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

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

REPLY COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION

September 15, 2014

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I. INTRODUCTION AND SUMMARY

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits its reply comments in response to comments filed regarding the Notice of Proposed Rulemaking released on May 15, 2014 in the above-captioned proceeding.[2] As NTCA stated in its initial comments, there are multiple participants in the ecosystem that make 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." As such, NTCA proposed that any rules the Commission may adopt to protect customers, promote competition and innovation, and ensure universal access to broadband take stock of the entirety of this Service and Network Ecosystem, including last mile, middle mile, and backbone network facilities, as well as retail broadband Internet access services and Content/Edge Providers[3] that utilize those facilities. Focusing only

[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*").

[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").

on selected segments (*e.g.*, last mile or retail access) of the broader ecosystem, as the *Open Internet NPRM* does, would only function as a "regulatory patch" that would fail to protect consumers' continued, seamless access to the vast array of content, applications, and services that broadband Internet access services can make available to them.

To that end, NTCA proposed, and the record supports, Commission action to treat all transport and transmission capacity on any underlying networks that convey data between one point and others as subject to Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). Such action will promote seamless interconnection across the Service and Network Ecosystem and protect consumers. It is also well within the Commission's authority, as the function of data conveyance, regardless of format or "protocol" in carrying data from one point to another, places the transport and transmission component of broadband squarely within the definition of a "telecommunications service."

The record also supports NTCA's proposal to adopt a "no blocking" rule utilizing its authority under Section 706 of the Telecommunications Act of 1996[4] and to apply it equally in all respects to both retail Internet Service Provider ("ISP") operations and Content/Edge Providers. Such a provision is well within the Commission's authority as confirmed by the D.C. Circuit Court of Appeals[5] and is necessary to ensure that both ISPs and Content/Edge Providers do not stall or stymie the "virtuous cycle" of innovation associated with consumer access to content and applications.

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4 47 U.S.C. § 1301, *et seq.*

5 *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir.2014).

The record does not, however, support the adoption of a "commercially reasonable practices" standard at this time. Commenters recognize that the rule as proposed in the *Open Internet NPRM* is overly broad and vague, in addition to being unnecessary at this time.

Finally, the record supports retaining, rather than enhancing, the existing transparency rules as adopted in 2010. There is no indication that the existing provisions are failing in any respect, and proposed enhancements are unnecessary to further Commission objectives.

II. THE RECORD SUPPORTS ACTION TO TREAT ALL TRANSPORT AND TRANSMISSION CAPACITY ON UNDERLYING NETWORKS AS SUBJECT TO TITLE II

To promote seamless interconnection across the Service and Network Ecosystem, and to ensure that consumer expectations will be fulfilled at every turn, NTCA proposed in initial comments several targeted and carefully tailored steps, the first being the treatment of all transport and transmission capacity on underlying networks as subject to Title II of the Act. As discussed below, many parties commenting on the *Open Internet NPRM* recognize that not only would such action be well within the Commission's legal authority, circumstances have evolved such that it is time for the Commission to reexamine its existing policies, particularly and specifically as it applies to the transport and transmission component underpinning broadband Internet access and the carriage of data across networks of all kinds.

As an initial matter, and as a legal backdrop for this discussion, the Act defines "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."[6] A "telecommunications service" is in turn defined as "the offering of

[6] 47 U.S.C. § 153(50).

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."[7] While a provider of a telecommunications service is subject to mandatory Title II regulation with respect to that service, "information service" providers (those offering a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"[8]) are not. When the Commission classified retail broadband Internet access service as an information service, that decision turned in large part on the finding that providers inextricably combine the offering of "powerful computer capabilities with telecommunications"[9] and that the "capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission."[10]

However, as a few commenters note, the intervening years since the Commission classified retail broadband Internet access service as an information service have seen the very

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7 *Id*. at § 153(53).

8 *Id*. at § 153(24).

9 *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 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*"), ¶ 15.

10 *Id*.

nature of this service, and how consumers utilize it, change considerably. These changed circumstances call into question the Commission's previous determination, and indeed provide a strong foundation on which to acknowledge that the transport and transmission service provided on underlying networks is indeed a "telecommunications service," and should be designated as such.

For example, in initial comments, AARP offers a comprehensive discussion of how "the nature and usage of Internet access service have fundamentally changed since the early 2000s, making Title I classification an historical anachronism."[11] More specifically, AARP discusses, among many other things, the large number of consumers still utilizing dial-up service in 2001,[12] the fact that the Content/Edge provider industry was in its infancy in the early 2000s,[13] the fact that widely used social media sites did not even exist when the *Cable Modem Declaratory Ruling*[14] was issued,[15] and an overall change in the intervening years in the manner in which consumers utilize their broadband connections for voice, video, and other data services.[16] Perhaps more importantly, in addition to these changes, AARP correctly points out the changing

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[11] Comments of AARP, GN Docket No. 14-28 (fil. Jul. 15, 2014) ("AARP"), p. 6.

[12] *Id*., p. 7. *See also*, Pew Research Internet Project study showing that only 3 percent of Americans as of May 2013 used dial-up Internet access, while 70 percent over aged 18 used broadband service, available at: http://www.pewinternet.org/2013/08/26/home-broadband-2013/.

[13] AARP, pp. 11-12.

[14] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*").

[15] AARP, p. 12.

[16] *Id*., pp. 10-12.

nature of the relationship between the Internet user and the Internet provider. In short, while broadband providers today may offer services of their own (such as email, video, web-hosting, or other content) to their customers in addition to pure Internet access, this:

> does not imply that the customer will use the information services offered by the broadband provider any more than the consumer will utilize the proprietary television and video services offered by the broadband provider. As a result, the broadband service that consumers rely on primarily today is *pure transmission* between their device and remote computing resources or content of their choice.[17]

Another example in the record bolsters this conclusion. In discussing the distinction between an "information service" and a "telecommunications service," Free Press states that:

> [i]f a consumer subscribes to a cloud storage service, the photos and files she uploads and downloads to and from her computing device and her cloud storage provider are transmitted without change in form or content. If this were not the case, and her broadband carrier transformed this information, she would find no value in the service. Indeed, in this case, it is clear that the cloud company is the information service provider, offering the capability to store and retrieve information via telecommunications, while the broadband provider simply *carries* that information between points selected by the user.[18]

As Free Press goes on to note, the pure transmission nature of the service offered by broadband providers is seemingly true across the board.[19] Consumers using a Gmail email service or a streaming music service rely on their broadband provider for *pure transmission*, and the provider does not modify the form or content of the data transmitted.[20]

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[17] *Id*., p.11 (emphasis in the original).

[18] Comments of Free Press, GN Docket No. 14-28, GN Docket No. 10-127, and GN Docket No. 09-191 (fil. Jul. 17, 2014) ("Free Press"), p. 66.

[19] *Id*., pp. 66-67.

[20] *Id*.

The Center for Democracy and Technology also correctly points out that:

> [i]t may be true, as the Commission found starting in 2002, that service providers often choose to offer [the] telecommunications function together with other, non-telecommunications services. But providers' decisions to package certain services together cannot, by themselves, change the way those services are classified…The question of whether Internet connectivity is offered as a distinct service, therefore, does not turn merely on whether it is sold together with other functions. It turns, ultimately, on whether the various functions are so "integrated" that it makes more sense to think of the entire package, as a "single, . . . comprehensive service offering" of which telecommunications is just one component – as the Commission ruled in 2002. Today, there is no basis for concluding that the telecommunications function of Internet access service is integrated with non-telecommunications functions. Rather, the additional functions are either relatively minor "add-on" services that many users ignore entirely, or are largely technical processes aimed at making the telecommunications function work smoothly.[21]

In short, the previous determination that the transmission element of broadband Internet access service is inextricably intertwined with the information service, thus requiring the combined service to be classified as an information service, was made in a bygone era. The Commission should therefore now recognize that the transport and transmission capacity underpinning retail broadband Internet access – the "network" layer, as opposed to the "service" layer – falls squarely within the definition of a "telecommunications service."

Indeed, the Commission itself recognized in 2005 that the "link" between the transmission element of broadband Internet access service and the information service was not inextricable. Specifically, the 2005 *Wireline Broadband Order* granted wireline broadband providers the option of offering the transmission component of broadband Internet access as common carriers under Title II on a permissive basis,[22] and a large number of rural carriers have

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[21] Center for Democracy and Technology, GN Docket No. 14-28, GN Docket No. 10-127 (fil. Jul. 17, 2014) ("CDT"), p. 10 (Internal citations omitted).

[22] *Wireline Broadband Order*, ¶¶ 89-95.

exercised this option for nearly a decade. This reality is entirely unacknowledged by those claiming that the transmission component of broadband and the information service are "inextricably intertwined." The fact that the Commission recognized as far back as 2005 that the transmission component *could* be separated out, and *the fact that it has been separated out* and offered separately on a tariffed basis by a large number of carriers undercuts any argument that the transport and transmission layer underpinning broadband Internet access are inextricably intertwined.

In addition, it is well past time for the Commission to acknowledge the unmistakable distinction between the networks underpinning retail broadband Internet access (*i.e.*, the transport and transmission layer) and the services that ride atop them. By recognizing this distinction, and applying Title II to the transport and transmission component underpinning broadband Internet access *only*, there is no risk that such action would be tantamount to "regulating the Internet." It would, rather, simply be a recognition that the seamless interconnection of *underlying* networks that simply convey data from point A to point Z in any given circumstance is critical to consumers' continued access to the services they choose to utilize via their Internet connection. More specifically, by ensuring that such interconnection happens on a transparent basis and is not subject to unreasonable discrimination, with a regulatory backstop available to step in to ensure that connectivity is not lost while disputes between underlying network operators are resolved, the Commission can help to ensure the continued existence of an Open Internet for the benefit of consumers.

Recognition of this "service versus network" distinction is critical for other reasons as well. For one, while NTCA supports the adoption of a specific and limited reciprocal no-

blocking rule (applicable to retail ISPs and Content/Edge Providers alike, and enacted pursuant to Section 706, as discussed further, below), consumer-facing provisions of this kind are unlikely, standing alone, to ensure that consumers' expectations continue to be fulfilled. As NTCA noted in initial comments, for example, the dispute between Comcast and Netflix regarding Comcast's carriage of Netflix traffic offers a prime example of why clear and enforceable "rules of the road" and a regulatory backstop governing interconnection and the exchange of data in an IP world are necessary to secure enduring values such as universal service, public safety, competition, and consumer protection. More specifically, a consumer-facing no-blocking rule, standing alone, would fail to protect consumers in the event that parties like Comcast and Netflix were unable to come to an agreement and consumers' connections were lost as a result. Thus again, recognition of the distinction between the network and the service layer (and regulation appropriately tailored to each) is critical to promote and ensure an Open Internet.

Having the "service versus network" distinction reflected in the Commission's rules would also reduce the risk that such action will discourage or hinder innovation. To the contrary, rather than discourage investment and innovation, Commission action would simply ensure that disputes over the carriage of traffic on underlying networks do not result in the loss of seamless access for consumers. Such common-sense "rules of the road" should only incent, rather than discourage, investment in broadband networks and by Content/Edge Providers in particular, as the presence of clear and enforceable rules will signal to investors and entrepreneurs alike how disputes between underlying network providers will be addressed and that such disputes will not prevent consumers from having access to the content, applications, and services they demand.

Contrary to the dire, and somewhat hyperbolic, predictions of a few,[23] the application of Title II *only and strictly* to the transport and transmission component underpinning retail broadband service will not cause investment in broadband networks and the services that ride atop them to grind to a halt. To the contrary, a continued lack of clear "rules of the road" is far more likely to have a deleterious effect on investment nationwide by providers large and small.

Moreover, arguments that the use of Title II would "chill innovation" are built in part on the assumption that legacy Title II regulations would take us back to the 1960's or 1970's in terms of regulating the transport and transmission component underlying retail broadband services. To the contrary, there are very few Title II-regulated services today that are subject to the "heavy hand" of monopoly-era regulations. As it has with so many other Title II-regulated services, the Commission is quite capable of conducting a "smart regulatory review" and forbearing from those that do not make sense based upon the presence of competition, evolution in technology, and/or shifts in consumer preferences. For example, as NTCA stated in its initial comments, provisions such as mandatory tariffing and rate regulation are not necessary to ensure seamless interconnection, market transparency, and non-discrimination, and the Commission need not blindly apply them here. Beyond that, a thoughtful regulatory review and use of the Commission's Section 10 forbearance authority[24] can result in a targeted and unobtrusive regulatory backstop that protects both consumers' interests and the ability of every party in the

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[23] *See*, Comments of Verizon and Verizon Wireless, GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 15, 2014) ("Verizon"), p. 46; Comments of AT&T Services, Inc., GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 15, 2014) ("AT&T"), pp. 39-64; Comments of the Telecommunications Industry Association, GN Docket No. 14-28 (fil. Jul. 15, 2014) ("TIA"), pp. 15-19.

[24] 47 U.S.C. § 160.

Service and Network Ecosystem to continue offering the innovative products and services that consumers demand.

Finally, to be clear, NTCA proposes a limited and targeted application of Title II *only* with respect to the transport and transmission capacity on networks and content delivery networks underpinning the routing, transmittal, and exchange of data between points. Title II need not, and indeed should 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.[25] In fact, it never has, even prior to the Commission's classification of broadband Internet access service as an information service and that fact need not change as a result of actions taken in this proceeding. This limited and targeted use of Title II properly recognizes the bifurcated nature of broadband – the network layer versus service layer distinction – and tailors appropriate regulation designed to protect consumers' continued seamless access to the content, applications, and services they demand without unnecessary intrusion into the retail relationship between providers and consumers.

III. THE RECORD SUPPORTS THE ADOPTION OF A TARGETED NO BLOCKING RULE, ADOPTED PURSUANT TO SECTION 706 AND APPLICABLE TO BOTH RETAIL ISPS AND CONTENT/EDGE PROVIDERS ON AN EQUAL BASIS; COMMENTERS AGREE THAT THE PROPOSED "COMMERCIALLY REASONABLE PRACTICES" RULE IS UNNECESSARY

As NTCA stated in its initial comments, the Commission should adopt a consumer-facing "no blocking" rule utilizing its authority under Section 706, but such a rule should apply equally in all respects to both retail ISP operations as well as Content/Edge Providers. A number of

[25] To be clear, 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.

parties agree that this latter category of entities has the same incentive and ability to block data as the former and that the Commission has the legal authority to apply a no-blocking rule to both categories of providers.

In terms of the Commission's legal authority to adopt a no-blocking rule, as the *Open Internet NPRM* states,[26] the D.C. Circuit Court of Appeals in *Verizon v. FCC*[27] upheld the Commission's determination that Section 706 granted it the authority to address behavior that threatens the "virtuous cycle" of broadband investment. However, the *Verizon* court did rule that the "anti-blocking" and "anti-discrimination" rules – as adopted by the Commission in 2010 – were *per se* common carrier regulations that exceeded the Commission's Section 706 authority, and thus those rules were voided by the court.[28] Most importantly, the *Verizon* court did make clear that those voided rules exceeded the Commission's authority *because* they left no room for "individualized" or "negotiated" agreements between broadband providers and Content/Edge Providers. As the *Open Internet NPRM* makes abundantly clear,[29] the no-blocking rule at issue here, as proposed in the *NPRM*, does not suffer from the same infirmity. More specifically, the no-blocking rule as proposed in the *NPRM* does allow "room for individualized bargaining and discrimination in terms,"[30] and thus does not rise to the level of *per se* common carrier regulations declared void by the *Verizon* court. Thus, the Commission is on solid legal ground –

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26 *Open Internet NPRM*, ¶ 23.

27 *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir.2014).

28 *Id.* at 656-59.

29 *Open Internet NPRM*, ¶ 95.

30 *Id.*, ¶ 93, citing *Verizon*, 740 F.3d at 658 (internal quotations omitted).

in keeping with the parameters of its legal authority as delineated by the *Verizon* court – in adopting the no-blocking rule as proposed in the *NPRM*.

With that as the legal backdrop, as NTCA stated in its initial comments, retail ISPs and Content/Edge Providers operate in a two-sided market, in which 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. As NTCA stated in initial comments, this is very much like the "virtuous cycle" acknowledged by the *Verizon* court as a proper foundation upon which the Commission can base its use of section 706. The American Cable Association correctly argues that "[t]o the extent the Commission determines open Internet rules are required, the exclusion of Internet edge providers from them will undermine the rules' goals and effectiveness, and, in turn, cause distortions in the multi-sided Internet marketplace."[31] Indeed, Time Warner is correct when it states, "[a] regime that applies only to broadband Internet access providers would not only be ineffective but also potentially unlawful, as such underinclusiveness would threaten the rationality and thus legal viability of the rules."[32] Thus the Commission is on solid legal and policy grounds in adopting a no-blocking rule that applies

[31] Comments of the American Cable Association, GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 17, 2014) ("ACA"), p. 6.

[32] Comments of Time Warner Cable, Inc., GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 15, 2014), p. 26. As Time Warner goes on to state, "[p]articularly given the absence of any cogent explanation for the selectivity proposed by the NPRM, failing to address comparable practices by others in the Internet ecosystem would be arbitrary and capricious under the Administrative Procedure Act and would risk violating the Constitution. An agency acts arbitrarily and capriciously when it applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record." *Id*. Internal citations and quotations omitted.

in equal measure to both retail ISPs and Content/Edge Providers pursuant to its Section 706 authority.

In addition, as NTCA and a number of other parties note, Content/Edge Providers' conduct that threatens the virtuous cycle of investment is far from hypothetical.[33] Like NTCA, several parties point to the recent dispute between content provider Viacom and certain cable providers over traditional video content which 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.[34] Such blocking of "free" online content is every bit as concerning as the potential behavior that the Commission apparently seeks to address in the *Open Internet NPRM*, and therefore supports the application of the proposed no-blocking rule on a reciprocal basis to broadband providers and Content/Edge Providers alike.[35]

On the other hand, the record in this proceeding does not support the adoption of the "commercially reasonable practices" standard as proposed in the *Open Internet NPRM*. For one, as NTCA stated in its initial comments, the rule as proposed is unreasonably vague, as the lack

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[33] Comments of the National Cable & Telecommunications Associations, GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 15, 2014) ("Cable"), p. 77; Cox Communications, Inc., GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 18, 2014) ("Cox"), pp. 12-13; ACA, p. 19.

[34] Cox, pp. 13-13; ACA, pp. 20-21. *See also*, 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/.

[35] *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.

of definition may hinder innovation as providers of all types fear running afoul of the standard. As even Comcast (a supporter of a "commercially reasonable practices" standard in certain specific instances) notes, the proposed rule "could be construed to create a roving standard of conduct governing everything a broadband providers does."[36] Such a standard is the exact opposite of the "clear rules of the road" that the Commission should be aiming for, as such clear standards promote investment and innovation by broadband providers and Content/Edge Providers alike.

In addition, the proposal for a "commercially reasonable practices" standard is rooted, at least in part, in the concern that paid-prioritization agreements could be a threat to the "Open Internet." However, as Verizon states, "neither Verizon nor any other broadband providers of which we are aware has introduced any form of paid prioritization arrangement to date, nor expressed a public interest in doing so."[37] Other commenters make similar statements.[38] Thus, it makes little sense to adopt a rule at this time to address practices that major industry players have to date disavowed. Certainly, the Commission can and should consider provisions to address threats to the Open Internet posed by these agreements should they arise in the future.

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[36] Comments of Comcast Corporation, GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 15, 2014) ("Comcast"), p. 26; *See also*, Cox, p. 27 ("Troublingly, the NPRM appears to suggest a roving standard of reasonableness that would apply to *all* broadband provider practices, including retail service attributes") (emphasis in the original); Comments of Netflix, Inc., GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 15, 2014), p. 7 (stating that the proposal in the Open Internet NPRM is "broad (and thus necessarily unclear) guidance that undermines any prophylactic value the rules may have.").

[37] Verizon, p. 37.

[38] Time Warner, p. 25; Comcast, p. 22; Comments of Bright House Networks, GN Docket No. 14-28 (fil. Jul. 15, 2014) ("BHN"), p. 27.

However, as that time has not arisen, a "commercially reasonable practices" standard is unnecessary at this time.

The Commission should proceed with the no-blocking rule as proposed above and monitor its effectiveness and determine at a later date whether any additional measures are warranted.

IV. COMMENTERS AGREE THAT THE COMMISSION SHOULD RETAIN ITS EXISTING TRANSPARENCY PROVISIONS

The record in this proceeding does not support the adoption of any additional transparency rules at this time. Commenters largely agree that the existing transparency provisions are sufficient to provide all interested parties (consumers, Content/Edge Providers, etc) with the necessary disclosures as to broadband providers' network management practices, performance, and commercial terms of service.[39] Moreover, as NTCA stated in initial comments, the NPRM seeks comment on how to measure the effectiveness of its existing rules. Adopting additional rules at this time in the absence of a determination that existing provisions have not been effective would be "putting the horse before the cart." Indeed, as the National Cable & Telecommunications Associations states, "there is no factual basis for such a step…[because] there have been *no* formal complaints regarding inadequate disclosure in the three years that the rules have been in effect."[40] In addition, as Verizon correctly states, "[i]n

[39] BHN, pp. 8-17; Time Warner, p. 31; AT&T, pp. 86-91.

[40] Comments of the National Cable & Telecommunications Associations, GN Docket No. 14-28 and GN Docket No. 10-127 (fil. Jul. 15, 2014) ("Cable"), p. 48. NTCA made a similar point in initial comments, stating that while the *Open Internet NPRM* discusses consumers' frustrations with the quality of service as compared to advertised speeds, it has been shown that such advertised speeds are quite often accurate predictions of the quality of service that end users ultimately receive. In addition, the NPRM admits that when viewing consumer complaints, "[i]n some cases, however, it is difficult to discern

several places the *NPRM* suggests more disclosures are needed, but then describes information that is already covered by the existing rule."[41] This calls into question whether the Commission has fully measured the effectiveness of its existing rules or based its proposals on a demonstrated need.

In terms of specific proposals in the *Open Internet NPRM*, Cox is correct in noting that proposals for tailored disclosures that would differ based upon the party at whom they are aimed "would be excessively burdensome and impractical"[42] particularly since, for example, **"**there is no evidence to suggest that ISPs' existing disclosures are insufficient to meet the needs of edge providers and, as a result, no basis on which to support the NPRM's tentative conclusion that changes to the existing transparency rule are warranted."[43] As others note,[44] the current transparency rules are sufficient to enable Content/Edge Providers to "develop, market, and maintain Internet offerings."[45]

The Commission should therefore retain its existing transparency provisions and decline to adopt additional rules. As the record shows, there is no demonstrated need for additional

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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.

41 Verizon, p. 22.

42 Cox, p. 19.

43 *Id*.

44 Comcast, p. 16.

45 47 C.F.R. § 8.3.

provisions, and thus the Commission should focus on measuring the effectiveness of and enforcing the provisions of existing rules.

V. REPLY COMMENTS IN RESPONSE TO INITIAL REGULATORY FLEXIBILITY ANALYSIS

NTCA submits these reply comments in response to the Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the proposals in the *Open Internet NPRM* on small entities. [46] The vast majority of NTCA's members are "small businesses," as defined or identified in the *Open Internet NPRM*. As such, NTCA's members would be disproportionately impacted by any regulations that create substantial new obligations. In particular, as explained in NTCA's initial comments and these reply comments and incorporated herein, additional "enhanced" transparency rules would impose new costly obligations on small providers without any demonstrable consumer benefit. If the Commission acts on these proposals, it must consider exempting small entities, or at a minimum, adopt differing, lesser compliance and reporting requirements that take into account the limited resources available to small entities.

The Regulatory Flexibility Act of 1980, as amended ("RFA")[47] requires the Commission to identify the compliance burden of its proposed rules on small entities as part of its IRFA and describe any significant alternatives that it has considered in reaching its proposed approach. Possible alternative approaches include the establishment of differing compliance or reporting requirements that take into account the resources available to small entities, the clarification or

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46 NPRM, Appendix B – Initial Regulatory Flexibility Analysis.

47 5 U.S.C. § 603.

simplification of compliance or reporting requirements under the rule, and an exemption from coverage of the rule, or any part thereof, for small entities.[48] Although the Commission failed to describe the burden or possible alternative approaches as part of its IRFA, it did state that it "expects to consider the economic impact on small entities, as identified in comments filed in this response to the Notice . . . in reaching its final conclusions and taking action in this proceeding."[49]

In that regard, the Commission should not expand or "enhance" its existing transparency requirements. The Commission seeks comment on how to measure the effectiveness of its existing rule, while simultaneously asking whether it should expand it.[50] In asking how to measure even just the effectiveness of the current rule, the *Open Internet NPRM* effectively confirms that the benefits of potential expansion are unknown and unknowable at the present time; one cannot tell what the benefits of an "enhanced" rule can be if one is unable to capture the benefits of the current rule. Moreover, there is no indication that increased transparency is necessary to address any specific shortcoming or gap in the existing rule, thus making the Commission's regulatory proposals premature.

By contrast, the potential burdens are quite clear. While NTCA supports the Commission's transparency goal, the proposed expanded transparency rules would be more burdensome for small entities than the current rules without a demonstrable need. The cost cannot be said to outweigh the potential benefit.

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48 5 U.S.C. § 603(c).

49 *Open Internet NPRM*, Appendix B, ¶ 51.

50 *Open Internet NPRM*, ¶ 67.

The Commission points to its request for suggestions for ways that industry associations might reduce the burden of enhanced disclosure rules on small providers as evidence of its flexible regulatory approach for small entities.[51] As the National Cable & Telecommunications Association points out, however, the question posed is only a question, and not an alternative proposal or tentative conclusion.[52] As such, it fails to meet the requirements of the RFA on its face. Moreover, even if such a proposal were presented and implemented, it would almost certainly increase, not decrease, the burden on small entities. NTCA, like most associations representing small entities, is run and supported by the small entities it represents. The burden for developing and implementing a flexibility regulatory approach would still fall largely on the shoulders of the small entities, to whom NTCA would need to turn to assist in implementation. Thus, the single possible alternative approach that the Commission points to for reducing the compliance burden on small entities would do little, if anything, to decrease the compliance burden for small entities.

Given that there is no indication that the current rules are in any way deficient or that there exists any consumer benefit that could outweigh the associated costs, the Commission should not be considering an expansion of existing transparency requirements.

VI. CONCLUSION

The Commission should:

- treat all transport and transmission capacity on underlying networks as subject to Title II of the Act;

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51 *Open Internet NPRM,* Appendix B, ¶51

52 Regulatory Flexibility Act Comments of the National Cable and Telecommunications Association, GN Docket No. 14-28, p. 5.

- adopt a “no blocking” rule utilizing its authority under Section 706 of the Telecommunications Act of 1996 and apply it equally in all respects to both retail ISPs and Content/Edge Providers;

- decline to adopt a “commercially reasonable practices” standard at this time; and

- retain the existing transparency rules as adopted in 2010.

Respectfully submitted,

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