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

In the Matter of	**)**	
	)	
Protecting and Promoting the Open Internet	**)**	GN Docket No. 14-28

COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION

July 18, 2014

TABLE OF CONTENTS

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	)	
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NTCA–THE RURAL BROADBAND ASSOCIATION

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits its comments in response to the Notice of Proposed Rulemaking released on May 15, 2014 in the above-captioned proceeding.[2] The *Open Internet NPRM* seeks comment on proposed rules by which the Federal Communications Commission ("Commission") can promote the Internet as an open platform for innovation, competition, economic growth, and free expression.

I. INTRODUCTION AND SUMMARY

Although the Commission's inquiry appears focused on the potential actions of retail broadband Internet access service providers, there are multiple participants in the ecosystem that makes up the Internet (the "Service and Network Ecosystem") who have both the incentive and ability to either fulfill or frustrate consumer expectations with respect to an "Open Internet." Accordingly, NTCA proposes that any rules the Commission may adopt be tailored to protect customers, promote competition and innovation, and ensure universal access to broadband by taking stock of the entirety of the Service and Network Ecosystem – including last mile, middle

[1] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many provide wireless, video, satellite, and/or long distance services as well.

[2] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) ("*Open Internet NPRM*").

mile, and backbone network facilities, as well as retail broadband Internet access services and content/edge services that utilize those facilities – rather than putting a regulatory patch on only selected segments (*e.g.*, last mile or retail access) of that broader ecosystem.

To promote seamless interconnection across this Service and Network Ecosystem and to ensure that consumer expectations will be fulfilled at every turn, the Commission should take several targeted and carefully tailored steps. First, with respect specifically to the transport and transmission capacity on all networks over which data travel, the Commission should ensure: (1) these networks will be interconnected on just and reasonable terms; (2) that it has the clear and unquestionable ability to step in when those networks do *not* interconnect seamlessly, and (3) important public policy goals of consumer protection, universal service, competition, and public safety are not threatened by the unjust and unreasonable acts or omissions of any given network operator. NTCA further urges the Commission to utilize its Section 706 authority to apply a reciprocal "no blocking" rule to preclude both retail broadband Internet access providers ("ISPs") and so-called "content" or "edge" providers ("Content/Edge Providers")[3] from denying basic consumer access to content, applications, or services that are otherwise available on the Internet. On the other hand, the Commission should refrain at this time from adopting its proposed "commercially reasonable practices" standard and instead monitor the extent to which a reciprocal "no blocking" rule fulfills the desired public policy objectives. Finally, the Commission should simply retain its existing transparency rule – pending a further review of its effectiveness – as the record does not currently support modifications to that rule.

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[3] *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, FCC 10-201 ("*Open Internet Order*"), ¶ 20 (defining "edge" providers as entities "providing content, applications, services, and devices accessed over or connected to broadband Internet access service").

II. THE COMMISSION SHOULD ADDRESS PROBLEMS THROUGHOUT THE SERVICE AND NETWORK ECOSYSTEM THAT THREATEN TO UNDERMINE CONSUMER EXPECTATIONS, COMPETITION, INNOVATION, OR UNIVERSAL SERVICE, RATHER THAN FOCUSING ON "LAST MILE" OR "RETAIL" ISP SERVICES ALONE.

Throughout the *Open Internet NPRM*, the Commission primarily examines the relationship between retail ISPs and Content/Edge Providers, focusing on the perceived incentive and ability of the former to exercise market power over the latter.[4] Although this may be one area of concern, a singular focus on "last mile" or "retail" ISPs fails to recognize the breadth of the relationships that exist amongst and between: (1) those entities; (2) other entities in the Service and Network Ecosystem; and (3) consumers. Broadband Internet access service providers and Content/Edge Providers exist in a multi-sided market. For example, while there usually is no direct privity between most retail ISPs and Content/Edge Providers, their relationship nevertheless warrants consideration: consumers find value in broadband through access to services, applications, and content offered by Content/Edge Providers, while Content/Edge Providers need the networks and services provided by retail ISPs for their services, applications, and content to be of use to consumers. Each party thus has the ability to enhance or undermine the successful operation of the other and its ability to serve consumers. Moreover, other network providers exist in this Service and Network Ecosystem and are just as critical to its functioning and resultant achievement of significant public policy goals. Middle mile providers, transit providers, backbone providers, and content delivery networks ("CDNs") all hold themselves out to retail ISPs and Content/Edge Providers alike as being capable of conveying data from one point to another for purposes of data

[4] *Open Internet NPRM*, ¶¶ 18, 39-53.

traveling between broadband consumers and the servers on which services, applications, and content reside.

While last mile/retail ISPs might theoretically be capable of withholding access to their customers in exchange for remuneration,[5] incentives and abilities to withhold or throttle access exist throughout this Service and Network Ecosystem. As one notable example, a recent dispute between content provider Viacom and certain cable providers over *traditional video content* reportedly led Viacom to block access to otherwise free and available *online content* for the broadband Internet access subscribers of at least some cable companies.[6] Such blocking of "free" online content is (or at least should be) every bit as concerning as the potential behavior that the Commission apparently seeks to address in the *Open Internet NPRM*.[7] Specifically, such conduct threatens consumers' ability to access the content, applications, and services that they choose via their broadband connection, all at the unduly discriminatory whim of a Content/Edge Provider seeking to protect its competitive interests in other service and product markets.

Similar concerns exist with respect to the variety of interconnected networks "in the middle" over which data travel to fulfill consumer demands. Clearly defined "rules of the road" are necessary and essential to ensure that consumer expectations are neither undermined nor defied

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5 *See, Id.* at ¶ 50.

6 *Viacom Dispute: Small Cableco Customers Can't Access Free Web Content*, Telecompetitor (May 7, 2014), available at: http://www.telecompetitor.com/viacom-dispute-small-cableco-customers-cant-access-free-web-content/.

7 *See, Open Internet NPRM*, ¶¶ 18, 39-53. To be clear, this concern with respect to online blocking is not intended to apply to and should not implicate content or applications placed behind "paywalls" or subject to subscriptions; such intellectual property rights of course should be respected. But if content or applications are purportedly "freely" available on the Internet, a consumer should not be denied access to such content or applications merely because they happen to use one ISP rather than another for retail broadband Internet access.

as a result of issues "in the middle" – unseen disputes or disagreements between underlying network operators that can result in diminished or even denied consumer service. This is particularly important for consumers served by smaller or rural ISPs, since these providers possess little, if any, bargaining power in negotiating the terms of interconnection with larger network operators and CDNs. For example, a push by larger providers for the use of fewer interconnection points spread out across wider geographic areas[8] threatens to impose significant new costs on rural ISPs and, by extension, rural consumers and businesses, as this contemplates smaller providers bearing full financial responsibility for carriage of traffic to points of interconnection several hundred miles or more outside their service areas (often over facilities owned by those larger providers). The Commission should recognize (as these same larger providers clearly do) that underlying networks do not become costless (or "free") in an IP-enabled world[9] – and the Commission must therefore adopt "rules of the road" to ensure that these costs will be borne equitably to avoid undermining, if not defeating altogether, the concept of universal service in a broadband world.

The controversy surrounding the reported agreement between Comcast and Netflix[10] for Comcast's carriage of Netflix traffic offers a prime example of why the focus in this proceeding

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[8] *See, e.g., Ex Parte* Letter from Brian Benison, Director – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Commission, GN Docket No. 13-5, WC Docket Nos. 13-97 and 10-90 (dated Jan. 24, 2014), at Presentation Slide 11 (showing 5 to 8 interconnection points total nationwide as the model for both Tier 1 IP voice and peering interconnection).

[9] *See, e.g., Ex Parte* Letter from Robert C. Barber, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Commission, WC Docket No. 10-90, CC Docket No. 01-92, GN Docket No. 14-28 (filed July 17, 2014), at Presentation Slides 15 to 18 (noting that "Carriage of Internet Traffic is Not Without Cost," presumably to help justify the various interconnection charging structures described in prior slides).

[10] *Netflix to Pay Comcast for Smoother Online Streaming*, Los Angeles Times (Feb. 23, 2014), available at: http://www.latimes.com/entertainment/envelope/cotown/la-fi-ct-netflix-comcast-20140224-story.html#page=1.

should – indeed, must – be broadened beyond a singular focus on "last mile" or retail ISPs, and instead extended to *all* networks involved in the transmittal of data from one point to another. In years past, when the rather straightforward exchange of data between parties was not clouded by claims that the exchange itself was somehow "enhanced" merely because the data originated in a certain type of protocol, the industry and consumers had a regulatory backstop to ensure that connections would be maintained and consumers would not suffer while parties involved in an interconnection dispute resolved their differences.

This regulatory backstop is no less important in an IP world. Although Comcast and Netflix ultimately reached an agreement, their dispute must serve as a warning that the lack of clear "rules of the road" and a regulatory backstop governing interconnection and exchange of data in an IP world can threaten enduring values of universal service, public safety, competition, and consumer protection. Even the most comprehensive "consumer-facing" rules will, if focused solely on "last mile" retail ISP service, fail to preserve these values. The "no blocking" rule proposed in the *Open Internet NPRM* might prevent a retail ISP from engaging in troubling behavior such as blocking otherwise "free" content that consumers desire, but the proposed rules do not address the substantial potential for disputes between operators of the underlying networks or how those disputes could ultimately affect consumers. If we learn anything about interconnection of networks from the epidemic of rural call "in-completion,"[11] it should be that in

[11] The negative effects of the lack of clear "rules of the road" can already be seen today in other important contexts. NTCA and its members have for several years now reported an alarming number of voice calls placed to rural areas that simply fail to complete. *See, e.g., Ex Parte* Letter from Shirley Bloomfield, Chief Executive Officer, NTCA, to Hon. Julius Genachowski, Chairman, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 at 2-3 (filed Sept. 20, 2011); *Ex Parte* Letter from Michael Romano, Counsel for NTCA, Stuart Polikoff, Vice President of Regulatory Policy and Business Development, Organization for the Promotion and Advancement of Small Telecommunications Companies, and Derrick Owens, Director of Government Affairs, Western

the absence of clear rules and a regulatory backstop, questionable practices that wreak adverse (and unlawful) impacts upon consumers can thrive (and perhaps become unstoppable) in the "unwatched middle."

At bottom, "rules of the road" are essential to ensure that data flow seamlessly across networks on an "end-to-end" basis as demanded by consumers, and that relative market power and associated bargaining power do not enable certain providers to foist costs upon rivals and demand concessions with respect to interconnection terms or pricing in a manner that undermines universal service and competition. Clear and transparent rules would provide certainty that fosters innovation and investment, creating a framework to ensure that the Internet remains open and available to consumers in all areas of the country.

The Commission itself has recognized that consumers' Internet experiences rest upon a complex, multi-sided ecosystem, and do not turn solely upon the actions of last mile/retail ISPs. A recent Commission blog entry captures this notion perfectly:

> No one company defines your personal Internet experience. The Internet Service Providers (ISPs) that sell you Internet access are only one part of a complex ecosystem that also includes backbone providers, content delivery networks, and other Internet traffic actors. The connection points between and among these groups

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Telecommunications Alliance, to Theresa Z. Cavanaugh and Margaret Dailey, Investigations and Hearings Division, Enforcement Bureau, FCC (filed June 13, 2011); *Ex Parte* Letter from Jill Canfield to Marlene H. Dortch, Secretary, FCC, WC Docket No. 13-39 at 1-2 (filed Aug. 19, 2013). Although the Commission has taken some action to attempt to get to the source of this problem, *see, e.g., FCC Launches Rural Call Completion Task Force to Address Call Routing and Termination Problems in Rural America,* News Release (rel. Sept. 26, 2011); *Rural Call Completion,* Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 13-39, FCC 13-135 (rel. Nov. 8, 2013), the very existence of these problems highlights the need for targeted, reasonable regulation to protect consumer expectations and promote universal service and public safety. Put another way, the rural call completion epidemic should be seen by policymakers as a "canary in a coal mine," showing the risks that can arise in the absence of clear "rules of the road." In addition, the now decade-long refusal to classify VoIP services as just another voice service like any other only "muddies the water" and perpetuates regulatory uncertainty that undermines, rather than furthers, the network investments needed to make such services available to consumers.

have many names: peering, transit, proxy services, interconnection, or traffic exchange.[12]

Accordingly, the Commission should examine and adopt carefully tailored rules to address *all* aspects of the Service and Network Ecosystem, in lieu of imposing obligations on any one component alone.

III. ALL TRANSPORT AND TRANSMISSION CAPACITY OFFERED ON UNDERLYING NETWORKS SHOULD BE REGULATED PURSUANT TO TITLE II, REGARDLESS OF ANY SERVICES OFFERED ATOP SUCH CAPACITY OR THE TYPE OF CAPACITY OFFERED.

When the D.C. Circuit Court invalidated the Commission's Open Internet rules, it did not find them unnecessary as a policy matter. Rather, it ruled only on jurisdictional grounds. According to the court, the Commission's choice to "classify Broadband providers in a manner that exempts them from treatment as common carriers" precluded it from adopting "anti-discrimination and anti-blocking rules."[13] Circumstances have evolved such that it is time for the Commission to reexamine that earlier determination, particularly and specifically as it applies to *the transport and transmission component* underpinning broadband Internet access and carriage of data across networks of all kinds.

The Communications Act charges the Commission with "regulating interstate and foreign commerce in communication by wire and radio."[14] "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing,

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[12] Official FCC Blog (Jun. 18, 2014), available at: http://www.fcc.gov/blog/internet-traffic-exchange-time-look-under-hood.

[13] *Verizon v. FCC*, 740 F.3d 623, p.4 (D.C. Cir. 2014).

[14] 47 U.S.C. § 151.

without change in the form or content of the information as sent and received."[15] A "telecommunications service" is in turn 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,"[16] and a provider of telecommunications service is subject to mandatory Title II regulation as a common carrier with respect to that service.[17] Information service providers—those offering a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications[18]—"by contrast, are not subject to mandatory common-carrier regulation under Title II."[19] When the Commission determined that broadband Internet access service was an "information service," it found that providers inextricably combine the offering of "powerful computer capabilities with telecommunications" and that the "end-user receives more than transparent transmission when she or he accesses the Internet." Nonetheless, wireline providers were allowed to choose to offer the transmission component of broadband Internet access as common carriers under Title II on a permissive basis,[20] an approach that many rural carriers have taken.

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15 *Id*. at § 153(50).

16 *Id*. at § 153(53).

17 *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

18 47 U.S.C. §153(24)

19 *Id*. at § 153(53); *Brand X*, 545 U.S. at 975-76.

20 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with*

With this as legal backdrop, and recognizing that the underlying transport and transmission networks that make possible the end-to-end delivery of services, applications, and content to consumers have as much impact on service quality and availability as retail "last mile" ISP services, NTCA proposes limited and targeted Title II regulation of *all* networks involved in the transport and transmission of data. The Commission in the *Open Internet Order*[21] understood the 2010 rules to regulate "broadband Internet access service," which it classified as an information service. But the Commission should now recognize that the transport and transmission capacity underpinning retail broadband Internet access – that is, the "network" layer, as compared to the "service" layer – falls squarely within the definition of a "telecommunications service" and thus within the Commission's regulatory authority under Title II. The transport, routing, conveyance, and exchange of data over networks is transparent, and involves no storage, transformation, or other manipulation of data. Indeed, application of regulation as a telecommunications service should apply in equal force and without distinction (or opportunity for self-selected differentiation and arbitrage) to CDNs and last mile, middle mile, and backbone network facilities that convey data of any kind.

To be clear, NTCA proposes a limited, targeted application of Title II *specifically and only with respect to transport and transmission capacity* on networks and CDNs underpinning the routing, transmittal, and exchange of data between points. Title II need not, and indeed should

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Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242, *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*"), at ¶¶ 89-95.

21 *Open Internet Order*, ¶ 44.

not, apply to all of the services offered atop these regulated networks – including, but not limited to, retail broadband Internet access as provided to the end-user. Instead, Title II should by its terms apply to those services that "ride atop" regulated networks *only* to the extent those services themselves qualify on an independent basis as regulated services under statutory definitions.[22] Thus, there should be no risk whatsoever that applying Title II to underlying *transport and transmission networks* would be tantamount to "regulating the Internet." Applying Title II to networks that merely route, transmit, and exchange data between points does not hinder innovation in "the Internet ecosystem" or saddle new services with legacy regulations. Rather, it simply ensures that the networks upon which Internet data travel will be interconnected on reasonable terms, that the Commission can step in when those networks do *not* interconnect seamlessly, and that important public policy goals of consumer protection, universal service, competition, and public safety are not threatened by the unjust and unreasonable acts or omissions of any given network operator.

The Commission would do much to protect consumers by applying a straightforward and limited Title II-based framework to all network transport and transmission facilities without distinction or opportunity for arbitrage. Sections 201 and 202 provide strong statutory grounding

[22] In other words, it is beyond time to recognize the unmistakable division between the networks and the services that ride atop them and then tailor appropriate levels of regulation for each. *See* NTCA Comments in Response to U.S. House of Representatives Energy & Commerce Committee White Paper 1: Modernizing the Communications Act (filed Jan. 31, 2014), at 2. ("With advanced networks that enable innovative service offerings, the otherwise inextricable tether between networks and services has been all but severed (although it is clear that advanced networks remain a prerequisite to cutting-edge services). One can today offer voice, video, and other data atop almost any kind of network, and underlying networks need not distinguish between types of data in performing their core functions of processing and transmission. For this reason, subject always to the touchstones of the Core Principles [of universal service, consumer protection, and competition], any legislative review and update should evaluate possible departure from 'vertical silos' of service regulation, and instead consider reasonable, carefully tailored regulation of services and networks based instead upon 'horizontal layers.'")

for limited, carefully-tailored rules to protect consumers.[23] Section 201 requires service to be provided upon reasonable request and codifies a carrier's duty to interconnect. Those who provide transport and transmission capacity will also be bound by rules prohibiting unjust and unreasonable discrimination under Section 202, and perhaps most importantly, there will be certainty regarding the resolution of complaints and enforcement mechanisms under Sections 206, 207, and 208.[24] In short, Title II can and does provide network operators with substantial flexibility to pursue tailored solutions to service needs and interconnection issues, albeit against a "regulatory backstop" to ensure that *consumers'* connectivity is not lost or unreasonably impaired due to disagreement or dispute between underlying network operators.

Moreover, as the *Open Internet NPRM* states, "access to accurate information about broadband provider practices encourages the competition, innovation, and high-quality services that drive consumer demand and broadband investment and deployment."[25] This principle should apply no less to interconnection agreements that exist for the exchange of IP-enabled and broadband traffic. In announcing that the Commission has received the agreements between certain ISPs and Content/Edge Providers and has requested others, Chairman Wheeler stated:

> consumers need to understand what is occurring when the Internet service they've paid for does not adequately deliver the content they desire, especially content they've also paid for. In this instance, it is about what happens where the ISP connects to the Internet. *It's important that we know – and that consumers know*.[26]

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23 47 U.S.C. §§ 201 and 202.

24 *Id*. at §§ 206, 207, 208.

25 *Open Internet NPRM*, ¶ 66.

26 Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion, June 13, 2014 (emphasis added).

Thus, as part of its baseline framework, the Commission should require more generally that the terms of interconnection between networks be filed for purposes of ensuring that, when problems arise, it is not in the position of begging for and then awaiting the delivery of information while consumers sit idly by.

At the same time, there can and should be clearly drawn limits to the application of Title II-based regulation to underlying networks and CDNs. The Commission should not blindly apply any and all legacy Title II regulations to the transmission and transport capacity at issue here. As the Commission's long-standing, extremely "light touch" treatment of long distance telecommunications services demonstrates, for example, Title II need not – and should not – be synonymous with heavy-handed regulation.[27] Whether via forbearance pursuant to Section 10 of the Act,[28] or through the prescription of new rules, the Commission can and should avoid application of outdated mandatory tariffing requirements or rate regulation to such network facilities.[29] There is no indication that such levels of regulation are necessary to serve the core objectives of ensuring seamless interconnection, market transparency, and non-discrimination.

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[27] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Implementation of Section 254(g) of the Communications Act of 1934, as amended*, FCC 96-424, Order on Reconsideration (rel. Aug. 20, 1997) (reaffirming commitment to detariffing policies for most interstate long distance services).

[28] 47 U.S.C. § 160.

[29] Even if such regulation need not compel the mandatory tariffing of these transport and transmission services, the Commission should, however, preserve the ability of carriers to voluntarily submit tariffs with respect to such facilities. *See Wireline Broadband Order*, at ¶¶ 89-95. The Commission should also ensure that each carrier/network operator can, consistent with its obligations to all customers under Title II, continue to engage in the kinds of reasonable network management necessary to enable the best possible experience for all users of that network.

IV. BOTH RETAIL ISPs AND CONTENT/EDGE PROVIDERS SHOULD BE SUBJECT TO LIMITED, TARGETED REGULATION THAT PROHIBITS BLOCKING PURSUANT TO SECTION 706.

The *Open Internet NPRM* proposes to rely upon Section 706 of the Telecommunications Act of 1996[30] to adopt a "no blocking" rule that would apply to retail/last mile ISPs.[31] NTCA supports the adoption of a consumer-facing "no blocking" rule, but such a rule should apply in equal measure to both retail ISP operations as well as Content/Edge Providers, given that the latter category would appear to have at least the same incentive and ability to block data as the former.[32]

Based upon current law, regulation under Section 706 provides a basis for the imposition of some basic level of regulation (although not common carriage regulations) on retail broadband Internet access as an information service. Specifically, Section 706 offers the Commission the authority to impose obligations where needed to preserve the openness of the Internet in the context of accelerating broadband deployment. Section 706(b) "empower[s] [the Commission] to take steps to accelerate broadband deployment if and when it determines that such deployment is not reasonable and timely."[33]

As discussed earlier in these comments, retail broadband Internet access service providers and Content/Edge Providers operate in a multi-sided market. Without content, there is no need for broadband; and without broadband, content is of little, if any, use or value. This is not unlike the

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30 *See* 47 U.S.C. § 1301, *et seq.*

31 *Open Internet NPRM*, ¶¶ 94 & 142.

32 Presumably, underlying network operators would be subject to a separate, basic "no blocking" restriction as well pursuant to the "light touch" regulatory framework described in the preceding section.

33 *Verizon*, 740 F. 3d at 641.

"virtuous cycle" underlying the proposed Open Internet rules. Specifically, in discussing the legal standard upon which the Commission aims to base the "no blocking" rule, the Commission notes that the "core purpose" is based in part on the "virtuous cycle" of consumer demand, which can be "adversely impacted by broadband network practices that, over the long term, depress end user demand, which then threatens broadband deployment."[34] The *Open Internet NPRM* states that "threats to the open Internet, such as limitations on users to access the content of their choice or speak their views freely, are therefore within the authority of the Commission to curb."[35]

When viewed through this lens, it is difficult to see a difference between a retail broadband ISP's "incentive and ability to limit openness"[36] and a Content/Edge Provider's withholding of access to certain services, applications, or content.[37] In fact, Content/Edge Provider blocking of otherwise freely available content upon an unduly discretionary whim is nothing less than a limitation on users' access to the content of their choice,[38] and as such, has as much adverse impact on consumer demand for broadband service as the theoretical behavior that triggered this proceeding. Consumers displeased with the prospect that the online content of their choice may not be available due to a dispute between a retail ISP and a Content/Edge Provider may see less

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34 *Open Internet NPRM*, ¶ 118.

35 *Id*.

36 *Id*. at ¶¶ 39-53.

37 For purposes of clarification, this concern with respect to online blocking is not intended to apply to and should not implicate the placement of content or applications behind "paywalls" or information subject to subscriptions; as noted earlier in these comments, such intellectual property rights of course should be respected. The point rather is that online content, services, and applications should be available without distinction specifically as to the ISP through whom any given consumer may obtain broadband.

38 *Open Internet NPRM*, ¶ 118.

need to keep, or utilize, their broadband subscription. This resulting depression in "end user demand, which then threatens broadband deployment,"[39] is at the very heart of this proceeding.

By contrast, NTCA urges the Commission to refrain from adopting the proposed "commercially reasonable practices" standard at this time. As an initial matter, that standard, defined in the NPRM as "practices that, based on the totality of the circumstances, threaten to harm Internet openness and all that it protects,"[40] is unreasonably vague. This lack of definition may hinder innovation as various entities fear taking actions that could be found to "threaten the Open Internet" (however that may be defined going forward through years of litigation and enforcement action). Instead, the Commission should monitor the effectiveness of a reciprocal "no blocking" rule and determine the extent to which any additional regulation might be warranted.

In addition, the Commission should simply maintain the existing "transparency" rules as upheld by the DC Circuit Court of Appeals in January 2014 in lieu of attempting to enhance those rules now.[41] For one thing, it is unclear why an "enhanced transparency" rule is even necessary at this time. Indeed, the NPRM seeks comment on how to measure the effectiveness of the existing rule.[42] It would be illogical for the Commission to impose additional burdensome requirements before it has even determined whether existing provisions are sufficient. Moreover, while the *Open Internet NPRM* discusses consumers' frustrations with the quality of service as compared to

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39 *Id*.

40 *Id*. at ¶ 116.

41 *Verizon*, 740 F.3d at 659.

42 *Open Internet NPRM*, ¶ 67.

advertised speeds,[43] it has been shown that such advertised speeds are quite often accurate predictions of the quality of service that end users ultimately receive.[44]

To be clear, transparency should be a Commission goal. As noted above, however, additional steps with respect to transparency should focus at this time on providers "higher up the chain" – that is, those operating underlying networks that can have as much an effect on consumers as last mile facilities and who to date have been subject to little, if any, obligations with respect to transparency. The Commission's steps in seeking access to the Comcast/Netflix and similar agreements represent a sensible first step in this regard, in lieu of expanding the scope of the transparency rules with respect to only one segment of the Service and Network Ecosystem.

V. CONCLUSION

The Commission should broaden its focus beyond retail broadband Internet access services or "last mile" transport and facilities to ensure that any rules ultimately adopted leave no gaps within the Service and Network Ecosystem in the interest of protecting consumers, promoting competition and innovation, and ensuring universal access to broadband. Limited, targeted application of Title II, specifically and only with respect to transport and transmission capacity on networks and CDNs underpinning the conveyance of data between points, would ensure that: (1) these networks over which data travel will be interconnected on just and reasonable terms; (2) the

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[43] The NPRM admits that when viewing consumer complaints, "[i]n some cases, however, it is difficult to discern whether the consumer's frustration is with slow speeds or high prices generally, or instead with how the service as actually provided differs from what the provider has advertised." *Open Internet NPRM*, n. 163.

[44] *2014 Measuring Broadband America Fixed Broadband Report, A Report on Consumer Fixed Broadband Performance in the U.S.*, at 14, available at: http://www.fcc.gov/reports/measuring-broadband-america-2014 (stating that "[t]he February 2013 Report showed that the ISPs included in the Report were, on average, delivering 97 percent of advertised download speeds during the peak usage hours. This Report finds that ISPs now provide 101 percent of advertised speeds") (internal citations omitted).

Commission can step in when those networks do *not* interconnect seamlessly, and (3) important public policy goals of consumer protection, universal service, competition, and public safety are not threatened by the unjust and unreasonable acts or omissions of any given network operator.

NTCA further urges the Commission to utilize its Section 706 authority to apply a reciprocal "no blocking" rule that will preclude both retail ISPs and Content/Edge Providers from denying basic consumer access to content, applications, or services that are otherwise available on the Internet. On the other hand, the Commission should refrain at this time from adopting its proposed "commercially reasonable practices" standard, and instead first monitor the extent to which a reciprocal "no blocking" rule fulfills the desired public policy objectives. Finally, the Commission should simply retain its existing transparency rule – pending a further review of its effectiveness – as there is no clear indication from the record that an enhanced rule of any kind is warranted.

Respectfully submitted,

By: /s/ Michael R. Romano
Michael R. Romano
Jill Canfield
Brian Ford
4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203
mromano@ntca.org
703-351-2000 (Tel)
703-351-2001 (Fax)