

**Before the Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Accelerating)
Wireline Broadband)
Deployment by Removing)
Barriers to Infrastructure)
Investment)

WC Docket No. 17-108

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES ON NOTICE OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”), file these initial comments on the multiple questions presented by the Commission’s Notice of Proposed Rulemaking (“NPRM”).

NASUCA is concerned that the Commission has not granted sufficient time for parties to fully research and respond to the large number of questions and related analysis in the NPRM. The time between release of the NPRM and the comment due date is short and overlaps with the preparation of opening and reply comments in the related dockets, WC Docket No. 17-84 and WC Docket No. 17-79.

The NPRM does not provide sufficient factual or legal justification to reverse the Commission's prior order classifying broadband Internet access as Title II. The courts have spelled out the criteria an agency must meet in order to make the proposed substantial change to existing policy. The NPRM fails to do so.

While the NPRM affirms the Commission's no-blocking policy, and considers retaining the related rules pertaining to no-throttling or paid prioritization, it fails to recognize that the courts have determined that these rules should be based on broadband Internet Access classified as Title II.

Finally, NASUCA's analysis demonstrates that there is ample Commission and judicial precedent to support retaining the Title II classification for broadband Internet access.

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I. INTRODUCTION

On May 23, 2017, the Federal Communications Commission (“FCC”) released a Notice of Proposed Rulemaking (“NPRM”), proposing to reverse rules adopted in February 2015, classifying broadband Internet access service as Title II.¹ The National Association of State Utility Consumer Advocates (“NASUCA”)², files these comments on the analysis and questions set forth in the NPRM.

As a preliminary matter, NASUCA is concerned that the Commission has not provided parties with adequate time to fully address the analysis and the large number of questions posed in the NPRM and the 180 degree turn to re-classify broadband Internet access as Title I that the Commission is now proposing. As the Commission is undoubtedly aware, many parties who are

¹ *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, (Adopted May 18, 2017, rel. Apr. 21, 2017) (“NPRM”)

² NASUCA is a voluntary association of 56 consumer advocate offices. NASUCA members represent the interests of utility consumers in 42 states, the District of Columbia, Puerto Rico, Barbados and Jamaica. NASUCA is incorporated in Florida as a non-profit corporation. NASUCA’s full members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also represent the interests of utility consumers but are not created by state law or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

deeply concerned about net neutrality are also deeply concerned about issues associated with copper retirement and technology transitions, and reply comments on the recently issued NPRM, Notice of Inquiry ("NOI") and Request for Comment ("RFC") on proposed revisions to those regulations³ are due on the same day as the opening comments in this proceeding. Further, the comment cycle for the copper retirement/tech transition proceeding overlaps with the comments on wireless infrastructure which, among other things, address Commission detailed proposals that would affect state and local permitting authority.

NASUCA has a long-standing interest in broadband Internet access service. Our organization has participated in numerous FCC proceedings encouraging recognition of broadband Internet access as essential and deserving of universal service funding, and supporting proposals that encourage widespread, affordable and reliable broadband deployment.⁴ Most recently, we reaffirmed these positions in NASUCA Resolution 2017-04, *Urging Local, State and Federal Officials to Ensure Reliable Broadband Internet Access Services are Accessible and Affordable to all Consumers*.⁵

³ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, (WC Docket No. 17-84), Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, (rel. Apr. 21, 2017) ("NPRM," "NOI", and "RFC" as applicable). On the same day, the FCC issued a separate NPRM/NOI regarding the acceleration of wireless broadband deployment. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, rel. Apr. 21, 2017) ("Wireless NPRM/NOI").

⁴ See, for example, *In the Matter of Preserving the Open Internet (GN Docket No. 09-191)*, *Broadband Industry Practices (WC Docket No. 07-52)*, Comments of the National Association of State Utility Consumer Advocates, January 14, 2010 ("January 2010 NASUCA Comments"); *In the Matter of The D.C. Circuit Court of Appeal Decision in Verizon v. FCC, and What Actions the Commission Should Take, Consistent with its Authority under Section 706 and all other Available Sources of Commission authority, in Light of the Court's Decision* GN Docket No. 14-28, NASUCA Comments (March 21, 2014), at pp. 21-22. ("March 2014 NASUCA Comments"); *In the Matter of Protecting and Promoting the Open Internet* (GN Docket No 14-28) and *In the Matter of Framework for Broadband Internet Service* (GN Docket No. 10-127), NASUCA Comments, July 15, 2014 ("July 2014 NASUCA Comments") and Reply Comments, September 15, 2014 ("September 2014 NASUCA Reply Comments").

⁵ <http://nasuca.org/nwp/wp-content/uploads/2017/01/2017-04-NASUCA-Broadband-Resolution.pdf>.

Broadband Internet access is provided over a mix of facilities including copper, coaxial cable, fiber and wireless,⁶ deployed by carriers to provide essential communications services subject to state and federal authority. The networks themselves, and many services offered over the networks (including voice telephone and broadband) are subject to both state and federal authority, because many state commissions and the FCC are not only authorized, but in many cases are obligated to ensure that essential telecommunications services are reliable, affordable and ubiquitously available.⁷ This oversight is crucial for the public safety, the health, and the well-being of all Americans and our economy.

The NPRM proposes to classify all broadband Internet Access services, both fixed and mobile, as Title I information services.⁸ The NPRM proposals are pegged to four main threads of support. First, the NPRM argues that the "text, structure, and history of the Communications Act and Telecommunications Act, combined with the technical details of how the Internet works" support reclassification.⁹ Further, the NPRM attempts to justify the reversal of position by citing to what it terms "agency precedents,"¹⁰ bolstered by a summary recounting historical FCC efforts to address the question of how to deal with the provision of data services over regulated telecommunications networks.¹¹ Moreover, the NPRM argues that "public policy supports classification as Title I."¹² In part, the public policy argument is supported by citing

⁶ 17-84 NPRM, NOI and RFC, at ¶1; 17-84 NASUCA Reply at 2

⁷ WC Docket No. 17-84, NASUCA Opening Comments at p. 28-29. Also, pursuant to the Communications Act, the Commission was created to "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication...." 47 U.S.C. 151.

⁸ NPRM at ¶ 55.

⁹ Id. at ¶25.

¹⁰ Id. at ¶38-42.

¹¹ Id. at ¶6-22.

¹² NPRM, at ¶¶ 44-51.

studies claiming to support the argument that Title II classification of broadband is somehow harmful to investment and to consumers in general. Finally, the NPRM argues that the Commission has the authority to classify broadband Internet access service as Title 1.

The limited time available for initial comments precludes NASUCA from attempting to address all of the questions, analysis and cited studies. We will address as many of these issues as possible in opening and reply. It would be inaccurate for the Commission to attempt to portray silence on an issue as tacit support for the NPRM's analysis or proposed reclassification. The Commission simply has not provided sufficient time for parties to respond to its questions and requests for comment on its analysis.

The NPRM includes some proposals that NASUCA supports:

- To retain the no-blocking rule, in order to ensure that all end users and edge providers can enjoy the use of robust, fast and dynamic Internet access.¹³ The Commission should also retain the related no-throttling¹⁴ and paid-prioritization rules.¹⁵
- The NRPM continues to support the objectives associated with the transparency rule in the 2015 Order where it found that "effective disclosure of Internet service providers' network management practices, performance, and commercial terms of service promotes competition, innovation, investment, end-user choice and broadband adoption."¹⁶
- To continue to maintaining support for broadband in the Lifeline program.¹⁷

NASUCA agrees with and supports all three of these proposals. These protections all require Internet access providers to treat all consumers fairly and without discrimination. As the court stated in *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014),

¹³ *Id.* at ¶80.

¹⁴ *Id.*, at ¶83.

¹⁵ *Id.*, at ¶85.

¹⁶ *Id.*, at ¶89.

¹⁷ *Id.*, at ¶68.

these are fundamentally common carrier obligations. The Commission's commitment to an open Internet and to these vital protections as well as the function and structure of Internet access and consumer expectations should inform its consideration of the proper classification of Internet access service.

NASUCA's analysis of the issues associated with broadband Internet access has been grounded in both historical research and legal analysis. On that basis we have stated that treatment of broadband Internet access as common carriage is fundamental to achieving key national, state and local policy objectives and is essential to fostering unimpeded access to, and provision of, information.¹⁸ Further, it is NASUCA's long-standing position, and the courts agree, that retaining the Title II classification is entirely consistent with Commission precedent and the Telecommunications Act of 1996.¹⁹

As discussed in more detail below, absent Title II common carriage classification, the Commission lacks authority to enact key elements of its current policies, including the no-blocking rule,²⁰ encouraging deployment through pole attachment reforms (because pole attachment rights and rules only apply to entities providing services classified as Title II),²¹ and promoting the competition that can bring lower consumer prices and more innovation.

The NPRM does not present a reasonable case for reversing the recent (and correct) reclassification of broadband Internet Access as Title II. The policy objectives of protecting

¹⁸ January 2010 NASUCA Comments at p. 2-3.

¹⁹ *United States Telecom Association v. Federal Communications Commission*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, 855 F.3d 381 (D.C. Cir. May 1, 2017)(*USTA*); see also *National Cable and Telecommunications Association v. Brand X*, 545 U.S. 967 (2005)(*Brand X*).

²⁰ NPRM at ¶ 80 emphasizes the continued need for a no-blocking rule.

²¹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, (WC Docket No. 17-84), *Technology Transitions* (GN Docket No. 13-5), *AT&T Petition to Launch a Proceeding Concerning the TDM to IP Transition* (GN Docket No. 12-353), Comments of Public Knowledge, at pp. 13-14.

consumers from blocking and other discriminatory or preferential treatment, ensuring transparency, and guaranteeing consumers’ freedom to reach the content of their choice have not changed since the Commission’s Title II Order. Similarly, Internet access sold to customers functions the same way it did two years ago, and consumers use Internet access just as they did in 2015, with the only change being that non-Internet Service Providers (ISP) websites, entertainment, and transactions like shopping, government functions, and news continue to grow. If the classification of Internet access is changed, vital protections for both consumers and edge content providers alike would be at risk. Therefore, reclassification of Internet access as an information service should be rejected.

II. THE NPRM DOES NOT PROVIDE A SUFFICIENT SHOWING TO SUPPORT RECLASSIFYING BROADBAND INTERNET ACCESS AS TITLE I.

The NPRM proposes to reverse its 2015 decision to classify fixed broadband service as a telecommunications service and mobile broadband as a commercial mobile service.²² That decision – based on a careful review of an extensive record – was upheld by the D.C. Circuit Court of Appeals.²³ If the Commission changes its recent decision, it is obligated to explain the change and whether there has been a change in facts or policies to justify the action.

As stated last year by the Supreme Court in *Encino Motorcars v. Navarro*, 579 U.S. ____, 136 S. Ct. 2117, 2125-26 (2016),

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, e.g., *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U. S. 967, 981–982 (2005); *Chevron*, 467 U. S., at 863–864. When an agency changes its existing position, it “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *FCC v. Fox Television*

²² NPRM at ¶24.

²³ *USTA*, supra.

Stations, Inc., 556 U. S. 502, 515 (2009). But the agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Ibid.*

The Court further stated, “In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy” citing *Fox Television Stations*, at 515–516.²⁴

The NPRM sets forth discussion of the Commission’s rationales for its proposals, mainly short summaries of FCC proceedings, judicial decisions, reports, letters and studies pertaining to the regulatory classification of enhanced services since the inception of Internet access and the development of broadband service.²⁵ But what the NPRM absolutely lacks is a showing that the 2014 Order – upheld in *USTelecom* – was based on a misunderstanding of how Internet access works, how consumers actually use Internet access services, or other mistakes or omissions.

An agency action must show “a rational connection between the facts found and the choice made.”²⁶ An agency’s adoption of regulatory policy must be based on “reasoned decision-making that weighs competing views, selects an approach with adequate support in the record, and intelligibly explains the reasons for making that choice.”²⁷ When the Supreme Court reviewed the classification of cable modem service in *Brand X*, it reviewed the treatment of Internet access service based on how the service was offered to the public, and how consumers perceive their Internet service.²⁸ *Brand X* was based on a record developed in 2002, when

²⁴ *Encino Motorcars*, 136 S. Ct. 2126.

²⁵ NPRM at ¶¶ 6-20, 38.

²⁶ *USTA*, 825 F.3d at 706.

²⁷ *USTA*, 825 F.3d at 706, quoting *FERC v. Electric Power Supply Ass’n*, — U.S. —, 136 S.Ct. 760, 784 (2016).

²⁸ *Brand X*, 545 U.S. 967, 993, (“As we have explained, Internet service is not “transparent in terms of its interaction with customer supplied information,” *Computer II Order* 420, ¶ 96; the transmission occurs in connection with information processing. It was therefore consistent with the statute’s terms for the Commission to assume that the parallel term “telecommunications service” in 47 U.S.C. § 153(46) likewise describes a “pure” or

independent ISPs could provide service using unbundled network elements from the local incumbent telephone company and broadband Internet access was still a developing service. The role of the integrated ISP, like those developed by cable companies that included both the underlying connection to the network and Internet access and content, had not been fully developed. The Court accepted the 2002 Commission's view that consumers then understood access to the Internet and content on the Internet provided by their ISP as a single service.²⁹ Today, however, the record in the Title II Order and common experience prove that consumers fully understand the difference between access to the Internet and the content provided by third party sites. As the *USTA* court commented, "[t]hat consumers focus on transmission to the exclusion of add-on applications is hardly controversial. Even the most limited examination of contemporary broadband usage reveals that consumers rely on the service primarily to access third-party content."³⁰ This factor alone makes reclassification of Internet access as an information service problematic.

Consumers use their ISP to access third party content and do not rely on the ISP to alter their communications. In the Title II Order, the Commission extensively reviewed the factual record, showing that consumers primarily use their ISP to access third party content, and that unlike ISP provided content, third party content had increased substantially since 2002.³¹

When an agency considers reversing existing policy, it bears the additional burden to explain why it is disregarding prior factual and policy conclusions. A change in classifications

"transparent" communications path not necessarily separately present, from the end user's perspective, in an integrated information-service offering.").

²⁹ *Brand X*, 545 U.S. at 989-90.

³⁰ *USTA*, 825 F.3d at 698.

³¹ NPRM at ¶¶ 346-354.

so soon after the development of an extensive record that supported the existing classifications “would be arbitrary and capricious” if existing facts are disregarded.³²

In the two years since the classifications at issue, consumers have continued to expand their use of the Internet. However, the NPRM did not provide information showing that consumers make greater use of ISP-provided content than they did two years ago, when the record showed that third-party email services were among the ten Internet sites most frequently visited during a single week, with more than 750 million visits to just two sites despite the fact that ISPs offer their own email sites to their customers.³³

The telecommunications and commercial mobile classifications continue to be based on the actual function of fixed and mobile Internet access, and consumers’ experiences and expectations when they are online. Consumers continue to expect that they can send and receive content on the Internet without alteration or interruption by their ISP. That fundamental consumer expectation puts Internet access squarely in the telecommunications classification. Consumer reliance on free access to Internet content is the bedrock of a free Internet. Protecting the consumers’ online choices from interference from their ISP is as compelling today as it was in 2015.

The harm that the *2015 Open Internet Order* rules address also remains. ISPs still have the technical and institutional power to block content, accept paid priority, and slow down or throttle select Internet usage. Substantial evidence of these harms was submitted to the record in

³² In *USTA* the Court explained: When reversing existing policy, the Supreme Court has held that “the APA requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It is not that further justification is demanded by the mere fact of policy change, but that **a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. Put another way, it would be arbitrary and capricious to ignore such matters.** *Id.* at 708-709 (internal citations and alterations omitted; emphasis added).

³³ *USTA*, 825 F.3d at 698.

GN 14-28 and formed part of the factual basis for the *2015 Open Internet Order*.³⁴

Significantly, large ISPs' financial incentives to favor affiliates' Internet sites have grown rather than diminished. In addition to Comcast being both a content provider and an ISP, AT&T has acquired Direct TV and its acquisition of Time-Warner, described by AT&T as a "global leader in premium content"³⁵ is pending. Verizon acquired Yahoo. These acquisitions create three dominant broadband Internet access providers with enhanced incentives to favor affiliated content and potentially block or otherwise interfere with competitors' content.

While the NPRM suggests that the Commission may reverse the classification of Internet access and commercial mobile service, the factual underpinnings of those classifications have not changed in the last two years. In light of the substantial record upon which the 2015 Title II/Open Internet Order relied, the lack of change in the intervening two years, and the *USTA* Court's extensive review of the record when it affirmed the telecommunications and commercial mobile service classifications, it is hard to see how a reversal of these classifications is justified and would not be deemed arbitrary and capricious.

III. TITLE II IS NECESSARY FOR THE COMMISSION TO ACCOMPLISH ITS STATED OBJECTIVE TO PREVENT BROADBAND INTERNET ACCESS PROVIDERS FROM BLOCKING LAWFUL MATERIAL.

While the NPRM has requested comment on reversing the fixed broadband telecommunications and the commercial mobile service classifications, it expressed support for

³⁴ Open Internet Order at ¶¶75, 78-84.

³⁵ http://about.att.com/story/att_to_acquire_time_warner.html

retaining the no-blocking and transparency rules.³⁶ The NRPM emphasizes that the Commission unconditionally opposes the practice of ISPs blocking lawful material:

We emphasize that we oppose blocking lawful material. The Commission has repeatedly found the need for a no-blocking rule on principle, asserting that the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness."³⁷

The no blocking rule, and the associated no paid prioritization and no throttling rules, are essential to consumer freedom to access the content of their choice without interference.³⁸ These rules, which address the unimpeded transmission of content, chosen by the consumer, without alternation, reflect consumer expectations and demonstrate that broadband Internet access service functions as a Title II, telecommunications service. The Telecommunications Act of 1996 defined a telecommunications service 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.”³⁹ Consumers expect their ISP to simply transmit their keyboard commands so they can freely use the Internet content without interference. That is the very definition of a telecommunications service.

The Courts have twice reversed the Commission’s earlier attempts to adopt no-blocking rules under the information classification. In response to a finding that Comcast had blocked consumers’ access to peer-to-peer sites, the Court in *Comcast Corporation v FCC* held that the Commission could not impose a no blocking “policy” that was not based on specific statutory

³⁶ NPRM at ¶¶80-82, 89.

³⁷ NPRM at ¶80.

³⁸ NPRM at ¶¶85, 83.

³⁹ 47 U.S.C. §153(50).

authorization.⁴⁰ Four years later, the *Verizon* Court held that a rule preventing blocking cannot be adopted in the absence of a telecommunications classification.⁴¹ The Court said:

Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se common carrier obligations, we vacate those portions of the Open Internet Order.⁴²

The DC Circuit found that the FCC's non-discrimination and no-blocking rules were classic common carriage.⁴³ It therefore held that "given the manner in which the Commission has chosen to classify broadband providers, the [no-discrimination and no-blocking] regulations cannot stand."⁴⁴ The no blocking rule was invalid not because the Commission lacked authority to impose rules on broadband service (as Verizon had argued), but because the Commission had itself defined broadband access as an information service that by definition did not support common carrier non-discrimination obligations.

The clear message of *Verizon* is that the Commission lacks statutory authority to impose common carrier-like requirements, such as anti-blocking and anti-discrimination rules, on information services. The NPRM does not question the policy underlying the telecommunications classification, i.e., to protect consumers from discriminatory blocking of lawful content. However, the *Verizon* court made it clear that an information service classification for Internet access will make it very difficult, if not impossible, to support a no-blocking rule.

⁴⁰ *Comcast Corp. v. FCC*, 600 F.3d 642, 651-52 & 661.

⁴¹ *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Circuit 2014).

⁴² *Id.* at 628.

⁴³ *Verizon*, 742 F.3d at 656 ("We have little hesitation in concluding that the anti-discrimination obligation ... has 'relegated [those providers], *pro tanto*, to common carrier status,'" citing *FCC v. Midwest Video Corp.*, 440 U.S.689, 700-701 (1979)).

⁴⁴ *Verizon*. at 650.

IV. THERE IS SUBSTANTIAL EVIDENCE OF HARMS TO INTERNET FREEDOM UNDER TITLE I AUTHORITY.

The NPRM seeks comment on specific ways in which consumers were harmed under the "light-touch" framework based on Title I.⁴⁵ The records in the Open Internet proceeding (GN 14-28) and the prior docket pertaining to a Framework for Broadband Internet (GN 10-127) are replete with concrete examples of the harms that occurred when broadband Internet access was not classified as Title II.

NASUCA pointed out in its March 2014 comments to the Commission regarding the path forward following the Verizon decision⁴⁶ (that the D.C. Circuit in *USTA* cites with approval) the following Commission findings, rejecting in many cases the factual and other assertions made by appellants:

- "[B]roadband providers' potential disruption of edge-provider traffic [is] itself the sort of 'barrier' that has 'the potential to stifle overall investment in Internet infrastructure'";⁴⁷
- "Internet openness fosters the edge-provider innovation that drives this 'virtuous cycle' [where innovation and growth drives the buildout of the underlying infrastructure]";⁴⁸
- Broadband Internet access providers "have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating telephone and/or pay-television services";⁴⁹
- Broadband Internet access providers have "the technological

⁴⁵ NPRM at ¶50.

⁴⁶ March 2014 NASUCA Comments, at pp. 21-22.

⁴⁷ *Verizon v. FCC*, 740 F.3d 623, 642 (D.C. Cir. 2014).

⁴⁸ *Id.*, at 644.

⁴⁹ *Id.*, at 645 ("As the Commission noted, Voice-over-Internet Protocol (VoIP) services such as Vonage increasingly serve as substitutes for traditional telephone services, and broadband providers like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own 'core video subscription service.' ... Broadband providers also have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users"), *Id.* citing Open Internet Order at ¶¶ 23-24.

ability to distinguish between and discriminate against certain types of Internet traffic";⁵⁰

- "[B]roadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers ... [the] provider functions as a 'terminating monopolist' ... [and has] this ability to act as a 'gatekeeper'";⁵¹
- "[E]nd users are unlikely to react [to a carrier's discrimination] in this fashion [immediately switching to a competing broadband provider]" as "end users may not know" that their broadband provider is imposing access costs on edge providers, and "even if they do have this information [consumers] may find it costly to switch."⁵²
- Prior incidents support the Commission's conclusion "that the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not ... 'merely theoretical'".⁵³

These factors all support the need for legally grounded Open Internet Rules. Because an information service classification can obstruct the goal of preventing the dangers described in the Title II Order, it will not meet the Commission's policy goals and should not be pursued.

V. THERE IS AMPLE COMMISSION AND JUDICIAL PRECEDENT TO SUPPORT CLASSIFYING BROADBAND INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE.

The NPRM invokes FCC precedent to support its proposed reclassification of broadband Internet access service as an information service, and asks for comment on its analysis. The

⁵⁰ *Verizon*. at 646.

⁵¹ *Id.*

⁵² *Id.* at 646-47.

⁵³ *Id.* at 648.

NRPM claims that its proposed classification is "firmly rooted in Commission precedent," that the Title II Order deviates from Commission precedent, and, therefore, this justifies reverting to treating broadband Internet access service as an information service.⁵⁴ In a prior section providing historical background, the NPRM discusses the 2005 US Supreme Court *Brand X*⁵⁵ decision, resulting from litigation following from the 2002 Cable Modem Order, and the 2014 D.C. Circuit decision "vacating the no-blocking and no-unreasonable discrimination rules adopted in the Open Internet Order."⁵⁶

There is ample support to show that the NPRM's characterization of both Commission precedent and key court decisions is incomplete and that, in fact, both Commission and legal precedent support classification of broadband Internet access as Title II. As NASUCA pointed out in prior comments,⁵⁷ reclassification is not a "radical departure" from precedent as Verizon claimed, but a return to the principles under which the Internet became what it is today.⁵⁸ As the D.C. Circuit pointed out, the FCC's 2002 Cable Modem Broadband Order was the radical departure from the well-settled consensus that the Nation's communication network (1) is a vital national resource subject to common carriage; (2) would not be dominated by the business interests that owned and controlled it; and (3) on which there was a well-defined separation of conduit and content. The Court noted that:

When Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which the end users accessed the Internet. See, e.g., *Second Computer Inquiry*, 77 FCC2d at 473-74, PP 228-

⁵⁴ NPRM at ¶38, 41-43.

⁵⁵ NPRM at ¶12.

⁵⁶ NPRM at ¶ 20.

⁵⁷ *In the Matter of Protecting and Promoting the Open Internet* (GN Docket No. 14-28) and *In the Matter of Framework for Broadband Internet Service* (GN Docket No. 10-127), Reply Comments of the National Association of State Utility Consumer Advocates on Notice of Proposed Rulemaking, September 15, 2014 ("NASUCA Reply, September, 2014").

⁵⁸ NASUCA Reply, September, 2014 at 13, responding to Verizon's comments.

29. Indeed, one might have thought, as the Commission originally concluded, ... Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously.⁵⁹

Thus, the D.C. Circuit firmly believed that a decision to apply Title II regulation would be consistent with both prior Commission action and the intent of the Telecommunications Act of 1996.

Similarly, in *United States v. AT&T.*, the 1983 court decision breaking up the AT&T monopoly, reflected a similar view of the distinction between information and telecommunications services and the need for common carrier protections:

All information services are provided directly via the telecommunications network. The Operating Companies would therefore have the same incentives and the same ability to discriminate against competing information service providers that they would have with respect to competing interexchange carriers. Here, too, the Operating Companies could discriminate by providing more favorable access to the local network for their own information services than to the information services provided by competitors, and here, too, they would be able to subsidize the prices of their services with revenues from the local exchange monopoly.⁶⁰

The *AT&T* Court further stated,

The restriction on the provision of information services by the Operating Companies has been attacked on the ground that it will remove their incentive to upgrade the local networks and will cause them to become technological backwaters. This claim underrates the role of the Operating Companies under the proposed decree. *These companies will carry traffic between the information service providers and their subscribers; their networks will therefore have to be capable of carrying these technologically advanced services; and they will have a financial incentive to create this capability because they will earn access charges for providing this service.*⁶¹

FCC precedent, the legislative intent underlying the Telecommunications Act of 1996, judicial precedent, and the nature of broadband Internet access are all consistent with a Title II telecommunications classification.

⁵⁹ *Verizon v FCC*, 740 F.3d at 638-639.

⁶⁰ *US v. AT&T*, 552 F. Supp 131, 189 (D.D.C. 1982).

⁶¹ *Id.* at 190 (emphasis added).

The NPRM attempts to portray *Brand X* as support for the notion that judicial precedent requires a Title I interpretation.⁶² That interpretation is incorrect. In fact, *Brand X* showed that the 2002 decision was only one, and not necessarily the most, reasonable interpretation of the Telecom Act.⁶³ The court noted that its conclusion that it is "*reasonable* to read the Communications Act to classify cable modem service solely as an 'information service' leaves untouched Portland's holding that the Commission's interpretation is not the *best* reading of the statute." In *Brand X*, the Supreme Court did not necessarily adopt or ratify the *Cable Broadband Order*, it *deferred* to the FCC's ruling.⁶⁴ This point was emphasized in the concurring opinion of Judges Srinivasan and Tatel when the D.C. Circuit denied *USTA*'s request for rehearing *en banc*:

The upshot of *Brand X* with regard to the FCC's congressionally delegated authority over broadband ISPs is unmistakable and straightforward. All nine Justices recognized the agency's statutory authority to institute "common-carrier regulation of all ISPs," with some Justices even concluding that the Act left the agency with no other choice. 545 U.S. at 1011, 125 S.Ct. 2688 (Scalia, J., dissenting). In the Order under review, the agency took up the *Brand X* Court's invitation. It decided to classify broadband ISPs as telecommunications providers, enabling it to impose common carrier obligations on ISPs such as the net neutrality rule in question here.⁶⁵

If anything, the analysis of Commission and judicial precedent supports retaining the Title II classification.

⁶² NPRM at ¶12.

⁶³ *Brand X*". See also *USTA*, Concurring Opinion of Srinivasan, Circuit Judge, joined by Tatel, 855 F.3d 381, 385 (denial of rehearing *en banc*).

⁶⁴ March 2014 NASUCA Comments, at p. 29.

⁶⁵ *USTA*, 855 F.3d at 385, Concurring Opinion of Srinivasan, Circuit Judge, joined by Tatel, (denial of rehearing *en banc*).

III. MOBILE BROADBAND INTERNET SERVICE FALLS SQUARELY WITHIN THE DEFINITION OF A COMMERCIAL MOBILE SERVICE AND MOBILE INTERNET CUSTOMERS DESERVE THE PROTECTIONS OF THE OPEN INTERNET RULES.

The NPRM asks for comment on whether the classification of mobile Internet service should remain a “commercial mobile service” or be returned to the “private mobile service” definition and treated like an information service.⁶⁶ Section 332 of the Telecommunications Act of 1996 provides both the definition of mobile service and its regulatory treatment. The terms of that statute, the way mobile broadband is offered to the public and consumers’ perception of the service should control its regulatory treatment. The Commission should not return to its treatment as a private mobile service when mobile Internet service was nascent in 2007.

The record in the Title II Order,⁶⁷ consistent with everyday experience, demonstrated that there is “universal access provided today and in the foreseeable future by and to mobile broadband,”⁶⁸ and that hundreds of millions of consumers now use mobile broadband to access the Internet.⁶⁹ In Illinois alone, there are 13.367 million mobile subscribers: 500,000 more than the Illinois population.⁷⁰ According to the CTIA, the mobile industry’s trade association, Americans used 25 times more data in 2015 than in 2010.⁷¹ Clearly, wireless data use is no longer nascent, and has moved firmly into the center of American lives.

Section 332 defines a commercial mobile service as “any mobile service (as defined in [section 153 of this title](#)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a

⁶⁶ NPRM at ¶55.

⁶⁷ *2015 Open Internet Order* at ¶¶388-403.

⁶⁸ *Id.* at ¶399.

⁶⁹ *Id.* at ¶398.

⁷⁰ CTIA, *The Future of Wireless* at page 4, presented at the Illinois Commerce Commission, Smart Cities and Small Cell Policy Session, 2017, available at: <https://icc.illinois.gov/publicutility/policy/SmartCities.aspx>

⁷¹ *Id.* at page 5.

substantial portion of the public, as specified by regulation by the Commission.”⁷² An “interconnected” service is “interconnected with the public switched network (as such terms are defined by regulation by the Commission).”⁷³ Today’s mobile broadband service fits this definition: it has hundreds of millions of subscribers, is available to the public, and there is little question that most carriers, such as AT&T, Verizon, T-Mobile, and Sprint offer this service for a profit. The other requirement is that the service is “interconnected with the public switched network.”

Section 332(d)(2) authorizes the Commission to define “the public switched network” and in the Title II Order the Commission found that the Internet should be added to telephone service as part of the public switched network.⁷⁴ The Commission’s conclusion was based on the fact that consumers could “send or receive communications to or from anywhere in the nation, whether connected with other mobile broadband subscribers, fixed broadband subscribers, or the hundreds of millions of websites available to them over the Internet.”⁷⁵ The Court in *USTA* affirmed that conclusion, noting that “mobile broadband by 2015 had come to provide the same sort of ubiquitous access” as mobile voice was found to provide in 1994 when it was added to the definition of the public switched network.⁷⁶

Mobile broadband service is plainly available to the public, and it has become an integral part of everyday life. Anticipating the fundamental role that ubiquitous mobile service plays, Section 332 provides that the provider of commercial mobile service “shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter.”⁷⁷ While the

⁷² 47 U.S.C. §332(d)(1).

⁷³ *Id.* at §332(d)(2).

⁷⁴ *2015 Open Internet Order* at ¶391.

⁷⁵ *Id.* at ¶398.

⁷⁶ *USTA*, 825 F.3d at 715

⁷⁷ 47 U.S.C. §332(c)(1)(A).

Commission can define the scope of regulation under this section, it cannot disregard the provision of Section 202, which provides:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.⁷⁸

The key obligations of the Open Internet rules – not to block or degrade the delivery of messages and not to discriminate or prefer some consumers – are a restatement of the obligations set out in Section 202 and cannot be found “inapplicable” by the Commission under Section 332⁷⁹.

The Commission should not change the current classification of mobile broadband service or the definition of the public switched network.⁸⁰ They accurately reflect how mobile broadband service is offered and how it is used by Americans. The common carrier obligation of the Open Internet rules should apply to mobile broadband just as they apply to fixed broadband.

IX. CONCLUSION

For the foregoing reasons, NASUCA requests that the Commission retain the classification of fixed broadband access service as a telecommunications service, retain the

⁷⁸ 47 U.S.C. §202(a).

⁷⁹ 47 U.S.C. §332(c)(1)(A) (“ A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—
(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
(ii) enforcement of such provision is not necessary for the protection of consumers; and
(iii) specifying such provision is consistent with the public interest.”)

⁸⁰ NPRM at ¶56.

classification of mobile broadband as a commercial mobile service, and retain the Open Internet rules adopted in 2015 by the Commission in the Title II Order, and affirmed by the D.C. Circuit Court of Appeals in 2016 in *USTA*.⁸¹

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⁸¹ *USTA*, 825 F.3d 674.