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

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

REPLY COMMENTS OF THE
ENTERTAINMENT SOFTWARE ASSOCIATION

The Entertainment Software Association ("ESA") hereby submits these brief reply comments in the Commission's Open Internet proceeding[1] to refute the claims of a handful of broadband providers who assert that any Open Internet regulation applicable to them should extend to edge providers as well.[2] Edge providers, they argue, also have some ability to "block[] or impede[] access to online services," and so should be subject to similar regulation.[3] We disagree.

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[1] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, DA 14-61, 29 FCC Rcd. 5561 (2014) ("*NPRM*").

[2] *See, e.g.*, Comments of National Cable & Telecommunications Association at 78, GN Docket No. 14-28 (filed July 15, 2014) ("If the Commission hopes to craft a national framework to address these policy concerns, it makes no sense to focus exclusively on Internet access providers and ignore conduct by edge providers that threatens similar harms."); Comments of Time Warner Cable Inc. at 26 (filed July 15, 2014) ("[T]here is no sound reason to single out broadband Internet access providers and exclude other sources of harm from the scope of any rules."); Comments of the Wireless Internet Providers Association at 22 (filed July 16, 2014) (the Commission "should take a broader view and examine the practices of edge providers…"); Comments of American Cable Association at 47-53 (filed July 17, 2014) (asserting that Section 706 allows the Commission to regulate edge providers); Comments of Cox Communications, Inc. at 13 (filed July 18, 2014) ("[T]o the extent the Commission seeks to restrict entities from engaging in blocking or discrimination with respect to online content and services, it should adopt competitively neutral rules that apply to network operators and edge providers alike.") ("Cox"); Comments of NTCA-The Rural Broadband Association at 15 (filed July 18, 2014) ("Content/Edge Provider blocking of otherwise freely available content upon an unduly discretionary whim is nothing less than a limitation on users' access to the content of their choice, and as such, has as much adverse impact on consumer demand for broadband service as the theoretical behavior that triggered this proceeding.").

[3] Cox at 12.

The Commission rejected calls to regulate edge providers only four years ago and has proposed to follow the same course here.[4] In doing so, it recognized that "broadband providers [are] distinguishable from other participants in the Internet marketplace," including edge providers.[5] And it found that, unlike edge providers, broadband providers "control access to the Internet for their subscribers and for anyone wishing to reach those subscribers."[6]

All of these observations remain true today:

- Edge providers face substantial competition.
- Edge providers cannot affect the openness of the Internet as a whole.
- The Commission's authority to regulate edge providers is questionable.

Edge providers are not similarly situated to broadband providers, and therefore there is no policy rationale for treating them similarly. Indeed, there is no conceivable policy rationale or legal basis to extend net neutrality rules to edge providers. Subjecting edge providers to unnecessary regulation would only undermine the Commission's goal of promoting and protecting the Internet as a platform for innovation and economic growth.

I. Edge Providers Face Substantial and Widespread Competition.

Edge providers face vastly different market conditions than do broadband providers. Generally, broadband service providers compete against few rivals in any particular locality, and higher-speed providers generally face even fewer competitors—if any.[7] As the Commission itself

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[4] *See NPRM* ¶ 58 ("We tentatively conclude that we would maintain this approach, but seek comment on whether we should change this conclusion.").

[5] *Preserving the Open Internet*, Report and Order, FCC 10-201, 25 FCC Rcd. 17905, n. 160 (2010) ("*2010 Order*").

[6] *Id*. ¶ 50.

[7] Tom Wheeler, Prepared Remarks of FCC Chairman Tom Wheeler: "The Facts and Future of Broadband Competition" (rel. Sept. 4, 2014), *available at* http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition; FCC, FCC Chairman Tom Wheeler: More Competition Needed in High-Speed Internet Marketplace (rel. Sept. 4, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329160A1.pdf.

has concluded, "most residential customers have only one or two options for wireline broadband Internet access service," and switching costs may be significant for many consumers.[8]

In stark contrast to the limited number of last-mile service providers, edge providers are too numerous to be counted. Within the video game industry alone, ESA's 35 members compete vigorously with each other and with hundreds of other app developers and other software publishers to make and distribute online gaming content. A staggering number of products and services are subject to similar competition, as "[w]hole new product markets have blossomed in recent years, and the market for applications has both diversified and exploded."[9] Indeed, with respect to mobile applications alone, "in 2012 there were more than 20 independent non-carrier mobile application stores, offering over 3.5 million apps for 14 different operating systems."[10] In short, the competitive landscape is much different than within the ISP market. Vigorous competition eviscerates the ability of any edge providers, even very large ones, to limit Internet openness.

II. Edge Providers Lack the Ability to Control Internet Openness.

Unlike broadband providers, edge providers cannot control the openness of the Internet. Broadband providers control the consumer's gateway to all Internet content. They have a "unique ability to carry, inspect, control, and apportion the capacity for all third party traffic riding over their networks…."[11] Most edge providers, by contrast, provide access only to their own product or service and have no control over how other content moves across the broader Internet. Any single edge provider stands as one among millions of entities from whom consumers can obtain

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8 *NPRM* ¶ 42.

9 *NPRM* ¶ 31.

10 *Id*.

11 Reply Comments of Google Inc. at 52, GN Docket No. 09-191 (filed Apr. 26, 2010).

online content. For this reason, any given edge provider cannot prevent consumers from accessing any other provider's content, and thus cannot control an end user's Internet experience in the same manner as a broadband provider.

III. The Commission's Authority to Regulate Edge Providers Is Uncertain.

As the Commission has recognized, the D.C. Circuit's decision in *Verizon v. FCC* "informs [the Commission's] exercise of legal authority" to create new Open Internet rules.[12] For this reason, the Commission has specifically proposed to follow the *Verizon* court's jurisdictional "blueprint" for regulation consistent with the court's interpretation of Section 706 of the Communications Act.[13] Importantly, however, the roadmap provided by the D.C. Circuit addressed only the Commission's authority "to promulgate rules governing *broadband providers*' treatment of Internet traffic."[14]

While the *Verizon* court found that "broadband providers [are] the precise entities to which section 706 authority to encourage broadband deployment presumably extends,"[15] its decision provides no guidance as to whether Section 706—or any other portion of the Communications Act—could justify novel regulation of the myriad application, service, and device providers at the network edge. Indeed, one of the reasons the Commission previously declined to regulate edge providers was that, in contrast to "edge provider activities … such as the provision of content or applications over the Internet," "the Communications Act particularly directs us to prevent harms related to the utilization of networks and spectrum."[16] In addition, any regulation of content

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[12] *See* NPRM ¶ 147.

[13] *See id*. ¶ 4.

[14] *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014) (emphasis added).

[15] *Id.* at 643.

[16] *2010 Order* ¶ 50 (citing 47 U.S.C. § 151).

providers could well implicate First Amendment interests. The Commission should not step onto shaky legal ground by extending regulations that were intended for broadband providers to edge services, particularly since there is no policy rationale for doing so.

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As ESA explained in its opening comments, the Commission should adopt clear and enforceable Open Internet principles to ensure that dominant broadband service providers cannot jeopardize gamers' online experiences. The Commission should ensure that its actions promote the growth of ubiquitous, low-latency Internet connections, and do not interfere with the growth of online video games or the experience of the millions of gamers all across the country. In order to achieve this goal, the Commission should avoid imposing unnecessary, novel regulations on edge providers, which are subject to an extraordinary amount of competition and cannot impact Internet openness.

Respectfully submitted,

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