

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

In the Matter of)
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Protecting and Promoting the Open Internet) GN Docket No. 14-28
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**Comments
Of
Charles Jay Iseman**

1. I, Charles Jay Iseman, respectfully submit the following comments in this proceeding. As a currently retired attorney and as a broadband consumer, I wish to share my thoughts on how best to protect and promote the open Internet.
2. Broadband Internet Access Service Should Be Reclassified As A Telecommunications Service. In the 2005 *Wireline Broadband Order*,¹ which concluded that wireline broadband internet access service is an information service, and not a telecommunications service, the Commission stated:

The term “Internet access service” refers to a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access Web pages and newsgroups. Wireline broadband Internet access, like cable modem service, is a *functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service.*

Similarly, the Commission has held that cable broadband internet access service² and wireless broadband internet access service³ are information services and not telecommunications services.

¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order, 20 FCC Rcd 14853 at ¶ 9 (2005) (internal citations omitted; emphasis added) (“*Wireline Broadband Order*”).

² *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), affirmed *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

³ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

But, as Stephen B. Wicker, Professor of Electrical and Computer Engineering at Cornell University and a Fellow of the IEEE, explains:⁴

This argument is deeply flawed on at least two points. First, the [Commission] is clearly confusing the “information processing” that takes place as part of any telecommunications service with that conducted by, say, an interactive website. To put it more technically, there is processing that takes place at the application layer on web servers, as *any* modern electronic communication system will combine “computer processing, information provision, and computer interactivity with data transport”. ... [B]asic voice telephony certainly combines all of these elements, and yet it still enjoys common carrier [*i.e.*, Title II telecommunications service] protection. Second, if one understands that there are different types of processing, the information and telecommunication services provided by the broadband service providers would be easily disentangled. The service providers would be allowed to retain editorial control over their own websites, while the rest of us would enjoy common carriage protections when using the data conduits provided by the service providers to access third-party sites.

3. In other words, broadband internet access service fits the definition of “telecommunications service” that is set forth in the Telecommunication Act of 1996, namely, “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.”⁵ The computer processing used to provide broadband access to end users is simply a network “management and control” function that is severable from the computer processing engaged by edge providers of information services. Although broadband providers in most cases also have their own websites and provide information services, these services are not inextricably intertwined with their provision of broadband access service. Those website and related information services should continue to be regarded as information service, but the broadband access service to end users – and to edge providers, as well – should be treated as the telecommunications service it truly is.

4. Broadband Internet Access Service should be subject to Title II common carrier provisions, with substantial waivers. Once broadband internet access service is reclassified as telecommunication service, it is clear that the common carrier provisions of Title II of the Act apply. However, Section 1302(a) of the Communications Act of 1934, as amended, provides:⁶

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, *price cap regulation, regulatory forbearance, measures that*

⁴ Wicker, Stephen B., Cellular Convergence and the Death of Privacy, Oxford University Press (New York, 2013), pp. 93-94.

⁵ 47 U.S.C. § 153 ¶ 53.

⁶ 47 U.S.C. § 1302 (a) (emphasis added).

promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

In accordance with Section 1302(a), the Commission should impose only the four requirements (including the anti-discrimination and anti-blocking rules) it set forth in the *Open Internet Order* that was remanded by the *Verizon* court⁷ and forbear from applying all other Title II requirements. In particular, for reasons discussed below, the ban on “paid prioritization” – as articulated in that *Order* – should be preserved.⁸ As a result, the wise ends sought in that *Order* will be achieved and the concerns expressed by the court will be satisfied.

5. “Paid Prioritization” Should Not Be Permitted. “Paid prioritization” means the establishment of fast lanes and slow lanes on the Internet, with edge providers who wish end users to have the ability to access their content more quickly being required by broadband access providers to pay a premium in order to accomplish this goal. In the context of today’s Internet in the United States, this is a terrible, contraindicated idea.

6. First, the United States now is said to rank 31st internationally in broadband data rates (vernacularly, “speed”).⁹ I believe that it is generally understood that the Internet, because of its end-to-end architecture, has been the golden thread of much innovation over the past fifteen-to-twenty years.¹⁰ I further believe that “net neutrality,” in turn, is the golden thread of innovation over the Internet. The Internet has empowered individuals to engage in horizontal communications with other individuals in ways, and in massive scope, that had never been possible previously. Additionally, vertical communications have been greatly enhanced. To now weaken net neutrality by permitting prioritization of Internet traffic would greatly jeopardize the ability of individuals to continue to innovate via the Internet and could hinder the ongoing economic recovery. License to prioritize is license to throttle, and license to throttle communications is license to kill innovation over the Internet. To assure that U.S. entrepreneurs will not be handicapped in developing future innovations, it is important for the U.S. to upgrade its Internet infrastructure so as to reach and maintain world-class “speeds.” It seems at present that the only meaningful incentive for the incumbent duopoly broadband providers to upgrade the data rates provided by their facilities is the occasional threat of competition by an insurgent such as Google.¹¹

⁷ *Protecting the Open Internet*, 25 FCC Rcd 17905 (2010) (“*Open Internet Order*”), remanded *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁸ The Commission’s explanation for adopting anti-blocking rules, *Protecting the Open Internet*, note 7, *supra*, at ¶¶ 62-67, is thorough, correct, and should be re-affirmed. No further comment is needed herein.

⁹ McGlaun, S., “US Ranks 31st On Global Broadband Speed List,” Nov. 27, 2013 (<http://www.slashgear.com/us-ranks-31st-on-global-broadband-speed-list-27306968/>).

¹⁰ See generally, Wicker, *supra* note 4, at pp. 106-113.

¹¹ See, e.g., Reardon, M., “Google’s Fiber Effect: Fuel for a Broadband Explosion,” April 30, 2014 (<http://www.cnet.com/news/googles-fiber-effect-fuel-for-a-broadband-explosion/>); Bode, K., “Austin Begins to Show Us What Broadband Competition Was Supposed to Look Like,” February 24, 2014 (<https://www.techdirt.com/articles/20140218/14292026271/austin-begins-to-show-us-what-broadband-competition-was-supposed-to-look-like.shtml>); Canon, S., “AT&T Might Challenge Google Fiber With High-Speed Internet Service in KC,” April 22, 2014 (<http://www.kansascity.com/news/business/article346078/ATT-might-challenge-Google-Fiber-with-high-speed-Internet-service-in-KC.html>).

7. Paid prioritization, however, would create a triple threat to American innovation over the Internet. First, in order to achieve paid prioritization, broadband providers would necessarily have to introduce an extra element of centralized control into their Internet architecture. By thus reducing the Internet's end-to-end architecture, an element of the essence of the lifeblood of innovation over the Internet would be imperiled.¹² Second, a requirement for potential innovators to pay a premium for higher speed access would clearly create a major economic disincentive to innovation. Third, and perhaps most importantly, paid prioritization would create a clear disincentive to the timely upgrade of Internet infrastructure. Game theory indicates that it generally would be in the incumbent's best interest to increase its use of paid prioritization – the creation of various speed lanes on the Internet – in order to delay the tipping point at which it would ultimately feel an urgency to build new or upgrade existing infrastructure. In light of the United States' paltry 31st international ranking in Internet speed, such delay would greatly disserve America's national interests. Therefore, now is not the time to permit paid prioritization.¹³

Respectfully,
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¹² See Wicker, *supra* note 10.

¹³ It appears, pursuant to the decision in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), that the only way -- or, at least, the most definitive way -- to disallow paid prioritization is through Title II common carrier classification of broadband internet access service.