

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Restoring Internet Freedom) GN Docket No. 17-108
)
)

To: The Commission

**COMMENTS OF
NATIONAL PUBLIC RADIO, INC.**

Introduction

National Public Radio, Inc. ("NPR") hereby responds to the Notice of Proposed Rulemaking in the above-captioned proceeding proposing to deregulate the offering of Internet access service by broadband Internet Service Providers ("ISPs").¹ NPR opposes such deregulation absent more substantial evidence of harm to ISPs under the current regulatory approach. If the Commission decides to proceed nonetheless, the Commission should adopt bright-line rules proscribing blocking, throttling, paid prioritization and other anti-competitive ISP practices to preserve an open Internet.

NPR is a non-profit membership corporation that produces and distributes noncommercial educational programming through more than a thousand public radio stations nationwide. In addition to broadcasting award winning NPR programming, including All Things Considered[®] and Morning Edition[®], NPR Member stations are themselves significant program producers and community institutions. NPR first developed the Public Radio Satellite System

¹ *In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108 (rel. May 23, 2017) [hereinafter "*NPRM*"].

(“PRSS”) almost four decades ago and continues to improve its efficiency and usefulness by incorporating new technologies. The result is an essential programming connection infrastructure that enables public radio producers, distributors, and stations to offer a broad and diverse array of educational and culturally enriching programming to the American people.

With the evolution of the Internet as a platform for engaging and educating the public over the past two decades, public radio has similarly expanded its ability to pursue its educational mission through innovative digital programming services and technologies. As but one example, the NPR One app blends local, regional, national, and international public radio content contributed by public radio stations and producers to provide a listening experience mirroring the over-the-air broadcast experience but one continuously customized to the individual's personal listening preferences. Just 3 years after the launch of NPR One, and with 80 percent of NPR Member stations participating, more than 6,000 unique station produced audio pieces are published to NPR One each week; local newscasts alone are heard 1.3 million times monthly; and more than 1,000 locally produced podcast programs and series are available in NPR One. This is but one public radio example of the benefits of an open Internet, but one that should be considered and understood before the Commission makes abrupt and unnecessary changes in regulating broadband Internet access by content and technology providers.

Regulation Of Basic Internet Access Services To Prevent, Or At Least Remediate, Anti-Competitive ISP Conduct Remains Essential To An Open Internet

As NPR explained in comments filed in the proceeding that culminated in the current regulatory regime,² public radio stations, producers, and distributors must be able to offer content to the public via Internet-based platforms free of unreasonable and discriminatory constraints

² *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) [hereinafter *Title II Order*].

imposed by content providers that control access to essential Internet facilities -- ISPs.³

Otherwise, an unchecked ability to control access to the Internet will inevitably lead ISPs to act on the obvious economic incentive to exploit such control. Exploiting access to essential Internet facilities may take various forms, but it invariably involves favoring or disfavoring an edge provider's access to the public based on an ISP's ability to extract revenue or impose terms and conditions beyond that which a competitive access market would otherwise permit.⁴

Thus, for instance, ISPs would have an economic incentive to increase revenues by charging edge providers for priority access and by neglecting non-prioritized providers and Internet traffic.⁵ In such circumstances, public media edge providers, which depend on the quality of their offerings rather than their financial resources, will inevitably suffer. The adverse consequences are not limited to individual edge providers. Internet access free of unreasonable and discriminatory pricing and practices is also more broadly essential to the "virtuous circle of innovation in which new uses of the network -- including new content, applications, services, and devices -- lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses."⁶

In addition to these economic and competitive considerations, the Commission adopted the *Title II Order* so that it possessed the regulatory means to address specific ISP conduct that

³ Comments of National Public Radio, Inc., *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, at 2-7 (filed July 15, 2014).

⁴ See *Preserving the Open Internet, Report and Order*, 25 FCC Rcd. 17905, at 17919-22 (2010), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁵ *Id.*, 25 FCC Rcd. at 17919-22.

⁶ *Id.*, 25 FCC Rcd. at 17910.

"significantly impeded consumers' ability to access the content and use the applications of their choice."⁷ -- a longstanding and fundamental tenet of federal Internet policy.⁸ Indeed, Title II regulation was adopted as a last resort in response to judicial rejection of prior Commission efforts to enforce open Internet principles based on regulatory authority short of Title II.⁹

While the *NPRM* recognizes the importance of an open Internet,¹⁰ it fails to address the underlying rationale for the current Title II approach or explain how the "light-touch regulatory framework" now proposed will enable the Commission to address ISP practices that undermine well established open Internet principles. Instead, the *NPRM* recounts the Commission's history of regulating ISPs as though the current rules were adopted without regard to practices that have occurred and can be expected to occur in the marketplace.¹¹ In so doing, the *NPRM* fails to explain the basis for the Commission's proposed regulatory departure in any meaningful way.¹² Such explanation is essential, not just to pass judicial muster, but to justify on public interest grounds the deregulation of broadband ISPs despite their control over access to the Internet.

⁷ See *NPRM* at ¶ 18 (citing the *Comcast-BitTorrent Order*).

⁸ See *id.* at ¶ 18. See also *id.* at ¶ 13 (describing the "Internet freedoms" to access lawful content, use applications, attach personal devices to the network, and obtain service plan information).

⁹ See *id.* at ¶¶ 18, 20.

¹⁰ See *id.* at ¶ 1 (noting that "Americans cherish an open Internet.").

¹¹ See *id.* at ¶ 22 ("In November 2014, then-President Obama called on the FCC to 'reclassify consumer broadband service under Title II of the Telecommunications Act. Three months later, the Commission adopted the *Title II Order*, reclassifying broadband Internet access services from information services to telecommunications services.") (citations omitted).

¹² See, e.g., *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U. S. 967, 981–982 (2005) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

Moreover, in analyzing the text and structure of Title II, the *NPRM* proposes an interpretation of “telecommunications” so narrow that it would appear to preclude the characterization of even a stand-alone transmission service as “telecommunications.”¹³ In this reading of the Communications Act, transmitting information of a user’s choosing between or among points specified by the user -- the essence of “telecommunications” -- requires the user to provide routing instructions based on the architecture of the ISP’s network, including the physical location of individual computer servers temporarily storing the user’s content.¹⁴ An ISP’s temporary manipulation of the form of an end-user’s content to accommodate the technical features of the ISP’s network likewise means the service is not a “telecommunications” service.¹⁵ Significantly, the *NPRM* cites no precedent in support of such a narrow interpretation of “telecommunications” under Title II.

While the principal public policy justification for the abrupt reversal the *NPRM* proposes is the harm to ISP investment in broadband networks resulting from the *Title II Order*,¹⁶ far too little time has elapsed since adoption of the *Title II Order* in 2014 and too little data have since been generated to draw any meaningful conclusions. Perhaps commenters will supplement the record in this proceeding with additional data, but the Commission should be careful to avoid arriving at an outcome based on insufficient data that only hints at but does not actually demonstrate the need for such an outcome. Indeed, because so little time has transpired since the

¹³ See *NPRM* at ¶¶ 29-30.

¹⁴ See *id.* at ¶ 29.

¹⁵ See *id.* at ¶ 30.

¹⁶ See *id.* at ¶¶ 29-30.

Title II Order was adopted, NPR urges the Commission to defer this proceeding until harm to the Internet compels a change.

At a minimum, however, NPR believes certain bright line rules are essential to an open Internet. Otherwise, the Commission will again lack the tools necessary to address ISP practices that unquestionably stymie an end-user's ability to access content and use Internet applications of their choice.¹⁷

In particular, the Commission should retain a clear prohibition on anti-competitive practices, including blocking, throttling, and paid prioritization, because such practices threaten an open Internet in two ways.¹⁸ First, under-resourced edge providers, like most public media entities, could face potentially significant financial obstacles simply to pursue their public service mission. Second, the end-user's choice of Internet-enabled content and services could be unduly influenced by their broadband ISP's efforts to exploit control over essential Internet facilities.

That is not to say that broadband ISPs should be prohibited from recouping their costs plus profits subject to normal competitive forces that otherwise constrain pricing. Nor should broadband providers be expected to offer the same pricing, terms and conditions to edge providers seeking materially different interconnection facilities. What should be prohibited, among other things, is charging edge providers seeking comparable access different amounts based on the ability and willingness of better resourced providers to pay more.

Finally, the Commission should apply these same prohibitions to fixed and mobile broadband access. Accessing Internet-enabled content, services, and applications via mobile

¹⁷ See *id.* at ¶ 18.

¹⁸ See *id.* at ¶¶ 76-92 (inquiring about the need for rules prohibiting blocking, throttling, and paid prioritization and requiring ISP transparency).

Internet connections is unquestionably important based on usage data,¹⁹ and blocking, throttling, or paid prioritization by mobile ISP providers are practices no less harmful to an open Internet. To the extent mobile and broadband Internet access may involve different network management requirements, those differences may require different implementation considerations, but they should not justify what are otherwise anti-competitive practices that undermine an open Internet.

Conclusion

Because the future of public media depends on open access to the Internet, NPR urges the Commission to retain its existing approach to regulating broadband Internet access service or, at a minimum, maintain clear regulatory prohibitions or requirements that enable it to police anti-competitive ISP practices.

Respectfully submitted,

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¹⁹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd. 699, 714-15 (2016).