

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

In the Matter of )  
 )  
Framework for Broadband Internet Service ) GN Docket No. 10-127  
 )

**COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER  
ADVOCATES ON NOTICE OF PROPOSED RULEMAKING**

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**I. INTRODUCTION AND EXECUTIVE SUMMARY**

On May 15, 2014, the Federal Communications Commission (“FCC” or “Commission”) released a Notice of Proposed Rulemaking (“NPRM”) that began “with a fundamental question: What is the right public policy to ensure that the Internet remains open?”<sup>1</sup> The National Association of State Utility Consumer Advocates (“NASUCA”)<sup>2</sup> appreciates the opportunity to comment on this question, which is crucial for consumers, industry, and the national economy.<sup>3</sup>

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<sup>1</sup>NPRM, FCC 14-61, ¶ 2.

<sup>2</sup>NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

<sup>3</sup>The Commission’s Wireline Competition Bureau put refreshing the record in 10-127 on the same timeline, so NASUCA is combining the refreshing with these comments.

At the outset, we wish to emphasize that reclassification of broadband transport as Title II is essential if the FCC is to achieve an open Internet. Reclassification need not involve "regulating the Internet" or stifling the development of innovative services and applications. Rather, it restores the level playing field of common carriage, the basis on which the Internet prospered, from its birth in the 1970s and 1980s through 2002. It provides both customers and innovators who rely on broadband access the opportunity to utilize this essential mode of communication without being impeded by unreasonable discrimination. The elements of a regulatory structure that are necessary for a truly open Internet are part and parcel of common carriage and Title II. The Commission should not attempt to achieve the vital public policy need for a level playing field with an inadequate legal rationale and framework. Instead, it should address the issues by reclassifying broadband as a telecommunications service under Title II.

In response to the NPRM, NASUCA submits the following key points:

- The FCC should reclassify broadband Internet access service (referred to hereafter as "broadband") as a telecommunications service.
- The FCC has clear authority for such reclassification under Title II of the 1996 Telecommunications Act.
- Such reclassification would allow the FCC to ensure that the Internet remains open.
- The FCC should not assert authority to prevent discrimination solely based on 47 USC § 1302 (Section 706). In its recent decision, the D.C. Circuit provided a clear path for the FCC to take the necessary steps to prevent discrimination through Title II.

These topics are discussed below in Sections II-VI of these comments.

In the NPRM, the FCC presents several proposals, some of which NASUCA will address in detail herein:<sup>4</sup>

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<sup>4</sup>NPRM, ¶ 10. Text *sic*, bullets added.

- First, ... to retain the definitions and scope of the 2010 rules.
- Second, [to] enhance the transparency rule ... so that the public and the Commission have the benefit of sunlight on broadband provider actions and to ensure that consumers and edge providers—indeed, the Internet community at large—have the information they need to understand the services they are receiving and to monitor practices that could undermine the open Internet.
- Third, [to] adopt the text of the no-blocking rule from the *Open Internet Order* with a revised rationale, in order to ensure that all end users and edge providers can enjoy the use of robust, fast and dynamic Internet access.

NASUCA agrees with and supports all three of these proposals, and will not provide additional comment on them here, except to emphasize one fundamental point: The D.C. Circuit rejected the 2010 net neutrality rules because the FCC attempted to adopt open Internet provisions that were, by their nature, common carriage obligations, without first reclassifying broadband as a Title II common carrier service.<sup>5</sup> The Commission should take steps not to repeat that mistake. We anticipate responding in reply comments to those who oppose the first three proposals.

NASUCA will address the following proposals in more detail in these opening comments:

- Fourth, and where conduct would otherwise be permissible under the no-blocking rule, ... to create a separate screen that requires broadband providers to adhere to an enforceable legal standard of commercially reasonable practices... [The Commission] ask[s] how harm can best be identified and prohibited and whether certain practices, like paid prioritization, should be barred altogether.

This is an important question, and is discussed in Section VII of these comments. In summary, given the fundamental public interest in telecommunications (including broadband) and the significant market power of network owners, NASUCA supports a standard that affords customers protections beyond what is merely “commercially reasonable.” As discussed below,

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<sup>5</sup> Verizon v. FCC (D.C. Circuit, January 14, 2014), slip op. at 45-46, 56,

even in the roaming context “commercially reasonable” has proven a difficult concept to interpret and enforce. Paid prioritization for network access and carriage should not in any event be countenanced. And consumers and entrepreneurial edge-network providers should not be required to suffer harm before rules are adopted or applied. Rules that prevent the harm in the first instance are appropriate here.

- Fifth, [the Commission] propose[s] a multi-faceted dispute resolution process to provide effective access for end users, edge providers, and broadband network providers alike and the creation of an ombudsperson to act as a watchdog to represent the interests of consumers, start-ups, and small businesses.

NASUCA supports this concept; however dispute resolution should not be a substitute for a bright-line anti-discrimination rule. Moreover, case by case dispute resolution is more effective if consumers and their representatives are able to participate in the dispute resolution process, which means there must first be a formal structure for such a process and this structure does not currently exist. The ombudsperson should have the authority, opportunity, and willingness to intervene and to refer disputes to the Enforcement Bureau, and the Bureau must be equipped to promptly resolve those disputes. While such an approach is compatible with regulation under Title II, it requires a commitment to build an infrastructure of administrative law judges or other decision makers to resolve disputes. This is discussed further in Section VIII.

- Sixth, and finally, we ask how either section 706 or Title II (or other sources of legal authority such as Title III for mobile services) could be applied to ensure that the Internet remains open.

As described in Sections II-V below, Title II is the most appropriate source of authority for regulating broadband providers. Broadband connectivity and service involves transport of both telecommunications and information services. As such, it is consistent with the paradigm of Title II telecommunications. The Internet became what it is on a Title II common carriage basis,

with the architects of this innovative effort making use of networks operating under the Title II regime. The core functions of the Internet, concomitant with its obviously enormous promise, were already developed at the time of the FCC's 2002 *Cable Broadband Order* which eliminated the then-current common carriage.<sup>6</sup> Since then, the FCC has tried to develop rules that would foster net neutrality while eschewing Title II. We believe this is a futile endeavor. As the DC Circuit pointed out, any approach to a non-discrimination or anti-blocking rule that does not include common carriage is inherently contradictory.<sup>7</sup> Section 706 should not be relied on exclusively to protect consumers. Broadband should be reclassified as Title II, and Title III and other FCC authority should be utilized where needed.

## **II. THERE ARE MANY REASONS TO RECLASSIFY BROADBAND AS A TELECOMMUNICATIONS SERVICE, WITH EXTENSIVE SUPPORT ALREADY IN THE RECORD**

The issue of reclassifying broadband as a Title II service has been extensively addressed in prior comment by many parties, including NASUCA. NASUCA refers the Commission to NASUCA's reply comments on the FCC's Notice of Inquiry in GN Docket No. 10-127 (FCC 10-114), filed August 12, 2010, at 2-5.<sup>8</sup>

NASUCA continues to support the reclassification of broadband transport service as a Title II service, consistent with how the service was treated prior to 2002. As NASUCA has argued, reclassification *would not* involve "regulating the Internet," nor would it involve regulating innovative applications and edge services that utilize the Internet. However, reclassifying broadband transport as Title II *would* prevent the carriers that own the facilities

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<sup>6</sup> *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) (*Cable Broadband Order*).

<sup>7</sup> Verizon, slip op.at 45.

<sup>8</sup>See <http://apps.fcc.gov/ecfs/document/view?id=7020706154> (internal footnotes retained).

over which transport is provided from using their significant market power to *control* the content and applications that are carried over their facilities and engaging in discriminatory practices that harm both consumers and innovative entrepreneurs who rely on these networks.

NASUCA's views are shared by many cutting edge Internet entrepreneurs and the venture capitalists who support them. For example, the benefits of Title II reclassification for Internet start ups were emphasized in a recent ex parte meeting involving Internet entrepreneurs and venture capitalists:

The participants talked about the relative merits of using Title II of the Communications Act of 1934 and Section 706 of the Telecommunications Act of 1996 as legal authority of open internet rules. Mr. Kopf asked whether using Title II would "deliver a whole new set of opportunities for start-ups that ensure they are treated no differently than the biggest companies." Mr. Kopf urged the Commission to reclassify broadband internet access as a telecommunications service under Title II of the Communications Act. Mr. Kopf believes that Title II is the best tool to protect start-ups from discrimination by internet access providers.<sup>9</sup>

Similar points with respect to both paid prioritization and broadband reclassification were made in ex parte meetings by venture capitalists who support Internet start-ups:

We explained that the FCC should ensure that phone and cable companies do not leverage their terminating access monopolies to impose new tolls on applications or to through deep packet inspection. We explained that the investment and entrepreneur community needs far more certainty than that offered by the FCC's proposed rule. We also explained that, because Section 706 cannot support rules against discrimination, the FCC should ground its action in Title II.<sup>10</sup>

Further, over 100 venture capitalists and angel investors submitted a letter to the FCC encouraging "the Commission to consider *all available jurisdictional tools at its disposal* in

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<sup>9</sup> GN 14-28, ex parte letter (June 26, 2014) filed by Gigi B. Sohn, reporting a June 24, 2014 meeting between representatives of Y Combinator, Andreessen Horowitz, Zetta Venture Partners, AngelList, Homebrew and Ad Roll and FCC Chairman Tom Wheeler, and Sagar Doshi and Gigi B. Sohn of the FCC.

<sup>10</sup>GN 14-28 ex parte letter (June 26, 2014) from Union Square Ventures reporting a June 24 meeting between Union Square Ventures and FCC staff.

ensuring a free and open Internet that rewards, not disadvantages, investment and entrepreneurship."<sup>11</sup>

As discussed above and stated in NASUCA's 2010 initial comments, the regulatory conundrum currently facing the Commission is due to the mistaken approach followed in the Commission's 2002 *Cable Modem Order*, in which Commission classified Internet access over a cable modem as an "information service." NASUCA believes that this classification was incorrect, and has been shown with every passing year to be inadequate and detrimental to broadband deployment, innovation and adoption. This current docket offers the Commission the opportunity to correct this historic mistake.<sup>12</sup>

The FCC has spent more than a decade seeking to create a patchwork regime that has failed to adequately address the issues associated with net neutrality (and evolving telecommunications networks in general), and this approach has been rejected by the courts. The obvious solution, as evident in the recent D.C. Circuit *Verizon* decision, is for the FCC to use its authority to pursue open Internet policies through reclassification of broadband transport and access service as Title II. NARUC has pointed out the pitfalls associated with the FCC's refusal to reclassify broadband (and fixed VoIP) as Title II:<sup>13</sup>

NARUC has spent the last decade urging the FCC to follow the technology-neutral approach of the Telecommunications Act and confirm the obvious, i.e., (1) that fixed (and nomadic) VoIP services are, in fact, "telecommunications services," and [(2)], as the NTCA Petition suggests, that "*all* interconnection for the exchange of traffic subject to Sections 251 and 252 is governed by the [1996 Act] regardless of the technology used to achieve such interconnection."

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<sup>11</sup> See GN 14-28, Union Square Ventures ex parte (May 9, 2014) attaching May 8, 2014 letter. May 8 letter at 2 (*emphasis added*).

<sup>12</sup> See GN 10-127, NASUCA Comments (July 15, 2010) at 2-3.

<sup>13</sup> GN 12-353, NARUC initial comments (January 28, 2013), at 3-4; see also *id.* at 10-18.

NARUC footnote 14, inserted at this point, states:

In a November 19, 2003 resolution, online at: [http://www.naruc.org/Resolutions/info\\_services.pdf](http://www.naruc.org/Resolutions/info_services.pdf), NARUC cautioned the FCC to consider the negative implications associated with a finding that IP-based services are subject to Title I jurisdiction, including the (i) uncertainty and reduced capital investment while the FCC's authority under Title I is tested in the courts; (ii) loss of consumer protections applicable to telecommunications services under Title II; (iii) disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences; (iv) increased risk to public safety; (v) customer loss of control over content; (vi) loss of State and local authority over emergency dialing services; and (vii) reduced support base for federal and State universal service as well as State and local fees and taxes. Those warnings remain valid today.”

And they remain valid in 2014 as well.

### **III. THE COMMISSION HAS THE AUTHORITY TO RECLASSIFY BROADBAND**

In a June 25, 2014 speech to the Free State Foundation, Commissioner Ajit Pai said that the FCC should seek Congressional blessing before reclassifying broadband as a telecom service.<sup>14</sup> The Commission did not seek such approval in 2002 before reclassifying broadband as a unitary information service; it need not seek such approval now. The U.S. Supreme Court's decision in *Brand X* showed that the 2002 decision was only one, and not necessarily the most, reasonable interpretation of the Telecom Act.<sup>15</sup>

The notion that the FCC does not have the current authority to reclassify broadband is erroneous. The D.C. Circuit noted that the Commission's decision to classify broadband providers as providers of information services instead of as providers of telecommunications

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<sup>14</sup><http://www.fcc.gov/document/comm-pai-remarks-reforming-communications-policy-digital-age>, at 4.

<sup>15</sup>*National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”).

services is “self-binding.”<sup>16</sup> As the DC Circuit further pointed out, Internet access was historically, and at the time of the Telecommunications Act of 1996, seen as a common carriage proposition. It continued to be so after the 1996 Act.<sup>17</sup> It was against this backdrop that the 1996 Act makes provision for “Advanced Telecommunications Services,” which specifically include broadband, as NASUCA noted in its March 2014 Comments.<sup>18</sup>

Broadband is telecommunications – it transports content from sender to receiver. It does not itself change or generate content.<sup>19</sup>

Some commenters claim the FCC is constrained by its 2002 decision. That is not the case. The FCC can change its position, as it did in 2011 regarding its view of the authority granted by Section 706. The Supreme Court did not necessarily adopt or ratify the *Cable Broadband Order* in its 2005 decision in *Brand X*. Rather, it *deferred* to the FCC’s ruling. The twelve intervening years have shown that broadband transport is indeed separable from content – that is how the service is sold. Broadband is a fungible service. And it is, at least in its last mile terminating monopolies, a bottleneck service. There are ample grounds for the Commission to reconsider its classification of broadband.

Commissioner Pai’s speech also expressed concern about potential litigation and uncertainty that would accompany reclassification.<sup>20</sup> NASUCA recently addressed this subject, in an ex parte in GN 14-28, responding to AT&T ex partes that expressed sentiments similar to

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<sup>16</sup> Verizon, slip op. at 45.

<sup>17</sup> See, e.g. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 17 F.C.C.R. 3019, 3037-40 ¶¶ 36-42 (2002).

<sup>18</sup> NASUCA Comments (March 21, 2014) at 24.

<sup>19</sup> See 47 U.S.C. 153(43). “Telecommunications” is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”

<sup>20</sup><http://www.fcc.gov/document/comm-pai-remarks-reforming-communications-policy-digital-age>, at 4.

those of Commissioner Pai.<sup>21</sup> The reality is that litigation is inevitable no matter which direction the Commission chooses. The question is, which path is more likely to stand up to judicial review? NASUCA submits that is clearly a reclassification to Title II. The D.C. Circuit has made it clear that an FCC effort to adopt common carrier-based protections such as effective prohibitions on unreasonable discrimination - which is central to achieving open Internet policy objectives - is valid under Title II, but not under Section 706. The Commission is far more likely to avoid reversal by the courts if it adopts an open Internet regime based on reclassifying broadband as Title II. As NASUCA pointed out in its ex parte response to AT&T:<sup>22</sup>

Since 1996, we have been trying to interpret the Telecom Act, with its tangled and still-evolving appellate history.<sup>[23]</sup> This task was made immeasurably more difficult by the FCC's 2002 decision to take broadband transport out of the telecommunications common carrier category,<sup>24</sup> a decision which unleashed a flood of litigation across the country, and has scarcely resulted in certainty.<sup>25</sup> Rather, the 2002 reclassification of broadband access as an information service has been in one way or the other the subject of numerous court challenges, has failed to provide a legal foundation for necessary Open Internet rules, and has been repeatedly whittled down to allow needed regulatory oversight for Voice Over Internet Protocol telephone service.<sup>26</sup>

Moreover, Title II is far more likely to grant certainty in terms of non-discriminatory access,

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<sup>21</sup>NASUCA ex parte (May 30, 2014) at 3-4. Internal footnotes in original.

<sup>22</sup>Internal footnotes in original.

<sup>23</sup>See *In re: FCC 11-161* (10<sup>th</sup> Cir. May 25, 2014).

<sup>24</sup>*Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, FCC No.02-77, 17 FCC Rcd 4798, 4870 (2002) (Cable Broadband Order), aff'd as *Brand X*.

<sup>25</sup>See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); see also *In re FCC 11-161*; see in general, FCC 11-161, WC Docket No. 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*[USF/ICC] Transformation Order*), at ¶ 71 ("the Commission's determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to "universal service" in section 254(c)"), ¶ 937 (citing numerous interconnection disputes traceable to the related confusion about VoIP's regulatory category).

<sup>26</sup>*Brand X*, 545 U.S. 967 (2005);; *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); e.g., 47 C.F.R. 54.706(a)(18) (entities that provide interstate telecommunications to the public include Interconnected VoIP providers, which are obligated to make contributions to the Universal Service Fund).

which both consumers and edge-provider entrepreneurs, who are dependent upon reliable, non-discriminatory access to broadband networks, desire. For example, Mozilla, a leading Internet player, made this point in an ex parte presentation to senior FCC staff:

We also expressed our concerns with reliance on Title I for open Internet protections, including the significant risk that efforts to find a balance between strong rules that can meet the standards set by the Court of Appeals will fall short on both counts, failing to protect the open Internet while also being overturned on review.<sup>27</sup>

#### **IV. RECLASSIFICATION WOULD ALLOW THE FCC TO TAKE THE ACTIONS NECESSARY TO KEEP THE INTERNET OPEN.**

The central message of the D.C. Circuit's *Verizon* decision is that the Commission lacks statutory authority to impose common carrier-like requirements, such as anti-blocking and anti-discrimination rules, on services it has defined as information services. Therefore, the choice becomes clear: In order to adopt such rules, the Commission will need to reclassify broadband or find some new source of authority. As discussed below, Section 706 may not provide clear authority. However, reclassification does provide clear authority, as shown by the *Brand X* decision. And reclassification will allow the Commission to combat problems such as unreasonably discriminatory paid prioritization.

#### **V. SECTION 706 MAY NOT BE ENOUGH TO ACHIEVE AN OPEN INTERNET**

Some parties have, post-*Verizon*, shown more interest in FCC reliance on Section 706 as sufficient to allow Open Internet rules.<sup>28</sup> At minimum, these parties now acknowledge the need for anti-discrimination rules. It is important to recognize that the argument in support of Section

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<sup>27</sup>GN 14-28, Mozilla ex parte letter (June 25 2014) reporting a June 24, 2014 ex parte meeting between representatives of Mozilla and FCC staff.

<sup>28</sup> See <http://www.phoenix-center.org/PolicyBulletin/PCPB35Final.pdf>.

706 does not undermine the need for exercise of Title II authority, as discussed above. Indeed, Section 706 and Title II are not contrary, they are additive. Section 706 is a “fail-safe” which allows the Commission to take certain steps to promote competition in broadband. How far Section 706 authority reaches, however, is problematic. Only Title II reclassification allows the Commission to squarely address discrimination.

The May 23, 2014 10<sup>th</sup> Circuit decision in *Re: FCC 11-161* offers relief for some parties as they look to this as providing more support for using § 706.<sup>29</sup> Yet, they also acknowledge the greater reach of Title II.<sup>30</sup>

NASUCA addressed the problems with basing Open Internet rules solely on Section 706 in its March 26, 2014 initial comments in this docket:<sup>31</sup>

[T]he D.C. Circuit precisely identified the Commission’s failure to classify broadband as a telecommunications service subject to Title II protections as the reason why these basic protections could not be applied here. After devoting the largest part of its decision to describing the Commission’s expansive powers under section 706, the Court makes an about-face and rejects the Commission’s efforts to address these issues because the Commission has left broadband Internet access service classified as an “information service,”<sup>32</sup> rather than as a “telecommunications service.”<sup>33</sup>

The Commission’s section 706 powers thus find their limit in the prohibition (in 47 U.S.C. § 153) of any regulation that smacks of common carrier regulation, *except where* the FCC has found that a “telecommunications carrier” is “providing telecommunications services.” The DC Circuit found that the FCC’s non-

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<sup>29</sup>See <http://www.consumerfed.org/pdfs/CFA-10th-Circuit-Ruling-Boosts-FCC-Authority.pdf>.

<sup>30</sup>Id.

<sup>31</sup>Internal footnotes in original.

<sup>32</sup>See 47 U.S.C. § 153(24) (The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

<sup>33</sup> See 47 U.S.C. § 153(50) & (53).

discrimination and no-blocking rules were classic common carriage.<sup>34</sup> It therefore held that “given the manner in which the Commission has chosen to classify broadband providers, the [no-discrimination and no-blocking] regulations cannot stand.”<sup>35</sup>

If the Commission is to truly address the fundamental issues surrounding open access it must adopt provisions associated with common carriage - no discrimination and no blocking. It is highly unlikely that attempting to do so without reclassification will be successful.

## **VI. “COMMERCIALLY REASONABLE PRACTICES” IS TOO LOW, AND TOO VAGUE, A STANDARD FOR BROADBAND.**

The NPRM states.

[W]here conduct would otherwise be permissible under the no-blocking rule, we propose to create a separate screen that requires broadband providers to adhere to an enforceable legal standard of commercially reasonable practices, asking how harm can best be identified and prohibited and whether certain practices, like paid prioritization, should be barred altogether.<sup>36</sup>

“Commercially reasonable practices” is a standard that comes out of the Commission’s data “roaming” decision, and from antitrust law.<sup>37</sup> NASUCA submits that this is a weak standard for a network-wide anti-discrimination rule for vital broadband services, whatever its source of statutory authority.

Once the concept of “reasonableness” is introduced, the Commission must mire itself in the fact finding unique to every case, which is often burdensome and difficult. A bright line rule

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<sup>34</sup>*Verizon*, slip op. at 56 (“We have little hesitation in concluding that the anti-discrimination obligation ... has ‘relegated [those providers], *pro tanto*, to common carrier status’”), citing *FCC v. Midwest Video Corp.*, 440 U.S.689, 700-701 (1979).

<sup>35</sup> *Verizon*, slip op. at 46-47, 56 ff.

<sup>36</sup>NPRM, ¶ 10.

<sup>37</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411 (2011) (*Data Roaming Order*), aff’d *Cellco P’ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

is much easier in application, provides more regulatory certainty, and is understandable to all involved. Thus, the process is enhanced.

The proposed standard of commercially reasonable practices also assumes that only practices that are **commercially** unreasonable will be prohibited. That is, they would be unreasonable even in a free, competitive market, which we do not have in broadband, as the Commission acknowledges.<sup>38</sup> “Commercially reasonable” is more a tool of antitrust than of the public interest and the enduring values<sup>39</sup> that the FCC must maintain.

The need to identify noncompliance or injury should not come *post facto*. Prophylactic rules will *prevent* harm. Harm should be identified and then prevented. The harms of paid prioritization, for example, have been extensively discussed.<sup>40</sup>

As if to underscore the problems with using a “commercially reasonable” standard in lieu of true anti-discrimination rules, less than two weeks after the instant NPRM issued, T-Mobile filed a Petition for Declaratory Ruling in the Roaming Obligations docket, essentially asking the FCC for guidance about what constitutes “commercially reasonable,” given the inherent ambiguities of the rule, and the “unequal bargaining power between the parties.”<sup>41</sup> T-Mobile argues that because of a lack of competition for facilities-based coverage in certain areas, the “commercially reasonable” standard allows the dominant carriers “to dictate commercially

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<sup>38</sup>NPRM, ¶¶ 39-53.

<sup>39</sup>See FCC 14-5, ¶ 9.

<sup>40</sup>See

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.franken.senate.gov%2Ffiles%2Fdocuments%2F140617NetNeutralityBill.pdf&ei=QMq5U7-V0o6TyATH3YLgCA&usg=AFQjCNFXKLv5ma7o2qoZSIMOTok\\_atP9BQ&sig2=S31ilxNHDrNy-ODidlrtag&bvm=bv.70138588,d.aWw](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.franken.senate.gov%2Ffiles%2Fdocuments%2F140617NetNeutralityBill.pdf&ei=QMq5U7-V0o6TyATH3YLgCA&usg=AFQjCNFXKLv5ma7o2qoZSIMOTok_atP9BQ&sig2=S31ilxNHDrNy-ODidlrtag&bvm=bv.70138588,d.aWw).

<sup>41</sup> Petition of T-Mobile for a Declaratory Ruling, in FCC 05-26 (*Reexamination of Roaming Obligations*) (May 27, 2014).

unreasonable roaming rates on terms highly unfavorable to the requesting provider.”<sup>42</sup>

If the “commercially reasonable” standard is proving vague, ambiguous, and difficult to implement in the relatively more bounded roaming market, it is unlikely to provide a reliable basis to prevent discrimination in broadband markets.

## **VII. DISPUTE RESOLUTION**

NASUCA supports the concept of a dispute resolution process, however we are concerned that ad hoc complaint resolution will be seen as an acceptable substitute for bright-line rules. It is not. As suggested above, all stakeholders in the Internet ecosystem need clarity about the neutral nature of its telecommunications transport underpinnings. Consumers should be able to participate in any dispute resolution process. The ombudsperson should also have the authority to participate, as well as the authority, opportunity and willingness to intervene and refer disputes to the Enforcement Bureau. The Commission must also ensure that both the ombudsperson and the Enforcement Bureau have sufficient staff, expertise and resources to fully address complaints. To the greatest degree possible, these efforts should be coordinated with the states, and the FCC should explicitly acknowledge a role for the states in addressing such complaints.

We share the concerns expressed by the National Association of Consumer Advocates (NACA) and Public Citizen that consumers should not be required to submit to arbitration to resolve disputes with broadband providers.<sup>43</sup>

## **VIII. CONCLUSION**

NASUCA submits that reclassification of broadband Internet access service as a

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<sup>42</sup> *Id.* at 4.

<sup>43</sup> GN 14-28, NACA and Public Citizen, Notice of Ex Parte Presentation (June 26, 2014).

telecommunications service will best address the enduring values that the Commission must support.<sup>44</sup> NCTA states that “NCTA and its members are committed to preserving a vibrant and open Internet; indeed, we view that objective as central to broadband providers’ ability to succeed in the marketplace.”<sup>45</sup> The traditional consumer response to such remarks has been two-fold: 1) If your members would be compliant with such rules, why would they object to the rules?; and 2) What about providers who do not view an open Internet as so important?

Professor Barbara van Schewick has noted a host of ways in which providers have motivations and capabilities to engage in conduct that discriminates among and against consumers.<sup>46</sup> The Commission must act to prevent such discrimination by adopting bright-line rules that protect consumers. The best authority for such rules is Title II.

Respectfully submitted,

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<sup>44</sup>See FCC 14-5, ¶ 9.

<sup>45</sup>14-28, NCTA Comments (March 30, 2014) at 1.

<sup>46</sup>14-28, van Schewick ex parte (April 17, 2014).