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

In the Matter of Protecting and	**)**	
Promoting the Open Internet	**)**	**GN Docket No. 14-28**
Framework for Broadband Internet	**)**	**GN Docket No. 10-127**
Services	**)**	

REPLY COMMENTS OF THE
VERMONT PUBLIC SERVICE BOARD
& VERMONT PUBLIC SERVICE DEPARTMENT

September 15, 2014

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I. INTRODUCTION

The Vermont Public Service Board ("Board") and Vermont Public Service Department ("Department") hereby submit these reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("NPRM") and the Wireline Competition Bureau's Public Notice in the above-captioned proceedings.[1]

The Board is a three member, quasi-judicial board that supervises the rates, quality of service, and overall financial management of Vermont's public utilities: electric, gas, telecommunications, and private water companies. The Board also supervises certain aspects of cable television companies in matters not preempted by federal authority.

The Department is an agency within the executive branch of Vermont state government and is charged with representing the public interest in energy, telecommunications, water, and wastewater utility matters.

II. SUPPORT AND ENDORSE PRIOR COMMENTS

The Board and Department support and endorse the comments submitted to the Commission in the above-captioned proceedings by the following parties: State of Vermont's Office of the Attorney General,[2] the Attorneys General of the States of Illinois and New York,[3] the Massachusetts Department of Telecommunications and Cable,[4] and Netflix, Inc.[5] Particular positions of these parties that the Board and Department support will be detailed throughout these reply comments.

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1. Promoting and Protecting the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 14-28, FCC 14-61 (rel. May 15, 2014); Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access, *Public Notice*, GN Docket No. 10-127, DA 14-748 (rel. May 30, 2014).

2. Comments of the Attorney General of Vermont, filed July 18, 2014 ("VT Comments").

3. Comments of the People of the State of Illinois and the People of the State of New York, filed July 15, 2014 ("Joint Comments").

4. Comments of the Massachusetts Department of Telecommunications and Cable, filed July 14, 2014 ("Mass Comments").

5. Comments of Netflix, Inc., filed July 15, 2014 ("Netflix Comments").

III. RECLASSIFY BROADBAND AS A "TELECOMMUNICATIONS SERVICE" SUBJECT TO TITLE II REGULATION

The Board and Department assert, as the Board has done before the Commission at other times in the past,[6] that broadband Internet service should be reclassified from an "information service" to "telecommunications service" subject to regulation pursuant to Title II of the Telecommunications Act of 1996.[7] The VT Comments, Joint Comments, Mass Comments, and Netflix Comments all make this same point to varying degrees.

(a) Broadband service should be subject to the same Title II common carrier requirements as telephone networks.

The Board and Department endorse the comments stating that broadband Internet service is a "telecommunications service" that should be classified as such and subject to similar Title II common carrier requirements as telephone networks. This reclassification is appropriate because broadband Internet service is essentially a transmission service - a service that enables consumers to access the Internet and send/receive content. From the consumers' perspective, Internet service providers ("ISPs") provide access to the Internet. When ISPs provide other services in addition to access (i.e., information, storage of information, and information processing - all types of "information services"), those other services are neither central nor definitive. Rather, Internet access and the transmission of content are what consumers purchase, services much more appropriately identified as "telecommunications service".

The Board and Department recognize that certain parties maintain that the transmission element is inextricably linked to the content for broadband. To the extent this was true at one time, it is not correct now, as the retail service offerings of providers make clear. It is possible to purchase broadband service without also purchasing any content, which would not be possible if the transmission and content were linked. Therefore, the Board and Department endorse the call

6. In the Matter of the Preserving the Open Internet Order Remand, *Public Notice*, GN Docket No. 14-28, DA 14-211 (rel. February 19, 2014), Comments of the Vermont Public Service Board, filed March 24, 2014.

7. 47 U.S.C. §151 *et seq.*

to reclassify broadband Internet service as a "telecommunications service" regulated under Title II.

(b) Prior two attempts using Section 706 resulted in delays and ambiguity.

The Board and Department endorse the comments cautioning the FCC against relying upon Section 706 as the primary source of authority for regulating broadband Internet service and ISPs. As other parties have noted, the two prior attempts by the Commission to rely upon Section 706 to impose reasonable and fair conditions upon the provision of broadband Internet service resulted in years of litigation resulting from actions initiated by Comcast and Verizon.[8, 9] Notwithstanding the recent decision of the District of Columbia Court of Appeals, relying upon Section 706 again is too risky and too likely to prolong the ambiguity currently besetting the field. By relying on Section 706, the Commission risks the ISPs once again embroiling the Commission and other parties in years of costly, time-consuming litigation that benefits no one except, perhaps, the ISPs and the large law firms representing them. Moreover, if subsequently Section 706 is found not to provide a jurisdictional basis for open Internet rules, those rules would be voided, undermining Commission policy and leading to a further period of uncertainty. Such an outcome should be avoided. Therefore, the Board and Department endorse the call to reclassify broadband Internet service as a "telecommunications service" regulated under Title II, rather than relying on Section 706 authority.

(c) The *Verizon* Court specifically noted Title II as an option.

The Board and Department endorse the comments noting that the District of Columbia Circuit Court of Appeals in the *Verizon* decision itself pointed to Title II as a viable means through which the Commission could act to regulate ISPs and maintain the kind of open Internet

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8. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

9. Interestingly, both Comcast and Verizon in their own comments in this docket caution the Commission that reclassifying broadband Internet service as a "telecommunications service" subject to regulation under Title II will lead to years of litigation. It seems that no matter what path the FCC takes, Comcast and Verizon will ensure there are years of litigation so as to delay or avoid the fair, reasonable conditions the FCC seeks to impose on ISP activity (i.e., no blocking and unreasonable discrimination).

that benefits consumers and our economy as a whole.[10] The DC Circuit Court clearly indicated that the Commission is not forever bound by its current classification of ISPs as "information services" and could, instead, reclassify broadband Internet service as a "telecommunications service" subject to Title II regulation.[11] Such a reclassification, as has been noted by several other commenters, places the FCC's legal footing on much firmer ground. For this reason, the Board and Department encourage the Commission to reclassify broadband Internet service as a "telecommunications service" subject to Title II regulation.

IV. UPHOLD NET NEUTRALITY AS IT HAS BEEN UNDERSTOOD TRADITIONALLY

The Board and Department endorse the VT Comments, Joint Comments, Mass Comments, and Netflix Comments insofar as they support the idea that net neutrality has traditionally been understood to mean that broadband Internet service providers should not block, limit, or otherwise degrade broadband access for users of the Internet. The practices of allowing paid-for-priority access (with faster and slower lanes), limiting openness, and offering minimum service levels - all of which are contemplated by the proposed rules and all of which run counter to a traditional understanding of net neutrality - should be forbidden by the rules eventually adopted by the Commission.

(a) Net Neutrality should be understood as defined in NARUC resolutions.

The National Association of Regulated Utility Commissioners ("NARUC") has issued several resolutions over the years on net neutrality, the most recent of which was issued on July 16, 2014.[12] The Board and Department understand net neutrality to have the meaning expressed

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10. *Verizon v. FCC*, 740 F.3d at 650.

11. *Verizon v. FCC*, 740 F.3d at 630-31 and 636.

12. NARUC *Resolution to Ensure Jurisdictional Bases for Open Internet Rules*, at http://www.naruc.org/Resolutions/Resolution%20to%20Ensure%20Jurisdictional%20Bases%20for%20Open%20Internet%20Rules.pdf . Also see NARUC November 13, 2002 *Resolution Regarding Citizen Access to Internet Content* at http://www.naruc.org/Resolutions/Resolution%20on%20Fair%20and%20Non%20Discriminatory%20Access%20to%20Content.pdf and NARUC February 17, 2010 *Resolution on Open Access to the Internet* at

in those various resolutions. Net neutrality involves the right of consumers to access the Internet without restrictions as to viewpoint and in a manner that does not involve unreasonable discrimination as to the lawful choice of content (including software applications). Furthermore, net neutrality means transparency; that is, consumers must receive meaningful information regarding the technical limitations of their broadband service. The FCC should regulate in a fashion that upholds and advances net neutrality so understood.

(b) Pay for Priority runs counter to traditional Net Neutrality.

The Board and Department endorse the comments opposing the FCC's proposed rules that would allow for a pay-for-priority model in which ISPs could charge edge providers (*i.e.*, providers of services that make use of the Internet access) higher fees in exchange for having faster, priority channels over which to distribute their content. Pay-for-priority runs totally counter to traditional notions of net neutrality and is simply bad public policy. The Board and Department join other commenters in strongly encouraging the Commission to eliminate from its proposed rules anything that would encourage or permit pay-for-priority arrangements by ISPs.

The FCC's proposed rules allow for pay for priority for the first time. This policy would essentially allow the ISP to determine what content will most quickly reach the consumer and, thus, which content is most likely to be viewed by the consumer. Ultimately, the ISPs will be able to skew the playing field in favor of their own preferred services, products, information, and partners. This is totally opposite to the idea of a neutral Internet where the consumers choose what wins and loses, not ISPs who can rig the game so certain players have unfair advantages.

As Netflix comments, the Internet as it operates today is a competitive equalizer because all content providers have the same opportunity to reach consumers. In this situation, consumers, not ISPs, pick the economic winners and losers.[13] With pay-for-priority, established content providers with more resources will be able to pay ISPs for a fast lane that allows them to reach consumers more quickly and uniformly; new content providers with limited resources, but not

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12. (...continued)
http://www.naruc.org/Resolutions/Resolution%20on%20Net%20Neutrality.pdf.

13. Netflix Comments at 5.

necessarily lesser quality content, will be forced to compete on an unequal playing field. Pay-for-priority will result in one of two equally bad outcomes: (a) consumers will have fewer choices and diversity in edge providers with poorer service from those who remain, or (b) ISPs will use paid prioritization as a method to quell competition by favoring their own affiliates and their own services with faster lanes, inundating consumers with content from the ISP (or its affiliates) rather than allowing the consumer to choose which services he or she prefers. Neither of those options is comparable to the open Internet where consumer preference drives Internet traffic.

Furthermore, with paid prioritization consumers will be charged at both ends of the transaction. Edge providers now needing to pay for priority to reach customers will inevitably pass those new costs on to consumers by increasing the price of their goods and services. Meanwhile, consumers are still going to have to pay their ISP access charges for Internet service, as ISPs are highly unlikely to reduce charges to consumers even given the new revenue stream from edge providers for prioritization. With paid prioritization, consumers will be left paying the bill on both ends.

(c) The openness fostered by traditional Net Neutrality is of profound value.

The Board and Department endorse the comments that encourage the Commission to embrace rules that foster true openness and neutrality on the Internet because that openness is at the heart of the real economic, civic, and cultural value generated by the Internet over the past two decades.

"The internet's ability to generate innovation, investment, and economic growth is a product of its openness."[14] As several parties have noted, openness has generated a virtuous cycle in which the deeper and richer content available on the Internet from edge providers drives consumers to demand and ISPs to build better and faster broadband connectivity, which in turn leads to more enhanced, innovative content. Unless the Commission has the capability and

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14. Netflix Comments at 3, quoting the *Amicus of Internet Engineers and Technologists*, filed in *Verizon v. FCC*, No. 11-1355 at 3 (D.C. Cir. Nov. 15, 2012).

established standards to safeguard this cycle, its ability to produce its many benefits will be undermined, perhaps destroyed entirely.

In opposing Title II regulation, some parties have opined that the open Internet of today - and all of its benefits - is not the child of regulation; rather, they say, it came to pass with little if any regulation. It is important to remember that lack of regulation was not the key; it was the openness of the Internet itself and the various Internet access platforms that was critical. ISPs operated an open, neutral platform on which all comers could compete equally. Absent anti-competitive behavior by ISPs, there was little need for regulation. It is the new, unprecedented network management arrangements that ISPs are proposing, and in some cases already engaging in, that give rise to the need for regulation to maintain the openness and neutrality that make the Internet such a powerful engine of growth and opportunity.[15] ISPs are disingenuous to complain about proposed regulation when it is precisely their altered behavior that gives rise to the need for that regulation.

V. TWO TIER INTERNET IS HARMFUL TO THE PUBLIC GOOD

The Board and Department endorse the VT Comments, Joint Comments, Mass Comments, and Netflix Comments insofar as those comments indicate that pay-for-priority will create a two-tier Internet in which competition will be harmed and the public good damaged.

The Commission's proposed rules prevent blocking a website entirely, but they allow ISPs to degrade service to content providers who do not pay for priority, essentially enabling ISPs to downgrade content providers to a "minimum level of access". Minimum service levels will undermine competition and harm the public good. When all edge providers play on an even field, the only thing that matters is quality of content. Consumers' choices are driven by that content and nothing else - content providers who meet the demands of consumers win and those who do not lose. However, under a pay-for-priority scenario, content is no longer king. Even the best content, if it travels at the minimum level of access on the bottom tier of a two-tiered, pay-

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15. Recall that it was Comcast's "throttling" of BitTorrent traffic in 2007-2008 that was an impetus for the issuance of the Open Internet Order.

for-priority system, could be swamped by lesser-quality content that is easier and quicker for a consumer to access.

Consider that part of what makes the Internet special is its ability to enable content providers with great ideas and innovative content to quickly, cheaply, and efficiently reach a global audience. It is the idea, the content that matters and makes the difference. In such a situation, new entrants can compete as long as their ideas and content capture the consumers' attention. Under a pay-for-priority scheme, new entrants no longer can rely on their ideas alone. With a two-tiered Internet, as contemplated under the Commission's proposed rules, a new entrant with insufficient capital with which to pay for priority access will immediately be at a disadvantage compared to an edge provider that can afford to pay-for-priority. Importantly, s/he will be at a disadvantage not because of the merit of his or her content but because the Internet would no longer be the level playing field it has always been.

Vermont is a small, rural state filled with many small businesses. Vermonters have benefitted greatly from the level playing field the Internet provides and, through the Internet, have access to much greater exposure than our rural setting traditionally allowed. Many of these businesses possess limited capital resources with which to purchase a spot on the fast-lane. Vermont businesses should be able to provide their products and services freely on the Internet, allowing the market to decide whether or not their services and products are valued. They should not be at the mercy of pay-for-priority arrangements with ISPs.

Finally, paid prioritization is fundamentally at odds with the public interest because consumers and content providers are uniquely vulnerable to ISPs. ISPs have clear, unequivocal economic incentives to interfere with competitive services by dealing preferentially with their own affiliates and business partners and to charge fees to content providers. ISPs also have disproportional bargaining power. Most edge providers do not have the resources to deal with large, entrenched ISPs, and most consumers do not have the technological know-how. It is a situation almost perfectly designed for consumers and edge providers to be taken advantage of, which is bad public policy and bad for competition.

VI. <u>PROPOSED RULES ARE NOT EASILY ENFORCEABLE</u>

The Board and Department endorse the VT Comments, Joint Comments, Mass Comments, and Netflix Comments insofar as those comments indicate that the Commission's proposed rules are not drafted in a manner that will allow for easy or effective enforcement.

(a) Proposed rules are too vague.

The Board and Department endorse the comments stating that some key terms used in the proposed rules are too vague and will lead to unnecessary confusion and litigation. For example, the "commercially reasonable" standard as it stands is problematically vague. The proposed rules now require that, if an ISP engages in blocking and discriminatory practices, those practices must be "commercially reasonable".[16] Unfortunately, that standard goes undefined in the rules. Furthermore, it is not clear how a "commercially reasonable" standard could be used in all situations with all content providers. (For example, can one really refer to the "commercially reasonable" standard in relation to edge provider content relating to free speech and civic engagement?)[17] This kind of ambiguity is going to result in the need for the FCC to be involved in case-by-case interpretations of the standard, which is something the FCC has recognized.[18]

(b) Case by Case reviews will be too burdensome.

The Board and Department endorse the comments stating that the Commission's proposal to conduct case-by-case reviews for commercial reasonableness are going to be too burdensome. This type of review suffers from three weaknesses. First, a case-by-case review simply invites too much intervention by the Commission into the daily business of the participants. Second, it will take too long for a cognizable interpretation of the standard to arise out of such a case-by-case review. In the meantime, consumers, content providers, and ISPs will be left in a state of legal and business limbo, unsure of how to proceed safely until such an interpretation emerges. Finally, a case-by-case review plays into the hands of the entrenched ISPs. ISPs have the

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16. *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (May 15, 2014) at ¶ 90.

17. See Netflix Comments at 8.

18. *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (May 15, 2014) at ¶ 136.

business, regulatory, legal, and financial resources to weather long, drawn-out regulatory processes. Edge providers do not have either the resources or the experience. Such an imbalanced field will only yield results more favorable to the ISPs and less rooted in fairness for consumers and edge providers.

(c) Transparency rules will be ineffective.

The Board and Department endorse the comments stating that the proposed transparency rules, although well-intentioned, largely will be ineffective in protecting consumers. Generally speaking, the average consumer does not have the technical expertise to understand the fine print associated with pay-for-priority agreements. Even assuming consumers have that knowledge, consumers do not have the kind of coordinated market power required to compel ISPs to stop using pay-for-priority arrangements. Further, consumers usually have only one or two ISP choices. As the industry adopts pay-for-priority, it is likely that all ISPs will adopt their use, so switching ISPs, where possible, probably will not prove effective to alter ISP behavior.

VII. STAKEHOLDER GROUP

The Board and Department strongly oppose the adoption by the Commission of rules that will allow pay-for-priority arrangements. However, should the Commission adopt these arrangements, then, as noted in the Mass Comments, the Commission should create a Net Neutrality Council to help establish clear, enforceable standards. The Council should be comprised of members from a wide range of stakeholders, including from state commissions.

VIII. CONCLUSION

For the foregoing reasons, the Board and Department respectfully urge the FCC to reclassify broadband Internet service as a "telecommunications service" subject to the common carrier requirements of Title II. In doing so, the Commission will ensure net neutrality, protect consumers and edge providers, and provide room for innovation, competition, and growth in the industry.

Respectfully submitted

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