

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

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

**COMMENTS OF
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

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Summary

Every major corporation in America, including the members of Ad Hoc, is an “edge provider” of Internet content who depends upon Internet openness to do business. Every retailer with an online catalogue, every manufacturer with online product specifications, every insurance company with online claims processing, every bank offering online account management, every company with a web site – every business in America interacting with its customers online is dependent upon an open Internet.

In order to preserve that open Internet, the time has come for the Commission to acknowledge that today’s broadband Internet access service is a “telecommunications service” as Congress defined that term in Title II of the Communications Act. This is a question of fact, not policy. As a result of changes in the engineering and deployment of network and Internet technologies, the Commission’s classification of Internet service in 1997 as an unregulated “information service” is simply out of step with reality.

The Commission can avoid unnecessary regulation of Internet access, despite its status as a telecommunications service, by using the Act’s forbearance authority where marketplace competition protects consumers and the public interest.

Marketplace competition does not protect consumers and the public interest when it comes to the “market failure” (as the Commission itself has characterized it) of terminating access, meaning the monopoly power enjoyed by ISPs when a business seeks to download content to the ISP’s subscriber and must use the subscriber’s choice of ISP to do so. No matter how competitive a market for Internet access may be, once a subscriber chooses an ISP, that ISP has a monopoly on access to that subscriber by any business trying to communicate with that subscriber online. The Commission has

previously recognized the harm that “terminating monopolies” can cause for legacy telecommunications and properly characterized them as market failures that must be addressed with appropriate regulation. The Commission must do the same in the case of Internet access.

The Commission’s “minimum level of access” proposal is an impractical and ineffectual solution to the terminating access problem. Given the variety of potential standards for determining a “minimum level” of access and the rapidly changing technical specifications, consumer expectations, provider interests, and market developments for Internet access service, any minimum access standard will be quickly outdated. A simple prohibition against blocking access to content of the customer’s choosing and a ban on charges for paid prioritization collected from content providers would be a more effective, self-executing method for providing certainty and clarity to the market.

In order to protect businesses and other edge providers from market failure, the Commission must adopt an explicit rule that prohibits ISPs from exploiting their terminating monopoly by demanding any payments from content or edge providers for access to the ISP’s subscribers, including “pay-for-priority” arrangements.

Such a rule would be consistent with the Commission’s previous determination that “bill-and-keep”, the model that requires service providers to charge only their own customers for service, not interconnecting service providers or their customers, is the most economically sound compensation framework for addressing market failures like terminating access monopolies.

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The Ad Hoc Telecommunications Users Committee (“the Committee” or “Ad Hoc”) hereby responds to the Commission’s Notice of Proposed Rulemaking (“NPRM” or “Notice”)¹ in the docket captioned above.

Every major corporation in America, including the members of Ad Hoc, is an “edge provider” of Internet content who depends upon Internet “openness” to do business. Every retailer with an online catalogue, every manufacturer with online product specifications, every insurance company with online claims processing, every bank offering online account management – every business in America interacting with its customers online is an edge provider dependent upon an open Internet.

In order to preserve that open Internet, the time has come for the Commission to acknowledge that today’s broadband Internet access service is a “telecommunications service” as Congress defined that term in Title II of the Communications Act. This is a question of fact, not policy. As a result of changes in the engineering and deployment

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (“NPRM”).

of network and Internet technologies, the Commission's classification of Internet service in 1997 as an unregulated "information service" is simply out of step with reality. The Commission can avoid unnecessary regulation of Internet access, despite its status as a telecommunications service, by using the Act's forbearance authority where marketplace competition protects consumers and the public interest. But marketplace competition does not protect consumers and the public interest when it comes to the "market failure" (as the Commission itself has characterized it) of terminating access, meaning the monopoly power enjoyed by Internet Service Providers ("ISPs") when a business seeks to download content to the ISP's subscriber and must use the subscriber's choice of ISP to do so. In order to protect businesses from that market failure, the Commission must prevent ISPs from imposing charges on content providers, including "pay-for-priority" arrangements, for the very same economic and policy reasons that required the Commission to adopt bill-and-keep for all other intercarrier compensation.

DISCUSSION

I. Today's Internet Access Service Constitutes Title II "Telecommunications" as Defined by the Communications Act

The Commission must determine whether today's broadband Internet access service is a "telecommunications service" rather than an "information service" under Title II of the Communications Act. The Commission's role is to conduct a factual inquiry, not a legislative policy debate, because Congress already decided the relevant policy when it defined the Commission's jurisdiction and powers under the Act. And as a factual matter, the rationale for the Commission's earlier classification of Internet access service as an unregulated "information service" is simply out of step with reality;

the engineering and deployment of broadband and Internet technologies have evolved far beyond the Commission's characterization of them in 1997. The Commission can easily avoid unnecessary regulation of Internet access, despite its status as a telecommunications service, by using the Act's forbearance authority to de-regulate Internet access services wherever marketplace competition protects consumers and the public interest.

The Communications Act confers authority on the Commission to regulate "telecommunications" and "communications by wire or radio." The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."² "Communications" is broadly defined to include any service that provides for the "transmission of writing, signs, signals, pictures, and sounds of all kinds" by aid of wire or radio.³ Under the statutory definitions, the key element is "transmission" and not variations in the technology or facilities used to perform the transmission.⁴

The Commission and the federal courts have interpreted these definitions to include a wide range of transmission facilities and services besides traditional voice telephone service. For example, the Commission declared that frame relay service was

² 47 U.S.C. § 153(50).

³ 47 U.S.C. §§ 153(40), 153(59).

⁴ *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3312 ("Under the statute, the heart of 'telecommunications' is transmission.") (2004).

a communications service when frame relay was in its infancy.⁵ The FCC has subsequently treated Internet Protocol (“IP”), ATM, and MPLS services as telecommunications.⁶

In contrast, “information services” are not subject to regulation under Title II of the Act. Congress has defined an information service as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”⁷ This definition describes an end user’s total Internet experience. But today, that end user experience results from the user’s combination of many component parts, obtained from unrelated providers, including equipment manufacturers, software providers, search engines, web hosting providers, database managers, content providers, and the telecommunications service provided by the user’s Internet access service provider to connect end user equipment to the Internet. For purposes of this rulemaking, the Commission must decide whether that Internet access service, not the myriad products subscribers combine it with to communicate via the Internet, constitutes “telecommunications” or “information services.”

The Commission first classified Internet access service as an information service in its 1997 Report to Congress.⁸ Subsequent decisions have relied heavily on the

⁵ *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Service is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (1995).

⁶ See, e.g., *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, DA 09-454 (Wireline Comp. Bur., rel. Feb. 25, 2009).

⁷ 47 U.S.C. § 153(24).

⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (“Report to Congress”)

factual descriptions in that report, repeating them with little or no updated factual analysis.⁹ But in 1995, only 14% of Americans had Internet access, via dial-up connections; 42% of U.S. adults had never heard of the Internet.¹⁰ By 1999, 65% of Internet users still used dial-up service,¹¹ meaning that most of the Internet access providers classified as information service providers by the Commission in 1997 did not provide telecommunications service at all; end users obtained those services separately from their local telephone company. As a result, the Commission relied on a variety of characteristics that no longer pertain to today's Internet access providers in order to classify Internet access service as an information service:

- The Commission stated that Internet access providers provided subscribers with the ability to run a variety of applications such as “electronic mail,” “World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients,” and “Telnet applications” over mail servers and other computer facilities owned by the ISP which thus had no “separate legal status.”¹² But modern-day users obtain applications like email and browsers on a stand-alone basis from providers other than their Internet access provider.
- The Commission stated that subscribers stored “files on Internet service provider computers to establish ‘home pages’ on the World Wide Web”¹³ and retrieved

⁹ See, e.g., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*; CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14862-5, ¶¶ 12-17 (2005).

¹⁰ Pew Research Center, *The Web at 25 in the U.S.*, Feb. 2014 at 10 (available at <http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/>).

¹¹ Cable Services Bureau, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission*, Oct. 1999 at 23.

¹² *Report to Congress Id.* at 11536-9, ¶¶ 75-78.

¹³ *Id.* at 11537, ¶ 76.

files “from the World Wide Web” by interacting with data maintained on an Internet access provider’s facilities.¹⁴ Today, Web content is maintained by a variety of means, including specialized Web hosting providers or content providers themselves who purchase and manage their own Web servers.

- The Commission stated that Internet service didn’t include transmission between “points specified by the user” because a Web page proprietor did not know who would seek to download its files and thus did not specify the points to which its files would be transmitted.¹⁵ Modern-day Internet access providers are separate from Web page proprietors, however, and they connect their subscribers to the points specified by the subscriber.

Viewed from the perspective of a 1997 customer, today’s Internet access would be unrecognizable. In today’s world, customers obtain Internet access service on an entirely separate basis from web hosting, web browsers, applications, “newsgroup” services, customer premise equipment (which now includes highly sophisticated hardware and software), email servers, etc. While ISPs are free to offer those functionalities as well, they are no longer “inextricably intertwined” with Internet access to create an information service.

Internet access has evolved since the Commission’s last in-depth analysis of the service. Functionalities that were the exclusive province of Internet access service providers are now purchased separately by increasingly sophisticated users from a myriad of stand-alone providers. Even less sophisticated users understand that Gmail is not a service they obtain from their cable company, even if the connection by which they access Gmail is. Accordingly, the time has come for the Commission to re-examine where, as a factual matter, Internet access service belongs in the statutory

¹⁴ *Id.* at 11538, ¶ 76.

¹⁵ *Id.* at 11537, ¶ 76.

taxonomy mandated by Congress. As a matter of fact, the Commission's earlier rationale for classifying Internet access service as an unregulated "information service" no longer matches the reality on the ground.

The appropriate classification of Internet access is, of course, a separate question from how, as a regulatable Title II service, it should be regulated. Competitive conditions vary, not only geographically but also structurally. Thus, a subscriber selecting its Internet access service provider may have competitive alternatives that make forbearance from regulation of that transaction necessary and beneficial. But businesses trying to communicate with that subscriber after the choice is made have no competitive alternatives. As discussed below, the Commission's statutory obligation is to impose regulations that protect the public from the ISP's monopoly power in that setting.

II. The Commission's Regulatory Regime Must Protect Consumers and Edge Providers from the "Last Mile" Terminating Monopoly of Internet Access Providers

The Commission has recognized repeatedly that ISPs have a "terminating monopoly" over access to their subscribers. The "terminating monopoly" refers to the fact that, regardless of how competitive an Internet access service market may be when a subscriber is choosing a provider, once she chooses a provider, that provider has a monopoly on access to the subscriber. Businesses seeking to communicate with a subscriber have no choice but to use the subscriber's chosen Internet access provider on the provider's terms. The Commission has also recognized that Internet access providers have the economic incentive and ability to degrade Internet openness by discriminating in the delivery of content from unaffiliated businesses or by extracting

fees from them.¹⁶ Actual ISP interference with Internet openness is well-established,¹⁷ putting to rest any claims that there is no need for clear rules to protect Internet openness. As discussed below (and in prior pleadings in this proceeding¹⁸), Ad Hoc supports Commission adoption of robust “rules of the road” to ensure Internet openness in light of the ISPs’ terminating monopoly and the resulting market failure that it creates for edge providers like American businesses.

A. Competition in the consumer Internet access market does not counteract the terminating monopoly

The FCC is right, as a matter of policy, to be concerned about the low level of competition in the broadband Internet access services market, where most residential consumers lack competitive options for providers of the service.¹⁹ A competitive Internet access market will certainly lead to greater innovation, higher broadband speeds, lower unit pricing, and greater consumer choice.

But in this proceeding, the level of competition in the consumer broadband market has only limited relevance for purposes of identifying the appropriate regulatory framework for Internet openness and the unimpeded transmission of content of the subscriber’s choosing. Even assuming a robustly competitive subscriber market, the Commission must still adopt rules to prevent ISPs from discriminating in the delivery of

¹⁶ NPRM at 5576-7, ¶¶ 42-43.

¹⁷ *E.g., id.* at 5567-8, ¶ 18 and 5575-6, ¶ 41; *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17925-6, ¶¶ 35-36 (2010) (“Open Internet Order”).

¹⁸ Comments of the Ad Hoc Telecommunications Users Committee on the Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) (“Ad Hoc Comments”) at 7-13.

¹⁹ NPRM at 5576, ¶ 42; Open Internet Order at 17931, ¶ 42 n.143.

content from nonaffiliated content providers or exploiting their terminating access monopoly by demanding fees from content providers to deliver or prioritize content. Competition in the consumer broadband market, even where it exists, cannot constrain the market behavior of a subscriber's ISP towards the businesses seeking to communicate with that subscriber. Once a subscriber selects her ISP, businesses and other edge providers have no option for communicating with the subscriber besides that ISP, regardless of the competitive choices available to the subscriber at the time of selection. As the Commission itself stated in an earlier proceeding to examine Internet openness, "even if there is competition among broadband Internet access providers, once an end-user customer has chosen to subscribe to a particular broadband Internet access service provider, this may give that broadband Internet access service provider the ability ... to favor or disfavor any traffic destined for that subscriber."²⁰

B. The Commission has previously solved this market failure through regulatory intervention.

As Ad Hoc described in its 2010 Comments,²¹ the Commission has addressed this very market dynamic when it reviewed terminating access charges in the switched voice market. The Commission's analysis and approach in that context is instructive for this proceeding because the terminating charges imposed by local exchange carriers ("LECs") on interexchange carriers ("IXCs") terminating long distance calls to the LECs' customers are analytically identical to the types of charges ISPs seek to impose on unaffiliated content providers for delivery and prioritization of content to the ISPs'

²⁰ *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13094-5, ¶ 73 (2009) ("2009 NPRM").

²¹ Ad Hoc Comments at 10-12.

subscribers.

In the case of terminating access for switched voice services, the Commission observed that “[f]or terminating access, the choice of service provider is made by the *called* party. ... The *calling* party, or its long-distance service provider, has little or no ability to influence the *called* party’s choice of service provider.”²² The Commission concluded that “even with a competitive presence in the market, terminating access may remain a bottleneck controlled by whichever LEC provides access for a particular customer. As such, the presence of unbundled network elements or facilities-based competition may not affect terminating access charges.”²³ Ultimately, the Commission determined that, when companies are required to pay terminating access charges, “[b]ecause the paying parties do not choose the carrier that terminates their interstate calls, competitive LECs potentially could charge excessive prices for terminating access.”²⁴

Five years later, the Commission made substantially the same observation in its April 2001 CLEC Access Charge Order:

[I]t appears that the CLECs’ ability to impose excessive access charges is attributable to two separate factors. First, although the end user chooses her access provider, she does not pay that provider’s access charges. Rather, the access charges are paid by the *caller’s* IXC, which has little practical means of affecting the...*called party’s* choice of provider...and thus cannot easily avoid the expensive ones. Second, the...IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, [so that] *the party causing the costs – the*

²² *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21472, ¶ 271 (1996) (“1996 Access Reform Order”) (subsequent history omitted) (emphasis added).

²³ *Id.*

²⁴ *Id.* at 21476, ¶ 279.

*end user that chooses the high-priced LEC – has no incentive to minimize costs. Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider.*²⁵

The Commission then determined that the market's failure to constrain terminating access rates created the opportunity for terminating access providers to charge unreasonable rates and that Commission action was required to prevent CLECs from exploiting their market power in the rates they imposed for switched access services.²⁶ In subsequent access charge decisions, the Commission repeatedly characterized the actions it took in the 2001 CLEC Access Charge Reform Order as necessary to address a "market failure."²⁷

The "market failure" that the Commission addressed for switched voice services is identical to the market failure faced by businesses seeking to communicate with an ISP's subscriber.²⁸ The subscriber chooses the Internet access provider who is then in

²⁵ *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report And Order And Further Notice Of Proposed Rulemaking, 16 FCC Rcd 9923, 9935-6, ¶ 31 (2001) ("CLEC Access Charge Order") (emphasis added).

²⁶ *Id.* at 9936, ¶ 34.

²⁷ See, e.g., *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc., for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 9 FCC Rcd 9108, 9110, ¶ 4 (2004); *Access Charge Reform; PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative Section 61.26(a)(6) of the Commission's Rules; SouthEast Telephone, Inc. Petition for Waiver of Section 61.26(a)(6) of the Commission's Rules; Cox Communications, Inc. Petition for Clarification or Reconsideration*, CC Docket No. 96-262, Order, 23 FCC Rcd 2556, 2557, ¶ 2 (2008); *Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules*, WC Docket No. 08-162, Memorandum Opinion and Order, 23 FCC Rcd 13187, 13188, ¶ 3 (2008); *Petition of Northern Telephone & Data Corp. for Waiver of Section 61.26(b)(1) of the Commission's Rules*, WC Docket No. 09-216, Order, 25 FCC Rcd 274, 275, ¶ 3 (2010).

²⁸ The Commission faced a similar market dynamic when it considered rules to facilitate "calling party pays" for the CMRS market. See *Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, WT Docket No. 97-207, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 10861 (1999). In that proceeding, Ad Hoc pointed out the structural defects presented by a "calling party pays" model and the terminating access market for switched voice services. Comments of the Ad Hoc Telecommunications Users Committee on the Notice of Proposed Rulemaking, WT Docket 97-207,

exactly the same position as LECs who are terminating switched voice traffic, in terms of the ISP's incentive and ability to make unreasonable demands on edge providers. As was true for calling parties and IXCs, the content, application, or service provider has no practical means of disciplining excessive charges by the subscriber's Internet access service provider. The economic imperative to regulate access charges in the switched voice market is thus equally applicable to the market for broadband Internet access services. As it did for switched access service, the Commission must adopt an explicit rule that prohibits ISPs from exploiting their terminating monopoly at the expense of edge providers.

The possibility of "multi-homing" subscribers is not an effective solution to this problem. In paragraph 46 of the NPRM, the Commission notes that "absent multi-homing, an end user has only one option to reach a given edge provider's content," suggesting that multi-homing offers a possible solution to the terminating monopoly problem. At this point in time, there is no evidence to suggest that a sizable number of consumers actually procure Internet access service from multiple ISPs simultaneously or that they would be able to switch seamlessly from one ISP to another in order to receive content from a provider imposing restrictions or burdensome charges on edge providers. Moreover, as was true in the case of terminating charges for switched voice, calling party pays, and the current broadband Internet access market, even a multi-homing consumer would not be paying the charges imposed by its ISP and would have little economic incentive to pick the ISP with the lowest charges if such charges were

at 8-11 (filed Sept. 17, 1999). The Commission ultimately did not approve calling party pays as a pricing model.

imposed on the content provider. Unless the content provider has multiple paths into a consumer's home and the ability to select the most cost effective route, the content provider would still be subject to exploitation by the ISP's terminating monopoly absent Commission rules protecting edge providers.

To preserve the "virtuous circle of innovation" identified by the Commission in the NPRM, the Commission must acknowledge the market failure for broadband Internet access services described above and adopt narrowly tailored rules to protect edge providers from the ISPs' exploitation of that market failure.

Nor is it reasonable, as some commentators have suggested, to rely upon consumer demand for particular content to discourage ISPs from demanding payments from edge providers as a condition for subscriber access.²⁹ While an ISP may be forced to allow access to certain content or content providers because the ISP's customers demand it, such demand would only apply to the largest and most popular content providers. Small start-ups, companies with little funding or name recognition, and those in the process of building their customer base – the types of entities that have benefitted so mightily from an open Internet – would have little recourse or leverage against ISPs whose customers were insufficiently numerous or vocal in demanding access to their content.

²⁹ See, e.g., 2009 NPRM at 13095, ¶ 74 n.171 (quoting a commentator that suggested if AT&T tries to charge Google for the right to stream video over its high speed fiber, Google could refuse to pay it, and AT&T "might" allow unfettered access to Google because its customers demand it).

C. Paid prioritization charges for edge providers allow Internet access providers to exploit their terminating monopoly

In 2010, the Commission adopted a rule that prohibited ISPs from engaging in content-based discrimination when transmitting network traffic over a consumer's broadband Internet access service.³⁰ The Commission indicated in the Open Internet Order that paid prioritization of specific content would likely be prohibited under the new rule.³¹ In its earlier comments on the 2010 NPRM, Ad Hoc strongly supported the Commission's adoption of the proposed non-discrimination rule and its putative ban on paid prioritization because the rule provided an effective remedy for the market failure described above.³²

This market failure requires that any reformulation of the now vacated non-discrimination rule include a ban on paid prioritization agreements as well as a prohibition against ISPs imposing or collecting charges for priority (discriminatory) treatment of a specific content provider's traffic.³³ Discriminatory treatment of traffic by an ISP can only be reasonable if it applies uniformly to similar types of traffic, regardless of the content or content provider's identity, and even then must be limited to technical requirements for network management. In the absence of such limitations, ISPs will face no meaningful restrictions on their ability and incentives to harm the public interest with unreasonably discriminatory practices.

³⁰ Open Internet Order at 17944, ¶ 68.

³¹ *Id.* at 17947, ¶ 76.

³² Ad Hoc Comments at 7-13.

³³ NPRM at 5595-6, ¶ 96; 5609, ¶ 138.

D. The Commission's "minimum level of access" proposal is an impractical and ineffectual solution to the terminating access problem

The Commission has proposed adoption of a rule that requires ISPs to provide a "minimum level of access" to consumers.³⁴ The NPRM seeks comment on whether adoption of this rule will provide effective protection to consumers and what standards the Commission should consider in establishing the minimum level of access.

Ad Hoc opposes the rule proposed by the Commission. Given the many different potential standards for determining a "minimum level" of access, the rule would embroil the Commission in perpetual disputes over the appropriate "minimum level" based upon changing technical specifications, consumer expectations, provider interests, and market developments. Any standard for minimum access the Commission deems appropriate at the end of this proceeding will inevitably change and, given the pace of technological change that characterizes this industry, evolve too rapidly and unpredictably for a practical and effective regulatory response.

Furthermore, it is a poor use of Commission resources to be constantly reviewing and reformulating the appropriate minimum access level. A simple prohibition against blocking access to content of the customer's choosing and a ban on charges for paid prioritization collected from content providers would provide greater certainty to the market and shift the market's focus toward enabling consumers to determine the appropriate speeds, bandwidth, and prioritization of their traffic.

³⁴ *Id.* at 5596, ¶ 97.

III. The Commission Has Previously Determined that Bill-and-Keep is the Most Economically Sound Framework for These Market Issues

In the USF/ICC Transformation Order,³⁵ the Commission adopted “bill-and-keep” as the framework and end state for all intercarrier compensation. Bill-and-keep refers to a payment model under which service providers bill only their own customers for service, not interconnecting service providers or the customers of those interconnecting providers, i.e., content and edge providers. The Commission found that “a bill-and-keep framework for intercarrier compensation best advances the Commission’s policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks and promoting the deployment of IP-based networks.”³⁶ The economic and policy analysis which compelled the Commission to adopt bill-and-keep for intercarrier compensation is equally applicable to Internet access service and compels the same result, for several reasons.

First and most fundamentally, as the Commission has stressed, a bill-and-keep regime reflects the market more accurately than other potential payment mechanisms: “Bill-and-keep brings market discipline to intercarrier compensation because *it ensures that the customer who chooses a network pays the network for the services the subscriber receives.*”³⁷ The customer has the incentive to choose the most efficient alternative because “a bill-and-keep framework helps reveal the *true cost* of the network

³⁵ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663 (2011) (“USF/ICC Transformation Order”).

³⁶ *Id.* at 17905, ¶ 741.

³⁷ *Id.* at 17905-6, ¶ 742 (emphasis added).

to potential subscribers.”³⁸ Bill-and-keep “provides better incentives for carriers to operate efficiently by better reflecting those efficiencies (or inefficiencies) in pricing signals to end-user customers.”³⁹

Moreover, by enabling potential subscribers (and competitors) to identify the most economically efficient service provider, bill-and-keep preserves the market forces that exert downward pressure on pricing, incent innovation, and encourage efficient behavior by providers, protecting both consumers and marketplace competition. If, instead of recovering its costs from the customer who selects it, a last-mile carrier were permitted to exploit its terminating access monopoly and extract some portion of its costs from other carriers and content providers, this critical market signaling would be disrupted. The subscriber would not see the full cost associated with her choice of provider, while the content provider or interconnecting carrier, who have no choice but to use the last-mile provider selected by the subscriber, would be forced to pay any charges that provider imposes. As the Commission found in the USF/ICC Transformation Order, in such a case, “subscribers [would] not have accurate pricing signals to allow them to identify lower-cost or more efficient providers.”⁴⁰ By contrast, a bill-and keep regime assures that the customer for the last-mile provider sees the entire cost of the connection, which means that the customer can take cost into account in choosing among her competitive alternatives – and this, in turn, “gives carriers appropriate incentives to serve their customers efficiently.”⁴¹

³⁸ *Id.* at 17908, ¶ 745 (emphasis added).

³⁹ *Id.* at 17909, ¶ 746.

⁴⁰ *Id.* at 17908, ¶ 745.

⁴¹ *Id.* at 17906, ¶ 742.

In short, the bill-and-keep model keeps markets honest and the resulting downward pricing pressure, incentives to innovate, and heightened economic efficiencies benefit both consumers and marketplace competition, all of which best serve the public interest. Allowing service providers to hide their true costs and efficiencies by using their terminating monopoly to extract payments from interconnecting providers or content providers does none of these things.

In addition to preserving competitive market forces and incenting economically efficient behavior by providers, bill-and-keep is consistent with the Commission's broader cost-causation principles in the access arena. The Commission has long recognized that each party to a communication should pay its own share of the costs. In particular, the called party (meaning, in the case of Internet access, the downloading party) should pay for its connection since "the subscription decisions of the [downloading] party play a significant role in determining the cost of [downloading content] to that party."⁴²

Importantly, the Commission has previously rejected claims made by a number of LECs that a bill-and-keep regime is appropriate only where traffic is "roughly in balance."⁴³ Again, because both parties share in the benefits of a connection between them, it is appropriate that they share its costs. And the sharing mechanism that is most efficient is bill-and-keep, since it places on each party the burden of the costs of

⁴² *Id.* at 17907-8, ¶¶ 744-745.

⁴³ *Id.* at 17913, ¶¶ 755-756.

the provider (and bandwidth) that party has chosen in order to connect its location to the Internet.⁴⁴

Finally, the Commission pointed out that bill-and-keep has the virtue of much greater administrative simplicity than other mechanisms for setting intercarrier compensation, which require extremely burdensome, costly, and time-consuming procedures at both the state and federal level.⁴⁵

All of these considerations bear directly on the Commission's decision-making in this proceeding, and militate strongly against some of the proposals in the NPRM – most notably the proposal that the Commission allow ISPs to discriminate among content providers with “pay-for-priority” arrangements. Under such arrangements, an ISP would be permitted to extract payments from a content provider as a condition of delivering the content provider's packets to the ISP's end users on a priority basis or at a higher speed compared to other traffic. The effect of such an arrangement is that content providers who do not pay would see their packets relegated to steerable-class status. Accordingly, the Commission asks in the NPRM (at paragraph 138) whether it should ban all or some of such arrangements outright.

Allowing such arrangements would be market-distorting in two respects. First, thanks to their terminating monopoly, ISPs would have no incentive to price “pay-for-priority” arrangements to reflect efficient cost recovery nor would there be any competitive pressure to do so. Just like last-mile providers in the intercarrier

⁴⁴ *Id.* at 17913, ¶ 756. As the Commission points out, indeed, bill-and-keep may be even more efficient when traffic is not balanced in that it eliminates uneconomic incentives to game other regimes, such as reciprocal compensation. *Id.*

⁴⁵ *Id.* at 17906, ¶ 743.

compensation arena, every ISP has a monopoly to exploit once the end user selects her ISP, as discussed in Section II above. Even if the ISP were to use content provider payments to subsidize its prices to the end user,⁴⁶ doing so would hide from end users the true cost of their connections, and prevent them from choosing providers on an economically efficient basis. To quote again the Commission's USF/ICC Transformation Order analysis discussed above, "subscribers [would] not have accurate pricing signals to allow them to identify lower-cost or more efficient providers."⁴⁷

Second, pay-for-priority arrangements would distort the consumer's choices among content and edge providers. Consumers would see (at least) two classes of such providers, the fast and the slow, which would inevitably affect their choice of content to consume or otherwise distort competition in the edge providers' markets. But the speed of delivery of a "fast" edge provider's content would have nothing to do with the edge provider's choice to deliver its content in a more efficient way (by, for example, buying more capacity on its "originating" end to deliver its content into the Internet backbone). Speed differences would instead reflect only the content provider's decision (made under economic duress) to pay the end user's ISP not to bump its traffic to the back of the line.

To be sure, it is appropriate that the content provider bear an appropriate share of the cost of delivering its content, but this it will do by paying its *own* ISP for sufficient capacity – and by picking an ISP on the basis of that ISP's ability to provide such capacity efficiently and reliably – so that content delivery is not compromised at its

⁴⁶ Of course, ISPs might instead use these payments to pad their profits as a form of monopoly rents, but this would hardly enhance consumer welfare or economic efficiency.

⁴⁷ USF/ICC Transformation Order at 17908, ¶ 745.

“originating” end. At that end, unlike the “terminating” end where the subscriber controls the choice of provider, the content provider has an actual choice. And by making this choice in a competitive environment, content providers will be able to act on accurate price signals, which means that their choices will reward efficiency, innovation, and cost management by ISPs.

The NPRM proposes to allow pay-for-priority arrangements subject to a “commercial reasonableness” test, which would be applied on a case-by-case basis to resolve disputes.⁴⁸ But that approach does not solve the problems described above, for several reasons.

First, the “commercial reasonableness” test would be far more administratively burdensome than the bill-and-keep regime already endorsed by the Commission for intercarrier compensation. The Commission’s discussion of the proposed commercial reasonableness standard takes up twenty-one full paragraphs and numerous footnotes in the NPRM.⁴⁹ It discusses many separate factors that might be used in making such inquiries and each of these factors carries with it any number of subsidiary factual inquiries that would have to be answered in any given case. This means that any standard adopted will necessarily be complex, inexact, and massively fact-driven. And unlike the cost-determination proceedings which the Commission rightly sought to avoid in the USF/ICC Transformation Order, each such adjudication would affect only one relationship between only two parties. Thus the sheer number of such adjudications would be much greater in this context. When these two factors are multiplied by each

⁴⁸ NPRM at 5602, ¶ 116; 5604, ¶ 122.

⁴⁹ NPRM at 5602-8, ¶¶ 116-136.

other, the administrative burden of a case-by-case determination of the commercial reasonableness of pay-for-priority arrangements would be staggering. Nor would the outcome be worth the trouble: the inherent unpredictability and fuzziness of the individual outcomes would hardly provide the market with the clear guidance needed to make efficient arrangements.

In addition, the NPRM itself identifies two other fundamental problems associated with pay-for-priority arrangements: “[B]roadband providers may have incentives to increase revenues by charging edge providers for access or prioritized access to the broadband provider’s end users. In particular, excessive fees could reduce edge provider entry, suppress innovation, and depress consumer demand. [Additionally], if providers could profitably charge edge providers they would have an incentive ‘to degrade or decline to increase the quality of service they provide to non-prioritized traffic.’”⁵⁰ Even if a pay-for-priority arrangement might conceivably avoid these problems in extraordinary instances, a case-by-case approach could not feasibly winnow out these cases from the vast number of those which would not avoid them.

To be clear, none of these market-distorting, anti-consumer effects arise if ISPs offer *directly to their subscribers* the option of higher speed service when the market faced by their subscribers is competitive. Thus, for example, a subscriber who can choose from Internet access service provided by her cable company, ILEC, wireless provider, or even municipal broadband provider is free to base her selection on whether the service provider offers an option to speed up service delivery for an additional charge. Many ISPs already offer such options today, of course, but such options are

⁵⁰ *Id.* at 5564, ¶ 6 (citations omitted).

“buffet” style in that they do not allow the subscriber to pick and choose specific content for speedier downloads. ISPs are free to offer subscribers an “a la carte” option whereby the *subscriber* could choose, for example, to download one or more streaming videos or music content at a higher bit rate while using slower speeds for e-mail and other websites. When ISPs offer such services directly to subscribers, the presence of marketplace competition and consumer choice can spur innovative, efficiency-enhancing service options, unlike ISP proposals to charge edge providers which merely exploit the ISP’s terminating monopoly. The Commission can ensure that consumers have the benefits of pay-for-priority service, to the extent there are any, by requiring ISPs to offer the option directly to their subscribers rather than compelling content providers to pay more under the threat of inferior connections to subscribers.

CONCLUSION

For the reasons discussed above, the Commission should re-classify Internet access as a telecommunications service and apply a “bill and keep” regulatory regime to protect the public interest, consumers, and competition from Internet access providers’ terminating monopoly.

Respectfully submitted,

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Certificate of Service

I, Amanda Delgado, hereby certify that true and correct copies of the preceding Comments of Ad Hoc Telecommunications Users Committee were filed this 18th day of July, 2014, via the FCC's ECFS system.



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