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

In the Matter of Protecting and Promoting the Open Internet	))))	GN Docket No. 14-28

COMMENTS OF CONSUMERS UNION

Delara Derakhshani
Policy Counsel
Consumers Union
1101 17th Street NW, Suite 500
Washington, DC 20036

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I. Introduction and Summary

Consumers Union, the policy and advocacy arm of Consumer Reports, appreciates the opportunity to share the consumer perspective on the Commission's proposed path forward to restoring net neutrality rules. Consumers Union's mission is to work for a fair, just, and safe marketplace. In the context of an open Internet, this means ensuring that consumers can access the online content of their choice at affordable prices, without interference from Internet Service Providers (ISPs), and putting in place strong net neutrality rules that protect consumers from harmful discriminatory practices by ISPs.

We have a long history of working with the Commission to ensure an open Internet for all consumers. We were deeply disappointed with the recent D.C. Circuit decision in *Verizon v. FCC* to overturn the Commission's 2010 rules against blocking and unreasonable discrimination. Since then, we have argued that the best way for the Commission to restore the principles underlying those rules is to reclassify broadband as a telecommunications service under Title II of the Communications Act.[1] Reclassification would put in place clear rules of the road to protect consumers and would ensure that consumers – and not a handful of ISPs – have control over access to content online.

Consumers agree that net neutrality should allow people to have unfettered access to the online content of one's choice, free from interference from ISPs. A February 2014 national survey by *Consumer Reports* found that seventy-one percent of respondents

[1] *See* Comments of Consumers Union, GN Docket 14-28 (filed Mar. 23, 2014).

would attempt to switch to a competing service provider if their provider blocked or slowed down popular services such as Netflix, Pandora, and Skype.[2]

We continue to have grave concerns about the Commission's proposal to allow paid prioritization arrangements. The market for last-mile Internet access is already controlled by a handful of powerful companies and the largest ISPs are becoming increasingly vertically integrated with programmers. Paid priority arrangements would give ISPs even greater power to determine which services reach consumers, putting them in a position to determine which services will thrive. With control over both the pipes and content, these providers have the leverage and incentive to favor their own content over the programming of their competitors, and to make market entry difficult for new entrants.

The recent string of proposed mergers only further exacerbates our concerns about the threats that the largest ISPs can pose to an open Internet, including the proposed Comcast-Time Warner Cable merger and AT&T's bid to acquire DirecTV. These mergers would only increase their market power to the detriment of consumers.

We are particularly concerned about the Comcast-Time Warner Cable merger, which would give Comcast unprecedented power in the video and Internet marketplace and control over nearly forty percent of the nation's broadband service. The merger would extend the company's reach significantly with the addition of millions of subscribers, giving Comcast additional leverage to engage in harmful discriminatory

[2] *See* Press Release, Consumer Reports, "71% of U.S. Households Would Switch From Providers That Attempt to Interfere With Internet (Feb. 18, 2014), *available at* http://www.consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm (last visited June 14, 2014).

practices that could ultimately raise prices for consumers and stifle viewer access to competitive options.

Comcast already owns a valuable stream of content from its merger with NBCUniversal. When that deal was approved, a number of conditions were put in place to address the concerns that regulators had about combining the two entities, including a requirement to abide by net neutrality protections. These rules were put in place in recognition of the fact that online video providers depend on ISPs' networks in order to reach subscribers, and that Comcast has the ability and incentive to engage in practices that harm these emerging competitors. However, as many, including Senator Franken have pointed out,[3] Comcast has previously failed to fully live up to its promises and obligations. We continue to have serious concerns that it still has the ability to prefer its own products and services over the wires it owns and its ability to make market entry difficult for new rivals. The combined company would serve as a gatekeeper for many millions of consumers, with enormous control over the speed, quality, and price of programming.

Comcast claims that the merger should not raise concerns with either the Commission or the Justice Department's Antitrust Division, because Comcast and Time Warner Cable do not currently compete in each other's geographical territories.[4] But as a Consumer Reports publication, *The Consumerist*, noted in March 2014, "the biggest long-term concern about the Comcast/TWC deal is what it would mean for consumers'

[3] Letter of Senator Franken to Chairman Wheeler, (Feb. 27, 2014) (noting that Comcast has a "history of breaching its obligations to consumers"), *available at* http://www.franken.senate.gov/files/letter/140227FCCLetterComcastTWC.pdf.
[4] *See* Comcast Public Interest Statement, MB Docket 14-57, at 138.

access to the Internet, as that is both the future of all content delivery and the main source of competition to pay-TV providers."[5]

The Commission must adopt a clear set of rules for net neutrality in order to achieve meaningful protections. We believe the best way to do this is to reclassify broadband as a telecommunications service, ban paid prioritization deals, and apply net neutrality protections to wireless broadband services.

II. The Commission Should Ban Paid Prioritization Deals

The Commission is currently considering rules that would allow ISPs to sell preferential access to content providers who are willing to pay for it. This move would seriously undermine the core principles of an open Internet by allowing ISPs to play favorites among websites and services. The result would be a two-tiered Internet where those that cannot pay for special treatment are subject to slower speeds and degraded quality – especially during times of congestion, when services are in high demand.

Consumers are concerned about these deals, which have the potential to significantly impact the flow of information online, as well as price and quality of service. In an April 2014 survey by the Consumer Reports National Research Center, fifty-eight percent of consumers said that they were opposed to allowing ISPs to charge extra for preferential treatment. Only sixteen percent of those surveyed thought it was a good idea.[6]

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[5] *See* Chris Morran, *Could A Merger Between DirecTV And Dish Be On The Horizon?*, THE CONSUMERIST, (Mar. 28, 2014), http://consumerist.com/2014/03/28/could-a-merger-between-directv-and-dish-be-on-the-horizon/.

[6] *See* Press Release, Consumer Reports, "Net Neutrality: 58% Say Government Should Not Allow Paid Prioritization In New Consume Reports Survey" (June 20, 2014), *available at* http://consumersunion.org/news/net-neutrality-58-say-government-should-not-allow-paid-prioritization-deals-in-new-consumer-reports-survey/ (last visited July 14, 2014).

Under paid prioritization agreements, ISPs guarantee that a company's content will get to a customer faster than a competitor's. Content providers can "cut to the front of the line" to avoid congestion problems. Customers and companies that opt not to pay for preferential treatment could correspondingly experience a decline in service, resulting in degraded service or slower load times. Permitting this type of preferential access for a fee will significantly disadvantage institutions and individuals that cannot afford to pay – including smaller businesses and non-profit organizations. Paid prioritization deals could prevent these entities' messages from ever reaching the consumer, thus limiting the universe of available content and services available to the end-user.

Paid prioritization arrangements also give ISPs the ability and incentive to exact higher "admission tolls" from content producers, the costs of which are passed along to consumers. Those who cannot afford the use of prioritized services may not be able to access them at all. As the National Broadband Plan identified, our nation currently faces a "Broadband Availability Gap," leaving millions of Americans unable to realize the economic, educational, entrepreneurial, and social benefits that flow from access to these services.[7] These deals have the potential to have a disproportionate negative impact on lower-income Americans and further exacerbate this divide.

Finally, some parties have argued that ISPs should make the necessary investments to improve the quality of all consumers' viewing experiences, instead of striking paid prioritization deals. As there is increased consumer demand and as traffic online grows, providers need to make investments in order to enhance the experience and the range of services for end users. But some parties argue that ISPs are not making

[7] Federal Communications Commission, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 136 (2010).

necessary upgrades that can accommodate additional traffic and ensure smooth delivery for everyone, choosing instead to focus on paid prioritization schemes that improve service for a select group of subscribers.[8]

III. A Commercially Reasonable Standard and Case-by-Case Approach in Conjunction With Section 706 is Insufficient to Protect Consumers

The Commission tentatively proposes to use a "commercially reasonable" standard to permit broadband providers to engage in individualized practices. In doing so, it proposes a case-by-case approach to analyzing provider practices. However, we are concerned that the standard is vague and unenforceable and will not prevent harms to consumers in real-world practice. This approach provides no meaningful certainty and will only favor the largest incumbents with the most resources who already have unequal bargaining power and dominant market power over consumers.

The Commission solicits comment on whether it should rely on Section 706 of the Communications Act to preserve an open Internet. Section 706 focuses on whether broadband is deployed to all Americans in a reasonable and timely fashion, and grants the Commission authority to take action that promotes competition and that is consistent with the public interest. However, the section differs fundamentally from a Title II common carriage approach in that it gives carriers significant room to permit discrimination and the flexibility to make individualized negotiations. Unfortunately, this approach and a case-by-case analysis in conjunction with Section 706 is not enough by itself to protect an open Internet.

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[8] *See* James O'Toole, CNN MONEY, "Netflix Speeds Lag For Verizon Users Amid Dispute"(Feb. 21, 2014) (noting Cogent's view that Comcast is "using their monopoly power to put a toll road in place" and "refusing to improve the connections between our network and their network"), *available at* http://money.cnn.com/2014/02/21/technology/verizon-netflix/.

We are concerned that this provision cannot effectively reach all of the harmful ISP practices that can hinder the free flow of information, treat consumers unfairly, and discriminate against online content creators. For example, a broadband provider could favor its own content by exempting its own services from restrictions such as data caps or throttling, minimize disruptions to streaming of affiliated content only, or raise its prices for particular content providers or consumers. Under the approach put forth by Section 706, the Commission may be able to intervene only if it determines that a broadband provider's actions are a barrier to deployment.

Nor would Section 706 reach instances in which a provider might be able to act in anti-competitive ways that may not even be apparent to the consumer but that have a profound impact on their viewing experience or prices of services. A case-by-case approach in conjunction with Section 706 would place the burden of proving harmful practices on users and edge providers, who may not always be aware of all of the circumstances surrounding a particular practice or negotiation. Even in instances in which the harms are obvious, we are concerned that problems will be alleviated only after a lengthy adjudication process, after consumers have already suffered harms. In other words, under a Section 706 approach, practices would be permitted to continue until a concrete harm could be demonstrated in a particular case.

The Commission proposes to adopt a "commercially reasonable" standard based on the standard that was initially adopted in the Commission's Data Roaming Order. The Commission adopted a data roaming rule to ensure that consumers could seamlessly use data services across the nation on the wireless carrier of their choice. The decision was meant to facilitate competition in the wireless market and to ensure that all carriers were

able to offer reliable services and compete on a level playing field. The agreements are necessary to enable smaller wireless carriers to rely on the networks of the largest carriers so that they can provide nationwide coverage.

The Data Roaming rules provide the Commission with a blueprint for how the commercially reasonable standard might work in practice. In that context, the standard was meant to facilitate business arrangements between wireless carriers, while enabling them to engage in flexible, individualized negotiations. This is not unlike the situation in the open Internet context, in which an app developer, website, or service must rely on the broadband provider in order to get its service to the subscriber.

However, real-life experience has demonstrated that the "commercially reasonable" standard is unworkable. In the data roaming context, the standard has proven to be too vague and unenforceable to prevent large incumbents from exploiting their market power. The result is an imbalance of bargaining power, and what some have characterized as a dysfunctional marketplace in which smaller players – who are entirely dependent on large incumbents in order to get services out to subscribers – are subject to abnormally high prices and unreasonable negotiation tactics. As they put it, "those with market power can and do charge whatever they want because there are no practical alternatives for most carriers in many areas."[9]

The concerns are not unlike those in the broadband ISP market. With enormous subscriber bases and control over the pipes, the largest incumbents continue to exercise tremendous leverage over smaller competitors and have the power to dictate how consumers can receive content and what prices they must pay. Because of their roles as

[9] T-Mobile Petition, In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265 (May 27, 2014)

gatekeepers to millions of customers, the largest ISPs recognize that smaller content providers depend on them for the viability of their business. Ideally, parties would be able to come to the table and agree on equitable terms as to what constitutes a "commercially reasonable" deal. But the market power of the largest ISPs and their unequal bargaining power puts them in a dangerous position to dictate terms highly favorable to them, and reveal why a commercially reasonable standard will be unworkable in the efforts to protect an open Internet.

IV. Title II is the Best Way to Protect Consumers

The underlying principles of net neutrality are best achieved with a regulatory framework that ensures that the Internet is available to everyone on equal, nondiscriminatory terms. The best way to achieve this will be to reclassify broadband as a telecommunications service under Title II. Reclassification will provide certainty, protect against practices that harm consumers and competition, and help ensure that consumers are able to reap the benefits of an affordable and accessible Internet.

At the heart of the concept of common carriage is the duty of the provider to treat all traffic equally. This principle is encompassed in Sections 201 and 202 of Title II, and gives the Commission the authority to determine whether any practices, classifications, and regulations are unjust or unreasonable. These provisions of Title II have served as an effective way to protect consumers under the traditional phone system and prevented providers from unfairly leveraging their market power. The Commission should apply the same pro-consumer framework to ensure open, affordable, and ubiquitous access to broadband.

The Commission can narrowly target this framework to best suit the particular needs of broadband service using its forbearance power under Section 10 of the Communications Act.[10] Under that section, the FCC can choose not to apply a particular Title II provision if it believes such a course of action is in the public interest in that it "will promote competitive market conditions" and "enhance competition among providers of telecommunications services."[11] In this way, the Commission can continue to prohibit paid prioritization and other harmful practices as inherently unreasonable practices under Sections 201 and 202, while maintaining a light regulatory touch appropriate for broadband.

V. The Commission Should Apply Net Neutrality Principles to Wireless Broadband Services

The Commission's 2010 Open Internet rules banned both wired and wireless services from blocking access to lawful content. But the Commission chose not to apply its prohibition against unreasonable discrimination to wireless services. CU believes that the Commission should revisit this decision and apply net neutrality protections to wireless in light of the increased dependence on these technologies and wireless carriers' demonstrated interest in restricting and controlling access to certain applications and services.

Since 2010, wireless service has become an even more essential part of consumers' lives. Smartphone penetration levels continue to increase,[12] and innovative new technologies and applications have improved consumers' lives in never-before-seen

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[10] 47 U.S.C. § 160

[11] *Id*.

[12] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 11-186, Sixteenth Report, FCC 13-34 (rel. Mar. 21, 2013) ("*Sixteenth Competition Report*") (noting that 55.5% of mobile wireless consumers owned smartphones as of July 2012, up 41% from the previous year).

ways. A growing portion of the population has chosen to "cut the cord" and replace landline phones with mobile wireless service. According to the FCC, thirty-four percent of adults lived in wireless-only households by the second half of 2012.[13] Others – including consumers in rural areas, low-income communities, and communities of color – rely on their cell phones as their only means of accessing the Internet.

The underlying principle of net neutrality is to allow consumers to freely access content, without interference from companies. Since that time, carriers have demonstrated that they, too, are able and willing to interfere with the apps and services that reach consumers. With few exceptions, carriers continue to employ restrictive practices by putting data caps in place, slowing down speeds, and eliminating unlimited "all-you-can-eat" data plans in the name of congestion and limited capacity. However, they have demonstrated that these restrictive practices can be used in a way to threaten Internet openness by driving consumers to particular uses, while withholding available bandwidth from other uses.

For example, AT&T's "sponsored data" plan, announced earlier this year, enables web sites and services to pay AT&T to exempt their services from data caps.[14] This type of behavior seriously distorts competition, favors companies with the deepest pockets, and prevents consumers from exercising maximum control over what they are able to access over the Internet. Large ISPs are motivated by private economic interests and the deals they strike in private negotiations may not have anything to do with what the consumer actually wants.

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[13] *Sixteenth Competition Report* at 26.
[14] See Marguerite Reardon, CNET, "AT&T Says 'Sponsored Data' Does Not Violate Net Neutrality" (Jan. 9, 2014), http://www.cnet.com/news/at-t-says-sponsored-data-does-not-violate-net-neutrality/.

More recently, T-Mobile announced a plan in which it provides free music streaming services and exempts these services from throttling practices.[15] While this example arguably may not be as concerning as AT&T's proposal, it, too, demonstrates how data caps are currently being used by wireless to threaten the openness of the Internet. Exempting certain affiliated services from data caps does not provide consumers with a meaningful choice. Instead, it pushes them to watch affiliated content out of fear that doing otherwise will count against their monthly caps and result in either overage charges or slower speeds. The result is that only services that are affiliated with the largest ISPs are the ones that thrive and reach consumers, putting carriers in a distinct position to pick winners and losers.

The Commission should also recognize that high switching costs can impact the open Internet and give providers even more power over consumers. In a truly competitive environment, users should be able to freely switch among carriers. In reality, many consumers are locked into expensive, long-term service agreements that create artificial barriers to competition and consumer choice, and dissuade consumers from switching among mobile service providers. These high switching costs affect the incentives and economic ability of providers to limit Internet openness, making it far less likely for consumers to leave a particular provider despite dissatisfaction with that service provider. With the knowledge that consumers are unlikely to respond negatively, carriers can impose restrictions or engage in behaviors that consumers otherwise would not tolerate. Although carriers argue that they have strong incentives to carriers to keep customers happy, the fact remains that when consumers have a harder time switching, carriers are under less pressure to respond to customer demands.

A January 2014 Consumer Reports article reported that high switching costs continue to serve as barriers to customers freely changing carriers. Thirty-one percent of survey respondents said that they are seriously considering switching providers, but one in six of that group said that they cannot switch because long-term contracts and early termination fees handcuff them to carriers. CU has provided advice to consumers as to how they can get out of the exorbitant fees associated with these long-term contracts – but more needs to be done to address consumers' concerns. In the context of an open Internet, these high switching costs are significant because they make it harder for a consumer to protest discriminatory practices. When a consumer has a reduced willingness to switch carriers, it becomes more likely that restrictive practices will be tolerated by consumers.

VI. Consumers Will Benefit From Additional Transparency

We agree with the Commission that transparency discourages harmful market behavior and that information regarding network management practices can help consumers but it is no substitute for putting in place robust net neutrality rules that provide meaningful consumer protections. As we have argued recently before the Commission, communications markets function best when consumers have access to accurate, consistent, and meaningful information. Disclosures can help consumers make informed and rational decisions, especially as they are faced with increasingly complex decisions in the marketplace.

In the context of an open Internet, transparency is particularly important to provide consumers with an accurate representation of the Internet services they received – both before they sign up and throughout the course of a relationship with a service

provider. Transparency also serves the important purpose of ensuring that providers are not unduly interfering with consumer access to services for which they have paid.

Unfortunately, as the Commission itself notes, consumers continue to express confusion about provider practices that apply caps, usage fees, or slow down service, often with little or no notice. The Commission reports it receives many complaints about broadband providers' practices, including "questions about the source of slow or congested services." Furthermore, subscribers may be confronted with confusing and unclear information regarding service quality and practices that may interfere with the consumer's ability to freely access the content of their choice.

The Commission seeks comment on the type of information that should be disclosed to consumers. As a general principle, we believe that consumers are empowered when they have more, not less, information on which to base decisions.
We believe that any disclosures to the consumer must be clear, consistent, and conspicuous and that information should clearly articulate actual service performance, as well as any potential limitations on the use of service. Ideally, this information should be provided in a consistent manner across service providers to enable consumers to compare and contrast services across providers.

In our experience, consumers are pushed to overbuy data and then underuse the data once they have paid for it. A January 2014 study in Consumer Reports noted that almost forty percent of consumers with limited data allowances typically only use half or less of what they're paying for. We've provided tips to help consumers better determine what usage plan is best. We've advised them to take a closer look at their bills over time to determine their usage patterns so that they may revise their plan accordingly.

We agree that there is a clear consumer need and desire for additional information, and that industry can do a better job of helping consumers understand exactly what they're buying. Consumers should be told clearly of practices that have the potential to impact an open network, including whether network resources are reserved for a particular purpose, or if they are withheld from other uses.

Again, we reiterate that increased transparency does not serve as a substitute for strong net neutrality protections, and that transparency does automatically make palatable practices that are restrictive, harm consumer choice, and threaten Internet openness. However, we recognize the important role it plays in the consumer experience and believe that its value can be improved.

VII. Conclusion

The Commission has long stood for the principles of accessible, ubiquitous, and affordable communications service, and it must put in place clear rules of the road to ensure the same in the broadband space. ISPs already have a great deal of power over consumers and content providers, and the wrong network neutrality approach would only increase their power to affect the prices and quality of services and the flow of information online.

The decisions pending before the Commission have profound and far-reaching effects on the future of the Internet and the ways consumers use it. In restoring net neutrality protections, the Commission should ensure that its decisions are in the best interests of consumers, rather than a handful of ISPs.

The Commission can best achieve this with a Title II framework. Examining these relationships on a case-by-case basis according to a vague and unworkable set of

standards would not serve the public interest. Instead, the Commission should rely on the more certain and time-tested provisions of Title II, and apply the non-discrimination principles found in Sections 201 and 202, while choosing not to apply the substantive provisions of Title II that are not well-suited to broadband. Furthermore, we strongly believe that paid prioritization deals should be banned outright. It is not an exaggeration to say that the future of the Internet is at stake. The Commission should do everything within its power to ensure that the interests of all consumers, rather than those of a handful of large Internet Service Providers, are the drivers of the new rules. The Internet must remain open, affordable, and available to everyone.