Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF ITTA

ITTA – The Voice of Midsize Communications Companies ("ITTA") hereby submits its comments in response to the Notice of Proposed Rulemaking ("*NPRM*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] In the *NPRM*, the Commission proposes to adopt a new Open Internet framework to replace the net neutrality rules the U.S. Court of Appeals for the D.C. Circuit struck down in *Verizon v. FCC*.[2] Specifically, the Commission proposes to enhance the transparency rule upheld by the Court,[3] revise the no-blocking rule the Court struck down by requiring Internet service providers ("ISPs") to afford a minimum level of access to edge providers,[4] replace the non-discrimination rule the Court overturned with a "commercially reasonable practices" standard,[5] and use Section 706 of the Communications Act as the statutory basis for such actions.[6]

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

[2] *See In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) ("*Open Internet Order*"), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[3] *See NPRM* at ¶¶ 66-88.

[4] *See id.* at ¶¶ 89-109.

[5] *See id.* at ¶¶ 110-41.

[6] *See id.* at ¶¶ 143-47. The Commission also seeks comment on alternatives to these proposals,

I. SUMMARY

ITTA maintains that any rules the Commission adopts in this proceeding should apply equally to all broadband providers. In the 2010 *Open Internet Order*, the Commission drew an artificial distinction between fixed and mobile broadband providers, subjecting fixed broadband providers to more stringent regulatory requirements.[7] However, there is no principled basis for treating fixed and mobile broadband providers differently and the societal and economic values the Commission aims to protect through imposition of net neutrality rules will be diminished if the "rules of the road" vary based on the technology used to gain access to the Internet. The Commission should apply any Open Internet rules it adopts in this proceeding to all ISPs in a technologically neutral manner.

There is no legal basis for the Commission to prohibit ISPs from entering into paid prioritization agreements with edge providers. As the Commission acknowledges in the *NPRM*, section 706 provides no authority for such action because it would constitute impermissible common carrier regulation of information services.[8] The Commission also lacks authority to prohibit paid prioritization under Title II. Title II prohibits "unjust and unreasonable discrimination;" however, a long line of legal precedent has established that this provision allows carriers to charge different prices for different services.[9] Thus, no legal path exists that would permit the FCC to ban pay-for-priority or other arrangements for preferential access between edge providers and ISPs.

ITTA urges the Commission to refrain from adopting enhanced transparency rules. There

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including whether to reclassify Internet service as a Title II telecommunications service, which would subject ISPs to common carrier regulation. *See id*. at ¶¶ 148-55.

[7] *See Open Internet Order* at ¶¶ 94-96.

[8] *See NPRM* at ¶ 138.

[9] 47 U.S.C. § 202(a).

is no evidence of market failure that would justify the burdens associated with such requirements. The Commission's proposed rules would impose unnecessary costs on ISPs based on hypothetical concerns that are not supported by record evidence of actual harm to consumers that the existing transparency rules would not adequately address.

II. THE COMMISSION SHOULD APPLY ANY OPEN INTERNET RULES IT ADOPTS IN A TECHNOLOGICALLY NEUTRAL MANNER

As noted above, the *Open Internet Order* established different rules for fixed and mobile broadband providers. Under the 2010 rules, fixed broadband providers were subject to a broad prohibition on "block[ing] lawful content, applications, services, or non-harmful devices, subject to reasonable network management," while mobile broadband providers faced narrower prohibitions on blocking access to lawful websites and "applications that compete with the provider's voice or video telephony services, subject to reasonable network management."[10] In the *NPRM*, the Commission proposes to adopt the same approach, and seeks comment on this proposal.[11]

The Commission should apply any Open Internet rules it adopts to all ISPs, regardless of the technology used to deliver Internet service. If the Commission's goal is to safeguard consumers' ability to access and effectively use the lawful content, applications, services, and devices of their choice on the Internet, it follows that the rules the Commission believes will achieve that goal should apply to all ISPs. Network management practices may vary depending on the technology used to provide Internet access, but the Commission's rules accommodate those technological differences by taking into account the particular network architecture and

[10] *Open Internet Order* at ¶ 99.

[11] *NPRM* at ¶ 105.

technology used to provide broadband Internet access service.[12] While the characteristics of mobile broadband networks may necessitate network management practices that would not be necessary in most fixed networks, the Commission's definition of reasonable network management is flexible enough to allow for such differences.

The Commission's rationale for differential treatment of fixed and mobile broadband networks is based in large part on the operational constraints that affect mobile broadband services.[13] As the Commission noted, "[m]obile broadband speeds, capacity, and penetration are typically much lower than for fixed broadband, though some providers have begun offering 4G service that will enable offerings with higher speeds and capacity and lower latency than previous generations of mobile service."[14] What the Commission fails to acknowledge, however, is that fixed broadband providers face many of the same challenges. For example, fixed broadband providers, like mobile broadband providers, operate with a finite amount of capacity, such that broadband performance at any given time depends on the types of applications and number of users consuming bandwidth.

Continuing to apply different regulations to different technology platforms creates perverse results. As one commenter has observed, the Commission's tentative conclusion to subject Wi-Fi services to different rules depending on whether they are fixed or mobile would subject a single data stream to different regulatory standards depending on whether it is being delivered via the provider's licensed mobile wireless service or has been off-loaded to an

[12] *See Open Internet Order* at ¶ 103 ("in determining whether a network management practice is reasonable, the Commission will consider technical, operational, and other differences between wireless and other broadband Internet access platforms").

[13] *See id*. at ¶ 95.

[14] *Id*.

unlicensed Wi-Fi service.[15] This distinction no longer makes sense in light of the increasing provision of Wi-Fi by broadband providers and the growing reliance by end users on Wi-Fi for the off-load of wireless broadband. As other commenters have noted, "[e]nd users should have the same freedom to use and access Internet resources whether their device is connected over WiFi to a wired LAN or, moments later, connected over a wireless carrier's network."[16]

As the Commission concluded in the *Open Internet Order*, the benefits of Internet openness, including increased consumer choice, freedom of expression, and innovation, apply to end users accessing the Internet using mobile services as well as fixed services.[17] There is one Internet, and it should remain open for consumers and innovators alike, regardless of whether it may be accessed through different technologies and services. The Commission should use the opportunity presented by this proceeding to reevaluate its previous decision to treat broadband services differently simply because they are provided over different technological platforms and extend any net neutrality rules it adopts to all ISPs.[18]

III. THE COMMISSION LACKS AUTHORITY TO PROHIBIT PAID PRIORITIZATION ARRANGEMENTS BETWEEN ISPs AND EDGE PROVIDERS

The Court overturned the no blocking rule adopted by the Commission in the *Open*

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[15] *See* Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28 (filed Mar. 26, 2014), at 10. *See also Open Internet Order* at ¶ 49 (explaining that the no-blocking and non-discrimination rules for fixed broadband services "encompass fixed wireless broadband services (including services using unlicensed spectrum)").

[16] Comments of the Open Technology Institute of the New America Foundation, GN Docket No. 14-28 (filed Mar. 23, 2014), at 11.

[17] *Open Internet Order* at ¶ 93.

[18] *See* Statement of Commissioner Mignon L. Clyburn, attached to *NPRM* at p. 91 (noting that this proceeding presents "a unique opportunity to take a fresh look and evaluate our policy in light of developments that have occurred in the market over the last four years, including the increased use of WiFi, deployment of LTE, faster speeds and connections to homes, schools, libraries, and the increased used of broadband on mobile devices, to name a few").

Internet Order because the rule improperly relegated fixed broadband providers to common carrier status.[19] In response to the decision, the Commission proposes in the *NPRM* to adopt the 2010 no blocking rule with the clarification that it allows broadband providers to engage in individualized negotiations with edge providers subject to a "commercial reasonableness" standard. So long as ISPs provide a minimum level of access to lawful Internet content, they would not violate the rule in serving customers and carrying traffic on an individually negotiated basis.[20] At the same time, however, the Commission seeks comment on whether it should prohibit broadband providers from entering into priority agreements with edge providers, including pay-for-priority arrangements.[21]

The Commission lacks authority to ban paid prioritization arrangements. As the *NPRM* recognizes, section 706 cannot be used to prohibit such arrangements.[22] Likewise, the Commission cannot look to Title II to ban pay-for-priority agreements. Title II only authorizes the FCC to prohibit "unjust or unreasonable discrimination," and both the Commission and the courts have consistently interpreted that provision as allowing carriers to charge different prices for different services.[23] Thus, there is no legal basis for the Commission to prohibit paid prioritization arrangements or other forms of preferential access between edge providers and ISPs.

Moreover, banning paid prioritization agreements ignores the realities of today's

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[19] *Verizon v. FCC*, 740 F.3d at 655-56.

[20] *See NPRM* at ¶ 89.

[21] *See id.* at ¶ 96.

[22] *See id.* at ¶138 (emphasizing that section 706 "could not be used" to institute a flat ban on pay-for-priority service without running afoul the Communications Act's prohibition on the imposition of common carriage obligations on information services).

[23] *See* Dissenting Statement of Commissioner Ajit Pai, attached to *NPRM* at p. 94.

communications marketplace and the benefits such arrangements have for consumers. It is routine for entities that do business over the Internet to pay for a variety of services to provide an optimal user experience for their customers.[24] Companies have been doing so for years without disturbing the thriving Internet ecosystem, proving that concerns that paid prioritization will degrade service for other users and relegate them to a so-called "slow lane" are unfounded.[25]

IV. THE COMMISSION SHOULD NOT ADOPT INCREASED DISCLOSURE REQUIREMENTS ABSENT EVIDENCE OF AN ACTUAL PROBLEM RESULTING IN REAL HARM TO CONSUMERS

The *NPRM* seeks comment on the Commission's tentative conclusion to enhance the transparency rule to improve its effectiveness.[26] Under the current transparency rule, ISPs are required to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of their broadband Internet access services sufficient for consumers to make informed choices regarding the purchase and use of such services and for edge providers to develop new Internet applications and offerings.[27] Such disclosure, the Commission believes, "encourages the competition, innovation, and high-quality services that drive consumer demand and broadband investment and deployment."[28]

The Commission now proposes to expand the transparency rule in various ways, including mandating tailored disclosures for each of edge providers, consumers, and the FCC;[29] the use of a standardized label that would provide broadband customers with information on average upload and download speeds, the monthly fee averaged over three years, and usage

[24] *See* Dissenting Statement of Commissioner Michael O'Rielly, attached to *NPRM* at p. 99.

[25] *See id.*

[26] *NPRM* at ¶ 67.

[27] *See Open Internet Order* at ¶ 54.

[28] *NPRM* at ¶ 66.

[29] *See id.* at ¶ 68.

restrictions such as data caps;[30] disclosure of packet loss, latency, and jitter;[31] disclosure to transit providers, content delivery network providers, and other entities;[32] disclosure of paid prioritization arrangements and changes to network practices when they occur;[33] and disclosure of information about network congestion, including its source, timing, speed, and duration.[34]

The Commission posits that disclosure policies are among the most effective and least intrusive regulatory measures at the Commission's disposal.[35] However, that is true only if the burdens do not outweigh the benefits associated with such requirements. Here, the enhanced transparency requirements proposed by the Commission are a solution in search of a problem. The Commission has pointed to no reliable evidence that the proposed disclosures will actually correct any problems that the current rules do not address. For instance, the Commission attempts to justify the need for improved transparency based on complaints from consumers suggesting that broadband providers may not be providing end users with accurate information regarding speeds, charges, and other commercial practices.[36] However, the Commission expressly acknowledges that "it is difficult to discern [from these complaints] 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."[37] In short, the examples provided by the Commission amount to hypothetical concerns that fail to demonstrate

[30] *See id.* at ¶ 72.

[31] *See id.* at ¶ 73.

[32] *See id.* at ¶ 76.

[33] *See id.* at ¶ 78.

[34] *See id.* at ¶ 83.

[35] *See id.* at ¶ 66.

[36] *Id.* at ¶ 69.

[37] *Id.* at n. 163.

an actual problem resulting in real harm to consumers. The Commission should not expand its transparency rule without any verifiable evidence that existing requirements have failed to achieve their intended purpose.

Commissioner O'Rielly aptly describes the Commission's various proposals for enhanced transparency as "a wish list of disclosures, reporting requirements, and certifications that will impose new burdens and carry real costs, but may not even be meaningful to end users."[38] As he points out, "what will the average consumer do with information on packet corruption and jitter?"[39] Absent any attempt by the Commission to quantify and compare the cost of the enhanced transparency requirements it is proposing against the supposed benefits, the Commission should not impose these new obligations on broadband providers.[40]

[38] Dissenting Statement of Commissioner Michael O'Rielly, attached to *NPRM* at p. 99.

[39] *Id.*

[40] *See id.*

V. CONCLUSION

The Commission should use the opportunity presented by this proceeding to ensure that any rules it adopts are applied in a technologically neutral way. It would be inappropriate for the Commission to adopt the proposals in the *NPRM* regarding paid prioritization and enhanced transparency because it lacks either the authority or evidentiary basis to do so.

Respectfully submitted,

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