

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF NETFLIX, INC.

Netflix supports strong net neutrality. Because Netflix believes the internet should be open, we do not support rolling back existing net neutrality protections as the FCC has proposed to do in the Restoring Internet Freedom Notice of Proposed Rulemaking.¹

Companies, consumer groups and millions of citizens have weighed-in to voice their support for an open internet.² They understand that the future of the internet is the future of civic engagement, free speech, innovation and economic development. Failing to protect the internet’s openness is the equivalent of shutting down Main Street, Wall Street and the public square, all rolled into one.

Since the beginning of this century, the Federal Communications Commission has struggled to solidify and sustain an open internet policy. Two years ago the FCC adopted strong net neutrality rules to protect consumers and innovation.³ One year ago, a court of appeals validated the FCC’s rules, providing policy and legal certainty that the internet would remain

¹*Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) (“NPRM”).

² As of the drafting of this comment, there are over 8 million comments filed in this docket.

³ *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015) (“2015 Open Internet Order”).

open.⁴ Unfortunately, the FCC is now proposing to walk back from those protections and that certainty.

Netflix supports enforceable rules that promote an open internet: free from blocking, throttling, and paid prioritization on the last mile and at the points at which a broadband provider's network connects to the Internet. An end user who has high-speed broadband service capable of reaching all endpoints on the Internet should be able to do so without interference from a broadband gatekeeper. When Netflix was starting out, an open internet enabled us to offer consumers an innovative option for watching movies and TV shows.⁵ Now, as the world's leading internet television network, Netflix is popular with consumers and has stable relationships with most major ISPs in the U.S. and across the globe. But broadband internet access services providers can use (and have used) gatekeeper power to restrict consumers' ability to access the content they choose, especially from growing and competitive firms. We have detailed examples of this in the Netflix company blog,⁶ and in past filings to the Commission.⁷

⁴ *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

⁵ Since 2005, there has been some form of net neutrality protection in place through broadly applicable rules (or threat of rules), and via conditions placed on internet access provider merger transactions. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14986 (2005); *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005); *Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010), *aff'd in part and vacated in part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4239 (2011); *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, *aff'd United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

⁶ *See* Reed Hastings, *Internet Tolls And The Case For Strong Net Neutrality*, Netflix Company Blog (March 20, 2014) available at <https://media.netflix.com/en/company-blog/internet-tolls-and-the-case-for-strong-net-neutrality>; Ken Florance, *The Case Against ISP Tolls*, Netflix Company Blog (April 24, 2014) available at <https://media.netflix.com/en/company-blog/the-case-against-isp-tolls>.

⁷ *Protecting and Promoting the Open Internet*, Comments of Netflix, GN Docket No. 14-28 (filed July 15, 2014); Reply Comments of Netflix, GN Docket No. 14-28 (filed Sept. 15, 2014).

In the *2015 Open Internet Order*, the Commission recognized that broadband internet access providers “have the ability to use terms of interconnection to disadvantage edge providers,” that ‘consumers’ ability to respond to unjust or unreasonable broadband provider practices are limited by switching cost,” and that broadband providers’ “representation to retail customers that they will be able to reach ‘all or substantially all Internet endpoints’ necessarily includes the promise to make the interconnection arrangements necessary to allow that access.”⁸ To protect consumers and competition from abuse of broadband gatekeeper power, the Commission concluded that it would resolve interconnection complaints on a case-by-case basis, in addition to adopting “last mile” prohibitions against blocking, throttling and paid prioritization.⁹ Netflix believes that the *2015 Open Internet Order* got it right and that strong net neutrality is essential to continued growth and health of the internet ecosystem. The world’s “Next Netflixes” might not be possible without the permissionless innovation enabled by open internet protections.

Netflix is disappointed that the FCC now proposes to walk back those protections, given widespread public support for, and the proven legal sustainability of, those rules. Moreover, the evidence the FCC cites as economic grounds for its 180 degree policy turn appears, at best, inconclusive -- at worst, a contrivance of cherry-picked data and analysis.¹⁰ Not only is there little evidence that investment by broadband providers has been harmed following the *2015*

⁸ *2015 Open Internet Order*, 30 FCC Rcd. at 5693-94 ¶¶ 204-205.

⁹ *Id.* at ¶ 195, noting that “anticompetitive and discriminatory practices in this portion of broadband Internet access service can have a deleterious effect on the open Internet, and therefore [we] retain targeted authority to protect against such practices.”

¹⁰ *NPRM* at 15-16, ¶ 45 (citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016) and George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2 (April 25, 2017)).

Open Internet Order, research indicates that some providers have increased investment since it took effect.¹¹

More concerning than the FCC's reliance on weak economic analysis are statements that misunderstand the basic components of internet architecture and misstate the application of the law. "Internet access" and "the internet" are not the same thing. The distinction between the physical network and the content that travels on top of it is foundational to the internet's growth as a platform. Broadband internet access providers sell a service that enables consumers to access the internet. That physical access service is separate and apart from the content and applications that comprise the internet. The internet was designed so that myriad applications could ride on top of the physical layers of the networks. The underlying networks are agnostic to the content and applications that travel over them. The goal of net neutrality protections is to ensure they remain so.

The FCC has only ever applied net neutrality protections to internet access services, never to the internet itself. This legal and factual distinction between "internet access" and "the internet" has been well understood by previous FCC administrations,¹² so it is troubling that the NPRM now conflates the two. For example, in proposing to walk back from the net neutrality protections currently in place, the *NPRM* proclaims it is "Ending Public Utility Regulation of the Internet."¹³ But the FCC has never regulated "the internet" -- public utility-style or otherwise.

¹¹ See Christopher Hooton, *An Empirical Investigation of the (Non) Impacts of Net Neutrality*, submitted as appendix to Comments of the Internet Association, GN Docket 17-208 (filed July 17, 2017). See also, S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in a Title II World* (May 2017).

¹² See, e.g., *2015 Open Internet Order*, 30 FCC Rcd. at 5775, ¶ 382 (explaining that net neutrality regulation "involves only the transmission component of Internet access service," not the Internet "or any Internet applications or content.")

¹³ *NPRM* at Section III.

Netflix believes that achieving strong net neutrality is critical to maintaining a vibrant, open internet to promote free expression, a diversity of content, and continued innovation. Unfortunately, the course of action proposed in the NPRM is likely to have the opposite effect. We hope the FCC will recognize that keeping the network neutral drives job growth and innovation and will maintain the kind of strong net neutrality protections currently in force.

Respectfully submitted,

_____/s/_____

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