrepreneurs to compete based on the quality of their products and services rather than their ability to compete with large incumbents to pay tolls to ISPs.<sup>9</sup> A co-founder of a startup based in Fargo, ND, has credited Fargo's booming startup community on an open internet that allows entrepreneurs to "innovate, enter the market, and compete with minimal barriers to entry."<sup>10</sup> Tens of thousands of people living in rural areas run sole proprietor home businesses via Etsy, with 28 percent of Etsy sellers living in rural areas compared to only 17 percent of all U.S. non-farm business owners.<sup>11</sup> Half of the items sold on Amazon worldwide are from sellers that offer their products through Amazon Marketplace; these two million small businesses and entrepreneurs selling on Amazon come from every state in the U.S., and from more than 130 different countries around the world. Similarly, eBay-enabled micro, small and medium-sized enterprises (MSMEs) are present in approximately 92% of U.S. counties and no county with a population exceeding 21,000

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<sup>9</sup> Letter from Engine et al. to FCC Chairman Ajit Pai, April 26, 2017, available at <http://www.engine.is/startups-for-net-neutrality>.

<sup>10</sup> Brandon Medenwald, *Preserve 'Net Neutrality' To Prevent 'Slow Lane' Internet*, at <http://www.inforum.com/opinion/4285576-letter-preserve-net-neutrality-prevent-slow-lane-internet> (letter from co-founder of Simply Made Apps, the creator of Simple In/Out, an app used for employee timekeeping).

<sup>11</sup> Internet Association, *Principles to Preserve and Protect an Open Internet*, White Paper, at 13, Appendix, June 21, 2017, at <https://internetassociation.org/reports/principles-to-preserve-protect-an-open-internet/> (Statement from Josh Silverman, CEO, Etsy).

failed to have at least one resident eBay-enabled MSME.<sup>12</sup> In addition, in the most recent economic recovery, new eBay-enabled MSMEs emerged across a wider and more inclusive range of U.S. counties than new enterprises grew in the U.S. economy overall.<sup>13</sup> Overall, the internet supported creation of 10.4 million U.S. jobs across all 50 states in 2016, 86 percent of which were outside major tech hubs.<sup>14</sup>

IA's member companies have been at the center of this transformation of our economy, investing heavily in infrastructure to enable the cloud economy. For example, total capital expenditure in the "data processing, hosting, and related services" sector was almost \$17 billion in 2015, an increase of 26 percent (\$3.5 billion) from the prior year.<sup>15</sup> Companies in this sector have invested billions of dollars in thousands of data centers, submarine cables, and other cloud infrastructure,<sup>16</sup> and pay

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<sup>12</sup> *United States Small Online Business Growth Report*, eBay Report, Apr. 2016, at 17, at [https://www.ebaymainstreet.com/sites/default/files/ebay\\_us-small-online-business-growth-report.pdf](https://www.ebaymainstreet.com/sites/default/files/ebay_us-small-online-business-growth-report.pdf).

<sup>13</sup> *Platform-Enabled Small Businesses and the Geography of Recovery*, eBay Report, Jan. 2017, at 3-4, at [https://www.ebaymainstreet.com/sites/default/files/ebay\\_report\\_county-growth\\_0.pdf](https://www.ebaymainstreet.com/sites/default/files/ebay_report_county-growth_0.pdf).

<sup>14</sup> <https://economicimpact.google.com/#/> (last visited July 14, 2017).

<sup>15</sup> S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in a Title II World*, at 45 (May 2017), available at <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

<sup>16</sup> See Angel Gonzalez and Matt Day, *Amazon, Microsoft Invest Billions as Computing Shifts to Cloud*, April 27, 2017, available at <http://www.seattletimes.com/business/technology/amazon-microsoft-invest-billions-as-computing-shifts-to-cloud/>.

hundreds of millions of dollars to send traffic over the Internet to users of their services.<sup>17</sup>

The NPRM ignores these facts, instead focusing solely on investments made by ISPs and the supposed impact of the Commission’s policies on investments by ISPs. As explained below, there is no evidence that ISP investment has been harmed following the 2015 *Open Internet* Order and, in fact, plenty of evidence that ISPs have increased their investments. Regardless, investment by ISPs is only part of the picture and must be viewed in conjunction with investments being made by edge providers in the cloud that are reshaping the U.S. economy and that, along with investments by ISPs in faster and more extensive broadband access, are benefitting consumers and small and large businesses around the country.

**B. The NPRM Ignores The Virtuous Circle of Broadband Innovation That Benefits The Cloud Economy, ISPs, Other Businesses, and Consumers**

By focusing solely on investments made by ISPs, the NPRM also ignores the Commission’s prior analysis – endorsed by the D.C. Circuit<sup>18</sup> – regarding the virtuous circle of broadband innovation. The Commission has previously explained that open Internet rules enable a “virtuous circle of innovation in which new uses of the network – including new content, applications, services, and devices – lead to increased end-user demand for broadband, which drives network improvements, which in turn

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<sup>17</sup> See, e.g., *How Netflix Works With ISPs Around the Globe to Deliver a Great Viewing Experience*, Mar. 17, 2016, at <https://media.netflix.com/en/company-blog/how-netflix-works-with-isps-around-the-globe-to-deliver-a-great-viewing-experience>.

<sup>18</sup> See *USTA v. FCC*, 825 F.3d at 694, 734 (D.C. Cir. 2016); *Verizon v. FCC*, 740 F.3d 623, 634, 644 (D.C. Cir. 2014).

lead to further innovative network uses.”<sup>19</sup> In other words, investment in the cloud economy and investment in retail broadband network deployment complement each other as new cloud-based services and consumer devices create greater demand for broadband and investment in broadband access networks. The NPRM’s failure to address how its proposals will impact the cloud economy represents a fundamental misunderstanding of innovation and investment in the broadband economy and threatens to harm the largest driving force in the U.S. economy today.

The success of the cloud economy and the transformation of the Internet into an indispensable part of daily life is largely based on a free and open Internet, one that enables consumers to access any website or app, buy any product, and use any service they choose. Net neutrality rules enable an ecosystem of “innovation without permission” in which anyone with a good idea can launch an app without having to strike a deal with an ISP or worry about whether an ISP will block, throttle, or otherwise discriminate against a service. Moreover, following the virtuous circle of broadband innovation, a free and open Internet benefits the entire ecosystem – ISPs who benefit from greater demand for their services from consumers, edge providers and startups who innovate knowing that their services will reach their customers without interference from ISPs acting as gatekeepers, and most of all consumers and small businesses who benefit from the wide range of innovative services available through the broadband ecosystem.

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<sup>19</sup> 2015 Open Internet Order, 30 FCC Rcd at 5627, para. 77 (citing *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, FCC 10-201, 25 FCC Rcd 17905, 17910-11, para. 14 (2010) (“2010 Open Internet Order”).

IA's member companies depend on this virtuous circle to continue to offer consumers the benefits of increased innovation and competition. And while opponents of net neutrality like to frame the issue as nothing more than a business dispute between large corporations, the reality is that a free and open Internet most benefits end users as well as smaller edge providers and content producers who are able to offer consumers greater choice and, relatedly, the benefits of competition. Recently, more than 1,000 startups, innovators, entrepreneurs, and entrepreneurial support organizations from around the nation joined Engine, Y Combinator, and Techstars in asking Chairman Pai to protect net neutrality and ensure that America's innovators don't get left behind. The letter makes clear that innovators and entrepreneurs "depend on an open Internet—including enforceable net neutrality rules" and that "[w]ithout net neutrality, the incumbents who provide access to the Internet would be able to pick winners or losers in the market."<sup>20</sup> Without net neutrality rules in place, ISPs could take "actions [that] directly impede an entrepreneur's ability to start a business, immediately reach a worldwide customer base, and disrupt an entire industry."<sup>21</sup> On the other hand, net neutrality rules allow innovators and entrepreneurs "to compete with incumbents on the quality of [their] products and services, not [their] capacity to pay tolls to Internet access providers."<sup>22</sup>

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<sup>20</sup> Letter from Engine et al. to FCC Chairman Ajit Pai, April 26, 2017, *available at* <http://www.engine.is/startups-for-net-neutrality>.

<sup>21</sup> *Id.* (internal quotation marks omitted).

<sup>22</sup> *Id.*

As the Commission has previously explained, growth and innovation by edge providers does not come at the cost of growth and innovation by ISPs.<sup>23</sup> Innovation and investment at the edge has led to greater demand for broadband access, leading in turn to rising broadband subscribership and purchases of higher broadband speeds. Rural Americans, like urban Americans, want fast broadband so they can watch their favorite shows on Netflix, Amazon, or Hulu, share and watch videos on YouTube, or listen to music on Spotify, leading to greater demand for broadband access in rural and other less populated parts of the country. The growth of cloud-based applications and services for small, medium, and large businesses has led to greater demand for faster and more reliable enterprise broadband services. Undoing or weakening the existing open internet rules will threaten this virtuous circle of broadband innovation, and the NPRM fails to explain why a departure from the Commission's existing, court-approved policy of promoting a virtuous circle is warranted or how doing so would serve the public interest.

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<sup>23</sup> 2015 Open Internet Order, 30 FCC Rcd at 5625-27, paras. 76-77 ("Both within the network and at its edges, investment and innovation have flourished while the open Internet rules were in force."); 2010 Open Internet Order, 25 FCC Rcd at 17910-11, para. 14.

## **II. THE 2015 OPEN INTERNET RULES ARE WORKING; THERE IS NO NEED TO REVISIT THEM AND INTRODUCE UNCERTAINTY INTO THE INTERNET ECOSYSTEM**

### **A. The NPRM's Claims That The Commission's 2015 Open Internet Order Has Hurt Broadband Investment Are Unsupported By Evidence**

The 2015 Open Internet Order was the culmination of over a decade of a bipartisan effort to protect and preserve an open internet. The Commission's first two attempts to implement net neutrality protections – its 2005 *Internet Policy Statement* and its 2010 rules – were vacated by the D.C. Circuit for lack of properly invoked statutory authority.<sup>24</sup> After an exhaustive process and input from all stakeholders, the Commission's rules adopted in 2015 seemed to settle the issue. The 2015 rules provide a light touch framework, rely on a firm legal basis, and promote the virtuous circle of innovation that is the hallmark of today's Internet economy. In the two-plus years since the rules were adopted, the benefits of an Open Internet to the entire ecosystem have been clear. Cloud-based service providers and startups have continued to thrive; ISPs have benefitted as demand for broadband has continued to grow; and consumers have reaped the benefits.

Nevertheless, the Commission now proposes to disrupt the broadband economy by revisiting its net neutrality rules. The Commission proposes to do so based on claims that reclassification of broadband internet access service ("BIAS") as a Title II service, as opposed to the substantive nondiscrimination rules themselves, has hurt

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<sup>24</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).



investment in broadband networks.<sup>25</sup> Even that limited assertion, which casts no doubt at all on the benefits of having FCC net neutrality regulations, is incorrect.

There is no reliable evidence that the 2015 Order has reduced ISPs' investments in broadband infrastructure. Comprehensive economic research by IA<sup>26</sup> has found that ISP investment is up over time, and shows no decline as a result of the Commission's 2015 Order promulgating net neutrality rules and classifying BIAS as a common carrier service under Title II of the Communications Act. Multiple, independent metrics – from actual capital expenditure numbers, to capacity, to prices – demonstrate that ISP claims of depressed investment don't mesh with reality.

Specifically, IA's research found the following (among other findings):

- There has been no demonstrable negative impact on broadband infrastructure investment, including no slowdown in investment in the U.S. compared to other OECD countries and no causal impact overall from the FCC policies on investment.
- Investment by network operators has continued to rise every year since 2009, before the FCC first adopted net neutrality rules in 2010, and appears unaffected by the change in regulatory classification of BIAS in 2015.
- Broadband penetration continues to grow, just as it did prior to the FCC's 2015 Open Internet Order, with fixed broadband subscriptions up over 3.5 percent from June 2015 to June 2016 and wireless broadband subscriptions up 10 percent in the same period.
- Cable broadband speeds have doubled from 2014 to 2016 following the adoption of the current net neutrality rules and reclassification of BIAS.

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<sup>25</sup> NPRM at 15-16, para. 45.

<sup>26</sup> Christopher Hooton, *An Empirical Investigation of the Impacts of Net Neutrality*, [https://internetassociation.org/wp-content/uploads/2017/07/InternetAssociation\\_NetNeutrality-Impacts-Investigation.pdf](https://internetassociation.org/wp-content/uploads/2017/07/InternetAssociation_NetNeutrality-Impacts-Investigation.pdf). A copy of Dr. Hooton's research paper is attached to these comments.

- There is no credible evidence of network operator industry harm, with aggregate corporate net income and equity for ISPs increasing steadily over the years, including after 2015.

A recent comprehensive study by Free Press found similar results, including the following factual findings:

- Total capital investments by publicly traded ISPs were up 5 percent during the two-year period following the FCC's 2015 Order compared to the two-year period prior to the Order;
- Capital investments were up at 16 of the 24 publicly traded ISPs following the 2015 FCC Order;
- Cable ISPs' core network investments in 2016 saw their highest single-year increase in more than 15 years;
- Large- and medium-sized ISPs accelerated or completed next-generation network upgrades since 2015; and
- All national wireless carriers have increased capacity sufficient to offer unlimited data plans following the 2015 FCC Order.<sup>27</sup>

The IA research and Free Press study confirm what common sense tells us — that investment in broadband networks is driven by growing demand for broadband access services. Investment decisions are also based on a number of other factors, including a history of capital expenditures (*e.g.*, an ISP that has recently concluded major network upgrades is less likely to spend significantly in the years immediately following such upgrades), the presence or absence of competition in particular markets, existing

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<sup>27</sup> S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in a Title II World*, May 2017, available at <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

spectrum holdings for wireless operators, interest rates, etc. The actual experiences of ISPs confirm this, with ISPs booming where consumer demand is high.<sup>28</sup>

This quantitative evidence is consistent with real world, ordinary course documents and other qualitative evidence from the ISPs themselves. ISPs have confirmed, in their own statements, that the 2015 Order and the reclassification of BIAS has not affected their investment decisions. Last month, 41 small, competitive ISPs from around the country wrote to Chairman Pai in support of the Commission's 2015 Order and rules, stating categorically: "We have encountered no new additional barriers to investment or deployment as a result of the 2015 decision to reclassify broadband . . . and have long supported network neutrality as a core principle for the deployment of networks for the American public to access the Internet."<sup>29</sup> Dane Jasper, CEO of Sonic, has said that Sonic's ability to innovate has not been affected by the decision to reclassify BIAS and that the 2015 Order "didn't hamper [Sonic's] investment or [its] concerns about [its] future ability to monetize the networks that [it] build[s]."<sup>30</sup>

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<sup>28</sup> To illustrate this point, several Bay Area ISPs have seen significant growth since the 2015 Open Internet Order. For example, Santa Rosa, CA-based ISP Sonic has doubled in size since 2015. Dominic Fracassa, *Bay Area Internet Providers Thriving in the Era of Net Neutrality*, June 6, 2017, at <http://www.sfchronicle.com/business/article/Bay-Area-Internet-providers-thriving-in-the-era-11200806.php>. Similarly, San Francisco-based wireless ISP Monkeybrains has expanded both its customer base and its workforce by 25 percent in each of the last four years, while San Francisco-based Fastmetrics has seen revenues grow by 17 percent in the last year. *Id.* (quoting Andreas Glocker, CEO of Fastmetrics, saying that "[d]emand has been phenomenal [and] [w]e're seeing more and more sales").

<sup>29</sup> Letter from A Better Wireless, NISP, LLC and 40 other ISPs to Hon. Ajit Pai, Chairman, FCC, WC Docket No. 17-108 (June 27, 2017).

<sup>30</sup> Troy Wolverton, *Sonic CEO Talks Expansion, Broadband Policy*, April 27, 2017, available at <http://www.mercurynews.com/2017/04/27/sonic-ceo-talks-expansion-broadband-policy/>.

Even large ISPs with a history of opposition to net neutrality rules and the 2015 decision to reclassify BIAS as a Title II service have made numerous public statements to investors and the SEC in which they deny that the 2015 Order, including its regulatory classification of broadband, had any impact on their investment or business decisions.<sup>31</sup> For example, Charter CEO Tom Rutledge has said that “Title II ... didn’t really hurt us; it hasn’t hurt us.”<sup>32</sup> Similarly, when asked in December 2016 whether doing away with Title II would result in a meaningful change or benefit to his company, Comcast CFO Mike Cavanagh replied “I think in terms of what actually happens . . . it’s the fear of what Title II could have meant, more than what it actually did mean.”<sup>33</sup>

With both the quantitative and qualitative evidence pointing in the same direction, it is difficult to avoid the conclusion that the 2015 Order, with its light touch rules, has had little impact on ISP incentives to invest and innovate.

Moreover, the NPRM ignores the effect of the 2015 Order on the rest of the broadband economy – *i.e.*, edge providers and consumers – and the impact of undoing the 2015 Order and the resulting regulatory uncertainty on the cloud economy. As discussed above, the economic data following the Commission’s 2015 Order and net

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<sup>31</sup> In nearly 50 pages of its study, Free Press catalogs extensively the actions and statements of over 20 ISPs that belie the claim that reclassification of BIAS under Title II has hurt investment. S. Derek Turner, *It’s Working: How the Internet Access and Online Video Markets are Thriving in a Title II World*, May 2017, at 66-113, available at <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

<sup>32</sup> Comments of Tom Rutledge, Chairman & CEO, Charter Communications Inc., at the UBS Global Media and Communications Conference (Dec. 6, 2016).

<sup>33</sup> Comments of Mike Cavanagh, Senior EVP & CFO, Comcast Corp., at the UBS Global Media and Communications Conference (Dec. 7, 2016).

neutrality rules demonstrate that the Commission’s analysis in its 2010 and 2015 Orders regarding maintenance of the virtuous circle of innovation and growth have remained true – clear rules of the road have given edge-based apps and services the certainty needed to attract investment and growth without being concerned about ISPs acting as gatekeepers, and the growth of these services has driven demand among consumers for faster and better broadband access leading to continued growth in ISP investment and broadband subscriptions.

The net neutrality debate is not just about investment by ISPs, but also investment by providers of edge-based apps and services and consumers of those services. As explained above in Section I.A, investment in the cloud economy has been booming since 2015. Perhaps no area has seen greater growth than online video, with subscription streaming video providers like Netflix, Amazon, and Hulu all expanding rapidly since the Commission’s 2015 vote, including significant investments in both original and acquired programming in addition to investment in networks and cloud infrastructure. Many over-the-top online TV services – so-called “skinny bundle” offerings – have launched since the 2015 Order was adopted including SlingTV, DirecTV Now, PlayStation Vue, Hulu With Live TV, YouTube TV, as well as offerings from smaller providers such as FuboTV and Layer3 TV and several online offerings from individual networks. In addition, there are rumors that other existing MVPDs are considering offering OTT pay-TV services outside of their existing network footprint.<sup>34</sup>

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<sup>34</sup> Gerry Smith, *Comcast Said to Gain Rights to Offer Online TV Nationwide*, *Bloomberg* (Mar. 23, 2017), available at <https://www.bloomberg.com/news/articles/2017-03-23/comcast-said-to-gain-rights-to-offer-web-tv-service-nationwide>; Lucas Shaw, Scott

Consumers now have an unprecedented number of choices of pay-TV services, allowing them to either cut or shave the cord, or subscribe to pay-TV for the first time at a wide variety of price points and channel offerings. The viability of all of these new online video services depends on continued guarantees of an open and nondiscriminatory path to customers free of interference from ISPs offering competing video services – *i.e.*, on enforceable, legally sustainable net neutrality rules.

**B. The Commission Should Not Revisit the 2015 Open Internet Order Without a Firm Legal Basis for Net Neutrality Rules**

Just as consumers care more about being able to access all of the lawful content of their choice no matter the source, regardless of legal theories or classifications of BIAS, IA has been and continues to be agnostic as to the legal classification of BIAS. Instead, IA's focus is on the substantive protections of net neutrality rules and whether they have a firm legal basis that can withstand the test of time and be enforced effectively.

The 2015 Order, upheld by both a three-judge panel of the D.C. Circuit and by the full court *en banc*, provides a firm legal basis and brings certainty to the Internet ecosystem of edge providers, ISPs, and consumers. IA is open to alternative legal bases for the rules, either via legislative action codifying the existing net neutrality rules or via sound legal theories offered by the Commission that will satisfy judicial review.

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Moritz, and Gerry Smith, *Verizon Said to Plan Online TV Package for Summer Launch*, *Bloomberg* (Mar. 30, 2017), available at <https://www.bloomberg.com/news/articles/2017-03-30/verizon-said-to-be-planning-online-tv-package-for-summer-launch>.

The NPRM, however, offers no clear alternatives. While the *Verizon* court endorsed Section 706 as a source of legal authority for the Commission to preserve a free and open Internet, it nevertheless found that Section 706 alone did not adequately support the anti-blocking and anti-discrimination rules that were adopted in 2010.<sup>35</sup> The *Verizon* court concluded that the anti-blocking or anti-discrimination rules could not be justified as long as BIAS was classified as a Title I, non-common carrier service. According to the *Verizon* court, such rules could be authorized under Title I only if they left room for ISPs to make individualized decisions and engage in individualized negotiations with edge providers<sup>36</sup> – an outcome that is inconsistent with open Internet principles and wildly impractical for the hundreds of thousands of startups and small businesses around the U.S.

The NPRM mentions Section 230(b) as a potential source of authority,<sup>37</sup> but IA is skeptical that Section 230(b) would fare any differently than Section 706 (assuming the Commission reclassifies BIAS under Title I, of course). While Section 230(b), like Section 706, might provide the Commission with the general authority to protect and preserve a free and open Internet, the *Verizon* court's analysis suggests that a court would have the same concerns regarding the Commission's legal authority to enact substantive net neutrality rules (except for transparency rules, which the *Verizon* court upheld).

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<sup>35</sup> *Verizon*, 740 F.3d at 649-58.

<sup>36</sup> *Id.* at 651.

<sup>37</sup> NPRM at 34, para. 102.

As noted above, however, IA is open to alternative sources of legal authority for net neutrality rules as long as they provide a firm basis for the current rules and are likely to withstand judicial scrutiny. Several opponents of the Commission's 2015 Order claim that they have no objections with substantive net neutrality rules but oppose Title II classification of BIAS. Any specific proposed alternative approach for legal authority should be made available to the public and subject to comment before it is finalized.

### **III. THE COMMISSION SHOULD MAINTAIN ENFORCEABLE EX ANTE RULES THAT PROTECT AND PRESERVE AN OPEN INTERNET**

#### **A. ISPs Continue to Possess the Incentive and Ability to Deny Consumers the Benefits of an Open Internet and to Harm Online Competitors**

In both its 2010 and 2015 Orders adopting net neutrality protections, the Commission explained in detail the ability and the incentives for ISPs to block, throttle, or otherwise discriminate against edge provider content.<sup>38</sup> The D.C Circuit has endorsed the Commission's analysis, explaining that the Commission "adequately supported and explained its conclusion that, absent [net neutrality] rules ..., broadband providers represent a threat to Internet openness and could act in ways that ultimately inhibit the speed and extent of future broadband deployment."<sup>39</sup>

The Commission has previously explained that ISPs serve as gatekeepers with respect to edge providers — *i.e.*, once a consumer chooses an ISP, edge providers can

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<sup>38</sup> 2015 Open Internet Order, 30 FCC Rcd at 5625-34, paras. 79-85; 2010 Open Internet Order, 25 FCC Rcd at 17915-25, paras. 20-34.

<sup>39</sup> *Verizon*, 740 F.3d at 645.



only reach that consumer via that particular ISP.<sup>40</sup> Traffic on ISP networks flows both ways, as many consumers also act as content creators by, for example, sharing videos and pictures on apps such as YouTube and Instagram. ISPs also serve as gatekeepers with respect to these consumers seeking to access edge providers' content, applications, services, and devices.

ISPs' gatekeeping power would be mitigated if consumers could easily switch providers, but the Commission has found that consumers face high switching costs as a result of activation fees, high upfront device installation fees, long-term contracts and early termination fees, and costs associated with equipment and services not working with a new broadband access service.<sup>41</sup> In addition, bundled pricing and family discount plans often discourage consumers from switching.<sup>42</sup> Of course, this assumes that the consumer even has more than one option for a high bandwidth service suitable for popular streaming HD video services – the Commission's most recent data indicate that 57 percent of Americans with access to broadband at or above the 25 Mbps/3 Mbps

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<sup>40</sup> 2015 Open Internet Order, 30 FCC Rcd at 5629-31, para. 80 ("Another way to describe this significant bargaining power is in terms of a broadband provider's position as gatekeeper – that is, regardless of the competition in the local market for broadband Internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber."); 2010 Open Internet Order, 25 FCC Rcd at 17919, para. 24 ("A broadband provider could force edge providers to pay inefficiently high fees because that broadband provider is typically an edge provider's only option for reaching a particular end user. Thus broadband providers have the ability to act as gatekeepers.")

<sup>41</sup> 2015 Open Internet Order, 30 FCC Rcd at 5631, para. 81; 2010 Open Internet Order, 25 FCC Rcd at 17924-25, para. 34.

<sup>42</sup> 2015 Open Internet Order, 30 FCC Rcd at 5631, para. 81.

benchmark have only one choice for such high-speed service, and thus cannot switch providers even if they wanted to.<sup>43</sup>

Moreover, edge providers are particularly susceptible to ISPs' gatekeeper power because consumers may not realize that their ISP is throttling or otherwise discriminating against an edge provider. Most consumers have no way of knowing whether slow speeds on an application or service are caused by their ISP or the edge provider, and no way of knowing that they would fare any better with a different ISP (if they have access to any).<sup>44</sup> As the D.C. Circuit put it, "broadband providers' ability to impose restrictions on edge providers simply depends on end users not being fully responsive to the imposition of such restrictions."<sup>45</sup>

As the Commission has explained previously, ISPs have clear economic incentives to favor their own or affiliated content over third-party, edge provider content.<sup>46</sup> Whether by blocking, throttling, or otherwise discriminating against third-party content, ISPs have the ability to negatively influence their subscribers' experience with third-party content and use their gatekeeping power to favor their own or affiliated content, thereby limiting consumer choice and competition.

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<sup>43</sup> FCC 2016 Broadband Progress Report, FCC 16-6, at para. 86, Table 6.

<sup>44</sup> 2015 Open Internet Order, 30 FCC Rcd at 5631-32, para. 81; 2010 Open Internet Order, 25 FCC Rcd at 17921, para. 27.

<sup>45</sup> *Verizon*, 740 F.3d at 648; see also *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, FCC 16-59, at 20, para. 43 (rel. May 10, 2016) ("During the Time Warner Cable/Netflix interconnection dispute, for example, Time Warner Cable customers did not abandon its BIAS when the quality of Netflix's stream deteriorated.").

<sup>46</sup> 2015 Open Internet Order, 30 FCC Rcd at 5632, para. 82; 2010 Open Internet Order, 25 FCC Rcd at 17916-18, para. 22.

ISPs also have the incentive to charge for prioritization of traffic delivered to end users and artificially create scarcity to incentivize edge providers to pay tolls to reach consumers at adequate speeds. Given consumers aversion to slow-loading content and impatience with buffering, edge providers who cannot afford to or otherwise do not pay tolls to ISPs may see the viability of their services severely threatened. To underscore the potential harm to edge providers, a recent Akamai study found that “[v]iewers disengage with storylines and react negatively to low-quality streaming incidents such as buffering regardless of the brand or interest in the content” and that “76 percent of [survey] participants said they would stop using a streaming service if issues such as buffering occurred several times.”<sup>47</sup>

Paid prioritization would severely harm perhaps the most beneficial aspect of the Internet, the fact that as an open and neutral platform it allows any startup with a good idea to compete based on the quality of its idea and the service it provides, and to reach consumers across the nation.<sup>48</sup> Historically, cable and other MVPD networks acted as gatekeepers for content providers, and any new entrant had to seek carriage on the MVPD network in order to reach consumers.<sup>49</sup> Allowing paid prioritization would in effect result in the “cable-ization” of the Internet, in which edge providers (like creators of video programming in the cable context) would have to negotiate carriage deals on

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<sup>47</sup> See Media Notes, Comm. Daily, June 22, 2017.

<sup>48</sup> The Commission has previously addressed in greater detail the range of potential harms that would result from paid prioritization. See 2015 Open Internet Order, 30 FCC Rcd at 5653-56, paras. 126-27.

<sup>49</sup> The competitive dynamics of such carriage led to an elaborate set of program access rules.

ISP networks in order to reach consumers effectively. This would harm startups and other small edge providers who lack the resources to pursue and pay for prioritized carriage, and would place all edge providers at the mercy of ISPs who would face minimal constraints on their ability to charge edge providers for prioritized access. The ultimate losers would be consumers who would be denied the wide variety of sources of content and services from edge providers. Instead, consumers would face a world in which their choices would be limited to those who could afford to pay ISPs for carriage, similar to MVPD networks today.

No facts relevant the Commission's 2015 analyses of the incentives and ability of ISPs to discriminate against edge provider content and services have changed; indeed, if anything, these incentives have only increased. For example, since the 2015 Order, there has been a proliferation of online streaming TV options from both traditional MVPDs and edge-based providers, as well as a growing number of more specialized streaming video apps from cable networks, sports leagues, and others. These services involve significant investments in original and acquired programming, technology (infrastructure and software development), marketing, etc. — all for services that compete directly with network operators' core video offerings.<sup>50</sup> Moreover, while there was at least an argument that OTT video content providers like Netflix and Amazon were complementary to MVPD subscriptions, the growing array of "skinny" bundle offerings such as Sling TV, DirecTV Now, PlayStation Vue, Hulu With Live TV,

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<sup>50</sup> *USTA v. FCC*, 825 F.3d at 694 (citing *Verizon*, 740 F.3d at 645) (“[B]roadband providers like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own core video subscription service ....”).

YouTube TV, and others are designed as OTT replacements for MVPD subscriptions that are in all but a few cases sold by ISPs.<sup>51</sup> Without clear ex ante rules preventing ISPs from blocking, throttling, or otherwise discriminating against these streaming video apps, these new competitors will find themselves at the mercy of their competitors and will be deterred from making such investments in the future. Ultimately, consumers will lose if these new entrants are kept from growing into meaningful competitive choices.

Finally, the harms that would result from an absence of clear net neutrality protections are anything but speculative. The Commission has previously noted several instances of harm caused by ISPs, including blocking of competing VOIP services, Comcast's throttling of peer-to-peer content sites such as BitTorrent, and various incidences of mobile operators blocking or restricting consumers' use of competitive mobile payment apps, voice applications, and remote video applications.<sup>52</sup> ISPs have also demonstrated their willingness to use their gatekeeping power to slow down traffic from competing video providers such as Netflix and to extract tolls from such edge providers to ensure that the delivery of content that the ISPs' subscribers have requested is not slowed down.<sup>53</sup> ISPs have not widely committed that they will not

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<sup>51</sup> See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, FCC 16-59, at 18, para. 41 (rel. May 10, 2016) (noting that "Sling TV, Sony Vue, and other slim or full bundle OVD competitors that may be launching in the future" are "closer substitutes" for New Charter's video services than distributors of "arguably complementary programming" like Netflix and Amazon Prime).

<sup>52</sup> 2015 Open Internet Order, 30 FCC Rcd at 5628 n.123, para. 79; 2010 Open Internet Order, 25 FCC Rcd at 17915-26, paras. 20-37.

<sup>53</sup> See, e.g., Drew Fitzgerald and Shalini Ramachandran, *Netflix-Traffic Feud Leads to Video*

engage in paid prioritization, and at least one large ISP has in the past admitted during oral arguments at the D.C. Circuit that it would engage in paid prioritization if it were not for the Commission's open internet rules.<sup>54</sup> Moreover, any weakening or undoing of the existing rules is likely to encourage harmful conduct from ISPs previously on guard for actions that would have provoked the Commission during times when it had made clear that protecting an open internet was a priority.<sup>55</sup> More importantly, the Commission must not lose sight that the true harm that would result from the lack of an open internet is not simply blocking, throttling, or other discrimination against edge provider content but also the loss of innovation when new ventures fail to attract funding or otherwise get off the ground because startups and other edge providers will no longer be guaranteed access to all internet users around the country.

**B. Clear, Enforceable Ex Ante Rules Are Needed to Preserve a Free and Open Internet**

Clear and generally predictable ex ante rules are necessary to ensure the Internet's virtuous circle of innovation and growth continues. Indeed, ISPs themselves agree that net neutrality protections are required (even if there is disagreement as to the extent of protections needed and the need for the Commission's 2015 reclassification of

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*Slowdown*, Wall St. J. (Feb. 18, 2014), available at <http://on.wsj.com/1m7zyP2>; Zachary M. Seward, *The Inside Story of How Netflix Came to Pay Comcast for Internet Traffic*, Aug. 27, 2014, at <https://qz.com/256586/the-inside-story-of-how-netflix-came-to-pay-comcast-for-internet-traffic/>; Comments of Netflix, Inc., GN Docket No. 14-28, at 12-14 (filed July 15, 2014).

<sup>54</sup> 2015 Open Internet Order, 30 FCC Rcd at 5604 n.6, para. 8.

<sup>55</sup> *Id.* at 5628 n.123 ("It is not surprising that, during a decade in which the Commission vowed to keep the Internet open, . . . Commission policy served as a deterrent to additional bad acts.").

BIAS). In order to ensure the virtuous circle continues, startups and other edge-based providers need assurances that their apps and services will not be blocked or discriminated against (and that there will be avenues for legal recourse if they are) *before* they invest in developing and rolling out new products.

Ex ante rules give ISPs, edge providers of apps and services, and consumers greater certainty and the resulting ability to structure their activities in the market. Consumers can make the choice, for example, to cut the cord and subscribe to a new online TV offering, knowing that such services will not be blocked, throttled, or otherwise discriminated against by their ISP. Online video and other service providers will know that they can expect a baseline level of nondiscriminatory treatment by all ISPs nationwide and can therefore market and offer their services nationwide regardless of a potential customer's choice of ISP. And smaller ISPs and new entrants will know that their success will depend on the services offered to consumers rather than their ability to compete with large ISPs who can extract rents from edge providers for interconnection and/or delivering traffic to consumers. It is no surprise that over three dozen small ISPs and over a thousand startups from around the country have urged the Commission to maintain the 2015 Order and rules.<sup>56</sup>

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<sup>56</sup> Letter from A Better Wireless, NISP, LLC and 40 other ISPs to Hon. Ajit Pai, Chairman, FCC, WC Docket No. 17-108 (June 27, 2017); Letter from Engine et al. to FCC Chairman Ajit Pai, April 26, 2017, *available at* <http://www.engine.is/startups-for-net-neutrality>.

**C. The Commission Should Maintain Its Existing Rules to Preserve and Protect an Open Internet**

The Commission should maintain its current rules that prevent blocking, throttling, paid prioritization, and unreasonable interference/disadvantage, as well its authority to intervene if internet traffic exchange arrangements harm or threaten to harm the open nature of the internet and the ability of consumers to reach all or substantially all internet endpoints. The existing exceptions for reasonable network management are sufficiently flexible to address legitimate, non-anticompetitive needs to prioritize certain content or otherwise manage traffic during incidences of network congestion. If necessary, the Commission can clarify that any specific concerns relating to, for example, prioritizing emergency communications is permitted under the exception for reasonable network management.

No Blocking or Throttling: The Commission should retain the bright line prohibitions on blocking and throttling. As discussed above, throttling of traffic can be particularly harmful to edge providers given the negative reaction that users have to any kind of slowing of traffic, with 76 percent of users in an Akamai study saying they would stop using an edge provider service after even just a few instances of buffering.<sup>57</sup> In assessing incidents of throttling, the Commission should consider any slowing of traffic to the end user (subject to reasonable network management, of course) caused by the gatekeeper ISP. Consumers should receive the download speeds for which they

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<sup>57</sup> See Media Notes, Comm. Daily, June 22, 2017.



have paid, regardless of what arrangements the content provider has for delivering traffic to the ISP's network.<sup>58</sup>

No Paid Prioritization: The Commission should maintain its prohibition on ISPs charging content, application, or service providers for enhanced or prioritized access to the subscribers of the ISP. Internet users and edge providers use and develop products designed to work on the open Internet. Allowing for paid prioritization will introduce artificial barriers to entry, distort the market, and discourage investment in more capable networks (because scarcity, even if artificial, is necessary to make prioritization valuable).

Allowing paid prioritization would enable ISPs to discriminate against edge providers that offer competing services (e.g., any of the new online TV services or streaming subscription video providers like Netflix, Amazon, and YouTube), and, if the prioritization services were used, would also destroy the open nature of the internet that allows new or smaller streaming video providers to compete with larger or better-funded edge providers.

The NPRM asks whether the use of content delivery networks ("CDNs") or other traffic delivery arrangements by edge providers is relevant to the Commission's consideration of paid prioritization.<sup>59</sup> Such arrangements are not analogous to paid

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<sup>58</sup> Interconnection should not be used as a chokepoint to artificially slow traffic or otherwise undermine the openness guarantees for end user access. In the 2015 Order, the Commission asserted its authority to monitor and resolve internet traffic exchange disputes on a case-by-case basis. 2015 Open Internet Order, 30 FCC Rcd at 5686-96, paras. 194-206. This authority has been upheld by the D.C. Circuit. *USTA v. FCC*, 825 F.3d at 711-13.

<sup>59</sup> NPRM at 29, para. 87.

prioritization or relevant to this discussion. CDNs localize edge provider content by bringing it closer to the end user, leading to less congestion in ISP and backbone networks and a more efficient internet experience for everyone. Locally stored content, whether it originates locally or is hosted by a CDN or other form of local caching, is delivered on the same terms as other content and applications. The only relevance in this proceeding of edge providers' localization of their own data is that by reducing congestion in ISP networks, such traffic localization undermines ISP arguments for using congestion and scarcity as a justification for paid prioritization arrangements that have harmful side effects.

Moreover, unlike ISPs, CDN providers do not serve a gatekeeping role as the only path for edge providers to reach that ISP's subscribers. CDNs' computers are not bottleneck facilities. The presence or absence of CDNs in a given market also is not subject to the same factors, such as rights-of-way, access to spectrum, etc., as the presence of ISPs. Moreover, edge providers enjoy no special privilege by being able to use CDNs to help deliver traffic more efficiently – CDN capacity can be self-provided or obtained from a third party. Indeed, network operators such as AT&T are free to use CDNs while delivering, for example, DirecTV Now content to non-AT&T ISP subscribers.

No unreasonable interference/disadvantage: The Commission should preserve its current rule under which it can examine and if necessary prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the

ability of consumers to reach the Internet content, services, applications, and devices of their choosing or the ability of edge providers to access consumers using the Internet.

The current rule states:

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.<sup>60</sup>

While the NPRM claims that the rule is too open-ended, it is in fact similar to the anti-discrimination rule adopted in the Commission's 2010 Open Internet rules, which also prohibited unreasonable discrimination and was generally not opposed by ISPs. What the Commission provided in the text of the 2015 Order is not a complicated or novel rule but rather a detailed guide on how, in any future enforcement proceedings, it expected to analyze claims of unreasonable conduct on the part of ISPs. The Commission can always provide revised guidance if it so chooses, without changing the straightforward underlying rule.

Transparency and Disclosure: The Commission should maintain its current transparency and disclosure requirements. Robust transparency rules that require broadband Internet access providers to disclose network management practices allow content providers and consumers to understand their Internet experience. In addition, robust transparency requirements will provide better information to all participants in the broadband ecosystem and will help further investment and innovation. To the

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<sup>60</sup> 2015 Open Internet Order, 30 FCC Rcd at 5609, 5660, paras. 21, 136.

extent that existing requirements are burdensome to smaller ISPs, the Commission has already addressed any concerns by exempting such providers from compliance with enhanced transparency requirements adopted as part of the 2015 rules.<sup>61</sup> Regardless, any burdens faced by small ISPs should not be used to excuse large ISPs from complying with these requirements.

Enforcement: Effective enforcement is critical to ensure that consumers enjoy the benefits of an open Internet. The Commission should preserve existing procedures that allow for informal and formal complaints, ensuring that even small startups can initiate an enforcement proceeding in a cost-effective manner. The Commission is well positioned to address the potentially complicated economic and technical issues at stake in deciding whether a particular network management practice is reasonable or not.

#### **IV. OPEN INTERNET RULES MUST APPLY EQUALLY TO ALL PROVIDERS OF BROADBAND INTERNET ACCESS SERVICE, INCLUDING FIXED AND MOBILE, ON A PLATFORM-NEUTRAL BASIS**

To protect today's Internet and all its users in the U.S., net neutrality protections must continue to apply equally to all providers of broadband internet access services, both fixed and mobile (including wired, terrestrial wireless, and satellite). Mobile broadband networks are as essential to the broadband ecosystem as wired broadband networks – maybe even more so as mobile apps and services continue to grow at breakneck speed. Americans rely on mobile wireless connectivity either to “multiscreen” their interaction with Internet content or services or because, especially in the case of lower-income users, they are wholly reliant on mobile wireless for Internet

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<sup>61</sup> *Small Business Exemption From Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28, Order, FCC 17-17 (rel. Mar. 2, 2017).

access. In recent years, fast-growing social media, messaging, and ride-sharing apps that exist almost entirely on mobile broadband networks have become ubiquitous. Given the way consumers today rely heavily on both wired and wireless broadband subscriptions, the Commission should maintain its current platform-neutral approach and keep in place a stable, consistent, and universally applicable set of open Internet protections that leaves room for legitimate network engineering differences within the framework of reasonable network management.

Mobile parity in net neutrality rules enhances competition and consumer choice among both edge providers and broadband providers. If a consumer knows that she can access the same content and services on mobile wireless devices as she can over wired broadband connections, she will be more likely to view wireless broadband providers as genuine alternatives to wired broadband providers. Allowing a consumer to access the applications and services of her choice over any wireless connection also will ensure that pay-to-play agreements with mobile broadband providers do not determine winners and losers in the Internet marketplace.

Mobile parity maintains a stable environment for all participants in the Internet's virtuous circle of investment and innovation. Net neutrality rules should not depend on the particular device or network a consumer uses to access it. Such disparities and double standards would create consumer confusion and uncertainty for edge providers and would be inconsistent with how today's consumers experience the broadband ecosystem.

## V. CONCLUSION

IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. Since its inception, the internet has been governed by principles of openness and non-discrimination, and as a result, it has created unprecedented benefits for society and consumers.

Undoing or weakening the existing open internet rules will undermine these benefits, create uncertainty in the leading sector of our economy, and threaten the virtuous circle of broadband innovation. We urge the Commission to maintain strong and enforceable net neutrality rules so that the U.S. internet economy may continue its unparalleled success story and deliver competition and consumer choice to U.S. consumers in the years to come.

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Respectfully submitted,

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