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

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| In the Matter of<br><br>Restoring Internet Freedom | WC Docket No. 17-108 |

# COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION


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July 17, 2017

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## COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

### I. INTRODUCTION AND SUMMARY.

The Entertainment Software Association ("ESA") is a trade association for companies that publish computer and video games for video game consoles, personal computers, and the Internet. Its 34 member companies include many of the world's largest video game producers.[1] Playing video games today is mainstream American entertainment. With over $30 billion in annual domestic revenues and providing for over 220,000 American jobs across the country, the video game industry is a significant and growing part of the U.S. economy.

ESA shares the Commission's "commitment to a free and open Internet"[2] that fosters "infrastructure investment, innovation, and options for consumers."[3] The free and open Internet has fueled dynamic growth, competition, and innovation in the video game industry. Put simply, the availability and quality of the game play experience increasingly depends on the availability

[1] ESA offers a range of services to interactive entertainment software publishers, including a global content protection program, business and consumer research, government relations, and intellectual property protection efforts. ESA also owns and operates E3, an annual event showcasing the video game industry.

[2] *See Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 ¶ 70 (rel. May 23, 2017) ("NPRM").

[3] *Id.* ¶ 5.

and quality of consumers' broadband service. As a supporter of the decade-old consensus open Internet principles and policies that advance broadband deployment, ESA believes the Commission can, and should, maintain enforceable open Internet protections, consistent with the Commission's authority, in a form that does not "deter[] the investment and innovation that has allowed the Internet to flourish."[4]

ESA continues to support enforceable open Internet protections. Indeed, such protections are essential where broadband providers have the greatest economic incentive to engage in anti-competitive traffic management practices. Thus, at a minimum, the Commission should adopt protections against broadband provider practices that block, throttle, or otherwise disfavor third-party online applications and services that compete with the broadband provider's vertically integrated services. Furthermore, the Commission should retain oversight through a flexible, case-by-case general standard as a backstop to ensure that video game providers and their millions of customers are not left without any meaningful recourse against broadband provider practices that violate the long-held open Internet principles. ESA also continues to support meaningful disclosures of network performance and traffic management practices under the transparency rule. Finally, ESA believes that any protections the Commission retains should apply to both fixed and mobile broadband service and should be adopted as clear rules of the road enforceable by the Commission, as the expert agency.

The Commission retains legal authority under section 706 and other statutory provisions to adopt enforceable open Internet protections, even should it reclassify broadband as an information service. By targeting open Internet protections on specific anti-competitive harms and by adopting a general case-by-case standard that allows for individualized negotiation, the

[4] *Id.* ¶ 71.

Commission can still act to at least mitigate ESA's concerns. ESA looks forward to working with the Commission to ensure an open Internet framework that fosters both broadband investment and Internet growth and innovation.

## II. THE VIDEO GAME INDUSTRY, WHICH IS THRIVING, REQUIRES FAST, RELIABLE BROADBAND CONNECTIONS.

The video game industry is a multi-billion dollar industry that plays a significant—and growing—role in the U.S. economy, creating jobs and generating revenue for communities across the nation. Video games are mainstream entertainment in America. According to the most recent industry data, 65 percent of U.S. households have at least one person who plays video games three or more hours a week.[5] The U.S. video game industry generated $30.4 billion in revenue in the last year alone,[6] up 30 percent from four years ago, and nearly triple what U.S. and Canadian consumers spent going to the movies in 2016.[7] With a presence in all fifty states and the District of Columbia, computer and video game companies are also responsible for creating over 220,000 direct and indirect jobs across the country.[8]

Fast, reliable, low-latency broadband connections are critical to the game industry and to consumers' enjoyment of the game play experience. To begin with, broadband connectivity is essential for the distribution of games—for several years now, digital downloads of games have surpassed physical sales. To get the benefits of buying and updating games online, players need a broadband connection with adequate bandwidth to support large file downloads in a timely

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5 *See* ESA, *Essential Facts About the Computer and Video Game Industry* (2017) at 4, http://www.theesa.com/wp-content/uploads/2017/06/!EF2017_Design_FinalDigital.pdf.

6 *See* ESA, *U.S. Video Game Industry Generates $30.4 Billion in Revenue for 2016*, (Jan. 19, 2017), http://www.theesa.com/article/u-s-video-game-industry-generates-30-4-billion-revenue-2016/.

7 *See* Motion Picture Association of America, *Theatrical Market Statistics* (2016) at 4, http://www.mpaa.org/wp-content/uploads/2017/03/MPAA-Theatrical-Market-Statistics-2016_Final.pdf.

8 *See* Stephen E. Siwek, *Video Games in the 21st Century: the 2017 Report*, ESA (2017) at 2, http://www.theesa.com/wp-content/uploads/2017/02/ESA_EconomicImpactReport_Design_V3.pdf.

manner. Moreover, the defining feature of video games is that they are interactive—incorporating and reacting to input from end users. Increasingly, video games feature real-time game play with other players in different physical locations and interaction with the game play environment over broadband networks. For these features to work, a consumer's broadband connection must not only be fast and reliable, it must also support low-latency connections with online game services and other players.[9] Severe increases in latency—the amount of time it takes for a particular data packet to move from its origin to its destination on the network—can be frustrating for the gamer and, given the interactive nature of game play, kill the game experience. No one wants to play a game and discover that they've swung too late for a pitch, fired at enemies that are no longer there, or missed a hairpin turn in a racing game.

Fast, reliable, and low-latency connections are even more important for streaming video games—a rapidly growing segment of the video game industry. Streamed games depend on low-latency broadband connections to enable split-second interactivity. Unlike streamed movies or music, games require immediate and continuous interactivity and cannot be buffered to compensate for delivery lags. Consumption of streamed games content is expected to create $3.5 billion in global revenue by 2021, up from an estimated $1.8 billion in 2017.[10] Not only is participation in streamed game play popular, but so is watching video streams of other people competing in video games. One streamed game competition, the 2015 *League of Legends Championship*, attracted a peak audience of 14 million, a viewership beginning to rival

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[9] Latency is also critical in other contexts. Low-latency connections, for example, allow edge providers to provide the immediate, responsive feedback in web applications that consumers expect, allow doctors to participate in medical procedures remotely, and allow consumers to communicate without awkward lag.

[10] *See* Juniper Research, *eSports & 'Let's Play' Revenues to Reach $3.5 Billion by 2021, Driven by Surge in Ad-Spend*, Juniper Research (Mar. 14, 2017), https://www.juniperresearch.com/press/press-releases/esports-%E2%80%98let%E2%80%99s-play%E2%80%99-revenues-to-reach-$3-5-bill.

traditional sporting events.[11] Twitch, a leading platform and community for gamers, attracts close to 10 million viewers each day to watch and discuss video games with 2 million unique video game streamers per month.[12]

## III. ENFORCEABLE NET NEUTRALITY PRINCIPLES TO ENSURE A FREE AND OPEN INTERNET.

ESA shares the Commission's "commitment to a free and open Internet"[13] that fosters "infrastructure investment, innovation, and options for consumers."[14] The NPRM recognizes the "long-standing consensus . . . that consumers should have access to the content, applications, and devices of their choosing as well as meaningful information about their service."[15] And stakeholders throughout the Internet ecosystem have recognized the importance of such open Internet principles.[16]

The free and open Internet has fueled dynamic growth, competition, and innovation in the video game industry. ESA thus continues to support clear and enforceable open Internet protections that both encourage broadband deployment and foster a broadband marketplace free

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11 *See* Juniper Research, *Top Ten Tech Predictions for 2017*, Juniper Research (Dec. 7, 2016), https://www.juniperresearch.com/press/press-releases/top-ten-tech-predictions-for-2017.

12 *See* Twitch, *About* (last accessed July 17, 2017), https://www.twitch.tv/p/about/.

13 NPRM ¶ 70.

14 *Id.* ¶ 5.

15 *Id.* ¶ 71.

16 *See, e.g.*, Brian L. Roberts, *Comcast Statement Supporting a Free and Open Internet*, Comcast (Apr. 26, 2017), http://corporate.comcast.com/comcast-voices/comcast-statement-supporting-a-free-and-open-internet (Comcast "continue[s] to strongly support a free and Open Internet"); Verizon, *Verizon's Commitment to our Broadband Internet Access Customers* (last accessed July 17, 2017), https://www.verizon.com/about/sites/default/files/Verizon_Broadband_Commitment.pdf (detailing Verizon's "commitment to the Open Internet"); Mark Zuckerberg, *Facebook post*, Facebook (July 12, 2017), https://www.facebook.com/zuck/posts/10103878724831141; Google, *We stand together*, Google Take Action (last accessed July 17, 2017), https://www.google.com/takeaction/action/freeandopen/index.html (stating the Internet should be "competitive and open"); Katy Tasker, *We Stand for a Free and Open Internet: the Declaration of Internet Rights*, Public Knowledge (July 2, 2012), https://www.publicknowledge.org/news-blog/blogs/we-stand-free-and-open-internet-declaration-i (Declaration of Internet Freedom signed by over 90 organizations).

from discriminatory or anti-competitive practices that jeopardize the availability and quality of consumers' online game play experiences.

It has long been ESA's view that the Commission should adopt policies that advance broadband investment and deployment. Expanding the availability of high-quality broadband services allows more consumers to download and stream video games, reliably access content, and enjoy the interactive features central to playing video games. Put simply, the availability and quality of video games depends on the availability and quality of consumers' broadband connections. Video game playing consumers are typically well-informed broadband consumers who seek out fast, reliable, low-latency broadband services to meet their needs. And broadband providers invest in infrastructure and offerings to meet this demand.[17] But these consumers must have meaningful information about their broadband service, and they must get what they pay for—the ability to access Internet content of their choosing, using devices of their choosing, free of blocking, throttling, or otherwise unreasonable traffic management practices. To that end, ESA believes that open Internet protections can—and should—be maintained in a form that does not "deter[] the investment and innovation that has allowed the Internet to flourish."[18]

**A. Protections Against Blocking and Throttling.**

ESA continues to support open Internet principles against blocking, throttling, or otherwise impairing online content, services, or applications—broadband provider practices that

[17] Broadband providers target the video game playing constituency through campaigns that emphasize their high speed, low-latency offerings. *See, e.g.*, Verizon Digital Media Services, Inc., *Get Verizon's best internet for gaming*, Verizon (2017), https://www.verizon.com/info/best-internet-for-gaming/.

[18] NPRM ¶ 71.

thwart consumers' freedom to access the online content of their choosing. Indeed, there is a broad consensus against such practices.[19]

Even if the Commission classifies broadband as an information service, ESA members and their customers should still have at least some meaningful recourse against broadband provider practices that block, degrade, or otherwise impair content, applications, and services that compete with a broadband provider's vertically integrated offerings, such as competing video game services.[20] At a minimum, therefore, ESA believes the Commission can—and should—retain targeted rules against anti-competitive blocking and throttling. While less comprehensive than the current bright-line rules, ESA believes that such targeted rules could still be supported under the Commission's proposed Title I classification and sustainable upon judicial review.[21] To the extent that this narrower, non-Title II approach would permit other types of blocking or throttling, such as a third-party edge provider entering an arrangement with an Internet service provider ("ISP") to degrade the traffic of another unaffiliated third-party edge provider, ESA does not endorse such conduct. Rather, such practices could still be addressed through the general standard discussed below.[22]

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19 *See, e.g.*, David L. Cohen, *FCC Begins Rulemaking Process to Protect an Open Internet*, Comcast (May 18, 2017), http://corporate.comcast.com/comcast-voices/fcc-begins-rulemaking-process-to-protect-an-open-internet (stating Comcast will not "block, slow down, or discriminate against lawful content"); NCTA May 17, 2017 advertisement, https://www.ncta.com/positions/supporting-open-internet (advertisement undersigned by 21 broadband providers stating they will not "block, throttle, or otherwise impair" consumers online activity); Google, *We stand together*, Google Take Action (last accessed July 17, 2017), https://www.google.com/takeaction/action/freeandopen/index.html ("[N]o Internet access provider should block or degrade Internet traffic"); Ferras Vinh, *Rules of the Road: Net Neutrality's Bright Line Protections*, Center for Democracy and Technology (May 11, 2017), https://cdt.org/blog/rules-of-the-road-net-neutralitys-bright-line-protections/ (noting "straightforward" case against blocking and throttling).

20 *See* NPRM ¶¶ 82, 83 (asking for formulations or modifications of the no blocking and no throttling rules "consistent with [the] proposed legal classification of broadband Internet access service as an information service and for which [the Commission has] legal authority").

21 *See infra* Section IV.

22 *See infra* Section III.B.

The NPRM recognizes that the 2015 open Internet rules, and the no throttling rule in particular, were justified, in part, to "prevent anti-competitive behavior by ISPs seeking to advantage affiliated content."[23] Indeed, this has always been among the primary concerns animating open Internet protections. The Commission's consent decree against Madison River—one of the earliest cases raising open Internet concerns—settled allegations that a broadband provider subsidiary to a telephone company blocked Internet ports used for competing VoIP applications that were dependent on the underlying broadband network to reach their customers.[24] The Commission's *2010 Open Internet Order* likewise found that "the practice of a broadband internet access service provider prioritizing its own content, applications, or services, or those of its affiliates" would raise "significant concerns."[25]

Open Internet protections are most needed when broadband providers have an incentive to use their special position to advantage their own services. Without recourse against such anti-competitive behavior, third-party providers would be disadvantaged in reaching customers with competing online services. For example, consumers could have a degraded experience with a third-party service if a broadband provider were to use its unique position to favor its own service.

The NPRM asks whether existing antitrust regulatory regimes render open Internet protections against anti-competitive broadband provider practices "[un]necessary," and whether the no throttling rule in particular is merely "duplicative" of those regimes.[26] The answer to both

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[23] NPRM ¶¶ 78, 84.

[24] *See Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, Consent Decree, 20 FCC Rcd 4295 (EB 2005).

[25] *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 ¶ 76 (2010) ("*2010 Open Internet Order*").

[26] NPRM ¶¶ 78, 84.

is no. Any relief available for such anti-competitive broadband provider behavior through modern antitrust litigation will almost certainly be too little and too late, particularly in the highly dynamic Internet environment. Many providers of online third-party services that compete with broadband provider affiliates are unlikely to have the massive resources required to pursue antitrust remedies; this is particularly true of small or medium enterprises. Here, where easily demonstrated price or output effects are unlikely, such cases will be particularly challenging and costly. And, even if pursued, antitrust cases take years to resolve, by which time third-party online applications and services will have lost significant ground—or more likely be out of business—before any relief is granted.

Nor would enforceable protections against anti-competitive conduct "negatively impact . . . pro-competitive business deals."[27] Broadband providers would remain free to acquire or affiliate with a vertically integrated service or application. Rather, the broadband provider would simply be unable to leverage its position as the operator of the underlying broadband network to engage in anti-competitive traffic management practices that distort the marketplace of online services and applications.

**B. A Flexible Standard Against Harmful Practices.**

ESA also believes that the Commission can—and should—retain a general standard to protect against discriminatory broadband provider practices on a case-by-case basis. Such a standard has always been a component of the Commission's open Internet principles. The Commission's *2005 Policy Statement* adopted open Internet principles, in part, to ensure "services are operated in a neutral manner."[28] The objective was "[t]o foster creation, adoption

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[27] *Id.*

[28] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd

and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition" among those online services.[29] Following that thread in 2010, the Commission adopted its rule against unreasonable discrimination, which "rest[ed] on the general proposition that broadband providers should not pick winners and losers on the Internet."[30] That rule covered myriad broadband provider practices that could cause harm to consumers, edge providers, or free expression, including interference with consumers' online choices, content-specific degradation, and pay-for-priority arrangements.[31] While the Commission's 2015 Order adopted bright-line rules against blocking, throttling, and paid prioritization, it retained a general standard against unreasonable interference or disadvantage ("2015 general conduct standard"). That standard provided oversight and a backstop against "other current or future practices" that could cause harm by limiting the ability of consumers to access the Internet content, services, and applications of their choice or the ability of Internet content, service, and application providers to reach those consumers.[32]

A backstop standard of some kind remains necessary to ensure the open Internet principles survive. Discrimination against video game services, for example, particularly in a manner that negatively impacts consumers' ability to access and fully enjoy the video games of their choice, could distort the vibrant competition in the online marketplace and impair online innovation. For the reasons described above, video game content is especially vulnerable, as any

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14986 ¶ 4 (2005) (*2005 Policy Statement*). These "Internet freedoms" were first articulated a year earlier in a speech by then FCC Chairman Michael Powell. Michael K. Powell, Chairman, FCC, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

29 *2005 Policy Statement* ¶ 5.

30 *2010 Open Internet Order* ¶ 78.

31 *Id*. ¶¶ 75, 76.

32 *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 135 (2015) ("*2015 Open Internet Order*").

increase in latency can be fatal to streaming and the interactive features that are so critical to many of today's most popular games. This is true whether or not the broadband provider has a vertically integrated video game service. The Commission must retain some oversight as a backstop against current and future broadband provider practices that impede the ability of consumers to acquire, use, and enjoy highly desired game applications.

The NPRM proposes to eliminate the 2015 general conduct standard in order to "eliminate[] the uncertainty" caused by that rule, and it proposes not to adopt any alternative.[33] But there is an element of uncertainty in any flexible standard that applies to the individual circumstances of a particular case. This is no reason to abandon altogether the Commission's ability to safeguard the long-standing open Internet principles. The inherent task of any standard is to provide sufficient guidance in striking an "appropriate balance between restricting harmful conduct and permitting beneficial forms of differential treatment."[34] ESA believes the Commission can do so here by setting clear rules of the road that both "promot[e] consumer freedom on the Internet" and "encourage innovative business models."[35] As discussed further below, the Commission retains legal authority to adopt such a standard, even under its proposed classification of broadband as an information service.[36]

Retaining a general standard in some form or another becomes even more crucial if the Commission chooses to eliminate the rules against blocking or throttling. In that case, declining to adopt such a standard would remove any and all Commission review of broadband provider practices under the open Internet principles for the first time since 2005. There would be no

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33 NPRM ¶¶ 73, 75.

34 *2010 Open Internet Order* ¶ 69.

35 NPRM ¶ 75.

36 See *infra* at 18-19.

Commission oversight even if a broadband provider blatantly structured its traffic management to drive traffic to one particular application or service over all others—allowing the broadband provider, not the consumer, to pick Internet winners and losers based on the broadband provider's bottom line. And why wouldn't rational broadband service providers pick winners and losers if they were permitted to do so and if it increased their profits?

Consumers and online providers must, at a minimum, have some recourse at the Commission to address broadband provider practices that violate the long-held open Internet principles. Without such a backstop, the Commission would abandon its "duty"—recognized since 2005—"to preserve and promote the vibrant and open character of the Internet."[37]

**C. The Continuing Importance of Meaningful Disclosures.**

The NPRM also seeks comment on the need for the transparency rule, expressing support for its underlying objectives and asking about the best way to accomplish them.[38] ESA members continue to support the transparency rule.[39] Increased detail about broadband network management practices allows consumers and content providers to make informed decisions when choosing their broadband service, and market pressure will help discourage practices that might result in degraded service quality.[40] In particular, consumers and publishers of video games benefit from information about bandwidth capacity, speed, and latency, which are central to playing video games. Players and operators of video game services—including streamed video games—also benefit from the transparency rule requirement to disclose packet loss information

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37 *2005 Policy Statement* ¶ 5.

38 NPRM ¶ 89

39 *See* Comments of ESA, GN Docket No. 14-28 (filed July 22, 2014).

40 By itself, market pressure is unlikely to be a sufficient disincentive. For this reason, we believe that enforceable protections are a necessary complement.

because the performance and quality of those services can be sensitive to dropped packets.[41] Broadband providers should also make clear the congestion levels that trigger their traffic management techniques and make available their traffic shaping policies, including what type of traffic is subjected to traffic shaping techniques. To the extent the Commission modifies its rules to permit paid prioritization, any such arrangements or other permitted discriminatory traffic practices must be disclosed along with the broadband provider's network management practices.

**D. The Scope and Enforcement of Open Internet Protections.**

The NPRM also asks a series of questions about the scope and enforcement of any retained open Internet protections.[42] In brief, ESA urges the Commission to apply any retained open Internet protections equally to both fixed and mobile broadband service. Consumers today increasingly rely on mobile devices and mobile broadband services to use and enjoy video games.[43] And the need for continued protections described above is no different for game services accessed over mobile broadband service. ESA also supports retaining the reasonable network management exception, which is sufficiently flexible to account for the different network characteristics of fixed and mobile services.

ESA also urges the Commission to adopt clear rules of the road, enforceable by the Commission as the expert agency. ESA appreciates the certainty of bright line ex ante protections, particularly when it comes to conduct such as blocking and throttling, to allow all

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41 *See* Tom's Guide, *Video Streaming Need to Know: Part 1 – Encoding, Bit Rates and Errors*, Tom's Guide (last accessed July 17, 2017), *https://www.tomsguide.com/us/video-streaming-need-to-know-part-1,review-760-8.html*.

42 NPRM ¶¶ 94, 95.

43 In 2015, over 51 percent of U.S. mobile phone users played video games on their mobile phones. And the penetration of mobile game play in the United States is projected to surpass 60 percent in 2018. *See* Statista, *Mobile gaming – Statistics & Facts*, Statista (last accessed July 17, 2017), https://www.statista.com/topics/1906/mobile-gaming/.

parties in the Internet ecosystem to invest and innovate with clarity as to the regulatory landscape. But, at a minimum, as noted above, the Commission should retain oversight through a generally applicable standard and mechanism to enforce protections on an ex post basis.

## IV. LEGAL AUTHORITY FOR ENFORCEABLE OPEN INTERNET PROTECTIONS.

The existing open Internet rules provide a suite of protections, including bright-line rules and a general conduct standard, that address ESA's concerns. Specifically, they ensure that broadband providers cannot block, throttle, or otherwise discriminate against video game services and applications in ways that would jeopardize the online game marketplace.

The NPRM asks whether there are other formulations of the existing rules that the Commission could adopt "consistent with [its] proposed legal classification of broadband Internet access service as an information service and for which [it has] legal authority."[44] Should the Commission adopt its proposed classification, it still possesses authority to adopt protections to mitigate ESA's concerns and act on its "commitment to a free and open Internet."[45] To be enforceable by the Commission, non-Title II open Internet protections must be both (1) grounded in an alternative source of legal authority and (2) structured in a way that does not impermissibly impose common carriage obligations on broadband providers.[46]

First, the Commission retains legal authority outside of Title II to address open Internet concerns. Section 706 provides that the Commission "shall encourage" and, upon a finding that broadband is not being reasonably and timely deployed to all Americans, "shall take immediate action to accelerate" broadband deployment by among other things "removing barriers to

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44 NPRM ¶¶ 82-83, 88.

45 *Id.* ¶ 70.

46 *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

infrastructure investment" and "promoting competition in the telecommunications market."[47] Three appellate decisions from two U.S. Courts of Appeal have upheld this provision as an affirmative grant of Commission authority for certain regulations of residential broadband service.[48] And in *Verizon*, the D.C. Circuit specifically held that the concerns animating the Commission's open Internet rules fell within the ambit of that affirmative grant of authority and upheld the 2010 Transparency Rule under section 706.[49]

The Commission relied on section 706 as a source of legal authority for both its 2010 and 2015 open Internet rules.[50] While the NPRM asks whether section 706 is better read as merely "hortatory," it neither points to changed circumstances nor articulates any explanation for such a changed interpretation, either as a general matter or—as relevant to this proceeding—consistent with the Commission's "commitment to a free and open Internet." Indeed, in prior open Internet proceedings, parties from all corners of the Internet ecosystem have supported the use of section 706 as an affirmative source of Commission authority.[51] As these parties previously have

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47 47 U.S.C. 1302(a), (b).

48 *See, e.g.*, *Verizon*, 740 F.3d at 636–42 (reviewing the *2010 Open Internet Order*); *In re FCC 11-161*, 753 F.3d 1015, 1054 (10th Cir. 2014) (upholding universal service subsidies for broadband capable networks); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 733–34 (D.C. Circ. 2016) (upholding the *2015 Open Internet Order*).

49 *Verizon*, 740 F.3d at 643, 659.

50 *2010 Open Internet Order* ¶ 117; *2015 Open Internet Order* ¶¶ 275-82.

51 *See, e.g.*, Comments of American Cable Association at 47-53 (filed July 17, 2014). Unless otherwise noted, all comments cited herein were filed in GN Docket No. 14-28. *See also, e.g.*, Comments of AT&T at 32 (filed July 17, 2014); Comments of Cox Communications, Inc. at 6-7 (filed July 18, 2014); Comments of Alcatel-Lucent at 13 (filed July 15, 2014); Comments of Consumer Electronics Association at 9 (filed July 17, 2014); Comments of Cisco at 23 (filed July 17, 2014); Comments of Comcast at 13-14 (filed July 15, 2014); Comments of National Cable & Telecommunications Association at 45-47 (filed July 15, 2014); Comments of Pennsylvania Public Utility Commission at 2 (filed July 15, 2014); Comments of Time Warner Cable at 7-8 (filed July 15, 2014); Comments of Wireless Internet Service Providers Association at 38-39 (July 16, 2014). Proponents of a Title II approach also supported the use of section 706 as an affirmative, and complementary, source of legal authority for open Internet rules. *See* Comments of Center for Democracy and Technology at 2 (filed March 26, 2014); Comments of Consumer Federation of America at 66 (filed July 15, 2014); Comments of iClick2Media at 10 (filed July 15, 2014).

explained, the Commission should use its section 706 authority to support enforceable open Internet protections—as the courts have said it can do.[52]

Additional sources of authority also remain available for the Commission to ensure a free and open Internet. With respect to mobile broadband service, for example, the Commission can rely on what the Supreme Court has described as its "expansive powers" to license spectrum under Title III of the Communications Act.[53] These include the Commission's authority to "[p]rescribe the nature" of licensed services under section 303, to "[p]rescribe . . . restrictions and conditions" on licensees in the public interest under section 303(r), and to modify existing licenses to "promote the public interest, convenience, and necessity."[54] The D.C. Circuit upheld the Commission's reliance on these authorities to adopt data roaming rules for mobile broadband service.[55] So too, the Commission's *2010 Open Internet Order* pointed to a number of Title II, III, and IV authorities as support for open Internet protections that would further the Commission's statutory responsibilities to promote competition in voice, audio, and video services. These authorities provide additional support particularly for rules that would protect online voice, audio, and video service that compete with broadband providers' own voice, audio,

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[52] Of course, as the courts and the Commission have explained, section 706 is not unbounded. *See Verizon*, 740 F.3d at 639-40. It can only support actions under section 706's text that are consistent with the provisions of the Act. *See, e.g.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability et al.*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, CCB/CPD Docket No. 98-15, RM 9244, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 ¶ 73 (1998) (finding that section 706 could not trump section 10 forbearance analysis). Here, its use is consistent with the text and bolstered by section 230, which states U.S. policy to maximize user control of Internet and preserve vibrant competition in Internet services.

[53] *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

[54] 47 U.S.C. 303(b) authorizes the agency to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." 47 U.S.C. 303(r) empowers the Commission, subject to the demands of the public interest, to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." 47 U.S.C. 316 empowers the Commission to modify existing licenses, including by rulemaking, if it determines that such action "will promote the public interest, convenience, and necessity."

[55] *See Cellco v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

or video services.[56] Finally, the Commission has additional information collection authority that provides support for the transparency rule.[57]

Second, under *Verizon*, if the Commission adopts its proposed Title I classification of broadband service, open Internet protections may not impose *per se* common carriage obligations on broadband providers.[58] In that case, the court struck down the Commission's 2010 no blocking and no unreasonable discrimination rules, finding that they impermissibly imposed *per se* common carriage on providers of a service the Commission had classified as a non-common carriage information service.[59] As the court explained, absent Title II classification, such open Internet protections must permit providers to "adapt . . . to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms."[60] The Commission's 2010 open Internet conduct rules were "not so limited," but rather "compelled carriage . . . in all circumstances and with respect to all edge providers."[61] "Significantly," the court noted, the Commission never argued how its 2010 rules "differed from the nondiscrimination rules applied to common carriage generally."[62]

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56 *2010 Open Internet Order* ¶¶ 124-132 (citing sections 201 and 251 for VoIP competition; 303 for radio/TV licensing and competition; and 548 for MVPD competition).

57 *See* 47 U.S.C. 154(k); 47 U.S.C. 257.

58 *Verizon*, 740 F. 3d at 650 (finding that these rules violated 47 U.S.C. 153(51), which provides that "A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services.").

59 *Id.* at 655-59.

60 *Id.* at 652 (quoting *Cellco*, 700 F.3d at 548).

61 *Id.* at 656.

62 *Id.* (striking down no unreasonable discrimination rule). With respect to the no blocking rule, the court likewise found that the Commission had failed to advance an argument that it allowed for individualized negotiation as distinct from the obligations generally applicable to common carriers. *Id.* at 658.

But the Commission can adopt enforceable, albeit more limited, protections that support a free and open Internet without imposing *per se* common carriage obligations on non-common carriers. First, courts have upheld rules designed to prevent anti-competitive conduct as not imposing *per se* common carriage. The Supreme Court in *Southwestern Cable*, for example, held that requiring cable systems to carry local broadcast signals when the cable operators imported the competing signals of other broadcasters into the local service area did not constitute common carriage, even though the Commission's rule applied to all cable systems. As the Supreme Court later explained in *Midwest Video*, the *Southwestern Cable* holding "was limited to remedying a specific perceived evil [that] did not amount to a duty to hold out facilities indifferently for public use."[63] In *Verizon*, the D.C. Circuit likewise explained that in *Southwestern Cable* the regulation at issue "imposed no obligation on cable operators to hold their facilities open to the public generally, but only to certain broadcasters if and when cable operators acted in ways that might harm those broadcasters."[64] Similarly, the "commercially reasonable" data roaming rule upheld by the D.C. Circuit in *Cellco* as not constituting common carriage *per se*, definitively states that "[c]onduct that unreasonably restrains trade . . . is not commercially reasonable."[65] While that rule imposes an across-the-board restriction on all mobile data providers, it still allows for sufficient individualized negotiation to avoid common carriage *per se*.

Under these precedents, open Internet protections targeted to address anti-competitive ISP practices that block, throttle, or otherwise discriminate against content or services that

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63 *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 n.16 (1979).

64 *Verizon*, 740 F.3d at 656.

65 *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 ¶ 45 (2011) ("*Data Roaming Order*").

compete with the ISP's vertically integrated content or services would not impose *per se* common carriage obligations. Unlike the vacated 2010 open Internet rules,[66] such rules would apply only with respect to certain edge provider services and only in certain circumstances—when they compete with a broadband provider's vertically-integrated service—otherwise allowing broadband providers to engage in individualized negotiations.

Second, a general open Internet standard that allows for sufficient individualized negotiation does not impermissibly impose *per se* common carriage obligations. In *Cellco*, the D.C. Circuit upheld the data roaming rule because it "expressly permit[ted] providers to adapt roaming agreements to individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms."[67] In *Verizon*, the court struck down the 2010 no unreasonable discrimination rule because it was indistinguishable from common-carriage non-discrimination obligations in that it failed to allow for such individualized negotiation.[68] Furthermore, the *2015 Open Internet Order* explained that the current 2015 general conduct standard—in and of itself—does "not constitute common carriage *per se*" because it does not, "in its isolated application, necessarily preclude individualized negotiations so long as they do not otherwise unreasonably interfere with the ability of end users and edge providers to use broadband Internet access services to reach one another."[69]

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[66] For mobile providers, the 2010 no blocking rule was limited, in part, with respect to applications that competed with a mobile provider's voice or video telephony services. *2010 Open Internet Order* ¶ 99. Neither the FCC's briefs, nor the *Verizon* court's analysis, focused on this aspect of the mobile no blocking rule, perhaps because the rule still prohibited blocking of all websites. In any event, the argument that the targeting of the rule made it different from general common carriage was not made by the FCC and, thus, not before the court.

[67] *Cellco*, 700 F.3d at 548. The data roaming rule specifically states that "providers may negotiate the terms of their roaming arrangements on an individualized basis." *Data Roaming Order* ¶ 45.

[68] *Verizon*, 740 F.3d at 652.

[69] *2015 Open Internet Order* ¶ 295.

As discussed above, a general standard remains necessary to enable Commission oversight and ensure a backstop against broadband provider conduct that would violate the Commission's long-held open Internet principles. Should the Commission conclude that broadband service is a Title I information service, the Commission can still retain such a general standard so long as it is clearly distinct from common carriage and allows for individualized negotiation.

## V. CONCLUSION.

A free and open Internet is critical to providing consumers with the great video game experience they demand and deserve. That experience depends on gamers' ability to access the legally distributed content of their choosing over low-latency, high-bandwidth broadband connections, free of anti-competitive and discriminatory broadband practices. The Commission can—and should—retain enforceable open Internet protections and has the legal authority to do so.

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