BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Protecting and	)	
	)	
Promoting the Open Internet	)	GN Docket No. 14-28
In the Matter of the Framework	)	
	)	
For Broadband Internet Access	)	GN Docket No. 10-127

PEOPLE OF THE STATE OF ILLINOIS and

PEOPLE OF THE STATE OF NEW YORK

COMMENTS ON THE MAY 15, 2014

NOTICE OF PROPOSED RULEMAKING

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I. INTRODUCTION

The People of the State of Illinois by Attorney General Lisa Madigan and the People of the State of New York by Attorney General Eric T. Schneiderman submit these Comments in response to the Federal Communications Commission (the "Commission")'s Notice of Proposed Rulemaking, FCC GN Docket No. 14-28, entitled "Protecting and Promoting the Open Internet" (hereinafter "NPRM"). The Commission has issued Proposed Rules to "protect and promote the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment."[1]

In these Comments, we first generally explain the importance of preserving net neutrality and an open Internet to protect the public interest and consumer expectations. We then address our concerns with the Proposed Rules, which are not consistent with the essential goals of an Open Internet by allowing, for the first time, a two-tiered Internet that will thwart openness and innovation. Finally, we explain why broadband Internet access should be classified as a "telecommunications service" under the Telecommunications Act of 1996. Classification as a "telecommunications service" properly reflects that Internet access is a service that transmits information at consumers' direction without modification or interference.

[1] Notice of Proposed Rulemaking, *In the Matter of Protecting and Promoting the Open Internet*, FCC GN 14-28 at 84, Proposed Rules at § 8.1 (May 15, 2014)(hereinafter NPRM).

II. NET NEUTRALITY PRINCIPLES AND AN OPEN INTERNET ARE IN THE PUBLIC INTEREST.

A. Consumers and Content Providers Have An Interest In An Open Internet.

It is generally accepted today that "[t]he Internet is America's most important platform for economic growth, innovation, competition, [and] free expression."[2] As a network of networks, the Internet connects businesses, government, and consumers by allowing each person or entity to tap into a vast web of connections. Consumers and content providers require and pay for access through physical wired, cellular or satellite connections. Consumers primarily subscribe to wired Internet access through the local cable company or telephone company, or to wireless Internet access through mobile telephone service or satellite service.

The Internet functions as the public square for over 300 million Americans, and broadband providers are the on-ramp to the information, content, and services available on the Internet. Consumers go online for essential services such as health and welfare services, to manage their financial affairs, to file federal and state income taxes, to obtain Affordable Care Act health insurance, to interact and transact business with governments and government agencies at all levels, to obtain employment information, to educate themselves through online classes, to entertain themselves and communicate with others in their community, and to keep informed about political and other current issues. Businesses use Internet access every time an employee swipes a credit card, creates a web site, sends an email, and when they talk on the telephone utilizing IP technology. The Internet is an open platform supporting tremendous innovation and economic growth over the last twenty years.

For years the Commission has helped foster the Internet's growth through policies and rules consistent with net neutrality principles. These policies and rules have ensured that when

[2] *Id*. at para. 1.

consumers purchase Internet access they can reach the *content of their choice without interference from their Internet service provider*. They also provided that content providers, or web sites, can reach consumers without making special arrangements with the consumer's broadband Internet service provider or paying the consumer's broadband Internet service provider an additional fee. This is the essence of today's Internet: an open and free form of communication, delivered without interference or change in form or content, consistent with the public interest in openness and innovation.

These net neutrality principles have been critical to protecting the public interest and to the Internet's success. As the Commission has recognized, "the Internet's openness promotes innovation, investment, competition, free expression and other national broadband goals."[3] Further, "the Internet's openness is critical to its ability to serve as a platform for speech and civic engagement and can help close the digital divide by facilitating the development of diverse content, applications, and services," and promotes "increased consumer choice, freedom of expression, and innovation."[4] The Commission has made it clear that the purpose of the Proposed Rules is to preserve the benefits of an Open Internet.[5]

B. Consumers and Content Providers Are Highly Vulnerable to Actions by Broadband Providers to Bias Content Delivery or Otherwise Interfere With Consumer Choice.

Both consumers and Internet content providers rely on consumers' ability to access the Internet through the broadband access provided by cable and telephone companies. These broadband providers are often the same entities that furnish consumers with telephone and television services. Given their dual roles, the Commission recognizes that broadband providers

[3] NPRM at para. 25.

[4] *Id.*

[5] *Id*. at paras. 4, 25-29.

may not share consumers' interest in openness, have incentives to interfere with competitive services, and have an interest in taking fees from content providers.[6] In *Verizon v. FCC*, the D.C. Circuit discussed these incentives when it stated that the broadband providers may:

> have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating telephone and/or pay-television services. As the Commission noted, … broadband providers like AT & T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own "core video subscription service.[7]

Further, the Court noted that Internet access providers have "powerful incentives to accept fees from edge providers [e.g. web sites or information sources], either in return for excluding their competitors or for granting them prioritized access to end users."[8] Such practices would violate open Internet principles and harm the public interest.

Often, the only link between consumers and the information they seek from independent web sites is their Internet access provider, making both consumers and content providers dependent upon the openness of their connection. Consumers' ability to send and receive the content of their choice is frustrated if a web site is blocked or delivered more slowly than its competitor. The vulnerability of consumers and content providers to the control broadband providers have over their connection can be effectively addressed by the Commission's adoption of comprehensive and enforceable rules to protect an open Internet.

The challenge before the Commission is to preserve the Internet as an open medium by ensuring that all consumers can send and receive content over the Internet without interference from broadband providers. By recognizing the function of Internet access as the transmission of

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[6] NPRM at paras. Paras. 39-53.

[7] *Verizon v. FCC*, 640 F.3d 623, 646 (D.C. Cir. 2014) (internal quotations and citations omitted).

[8] *Id*.

information of the user's choosing, without change in form or content and adopting the proper classification, the Commission can preserve the Internet as "the preeminent 21st century engine for innovation and the economic and social benefits that follow."[9]

III. THE PROPOSED RULES WILL NOT PRESERVE NET NEUTRALITY OR AN OPEN INTERNET.

The Open Internet rules proposed in the NPRM will not preserve net neutrality or an open Internet. On the contrary, the Proposed Rules would allow pay-for-priority and individualized arrangements that will produce a two-tier system in which some content is given faster and better delivery based on what the content provider is willing to pay. While the Proposed Rules purport to limit the use of these arrangements to those that are "commercially reasonable," this standard is undefined, will invite years of litigation, and will not prevent a two-tiered Internet.

As discussed below, the Proposed Rules are deficient because they will create a two-tiered Internet by: (1) permitting undefined, *ad hoc* pay-for-priority arrangements that will allow broadband providers to extract new payments from content providers while disadvantaging competitors; and (2) creating a minimum service level while allowing broadband providers to enter into individualized arrangements at enhanced service levels. The Proposed Rules also erroneously rely on complicated disclosures and consumer vigilance to counter pay-for-priority and individualized arrangements, despite the transaction costs and limited choices available to consumers.

A. Allowing Pay-for-Priority Arrangements Will Defeat Internet Openness and Create a Two-Tiered Internet.

The May 15, 2014 NPRM would, *for the first time,* allow Internet access providers to charge content providers (*e.g.*, web sites) for preferential treatment. Specifically, the Proposed

[9] NPRM at para. 1.

Rule would permit pay-for-priority arrangements, enabling some web sites to pay consumers' broadband providers a fee so that their content is given special, priority treatment.[10] The Commission discussed pay-for-priority arrangements as "commercial agreements with edge providers to govern the carriage of the edge providers' traffic."[11] This priority, while undefined in the Proposed Rules,[12] will allow broadband providers to charge some content providers for faster delivery of content or more exposure for prioritized web sites in consumer searches or in Internet default settings. This preference or priority will enable the broadband provider to pre-select the most visible information for the consumer by favoring some content providers, while other web sites receive poorer or slower delivery.

Prioritization is fundamentally inconsistent with the public interest in preserving net neutrality and an open Internet. Significantly, the effect of purchased priority might be subtle, resulting in the public being directed to favored sites without their knowledge that they have been so directed. If broadband providers can discriminate among content, they can effectively pick winners and losers, interfering with the public's ability to freely educate itself about political, cultural and social issues – education that is critical to our democracy.

An open Internet is as vital for content providers as for consumers and is in the public interest generally. In addition to interfering with consumers' use of the Internet, pay-for-priority arrangements will burden the web site or content provider paying for priority in order to reach

[10] NPRM at page 85, Proposed Rule §8.3(c)("In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall publicly disclose in a timely manner to end users, edge providers, and the Commission when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or 'best efforts' service as distinct from any priority service.")

[11] NPRM at paras. 37-38.

[12] NPRM at pp. 85-86, Proposed Rule §§8.3(c) and 8.11 (Definitions).

the broadband provider's customers. As the *Verizon* Court explained, broadband providers effectively function like gatekeepers, controlling the access between consumers and information:

> [B]roadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers. Because all end users generally access the Internet through a single broadband provider, that provider functions as a "terminating monopolist," with power to act as a "gatekeeper" with respect to edge providers that might seek to reach its end-user subscribers. As the Commission reasonably explained, this ability to act as a "gatekeeper" distinguishes broadband providers from other participants in the Internet marketplace—including prominent and potentially powerful edge providers such as Google and Apple—who have no similar control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers.[13]

Giving the broadband providers or "gatekeepers" the legal right to extract disparate payments for priority service to reach consumers will leave content providers vulnerable to escalating and discriminatory demands for payment. This will result in an increasingly stratified Internet where those who fail or refuse to pay for priority are relegated to poorer access to subscribers, and new entrants and innovators face increased costs or more obstacles to reaching consumers.

In addition, to the extent that consumers are already paying rates that fully recover the costs of higher speeds to enable fast delivery of video and other large files, the introduction of pay-for-priority arrangements would constitute double-dipping or double recovery of costs by broadband access providers. Because it is technically feasible to achieve prioritization by simply degrading the service offered to those unwilling to pay for priority, pay-for-priority service also raises real risks that it will not only create a two-tiered Internet, but that overall service will slow to a level below consumers' current expectations.

The concept of pay-for-priority or individualized arrangements presupposes that certain services, such as video downloads, actually impose costs or burdens on broadband access

[13] *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (internal quotations and citations omitted).

networks that are not already being recovered from consumer subscription fees. Currently most providers offer several "tiers" of service differentiated from one another by download speeds or data rates. In Illinois, Comcast, for example, offers an array of download speeds ranging from 3 to 25 to 105 megabit-per-second (mbps), at correspondingly increasing monthly rates of $19.95, $29.99 to $89.99 respectively.[14] AT&T does the same for its U-Verse services, with prices for 1.5 to 6 to 18 mbps equaling $41.00, $51.00 and $61.00 respectively.[15] Consumers are already paying graduated rates for the speed they believe they need for acceptable downloads of video and other applications and services.

The Commission suggests that pay-for-priority arrangements be "subject to scrutiny under the proposed commercial reasonableness rule and prohibited under that rule if they harm Internet openness."[16] The terms of the commercial reasonableness rule, however, simply provide that a provider "shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice."[17] The NPRM leaves the determination of whether a pay-for-priority arrangement is commercially reasonable or reflects reasonable network management undefined, guaranteeing substantial, protracted litigation. By contrast, a rule that does not permit discriminatory pay-for-priority agreements will create certainty and reduce litigation.

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[14] COMCAST, http://www.comcast.com/internet-service (last visited on July 9, 2014).

[15] AT&T, http://www.att.com/shop/internet/u-verse-internet.html (last visited on July 9, 2014).

[16] NPRM at para. 97.

[17] *Id*. at p. 85, Proposed Rule at § 8.7. Reasonable network management is defined as "appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service." *Id*. at p. 87, Proposed Rule at § 8.11(g).

B. The Proposed Anti-Blocking Rule Allows Broadband Providers To Disadvantage Some Content Providers by Offering Slower and Inferior Service.

The Commission's Proposed Rules would prohibit Internet service providers from blocking access to particular websites, but they would allow broadband providers to negotiate "individualized, differentiated arrangements … [s]o long as broadband providers do not degrade lawful content or service to *below a minimum level of access*[.]"[18] A "minimum level of access" necessarily implies that a higher or preferential level of service will become available, creating the very two-tiers of service that the Proposed Rules are intended to prevent.[19]

The option of individualized agreements will not affect consumers' choice of access speeds, but will affect the way content reaches consumers. The Commission's proposal describes a rule that authorizes two levels of service (a minimum level of service and individualized contracts) and suggests that broadband providers will therefore no longer "be required 'to hold themselves out to serve all comers indiscriminately on the same or standardized terms.'"[20] These are fundamental changes in the way both consumers and providers of information, content, applications, services and other innovative products access and use the Internet. No longer will start-ups and innovators have the same access to consumers that established providers have, undermining the very democracy, openness, and innovation that have been the hallmarks of the Internet.

The Commission suggests that individualized arrangements between broadband providers and information or content providers "would be subject to scrutiny under the proposed

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[18] *Id.* at para. 89. See also, *id.* at pp. 85-86, Proposed Rules at §§8.5 & 8.11(a) (emphasis added).

[19] *See* Concurring Statement of Commissioner Jessica Rosenworcel, NPRM at page 120 ("We cannot have a two-tiered Internet, with fast lanes that speed the traffic of the privileged and leave the rest of us lagging behind.").

[20] NPRM at para. 93.

commercial reasonableness rule and prohibited if they harm Internet openness."[21] Like the pay-for-priority rules, the standard for commercial reasonableness is not defined, leaving application of this standard to case-by-case adjudication and ensuring years of litigation over how the standard will be applied.[22] The NPRM itself notes that an "Objective, Evolving 'Reasonable Person' Standard" may capture consumers' changing expectations, but at the same time "create less certainty than other approaches might and could be more difficult to enforce."[23] On the other hand, if the minimum required level of service is static, the rule may effectively freeze current speeds as the default minimum, preventing increased deployment and improved default speeds. Further, a practice that delivers a web site's content at a minimum speed that is slower than that purchased by the consumer would frustrate the consumer's expectation of open access to all information providers.

If the Commission allows pay-for-priority or individualized arrangements, these types of situations can be expected to become the norm. This will leave consumers subject to the bargaining tactics of broadband providers and content providers, and interfer with consumers' existing and reasonable expectation that they can use the Internet at the speeds they select to access the lawful content, applications, services and products of their choice without interference, subtle or otherwise.

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[21] *Id*. at para. 97. See also, *id*. at paras. 111, 116.

[22] *Id*. at para.122 (Commission to identify pre-defined factors "to provide guidance to encourage commercially reasonable, individualized practices, and if disputes arise, provide the basis for the Commission to evaluate whether, taking into account the totality of the circumstances on a case-by-case basis as discussed below, a particular practice satisfies the enforceable legal standard.").

[23] *Id*. at para.104.

C. The Proposed Enhanced Transparency Rule Will Not Eliminate or Discourage Discrimination, Preference or Other Individualized Arrangements That Harm Consumers and the Public Interest in the Free Flow of Information.

The Commission requested comment on the effectiveness of the existing transparency rule, which remains in effect and requires disclosure of management practices, performance, and commercial terms of service "sufficient for consumers to make informed choices regarding the use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[24] Transparency or disclosure rules, however, are based on the faulty premise that consumers have the power to discourage or constrain lawful pay-for-priority and individualized arrangements if they know about them. In fact, consumers have few choices for Internet access and switching costs are high. Given the incentives of broadband Internet service providers to charge content providers for access to end-users, it is unlikely that consumers will be able to avoid such arrangements by changing broadband providers.

Consumer disclosures, particularly the complicated and potentially extensive "fine print" disclosures that can be anticipated if pay-for-priority and individualized arrangements are allowed, often are not sufficient to enable consumers to avoid undesirable, but lawful, practices. Disclosures may be difficult to find, requiring consumers to go to the broadband Internet service provider's web site and find the appropriate link.[25] The disclosure, especially if pay-for-priority and individualized arrangements are included, can be expected to be long and difficult to understand. The average consumer does not have the time or specialized knowledge to sort

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[24] *Id*. at paras. 63, 65.

[25] NPRM at par. 64, fn 150.

through the implications of network management practices, congestion management, application-specific behavior, or other details that may be required in a disclosure.[26]

Importantly, even if a consumer takes the time to read through the "fine print," in most areas of the country consumers simply do not have multiple, equivalent choices. There are often no more than one to three wired Internet options offering broadband speeds to residential consumers.[27] Further, the transaction costs of changing service in order to avoid pay-for-priority or individualized arrangements can be substantial. They include early-termination fees, installation fees, finding an alternative broadband Internet service provider and comparing speeds, determining the appropriate rate, assessing the effect of a move on other services that may be bundled with Internet access (such as television and telephone service), obtaining the necessary equipment, and possible email changes. Of course, given the broadband providers' interest in obtaining payment from content providers as well as from consumers, it would not be surprising if all of the local broadband providers have pay-for-priority or individualized arrangements that affect consumer choices. Under those circumstances, consumers would gain nothing from switching, and the use of pay-for-priority or individualized arrangements will be unimpeded.

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[26] *See id*. at paras. 64, 68.

[27] FCC, INTERNET ACCESS SERVICES, AS OF JUNE 30, 2013, Page 63, Map 5 (2014), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf.

IV. TO PROTECT NET NEUTRALITY, BROADBAND INTERNET ACCESS SHOULD BE CLASSIFIED AS A "TELECOMMUNICATIONS SERVICE."

A. Prior Open Internet Rules Were Not Upheld Because Internet Access Had Not Been Properly Classified.

Prior Open Internet rules have not been upheld because the Commission's classification of broadband Internet access as an "information service" has proved incompatible with the Commission's legitimate regulatory objectives. The Commission invited Comment on whether it "should revisit the Commission's classification of broadband Internet access service as an information service[.]"[28] After two failed attempts to adopt meaningful Open Internet rules within the framework of the "information service" classification, it is time for the Commission to recognize that the "information service" classification does not accurately reflect the function of broadband Internet access and has become an obstacle to preserving an open Internet.

The Telecommunications Act of 1996 creates two classes of services: (1) "telecommunications services," which are subject to traditional common carrier regulation, and (2) "information services," which are not.[29] The Communications Act of 1934 provides that common carriers are required to furnish communications services upon reasonable request; treat all users fairly; refrain from engaging in unreasonable discrimination in charges, practices, classifications, or services; and not give unreasonable preference to any particular person, class

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[28] NPRM at para.148.

[29] The Telecommunications Act of 1996 defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. §153(24) (2010). It defines the term "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id*. at §153(50). The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* at §153(53).

of persons, or locality, or to subject any particular person or class of persons.[30] These common carrier obligations, which, pursuant to the Telecommunications Act of 1996, only attach to "telecommunications services," would limit the ability of broadband Internet service providers to block or discriminate against certain content providers and provide the protections needed to assure that our communications networks are open to all Americans, both consumers and content providers.

Prior to 2002, consumers accessed the Internet primarily by dialing the number for an "Internet Service Provider" or "ISP" over their telephone line.[31] The telephone lines over which the Internet was accessed were classified as a "telecommunications" service under the Telecommunications Act of 1996 and subject to common carrier obligations.[32] By 2002, however, both telephone companies and cable companies began to offer consumers faster connections to the Internet (referred to as "broadband" connections), enabling faster downloads and more Internet uses.

As broadband connections became more available, the Commission determined that broadband Internet access provided by cable companies was not a "telecommunications" service because cable companies provided certain information services as part of their broadband offerings.[33] In *National Cable & Telecommunications Association v. Brand X Internet Services*,

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[30] 47 U.S.C. §§201(a), 202(a).

[31] In 2003, only 19% of households used broadband access, up from 4% in 2000, compared to 54% subscribing to broadband access as of June 30, 2013. FCC, OBI TECHNICAL PAPER NO. 4: BROADBAND PERFORMANCE, 21 (2010), available at: http://www.fcc.gov/document/obi-technical-paper-no-4-broadband-performance. See also FCC INTERNET ACCESS SERVICES, STATUS AS OF JUNE 30, 2013, page 34, Table 13, available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf. The Commission notes that 87% of Americans used the Internet in 2014. NPRM at para. 35.

[32] *Verizon v. FCC*, 640 F.3d 623, 630 (D.C. Cir. 2014)(describing the classification of Internet access).

[33] See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002).

the Supreme Court held that the Commission had the discretion to classify cable broadband Internet access as an "information service." [34]

Once the Commission classified broadband Internet access service as an "information service," it was no longer subject to common carrier obligations.[35] Despite this classification of broadband Internet access as an "information service," the Commission affirmed its commitment to net neutrality principles. To ensure that broadband Internet access providers would not block consumers' access to the content of their choice, the Commission adopted a Policy Statement in 2005 in which it stated its intention to "preserve and promote the open and interconnected nature of the public Internet[.]"[36] The Commission's ability to rely on a Policy Statement to preserve an open Internet, however, was limited by the federal courts. When the Commission attempted to enforce the Policy Statement in response to complaints that Comcast had blocked consumer access to lawful peer-to-peer applications, the D.C. Circuit held that the Commission lacked authority to enforce the Policy Statement because the Commission did not act under specific statutory authority.[37]

In response to the *Comcast* ruling, the Commission made another attempt to adopt Open Internet rules in 2010. Those rules set out three basic principles: no blocking of lawful content, applications, services or devices; no unreasonable discrimination; and transparency or disclosure of network management practices.[38] The Commission specifically stated that "pay-for-priority"

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[34] *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 996-997 (2005).

[35] *See* 47 U.S.C. §153(51) (providing that common carrier obligations can be applied "only to the extent that [the carrier] is engaged in providing telecommunications services").

[36] *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14986, 14987-88, para. 4 (2005).

[37] *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

agreements that directly or indirectly favor some Internet traffic over other traffic "would represent a significant departure from historical and current practice[]" and were unlikely to satisfy the no unreasonable discrimination standard in the rules.[39]

Verizon appealed the Commission's adoption of the 2010 Rules, and in 2014 the D.C. Circuit held that the Commission could not adopt Open Internet rules that mirrored the essential no-blocking and non-discrimination obligations of a common carrier because the Commission itself had classified Internet service as an "information service" and not a "telecommunications service."[40] The Court stated:

> We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has "relegated [those providers], *pro tanto*, to common carrier status." In requiring broadband providers to serve all edge providers [e.g. web sites or information sources] without "unreasonable discrimination," this rule by its very terms compels those providers to hold themselves out "to serve the public indiscriminately."[41]

The *Verizon* Court gave the Commission two options: (1) reclassify Internet service as a "telecommunications" common carrier or (2) attempt to adopt rules that could keep the Internet "open" but continue to treat broadband access as an "information service."[42]

In responding to this ruling, the Commission must recognize that the *function* of broadband providers is the transmission of information of the user's choice without change in content or form, and this function requires that broadband providers be treated as "telecommunications" carriers under the Telecommunications Act of 1996, subject to the

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[38] *In re Preserving the Open Internet*, 25 FCC Rcd 17905, 17992, App. A, §§8.3, 8.5 and 8.7 (2010).

[39] *Id*. at para. 76.

[40] *Verizon v. FCC*, 740 F.3d 623, 655-56 (D.C. Cir. 2014).

[41] *Id*. (citations omitted).

[42] *Id*.

attendant no-blocking and non-discrimination obligations. Without the proper classification, Open Internet rules will continue to face legal challenges, and the freedom of choice that the public interest demands and consumers expect will continue to be in jeopardy.

B. Broadband Internet Access Is A "Telecommunications Service" That Transmits Information at Consumers' Direction Without Modification or Interference.

Classification of broadband Internet access as a "telecommunications service" is warranted. The very definition of "telecommunications" under the Telecommunications Act of 1996 reflects modern consumers' expectation of Internet access as "*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."[43] Today, broadband providers, such as local cable companies and telephone companies, offer transmission of information over the Internet directly to the public, for a fee.[44]

The distinction between broadband access to the Internet and the information and services available as a result of that access is clear. Today consumers can choose to use the broadband Internet service provider's email, home page, search engine, or other functions or choose other competitive content and information providers for these services. Given these readily available Internet choices, the risks associated with giving the access provider the right to grant priority or preference to some and to discriminate against other sources of information are also more evident.

When modern consumer expectations and experiences are matched with the language of the Telecommunications Act of 1996, it is clear that broadband Internet *access* is separate from the actual provision of information, storage of information, and information processing that are

[43] 47 U.S.C. §153(50) (2010)(emphasis added).

[44] *Id.* at §153(53) (defining a telecommunications service).

the touchstones of an information service.[45] Once broadband Internet access is correctly classified as a "telecommunications service," appropriate Open Internet rules will be fully consistent with the essential obligations at the heart of common carrier status, *i.e.*, that service be provided with no unjust or unreasonable discrimination in charges or practices and no undue or unreasonable preferences or advantage, or prejudice or disadvantage to any particular person or class of persons.[46]

Classification of broadband Internet access as a "telecommunications service" represents a "reasoned interpretation to change course" in light of the current state of the Internet, the dangers of discrimination and paid preference, and the actual function of facilities-based Internet access providers.[47] A change in the classification of Internet access service from an "information service" to a "telecommunications service" will protect the Open Internet, provide a solid foundation for effective non-discrimination and no-blocking rules, and will not prevent reasonable network management practices.

IV. CONCLUSION

Attorneys General Lisa Madigan of Illinois and Eric T. Schneiderman of New York support net neutrality and an Open Internet. When consumers pay for broadband Internet access, they should be able to freely use the Internet to reach the lawful content, applications, services and products of their choice without interference and without their request or the reply being interfered with or changed in form, content, or speed. This is the hallmark of a

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[45] 47 U.S.C. §153(24)(2010).

[46] *Id*. at §202(a).

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

"telecommunications" service under the Telecommunications Act of 1996. This goal can be achieved by making the necessary reclassification so that broadband Internet access service is classified as a "telecommunications service," giving consumers and content providers the protections associated with common carrier services.

The Proposed Rules allowing pay-for-priority or individualized arrangements should not be adopted. These types of arrangements, if allowed by the rules, can be expected to become the norm due to the financial benefit received by the broadband providers and their role as gatekeeper over content providers' access to Internet end-users. We recommend that the Commission promulgate rules that protect net neutrality and preserve an Open Internet.

Respectfully submitted,

The People of the State of Illinois

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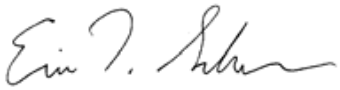

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