

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Restoring)	
Internet Freedom)	WC Docket No. 17-108
Promoting the Open Internet)	

**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**

ON THE MAY 18, 2017

NOTICE OF PROPOSED RULEMAKING

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I. INTRODUCTION

As the chief consumer protection officers in our respective states, the undersigned state attorneys general write in opposition to the Notice of Proposed Rulemaking (NPRM),¹ which suggests that the Federal Communications Commission may eliminate or modify the Open Internet rules² adopted in the 2015 order *In the Matter of Protecting and Promoting the Open Internet (Title II Order)*³ and affirmed by the District of Columbia Circuit Court in *United States Telecom Association v. Federal Communications Commission* (2016).⁴ Changes to the Open Internet rules would contradict consumers' understanding of the role of their Internet Service Provider (ISP) and would unnecessarily expose consumers to the risk that their Internet access will be interfered with and disrupted.

We urge the Commission to consider paramount the impact that this proposal would have on consumers' trust and free use of the Internet. The NPRM's proposed change in policy is unwarranted because (1) consumers expect and rely on an open Internet, (2) these rules were previously adopted based on a demonstrated need and upheld on judicial review, and (3) there has been no change in the function of the Internet or consumer perception of Internet access service that would justify reversing existing policy. Failure to address any other issue should not be seen as agreement or waiver of any position related to those issues.

¹ *In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108 (May 18, 2017) (NPRM).

² 47 C.F.R. Part 8.

³ *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

⁴ *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) *reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017).

II. REGULATIONS TO ENSURE AN OPEN INTERNET MUST MATCH THE REALITIES OF TODAY’S INTERNET USE AND RESPECT CONSUMER EXPECTATIONS AND NEEDS.

Understanding how consumers interact with their ISP and acknowledging their expectations must be at the core of any consumer protections designed to protect a free and open Internet. As the D.C. Circuit held in *USTA*, whether a service should be classified as a telecommunications service or an information service should be based in large part on the consumer’s perception and use of that service.⁵ The current Open Internet rules were based on the premise that consumers expect and deserve an open and transparent Internet and that their right to access their chosen content without interference from their service provider should be protected. The existing rules recognize that the Internet has become an essential service in our society, and that role could be compromised by allowing private companies, many of which have conflicts of interest, to dictate the terms of consumers’ access to and use of the Internet. Consumers expect transparency and fairness from their Internet service when they go online, and those expectations should be reflected in the FCC’s rules.

A. An open Internet is essential to consumers’ daily lives.

The NPRM correctly acknowledges that “Americans cherish a free and open Internet.”⁶ The Internet is the source of most consumers’ daily consumption of information, news, and entertainment. It is essential for access to public services and government functions, like filing taxes and enrolling for healthcare coverage. Thirty-two percent of American undergraduate students have taken online courses.⁷ Thirty-eight percent of consumers with a bank account access mobile banking services, a number that continues to rise along with the use of

⁵ *USTA*, 825 F.3d at 698-99.

⁶ NPRM ¶ 1.

⁷ National Center for Education Statistics, “Distance Education in Postsecondary Institutions,” Nov. 2015 (reporting that during the 2011-2012 school year, about 7.4 million undergraduate students took an online course).

smartphones.⁸ As of 2015, seventy-nine percent of Americans have made a purchase online, compared to only twenty-two percent in the year 2000.⁹ Eighty-five percent of American adults get their news from a mobile device.¹⁰

In particular, entertainment sites on the Internet continue to expand, with consumers watching videos on both their fixed home and mobile devices, to the point that Internet access to entertainment is displacing subscriptions to pay television services, such as cable or satellite services.¹¹ Fixed broadband ISPs offer consumers more than 1000 gigabits of data every month,¹² and mobile broadband providers offer “unlimited” data for mobile broadband consumers.¹³ Mobile broadband providers predict that the demand for data will increase five times, from 17 T Mb in 2016 to 80.5 T Mb in 2021, driving the need for investment in next generation (5G) mobile broadband service.¹⁴

This variety of uses for the Internet demonstrates that consumers use their Internet service for much more than just accessing information provided by their ISP. Consumers’ free access to third-party sites and mobile applications has allowed Internet service to become an

⁸ Board of Governors of the Federal Reserve System, “Consumers and Mobile Financial Services 2016,” 7, March 2016, available at: <https://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201603.pdf>.

⁹ Pew Research Center, “Online Shopping and E-Commerce,” Dec. 19, 2016, available at: <http://www.pewinternet.org/2016/12/19/online-shopping-and-e-commerce/>.

¹⁰ Pew Research Center, Kristine Lue, “Growth in mobile news use driven by older adults,” June 12, 2017, available at: <http://www.pewresearch.org/fact-tank/2017/06/12/growth-in-mobile-news-use-driven-by-older-adults/>.

¹¹ Ian Morris, “Netflix is now Bigger Than Cable TV,” Forbes, June 13, 2017, <https://www.forbes.com/sites/ianmorris/2017/06/13/netflix-is-now-bigger-than-cable-tv/#31691334158b>.

¹² See, e.g., Comcast: <https://dataplan.xfinity.com/>; AT&T: <https://www.att.com/esupport/article.html#!/u-verse-high-speed-internet/KM1010099>

¹³ See, e.g., <https://www.verizonwireless.com/plans/verizon-plan/> (accessed July 6, 2017) (“Verizon hotspot included for no extra charge, you’ll never go over again.”); <https://www.att.com/> (accessed July 6, 2017) (“Get unlimited data and 60+ DIRECTV NOW channels for a great price. After 22GB of data usage, AT&T may slow speeds.”)(“You deserve super-fast Internet. Surf, stream, chat and game with Internet 1000 and enjoy speeds like never before on our 100% fiber network.”); https://www.t-mobile.com/cell-phone-plans?icid=WMM_TM_Q117TMO1PL_H85BRNKTD037510 (accessed July 6, 2017)(“One plan. All unlimited”), <https://www.xfinity.com/support/cable-tv/live-tv-streaming/> (accessed July 6, 2017)(“Watch Live TV and XFINITY On Demand Content Online and on Your Mobile Device”); <https://www.verizonwireless.com/solutions-and-services/video/> (access July 6, 2017)(“Video Streaming. Watch TV, Movies, and Live Sports”).

¹⁴ CTIA, Future of Wireless, presented on June 7, 2017, Illinois Commerce Commission Smart Cities and Small Cell Networks Policy Session, available at: <https://www.icc.illinois.gov/telecommunications/policy/>.

integral part of everyday life. Just as consumers expect that they will be able to call any number through their telephone company, they expect that they will be able to reach any website through their ISP. This freedom has given rise to the innovation that has become characteristic of today's Internet. The rapid expansion of smartphone use and the impact it has had on consumers' consumption of information demonstrates the importance of maintaining an open and accessible Internet for consumers.

B. Consumers expect that their ISP will be transparent about its practices and will be held accountable for violating them.

Consumers expect that an ISP will disclose its network management practices. When consumers visit a website and provide information about themselves, they might review the website's privacy policy to determine how that site will protect or share information about them. If a website fails to honor any commitments in its privacy policy about its data collection or privacy practices, consumers, as well as state and federal regulators, can hold them accountable. This system is not perfect and many privacy policies obfuscate the true nature of a websites' data collection and privacy practices. Requiring disclosures about the conditions and management of the service that a consumer has purchased is even more crucial, as it allows consumers to assess whether they are getting the service they paid for.

Because most consumers view their Internet service as a means for accessing other content, they are far less likely to expect that an ISP would interfere with their Internet usage. For service as crucial as that provided by an ISP, consumers should be entitled to know if an ISP decides to change the terms by which the consumer can access the Internet. Strong regulations that promote transparency are crucial to ensuring that ISPs are living up to their promises and consumer expectations.

III. THE OPEN INTERNET RULES PROVIDE ESSENTIAL CONSUMER PROTECTIONS THAT ARE CRITICAL TO PRESERVING A CONSUMER-DRIVEN INTERNET.

In the 2015 *Title II Order*, the Commission adopted five rules governing how ISPs treat consumers' Internet use.¹⁵ It included three “bright line” rules, which are:

- (1) No blocking of lawful applications, services, or non-harmful devices, subject to reasonable network management, so that consumers can send and receive the content of their choice;¹⁶
- (2) No throttling (i.e. the purposeful slowing of available bandwidth) or degrading of lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management, so that no content is slowed down or made more difficult to access;¹⁷ and
- (3) No paid prioritization, or directly or indirectly favoring some traffic over other traffic, in exchange for consideration or to benefit an affiliated entity.¹⁸

The Commission also adopted a general conduct rule that an ISP should not “unreasonably interfere with or unreasonably disadvantage” consumers' use of the Internet.¹⁹ This rule was intended to “enable flexibility in business arrangements and ensure that innovation in broadband and edge provider business models is not unduly curtailed” while providing “sufficient certainty and guidance to consumers, broadband providers, and edge providers—particularly smaller entities that might lack experience dealing with broadband providers—while

¹⁵ *Title II Order*.

¹⁶ 47 C.F.R. § 8.5.

¹⁷ *Id.* § 8.7.

¹⁸ *Id.* § 8.9. The no paid prioritization rule also includes a waiver provision to provide some flexibility to address practices that may benefit the public. (“The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.” § 8.9(c))

¹⁹ *Id.* § 8.11.

also allowing parties flexibility in developing new services.”²⁰ The *Title II Order* set out several factors that it would consider in reviewing policies under the general conduct rule.²¹

Lastly, the Commission retained the transparency rule initially adopted in 2011.²² It requires ISPs to “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.”²³

The NPRM describes these rules as “utility-style regulation” and a “massive and unprecedented shift in favor of government control of the Internet.”²⁴ However, the Open Internet rules are not “government control of the Internet.” The Open Internet rules represent the same principles to counter potential ISP self-interest that have been embraced by the Commission since 2004.²⁵ The rules recognize that an ISP’s financial or corporate interests may be at odds with consumers’ interest in an open Internet,²⁶ and they protect consumers against ISP practices that could interfere with consumers’ ability to access the Internet content of their choice. The rules do not interpose the government between the consumer and the consumer’s use of the Internet as suggested in the NPRM.²⁷

²⁰ *Title II Order* ¶ 138.

²¹ *Id.* ¶¶ 139-146.

²² 47 C.F.R. § 8.3.

²³ *Id.*

²⁴ NPRM ¶ 3.

²⁵ *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14,986 (2005) (*Internet Policy Statement*); see also, NPRM ¶¶ 13-15.

²⁶ *Title II Order* ¶¶ 102-103; see also *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (referring to FCC’s conclusion regarding competition between third-party services and ISP affiliates, stating that “absent rules such as those set forth in the Open Internet Order, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.”); *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (finding that Comcast blocked consumer access to peer-to-peer website without consumer knowledge). Recent mergers of Comcast and NBC Universal, Verizon and AOL and Yahoo, AT&T and DirectTV, and the pending AT&T/Direct TV and Time Warner merger all create potential conflicts between the delivery of third-party content and a preference for an ISP’s affiliate content.

²⁷ NPRM ¶ 3.

The NPRM suggests that the Open Internet rules should be revisited and Internet access service reclassified because of the “increased regulatory burdens and regulatory uncertainty stemming from the rules.”²⁸ The Commission refers to “significant regulatory burdens,” “depressed investment,” and the cost of “newly imposed regulatory requirements,” as evidence that the rules are too onerous.²⁹ The Open Internet rules, however, act largely as prohibitions on harmful conduct and they should not impose affirmative costs on ISPs. This is particularly true in light of the NPRM’s acknowledgement that the principles underlying the rules have generally been accepted and followed by ISPs since at least 2010.³⁰

The *Title II Order* reflected a “tailored regulatory approach.”³¹ When the Commission adopted the *Title II Order*, it acknowledged theoretical burdens on ISPs and specifically limited common carrier obligations.³² The Commission declined to apply regulations otherwise applicable under the Telecommunications Act of 1996,³³ and it limited the regulations to the Open Internet rules, stating that it would:

forbear from other requirements, including pre-existing tariff requirements and Commission rules governing rate regulation, which we find are not warranted here. Thus, any pre-existing rate regulations adopted by the Commission under its Title II authority—including any regulations adopted under sections 201 and 202—*will not be imposed on broadband Internet access service as a result of this Order.*³⁴

²⁸ *Id.* ¶ 44.

²⁹ *Id.* ¶ 45.

³⁰ *Id.* ¶¶ 15, 80, 85. Nevertheless, Comcast was cited for violating the rules in 2007, but the Court found that the Commission lacked authority to enforce under the then current rules and classifications.

³¹ *Title II Order* ¶ 513.

³² *Id.* ¶ 458; 47 U.S.C. § 153(50).

³³ 47 USC § 153(50).

³⁴ *Title II Order* ¶ 452 (2015). Section 10 of the Communications Act provides that the Commission “shall forbear” from applying rules if the rules are not necessary to ensure that the carrier’s practices are just and reasonable and are not unreasonably discriminatory, are not necessary to protect consumers, and are not necessary to protect the public interest and competition. 47 U.S.C. § 160; *see also* *USTA*, 825 F.3d at 727.

While the *Title II Order* required ISPs to refrain from interfering with consumers' use of the Internet, it did not impose significant regulation on ISPs and imposed no obligations on content providers.

Additionally, any relatively minor regulatory burden created by the *Title II Order* should be weighed against the potential harm that unregulated conduct could cause to consumers. For example, in 2010, the D.C. Circuit accepted the Commission's conclusion that Comcast blocked consumer access to peer-to-peer websites in violation of federal policy.³⁵ In its review of the Commission's 2010 Open Internet rules, the *Verizon* court agreed with the Commission that ISPs have the economic power to restrict consumer access to websites, and noted that ISPs "function as a 'terminating monopolist,' with power to act as a 'gatekeeper' with respect to edge providers that might seek to reach its end-user subscribers."³⁶ The NPRM's proposed elimination of the Open Internet rules does not give sufficient recognition to the purpose and goal of the Open Internet rules: to protect consumers from harmful conduct.

The Commission should not change the Open Internet rules or the tailored regulatory approach adopted in the *Title II Order*. The rules provide clear limitations on conduct to assure that consumers' ISPs do not intrude into or control consumers' rights to access the Internet without interference. The Commission agrees that consumers expect a free and open Internet, and the existing rules are needed to assure that these expectations are not frustrated now or in the future.

³⁵ *Comcast v. FCC*, 600 F.3d at 645 ("the Commission ruled that Comcast had "significantly impeded consumers' ability to access the content and use the applications of their choice," and that because Comcast "had several available options it could use to manage network traffic without discriminating" against peer-to-peer communications, its method of bandwidth management "contravened ... federal policy.") (internal citations and punctuation omitted).

³⁶ *Verizon*, 740 F.3d at 646.

IV. THE CURRENT TELECOMMUNICATIONS CLASSIFICATION FOR INTERNET ACCESS IS CORRECT AND SHOULD NOT BE CHANGED.

A. The history of the Open Internet rules demonstrates that a telecommunications services classification is appropriate.

The NPRM discusses the history of the Open Internet rules and asks if an information service classification would support Open Internet rules.³⁷

The Telecommunications Act of 1996 creates two classes of services: (1) “telecommunications services,” which are subject to traditional common carrier regulation, and (2) “information services,” which are not.³⁸ It defines the term “telecommunications” as:

the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.³⁹

The term “telecommunications service” is defined as:

the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.⁴⁰

A telecommunications carrier is defined as:

any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). *A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services*, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.⁴¹

An information service is defined as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

³⁷ NPRM ¶¶ 6-22.

³⁸ 47 U.S.C. § 153(51) (2010).

³⁹ *Id.* § 153(50).

⁴⁰ *Id.* § 153(53).

⁴¹ *Id.* § 153(51).

information via telecommunications, and includes electronic publishing, but *does not include* any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁴²

The NPRM asks for comment about the text, structure and history of the law and its application to Internet access and how the Internet works.⁴³ In the 1990s, at the inception of broadband service, the Commission treated the line that delivered Internet access as a telecommunications service, and gave independent ISPs access to it under the unbundling provisions of the Telecommunications Act of 1996.⁴⁴ At the same time, the incumbent telephone company could establish its own ISP affiliate, and access the same transmission path as other ISPs.⁴⁵ The D.C. Circuit has related this history in its review of prior open Internet orders.⁴⁶

In 2002, the Commission classified *cable* Internet access service as an information service and a divided Supreme Court deferred to the FCC's judgment on the issue in *National Cable and Telecommunications Association v. Brand X* in 2005.⁴⁷ The Commission classified broadband offered by incumbent telephone companies as an information service later in 2005.⁴⁸ Despite these deregulatory moves, the Commission under Chairmen Michael Powell and Kevin Martin was concerned about the ability of ISPs to undermine the openness of the Internet and harm consumers. The Commission adopted the Open Internet Policy Statement in 2005, declaring that consumers are "entitled to access the lawful Internet content of their choice."⁴⁹

⁴² *Id.* §153(24) (emphasis added).

⁴³ *Id.* ¶¶ 25, 38-43.

⁴⁴ *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24,012, ¶ 11 (1998).

⁴⁵ *Id.*

⁴⁶ *USTA*, 825 F.3d at 691-692; *Verizon v. FCC*, 740 F.3d 623, 630-631 (D.C. Cir. 2014); *Comcast v. FCC*, 600 F.3d 642, 649 (D.C. Cir. 2010).

⁴⁷ 545 U.S. 967 (2005) (*Brand X*).

⁴⁸ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14,853 (2005), *affirmed Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *see also* NPRM ¶ 14.

⁴⁹ *Internet Policy Statement* ¶ 4; NPRM ¶ 15.

However, until the *Title II Order* was affirmed in *USTA*,⁵⁰ efforts to enforce that policy failed in the courts.

In 2010, the D.C. Circuit in *Comcast v. FCC* held that the Commission lacked authority to enforce the Open Internet Policy Statement because the Commission did not act under specific statutory authority.⁵¹ In response to the *Comcast* ruling, the Commission made another attempt to adopt Open Internet rules, which were reviewed in *Verizon v. FCC*.⁵² In that case, the D.C. Circuit held that the Commission could not adopt Open Internet rules that mirrored the essential no-blocking and non-discrimination obligations of a common carrier because the Commission had previously classified Internet service as an “information service” and not a “telecommunications service.”⁵³ The Court stated:

We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has “relegated [those providers], *pro tanto*, to common carrier status.” In requiring broadband providers to serve all edge providers [*e.g.* web sites or information sources] without “unreasonable discrimination,” this rule by its very terms compels those providers to hold themselves out “to serve the public indiscriminately.”⁵⁴

The *Verizon* decision left the Commission with two options: (1) reclassify Internet service as a “telecommunications” service or (2) attempt to adopt rules that could keep the Internet “open” but continue to treat broadband access as an “information service.”⁵⁵

In affirming the Commission’s *Title II Order*, the D.C. Circuit in *USTA* held that the *Title II Order* properly changed the classification of Internet access to telecommunications.⁵⁶ The

⁵⁰ *USTA*, 825 F.3d at 701-711.

⁵¹ *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

⁵² *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014).

⁵³ *Id.*

⁵⁴ *Id.* at 655-656.

⁵⁵ *Id.*

⁵⁶ *USTA*, 825 F.3d at 700.

Court applied the standard for reclassification from *Brand X*,⁵⁷ and found that the Commission had articulated a “reasoned interpretation to change course” based on “the factual particulars of how Internet technology works and how it is provided.”⁵⁸

Only one year after the D.C. Circuit’s affirmance of the current rules, the NPRM asks if the current classification of Internet access as a telecommunications service and the associated rules should be reversed.⁵⁹ The evidence that led the FCC to adopt the Open Internet rules has not changed; and those current rules and classification should not be changed, either.

B. The current telecommunications classification accurately reflects how ISPs operate and how consumers view Internet access service and should not be changed.

The NPRM asks for comment on whether the current classification of Internet access should be changed from a telecommunications service to an information service.⁶⁰ Consistent with this focus on consumers’ perception of Internet access service, the NPRM seeks comment on how consumers are using broadband Internet access service today.⁶¹

When consumers access the Internet, they expect to send and receive their chosen content without change in the form or content of the information as sent and received. This is the fundamental attribute of a telecommunications service.⁶² Websites that generate, store, or otherwise manage information for consumers, such as news sites or email services, generate or provide information and fall within the definition of an information service.

⁵⁷ *Nat’l Cable and Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. at 981-982 (2005) (“[T]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.”).

⁵⁸ *USTA*, 825 F.3d at 702, 703.

⁵⁹ NPRM ¶ 24.

⁶⁰ *Id.* (“Today, we propose to reinstate the information service classification of broadband Internet access and return to the light-touch regulatory framework.”)

⁶¹ NPRM ¶ 28.

⁶² *Verizon*, 740 F.3d at 655-56.

In *USTA*, the D.C. Circuit reviewed the *Title II Order*'s conclusion that Internet access meets the definition of a telecommunications service. The Court stated that classification should take into account "the end user's perspective," and it affirmed the Order's conclusion that "consumers perceive broadband as a standalone offering."⁶³ The Court found sufficient evidence to support the Commission's findings that:

- Consumers use Internet access principally to access third-party content;⁶⁴
- Consumers "focus on transmission to the exclusion of add-on applications;"⁶⁵
- Third-party Internet content dominates the broadband experience and has grown from approximately 36 million websites to an estimated 900 million websites between 2003 and 2015;⁶⁶
- Many consumers "have spurned the applications offered by" their ISPs in favor of third-party services;⁶⁷ and
- ISPs own marketing focus on transmission speeds – not on content or web services.⁶⁸

Additionally, the record in the *Title II Order* demonstrated that consumers primarily use their ISP as a path to third-party content on the Internet, and that the information services offered by their ISP, such as email or news feeds, were incidental and easily replicated by third parties.⁶⁹ For example, third-party email services were among the ten Internet sites most frequently visited during a single week, with more than 700 million visits to just two sites despite the fact that ISPs offer their own email sites to their customers.⁷⁰ The Court accepted the Commission's

⁶³ *Id.* at 698-99, 704-05 ("[T]he record contains extensive evidence that consumers perceive a standalone offering of transmission, separate from the offering of information services like email and cloud storage.").

⁶⁴ *Id.* at 689.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 699.

⁶⁸ *Id.*

⁶⁹ *USTA*, 825 F.3d. at 697-700 (for example, third-party email services were among the ten Internet sites most frequently visited during a single week, with more than 700 million visits to just two sites despite the fact that ISPs offer their own email sites to their customers).

⁷⁰ *Id.* at 698.

conclusion in the *Title II Order* that consumers do not view the transmission of their chosen content to be “integrated” with the ISPs’ information services.⁷¹

Consumers’ perception of their Internet access service as the transmission of content without change in form or content has not changed in the two years since the *Title II Order* was entered. For example, consumers still shy away from using the email addresses available with their subscriptions because it presents a barrier to changing providers. While many ISPs offer security software to address computer virus and other threats, third party vendors provide the same services which may be sold at the time a computer is purchased or online at a later time.⁷² Access to ever-increasing third-party content over ISP services confirms that the ISP provides a transmission service that sends and delivers content of the consumer’s choosing “without change in the form or content of the information as sent and received.”⁷³

In its review of the *Title II Order*, the D.C. Circuit in *USTA* accepted the *Title II Order*’s evidentiary findings regarding consumers’ use of ISP services.⁷⁴ The *USTA* Court commented, “Even the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content.”⁷⁵ The Court detailed the ways consumers use access to reach third party content, and concluded that:

Indeed, given the tremendous impact third-party internet content has had on our society, it would be hard to deny its dominance in the broadband experience. Over the past two decades, this content

⁷¹ *Title II Order* ¶ 365 (“To the extent that broadband Internet access service is offered along with some capabilities that would otherwise fall within the information service definition, they do not turn broadband Internet access service into a functionally integrated information service. To the contrary, we find these capabilities either fall within the telecommunications systems management exception or are separate offerings that are not inextricably integrated with broadband Internet access service, or both.”), cited in *USTA*, 825 F.3d at 697.

⁷² See, e.g., Consumer Reports buying guide for security software, <http://www.consumerreports.org/cro/security-software.htm> ; security software offered where computers sold, <http://www.bestbuy.com/site/security-utilities/antivirus/pcmcat209700050013.c?id=pcmcat209700050013>; McAfee Internet Security, <https://promos.mcafee.com/offer.aspx?id=1281369&culture=en-us&affid=1194&cid=214142&ctst=1&pir=1> ; Site offering multiple options for free security software <http://download.cnet.com/s/security/>.

⁷³ See 47 U.S.C. § 153(50) (defining telecommunications).

⁷⁴ *USTA*, 825 F.3d at 696.

⁷⁵ *Id.* at 698.

has transformed nearly every aspect of our lives, from profound actions like choosing a leader, building a career, and falling in love to more quotidian ones like hailing a cab and watching a movie. The same assuredly cannot be said for broadband providers' own add-on applications.⁷⁶

The function of the ISP, to transmit consumer content without change in form or content, has not changed. The current classification of Internet access as a telecommunications service accurately reflects the function of an ISP to send and receive consumer communication, much as traditional telephone service provided the conduit for consumers to place and receive the calls of their choice. Consumers know that a provider of telephone service does not have the right to interfere with consumer calls. Similarly, a provider of Internet access does not have the right to interfere with consumers' use of the Internet. The telecommunications classification accurately reflects the ISPs' role as transmitting information of the consumer's choice without change in form or content.

C. ISPs' unchanged use of information services does not warrant changing the telecommunications classification.

The NPRM asks whether certain software and systems used by ISPs for the management and operation of their systems support an information service classification.⁷⁷ ISPs use Domain Name Service (DNS) and caching to interpret consumer keyboard commands and route traffic through the network.⁷⁸ DNS is "most commonly used to translate domain names into numerical IP addresses that are used by network equipment to locate the desired content."⁷⁹ Caching is "the storing of copies of content at locations in the network closer to subscribers" to enable more rapid retrieval of content that consumers frequently request.⁸⁰ While it is clear that these are

⁷⁶ *Id.*

⁷⁷ NPRM ¶ 37.

⁷⁸ *USTA*, 825 F.3d at 709.

⁷⁹ NPRM at FN 94, *quoting* the *Title II Order*.

⁸⁰ *Id.* at FN 95.

technical functions used to manage the network, even if they are considered information services that generate, store or retrieve information, the Telecommunications Act of 1996 specifically exempts information services used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service” from the definition of an information service.⁸¹ The use of DNS and caching does not support a change in classification.

The *USTA* Court reviewed the *Title II Order*’s conclusion that ISPs’ reliance on certain information services to transmit content to end-users does not turn Internet access service into an information service. The Court explained how ISPs use DNS and caching, and rejected the argument that these functions turn Internet access service into an information service.⁸² The Court affirmed the Commission’s conclusion that DNS allows “more efficient use of the telecommunications network by facilitating accurate and efficient routing from the end user to the receiving party,” and that caching enables “more rapid retrieval of information.”⁸³

An ISP’s use of DNS, caching or other functions that support the delivery of a consumer’s chosen content, even if they are properly classified as information services under the Telecommunications Act of 1996, does not support changing the classification of Internet access as a telecommunications service. The Commission should not alter the telecommunications classification of Internet access service adopted in the *Title II Order* and affirmed by the *USTA* Court.

⁸¹ 47 U.S.C. § 153(24).

⁸² *USTA*, 825 F.3d at 705.

⁸³ *Id.*

D. The Commission must meet a higher standard of review if it reverses a recently adopted policy.

The NPRM also requires comment on whether and how the Commission should modify or eliminate the existing rules.⁸⁴ Under the Administrative Procedures Act, when an agency reverses existing policy, it must show a change in circumstances and policy and provide strong reasons for disregarding prior factual and policy conclusions.⁸⁵ As the *USTA* Court explained:

When reversing existing policy, the Supreme Court has held that the APA requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It is not that further justification is demanded by the mere fact of policy change, but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” Put another way, “it would be arbitrary and capricious to ignore such matters.”⁸⁶

The way consumers use the Internet, and their interest in accessing third party content without interference from their ISP, have not changed in the two years following the *Title II Order*. The current telecommunications classification is based on the actual function of Internet access, and the rules adopted in the *Title II Order* remain important consumer protections. The power of ISPs to block content, accept paid priority, and slow down or throttle select Internet usage has not changed. Further, an ISP’s financial incentives to favor its affiliates’ Internet sites have only grown stronger. Most importantly, consumer reliance on unfettered access to Internet content continues to grow, making protecting the consumer expectation of free Internet access as compelling today as it was in 2015.

⁸⁴ *Id.* ¶ 70.

⁸⁵ *Id.* (quoting *FERC v. Electric Power Supply Ass’n*, — U.S. —, 136 S.Ct. 760, 784 (2016)); *see also* 5 U.S.C. § 706.

⁸⁶ *Id.* at 708-709 (internal citations and punctuation omitted).

The Commission should decline to change the Open Internet rules. The short time between the *Title II Order*, *USTA*, and today and the lack of change in consumer use of Internet access demonstrate that there are not substantial reasons or justification for the wide-ranging change in policy and rules suggested in the NPRM.

V. GIVEN CONSUMER EXPECTATIONS AND THE PROPER CLASSIFICATION OF INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE, THE COMMISSION SHOULD RETAIN THE CURRENT OPEN INTERNET RULES.

The current Open Internet rules, including the no blocking, no paid priority, and no throttling rules, ensure that when consumers pay for Internet service, ISPs cannot provide a lesser service by restricting or favoring certain content. As the FCC acknowledged in the *Title II Order*, “broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls.”⁸⁷ This reality has only increased since 2015. While consumers increasingly rely on their broadband service or smart phone to replace the functions of traditional cable television and telephone service, market consolidation has resulted in both fewer and larger ISPs, giving a small number of providers large control over the market. Even in the areas of the country with more than one broadband competitor, long-term contracts and installation fees make it difficult to switch providers. Competition therefore provides an inadequate check against abusive practices.

A. Prohibitions on blocking, paid priority and throttling are necessary to ensure consumers have true freedom of choice.

The NPRM acknowledges the importance of unfettered consumer access to content: “We emphasize that we oppose blocking lawful material,” but suggests that the prohibitions on

⁸⁷ *Title II Order* ¶ 20.

blocking, paid priority, and throttling are not necessary.⁸⁸ Without enforceable rules assuring that their ISPs will deliver all content and services as requested, there are no guarantees that consumers will not be deprived of the freedom they now enjoy when they go online.

The NPRM opposes ISPs blocking Internet content but questions whether throttling is harmful to consumers.⁸⁹ Throttling, or slowing or impairing consumers' Internet traffic, is a form of discrimination that interferes with consumers' freedom to use the Internet as they choose.⁹⁰ Similarly, pay-for-priority arrangements enable some web sites to pay broadband providers a fee so that their content is given special, priority treatment.⁹¹ In both situations, the effect might be subtle, resulting in the public being discouraged from using throttled sites or directed to favored sites without their knowledge. If ISPs can discriminate among content through blocking, throttling, or paid prioritization, they can effectively pick winners and losers, interfering with the public's ability to freely use the Internet. The three bright line rules should not be changed.

B. There is a real risk that consumers will suffer harm if the Open Internet rules are revoked.

This is not merely a hypothetical problem. The desire of ISPs to dictate the terms on which their customers can access certain websites and applications is well known. In 2014, Comcast and Netflix announced a deal in which Netflix would pay Comcast to provide faster service to Netflix subscribers.⁹² The *Title II Order* referred to Verizon's statement at Oral

⁸⁸ NPRM ¶¶ 80-88.

⁸⁹ NPRM ¶ 83.

⁹⁰ *Title II Order* ¶¶ 119-124.

⁹¹ *Id.* ¶¶ 126-127 (“Prioritizing some traffic over others based on payment or other consideration from an edge provider could fundamentally alter the Internet as a whole by creating artificial motivations and constraints on its use, damaging the web of relationships and interactions that define the value of the Internet for both end users and edge providers, and posing a risk of harm to consumers, competition, and innovation.”)

⁹² New York Times, “Comcast and Netflix Reach Deal on Service,” Feb. 23, 2014, available at: https://www.nytimes.com/2014/02/24/business/media/comcast-and-netflix-reach-a-streaming-agreement.html?_r=0. (Although this was an interconnection deal, rather than an example of traffic discrimination on Comcast's network,

Argument in *Verizon* that “but for [the 2010 Open Internet Order] rules we would be exploring [such] commercial arrangements.”⁹³ In 2015 and 2016, the FCC expressed concern about several mobile service providers that gave preferential treatment to subsidiary streaming video services.⁹⁴ Although preferential treatment for one service may sound like a benefit for the customers of that service, it also diminishes the ability of consumers of other services to access their content of choice at the same speeds and reliability. This imposes a cost on those consumers who use sites that do not receive preferential treatment. Small start-ups that can’t afford to pay for preferential treatment might not survive, reducing competition and leaving consumers with access to fewer innovative online services. Furthermore, this preferential treatment arrangement is not designed to provide a service to the consumer; it is designed to serve the interests of the ISP and gives the consumer no control or choice in the matter. The Open Internet rules are necessary to protect consumer online freedom.

C. The transparency rule bolsters the Open Internet rules by ensuring that consumers can assess whether their ISP is providing the proper service.

The NPRM asks whether “to keep, modify, or eliminate the transparency rule.”⁹⁵ At the same time, the NPRM states that the Commission continues to support effective disclosure of ISP network management and other practices.⁹⁶ It also concludes that “the disclosure

it still demonstrates that ISPs have the power and desire to extract payments from web companies for better service. Due to the potential for abuse, the FCC should maintain its oversight of these types of interconnection arrangements.)

⁹³ *Title II Order* ¶ 127, citing *Verizon Oral Arg. Tr.* at 31.

⁹⁴ See Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Robert W. Quinn, Jr., Senior Executive Vice President, External and Legislative Affairs, AT&T, dated December 1, 2016; Letter from Jon Wilkins, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Kathleen Grillo, Senior Vice President and Deputy General Counsel, Public Policy and Government Affairs, Verizon, dated December 1, 2016; Letter from Roger Sherman, Chief, Wireless Telecommunications Bureau, to Kathleen Ham, Senior Vice President, Governmental Affairs, T-Mobile (Dec. 16, 2015).

⁹⁵ NPRM ¶ 89.

⁹⁶ *Id.*

requirements were among some of the least intrusive regulatory measures” adopted by the *Title II Order*.⁹⁷

The transparency rule is a key consumer protection and it should be retained by the Commission. The rule provides that an ISP:

shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumer to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.⁹⁸

While the terms of a privacy policy or network management policy may be technical and challenging for consumers to decipher, transparency promotes good practices and enables consumers and state attorneys general to understand the terms and limitations of an ISP’s services. The transparency rule represents good policy and there has been no change in circumstances to justify changing or withdrawing it.

The NPRM recognizes the value of transparency rules and notes that the Court has upheld transparency rules in both the *Verizon* and the *USTA* decisions.⁹⁹ In addition to the legal validity of transparency rules, consistent rules applied uniformly to all ISPs will provide certainty to both consumers and providers. Existing transparency rules require ISPs to publicly disclose accurate information about their privacy practices ensuring that the FCC, attorneys general, and consumers can hold ISPs accountable if they violate those policies through Section 201 of the Communications Act. Further, transparency rules ensure that consumers – and regulators – can monitor the data collection and privacy practices of ISPs. Without these protections and without strong disclosure requirements, it would be difficult, if not impossible,

⁹⁷ *Id.* ¶ 90.

⁹⁸ 47 C.F.R. § 8.3.

⁹⁹ NPRM ¶¶ 88-89.

for consumers to determine whether their service includes network management policies or other conditions that may interfere with their online use and whether one ISP's policies differ from another ISP. Consumers will not be able to make accurate decisions about whether one ISP better suits their preferences over another if uniform disclosure requirements are eliminated. The transparency rule should not be changed.

VI. CONCLUSION

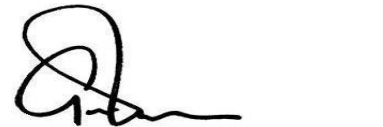
For the foregoing reasons, the undersigned Attorneys General request that the Commission decline to change the existing Open Internet Rules or the classification of Internet access service as a telecommunications service subject to common carrier obligations.




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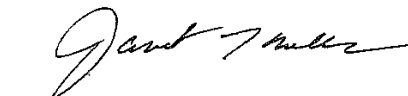
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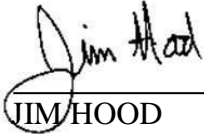
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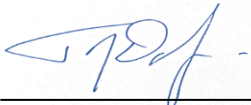
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