

**Before the  
Federal Communications Commission**

**In the Matter of**

**Protecting and Promoting the  
Open Internet**

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**GN Docket 14-28**

**Comments of Tumblr, Inc.**

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## Executive Summary

Tumblr is an online media network, comprised of over 200 million blogs and 400 million monthly unique visitors, that allows its users to effortlessly post all forms of media, including text, images, and videos, from their desktop and mobile devices. In addition to creating and sharing their own original content, Tumblr users can also follow their favorite blogs and communicate with other members of the Tumblr community. Tumblr is home to millions of the world's most innovative online creators and curators, and has helped launch the careers of influential artists and entrepreneurs in a variety of industries including fashion, broadcasting, music, and literature.

The development and growth of the Tumblr platform was made possible by the availability of a free and open internet. In 2007, Tumblr had two employees, but was already hosting over 150,000 blogs; by the end of 2012, with a modest headcount of 136 employees, Tumblr was a top 10 internet destination hosting nearly 90 million blogs. Tumblr was able to quickly scale its platform because it could host and deliver media content across a massive worldwide network without worrying about competing for preferred internet access with companies of vastly greater resources. The level playing field of the open internet allowed Tumblr to focus its limited resources on improving the platform and growing its audience organically with a superior product.

Tumblr strongly supports a free and open internet, and believes that it would have been exceedingly difficult for Tumblr in 2007 to develop, compete, and thrive if broadband providers were permitted to (1) discriminate against content and services through paid prioritization schemes, (2) congest interconnection layers at the edges of their networks, (3) impose discriminatory data cap exemptions, (4) discriminate based on application, and apply priority to preferred applications or media (including their own), or (5) block sites based on content. A multi-tiered system catered to the economic interests of broadband providers with termination monopolies to end consumers will undoubtedly harm innovation and competition in industries reliant on the internet (a set of industries that now extends far beyond the usual "tech" sector) and stifle free expression for millions of users of Tumblr and other platforms for free expression. In such a world, aspiring entrepreneurs in the United States will be prevented from innovating not because they lack great ideas or the ability to execute against them, but because they lack the financial resources to pay for reasonable internet access to compete with established players who have paid for priority access to end consumers. Additionally, such arrangements between incumbents with significant resources and broadband providers could be used to stifle important political speech from Tumblr and other socially conscious online platforms.

Tumblr therefore urges the FCC to adopt bright-line rules promoting an open internet and prohibiting broadband providers—both fixed and mobile—from implementing, among other practices, access fees and paid prioritization schemes, congestion of interconnection points, discriminatory data cap exemptions, application-based discrimination, and site blocking. To facilitate the implementation of these rules, Tumblr recommends that the FCC reclassify broadband internet access as a "telecommunications service" subject to Title II's framework and appropriate forbearance.

## I. Tumblr and the World's Creators

Tumblr's mission is to empower the world's creators to make their best work and put that work in front of the audience they deserve. Tumblr users can create, share, and consume media content of all kinds. Tumblr the product was first released in February, 2007 by then 21-year old David Karp, who created Tumblr as a specialized publishing platform to meet his need for frictionless and limitless self-expression on the web. David, and his first employee Marco Arment, established Tumblr, Inc. in September, 2007 when David raised a round of seed capital from Union Square Ventures and Spark Capital. Over the next seven years, Tumblr evolved from a tiny startup into an immensely popular global platform localized in thirteen languages, and hosting over 200 million blogs and 90 billion posts.

While Tumblr now has almost 300 employees in offices across the United States, it remains headquartered in New York City and is immensely proud to be Made in New York. In 2013, Tumblr was acquired by Yahoo! Inc. for \$1.1 billion, which was the largest exit to date for a New York City-based, venture-backed private company. Tumblr continues to operate independently as a subsidiary of Yahoo! Inc. with David Karp at the helm as CEO, and Tumblr generates revenue through a combination of advertising and premium services.

Tumblr's relentless focus is, and always has been, on providing the best experience for its users and upholding the highest standards of communication and trust with those users. Creators on the Tumblr platform include people and organizations from around the world in every discipline imaginable; notable examples include The White House, the NSA, actors Mark Ruffalo and Jared Leto, musicians Taylor Swift and Shakira, Los Angeles Mayor Eric Garcetti and ex-U.S. Treasury Secretary Robert Reich, as well as countless other influential artists, photographers, journalists, political figures, brands, and charities.

In addition to serving as a home for more-established fixtures, Tumblr has helped launch the careers of countless artists and entrepreneurs in a number of industries.<sup>1</sup> For example:

- **Photo-journalism:** After losing his job as a bond trader in July 2010, Brandon Stanton bought his first semi-professional camera and embarked upon a tour of American cities during which he began taking candid street portraits and pairing them with interviews. New York City was mid-way on his itinerary but it proved such an ideal setting for his style that Stanton never left; "Humans of New York" (HONY) launched on Tumblr soon after. HONY sparked a true movement on the platform which, among other things, raised nearly a half million dollars for Hurricane Sandy victims (in partnership with Tumblr) and culminated in the publication of Stanton's New York Times #1 bestselling book in late 2013. Stanton is currently traveling across the Middle East with the United Nations, covering the region's crises in his uniquely human-centered style.

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<sup>1</sup> Note that our inclusion of these examples of success stories on Tumblr, of which we are incredibly proud to have been a small part, do not imply any knowledge, endorsement, or support of Tumblr's comments herein (though we suspect many, if not all, would support the substance).

- **Broadcasting:** In connection with his 2010 Ph.D. dissertation, Austin-based biologist and science writer Joe Hanson started blogging about science on Tumblr. His human approach to the sciences truly resonated with the Tumblr audience, and he amassed a huge following of seasoned science lovers as well as new enthusiasts. By 2012, his Tumblr “It’s Okay To Be Smart” caught the attention of PBS producers, and Joe now serves as the creator, host, and writer of PBS Digital Studios’ *It’s Okay To Be Smart*.
- **Media:** Mr Gif collaborators Jimmy McCain and Mark Portillo launched their Tumblr blog in 2011 with a simple premise: to create animated GIFs with their analogue cameras and to have fun while doing it. Soon they were capturing portraits of everyone from Kanye West to Maria Sharapova, earning work with countless brands in the process, from American Apparel to Evian to Axe to Disney. In 2014 McCain and Portillo left their jobs at Complex and MTV to launch their own agency on Tumblr; now Mr Gif is a thriving, full-time pursuit.
- **R&B Music:** On July 11, 2012, R&B sensation Frank Ocean surprised his fans by making his album, *Channel Orange*, available on his Tumblr one week before its official launch. He posted a full-album stream on Tumblr, and presented it the way he wanted his fans to first hear it—in one fluid track. Fans could click through to buy the album on iTunes, the only place from which fans could download it, and his Tumblr promotion contributed to nearly 30% of his first week sales in just twenty-four hours. In fact, from the start of his career, Ocean has used Tumblr to express himself and his art in groundbreaking ways. So when it came time to release his debut album, he had a community and platform through which he could propel himself to #1 on iTunes and #2 on the Billboard charts.
- **Digital Art:** The Jogging, a global arts collective that started on Tumblr, now hosts a robust community of cutting edge artists exploring the aesthetics of internet culture and the way it affects how we see the world today. Featured in numerous major art publications, the collective now pays contributors for Tumblr posts submitted through their site.
- **Fashion:** In 2009, Jamie Beck started a fashion blog on Tumblr in collaboration with her now-husband Kevin Burg. Inspired by animated GIFs (a digital image format popular on the Tumblr platform), the couple invented a completely new visual form: subtle moving image photos called cinemagraphs, which became a sensation on Tumblr and quickly gained attention beyond. Beck and Burg used Tumblr to become a different kind of fashion blogger, known primarily for innovative visual storytelling. In the last five years, the duo has worked with major brands and publishers like Tiffany & Co, Saks Fifth Avenue, Chopard, DKNY, Ralph Lauren, Lincoln Cars (and many more), and has photographed editorials on virtually every continent.
- **Print Art:** 9-Eyes.com, a series of imagery from Google Street View that started as a documentation project on Tumblr, has been picked up by major London gallery Seventeen Gallery, selling large aluminum prints of the works at competitive market prices at the world’s most prestigious art fairs.

- **Literature/Publishing:** Tumblr has helped launch over 100 book-publishing deals. For example, writer Katie Coyle was scrolling through her Tumblr dashboard one day when she saw that author Neil Gaiman had posted about Hot Key Books' search for debut authors. She wrote a chapter, entered Gaiman's competition - and won. Her novel *Vivian Versus the Apocalypse* was published this year and the sequel will be out soon. Katie is now a full-time author. Similarly, Kate Gavino turned her love of author events and magic markers into a career: her Tumblr blog Last Night's Reading started as a quirky hobby and quickly amassed a dedicated following. As a result, she is regularly invited to major industry events like the National Book Awards as official artist, was tapped as Artist-in-Residence for the Ace Hotel, has a book deal of her own, and is in talks to license her work on mugs and tote bags. In another publishing success story, Greg Pembroke was an average dad frustrated by the silly things that seemed to send his kids into tantrums. He started his Tumblr blog, Reasons My Son Is Crying, to vent and bond with other parents. Now he's a published author in several countries and he has appeared on TV and radio programs around the world, including The Today Show.
- **Design:** Matthias Brown was a student at SCAD experimenting with animated GIFs on his Tumblr blog, [traceloops.tumblr.com](http://traceloops.tumblr.com), mixing digital and analog technologies. In 2013, he caught the eye of Converse, and created content for the footwear company that received record engagement levels for them on Tumblr. Brown is now routinely sought after to develop creative advertising content for brands, including Disney and Converse, and is a self-sustaining artist.
- **Hip-Hop Music:** Since their first post in February of 2010, the hip-hop collective Odd Future established its musical identity, and built an entire culture, through the Tumblr platform. They are the first major artists whose core fans discovered them through Tumblr, and they continue to use Tumblr as their public relations platform. Odd Future's music ushered in the age of "Tumblr Rap," coined by journalists to refer to hip hop music and lyrics inspired by modern contexts such as suburban skate culture. Music artists Frank Ocean, Tyler, the Creator, and Earl Sweatshirt all come from Odd Future.

These creative breakthroughs, and the countless other Tumblr success stories, would not have been possible without a free and open internet, and the platforms, like Tumblr, it has enabled. Such platforms are places where creators can quickly produce and distribute their work for free (in spite of sometimes meaningful bandwidth demands for distribution), gain fast recognition, and build lasting and meaningful careers focused on creation. The availability of free platforms like Tumblr has made creation, and particularly financially self-sustaining creation, more diverse, available, and democratic than ever before in human history. Without an open internet, which enabled the founding and growth platforms upon which this activity occurs, we would be robbed of this wealth and diversity of creation and economic development.

## **II. A De Facto Net Neutral Environment Was Critical To Tumblr's Early Success and Expansion As A Global Media Platform**

When David Karp launched the Tumblr product in early 2007, he was an ambitious, self-taught (high-school dropout), 21-year old programmer with one software engineer employee, Marco

Arment. By the end of 2007, David and Marco made Tumblr the home for over 150,908 blogs. The following year, Tumblr doubled its employee count to four, and nearly quadrupled its blog count to 599,991. By the end of 2012, Tumblr had only 136 employees, but was a top 10 internet destination hosting 87,500,258 blogs, representing a blog-to-employee ratio of 643,384 to 1. Today, Tumblr has just over 275 employees, and is host to one of the largest blog networks in the world, with nearly 200 million blogs and 90 billion blog posts.

De facto net neutrality has been a fundamental pillar of the innovation and economic growth spurred by and because of the internet, and Tumblr's existence would not have been possible without it. In fact, Tumblr was able to *thrive* under the de facto net neutral regime, where business and technological limitations prohibited, *inter alia*, paid prioritization, interconnection congestion, data cap exemptions, application-specific discrimination, and blocking.

The absence of access fees and paid prioritization schemes was critical to Tumblr's early success. Tumblr is a media rich platform that relies on its ability to rapidly deliver high-quality media content to its desktop and mobile users. Because buffering and bottlenecks discourage users from uploading or streaming content to and from Tumblr, Tumblr worked diligently to improve the quality of its servers and network, and to use the services of content delivery networks and first-mile broadband providers to optimize its traffic. Such costs would have increased dramatically had Tumblr been forced to pay premiums for priority access over the last mile to end consumers, either in the form of actual monetary costs for a "fast lane" (access fees) or user growth and retention costs when operating in the "slow lane" (the inability to grow and retain its user base because of poor delivery of media content to end users).

In its early years, Tumblr was not generating significant revenue; rather, the Tumblr team's efforts focused almost exclusively on improving the creation, sharing, and communication tools on the platform, and thereby attracting users to the platform, primarily using venture capital to finance this development. Had Tumblr been required to pay different broadband providers merely to make sure it could stay competitive from an internet access perspective, and perhaps been forced to hire a lawyer among its first few employees to negotiate with broadband providers for "fast lane" transit to consumers, Tumblr may not have survived, and thrived, in its first few years. Similarly, had different broadband providers been permitted to impose discriminatory traffic rates on Tumblr, it would have been forced to deal with a materially significant cost variable that may have prevented the critical venture capital investment it received to fund development of the platform.

Payments to avoid interconnection congestion also would have threatened Tumblr at an early stage in its development. As the FCC is aware, prohibiting the implementation of slow and fast lanes will not ensure equal access if broadband providers are permitted to congest the interconnection points of the broadband networks in order to attract payments from online services such as Tumblr for preferred access. On the contrary, broadband providers may be *encouraged* to congest their entry points, in order to charge such entrance fees. This harm is not theoretical: Some broadband providers have admitted that they are constraining capacity from network providers like Level 3, who are chosen by media platforms like Tumblr to deliver media content requested by those providers' own paying broadband consumers. *See* <http://bit.ly/1su4kY0>. Whether broadband providers engage in blocking, discrimination, or

access fees through deep packet inspection, or engage in functionally equivalent practices through underinvestment at points of interconnection, consumers and edge providers will still be harmed, and innovation and free expression will still be stifled.

Similarly, if broadband providers are permitted to require payments from app developers in exchange for exemptions from mobile data caps, those same broadband providers will be able to place tremendous pressure on app developers to pay or be punished. Startups that rely on mobile apps (most startups these days) will be forced to negotiate data cap exemptions before launch, because mobile app users will be incentivized only to use apps that are exempted from their data plans. This effectively results in discrimination against apps that cannot afford to pay for the exemption and, ultimately, the apps that will not be able to pay are the small startups, like Tumblr in 2007 and the next generation of innovative startups today, that are still working toward profitability.

The absence of significant application-specific discrimination on the internet in 2007 allowed Tumblr to offer both web and mobile services and applications, with a full range of media features, without worrying that a particular application or feature might suddenly subject Tumblr to discrimination. Furthermore, it would have been difficult to predict how such application-specific rules would be applied in practice, as applications (and the platforms supporting them) often elude clear definitions. For example: Is Tumblr a social network? A video streaming website? An image sharing network? A communications system? A news service? Moreover, mounting a legal challenge to such case-by-case adjudications would have been extremely difficult and resource-intensive (and virtually impossible for two engineers).

It is also critical to note that the prior norm against blocking traffic on the basis of its origin has allowed Tumblr and its users to take principled positions on important political issues -- such as the Tumblr community's highly-publicized campaign against SOPA/PIPA in 2011 -- without fear of retribution through content-based discrimination. Had broadband providers been permitted to block Tumblr based on content it hosted around hot button issues, Tumblr and its users may have been deterred from entering the political debate, thereby stifling free speech and engagement for millions of people. Even brief blackouts can be tremendously harmful to public confidence in an online platform, particularly one in an early stage of development.

In sum, the nascent Tumblr of 2007-2010, with limited funding and employee resources, did not need to negotiate a non-net neutral internet in order to deliver a phenomenal product to millions of people. Instead, a platform developed initially by two people was able to flourish and facilitate millions of people to create, share, and express themselves, even launching scores of sustainable creative careers in the process.

Unfortunately, the internet practices and standards that made Tumblr possible are now in jeopardy, and net neutrality is no longer the de facto reality of the internet. We have seen content-based discrimination in practice - in 2005, for example, Telus, a Canadian broadband provider, blocked access to a website that was being used to coordinate the activities of the Telecommunications Workers Union during a strike. *See* <http://bit.ly/1nGzbKQ>. We cannot allow the possibility of this kind of private content-based discrimination to cloud innovation and self-expression in the United States.

### **III. The FCC's Proposal Threatens the Future of Tumblr and the Next Generation of Internet Startups**

Under the FCC's current proposal, the net neutral regime that allowed Tumblr and similarly situated companies to thrive would be turned upside down, and the economic consequences would be significant. Tumblr is now a growing advertising-based business, and its revenues are tied almost exclusively to the cyclical advertising market. Imposing a multi-tiered system of internet access would seriously disrupt Tumblr's business model, forcing it to reallocate its already limited resources *away* from other, far more mission-critical services -- such as engineering, sales, community development, and hiring new employees -- and *toward* broadband provider "fast lane" payments, preferred access at interconnection points, and data cap exemptions. The FCC's proposal would also allow broadband providers to negotiate exclusive deals with edge providers, which would provide them with exclusive access to the "fast" lane under certain circumstances. Tumblr certainly could not afford *that* level of payments.

From a paid prioritization standpoint, even if a "slow" lane remains reasonably fast, marginal differences in upload and streaming speeds moving forward would deter people from using slower services, and severely punish companies that cannot pay for prime access. *See* <http://nyti.ms/1ut4yO4> ("These days, even 400 milliseconds — literally the blink of an eye — is too long, as Google engineers have discovered. That barely perceptible delay causes people to search less."). And latency is particularly important to Tumblr, a high bandwidth service featuring extensive audio, image, and video content. As a consequence, if the FCC allows networks to discriminate based on content or applications, in order to remain competitive Tumblr will be effectively forced to pay for a "fast" lane. As discussed above, similar financial pressures would come to bear with respect to interconnectivity and data cap exemptions.

While Tumblr *may* be able to reallocate a portion of its already limited resources toward such payments at this stage in its development (and likely with a detrimental impact on its product), the next generation of startups will not have the resources to do so. Notably, a large number of broadband providers supply content through their own on-demand services. Under a multi-tiered system, these broadband providers would be incentivized to provide priority access to their own content, and to raise prices for the same access by competing services, thereby harming smaller companies such as Tumblr that are focused on delivering media content.

Given Tumblr's active role as a consumer advocate on issues like net neutrality and IP law reform, Tumblr is also concerned that broadband providers' control of the last mile to end consumers may be used to limit its speech and participation in political issues. This applies equally to other platforms that are active in the public sphere. While Tumblr theoretically may be able to file a legal action to vindicate its rights, as a small business with only two full time lawyers -- neither of whom specialize in telecommunications law -- and zero lobbyists on staff, Tumblr's ability to protect itself is severely limited. This sets aside the practical reality that such adjudications take time, and corresponding delays are often fatal in practice to effective political speech on issues of immediate importance.

Tumblr welcomes, and thrives on, competition on the merits of products and services - the focus of everyone in the internet ecosystem should be on providing the best products and services to

the billions of people worldwide who use and rely on the internet. Competition on the merits, however, is only possible when barriers to entry are low and when the substrate of competition is neutral and fair, such that new competitors are able to freely enter existing markets, and challenge incumbents to innovate. A multi-tiered system of internet speed, connectivity, and data limits, that determines winners based on which entities can pay for preferred access, would undermine such competition and produce a weaker, less innovative internet ecosystem not just for technology companies, but for the United States economy as a whole, particularly as aggregate investment increasingly focuses on the “edge” of the internet (applications and content) rather than the core (infrastructure).

#### **IV. The Internet Needs Bright-Line Rules, Not “Commercial Reasonableness” and Other Vague Standards**

Tumblr supports the FCC’s continued ban on broadband providers blocking lawful content, and its expansion of broadband providers’ transparency obligations. However, Tumblr believes the FCC’s new proposal to allow broadband providers to discriminate against traffic, so long as that discrimination is “commercially unreasonable,” does not provide the level of protection necessary to ensure a free and open internet. If the FCC does not invoke Title II of the Communications Act, it cannot lawfully treat broadband providers as common carriers. The DC Court of Appeals held in *Verizon v. FCC* that “[w]e think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers. Given the Commission’s decision to classify broadband providers not as providers of ‘telecommunications services’ [under Title II] but instead as providers of ‘information services,’ ... such treatment would run afoul of [the Act].” *FCC v. Verizon*, No. 11-1355 (D.C. Cir. Jan. 14, 2014), at 45. The Court further held that under Section 706 of the Communications Act, only rules that “leave substantial room for individualized bargaining and discrimination in terms” will not “run afoul of the statutory prohibitions on common carrier treatment.” *See id.* at 61.

In other words, the FCC cannot implement a bright line prohibition against discrimination without Title II reclassification, nor can it ban access fees and paid prioritization, as the Court ruled that such a ban leaves “no room at all” for discrimination. Therefore, in order to protect a truly free and open internet, the FCC must reclassify broadband internet access as a “telecommunications service” subject to Title II’s framework. The Supreme Court has already made clear, in 2005, that the FCC can change the classification of broadband Internet service if the facts change, and the facts have changed. Today, broadband providers offer telecommunications service that is not inextricably linked to information services, but is instead a bare pathway. Generally, today’s providers offer “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.” Moreover, even if facts had not changed, the Court determined that the definition of “telecommunications service” is ambiguous and the FCC has deference in interpreting or properly reinterpreting that term.

Reclassification of broadband providers as “telecommunications services,” subject to light-touch Title II, is a modest proposal. We propose, with significant deference to the FCC’s expertise in telecommunications law, that the FCC could arguably forgo all provisions of Title II except for the following fifteen sections: Sections 201, 202, and 208 (guaranteeing net

neutrality), 206, 207, 209, and 216 (holding broadband providers accountable for violations), 222 (protecting privacy), 251(a) and 256 (promoting interconnection), and 214(e), 225, 254, 255, and 257 (promoting access to the network). Whether additional provisions are necessary is a determination within the FCC's purview; the important takeaway is that the FCC has the authority to forbear as appropriate and make the reality of Title II reclassification a "light" regulatory action. We certainly do not believe that this kind of regulatory activity is harmful, or would subject the internet to the government's "control" as some fringe groups have stated (*see* <http://motherboard.vice.com/read/net-neutrality-is-marxist-according-to-this-koch-backed-astroturf-group>); rather, in this case, a small and limited amount of government regulation is necessary to promote and protect a competitive and lightly regulated marketplace. It is also critical to note that enterprise broadband services and commercial radio media services (the mobile services we use to make phone calls) are *currently* subject to light-touch Title II regulation, involving thirteen sections in total, showing that a light-touch application of Title II is not only possible in theory, but is also eminently executable in practice.

On the other hand, the "commercial reasonableness" standard articulated in the FCC's May 15, 2014 proposal rests on shaky legal grounds, and provides startups like Tumblr with little comfort. According to the FCC's proposal, under Section 706, the FCC would allow broadband providers "substantial room" to charge websites and applications new fees and to discriminate amongst them and the FCC would assume an ongoing role over new, discriminatory deals and tolls, requiring companies such as Tumblr to go through an onerous administrative claims process to prove that discriminatory deals and tolls are not "commercially reasonable" and do not "harm consumers." Notably, Tumblr has only two lawyers, and no telecommunications lawyers or lobbyists on staff. Tumblr cannot afford to engage in what would likely be multi-year challenges against the biggest broadband providers, with large legal teams experienced in telecommunications law, simply to secure access for its users equal to that of its current, and future, competitors with deeper resources. The alternative -- negotiating with broadband providers in the United States, and likely broadband providers abroad as they seek the same ability to tax and discriminate based on traffic -- would be a material, and possibly crippling, diversion from Tumblr's core mission of empowering the world's creators.

Instead, we urge the FCC to exercise its legal authority to classify the provision of both fixed and mobile broadband internet as "telecommunications services" under Title II of the Communications Act, and to enact bright line rules which prohibit paid prioritization schemes, congestion of interconnection layers, data cap exemptions, application-based discrimination, and site blocking.

## **V. Conclusion**

For the reasons set forth above, Tumblr asks the FCC to reclassify broadband internet access as a "telecommunications service" subject to Title II's framework, and to adopt bright-line rules prohibiting, on both mobile and fixed networks, access fees and paid prioritization schemes, congestion of interconnection points, discriminatory data cap exemptions, application-based discrimination, and site blocking.

We thank the FCC for the opportunity to comment on this matter.

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Respectfully submitted,

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