

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Restoring Internet Freedom

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WC Docket No. 17-108

REPLY COMMENTS OF INTERNET ASSOCIATION

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August 30, 2017

SUMMARY

The initial comments filed in this proceeding demonstrate overwhelming support for preserving existing open internet protections from a wide array of parties spanning the entire internet ecosystem and society at large, including edge providers, ISPs, public interest and consumer groups, startups and other small businesses, religious organizations, medical professionals, and broad-based membership organizations such as the AARP. The record also disproves the rhetorical fiction that net neutrality rules only come into play in disputes between ISPs and a handful of large edge providers. Numerous small businesses filed comments in support of the existing open internet rules, explaining the importance of an open internet to small businesses and other new entrants.

No Policy or Economic Justification to Reverse or Revisit Existing Rules

The record provides no basis for the Commission to reverse course from its 2015 Order barely two years after the 2015 Order went into effect. Under Supreme Court precedent, the Commission must demonstrate “good reasons” for changing its positions, and must provide a “more detailed justification” when its “new policy rests upon factual findings that contradict those which underlay its prior policy.” This rationale applies with extra force when the Commission proposes to reverse or significantly revisit its open internet rules barely two years after the effective date of the 2015 Order – in such circumstances, where a full assessment of the impact of the new rules is impossible, the Commission should rely on factual findings that are abundantly clear in demonstrating a basis for reversing course.

Neither the NPRM nor comments and economic studies submitted by ISPs include reliable evidence that the 2015 Order has negatively impacted investment in broadband networks. The economic studies submitted by the ISPs do not present any new empirical evidence regarding any negative economic impact of the 2015 Order, relying instead on the same incomplete and questionable empirical studies cited in the NPRM that IA and others call into question in initial comments. Indeed, even these economic studies submitted by ISPs acknowledge the difficulty of drawing meaningful conclusions based on empirical data in the barely two years since the 2015 Order went into effect, and do not present a full cost benefit analysis of the 2015 Order (let alone the NPRM's proposals).

Moreover, while the record is replete with commenting parties reminding the Commission to consider the impact of the 2015 rules on the entire internet ecosystem, ISPs focus almost exclusively on how the rules impact their own businesses and investments. This approach by the ISPs is as if what was relevant was a "virtuous semi-circle of innovation" in which the only costs and benefits to be considered are those that impact ISPs, rather than the public interest in policies that support innovation and investment across the entire internet ecosystem.

Maintaining FCC Authority to Enforce Rules

IA supports the existing open internet rules, which the D.C. Circuit confirmed as resting on a firm legal basis and finally resulted in legal certainty for the entire internet ecosystem. IA, however, is agnostic as to the specific legal authority for these net

neutrality protections as long they have a strong legal basis that will withstand court review and can be enforced effectively.

ISPs claim to support at least some open internet rules covering blocking, throttling, and some forms of paid prioritization (in addition to transparency rules), but do not provide a clear legal theory supporting their suggested rules. In fact, it appears that the ISPs' suggested legal basis for open internet rules would permit them to engage in paid prioritization and other forms of discrimination, thereby significantly weakening the existing rules and leaving the FCC powerless to address the most worrisome potential harms in today's marketplace. In short, the record reveals no clear path that would put new open internet rules on a legal foundation that is as strong as the firm one upon which the existing rules rest today.

The Commission also must not simply cede authority to the Federal Trade Commission ("FTC") to enforce industry commitments, as some ISPs suggest. Voluntary industry commitments are insufficient to provide edge providers, particularly startups and other small businesses, with the enough of an assurance that they will be able to reach consumers without interference by ISPs. In addition, potential violations of open internet rules stem from ISPs' control over last mile networks that fall squarely within the Commission's traditional authority over network operators and will likely involve technical questions that only the FCC has the requisite experience and expertise to analyze adequately.

Preserving the 2015 Order's Rules and Scope

Acknowledging the importance of open internet protections to consumers and to the internet ecosystem generally, even opponents of the 2015 rules, including most large ISPs, express support for basic open internet protections including a transparency rule and bright line rules prohibiting blocking and throttling. In addition, at least some major ISPs support prohibitions on most forms of paid prioritization, and are on record in the past forswearing from any form of paid prioritization arrangement. However, numerous commenting parties agree with IA that the Commission should maintain its existing open internet rules and the scope of the 2015 Order.

Paid Prioritization: The Commission must maintain its prohibition on allowing ISPs to create fast lanes and to charge some edge providers for prioritized access that smaller and less well-funded edge providers cannot afford. Paid prioritization arrangements give ISPs the incentive to create scarcity in their networks so that edge providers have reason to pay for the privilege of accessing a fast lane. Allowing paid prioritization will introduce artificial barriers to entry, distort the market, and discourage investment in more capable networks. While some ISPs argue that prohibiting paid prioritization arrangements threatens their ability to ensure that services such as telemedicine, emergency and safety-related communications, etc. are delivered without any delays, such services would be allowed under the existing rules as specialized services and the ISP comments fail to identify any service that is prohibited today under the existing rules that would be desirable paid prioritization furthering the public interest.

No unreasonable interference/disadvantage: The Commission should maintain its rule prohibiting unreasonable disadvantage or interference, which is similar to the 2010 anti-discrimination rule that also prohibited unreasonable discriminatory conduct on the part of ISPs. Rules subject to some measure of agency interpretation are far from novel in communications law (or other regulatory arenas) – for example, several of the existing open internet rules are subject to “reasonable network management,” an exception supported by ISPs that is similarly left to some degree of interpretation. The Commission can always provide further guidance to supplement discussion in the 2015 Order regarding how the rule would be enforced in practice without eliminating the straightforward underlying rule, thereby preserving the Commission’s ability to address ISP conduct that harms an open internet and goes beyond blocking, throttling, or paid prioritization.

Interconnection: IA supports maintaining the scope of the 2015 Order, including the Commission’s 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. While several ISPs argue that there is no need for regulatory oversight of interconnection arrangements under current market conditions, the 2015 Order did not adopt prescriptive rules and took a measured approach by merely asserting the authority to continue to monitor developments in the marketplace and intervene if needed. Given subsequent factual findings by the FCC in the Charter-Time Warner Cable merger proceeding, and the concerns raised by numerous parties regarding the ability of ISPs to harm the open internet via their

interconnection practices, the record provides no basis for the Commission to relinquish its minimal regulatory oversight over internet traffic arrangements.

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REPLY COMMENTS OF INTERNET ASSOCIATION

Internet Association (“IA”) hereby files these reply comments to urge the Commission to maintain its existing open internet rules, including the full scope of the 2015 Order.¹ The record demonstrates overwhelming support for preserving existing open internet protections from a wide array of parties spanning the entire internet ecosystem and society at large, including edge providers, ISPs, public interest and consumer groups, startups and other small businesses, religious organizations, medical professionals, and broad-based membership organizations such as the AARP.

The record in this proceeding provides no basis for the Commission to reverse course from its 2015 Order barely two years after the 2015 Order went into effect. Neither the NPRM nor comments and economic studies submitted by ISPs include reliable evidence that the 2015 Order negatively impacted investment in broadband

¹ 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/>.

networks. Moreover, while the record is replete with commenting parties reminding the Commission to consider the impact of the 2015 rules on the entire internet ecosystem, ISPs themselves focus almost exclusively on how the rules impact their own businesses and investments, rather than the public interest in policies that support innovation and investment across the entire internet ecosystem.

I. THE RECORD DEMONSTRATES BROAD SUPPORT FROM INDUSTRY, PUBLIC INTEREST GROUPS, SMALL BUSINESSES, AND CONSUMERS FOR PRESERVING THE EXISTING NET NEUTRALITY RULES

The comments filed in response to the *Notice of Proposed Rulemaking* (“NPRM”)² demonstrate a clear consensus that Americans support rules that preserve and protect a free and open internet. A variety of edge providers,³ online retailers,⁴ internet backbone providers,⁵ ISPs,⁶ trade associations,⁷ artists and other content creators,⁸ state Attorneys

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

³ *See, e.g.*, Comments of Amazon; Comments of Microsoft Corp.; Comments of Mozilla; Comments of Netflix, Inc.; Comments of Vimeo, Inc.; Comments of DigitalOcean, Inc. (a cloud infrastructure provider/data center operator). Unless otherwise stated, all comments cited to below were filed in WC Docket No. 17-108 on July 17, 2017.

⁴ *See, e.g.*, Comments of Etsy, Inc.

⁵ *See, e.g.*, Comments of Cogent Communications Inc.; Comments of Level 3 Communications.

⁶ *See, e.g.*, Joint Comments of NTCH, Inc., and Flat Wireless, LLC; Comment of Volo Broadband (July 12, 2017); *see also* 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).

⁷ *See, e.g.*, Comments on INCOMPAS; Comments of the Computer & Communications Industry Association (CCIA); Comments of Internet Association.

⁸ *See, e.g.*, Comments of the Writers Guild of America West, Inc. (“WGAW Comments”); Comments of National Public Radio, Inc.; Comments of Music for a Healthy Internet (signatories include 19 independent record labels and 58 musicians, including R.E.M, My Morning Jacket, Jeff Tweedy of Wilco, Jeff Mangum of Neutral Milk Hotel, and legendary punk rock artist Ian MacKaye of Minor Threat and Fugazi); Letter from Laura Chernikoff, Executive Director, Internet Creators Guild, to Chairman Pai, WC Docket No. 17-108 (July 6, 2017) (letter

General,⁹ state utility regulators,¹⁰ other state and local government representatives,¹¹ realtors,¹² the nation's largest provider of home and business automation and alarm

from 330 independent online creators who collectively reach an audience of 225 million expressing support for strong net neutrality protections, and noting that if “net neutrality is lost, we will lose the permissionless innovation that has made creativity on the Internet so great” and that “[i]ndependent creators such as ourselves would be greatly disadvantaged by the removal of [existing] protections and the inevitable creation of fast lanes that would privilege the large media companies that can afford to pay for such service.”).

⁹ *See, e.g.*, Comments of the Attorneys General of the States of Illinois, California, Connecticut, Hawaii, Iowa, Maine, Maryland, Massachusetts, Mississippi, Oregon, Vermont, Washington, and The District of Columbia (“Attorneys General Comments”); Comments of The People of the State of New York by Attorney General Eric T. Schneiderman.

¹⁰ *See, e.g.*, Comments of the National Association of Regulatory Utility Commissioners; Comments of the California Public Utilities Commission.

¹¹ *See, e.g.*, Letter from Jay Inslee, Governor of Washington State, to Chairman Pai, WC Docket No. 17-108 (July 13, 2017); Letter from Edwin M. Lee, Mayor, City and County of San Francisco, CA, and 61 Other Mayors to Chairman Pai and Commissioners Clyburn and O’Rielly, WC Docket No. 17-108 (July 13, 2017); Letter from Leif Hansen, Chairman, Mt. Hood Cable Regulatory Commission to Chairman Pai, WC Docket No. 17-108 (July 6, 2017); Letter from Hardik Bhatt, Chief Digital Officer and Acting Secretary, Illinois Department of Innovation and Technology, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108 (July 16, 2017).

¹² *See, e.g.*, Comments of the National Association of Realtors; Letter from Geoff McIntosh, President, California Association of Realtors, to Chairman Pai, WC Docket No. 17-108 (July 17, 2017).

monitoring services,¹³ small¹⁴ and large¹⁵ businesses, startup advocacy and support organizations,¹⁶ universities and other educational institutions,¹⁷ libraries,¹⁸ engineers

¹³ Comments of the ADT Corp.

¹⁴ *See, e.g.*, Comments of North Dakota Startups and Entrepreneurs for Net Neutrality (July 11, 2017); Comments of Shapeways, Inc. (online platform that makes 3D printing accessible to anyone with an internet connection, with a factory located in the U.S.); Comments of Mapbox, Inc. (July 12, 2017) (mapping platform for businesses providing scalable components for mobile and web apps); Comments of Kip (Interface Foundry PBC) (June 22, 2017) (small business developer of an artificial intelligence agent that helps social shoppers streamline the group ordering and payment splitting); Comments of MageMail, LLC (July 11, 2017) (small business startup with a software-as-a-service marketing that helps online retailers to increase revenue through stronger customer engagement); Comments of Fertman/Skinner/Monger Inc., d/b/a The Monger (sales and discovery platform and marketplace for specialty foods that connects small family farms and independent small businesses with multi-million dollar distributors and importers, regional and national chain retailers, and tiny pop-up shops in every corner of the country); Comments of Deep Core Data, LLC (filed May 11, 2017) (IT solutions provider based in Waltham, MA); Comments of Adept Data Systems, L.L.C. (developer and publisher of client-server based data management software applications); Comments of Evo Inc. (June 5, 2017) (manufacturer of WiFi- and wireless-enabled baby monitor products with patented cry detection technology); Comments of Liquid Technology Inc. (April 28, 2017) (small business in Kansas City, Missouri focusing on liquid processing and packaging equipment); Comments of Multifreq, LLC (July 6, 2017) (veteran-owned company in Glendale, Arizona focusing on radio frequency detection); Comments of StairCase 3, d/b/a RepeaterStore (Glendale, CA-based small business); Comment of NodeCraft Hosting LLC (May 8, 2017) (Oklahoma-based startup providing direct-to-consumer server hosting services to gamers); Comment of R Cubed Networks, LLC (April 28, 2017) (Pennsylvania-based video production company for which large file uploads and downloads over the open internet is critical for its business); Comment of Hacker Jewelers, Designers & Goldsmiths, Inc. (May 9, 2017) (small business in Tecumseh, Michigan urging the FCC to “keep the playing field level for small town Main-Street job-providers like us”); Letter from Stephanie McGraw, Founder and CEO, New Heights Naturals LLC to Chairman Pai, WC Docket No. 17-108 (July 13, 2017) (Texas-based natural and organic skin care products for kids).

¹⁵ *See, e.g.*, Comments of Ad Hoc Telecommunications Users Committee (leading telecom advocacy group for enterprise customers).

¹⁶ *See, e.g.*, Comments of Engine; Comments of Y Combinator.

¹⁷ *See, e.g.*, Comments of American Association of Community Colleges, American Association of State Colleges And Universities, American Council on Education, Association of American Universities, Association of Public and Land-Grant Universities, Association of Research Libraries, Educause, National Association of College and University Business Officers, and The National Association of Independent Colleges And Universities.

and other technologists,¹⁹ online gamers,²⁰ the largest membership organization in the country,²¹ health care providers,²² religious organizations,²³ public interest²⁴ and civil liberties organizations,²⁵ consumer groups,²⁶ and millions of individuals filed comments urging the Commission to maintain its strong net neutrality rules to preserve a free and open internet. Overall, almost 22 million comments have been filed so far, a majority of which are in support of the rules adopted by the Commission in 2015. While some apparently bogus comments received an unwarranted amount of attention, the reality is that many million comments filed were from Americans exercising their First Amendment right to petition their government about an issue of vital importance to them – to preserve a free and open internet.

¹⁸ See, e.g., Comments of American Association of Law Libraries, American Library Association, and Chief Officers of State Library Agencies (“Library Community Comments”); Comments of Medical Library Association and Association of Academic Health Sciences Libraries (July 14, 2017); Comment of Young Adult Library Services Association (May 26, 2017).

¹⁹ See, e.g., Joint Comments of Internet Engineers, Pioneers, and Technologists (comments filed by nearly 200 experts from industry and leading universities around the country) (“Internet Engineers and Technologists Comments”).

²⁰ See, e.g., Comments of the Electronic Gaming Federation, Inc. (June 21, 2017).

²¹ Comments of AARP.

²² See, e.g., Comments of the American Academy of Family Physicians (July 13, 2017); Comments of the American Association of Critical-Care Nurses (July 12, 2017).

²³ See, e.g., Comments of the United States Conference of Catholic Bishops (UCSSB).

²⁴ See, e.g., Comments of Free Press; Comments of Public Knowledge and Common Cause; Comments of the Open Technology Institute at New America.

²⁵ See, e.g., Comments of Electronic Frontier Foundation; Comments of the American Civil Liberties Union (July 14, 2017).

²⁶ See, e.g., Comments of Consumers Union.

As IA explained in its Comments, by focusing almost exclusively on ISPs the NPRM ignores the benefits of and investment in the cloud and the virtuous circle of innovation that results from an open internet.²⁷ Amazon illustrates that investment in cloud infrastructure has transformative benefits for the economy at large:

To highlight one example, [Amazon Web Services] enables emerging technology companies, small and large enterprise customers, and public entities to move their operations to the cloud, and it offers a wide array of innovative technology services that can be provisioned quickly – without upfront capital expense – that help businesses drive costs down and increase productivity. To illustrate, Novartis used AWS to conduct 39 years of computational chemistry in nine hours for a project that involved virtually screening 10 million compounds against a common cancer target. The estimated investment needed to internally conduct this experiment was close to \$40 million, but the cloud led to an actual cost of approximately \$4,200. And millions of other enterprise customers, such as Airbnb, Yelp, and Spotify, have benefited from these types of cloud services and have thrived in part because of them. Enterprise customers that leverage the cloud do so based on an understanding that a broadband service providers would not interfere with the unfettered ability of their customers to reach and utilize their services, especially and including when the companies may be competitive in other lines of business.²⁸

After describing investment in the cloud economy generally and its own investments in particular,²⁹ Microsoft similarly notes that the Commission must focus on the impact of rules on the entire internet ecosystem rather than focusing solely on ISP networks:

A vibrant, growing internet economy requires more than policies that concentrate solely on the deployment of last mile broadband infrastructure; it also requires a positive environment in which the services, applications, and content accessible over those facilities can

²⁷ IA Comments at 4-10.

²⁸ Amazon Comments at 3-4.

²⁹ Microsoft Comments at 4-6.

thrive. This means adopting a regulatory mindset and promoting policies that support investment and innovation in all the components of the internet ecosystem, not just the traditional network players and not just in last mile networks. . . . The continued growth of the internet economy depends critically on the preservation of an open internet.³⁰

Other edge providers explained the importance of open internet rules to their development. Netflix notes that “[w]hen [it] was starting out, an open internet enabled [it] to offer consumers an innovative option for watching movies and TV shows” and that it has now grown into “the world’s leading internet television network”.³¹ Netflix goes on to state that “[t]he world’s “Next Netfixes” might not be possible without the permissionless innovation enabled by open internet protections.”³² One of the “Next Netfixes,” Vimeo, explains:

Vimeo is an example of an online video service that has flourished due to network neutrality. Vimeo’s success as a video platform depends upon its ability to deliver a high-quality viewing experience to its users at a predictable cost that has historically decreased, on a per unit basis, over time. If broadband providers could block, throttle, or charge arbitrary fees, Vimeo’s incentive to make capital investments would be severely reduced.³³

The record also disproves the notion – proffered by opponents of meaningful open internet rules – that the rules are meaningful only in guiding relationships between ISPs and a small number of major edge providers. Historical net neutrality

³⁰ *Id.* at 8.

³¹ Netflix Comments at 2.

³² *Id.* at 3.

³³ Vimeo Comments at 9.

issues, such as Madison River’s blocking of VoIP calls,³⁴ Verizon’s prohibition on tethering applications,³⁵ AT&T’s throttling of its “unlimited” customers,³⁶ and Comcast’s blocking of peer-to-peer file sharing,³⁷ have not involved abuses targeted at large edge companies. And as noted above, an incredibly diverse array of parties filed comments in support of the existing rules and in opposition to the NPRM’s proposals.³⁸ Numerous small businesses filed comments in support of the existing open internet rules, explaining the importance of an open internet to small businesses and other new entrants.³⁹ For example, three startups based in Fargo, North Dakota – Simply Made Apps, Harvest Profits, and BNG Holdings – filed joint comments to emphasize the importance of open internet protections to their business and the need for the Commission to maintain its existing rules:

We support a truly open Internet, and we rely on it for our business. The FCC’s proposal would allow the creation of a two-tiered Internet, stifling our ability to compete with big, established incumbents. Allowing big cable and wireless companies to pick winners and losers in the market will not only harm our business, but the ability of any new entrants to

³⁴ *Madison River Communications*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enforcement Bur. 2005).

³⁵ *Cellco Partnership d/b/a Verizon Wireless*, File No. EB-11-IH-1351, Acct. No. 201232080028, FRN 0003290673, Order and Consent Decree, 27 FCC Rcd 8932 (2012).

³⁶ *AT&T Mobility, LLC*, File No. EB-IHD-14-00017504, NAL/ Acct. No. 201532080016, FRN: 0018624742, Notice of Apparent Liability for Forfeiture and Order, 30 FCC Rcd 6613 (2015).

³⁷ *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,”* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

³⁸ See footnotes 3-26, *supra*.

³⁹ See *supra* note 14.

enter the market to compete fairly with incumbents (including the cable and wireless companies themselves).⁴⁰

Shapeways, a 3D printing online platform and marketplace with over 40,000 shops owned by individual designers of jewelry, housewares, games, etc., explains that the “[current] rules provide a clear basis to protect the open internet that is critical to Shapeways and the entire Shapeways community.”⁴¹ Shapeways goes on to explain that “[r]ejecting the current open internet rules would open the door to a two-tiered internet governed by the preferences of a few large ISPs” and that “[t]his would undermine the preferences of users and erect barriers to new online services.”⁴²

The record also makes clear that the existing rules are important not just to startups and small businesses that are thought of as “internet companies” but also to other small (and large) businesses in all economic sectors. For example, the National Association of Realtors (“NAR”), whose membership overwhelmingly comprises small businesses with two principals or fewer, filed comments in support of the current open internet rules and opposing any rollback of the 2015 Order. NAR explains:

Streaming video, Voice over Internet Protocol, mobile applications, drone photography and Internet of Things (IOT) enabled smart devices are commonly used technologies in our businesses today. In the future, new technologies, like virtual reality and telepresence among others, will be available that will no doubt require open Internet access. Simply stated, network access free from discriminatory behavior has become

⁴⁰ North Dakota Startups and Entrepreneurs for Net Neutrality Comments at 1.

⁴¹ Shapeways Comments at 1.

⁴² *Id.*

fundamental to our members' ability to do business in today's digital economy.⁴³

The example of realtors illustrates that an open internet matters to nearly all businesses. As Ad Hoc Telecommunications Users Committee, representing large business enterprise customers, explains:

[E]very corporation in America . . . is an "edge provider" of internet content that depends upon an open internet to do business. Every retailer with an online catalogue, every manufacturer with online product specifications, every insurance company with online claims processing, every bank with online account management, every company advertising and selling its products via a web site — every business in America interacting with its customers online is dependent upon internet freedom.⁴⁴

Of course, open internet policies are important not just to businesses; consumers comprise the largest group of commenters supporting the existing rules, including groups representing consumers such as Consumers Union and AARP. When IA member company Reddit, Inc. invited its users to share their thoughts on net neutrality this past July, almost 10,000 Reddit users from all 50 states responded, sharing compelling personal stories about why net neutrality is critical to their lives. Their considerations ranged from ensuring the competitiveness of their small businesses, to their power of choice in accessing news and information even in rural or underserved areas, to their ability to stay in close touch with friends and family members serving

⁴³ National Association of Realtors Comments at 1.

⁴⁴ Ad Hoc Telecommunications Users Committee Comments at i.

overseas.⁴⁵ Users also highlighted the prohibitive effect that additional costs or tiered fee structures for these services would have on their ability to access these services, which they consider essential to their lives.

Finally, it is important to note that ISPs, including even those that oppose some of the provisions of the Commission's 2015 Order, support open internet rules.⁴⁶ Comcast states that it does not block, throttle or discriminate against lawful content, and supports rules that address transparency, blocking, throttling, and paid prioritization – acknowledging that paid prioritization arrangements can threaten internet openness.⁴⁷ Similarly, Verizon expresses support for rules prohibiting blocking, throttling, and paid prioritization arrangements that offer varying speed “lanes” to competing services.⁴⁸ Like Comcast, NCTA supports rules addressing transparency, blocking, throttling, and paid prioritization.⁴⁹ NCTA also acknowledges that investment in ISP networks “is driven, in the first instance, by ‘increased end-user demand for broadband’” and that “Netflix and other edge services [are] major drivers of consumer demand for high-speed broadband service”⁵⁰ – *i.e.*, the virtuous circle

⁴⁵ See

https://www.reddit.com/r/blog/comments/6mtgtp/we_need_your_voice_as_we_continue_the_fight_for/ (last visited August 29, 2017).

⁴⁶ As noted above, dozens of small ISPs have expressed support for the Commission's existing 2015 open internet rules. See *supra* note 6.

⁴⁷ Comcast Comments at 52-56.

⁴⁸ Verizon Comments at 19-21.

⁴⁹ NCTA Comments at 4-6.

⁵⁰ *Id.* at 51.

principle that the Commission and the D.C. Circuit have relied upon in the past that the NPRM seems to ignore. Comcast and NCTA also agree with IA and many others that open internet rules should apply equally to wired and wireless networks.⁵¹

In summary, parties from all parts of the economy and society generally support maintaining the existing open internet rules, and even opponents of the 2015 rules support rules that protect an open internet. Outside of comments filed in this proceeding, polls show broad bipartisan support for preserving existing net neutrality rules,⁵² and local newspapers and media around the country feature op-eds and letters from small businesses and entrepreneurs in support of existing rules and opposing plans to weaken them.⁵³ Faced with this overwhelming support for open internet rules, the last thing the Commission should be considering is weakening the existing rules.

⁵¹ *Id.* at 59-63; Comcast Comments at 83-86.

⁵² See, e.g., Harper Neidig, *Poll: 60 Percent of Voters Support FCC's Net Neutrality Rules*, June 23, 2017, at <http://thehill.com/policy/technology/339137-poll-60-percent-of-voters-support-fccs-net-neutrality-rules> (Politico and Morning Consult poll showing 60 percent of voters, including 61 percent of Democrats and 59 percent of Republicans, support net neutrality rules while only 17 percent oppose); Harper Neidig, *Cable Industry Poll: Majority Support Net Neutrality Rules*, May 11, 2017, at <http://thehill.com/policy/technology/332948-cable-industry-poll-majority-support-net-neutrality-rules> (61 percent of voters support net neutrality rules and only 18 percent oppose); Cathy Burke, *Poll: Trump Voters Love Net Neutrality Rules*, July 14, 2017, at <http://www.newsmax.com/Newsfront/internet-free-and-open-service-providers-conservatives/2017/07/13/id/801539/> (poll by a GOP polling firm finds that Trump voters support current net neutrality rules by a 3:1 margin).

⁵³ See, e.g., Jared Heyman, *Federal Regulators Threaten Net Neutrality and Your Health*, July 25, 2017, at <http://www.scottsdaleindependent.com/opinions/heyman-federal-regulators-threaten-net-neutrality-and-your-health/> (CEO of CrowdMed, an online business, expressing concern that NPRM “would essentially be giving the greenlight to internet access providers (ISPs) – who are usually big cable and wireless companies – to discriminate among online users and businesses.”); 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 Fargo, ND-based co-founder of Simply Made Apps, the creator of Simple In/Out, an app used for employee timekeeping, expressing support for net neutrality rules).

II. THE RECORD LACKS SUPPORT FOR THE FCC TO REVERSE OR EVEN REVISIT THE 2015 ORDER

As IA and others explained in initial comments, the 2015 Order is working – both the cloud economy and ISPs are doing well (and claims that investment by ISPs has been hurt by the 2015 Order are unsupported by evidence), and consumers are reaping the benefits of the virtuous circle of innovation across the internet economy.⁵⁴ Several commenters also explained that after years of legal uncertainty, the 2015 Order and the D.C. Circuit’s affirmance of it finally placed enforceable open internet rules on firm legal footing.⁵⁵ Commenters also explained the importance of these rules in giving startups and other businesses greater certainty that their success or failure hinges upon their own efforts and not on ISPs picking winners and losers in the market by blocking, throttling, or making new entrants pay for “fast lanes” to reach potential customers at the same speeds as more established (and better funded) competitors.⁵⁶

The NPRM proposes to undo these benefits to the economy by revisiting the 2015 rules and their legal foundation but, fortunately, there are high barriers to this destructive course. While the Commission may change its mind on proper grounds, the Supreme Court has held the Commission must demonstrate “good reasons” for

⁵⁴ See, e.g., IA Comments at 4-17; AARP Comments at 61-73; CCIA Comments at 11-17; Engine Comments at 24-30; Etsy Comments at 6-7; Free Press Comments at 86-208; Microsoft Comments at 2-9; PK and Common Cause Comments at 101; Vimeo Comments at 8-26; WGAW Comments at 29-34..

⁵⁵ See, e.g., AARP Comments at 8-9; Free Press Comments at 4; Mozilla Comments at 5; Netflix Comments at 1-2; WGAW Comments at 1-2; IA Comments at 1-3.

⁵⁶ See, e.g., IA Comments at 25-26; Engine Comments at 4-11; Etsy Comments at 3-5; Vimeo Comments at 8-9.

changing its positions, and must provide a “more detailed justification” when its “new policy rests upon factual findings that contradict those which underlay its prior policy.”⁵⁷ This rationale applies with extra force when the Commission proposes to reverse or significantly revisit its open internet rules barely two years after the effective date of the 2015 Order – in such circumstances, the Commission should rely on factual findings that are abundantly clear in demonstrating a basis for reversing course.⁵⁸ The record in this proceeding provides no such basis for the FCC to reverse or revisit its 2015 Order.

As an initial matter, neither the NPRM nor the comments filed by ISPs address the impact of the 2015 rules on investment in the entire internet ecosystem. As IA and others emphasized in their comments, the existing open internet rules protect a virtuous circle of innovation that benefits the fast-growing, cloud-based economy and, in turn, leads to positive outcomes for the broader U.S. economy as businesses turn to the cloud to more efficiently run their operations.⁵⁹ However, the economic analyses and largely theoretical cost/benefit analyses presented by ISPs – and discussed further below – focus almost exclusively on the alleged impact of the 2015 rules on ISPs and their incentives to invest. Indeed, some ISPs argue that the Commission must *only* consider the impact of its open internet policies on ISPs and cannot consider beneficial outcomes

⁵⁷ *FCC vs. Fox Television Stations*, 556 U.S. 502, 515 (2009).

⁵⁸ See Attorneys General Comments at 17-18 (noting that nothing has changed since the 2015 Order that would justify a change); CCIA Comments at 34-37.

⁵⁹ See, e.g., IA Comments at 4-10; Amazon Comments at 2-6; Engine Comments at 7-24; Etsy Comments at 2-3; Microsoft Comments at 1-9.

for the broader economy.⁶⁰ It is as if what was relevant was a “virtuous semi-circle of innovation” in which the only costs and benefits to be considered are those that impact ISPs, rather than the public interest in policies that support innovation and investment across the entire internet ecosystem.

Furthermore, the economic studies submitted by the ISPs do not present any new empirical evidence regarding any negative economic impact of the 2015 Order, relying instead on the same empirical studies cited in the NPRM⁶¹ and on theoretical economic arguments rather than real world outcomes of the 2015 rules. The empirical studies relied upon by the ISP economic studies have already been examined and countered by IA and others, with numerous parties explaining that the findings are inconclusive at best and that there is no reliable evidence that the 2015 Order has reduced ISPs’ investments in broadband infrastructure.⁶² Indeed, in the study submitted by NCTA, economist Bruce Owen highlights the speculative nature of the empirical studies cited in the NPRM by noting their “*valiant efforts* to quantify the harms posed by Title II to broadband investment in recent years.”⁶³

⁶⁰ AT&T Comments at 104.

⁶¹ NPRM at 16 n.113-14 (citing studies by Hal Singer and George Ford).

⁶² See, e.g., IA Comments at 11-16; AARP Comments at 50-73; CCIA Comments at 13-14; Free Press Comments at 75-80, 86-208; PK and Common Cause Comments at 64-65; see also Christopher Hooton, *An Empirical Investigation of the Impacts of Net Neutrality*, https://internetassociation.org/wp-content/uploads/2017/07/InternetAssociation_NetNeutrality-Impacts-Investigation.pdf (attachment to IA Comments).

⁶³ Bruce M. Owen, *Internet Service Providers as Common Carriers: Economic Policy Issues*, at 12, filed as Appendix A to NCTA Comments (emphasis added).

Even the economic studies submitted by ISPs acknowledge the difficulty of drawing meaningful conclusions based on empirical data in the barely two years since the 2015 Order went into effect. As the NCTA-Bruce Owen study states, “quantifying the impact of the [2015 Order] at this early date is challenging.”⁶⁴ Similarly, the AT&T-Israel et al. study states: “Ultimately, what this mixed empirical record shows is that *empirical inferences one way or the other are difficult to draw using simple analyses of investment levels over time, particularly given the limited time period.*”⁶⁵ Even taken on its own terms, such analyses hardly provide a basis on which the Commission could find that its own predictive judgments in 2015 were clearly incorrect.

Furthermore, none of the ISPs present a full cost benefit analysis of the 2015 Order (let alone the NPRM’s proposals). Indeed, the Comcast-Dippon study states this explicitly: “This White Paper does not present a full cost-benefit analysis of Title II reclassification.”⁶⁶

Rather than provide empirical data regarding the real world impact of the 2015 Order, the economic studies submitted by ISPs address primarily the basis for the 2015 Order – the ability of ISPs to act as gatekeepers, etc. These arguments were already considered and rejected by the Commission in reaching a decision that was upheld by the D.C. Circuit last year. Indeed, subsequent factual findings by the Commission and the record in this proceeding demonstrate that the arguments made in the economic

⁶⁴ *Id.* at 9.

⁶⁵ Declaration of Mark A. Israel et al. at 56, filed as part of AT&T Comments (emphasis added).

⁶⁶ White Paper by Christopher M. Dippon at 37, filed as Appendix C to Comcast Comments.

studies submitted by ISPs are incorrect and that ISPs continue to possess the incentives and ability to harm internet openness.⁶⁷ Regardless, what the ISP economic studies do not do is provide sufficient basis for the FCC to reverse course consistent with the legal precedent discussed above, since they do not demonstrate a change in the gatekeeper status of ISPs that was a key factual basis underlying the 2015 Order.

In summary, the record does not provide the Commission with “good reasons” to reverse course from its 2015 Order. For the Commission to reverse course barely two years after the 2015 rules went into effect and without reliable evidence of erroneous predictions in the 2015 Order would represent exactly the sort of arbitrary and capricious agency decision-making prohibited by law.

III. THE FCC SHOULD PRESERVE ITS AUTHORITY TO PROTECT AND PRESERVE AN OPEN INTERNET

As it explained in its initial comments, IA supports the 2015 rules, which the D.C. Circuit confirmed as resting on a firm legal basis. The 2015 Open Internet Order was the culmination of over a decade of a bipartisan effort to protect and preserve an open

⁶⁷ See, e.g., *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 14-66, paras. 34-139 (rel. May 10, 2016); IA Comments at 19-25; INCOMPAS Comments at 7-41; Engine Comments at 19-24; PK and Common Cause Comments at 74-76, 81-83; Attorneys General Comments at 19-20; see also Response to Oppositions To Motion of INCOMPAS to Modify Protective Orders, WC Docket No. 17-108, at 13-18, App. A (Aug. 3, 2017) (citing FCC and DOJ findings that ISPs have incentives and abilities to harm consumers and online competitors). The Motion filed by INCOMPAS seeks to include evidence from prior merger proceedings relevant to demonstrating market power possessed by ISPs. Motion of INCOMPAS to Modify Protective Order, WC Docket No. 17-108 (filed July 17, 2017). IA supports the inclusion of such evidence in the record in this proceeding in order to get a complete picture of the likely harm that will result if the current open internet rules are weakened.

internet, and finally resulted in legal certainty for the entire internet ecosystem. IA, however, is agnostic as to the specific legal authority for clear net neutrality protections as long they have a strong legal basis that will withstand court review and can be enforced effectively.⁶⁸

ISPs claim to support at least some open internet rules covering blocking, throttling, and some forms of paid prioritization (in addition to transparency rules), but do not provide a clear legal theory supporting their suggested rules. Some ISPs simply refer to the portion of the *Verizon* court's decision that held that Section 706 gives the Commission the authority to preserve openness, while not adequately addressing the *Verizon* court's conclusion that the 2010 no blocking and anti-discrimination rules were impermissible under Title I.⁶⁹ Other ISPs suggest a legal basis that purports to allow prohibitions on blocking and throttling, but does not appear to be sufficient to address paid prioritization arrangements or other discriminatory conduct by ISPs.⁷⁰ In other words, these ISPs' suggested legal basis for open internet rules would permit them to engage in paid prioritization and other forms of discrimination, thereby significantly weakening the existing rules and leaving the FCC powerless to address some of the most worrisome potential harms in today's marketplace. Moreover, the legal basis that ISPs seem to favor the most – Section 706 – is one that the NPRM appears to view

⁶⁸ IA Comments at 17.

⁶⁹ Comcast Comments at 57-58; NCTA Comments at 57.

⁷⁰ AT&T Comments at 101-04.

skeptically.⁷¹ Other commenters also express doubts as to the Commission’s ability to adopt open internet rules under the legal authority suggested by ISPs.⁷² In short, the record reveals no clear path that would put new open internet rules on a legal foundation that is as strong as the firm one upon which the existing rules rest today.

Finally, the Commission must not, as some ISPs suggest, simply cede authority to the Federal Trade Commission (“FTC”) to enforce industry commitments.⁷³ As an initial matter, voluntary industry commitments are insufficient to provide edge providers, particularly startups and other small businesses, with the enough of an assurance that they will be able to reach consumers without interference by ISPs.⁷⁴ In addition, potential violations of open internet rules stem from ISPs’ control over last mile networks and the fact that they serve as a gatekeeper between edge providers and consumers – issues that fall squarely within the Commission’s traditional authority over network operators.⁷⁵ Perhaps most significantly, disputes involving open internet rules will likely involve technical questions that only the FCC has the requisite experience and expertise to analyze adequately. For example, whether a particular

⁷¹ NPRM at 33-34, para. 101.

⁷² See, e.g., AARP Comments at 36-46; EFF Comments at 21-22; Level 3 Comments at 13-15.

⁷³ NCTA Comments at 54-56; Comcast Comments at 63-67.

⁷⁴ It should be noted that several ISPs have seemingly backed away from prior commitments regarding their lack of plans to engage in any form of paid prioritization arrangement. See *infra* note 79. Such changes in commitments illustrate the problems with trusting ISPs to follow through on current or future representations about their business plans.

⁷⁵ *Comcast Corp. v. FCC*, 600 F.3d 642, 646-47 (D.C. Cir. 2010) (“Comcast concedes that ... the company’s internet service qualifies as ‘interstate or foreign communication by wire’ within the meaning of Title I of the Communications Act[,] 47 U.S.C. § 152(a).”).

ISP's actions amounted to "reasonable network management" will involve an analysis that requires expertise in the technical characteristics of cable, wireline, fixed and mobile wireless, and satellite networks, as well as the economics of operating such networks. Moreover, the FCC is also best positioned to use its established procedures to solicit public input while deciding matters that may have industry-wide application and to adopt rules that apply consistently across the entire industry.

IV. THE FCC SHOULD PRESERVE THE 2015 ORDER'S RULES AND SCOPE

Numerous commenting parties agree with IA that the Commission should maintain its existing open internet rules and the scope of the 2015 Order.⁷⁶

Acknowledging the importance of open internet protections to consumers and to the internet ecosystem generally, even opponents of portions of the 2015 rules, including most large ISPs, express support for basic open internet protections including a transparency rule and bright line rules prohibiting blocking and throttling.⁷⁷ At least some major ISPs go further and support prohibitions on most forms of paid prioritization.⁷⁸ Several are on record in the past forswearing from engaging in *any* form of paid prioritization arrangement.⁷⁹ The overwhelming support for maintaining

⁷⁶ AARP Comments at xvi; Attorneys General Comments at 18-22; EFF Comments at 1; Engine Comments at 24-30; Free Press Comments at 64-71; Library Communities at 14-19; Mozilla Comments at 1; PK and Common Cause Comments at 100-127; Vimeo Comments at 8-26.

⁷⁷ Comcast Comments at 52-55; NCTA Comments at 4-5; Verizon Comments at 19-20.

⁷⁸ Comcast Comments at 55-57; NCTA Comments at 5-6; Verizon Comments at 20-21.

⁷⁹ See, e.g., Jim Cicconi, *Net Neutrality and Modern Memory*, AT&T Public Policy Blog, June 6, 2014, at <https://www.attpublicpolicy.com/fcc/net-neutrality-and-modern-memory/> ("There is no paid prioritization . . . on the Internet today. No one has any plan or intent to introduce such paid prioritization practices. ISPs have all posted policies that prohibit them. And the FCC can

these key net neutrality protections rests on a sound logical foundation and strong factual record, as explained below.

Paid Prioritization: The Commission must maintain its prohibition on allowing ISPs to create fast lanes and slow lanes for specific edge providers that depend on the general internet, and to charge some edge providers for prioritized access that smaller and less well-funded edge providers cannot afford. Paid prioritization arrangements targeted at content, application, and service providers give ISPs the incentive to create scarcity in their networks so that these edge providers have a reason to pay for the privilege of accessing a fast lane. Allowing such paid prioritization – unlike offering users higher-bandwidth services for the traffic they choose to access – will introduce artificial barriers to entry into online businesses, distort edge markets, and discourage investment in more capable networks so as to increase the value of scarce priority delivery. Furthermore, as IA explained in its comments, allowing paid prioritization arrangements would turn the open internet into a network resembling cable networks today, where new entrant content providers have to pay a toll to reach consumers.⁸⁰

act against anyone who might nonetheless try to do that. In short, the Internet today is totally safe from fast lanes and slow lanes.”); David L. Cohen, *FCC Votes on New Open Internet Rules*, Feb. 26, 2015, at <http://corporate.comcast.com/comcast-voices/fcc-votes-on-new-open-internet-rules> (“Today, the FCC voted 3-2 to adopt new Open Internet rules – rules that we support and agree should be put in place as legally enforceable by the FCC. . . . [W]e have no issue with the principles of transparency and the no blocking, no throttling, and no fast lanes rules incorporated in today’s FCC Order.”); Verizon Policy Blog, Oct. 29, 2014, at <http://www.verizon.com/about/news/a-response-to-sen.-patrick-leahy> (“Verizon has not and is not using “paid prioritization,” does not hinder or slow consumers’ Internet traffic to the advantage of others’, and is on record numerous times as saying that it has no plans to undertake the hypothetical “paid prioritization” business model.”).

⁸⁰ IA Comments at 22-23.

Creating fast and slow lanes would not just harm more established edge providers like Netflix, but would keep smaller providers like Vimeo from becoming the next Netflix and even smaller startups from becoming the next Vimeo. It is no surprise that the potential for allowing paid prioritization and the creation of “fast lanes” is mentioned consistently by the numerous startup and small business commenters as the most significant potential harm to their businesses and their continued viability.⁸¹

Some ISPs argue that prohibiting paid prioritization arrangements threatens their ability to ensure that services such as telemedicine and emergency and safety-related communications are delivered without any delays.⁸² But the services identified by these ISPs would be allowed under the existing rules as specialized (i.e., non-BIAS data) services, a reality Verizon acknowledges.⁸³ The ISP comments fail to identify any service that is prohibited today under the existing rules that would be desirable paid prioritization furthering the public interest.

No unreasonable interference/disadvantage: The Commission should also maintain its rule prohibiting unreasonable disadvantage or interference with consumers’ selected internet traffic. As IA explained in its initial comments, this rule is similar to the 2010 anti-discrimination rule, which also prohibited unreasonable discriminatory conduct on the part of ISPs. Rules of conduct subject to some measure of interpretation are far from novel in communications law (or other regulatory arenas),

⁸¹ See *supra* note 14.

⁸² Comcast Comments at 56-57; NCTA Comments at 5-6 n.14.

⁸³ Verizon Comments at 21.

notwithstanding AT&T's overwrought claim that such rules "give[s] regulated parties 'no principle for determining' when they pass 'from the safe harbor' of the permitted 'to the forbidden sea' of the prohibited."⁸⁴ Indeed, several of the existing open internet rules are subject to "reasonable network management," an exception supported by ISPs that is similarly left to some degree of interpretation. And some opponents inconsistently argue for adding an "anticompetitive" conduct requirement on top of provisions in the current rules, which would add uncertainty.⁸⁵ It seems ISPs oppose vesting the FCC with a measure of agency discretion not as a matter of principle, but only when the discretion might cut against them in practice.

In fact, the 2015 Order provided detailed guidance on how the FCC would view cases brought before it, although this guidance too was criticized by ISPs as being too vague.⁸⁶ Again, it is telling that opponents of open internet rules often criticize bright line rules as being too inflexible — for example, in several ISP's criticism of the existing prohibition on paid prioritization⁸⁷ — but when confronted by a more general standard argue that such a standard is too vague.

If the Commission were to conclude that further guidance is appropriate to supplement discussion in the 2015 Order, it could do so without eliminating the straightforward underlying rule, thereby preserving the Commission's ability to

⁸⁴ AT&T Comments at 50 (citation omitted).

⁸⁵ Comcast Comments at 55-57; NCTA Comments at 5-6; Verizon Comments at 20-21.

⁸⁶ AT&T Comments at 50-51, Comcast Comments at 69-70.

⁸⁷ Comcast Comments at 56-57; AT&T Comments at 40-41.

address ISP conduct that harms an open internet that goes beyond blocking, throttling, or paid prioritization.⁸⁸ Similarly, to the extent that existing efforts to reform the Commission's enforcement processes are insufficient, the Commission can take reasonable formal or informal efforts to streamline enforcement processes. There is no need for a change to the codified rule against unreasonable interference with consumers' chosen internet traffic.

Interconnection: IA supports maintaining the scope of the 2015 Order, including the Commission's 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.⁸⁹ In their comments, several ISPs argue that there is a competitive market for interconnection and that there is no need for regulatory oversight of interconnection arrangements. Of course, the 2015 Order did not include any finding about the current state of interconnection or adopt prescriptive rules. Despite calls for more prescriptive rules and being presented with evidence of discriminatory conduct during interconnection disputes, the FCC took a measured approach by merely asserting the authority to continue to monitor developments in the marketplace and intervene if needed.⁹⁰ Subsequent to the 2015 Order, the Commission has found evidence of past and potential future harm in the market for internet traffic

⁸⁸ IA Comments at 30.

⁸⁹ IA Comments at 27.

⁹⁰ *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, 5687-95, paras. 196-205 (2015) ("2015 Open Internet Order").

exchange by at least one large ISP.⁹¹ Particularly given these recent findings, and the concerns raised by numerous parties regarding the ability of ISPs to harm the open internet via their interconnection practices,⁹² the record provides no basis for the Commission to relinquish its minimal regulatory oversight over internet traffic arrangements. In that regard, it is worth noting that AT&T elsewhere acknowledges that when “future market failures were theoretically possible,” the Commission could preserve “a readiness to intervene if and when circumstances necessitate” — which is exactly what the Commission did here.⁹³

V. THE COMMISSION SHOULD NOT CONFLATE ISPS AND EDGE PROVIDERS AND THEIR RESPECTIVE POSITIONS IN THE BROADBAND ECOSYSTEM

The Commission must be careful not to confuse its analysis by conflating ISPs and edge providers and their different roles in the internet ecosystem. As other commenters point out, the NPRM at times appears to conflate “internet access”

⁹¹ *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 48-65, paras. 93-136 (rel. May 10, 2016); *id.* at 48, para. 93 (“We . . . find that New Charter’s share of wired nationwide BIAS subscribers and control of interconnection traffic will give it sufficient market and bargaining power in the interconnection market to raise prices for edge providers, and to cause harm to video competition by impairing rival OVDs.”); *id.* at 58-59, para. 120 (“During its 2014 dispute with Netflix, some observers claim that Comcast demonstrated its ability to leverage Internet interconnection into its network in order to pressure Netflix to pay for a direct interconnect agreement with Comcast. The record indicates that Time Warner Cable, despite having fewer subscribers than Comcast, has used similar tactics to pressure edge providers to pay for access to its BIAS subscribers.”).

⁹² See Level 3 Comments at 3-13; Cogent Comments at 8-19; INCOMPAS Comments at 57-62; Microsoft Comments at 21-22; AARP Comments at 17-18.

⁹³ AT&T Comments at 21-22.

provided by ISPs with the “internet” or content, applications, and services provided by edge providers.⁹⁴ Oracle and USTA similarly attempt to obfuscate the issues at stake in this proceeding by arguing about the size of some large edge providers and the growth in market cap of these edge providers in recent years relative to that of ISPs.⁹⁵ These arguments appear to be a deliberate attempt to muddy the waters regarding the concern that the existing open internet rules address — *i.e.*, the gatekeeper role that all ISPs play with respect to their subscribers by virtue of their control over last mile broadband access networks.

The Commission explained the differences between ISPs and edge-based providers of content, applications, and services in its 2010 *Open Internet Order*. As the Commission explained in that *Order*, “the Communications Act directs [the Commission] to prevent harms related to the utilization of networks and spectrum to provide communication by wire and radio,” as opposed to any harms related to edge-based providers of content and applications.⁹⁶ And unlike edge providers, ISPs “control access to the Internet for their subscribers and for anyone wishing to reach those subscribers,” meaning that they are the ones “capable of blocking, degrading, or favoring any Internet traffic.”⁹⁷ The D.C. Circuit endorsed this analysis, explaining that

⁹⁴ See, e.g., Microsoft Comments at 3-4; Netflix Comments at 4; Internet Engineers and Technologists Comments at 19-23.

⁹⁵ Oracle Comments at 3-4; USTA Comments at 18, 22-23; see also AT&T Comments at 43-44.

⁹⁶ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, FCC 10-201, 25 FCC Rcd 17905, 17934, para. 50 (2010) (“2010 Open Internet Order”).

⁹⁷ *Id.* at 17935, para. 50.

ISPs' ability "to act as a 'gatekeeper' distinguishes broadband providers from other participants in the Internet marketplace – including prominent and potentially powerful edge providers such as Google and Apple – who have no similar 'control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers."⁹⁸ The Commission's analysis in 2015 reiterated these findings, detailing the unique gatekeeper role played by ISPs: "Broadband providers' networks serve as platforms for Internet ecosystem participants to communicate, enabling broadband providers to impose barriers to end-user access to the Internet on one hand, and to edge provider access to broadband subscribers on the other."⁹⁹

These distinctions between ISPs and edge providers and the different roles they play in the broadband ecosystem remain. Whereas consumers have few choices for access to the Internet, they have a plethora of choices for Internet content. For example, while most consumers have very limited if any choices for fast broadband networks and high barriers to switching among the few available choices, consumers routinely subscribe to or view multiple online video services such as Netflix, Amazon, Vimeo, YouTube, and others, and can typically unsubscribe from online services with a click or two. Similarly, the various online TV bundle options from AT&T, DISH, Hulu, Sony, YouTube, and others allow users to sign up without a long-term contract. Most importantly, edge-based providers of content, applications, and services do not control

⁹⁸ *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (citing 2010 Open Internet Order).

⁹⁹ 2015 Open Internet Order, 30 FCC Rcd at 5629-31, para. 80.

consumers' access to the internet and have no ability to block, degrade, or favor internet traffic coming from other sources, which is the unique ability of ISPs. What the existing open internet rules require is that when ISPs offer a service consisting of access to the entire internet, they must refrain from abusing their unique power. There should be no controversy or confusion about that straightforward principle.

* * *

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August 30, 2017