

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of)	GN Docket No. 14-28
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Protecting and Promoting the Open Internet)	FCC 14-61
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COMMENTS OF NEW MEDIA RIGHTS

Art Neill, Kyle Reynolds, Teri Karobonik
New Media Rights
1855 1st Ave, Suite 102
San Diego, CA 92101
art@newmediarights.org
619-591-8870

Table of Contents

I. Introduction & Background	1
A. Broadband internet access, speeds, and affordability in the United States are woefully inadequate	1
B. Americans need an Open Internet, with world class internet speeds at affordable prices	3
C. Broadband internet access providers are already threatening the Open Internet	5
D. Threats to the Open Internet have tangible negative consequences for edge providers 11	
E. Where we should go from here	13
II. Reclassification is a necessary first step towards an Open Internet	13
A. Reclassification simply provides the FCC with necessary authority over broadband internet access providers	14
B. Reclassification is necessary from a legal perspective	16
1) Reclassification provides clarity because internet access providers have been improperly grouped with edge providers as information services.....	17
2) Reclassification achieves the Commission’s goal of avoiding rules being challenged as beyond the Commission’s authority to enact	20
3) Reclassification provides legal certainty by avoiding protracted litigation over the Commission’s authority to act and an understood, preexisting legal framework under which to regulate.....	22
C. Reclassification is necessary given the current state of the broadband market	23
D. The Commission’s suggested forbearances are proper	24
III. Comments on the proposed rules	26
A. Transparency	26
B. No Blocking	28
C. No Commercially Unreasonable Practices	30
IV. Conclusion	31

I. Introduction & Background

This Notice represents an opportunity for this Commission to choose a communications future of innovation, creative exchange, and consumer choice, rather than one where powerful companies can alter the Internet to support entrenched business models. New Media Rights (“NMR”) agrees with the Commission that the Internet is “America’s most important platform for economic growth, innovation, competition, free expression, and broadband investment and deployment.”¹ As a non-profit organization focused on providing free and low-cost legal assistance to independent creators, internet users, and start-up entrepreneurs (such as musicians, artists, filmmakers, mobile app developers, and more), we’re reminded daily of the innumerable benefits the Internet can provide to American innovators, creators, and consumers. As the Commission suggests, these benefits largely flow from the open architecture of the Internet and its low barriers to entry.² However, in recent years this openness has been challenged by fixed and mobile broadband internet access providers. We stand at a fork in the road, and if the Commission cannot implement strong, certain, and legally defensible rules to maintain the basic tenants of Net Neutrality (Transparency, No Blocking, No Discrimination), the trend away from an Open Internet is likely to continue to the detriment of not only American consumers and innovators, but American society as a whole. With these concerns in mind, we provide a brief background followed by specific recommendations .

A. Broadband internet access, speeds, and affordability in the United States are woefully inadequate

¹ *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 ¶ 1 (2014) (hereinafter “NPRM”).

² *Id.*

The current state of broadband internet infrastructure and quality of service in the United States is unacceptable. Despite industry claims of massive infrastructure investment³, the United States currently ranks around 29th in the world in terms of download speed and around 51st in upload speed.⁴ Yet Americans also pay more for this access than many other countries with far better service.⁵ Even as Americans are paying more for slower speeds, broadband investment in infrastructure expansion and improvement are decreasing significantly.⁶ Given the opportunity to continue to operate without proper oversight, broadband internet service providers will continue to charge Americans more for less.

The United States lacks a regulatory regime that provides the Commission authority to act. This is no longer wise or appropriate in today's broadband marketplace. Over a decade ago, it was believed that deregulation would foster competition, growth, and innovation in the broadband market.⁷ Today, instead of a healthy, competitive market for broadband internet access; vertical integration, consolidation, and a lack of competition have become the norm.⁸

³ Comments of Comcast Corporation, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, at 30 (filed July 15, 2010); Comments of Verizon, *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, at 41 (filed Jan. 14, 2010); *But cf. Retaining Government Power to Make Economic Policy for Internet Access: The Role of the First Amendment with Susan Crawford*, UCSD TV, <http://www.ucsd.tv/search-details.aspx?showID=27752> (last visited July 11, 2014) (at 18:40, discussing capital expenditures) (hereinafter "UCSD TV: Susan Crawford"); *cf. also* Matthew Yglesias *Big Cable says broadband investment is flourishing, but their own data says it's falling* (May 12, 2014 6:00 PM)

<http://www.vox.com/2014/5/12/5711082/big-cable-says-broadband-investment-is-flourishing-but-their-own-data>.

⁴ See Ookla Net Index, Download, <http://www.netindex.com/download/allcountries/> (last visited July 11, 2014, 11:21 AM); See also Ookla Net Index, Upload, <http://www.netindex.com/upload/allcountries/> (last visited July 11, 2014, 11:21 AM). Note that upload speed in particular is essential to content creators and innovators, as it is how they share their content with others via the Internet.

⁵ See Ookla Net Index, Value in Cost per Mbps, <http://www.netindex.com/value/allcountries/> (last visited July 11, 2014, 11:27 AM) (note that many of the countries with cheaper access per Mbps also have significantly faster average access speeds);

⁶ UCSD TV: Susan Crawford, *supra* note 3 (at 18:40, discussing capital expenditures).

⁷ Michael K. Powell, *The Great Digital Broadband Migration*, remarks before The Progress & Freedom Foundation (Dec. 8, 2000).

⁸ Susan Crawford, *Captive Audience* 64 (2013); See also Tim Wu, *Comcast Versus the Open Internet*, *The New Yorker* (Feb. 24, 2014), <http://www.newyorker.com/online/blogs/elements/2014/02/comcast-versus-the-free-internet.html> (discussing Comcast's "termination monopoly").

Without proper oversight and a regulatory regime that fosters competition by creating a level playing field, incumbent providers like Comcast, Time Warner Cable, Verizon and other incumbents have little incentive to make the necessary infrastructure improvements to bring Americans internet access at world-class speeds. Under the proposed rules, the incumbents will simply reap the benefits of the infrastructure that is already in place and avoid meaningful competition. American broadband internet users will be artificially held back, and charged incrementally more for marginal increases in access speed when the rest of the world has already left the United States behind. Our current status as a second-tier high-speed broadband nation follows a decade of deregulation. The fundamental question in this proceeding is this: should we create a regulatory regime that crystalizes powerful incumbent broadband internet providers' ability to unilaterally shape the future of our primary communications platform without meaningful oversight? Our answer is that failure to act now to establish regulatory authority and rules not only threatens our long term prospects to compete with leading countries in broadband access, speed, and affordability, but also harms the very platform that is quickly becoming the home of American communication, creativity, and innovation..

B. Americans need an Open Internet, with world class internet speeds at affordable prices

American innovators need better, more affordable broadband internet access than what is available in most regions of the country today. They also need that access to be as open and non-discriminatory as it has been in the past so they, not broadband service providers, are choosing the tools they use to get the job done. The individuals NMR assists every day serve as perfect examples. These innovative artists, educators, filmmakers, software developers, and musicians

rely upon, or in some cases are themselves, edge providers who in turn rely on the open architecture of the Internet to do business and to reach their audiences. Cy Kuckenbaker⁹, an NMR client who works as a film professor as well as an independent filmmaker utilizing the Internet to conduct his filmmaking business and distribute his works worldwide, has stated that “[t]he Open Internet is the emergent backbone of my art form and foundation on which I have built a career and business.”¹⁰ Cy further notes that “[p]ressure by interests that seek to control and monetize this creative ecosystem represent a significant threat to [his] work.”¹¹ Currently, small-scale, often independent creators and innovators like Cy can compete with entrenched interests and with larger businesses thanks to the low barriers to entry that are the hallmark of a truly Open Internet. Cy relies on a variety of internet reliant tools, services, and devices to create and share his work, and to do business around the world.

Creators and innovators like Cy rely on an Open Internet. In addition to its impact on creators, the Open Internet helps facilitate the growth and success of the Google, YouTube, Twitter, Facebook, and Spotify-like edge providers of the next ten years. However, as broadband internet access providers test the limits of their power to monetize edge provider access to their subscribers, the traditionally low barriers to entry that have allowed creators and innovators to thrive and succeed are being threatened. It is thus crucial to the success of all edge providers that the Internet remain free of interference by broadband internet access providers.

An Open Internet is a cultural boon as well as an economic one. The preservation of an Open Internet is not only important to start-ups and entrepreneurs, but also to those who

⁹ Cy Kuckenbaker, <http://cysfilm.com/> (last visited July 11, 2014).

¹⁰ Interview with Cy Kuckenbaker, Professor and Filmmaker (July 2, 2014).

¹¹ *Id.*

Americans who create and innovate as supplemental income or to enrich American society through creative arts, investigative journalism, or intellectual discourse. An Open Internet is not only vital to all Americans economically – by allowing for, and spurring more innovation and content creation – but also culturally, as it facilitates the creation and spread of new creative ideas and works. A less open Internet, fragmented by provider favoritism and pay-for-priority access will have disastrous effects on not only these independent edge providers, but on America’s creative culture and our exchange of ideas.

C. Broadband internet access providers are already threatening the Open Internet

Broadband internet access providers have a proven track record of acting as gatekeepers by discriminating between edge providers and data on their networks. This is not speculation: Broadband providers are already offering services which favor certain edge providers over others.¹² This is not something that has come about only recently. Over the past decade, in the absence of oversight, broadband internet access providers have moved increasingly towards the kind of discrimination and paid agreements that are now occurring.

In 2007, it was brought to the Commission’s attention that Comcast was degrading data from peer-to-peer file sharing applications passing through their networks.¹³ While Comcast ultimately ceased these practices after a large public outcry and after Free Press and Public Knowledge filed a formal complaint,¹⁴ the damage had been done. It was subsequently made

¹² See Chris Ziegler, *T-Mobile’s ‘Music Freedom’ is a great feature – and a huge problem*, The Verge (June 18, 2014 9:42 PM), <http://www.theverge.com/2014/6/18/5822996/t-mobile-music-freedom-net-neutrality>; See also Kevin Fitchard, *AT&T launches “Sponsored Data,” inviting content providers to pay consumers’ mobile data bills*, Gigaom (Jan. 6, 2014 9:00 AM), <https://gigaom.com/2014/01/06/att-launches-sponsored-data-inviting-content-providers-to-pay-consumers-mobile-data-bills/>.

¹³ See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

¹⁴ Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. For Secretly Degrading Peer-to-Peer Applications, available at https://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf.

clear in *Comcast v. FCC* that under the existing regulatory approach, the Commission was essentially powerless to stop this kind of behavior.¹⁵ This was not the last time the Commission's power would be called into question, and it would not be the last time a broadband provider tried to bend long accepted tenets of the Open Internet.¹⁶

In 2009, the Commission sought an explanation from AT&T and Apple regarding the rejection of Google Voice – a Voice over Internet Protocol (“VoIP”) app – from the Apple App Store on the hugely popular iPhone.¹⁷ During the proceedings, it was revealed that AT&T and Apple had an agreement in place that Apple would not help users with VoIP apps.¹⁸ Such apps directly competed with AT&T's mobile phone voice plans. Skype, another VoIP app, was similarly blocked in 2009.¹⁹ It is clear that innovative third party services that threaten broadband providers' bottom lines have been, and will continue to be, manipulated by broadband providers and their partners. There is dramatic growth in broadband service providers' vertical integration, meaning they have become significant owners of a wide variety of content and services provided over their networks. The incentives, then, have never been greater to control the way data flows over the internet. Normally, the best check on this kind of abuse of power would be competition. However, broadband providers have continually sought to consolidate vertically and horizontally over the last decade or more. In our petition for this Commission to deny the proposed merger between AT&T and T-Mobile in 2010, NMR warned of these same dangers of broadband

¹⁵ See *Comcast*, 600 F.3d 642.

¹⁶ Transparency, No Blocking, No Unreasonable Discrimination.

¹⁷ Ryan Singel, *Google Voice App Rejection: AT&T Blames, Apple Denies, Google Hides*, *Wired* (August 21, 2009 5:39 PM), <http://www.wired.com/2009/08/apple-att-and-google-respond-to-feds-on-google-voice-rejection/>.

¹⁸ *Id.*

¹⁹ Bill Snyder, *AT&T and Apple needlessly shackle Skype users*, *Info World* (April 9, 2009), <http://www.infoworld.com/d/the-industry-standard/att-and-apple-needlessly-shackle-skype-users-826?page=0,0>.

provider consolidation.²⁰ While that merger was wisely rejected by the Commission, other approved mergers like the Comcast and NBC merger have introduced new kinds of consolidation, reduced competition, and incentives that threaten an open internet. Given the continued consolidation and lack of competition in the broadband provider markets for both mobile and fixed broadband internet access, and the amount of edge-provider like services and content now owned by broadband provider, it is clear that the Commission must again take action to protect consumers and third party innovators alike.

Another story that demonstrates the threat to an open internet is the recent deal made between Netflix and Comcast. After extended periods of its customers experiencing poor quality of service over Comcast's network, Netflix capitulated to Comcast's demands and entered into a paid peering arrangement with the massive broadband provider earlier this year.²¹ The timing of the agreement is not surprising, considering it came only days after Comcast announced its desire to merge with Time Warner Cable – another example of the real threat that broadband provider consolidation poses to third parties and edge providers, and consumers' ability to reach edge providers' services.²² This is the culmination of years of broadband providers consolidating their position, and then testing ways to expand already stellar profit margins at the expense of an Open Internet and consumers. While Comcast shifted blame to Netflix and backbone provider Cogent, Netflix had a business choice to make, and after months of inferior quality service to its customers, it chose not to be essentially cut off from Comcast's subscribers by paying Comcast

²⁰ Petition to Deny of New Media Rights, Utility Consumers' Action Network, and Privacy Rights Clearinghouse, *In the Matter of Applications of AT&T, Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, 4 (2011)

²¹ Jon Brodtkin, *Netflix is paying Comcast for direct connection to network*, Ars Technica (Feb. 23, 2014), <http://arstechnica.com/business/2014/02/netflix-is-paying-comcast-for-direct-connection-to-network-wsj-reports/>.

²² *Id.*

for improved access to end users. Netflix, however, is a larger, established edge provider and can afford to pay for a better connection to broadband internet providers. However, the stage has now been set for similar actions by other broadband providers against any edge provider, including startups without the capital to pay for their service to be accessible to consumers. In exchange for providing new ways to extract money from the internet ecosystem, we are allowing broadband providers to manipulate the market and choose winners and losers. This is not an imagined threat, as Verizon has already reached a similar deal with Netflix under similar circumstances to address poor Netflix video quality on Verizon's network.²³

While the Comcast / Netflix deal may have been the culmination of years of testing the Net Neutrality policies by fixed broadband providers, the "Music Freedom" initiative by T-Mobile is perhaps the current iteration of such practices in the mobile broadband market.²⁴ Through its deceptively named initiative, T-Mobile has decided which online music services will be exempt from its mobile broadband data caps.²⁵ T-Mobile is picking winners and losers through this discriminatory program, and consumers will ultimately lose out in the end as this stifles competition among edge providers. The problems this creates are not unique to T-Mobile or to music service providers.²⁶ Allowing this kind of behavior establishes a dangerous precedent. Will all future edge providers have to seek approval, or pay tolls to broadband providers if they

²³ See Jon Brodtkin, *Netflix got worse on Verizon even after Netflix agreed to pay Verizon*, Ars Technica (Jun. 9, 2014), <http://arstechnica.com/business/2014/06/netflix-got-worse-on-verizon-even-after-netflix-agreed-to-pay-verizon/>; See also Jon Brodtkin, *Netflix packets being dropped every day because Verizon wants more money*, Ars Technica (Feb. 21, 2014), <http://arstechnica.com/information-technology/2014/02/netflix-packets-being-dropped-every-day-because-verizon-wants-more-money/>.

²⁴ Michael Weinberg, *T-Mobile Uses Data Caps to Manipulate Competition Online, Undermine Net Neutrality*, Public Knowledge (Jun. 19, 2014), <https://www.publicknowledge.org/news-blog/blogs/t-mobile-uses-data-caps-to-manipulate-competition-online-undermine-net-neutrality>.

²⁵ Ziegler, *supra* note 12.

²⁶ Nilay Patel, *AT&T's Sponsored Data is bad for the internet, the economy, and you*, The Verge (Jan. 6, 2014 3:00 PM), <http://www.theverge.com/2014/1/6/5280566/att-sponsored-data-bad-for-the-internet-the-economy-and-you>.

wish to have competitive access to consumers? If broadband providers can essentially place a tax on edge providers that are new, or cannot or will not pay for priority access, this limits competition and new entrants into the market of internet dependent services. The Commission must be able to take a strong, legally defensible stance against such actions, no matter what kind of pro-consumer language broadband providers choose to dress these blatantly discriminatory practices in.

There is no reason to believe that this kind of behavior will not increase in frequency and severity if this Commission fails to enact firm rules prohibiting this kind of unreasonable discrimination – something that the proposed rules fail to accomplish. This is because broadband providers have sought to continue a trend of consolidation and reduced or non-competition since 2010. As more vertical and horizontal consolidation occurs in the market, incumbent providers will only gain more market power and other tools with which to thwart entry into the market and prevent competition on the merits of service and consumer satisfaction. Especially in the case of vertical integration, this leads to incumbent broadband providers like Comcast, Time Warner Cable, or another combined broadband juggernaut, having the incentive to discriminate in favor of their own services and discourage others from making the necessary investments to provide competing broadband services. This is because many broadband providers now control the pipe (the broadband network) and significant portions of the content and services that flow through it. This creates a dangerous and highly suspect environment where edge providers must go to some of their direct competitors, broadband providers, to access their intended audiences or to license content. Similarly, a new broadband internet service provider would have to try to negotiate with the large incumbent broadband provider if it wanted to deliver any of the provider's video content or other services to its own customers. With the power of incumbent broadband

providers growing in markets for both the provision of access to content and content itself, it's all the more important to establish solid rules to rein in these firms.

In addition to consolidation, broadband internet access providers have taken other actions that have reduced and prevented competition. For example, a key potential competitor to the incumbent cable monopolies, Verizon, discontinued rollout of its competitive FiOS fiber internet service shortly after partnering with prominent fixed broadband providers to sell its wireless, complementary service.²⁷ While Verizon has continued to operate its FiOS service in select areas (primarily on the Northeast and Mid-Atlantic coast), this service is only available to a small fraction of Americans.²⁸ Meanwhile Comcast has proudly boasted to investors of plans to reach 90% to 100% market share in markets in which it is operating.²⁹ This should be considered because, should the proposed merger between Comcast and Time Warner Cable be approved, Comcast would pass about two thirds of American homes.³⁰ In light of the amount of cooperation and partnership between fixed and wireless broadband providers, these statistics are not surprising – though they should nonetheless be concerning. The current approach, focused on deregulation, has not yielded the competitive market that was hoped for a decade ago. In fact, the market is more consolidated than ever, and Americans pay more for less than their counterparts in many countries as a result. The proposed rules do not possess the necessary authority or regulatory strength to provide oversight over such a consolidated market.

²⁷ Cecilia Kang, *Verizon ends satellite deal, FiOS Expansion as it partners with cable*, Washington Post (Dec. 8, 2011 2:58 PM), http://www.washingtonpost.com/blogs/post-tech/post/verizon-ends-satellite-deal-fios-expansion-as-it-partners-with-cable/2011/12/08/gIQAGANrfO_blog.html.

²⁸ Bernstein Research, *U.S. Telecommunications and U.S. Cable & Satellite: Nature Versus Nurture*, May 2012, 139.

²⁹ *Id.*, at 16:20–17:15.

³⁰ *Id.*, at 21:33.

The current lack of competition encourages broadband providers to offer bare minimum speeds and charge monopoly prices. Broadband internet access prices and services in markets where the provider faces no competition contrast sharply with markets in which competing services have managed to grow.³¹ This fact belies industry claims that the market for broadband internet access is and “vibrantly competitive”.³² And of course, broadband internet access providers have a track record of vigorously and aggressively opposing attempts by localities to establish competing services.³³ As broadband service providers continue to consolidate vertically and horizontally they are only becoming more capable of limiting consumer choice by preventing competitors from entering their markets. This underscores a need for the FCC to grasp real authority to act now, so that it can utilize that authority to protect an open internet for years to come, to the benefit of the American public.

D. Threats to the Open Internet have tangible negative consequences for edge providers

With new technologies like 4k video³⁴, virtual reality³⁵, and other data intensive services coming in the near future, American innovators and consumers need affordable high speed access to an Open Internet. Change is necessary if America is to remain on the cutting edge of innovation. As an example, the current cable infrastructure available in most of America today

³¹ Crawford, *supra* note 8, at 255. See Rick Jervis, *Louisiana City Blazes High-Speed Web Trail*, USA Today (Feb. 5, 2012 12:28 PM) <http://usatoday30.usatoday.com/news/nation/story/2012-02-01/broadband-telecom-lafayette/52920278/1>; See also Brad Reed, *This is what happens when Time Warner Cable is forced to compete*, BGR (Feb. 20, 2014 3:01 PM), <http://bgr.com/2014/02/20/time-warner-cable-internet-speeds-austin/>.

³² Comments of Comcast Corporation, *supra* note 3, at 32; See also Yglesias *supra* note 3.

³³ Crawford, *supra* note 8, at 254-255; Andrea Peterson, *Comcast is donating heavily to defeat the mayor who is bringing gigabit fiber to Seattle*, The Washington Post (Oct. 31, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/31/comcast-is-donating-heavily-to-defeat-the-mayor-who-is-bringing-gigabit-fiber-to-seattle/>.

³⁴ Ty Pendlebury, *What is 4k UHD? Next-generation resolution explained* (Jan. 23, 2012 11:45 AM), <http://www.cnet.com/news/what-is-4k-uhd-next-generation-resolution-explained/>.

³⁵ For example, Oculus VR is a new start-up company – recently purchased by Facebook – developing a virtual reality headset. Oculus VR, <http://www.oculusvr.com/>.

cannot adequately support the upload speeds necessary to efficiently and effectively share large video files. Cy Kuckenbaker, the film professor and independent filmmaker discussed previously in this section, says that “[c]lients are increasingly interested in distance collaborations, which require me to move video files rapidly on and off servers,” and yet due to subpar internet access, he is “still shipping USB sticks via mail to move files that filmmakers in other countries can upload and transfer via broadband in under an hour.”³⁶ Cy further notes that he must constantly make adjustments to compensate for the fact that he cannot purchase the kind of access he needs for his business from his current carrier; Cy states “To get the speed I need for 4k [video] is cost prohibitive and will remain so for the foreseeable future.”³⁷ Fixed broadband providers, entrenched in a stagnant and non-competitive market, have no incentive to upgrade their infrastructure to keep pace with new data intensive services like 4k video, thus putting them essentially out of reach of many American consumers and edge providers.³⁸

In an environment where American creators and innovators are already struggling with poor access speeds, broadband internet access providers should not be allowed to create a more difficult playing field for startup edge providers (or even large, existing edge providers) to break into markets through blocking and discrimination.³⁹ If these practices are allowed to continue under the proposed rules it will severely diminish the already limited ability of new and/or

³⁶ Interview with Cy Kuckenbaker, *supra* note 10.

³⁷ *Id.*

³⁸ “With 4K TVs finally becoming available, there’s an opportunity for even greater video resolution. The only problem is that networks aren’t built to support the load that streaming that video would require. With H.265, 4K streaming could be possible with as little as 20-30 Mbps of bandwidth. Still a lot by today’s standards, but not completely unheard of.” Ryan Lawler, *Next-Gen Video Format H.265 Is Approved, Paving the Way For High-Quality Video on Low-Bandwidth Networks* (Jan. 25, 2013), <http://techcrunch.com/2013/01/25/h265-is-approved/>; *See also Trends in broadband adoption*, Pew Research Internet Project (Aug. 11, 2010), <http://www.pewinternet.org/2010/08/11/trends-in-broadband-adoption/> (noting that around 50% of broadband subscribers in 2010 subscribed to “basic” internet). The problem is thus clear, given that “basic” broadband is generally between 5-10 Mbps, and streaming 4k video could be possible only at speeds of 20-30 Mbps or more.

³⁹ *See* discussion of broadband provider actions *supra* pp. 5-8.

independent edge providers to compete with established edge providers that can afford to pay the toll for the best access. The traditionally low barriers to entry that have allowed for the explosion of economic growth via the internet will be all but destroyed under such a system as new edge providers or edge providers that are disfavored by broadband providers will find it difficult or impossible to reach their intended audiences. The Commission must maintain a firm stance against such actions by broadband internet access providers, one that is simply not embodied in the proposed rules.

E. Where we should go from here

The Internet is undoubtedly one of the greatest technological developments in the last hundred years. That greatness has stemmed, in part, from a lack of interference both from private and governmental entities, and maintenance of a relatively level playing field for those sharing creativity, innovations, and ideas through the medium. However, as private entities have begun to undermine the principles that have been so crucial to the rapid growth and success of the Open Internet, the Commission must have the authority to safeguard consumers against these harmful practices, as well as innovators on the edge of the network creating the next great Internet based companies. This can best be achieved through reclassification of broadband internet access providers as telecommunications services, subject to Title II common carriage.

II. Reclassification is a necessary first step towards an Open Internet

To begin to address the challenges outlined above, the Commission should reclassify fixed broadband internet access as a “telecommunications service” under Title II and establish strong Open Internet policies that benefit consumers and businesses alike. . The most effective and least disruptive approach to reclassification would be similar to the “Third Way” proposed in

2010.⁴⁰ That is, the Commission should apply Title II common carriage obligations to broadband internet access providers while forbearing from certain provisions of Title II. This approach is not only appropriate given the current state of the broadband provider market, but also well within the Commission’s authority under *BrandX*.⁴¹ In discussing reclassification, the Commission should recognize the following:

- Reclassification is not a drastic departure from prior law and regulation, and simply provides the Commission with the requisite authority to regulate increasingly powerful and consolidated broadband internet access providers.
- Reclassification is necessary to maintaining an Open Internet from a legal perspective, given that it will provide clarity, certainty, and reliable legal authority.
- Reclassification is necessary to maintaining an Open Internet from a factual perspective, given the consolidated state of the broadband provider market.
- The approach to forbearance described by the Commission is proper, though the Commission should more seriously consider not forbearing on Section 222.

A. Reclassification simply provides the FCC with necessary authority over broadband internet access providers

Reclassification of broadband internet access as a “telecommunications service” is merely a return to a previous regulatory regime that provides the FCC with the authority to protect the Open Internet while avoiding continued challenges to that authority. Prior to the Commission’s classification of cable modem internet access service as an information service,

⁴⁰ *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, 25 FCC Rcd. 7866 ¶ 2 (2010).

⁴¹ *NCTA v. BrandX*, 545 U.S. 967, 981 (2005).

facilities-based internet access providers (ie. the phone companies) operated under similar regulations for most of the formative years of the modern Internet infrastructure. A return to this prior regulatory regime is not the drastic change some opponents of reclassification have claimed.⁴² Nor is it one that is outside the authority of this Commission under *BrandX*.⁴³

Reclassification is a means and not an end, and the negative ramifications some have claimed will follow are well within the Commission's power to diminish. This is because the outcome of reclassification is entirely within the power of the Commission to, within reason, mold as it sees fit, primarily through appropriate forbearances. The Commission need only apply Title II in a limited fashion in order to vest in itself the authority to maintain the status quo of an Open Internet through policies akin to those proposed in 2010.⁴⁴ Further, considering the Commission's close relationship with, and expert knowledge of, the telecommunications industry, claims that a future Commission will suddenly decide to employ Title II to cripple broadband internet access providers for no reason are highly unrealistic.⁴⁵

Even though the Commission has generally been accommodating to the industry, in the occasional situations where the Commission has sought to exert its authority, broadband providers have been able to deny the Commission's basic authority to regulate the preeminent 21st Century communications medium it is entrusted by the American people to regulate. Through reclassification, the Commission, which is the "United States' primary authority for

⁴² Comments of Verizon, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, at 11 (filed July 15, 2010).

⁴³ *Id.*

⁴⁴ *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, Report and Order, 25 FCC Rcd 17905, 17992 (2010) (hereinafter "Open Internet Policy").

⁴⁵ Comments of AT&T, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, at 7 (filed July 15, 2010).

communications law, regulation and technological innovation,”⁴⁶ will have authority to regulate the communications medium that is fast becoming our sole means of accessing information. To the extent that Open Internet policies enacted under Title II authority may affect or restrict business practices and profit models that violate Net Neutrality, this should be viewed as a beneficial and necessary result to protect the Open Internet.

B. Reclassification is necessary from a legal perspective

Reclassification is necessary from a legal perspective for several reasons. While recent judicial decisions have made it clear that any policies adopted by this Commission that sufficiently support the tenets of an Open Internet must rely on Title II authority⁴⁷, there are additional reasons why reclassification is legally proper:

- 1) Reclassification is necessary to avoid the quagmire that has resulted from an incorrect grouping of broadband internet access services with edge providers (like Google, Facebook, and other edge providers) as “information services” – these services are conceptually and practically separable and the basic data transfer service provided by broadband internet access providers must be distinguished from true information services.

⁴⁶ Federal Communications Commission, *What We Do*, <http://www.fcc.gov/what-we-do> (last visited July 14, 2014). *See also* Communications Act of 1934 47 U.S.C. § 151.

⁴⁷ *See Comcast*, 600 F.3d 642; *See also Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). In *Comcast*, the DC Circuit essentially eliminated the Commission’s ability to rely on its ancillary authority. In *Verizon*, the DC Circuit followed up by gutting the Commission’s proposed rules on the grounds that they imposed “common carriage *per se*” on broadband internet access providers, severely limiting regulatory action the Commission can take so long as broadband internet access is considered an information service.

- 2) Reclassification is the surest way to achieve the Commission's stated goal of avoiding further litigation over its authority to enact rules as opposed to its application of those rules.
- 3) Finally, reclassification will create more legal certainty by clarifying the distinction between telecommunications services and information services, avoiding protracted litigation over the Commission's authority to enact rules, and providing an understood, pre-existing legal framework under which the Commission can regulate as it sees fit.

Reclassification is both necessary and reasonable in light of the current state of the Internet and related markets.

1) Reclassification provides clarity because internet access providers have been improperly grouped with edge providers as information services

One of the primary benefits of reclassification is that it will clarify the distinction between information services and telecommunications services. The decision to classify internet access as an information service was based on broad claims that the ancillary services provided by internet access providers (email, web browsing, website hosting, etc.) are so fully integrated with the basic telecommunications offering, internet access, that they cannot be separated.⁴⁸ This is simply not the case. This approach conflates distinct services that should be treated differently from a regulatory standpoint. Users utilize a wide variety of third party options when it comes to any of the services cited and the idea of a "walled garden" internet that is entirely molded by, and accessed through, your internet access provider is an outdated concept. "Internet Access", whether it is provided by a facilities-based provider (one that controls access as well as the

⁴⁸ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 ¶¶74-80 (1998) (hereinafter "Universal Service Report").

physical wire through which data is transferred) or a provider that uses another provider's infrastructure (Prodigy and AOL on the early internet), should be understood to be a telecommunications service. This is because, at its core, internet access service provides simple data transfer from the end user and any other point on the Internet. "Bundled" services such as email, web hosting, and so on, are merely secondary to this basic access and they can and should be treated as separate information services.

Allowing broadband internet access to remain an information service makes it unclear whether anything can truly be a telecommunications service. The Commission noted in 1998 that an incumbent local exchange carrier ("ILEC") could not "escape Title II regulation" of its local exchange service "by packaging that service with voice mail."⁴⁹ And yet this is exactly what the Commission has consistently done in its decisions to allow broadband internet access providers to remain information services. By considering "internet access" a fully integrated bundle of what are conceptually, practically, and legally separable services⁵⁰, the Commission has allowed broadband internet access providers to remain beyond its regulatory reach. In doing so, the Commission has also blurred the line between what is a telecommunications service and what is an information service. Defining a bundle of entirely separable services under the one heading of "broadband internet access" and classifying this as an information service flatly contradicts the Commission's more correct statement that ILECs could not similarly bundle services to escape Title II regulation. While this was less of a pressing concern in the formative first decades of the Internet, broadband service providers are now testing the limits of their ability to change the fundamental nature of the internet, and it is essential that the Commission assert its authority to

⁴⁹ *Id.* at ¶ 60.

⁵⁰ In its *Universal Service Report*, the commission errantly states that these services are "inextricably intertwined" with data transport, but this is simply not true. data transfer

protect consumers from business practices that violate the critical tenets of an Open Internet. The Commission cannot assert its authority properly without reclassifying broadband internet access as a telecommunications service subject to Title II.

The legal clarity provided by reclassification will also allow the Commission to stop broadband internet access providers from continuing to take advantage of the same sort regulatory safe harbor as actual information services like those provided by Facebook, Twitter, Pinterest, Google Search, and so on. The current regulatory discrepancy is problematic because broadband internet access is significantly different than most overlaid information services; primarily because broadband internet access providers provide a telecommunications service that is wholly separable from the information services they supply. Overlaid information services, such as those provided by web hosting services (such as GoDaddy, WordPress, etc.), email services (such as Gmail, Yahoo Mail, etc.), and others merely utilize the telecommunications service that other entities provide in order to reach consumers. This puts them in a distinctly different position than broadband internet access providers, who provide not only their own information services, but also provide the underlying telecommunications service infrastructure and carrying capability that all other information service providers must use to reach their subscribers. This confusing grouping of two vastly different services puts broadband internet access providers in a dangerously powerful position. This is because broadband providers control the “pipe” that all other overlaid services rely on to reach consumers while still enjoying the same regulatory freedoms as pure overlay services. In this sense, the current regulatory system treats the two types of services as the same from a regulatory standpoint, when nothing could be farther from the truth. Most information services and edge providers rely on access to broadband service providers but due to non-competition and consolidation among broadband providers,

those services have little leverage to bargain with broadband providers even within the bounds of the Open Internet rules – the relationship is almost entirely one-sided, with broadband providers in a far more powerful position than edge providers. Reclassification will help alleviate some of these issues by vesting in the Commission the authority to put checks into place that balance the power of broadband internet access providers and ensure they operate within the bounds of Net Neutrality.

2) Reclassification achieves the Commission’s goal of avoiding rules being challenged as beyond the Commission’s authority to enact

The Commission states in its Notice of Public Rule Making that it wishes to select a legal standard that can be validly adopted and only challenged as applied.⁵¹ This goal is best achieved through reclassification. While the question of whether reclassification is appropriately within the power of the Commission will undoubtedly be litigated, this path has firm legal support from *BrandX*.⁵² Further, once the Commission has established its authority to regulate broadband internet access providers under Title II, legitimate challenges to subsequently enacted rules could only be “as applied”. That is, a party could only legitimately challenge how the rules are applied rather than the FCC’s basic authority to regulate. The judiciary has repeatedly reinforced the idea that prior Open Internet policies would have been acceptable were it not for the fact that the Commission had classified broadband internet service providers as information services.⁵³ The Commission also expressed its concern several times as to whether and how it might avoid per se

⁵¹ NPRM, *supra* note 1, at ¶118.

⁵² *BrandX*, 545 U.S. at 981.

⁵³ *See Comcast*, 600 F.3d 642; *See also Verizon v. FCC*, 740 F.3d 623.

common carriage challenges⁵⁴. Reclassification is the only way the Commission can assuredly avoid future per se common carriage challenges.

Failure to reclassify will lead to decades of litigation and uncertainty for consumers and businesses alike. If the Commission continues to attempt to enact rules under its authority pursuant to Section 706 or its ancillary authority, it is likely that any future enforcement actions will be challenged on the basis of the Commission's authority, preempting the important discussions of how the rules should be applied. Broadband internet access providers have already clearly illustrated their willingness to litigate and repeatedly challenge the Commission's authority to act against them. While a decision to reclassify will likely be litigated on the basis of the Commission's authority a single time and subsequent rules challenged only as applied, any rules enacted under alternative sources of authority will result in continued years of case-by-case challenges of the Commission's authority before the application of specific rules is ever discussed. This will lead to continued uncertainty in our broadband legal framework, undermining American innovation at a time when our nation is already struggling to keep up with the rest of the world in broadband accessibility, speed, and cost.⁵⁵ This will also permanently hamstring the Commission in its efforts to shape American communications policy in the 21st Century, abdicating authority to broadband internet access providers who will benefit from the confusion and uncertainty of our legal framework for regulating broadband internet access at the expense of American consumers and American innovators. The stark reality of not pursuing Title II authority is a future with either a) rules that abdicate the FCC's role in regulating communications or b) rules that are challenged repeatedly on the basis of the

⁵⁴ NPRM, *supra* note 1, at ¶ 80.

⁵⁵ See discussion *supra* pp. 4, 13-14.

Commission's authority. Not reclassifying under Title II would be a waste of time, resources, and an abdication of the Commission's basic role as regulator that cannot be allowed to happen.

The Commission should at least adhere to Rep. Waxman's suggestion of using Title II as a "backstop" in enacting a new Open Internet Policy, but not to enact the currently proposed rules.⁵⁶ If the Commission is hesitant to proceed fully under Title II, Rep. Waxman's backstop authority plan provides a reasonable alternative that will provide the Commission with the authority to move forward more efficiently even if its non-Title II authority is challenged once again. However, the Commission should take to heart Rep. Waxman's concern with watering down "essential open Internet protections".⁵⁷ The proposed rules have indeed been watered down in an effort to enact them under the Commission's more tenuous non-Title II authority and the Commission should endeavor to strengthen the proposed rules in order to bring the rules more in line with the 2010 Open Internet Policy and traditional notions of Net Neutrality.⁵⁸

3) Reclassification provides legal certainty by avoiding protracted litigation over the Commission's authority to act and an understood, preexisting legal framework under which to regulate

In order to provide legal certainty and avoid litigating the same issues of authority repeatedly, the Commission must reclassify broadband internet access as a telecommunications service subject to Title II. In addition to alleviating concerns addressed above regarding the threat of constant litigation to defend its authority to enact each rule (and any subsequent rules),

⁵⁶ Letter from Rep. Henry Waxman, Ranking Member, Committee on Energy and Commerce, to Thomas Wheeler, Chairman, Federal Communications Commission (May 14, 2014), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Wheeler-Title-II-Backup-Option-2014-5-14.pdf>.

⁵⁷ *Id.* at 3.

⁵⁸ Open Internet Policy, *supra* note 44, at 17992.

reclassification will provide the Commission with a source of authority that is reliable and well-understood. Title II regulation has existed for decades and, unlike the vague implications of authority drawn from ancillary authority or Section 706, it is something that businesses and regulators understand. In this way it is uniquely preferable to continuing to attempt to draw specific rules based on the Commission's broad interpretations of authority granted to it through general mandates from Congress. If the Commission succeeds in its pursuit of testing the bounds of its general sources of authority, such as Section 706, this will undoubtedly create uncertainty as to what the Commission may choose to do or not do under those sources of authority in the future. By reclassifying broadband internet access as a telecommunications service, the Commission can make clear its intentions by regulating under a pre-existing framework (Title II) that it can mold through forbearances into a more predictable and reliable source of authority.

C. Reclassification is necessary given the current state of the broadband market

When the decision was made to classify broadband internet access as an information service, it was believed by many that there would be a healthy, competitive market for broadband internet access between broadband over powerlines, cable broadband, and DSL.⁵⁹ This vision did not pan out, and continuing to defer to the claims of broadband providers that they are in a “vibrantly competitive”⁶⁰ market is only going to harm consumers in the end. Now that a few broadband providers have dominated the broadband internet access market, a completely hands-off system can no longer ensure consumers have access to an Open Internet.

⁵⁹ Crawford, *supra* note 8, at 52.

⁶⁰ Comments of Comcast Corporation, *supra* note 3, at 32.

The current deregulated environment that broadband internet access providers operate in may have seemed appealing at a time when DSL and other services appeared to be providing some form of competition for cable modem service. That is simply no longer the case. DSL is no longer a realistic option in terms of access speeds, and other prospective services (like broadband over power lines) have been left by the wayside. Fiber internet, the only internet access service that truly competes with cable modem internet access services, reaches only a small fraction of American homes (around 14%).⁶¹ Cable modem service providers also generally do not operate within the same geographic locations.⁶² Last, due to the practical realities of the market, (for example, the prohibitively high investment costs to build infrastructure and the entrenched positions of the incumbents in terms of programming and licensing deals) the broadband internet access provider market will likely remain heavily consolidated for the foreseeable future, with limited and often non-existent competition. Without sufficient competition, it becomes imperative for the FCC to put in place strong policies to protect consumers before broadband internet access providers wield their economically powerful positions to the detriment of innovation and American consumers.

D. The Commission's suggested forbearances are proper

If the Commission elects to pursue reclassification, it will be necessary to forbear from certain inapplicable or unnecessarily burdensome sections of Title II. The Commission should be cautious in determining these forbearances, not just with regard to the burdens placed on broadband internet access providers, but also so that it does not overly limit its own regulatory authority similar to when it classified internet access as an information service. That said, the

⁶¹ Bernstein Research, *supra* note 28.

⁶² *Id.* at 10:21-11:04.

sections that the Commission has suggested that it will not forbear on in 2010 were proper and wisely chosen.⁶³ However, in addition to the basic Sections regarding common carriage (Section 201, 202, and 208) the Commission should also strongly consider not forbearing on Sections 222 and 254.

The Commission should highly consider not forbearing on Section 222, which pertains to privacy of customer information. Online privacy is becoming an increasingly important social and political issue, and it would be wise for the Commission to retain some authority to regulate what broadband internet access service providers may do with customer information. Broadband providers may bemoan the possible ramifications of not forbearing on this section, but as with reclassification in general, limiting business practices that wrongfully use private customer information should be viewed as a beneficial result and not a detrimental one. Further, Section 222 contains ample exceptions such that it will not be unnecessarily burdensome to broadband internet access providers. Thus, if the Commission proceeds with reclassification under Title II, it should consider not forbearing on Section 222.

The Commission should also consider not forbearing on Section 254, which relates to the Universal Service Fund (“USF”). One of the most significant benefits that broadband internet access providers currently reap from being classified as information services is exemption from the USF. While this has long been a controversial issue, by choosing to not forbear on Section 254, the Commission can retain the authority to facilitate the expansion of broadband internet access, especially to key anchor institutions like health care providers and schools.⁶⁴ The benefits of ensuring more readily available broadband access for health care providers and schools cannot

⁶³ NPRM, *supra* note 1, at ¶ 154.

⁶⁴ 47 U.S.C. § 254(h)(1).

be overstated. For example, through the USF, the Commission can enable wider access to telemedicine⁶⁵— something that is simply not possible without high speed internet access – and could vastly improve access to physicians and important medical procedures in remote rural areas. However, because bringing broadband internet access providers under the USF could create new responsibilities for both the providers and the federal government, the Commission should refrain from making a forbearance decision with regard to Section 254 until it has obtained further specific comment on the economic feasibility and effectiveness of this decision.

III. Comments on the proposed rules

Once the Commission has reclassified, it must utilize rules that protect the core tenets of an Open Internet. In this section, we will address particular concerns with rules 8.3 (Transparency, 8.5 (No Blocking), and 8.7 (No Commercially Unreasonable Practices) as well as providing general comment on important issues related to each rule. In line with the discussion in the previous sections, these comments assume that reclassification is necessary and, in fact, the only possible way to enact the strong and reliable Open Internet policies we recommend.

A. Transparency

The Commission’s proposed Transparency rule appears sound. The rule should fall well within the Commission’s authority⁶⁶, especially if the Commission proceeds with reclassification. While we do have concerns that the practical effects the transparency rule will

⁶⁵ “[T]elemedicine seeks to improve a patient's health by permitting two-way, real time interactive communication between the patient, and the physician or practitioner at the distant site. This electronic communication means the use of interactive telecommunications equipment that includes, at a minimum, audio and video equipment. Medicaid.gov, *Telemedicine*, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Telemedicine.html> (last visited July 14, 2014).

⁶⁶ See *Verizon*, 740 F.3d at 659.

be minimal, we agree with the Commission's decision to describe in more detail the disclosures that will be required of broadband internet access providers. Nonetheless, the rule appears to provide adequate grounds for the Commission to pursue a wide variety of transparency-related issues and we believe that, if applied properly, the rule can still be effective as a regulatory tool.

While NMR is in favor of the current form of the proposed transparency rule, we are strongly concerned about the idea of transparency in the broader sense, especially as it applies to the information to which the Commission alone is currently privy. For example, the Commission regularly collects public complaints about broadband internet access providers,⁶⁷ and yet these complaints are not available to the public. This kind of information can be an incredibly useful tool for consumers and the public to have access to, leading to better purchasing decisions by consumers and better informed public comment in future regulatory proceedings.

The proposed transparency rule will likely result in new disclosures from broadband providers to the public, to edge providers, and to the FCC. While some of the information that the Commission receives from broadband providers must necessarily remain confidential, the Commission should strongly consider publicizing any other relevant information it receives for public use. This will put greater pressure on broadband providers to be more forthcoming in their public disclosures and will generally promote greater public awareness of any future harmful behavior that broadband providers engage in. At the very least, publication of this kind of disclosure data and the public complaints discussed above will allow better oversight and policymaking, which will assist the Commission in its efforts to maintain an open and prosperous Internet. In direct response to the Commission's question regarding requesting

⁶⁷ NPRM, *supra* note 1, at ¶¶ 69, 161.

disclosures to be in a certain format,⁶⁸ we believe that such a formatting requirement would facilitate dissemination of appropriate disclosure information to the public and would thus be a wise decision. We recommend therefore that the Commission proceed with its currently proposed transparency rule while carefully considering what kinds of information will be critical for broadband internet access providers to provide to ensure an open internet, and ways it might make information related to an Open Internet more readily available to the public.

B. No Blocking

While the first half of the “No Blocking” rule is sound (indeed, the inclusion of a robust definition for “block”⁶⁹ is an improvement over its 2010 iteration⁷⁰); the fact the mobile broadband internet access providers are still treated differently under this rule is problematic for several reasons. First, if there are concerns about data speeds and network management on mobile broadband networks that are somehow different than fixed broadband networks, there is already a built in network management exception that can account for those concerns and is adaptable over time to a changing industry. Second, distinguishing between “websites” and other sources of data like phone widgets or applications that are critical to maintaining an Open Internet in mobile broadband is an arbitrary distinction. And finally, many individuals who primarily access the Internet through mobile broadband do so either because they cannot afford a fixed broadband service or because one has not been deployed in their area.⁷¹ These individuals are the most vulnerable to being on the wrong side of the digital divide, and we should not

⁶⁸ NPRM, *supra* note 1, at ¶ 72.

⁶⁹ NPRM, *supra* note 1, at 66, Appendix A § 8.11(a).

⁷⁰ Open Internet Policy, *supra* note 44, at 17992.

⁷¹ *Main Findings*, Pew Research Internet Project (Sept. 16, 2013), <http://www.pewinternet.org/2013/09/16/main-findings-2/>.

provide them second class internet by leaving them open to blocking when those who can afford a fixed broadband service are not.

It is important to note that any concerns posed by mobile broadband providers about their networks can be remedied by the reasonable network management exception. Reasonable network management might apply differently, depending on the circumstances, because it takes “into account the particular network architecture and technology of the broadband Internet access service.”⁷² The existence of this exception renders moot any concerns about mobile broadband networks suffering harms as a result of providers not being able to block non-website (and non-competing) sources of data. Through the exception, mobile broadband providers will retain the ability to remedy situations where data transfer causes harm to their networks. Creating a different “no blocking” rule for mobile broadband providers is redundant and antithetical to the principles of an Open Internet, as well as the Chairman’s statement that there is only “one internet.”⁷³ As discussed previously, mobile broadband providers have already used their gatekeeping power to block useful and lawful applications without justification,⁷⁴ and they should be held to the same standard as fixed broadband providers.

From a technical perspective, discriminating between websites (which cannot be blocked under the proposed rule⁷⁵) and non-competing⁷⁶ applications is arbitrary and serves no purpose other than providing mobile broadband providers with unnecessary gatekeeping authority. For example, it is unclear how data transfer that occurs when a user accesses the Facebook website

⁷² NPRM, *supra* note 1, at 66 Appendix A § 8.11(g).

⁷³ “I’ve consistently said that there is only one Internet,” Wheeler said, Jim Puzzanghera, *FCC chairman gets bipartisan grilling over Net neutrality proposal*, LATimes (May 20, 2014 9:34 AM), <http://www.latimes.com/business/technology/la-fi-net-neutrality-fcc-wheeler-congress-20140520-story.html>

⁷⁴ See discussion of mobile broadband provider actions *supra* pp. 6-7.

⁷⁵ NPRM, *supra* note 1, at 66, Appendix A § 8.5

⁷⁶ *Id.*

through his mobile web browser is any different than when he accesses Facebook through its proprietary app. The end result in both cases is the same: The user accesses Facebook and some data is exchanged over the mobile broadband provider's network. Mobile broadband providers already possess vast control over data usage by subscribers and it seems unclear why data coming from lawful and harmless applications should be treated differently than data coming from a web browser – after all, to reiterate, the reasonable network management exception would allow data transfer that harms the network or that is unlawful to be blocked. This distinction between sources of data serves only to create an unreasonable disparity between those accessing the internet through a fixed broadband provider and those accessing it through a mobile broadband provider.⁷⁷

With these concerns in mind, NMR recommends that the Commission adopt only the first paragraph of the No Blocking rule and apply it to both fixed and mobile broadband internet access providers. We further recommend that the Commission retain the robust definition of “block”. In this way, the Commission can ensure fair and equal access to an Open Internet for all Americans across both fixed and mobile platforms and avoid leaving some Americans with only second class access.

C. No Commercially Unreasonable Practices

Unlike the transparency and no blocking rules, the “No Commercially Unreasonable Practices” rule is not satisfactory in any sense. The current proposed rule is too vague to be a useful enforcement tool and will only cause uncertainty and confusion for consumers, edge

⁷⁷ This disparity cannot be squared with the principles of an Open Internet. The Commission notes that the purpose of the proposed rules is to “protect and promote the Internet as an open platform enabling consumer choice” with “end user control” (NPRM, *supra* note 1, at 66, Appendix A § 8.1) – both of which will be stifled by allowing mobile broadband providers to limit access on mobile devices.

providers, and broadband internet access providers. A return to the “No Unreasonable Discrimination” rule from the 2010 Open Internet Policy⁷⁸ is necessary.

The rule in its current state serves little purpose other than to illustrate that no one can know what kind of conduct by broadband internet access providers will be allowable or not until extensive litigation and administrative proceedings have shaped the definition of “commercially unreasonable”. Now is not the time to force American consumers, innovators, and businesses to blindly navigate this kind of legal labyrinth. While NMR agrees that any rule of this kind will have to be resolved on a case-by-case basis to some extent, more certainty and reliability is necessary as an initial matter. Some initial certainty is not only necessary to avoid confusion and time-intensive proceedings at a time when America is already falling behind the rest of the world in broadband internet access, but also to avoid broadband internet access providers evading enforcement and permanently altering the meaning of the rule through clever lawyering in all-important first application cases. As such, a return to the no unreasonable discrimination rule from 2010 is necessary. Further, a return to the no unreasonable discrimination rule is both appropriate and within the Commission’s authority so long as it chooses to reclassify broadband internet access as a telecommunications service.⁷⁹ Therefore, through reclassification and a return to a rule either identical or more akin to the no unreasonable discrimination rule from the Open Internet Policy, the Commission can create a more certain and reliable regulatory framework for the future.

IV. Conclusion

⁷⁸ Open Internet Policy, *supra* note 44, at 17992, Appendix A § 8.7.

⁷⁹ See *Verizon*, 740 F.3d at 650.

In light of the many social, cultural, and economic benefits discussed above, NMR recommends that this Commission reclassify broadband internet access as a telecommunications service and enact more appropriate Open Internet rules as discussed. While it is true that such a step will certainly require further proceedings and may result in litigation from broadband internet access providers, it is absolutely essential to the preservation of a truly Open Internet for American consumers, creators, and innovators. The alternative to reclassification and strong Open Internet policies is decades of uncertainty, extensive litigation, and America utterly failing to keep pace with the rest of the world in terms of internet access. Such a future would be an immense waste of time and resources that will only benefit broadband internet access providers at the expense of our nation as a whole. This Commission has the opportunity and the appropriate legal authority to avoid this grim future. This Commission must reclassify broadband internet access providers and enact strong policies in favor of an Open Internet in order to ensure that America's internet ecosystem will be free to continue to create, innovate, and thrive long into the future.