Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
New Docket Established to	)	
Address Open Internet Remand	)	GN Docket No. 14-28
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COMMENTS OF
THE COMPUTING TECHNOLOGY INDUSTRY ASSOCIATION

I. Introduction and Summary

The Computing Technology Industry Association ("CompTIA") hereby submits these comments in response to the FCC's Public Notice[1] establishing a new docket to address open Internet rules. CompTIA is a non-profit IT trade association representing more than 2,000 corporate members, many of whom are small and medium sized technology firms, and more than 3,000 academic and training organizations. Our members are at the forefront of innovation and provide a critical backbone that supports broader commerce and job creation. Our membership includes software developers, cloud computing providers, network security providers, and IT specialists whose products and services are accessed by their customers through broadband connections.

CompTIA supports Chairman Wheeler's proposal[2] to pass new rules to preserve an open Internet. The interests of small businesses online can be promoted and protected through regulatory certainty and transparency in ISPs' network management practices as well as by the passage of new no blocking and non-discrimination rules.

II. Small Businesses Online

Since its inception, the Internet has been a place where a business started in a bedroom can become the next Fortune 500 company seemingly overnight. It offers immense access to a massive audience at the price of a broadband connection, and to-date small businesses have been its lifeblood. Innovations from once-small companies like Google

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[1] *See*, New Docket Established to Address Open Internet Remand GN Docket No. 14-28 (rel. February 19, 2014).
[2] *See*, Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules, February 19, 2014.

and Facebook have changed our online experience forever, and there's no telling where the next such innovation could come from. However, the key to small businesses' success online, access to the average broadband subscriber, could evaporate without rules protecting small businesses' interests. Allowing the Internet to transform into a small network of massive companies who can afford to pay ISPs for access to their customers will cost thousands of Americans their jobs. The small-and-medium business sector of the IT industry accounts for roughly 40% of industry jobs, which amounts to more than 163,000 businesses and over 2 million employees.[3] This sector of the economy could take a significant hit if ISPs start charging edge providers.

The original Open Internet Order[4] succeeded in protecting small businesses online, but promulgated rules that were ultimately deemed too restrictive by the D.C. Circuit.[5] The FCC now has to try again, and this time must pass rules that not only protect small businesses, but can also stand up in the face of a legal challenge. It's a difficult line to toe, but the framework for new rules that Chairman Wheeler laid out last month[6] is a positive step forward. We hope the FCC continues down this path and passes new open Internet rules that allow small businesses to continue to thrive, grow and innovate online.

III. Certainty

Since the 2010 *Comcast* decision[7] that put the FCC's authority over broadband ISPs into question, uncertainty has loomed over the future of net neutrality. While the *Verizon* case was an apparent blow for net neutrality in the short-term, the Court affirmed that Section 706 of the Telecommunications Act gives the FCC the power "to promulgate rules governing broadband providers' treatment of Internet traffic" to "preserve and facilitate the 'virtuous cycle' of innovation that has driven the explosive growth of the Internet."[8] The *Verizon* decision now empowers the FCC to pass new open Internet rules with the confidence that they have the authority to do so.

With the authority question answered, the FCC should now follow the D.C. Circuit's guidance in passing new open Internet rules so as not to provoke yet another challenge to the rules that could create several more years of uncertainty about the future of regulation in this industry. The new rules should not approach common carriage regulations as the

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[3] CompTIA, *Information Technology: Generating Growth Jobs for the U.S. Economy* (2011).
[4] *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) (*Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, No. 11-1355 (D.C. Cir. Jan. 14, 2014).
[5] *Verizon v. FCC*, No. 11-1355, slip op. at 4.
[6] *See*, Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules, February 19, 2014.
[7] *Comcast Corp v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).
[8] *Verizon v. FCC*, No. 11-1355, slip op. at 4.

previous rules did, nor should the rules push the limits of the Commission's authority. Uncertainty about the future of the rules could potentially be worse than having no rules at all in the near-term by stifling investment. The FCC should thus tailor the rules very carefully so as to give certainty to both ISPs and edge providers and promote investment by both parties.

IV. Transparency

We applaud Chairman Wheeler's plans to "enforce and enhance the transparency rule."[9] The Open Internet Order's "transparency rule" was the only one of the three rules left standing in the wake of the D.C. Circuit's decision because it was found not to be a common carrier obligation.[10] We believe that the transparency rule is vitally important today, and will play an even more significant role in a world in which ISPs and edge providers have flexibility to bargain with one another. Having full information about how an ISP is running their network is necessary for small businesses to be able to compete in the incredibly competitive Internet economy.

Our member companies serve not merely as edge providers trying to reach ISP customers, but also as ISP customers themselves. As edge providers, it is essential for companies to have technical information about an ISP's network so they know that their products and services are fully accessible to an ISP's broadband subscribers. They also must know whether their competitors are paying an ISP for improved access to that ISP's customers. As customers of ISPs, companies must have full knowledge of the products and services available to them through an ISP's network, and whether any edge providers are receiving preferential treatment from that ISP.

V. New No Blocking Rule

CompTIA believes that a new no blocking rule is key to any new open Internet rules promulgated by the FCC. Following the D.C. Circuit's decision, a number of CompTIA's member companies, all of which were small edge providers, voiced concern that ISPs would now charge them for access to their customers and block them if they refused to pay. These small companies feared that large companies who could afford to pay ISPs for carriage would take their business. All edge providers, large and small, must be able to reach potential customers, and ISP customers must be able to access any lawful content and applications they wish.

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[9] Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules, February 19, 2014.
[10] *Verizon v. FCC*, No. 11-1355, slip op. at 62.

While the D.C. Circuit struck down the original no blocking rule[11], the decision left sufficient room for the FCC to pass a new rule that would not amount to a common carrier obligation. The court seemed to agree with the assertion the FCC advanced at oral argument that "it's not common carriage to simply have a basic level of required service if you can negotiate different levels with different people."[12] Thus, if the FCC required that ISPs offer edge providers not merely "access to their subscribers generally" but allowed for ISPs to "distinguish somewhat among edge providers," the rule would not amount to common carriage because it would "leave sufficient 'room for individualized bargaining and discrimination in terms.'"[13]

The Court did not allow the rules to stand on this ground, however, because the FCC did not advance the argument in the *Open Internet Order* or in any of its briefs in the case.[14] But if the FCC were to put forth a new no blocking rule premised on that argument, a court would be unlikely to overturn it next time around. We strongly encourage the FCC to do just that and put a new no blocking rule in place to protect the interests of small businesses online.

VI. Non-Discrimination

The D.C. Circuit's decision didn't lay out how the FCC should pass a new non-discrimination rule quite so explicitly as it laid out the no-blocking rule, but it did provide some guidance on what sort of non-discrimination rule could withstand challenge in court.[15] The court struck down the previous iteration of the rule because they found its lack of room for "individualized bargaining" caused it to amount to a common carrier obligation.[16] However, they said that a new non-discrimination rule could withstand legal scrutiny if it allowed for reasonable bargaining flexibility between ISPs and edge providers.[17]

It's difficult to determine exactly what such a rule would look like, but we encourage Chairman Wheeler to follow through on his plan to fulfill the goals of the original non-discrimination rule in any new open Internet rules.[18] We hope that the FCC keeps small businesses in mind when crafting this new rule and protects the interests of small edge providers who cannot afford to pay ISPs for prioritized service. Particularly, edge

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[11] *Id.* at 4.
[12] *Id.* at 60.
[13] *Id.* at 61.
[14] *Id.*
[15] *Id.* at 58-60.
[16] *Id.*
[17] *Id.*
[18] Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules, February 19, 2014.

providers must certainly not be permitted to pay ISPs to degrade the services of their competitors. ISPs also must not be permitted to act anti-competitively towards edge providers by degrading services that they view as a threat to their businesses or the businesses of their partner companies.

Chairman Wheeler's plan to set a "legal standard that provides guidance and predictability to edge providers, consumers and broadband providers," and "evaluate situations on a case-by-case basis to determine whether the standard is met"[19] appears to be an excellent way of enforcing non-discrimination without provoking legal challenges from ISPs. Such a non-discrimination rule would not be nearly as broad as the rule struck down in the *Verizon* case, but could have the same impact on protecting small edge providers. We are intrigued to see the proposed language of this rule in the upcoming NPRM and hope that it is sufficient to protect the interests of small businesses online.

VII. Conclusion

CompTIA encourages the FCC to take the next steps towards codifying new rules to promote an open Internet by releasing a Notice of Proposed Rulemaking in the coming months. Chairman Wheeler's statement established an excellent roadmap for these new rules, and we hope that the FCC follows his lead. The FCC should pass new no blocking and non-discrimination rules to help protect small edge providers. The Commission should also update and enforce its transparency rule to better suit the ISP-edge provider relationship that will exist once new rules are in place. Small businesses need the support of the FCC so that they can continue to make the Internet the hotbed of innovation it has been since its inception.

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[19] *Id.*