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

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

COMMENTS OF CONSUMERS UNION

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I. INTRODUCTION

Consumers Union,[1] the policy and mobilization arm of Consumer Reports, has long supported strong, enforceable net neutrality rules to ensure an open internet for consumers, free of interference by their internet service providers (ISPs). After years of bipartisan attempts to craft workable rules to support and promote net neutrality, the Federal Communications Commission (FCC) finally passed court-approved rules when it enacted the *2015 Open Internet Order.*[2] This measure contains basic net neutrality rules that ensure ISPs cannot block or slow down websites or apps, or prioritize access and prefer some content and apps for a fee. These rules were adopted based upon an extensive rulemaking record, and with the support of millions of consumers and ultimately, a federal court**.**

The *Notice of Proposed Rulemaking*[3] we are commenting upon today proposes to uproot the legal authority upon which the FCC's net neutrality rules stand, and perhaps even do away with the rules altogether. First, the *NPRM* seeks to rollback Title II reclassification (what it dubs "utility-style regulation") of broadband service claiming it has caused ISP investment in new services and infrastructure to decline. Second, the *NPRM* then sets out to eliminate one net neutrality rule altogether and ponders whether to keep, modify or get rid of the remaining ones. While we appreciate the opportunity to review the Commission's proposals, we do not support

[1] Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumers Reports has over eight million subscribers to its magazine, website, and other publications.

[2] *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (Note: the *NPRM* repeatedly refers to this Order as the *Title II Order*; we have chosen to use its more common reference, the *2015 Open Internet Order*).

[3] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking (May 23, 2017) (*NPRM).*

the goals of the *NPRM* to undermine the legal authority or repeal the pro-consumer net neutrality rules that are necessary to ensure an open internet. Treating ISPs as common carriers under Title II finally provides the proper legal foundation on which to base net neutrality rules—rules essential to protecting consumers' ability to access an open internet without anti-competitive interference from their ISP. These rules are working and serve consumers well.

Net neutrality, and the rules that support it, is pretty straightforward. At the risk of over-simplification, we consider how the internet has worked for the last 20 or so years. The millions upon millions of websites, applications, and services that consumers enjoy are like traffic driving up and down a road—a massive, infinite, global amount of traffic delivering packets of data. Whether a consumer is reading an email, streaming music, checking headlines, or sharing photos, it is just a transmission of bytes being sent and received that makes it all possible.

In the two decades that consumers have been doing all of this digital sharing, they have become accustomed to a free and open internet. Whether using the internet at home or on a mobile device, consumers can shop at any website they want, find the news they like to read, and hook up the devices they prefer to use. All of the packets of information traveling back and forth across the internet have been treated the same way without favoritism or discrimination. Consumers expect that legal sites or apps will not be blocked or slowed down (a practice known as "throttling"). And consumers expect the fee they pay their ISP every month means they can access *all* the websites and apps they want to visit and use, not just some chosen by the ISP.

Enshrining these basic principles into rules that preserve a free and open internet has been the goal of the FCC, under both Republican and Democratic chairmen, for more than a decade as

the *NPRM* correctly notes.[4] The FCC's *2015 Open Internet Order*, which was upheld by the DC Court of Appeals in 2016,[5] contains the net neutrality rules consumers enjoy today, and the arguments the *NPRM* now offers in favor of their repeal are unpersuasive, especially when considering that ISPs have been caught doing the very things these rules now prohibit. For example, in 2007, Comcast was revealed to have been blocking access to file-sharing applications.[6] AT&T is currently in litigation for allegedly throttling the speed of some of its wireless customers by as much as 90 percent.[7] And, in 2013, Verizon stated in federal court that, absent net neutrality rules, it "would be exploring" paid prioritization plans.[8] An internet where blocking, throttling, and discrimination are allowed would look and feel very different than today's open internet.

Consumers are not clamoring for the repeal of net neutrality. In fact, evidence suggests that the majority of Americans support net neutrality rules. In May of this year, Consumer Reports conducted a phone survey of more than 1000 people asking consumers how they would react if an ISP offered paid prioritization deals, in which it would provide the fastest, best delivery of content to those companies willing and able to pay it; 62 percent did not think this practice should be allowed. And 67 percent believed ISPs should not be allowed to block the content of a competitor.[9]

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[4] *NPRM* at ¶ 13-22.
[5] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016) (*USTelecom).*
[6] Peter Svensson, *Comcast Blocks Some Internet Traffic,* Washington Post (October 19, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html.
[7] Brian Fung and Craig Timburg, *The FTC Is Suing AT&T for Throttling Its Unlimited Data Customers,* Washington Post (October 28, 2014) https://www.washingtonpost.com/news/the-switch/wp/2014/10/28/the-ftc-is-suing-att-for-throttling-its-unlimited-data-customers/?utm_term=.362403f6804d.
[8] Brian Fung, *Verizon Denies Using Net Neutrality Victory to Sabotage Netflix and Amazon,* Washington Post (February 5, 2014) https://www.washingtonpost.com/news/the-switch/wp/2014/02/05/verizon-denies-using-net-neutrality-victory-to-sabotage-netflix-amazon/?utm_term=.82af26652e2b.
[9] James K. Wilcox, *Who Should Control Access to Your Content?,* Consumer Reports (June 20, 2017), http://www.consumerreports.org/net-neutrality/battle-for-net-neutrality-who-should-control-your-access-to-content/.

Consumers Union believes maintaining an open internet with strong net neutrality rules is vital to consumers' everyday experience. Our connected world is how we work, learn, interact, play and even save lives—all because of a wide open internet kept free from interference. Preserving the FCC's *2015 Open Internet Order* means preserving the internet as we know it, where a tiny blog can reach readers just as well as Facebook or Google. Consumers benefit when the internet is a level playing field and not a place where ISPs can pick winners and losers by charging websites and services extra for access, or blocking those who will not agree to pay.

For these reasons and more, Consumers Union strongly opposes any repeal of the FCC's net neutrality rules, or any change in legal authority that would threaten their viability to withstand a court challenge.

II. REVIEW OF THE NOTICE OF PROPOSED RULEMAKING: CHANGING THE TITLE II RECLASSIFICATION OF INTERNET BROADBAND SERVICE IS UNWARRANTED AND UNSUPPORTED BY THE NPRM

In 2014, Consumers Union supported the reclassification of broadband internet access service as a Title II telecommunications service as the best legal authority on which to base the FCC's net neutrality rules.[10] The necessity for reclassification was made clear in the wake of the FCC's *2010 Open Internet Order* being struck down by the DC Court of Appeals in *Verizon vs. FCC*.[11] In that case, the court ruled the FCC's net neutrality rules amounted to "common carrier" obligations—and per the 1996 Telecommunications Act, only telecommunications services are subject to common carrier regulations under Title II by the FCC.

[10] Comment of Consumers Union, *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*CU 2014 Comment)*.
[11] *Verizon v. FCC*, 740 F.3d 623, 655–58 (D.C. Cir. 2014) (*Verizon*).

The *NPRM* recognizes that ISPs, which include some of the largest cable and telecom companies in the country, were not, at the time *Verizon* was decided, classified as providing a telecommunications service, but rather an information service, and therefore unable to be regulated as common carriers. Regulations for telecommunications services are found in Title II of the Communications Act, and while the legal nuance may seem subtle to the average consumer, it is crucial for understanding how the FCC's net neutrality rules work from a legal point of view. Without the proper legal foundation that Title II reclassification of ISPs would later provide, the *2010 Open Internet Order* collapsed like a house of cards.

Indeed, after the 2014 court decision in *Verizon*, what became apparent to supporters of net neutrality was the need to reclassify ISPs under Title II, hence making them common carriers for purposes of the law. The Commission also recognized that consumers perceive and use internet access much as they experience telecommunications services. Therefore, the FCC properly reclassified ISPs and the broadband service they provide as a Title II telecommunications service when it adopted the *2015 Open Internet Order* as the best way to enact strong net neutrality rules that protect consumers' ability to fairly access the internet. With the revised legal authority provided by Title II, the new rules were upheld a year later in federal court in the *USTelecom* case.

The *NPRM* chooses to revisit the settled question of whether broadband internet access service is properly classified as a telecommunications service under Title II or as an information service, and levels several arguments in support of this goal. As detailed below, we do not believe these arguments are supported by the evidence or adequately consider the consumer interests at stake. In sum, we do not believe Title II reclassification upon which net neutrality

rules depend represents utility-style regulation, slows investment by ISPs, adversely impacts the deployment of new and improved broadband services, or needs to be reversed.

A. Government "Regulation of the Internet" and "Utility-Style Regulation" Are Mischaracterizations.

The *NPRM* opens by characterizing the *2015 Open Internet Order* as the application of "utility-style regulation" to the internet, and then charges that the "decision represented a massive and unprecedented shift in favor of government control of the Internet."[12] The *NPRM* then combines the two by stating it is "proposing to end the utility-style regulatory approach that gives government control of the Internet."[13]

Not only is "utility-style regulation" left undefined, but these statements confuse what exactly is being regulated and governed by the *2015 Open Internet Order.* The net neutrality rules contained within the *Order* do not regulate the internet, but rather those ISPs that charge consumers and businesses money to provide *access* to the internet. Similarly, it is unclear how prohibiting an ISP from blocking or throttling lawful internet content that consumers want represents government control of the internet, or of the content contained in it.

In addition, this portion of the *NPRM* makes no mention of the fact that the *2015 Open Internet Order* exercised forbearance in declining to apply many aspects of Title II regulation—such as rate regulation, price caps, or network unbundling—to the ISPs covered by the *Order*. Indeed, the *NPRM* later notes that the *Order* "forbore either in whole or in part on a permanent or temporary basis from 30 separate sections of Title II" in support of the argument that Title II

[12] *NPRM* at ¶ 3.
[13] *Id. at* ¶ 5.

is a "poor fit" for broadband internet access service.[14] However, no mention of this forbearance is made when the *NPRM* asserts that the *Order* constitutes "utility-style regulation," thus omitting important context for the sort of light-touch, pro-consumer regulation the *2015 Open Internet Order* really represents.

B. Claims That Investment In Broadband Infrastructure Has Decreased Are Inadequately Supported.

Perhaps the most forceful rationale the *NPRM* presents in support of repealing the *2015 Open Internet Order* is summed up in a single sentence from its fourth paragraph: "Investment in broadband networks declined."[15] The *NPRM* further posits that, in the two years we have been living with net neutrality rules, jobs have been lost and ISPs have "pulled back on plans to deploy new and upgraded infrastructure and services to consumers."[16] Though scant evidence is provided to support these assertions, one might assume the broadband internet access service industry is experiencing a serious depression. The facts and real-life stories of what is really occurring in this market suggest otherwise.

The *NPRM* later cites as evidence of reduced investment by ISPs a report published in last year. According to that study, "capital expenditure from the nation's twelve largest Internet service providers has fallen by $3.6 billion, a 5.6% decline relative to 2014 levels."[17] However, it is important to note that the author of this study has long been an opponent of Title II

[14] *Id. at* ¶ 33.
[15] *Id. at* ¶ 4.
[16] *Id.*
[17] *Id. at* ¶ 45, citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016) https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era.

reclassification and has been funded by large ISPs in the past.[18] Further, the study fails to account for investments made by edge providers and other players in the ecosystem, and draws sweeping conclusions based on a limited period of time. Before making policy changes that could significantly impact the internet and consumers, we would hope the FCC would obtain new, unbiased research from multiple sources.

The *NPRM* also mentions that "interested parties have come to different conclusions" with a citation to an economic study[19] conducted by Free Press, but then quickly discredits that work in a footnote.[20] What the *NPRM* ignores is the extensive data in that report which demonstrates substantial increases in capital investment in the broadband market. For example, Comcast, the ISP with the most broadband subscribers in the country, boosted capital expenditures ("capex") by 26 percent since the net neutrality rules under Title II were adopted.[21] In fact, a survey of two dozen publicly-traded ISPs reveals an aggregate increase of more than five percent of capex from the 2013-2014 time period to 2015-2016.[22] Furthermore, the Free Press study includes numerous statements of ISP executives whose remarks suggest a bullish market and make clear that Title II reclassification of broadband internet access service has not harmed them or affected their plans to invest.[23]

The *NPRM*'s claim that ISPs have pulled back from offering consumers new services or deploying new, upgraded infrastructure is also questionable in light of the ISP's own public

[18] Dwayne Winseck and Jefferson Douglas Pooley, *A Reply to Faulhaber, Singer, and Urschel's Curious Tale of Economics and Common Carriage (Net Neutrality) at the FCC*, International Journal of Communication, [S.l.], v. 11, p. 32 (June 2017) http://ijoc.org/index.php/ijoc/article/view/7543/2077.
[19] S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era*, Free Press (May 2017) https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf (*Free Press Study).*
[20] *NPRM* at ¶ 45, see footnote 116.
[21] *Free Press Study* at p. 19.
[22] *Id.*
[23] *Id.* at pp. 64-113.

announcements. For example, the internet service provider, RCN, doubled its top broadband internet speed offering to 330 Mbps in the greater Boston area last November.[24] Earlier that month, RCN rolled out even faster 1 Gbps broadband service to consumers in Washington DC, New York City, Philadelphia and Chicago.[25] In announcing the upgrade in the Washington DC market, RCN stated:

> The fastest Internet speeds in the market are now available to the D.C. area where reliable, uninterrupted and high performance speed is in high demand," Sanford Ames, Jr., SVP and GM of RCN D.C. Metro, says. "We recognize our customer's need for speed is getting stronger with multiple devices, over-the-top (OTT) video content, smart homes, and more. By integrating the newest technologies, RCN remains unrivalled in D.C. innovation."[26]

Apparently, the *2015 Open Internet Order* has not negatively affected RCN's deployment of newer, faster services to its consumers. Various news articles cite other examples of both increased investment and new job creation by ISPs.[27]

Finally, several new, competitive video services are being offered to consumers in just the past two years via the open internet. In the over-the-top (OTT) video market, ISPs are launching their own live streaming video services (e.g., DirecTV Now) to compete with similar offerings supplied by virtual service providers (VSPs) like PlayStation Vue, Sling TV, Hulu with Live TV, and YouTube TV. This new form of competition where VSPs deliver a live, cable-like viewing experience for consumers holds the promise of robust and direct head-to-head

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[24] Laura Hamilton, *RCN Doubles Its Speed in Boston*, CED Magazine (November 23, 2016). https://www.cedmagazine.com/news/2016/11/rcn-doubles-its-speeds-boston.
[25] *Id.*
[26] Laura Hamilton, *RCN Deploys Gigabit Service in Washington D.C. Area*, CED Magazine (November 11, 2016) https://www.cedmagazine.com/news/2016/11/rcn-deploys-gigabit-service-washington-dc-area.
[27] See Dominic Fracassa, *Bay Area Internet Providers Thriving in the Era of Net Neutrality*, San Francisco Chronicle (June 6, 2017) http://www.sfchronicle.com/business/article/Bay-Area-Internet-providers-thriving-in-the-era-11200806.php, and Chris Morran, *FCC Chair Claims Broadband Investment At Historic Low Level Because Of Net Neutrality; That's Not What The Numbers* Say, www.consumerist.com (February 28, 2017) https*://consumerist.com/2017/02/28/fcc-chair-claims*-broadband-investment-at-historic-low-level-because-of-net-neutrality-thats-not-what-the-numbers-say/.

competition in the multichannel video programming distribution (MVPD) market that has been dominated by large, cable monopolies (who now, ironically, are also the leading ISPs). Consumers Union stresses that these new services—many launched after the effective date of the *2015 Open Internet Order*—are thriving in an internet governed by strong net neutrality rules, despite the *NPRM*'s claims to the contrary.

C. Legal Exercise to Determine the Proper Classification of Broadband Service Is Unnecessary In Light of the Court Decision (USTelecom vs. FCC).

The *NPRM* revisits at length the decision of the *2015 Open Internet Order* to reclassify broadband service as a telecommunications service versus an information service. However, this issue has been extensively considered by the courts and is now resolved. Indeed, legal debate of how to treat and classify broadband internet service stretches back more than a decade and has been litigated all the way to the Supreme Court.[28] Most importantly, just last year, the DC Court of Appeals in *USTelecom* upheld the Commission's reclassification of broadband under Title II, and rejected the ISPs' many arguments against that determination. While the *NPRM* claims that the court "did not reach many aspects of the statutory analysis we propose here,"[29] many of its arguments (rooted in a lengthy exercise in statutory construction) are in fact the *same* as those made by the ISPs in *USTelecom*—and those arguments were soundly rejected. As the court stated: "Petitioners assert numerous challenges to the Commission's decision to reclassify broadband. Finding that none have merit, we uphold the classification."[30]

Re-litigating the question of whether classifying broadband as an information service "more faithfully adheres to the Act and reflects the better of the reading of the relevant

[28] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).
[29] *NPRM* at ¶ 54.
[30] *USTelecom*, 825 F.3d at 700.

provisions"[31] does not serve the interests of consumers or the public. The effort expended in the *NPRM* to support its preferred classification—despite a federal court of appeals decision that was affirmed *en banc*[32]—has the feel of a "do-over" for those who lost both at the Commission and in court.

Reclassifying broadband service under Title II provided the legal authority for the *2015 Open Internet Order* to survive a court's review, unlike its predecessors. The court has spoken and approved the Commission's actions to give consumers working net neutrality rules. Consumers Union strongly supports retention of the Title II reclassification, the foundation for the important consumers protections found in the FCC's net neutrality rules.

III. RETAIN THE EXISTING NET NEUTRALITY RULES TO PROTECT CONSUMERS

After questioning the legal authority for the net neutrality rules, the *NPRM* next discusses the rules themselves. The *NPRM* proposes to eliminate one rule entirely (the internet conduct standard), and then asks whether to keep, modify or eliminate the bright line rules (no blocking, no throttling, and no paid prioritization) and the transparency rule. As an initial matter, Consumers Union, unconvinced as to how these rules have unfairly burdened ISPs or harmed consumer choice, opposes their elimination or modification. Further, while the *NPRM* asks how it might retain some of the rules under an information service classification, we seriously question how the Commission could promulgate strong net neutrality rules absent Title II reclassification. We detail our more specific concerns below.

[31] *NPRM* at ¶ 54.
[32] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016) *reh'g en banc denied*, No. 15- 1063, 2017 WL 1541517 (D.C. Cir. May 1, 2017).

A. Internet Conduct Standard.

The *NPRM* makes clear that the Commission proposes to eliminate the internet conduct standard.[33] In a nutshell, the internet conduct standard is applied by the FCC on a case-by-case basis to ensure that ISPs cannot "unreasonably interfere with or unreasonably disadvantage" consumers' access to legal online content or edge providers ability to create it.

In proposing to eliminate this rule, the *NPRM* states that because the standard "is premised on theoretical problems that will be adjudicated on an individual, case-by-case basis,"[34] ISPs are harmed by the uncertainty about what practices they can engage in, or services they can offer to consumers.

We do not find this rationale persuasive. First, we note with interest that the *NPRM* seems to suggest case-by-case enforcement is unfavorable in the context of the internet conduct standard. However, opponents of net neutrality rules who question their need often cite antitrust law as sufficient to police the behavior of ISPs—indeed, the *NPRM* says as much when seeking comment on whether the bright line rules (discussed below) are necessary in light of the availability of antitrust law to police the practices.[35] To be clear, the application of antitrust law is a case-by-case endeavor, and yet it is often supported by those in favor of light-touch regulation as a preferred alternative to net neutrality rules.

The *NPRM* also discusses the FCC's Zero Rating Report (since retracted by Chairman Pai earlier this year) and relies upon it as example of the harm caused by the internet conduct rule. The Zero Rating Report (released in January of this year) examined and questioned the zero

[33] *NPRM* at ¶ 73.
[34] *Id.* at ¶ 74.
[35] *Id.* at ¶ 78. "With the existence of antitrust regulations aimed at curbing various forms of anticompetitive conduct, such as collusion and vertical restraints under certain circumstances, we seek comment on whether rules are necessary in light of these other regulatory regimes."

rating services offered by ISPs, including AT&T and others, over the last year. Zero rating is a relatively new practice whereby ISPs designate certain content as not counting against a data cap. For example, AT&T's first zero rating plan was originally offered to AT&T's wireless service customers who also subscribe to DIRECTV, allowing them to watch DIRECTV programming on their mobile devices without it counting against their AT&T wireless data cap. Zero rating is now being offered as well to AT&T wireless customers who subscribe to DIRECTV Now, AT&T's over-the-top (OTT) video streaming service.

Consumers Union is concerned these zero rating offers can anti-competitively discriminate against other video providers and ultimately restrict consumer choice in violation of the internet conduct standard. Despite the *NPRM*'s suggestion the Zero Rating Report (which included a review of AT&T's zero rating practices) did not "identify any particular harm from offering consumers free data,"[36] the FCC agreed with us and concluded "these practices inhibit competition, harm consumers, and interfere with the "virtuous cycle" needed to assure the continuing benefits of the Open Internet."[37]

We do not believe that the case-by-case application of a flexible standard is reason enough to do away with a rule. In this case, the internet conduct standard is a forward-looking rule designed to allow the Commission jurisdiction to at least examine future business practices of ISPs—like the zero rating practices explained above—that may not directly violate the bright line rules, but could harm consumers all the same. Like all FCC actions, any misuse or abuse of its discretion to apply the rule is and would be subject to review.

[36] *Id.* at ¶ 74.
[37] FCC (Jon Wilkins, Wireless Bureau) Letter to AT&T (Robert W. Quinn, Jr., External and Legislative Affairs), Dec. 1, 2016.

B. Bright Line Rules (No Blocking, No Throttling, No Paid Prioritization).

We are encouraged that the *NPRM* agrees that ISPs should not be able to block lawful material.[38] But, the *NPRM* then seeks comment as to whether a codified rule is necessary, apparently because many large ISPs voluntarily followed the *2010 Open Internet Order's* no-blocking rule "despite a regulatory obligation to do so."[39] What the *NPRM* ignores is that, despite ISP promises to follow the no-blocking rule, which the 2010 *Order* only applied to fixed broadband services, some ISPs denied consumers' access to content and apps prior to 2015 in the wireless broadband market in absence of a rule preventing them from doing so.[40] This suggests that the no-blocking rule (which now applies to fixed and wireless broadband service alike) is necessary and should be kept. Furthermore, if ISPs publicly agree not to block content as a core net neutrality principle, then we do not see how a simple, bright-line rule is onerous or burdensome to them.

Consumers Union also supports retention of a bright-line no throttling rule. The *NPRM* asks "when is 'throttling' harmful to consumers?"[41] The answer is simple. If an ISP can slow down or throttle a competitor's content, the ISP can harm a consumer's ability to access the content of her choice by making access to the content less desirable. Similarly, by choosing not to throttle other content, an ISP could make that content or app more desirable to the consumer. The *NPRM* mentions product differentiation,[42] and it is not clear if that means differentiating

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[38] *NPRM* at ¶ 80.
[39] *Id.*
[40] See David Goldman, Verizon Blocks Google Wallet, CNN Money (December 6, 2011) http://money.cnn.com/2011/12/06/technology/verizon_blocks_google_wallet/index.htm. and Cecilia Kang, AT&T Faces Complaint Over iPhone FaceTime Blocking, Washington Post (September 18, 2012) https://www.washingtonpost.com/blogs/post-tech/post/atandt-faces-complaint-over-iphone-facetime-blocking/2012/09/18/799c8650-0183-11e2-b257-e1c2b3548a4a_blog.html?tid=a_inl&utm_term=.34c6f14bfc85.
[41] *NPRM* at ¶ 83.
[42] *Id.*

products (e.g., websites, streaming services, or other apps) based upon what is throttled or not. In a market where a majority of consumers only have one choice of broadband provider,[43] we are concerned that ISPs could abuse their market power if given free rein to throttle content. When supporters of net neutrality point out that ISPs should not be allowed to pick winners and losers on the internet, this is precisely the sort of power a no throttling rule is designed to restrict.

Consumers Union also opposes any repeal of the paid prioritization ban, a rule we have long supported.[44] Paid prioritization refers to ISPs favoring or speeding up traffic to a website, app, service, or connected device in exchange for a fee (paid either by the consumer or the edge provider). When people refer to internet "fast lanes" and paying for them, this is what they are talking about. We believe an internet with paid prioritization at its access points would quickly create a tier of service where prioritized traffic is sped up to the detriment of all other traffic.

Before allowing paid prioritization, policy makers should consider how consumers and all users of the internet would be impacted. As we mentioned in 2014, we fear if paid prioritization is allowed, ISPs may charge an "admissions toll" to edge providers to even access consumers online.[45] With new expenses to operate, edge providers could then pass those costs onto consumers in the form of higher prices or reduce the number of free services. We are also concerned that consumers may find it necessary to purchase prioritized access plans to continue to enjoy the level of service they have today. Without a fast lane, the remaining non-prioritized traffic could be slowed down or degraded in what would amount to a "slow lane" for anyone not able to afford a higher priced prioritized plan.

[43] FCC Report, *Internet Access Services as of June 30, 2016*, Industry Analysis and Technology Division, Wireline Competition Bureau (April 2017) https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf.
[44] *CU 2014 Comment* at 5.
[45] *Id.* at 6.

Without restrictions upon paid prioritization, the internet could very well become commoditized in a way where it would look and feel different, with an expensive tier of prioritized access, and an "everything else" tier of slower service. We do not believe this alternative, two-tiered—and likely, more expensive—internet benefits consumers. When ISPs become something other than impartial access providers, consumer lose the choice to pick their internet experience, free of ISP influence.

C. Transparency Rule.

Finally, the *NPRM* asks whether to keep, modify, or eliminate the transparency rule.[46] As the *NPRM* points out, the transparency rule was first included in the *2010 Open Internet Order,* survived the court challenge in *Verizon*,[47] and has remained in effect since then. The transparency requires the disclosure to consumers of an ISP's terms of service, pricing, fees, broadband speeds, promotional rates, data caps and allowances, network management practices, and other related information. Providing such information is simple, straightforward and pro-consumer, and as pointed out by the *2015 Open Internet Order*, "promotes competition, innovation, investment, end-user choice, and broadband adoption."[48] While agreeing with those objectives, the *NPRM* questions if there are "other methods" of achieving them,[49] leading us to wonder if the Commission wishes to do away with the transparency rule altogether.

The *NPRM* asks: "Is there merit in continuing to promote the broadband consumer labels that provided the ISPs with a safe harbor—or do those standardized notices harm consumers by

[46] *NPRM* at ¶ 89.
[47] *NPRM* at ¶ 90.
[48] *2015 Open Internet Order*, 30 FCC Rcd at 5670, para. 157.
[49] *NPRM* at ¶ 89.

preventing them from obtaining additional information?"[50] The introduction of broadband consumer labels, based upon recommendations made by the FCC's Consumer Advisory Committee (in which Consumers Union participates), serves both consumers and ISPs alike. Information regarding broadband speeds, data caps, monthly charges, and additional fees is provided to consumers in a simple, easy-to-understand format without having to search through dense, legal terms of service documents. ISPs benefit by availing themselves of an easy-to-use safe harbor that satisfies their obligations under the transparency rule.

Consumers Union strongly supports the use and promotion of broadband consumer labels as they supply consumers with relevant information about their broadband service in a comprehensible manner. Further, we do not understand how these labels prevent consumers from seeking additional information, as nothing forbids consumers from doing so. Indeed, without these rule, we fear ISPs could bury information regarding network management practices, real performance speeds, and fee information in lengthy disclosures, if provided at all. Requiring ISPs to publish the basic features and price of the broadband service they offer is a rudimentary consumer protection. At the heart of the transparency rule is the premise that consumers should be provided accurate information in order to make an informed choice. Consumers Union urges its retention by the Commission.

IV. CONCLUSION

As the court in *USTelecom* observed, the issue of "internet openness" was argued and decided before them three times in seven years.[51] Questions about the appropriateness and legality of net neutrality rules has consumed ISPs, policy makers, and consumers for even

[50] *NPRM* at ¶ 91.
[51] *USTelecom*, 825 F.3d at 689.

longer. Although Consumers Union had hoped the debate was, at long last, resolved last year with the court's decision to uphold the FCC's net neutrality rules—and the Title II reclassification underlying them—the Commission is again revisiting old arguments and forming new ones in an apparent effort to dismantle these pro-consumer rules.

Nothing in the *NPRM* persuasively demonstrates that the five net neutrality rules in the *2015 Open Internet Order* should be repealed, or that broadband service was inappropriately reclassified as a telecommunications service regulated under Title II of the Communications Act. And as Consumers Union stated in the FCC's 2014 net neutrality proceeding, we continue to believe these rules should be equally applied to fixed and wireless ISPs alike.

Of particular concern is the apparent justification provided by the *NPRM* to revisit these rules: that investment by ISPs in broadband has declined since adoption of the *2015 Open Internet Order*, and that consumers have been denied new services offered by ISPs as a result of this reduced deployment of broadband services. This justification is not borne out by the facts. As discussed above, surveys of ISPs' capital expenditures, media reports, and announcements of better product offerings made by the ISPs themselves suggest a thriving broadband market with increased investments and new services—all despite the adoption of net neutrality rules and Title II reclassification in 2015.

Consumers Union believes there is nothing wrong with the current rules that needs to be fixed as the *NPRM* suggests. The *2015 Open Internet Order*'s net neutrality rules and the Title II reclassification upon which they stand were upheld in federal court and serve consumers well. Because of them, consumers have access to an open internet that is a level playing field free of blocking, throttling, and paid prioritization—core rules that preserve a dynamic internet full of

competition, new services, and innovation that benefits consumers. We cannot support any change in the Commission's legal authority that backs the current net neutrality rules. Doing so would likely mean the end of those rules, and threatens a vibrant internet where consumers, not ISPs, have the power to choose the service and content they wish to access, free of interference.

Respectfully submitted,

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