

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

In the Matter of

Protecting and Promoting the Open Internet

GN Docket No. 14-28

**COMMENTS OF
THE MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

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The Massachusetts Department of Telecommunications and Cable (“MDTC”)¹ respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“FCC”) on May 15, 2014, in the above-referenced docket.² The NPRM seeks comment on proposed rules to protect and promote Internet openness relying on section 706 of the Telecommunications Act of 1996; the benefits of using section 706 and Title II of the Communications Act in furtherance of the same; and “the best ways to define, prevent, and punish the practices that threaten an open Internet.”³

As discussed below, the MDTC supports a robust and democratic Internet in which data flows without interference between the consumer and those providing content and services. The MDTC also supports the establishment of an advisory council of stakeholders of an open Internet, which could design standards and set best practices regarding Internet traffic discrimination. Finally, the MDTC believes that the FCC should be clear as to the circumstances

¹ The MDTC regulates telecommunications and cable services within Massachusetts and represents the Commonwealth before the FCC. MASS. GEN. LAWS ch. 25C, § 1; GEN. LAWS ch. 166A, § 16.

² *In re Protecting & Preserving the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (May 15, 2014) (“NPRM”).

³ *Id.* at ¶ 4.

under which it would exercise its Title II authority to classify broadband Internet service as a common carrier service.⁴

I. ENGINE OF COMMERCE AND DEMOCRACY

A. The Internet Is Successful Because of Neutrality and Openness.

America’s Internet is a tool by which billions of dollars in commerce transact every year. According to the Census Bureau of the U.S. Department of Commerce, there was an estimated \$71.2 billion dollars in retail e-commerce sales in the first quarter of 2014.⁵ The Internet has become a prominent means of communication. For example, half of the televisions in the United States are connected to the Internet, up from only a quarter in 2010, and that number is expected to increase.⁶ Our homes, cars, and even persons are increasingly connecting to the “Internet of things,” where appliances do not merely operate in isolation, but communicate with each other to improve their functionalities.⁷ As Commissioner Mignon L. Clyburn noted, the Internet is the conduit through which Americans enjoy the free and open exchange of ideas critical to a democratic society.⁸ The Internet’s successful growth in these past two decades was based on the principles of neutrality and openness.⁹

Massachusetts has benefitted substantially from the open Internet and its capabilities.

Massachusetts “[b]oast[s] a concentration of software, hardware, and biotech firms supported by

⁴ The MDTC’s silence on any particular issue presented by the FCC should not be construed as rejection or support of that issue.

⁵ Press Release, the Census Bureau of the U.S. Dept. of Commerce, Quarterly Retail E-Commerce Sales: 1st Quarter 2014, at 1 (May 15, 2014), http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

⁶ Press Release, Leichtman Research Group, 49% of U.S. households have a TV connected to the Internet (June 6, 2014), <http://www.leichtmanresearch.com/press/060614release.html>; *see NPRM* at ¶ 12.

⁷ *See* Kevin Ashton, *That ‘Internet of Things’ Thing*, RFID Journal (June 22, 2009), <http://www.rfidjournal.com/articles/view?4986>; Serena Saitto, *Making Cars and Pajamas Smart*, BloombergBusinessweek: Technology (May 22, 2014), <http://www.businessweek.com/articles/2014-05-22/jaspers-cloud-software-enables-machine-to-machine-communication>.

⁸ Statement of Commissioner Mignon L. Clyburn, *NPRM* (“*Clyburn Statement*”) at 89.

⁹ *In re Preserving the Open Internet*, GN Docket No. 09-191, Report and Order, FCC 10-2-1 (Dec. 21, 2010) (“*2010 Order*”), ¶ 14.

world-class universities.”¹⁰ Massachusetts also has one of the highest household broadband adoption rates in the country and a higher level of broadband and advanced services access than other states.¹¹ Indeed, “[t]he foundation of the Massachusetts economy is the innovative and entrepreneurial capability of its residents to transform existing technologies and industries and create new ones.”¹² An open Internet is the backbone of Massachusetts’ innovation economy.¹³

Accordingly, the MDTC shares the concern of Senators Elizabeth Warren and Edward J. Markey of Massachusetts in their letter of May 9, 2014:

As the potential to profit from monopolistic, anti-competitive, anti-innovation, and anti-consumer practices has grown, the need for explicit, enforceable rules has become more urgent. However, it will only be a positive step if you and your staff craft meaningful rules.¹⁴

Without strong net neutrality rules, ISPs could discriminate between content providers, prioritizing traffic over competitors, thus reducing competition. For example, in the absence of rules protecting an open Internet, an ISP offering an Internet-connected home alarm system could discriminate in favor of its own product over those of a competitor. Without action by the FCC, the Internet is at risk of becoming less democratic as established interests price out innovative voices and ideas. Of particular concern to the MDTC, is that governmental entities

¹⁰ Robert D. Atkinson & Luke A. Stewart, *The 2012 State New Economy Index: Benchmarking Economic Transformation in the States*, at 12, The Information Technology & Innovation Foundation, (Dec. 2012); see also Innovation Inst. at Mass. Tech. Collaborative, *The Massachusetts Innovation Economy Annual Index*, at 11 (Jan. 2014).

¹¹ See MDTC Comments, WC Docket No. 06-122, GN Docket No. 09-51 (filed Jul. 9, 2012), at 9 n.25.

¹² See Mass. Executive Office of Housing & Economic Development Key Initiatives, Innovation Economy, <http://www.mass.gov/hed/economic/initiatives/compete/powering-innovation/> (last visited June 27, 2014).

¹³ *Id.*

¹⁴ Letter from Ron Wyden, Sen., *et al.*, to Thomas Wheeler, Chairman, FCC, at 1 (May 9, 2014) (“*Senators’ Letter*”), <http://www.wyden.senate.gov/download/?id=54fa5f99-47c8-47be-93c1-46374e531e1a&download=1>; see also, Press Release, Edward J. Markey, Sen., Markey Statement On FCC Open Meeting (May 15, 2014), <http://www.markey.senate.gov/news/press-releases/markey-statement-on-fcc-open-meeting> (“Without a truly open Internet, America will be closed to innovation[....] Start-ups and small business would suffer, slowing our economy and job growth throughout Massachusetts and around the country.”).

may need to pay ISPs for prioritization in order to serve its citizens. Clearly, strong rules ensuring net neutrality are essential to the Internet's continued success.

B. Maintain the Success of the Internet Through Consumer Choice.

According to Commissioner Clyburn, “[a]t its core, an open Internet means consumers, not a company, not the government, determine winners and losers. It is the free market at its best.”¹⁵ The MDTC agrees that a bedrock principle of an open Internet is allowing consumers to choose the content and services they want, accessed through the broadband Internet service they purchase.

There is a clear need for net neutrality rules.¹⁶ When the Internet was nascent, it benefitted ISPs to provide an open and unblocked Internet as “edge providers,” those who create content and services, drove consumers’ adoption of broadband.¹⁷ Now, a majority of Americans use and rely upon some form of broadband Internet service.¹⁸ As the Internet matures, some ISPs have taken advantage of this growing reliance to prioritize or delay certain network traffic, demonstrating the need for net neutrality rules.¹⁹ Indeed, the FCC began addressing the issue of net neutrality because of complaints from consumers about their ISPs.²⁰

Like Senators Warren and Markey,²¹ Commissioner Clyburn,²² and stakeholders ranging from Public Knowledge²³ to Google and Microsoft,²⁴ the MDTC believes the best way to protect the open Internet is to keep in place the practices that made it successful. That is, the FCC

¹⁵ *Clyburn Statement* at 89.

¹⁶ *See NPRM*, ¶¶ 25-53.

¹⁷ *2010 Order*, ¶ 14; *Verizon*, 740 F.3d at 644.

¹⁸ Pew Research Center, Broadband Technology Fact Sheet (Sep. 30, 2013), <http://www.pewinternet.org/fact-sheets/broadband-technology-fact-sheet/>.

¹⁹ *NPRM*, ¶ 17; *Verizon*, 740 F.3d at 645-46.

²⁰ *Verizon*, 740 F.3d at 632.

²¹ *See Senators’ Letter* at 1-2.

²² *See Clyburn Statement* at 89.

²³ *See Public Knowledge, Net Neutrality*, <https://www.publicknowledge.org/issues/net-neutrality> (last visited June 27, 2014).

²⁴ Letter from Amazon, *et al.*, to Thomas Wheeler, Chairman, FCC, *et al.*, at 1 (May 6, 2014), http://cdn1.vox-cdn.com/assets/4422119/letter_to_FCC.pdf (“*Amazon Letter*”).

should prevent intentional and incidental blocking, ban discrimination, and promote transparency in the Internet marketplace. This means no discrimination against or preferential treatment of edge providers, and safeguarding the power of consumers to choose. This has been the practice and expectation of traffic carriage on the Internet of the last two decades, it has performed exceptionally well, and should be continued.

C. Standards Should be Developed by All Stakeholders.

Because the United States Court of Appeals for the District of Columbia Circuit ruled that the FCC cannot bar discrimination of Internet traffic by ISPs under section 706 of the Telecommunications Act of 1996, the FCC now contemplates permitting paid prioritization of Internet traffic.²⁵ Specifically, the FCC is exploring establishing a minimum speed at which ISPs would carry traffic, and permit ISPs to charge edge providers for priority access to consumers.²⁶ The MDTC submits that paid prioritization runs counter to a truly open Internet.²⁷ Rules that permit ISPs to charge for faster delivery of content could place promising start-up companies with limited financial resources at a disadvantage to more established yet inferior edge providers.²⁸ However, if the FCC permits paid prioritization or some other form of blocking or discrimination, the standards governing such practices must be clear, objective, and created by all stakeholders.

²⁵ *NPRM*, ¶¶ 96, 116, 121, 128, 138; *but see* Brian Fung, *FCC Chair: An Internet fast lane would be 'commercially unreasonable,'* Washington Post: The Switch Blog (May 20, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/20/fcc-chair-an-internet-fast-lane-would-be-commercially-unreasonable/> (Chairman Wheeler, testifying that paid prioritization interferes with the Internet's "virtuous cycle.").

²⁶ *NPRM*, ¶¶ 96-104, 111, 116, 128.

²⁷ *See Amazon Letter* at 1; Freepress, *Paid Prioritization: The Antithesis of Openness on the Internet* (July 26, 2010), http://www.freepress.net/sites/default/files/resources/Paid_Prioritization.pdf.

²⁸ *NPRM*, ¶ 43; Fred Wilson, *VC Pitches in a Year or Two* (Jan. 15, 2014), <http://avc.com/2014/01/vc-pitches-in-a-year-or-two/>.

The proposed net neutrality rules require blocking and discrimination practices, including paid prioritization, to be commercially reasonable.²⁹ However, the proposed rules provide little guidance as to what constitutes “commercially reasonable” behavior, other than stating “[r]easonable network management shall not constitute a commercially unreasonable practice.”³⁰ Similarly, “reasonable network management” is ambiguous. Among other questions, how will the FCC set minimum Internet service speeds? Will the minimum speeds increase as technology improves? May an ISP negotiate different prices for prioritization from similar types of traffic? May an ISP discriminate against traffic from an edge provider competing directly against an edge provider affiliated with the ISP? Will ISPs charge for prioritization of services and information provided by governments and universities?

The MDTC believes fairness and transparency are critical in any exceptions to the bedrock principle of letting consumers choose the winners and losers. Thus, the standards for commercially reasonable blocking and discrimination, reasonable network management, and other aspects of net neutrality rules should be as clear and unambiguous as possible. To that end, the MDTC suggests the FCC consider creating a body of stakeholders, a “Net Neutrality Council,” that could help craft open Internet standards.

The establishment of the Net Neutrality Council could provide guidance on issues such as minimum broadband speeds (should the FCC permit paid prioritization agreements) and best practices regarding blocking or discriminating against edge providers. The Net Neutrality Council could operate like the FCC’s Communications Security, Reliability, and Interoperability Council (CSRIC), the Federal-State Joint Conference on Advanced Services (706 Joint Conference), or other FCC Advisory Committees, which have been effective in tackling

²⁹ Although the proposed no-blocking rule does not itself require commercial reasonableness, suspect blocking practices must separately conform to commercial reasonableness in the proposed anti-discrimination rule. *NPRM*, ¶ 90.

³⁰ *NPRM*, Appendix A, § 8.7.

important policy issues. The Net Neutrality Council could hold periodic meetings, create timelines, and provide reports to the FCC on progress of projects undertaken on behalf of the FCC. Importantly, collaboration by stakeholders with differing views, including state commissions, may build consensus support for net neutrality rules going forward.

D. Adjudications Would Guide Stakeholders.

Even with generally accepted net neutrality rules, it may be inevitable that disputes regarding their interpretation and application will arise. Indeed, the adjudication and resolution of disputes may contribute to the development of standards, practices, and rules that will guide stakeholders in the future.³¹ The MDTC believes that the factors used by the FCC in case-by-case adjudications under 628(b) of the Communications Act is a reasonable and efficient starting point for adjudicating disputes that may arise over what constitutes commercially reasonable behavior.³² The MDTC submits that the FCC could also draw upon the jurisprudence established in *Cellco Partnership v. FCC*.³³ In *Cellco*, whether conduct and offerings are commercially reasonable are based on the totality of the circumstances; this would, as noted by the D.C. Circuit, ensure “providers more freedom from agency intervention than the ‘just and reasonable’ standard applicable to common carriers.”³⁴

II. RECLASSIFICATION OF INTERNET SERVICE PROVIDERS

In *Verizon v. FCC*, the D.C. Circuit was clear regarding the FCC’s authority to reclassify ISPs as telecommunications services.³⁵ According to the D.C. Circuit, the FCC “need not be forever bound” to its classification of ISPs as an information service.³⁶ Indeed, ISPs using DSL

³¹ NPRM, ¶¶ 175-76.

³² 47 U.S.C. § 548(b) (prohibiting unfair or deceptive practices that hinder video distribution via satellite); 47 C.F.R. § 76.1003.

³³ 700 F.3d 534 (D.C. Cir. 2012).

³⁴ *Id.* at 548.

³⁵ *Verizon*, 740 F.3d at 650.

³⁶ *Id.* at 636.

services had been classified as telecommunications services subject to common carrier restrictions, before being reclassified as information service providers.³⁷

Whether and when the FCC should reclassify ISPs as common carriers under Title II is a question only the FCC itself can answer. The MDTC respectfully offers the following observations.

This NPRM is the FCC's third attempt at providing clear net neutrality rules, and as suggested by Commissioner Ajit Pai, these net neutrality rules may also be litigated and voided at the D.C. Circuit.³⁸ Reclassifying ISPs as telecommunications carriers would ground the FCC's net neutrality rules on more solid legal footing.³⁹ By clearly stating the circumstances under which the FCC would exercise its authority to reclassify ISPs, it would provide clear incentives to all stakeholders to negotiate in good faith, and to seek consensus in the development of net neutrality rules under section 706.⁴⁰

The MDTC also anticipates that discussions regarding Title II reclassification will implicate issues regarding forbearance from certain common carrier restrictions. Accordingly, the MDTC incorporates its previously-filed comments regarding Title II forbearance.⁴¹

³⁷ *Id.* at 630-31.

³⁸ Dissenting Statement of Commissioner Ajit Pai, *NMPP* at 94; *but compare* Statement of Commissioner Ajit Pai on FCC Internet Regulation (Feb. 19, 2014), <http://www.fcc.gov/document/commissioner-pai-statement-fcc-internet-regulation> ("Net neutrality has always been a solution in search of a problem.") *with Verizon*, 740 F.3d at 645 ("Equally important, the Commission has adequately supported and explained its conclusion that, absent rules such as those set forth in the *Open Internet Order*, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.").

³⁹ Tim Wu, *The Solution to the FCC's Net Neutrality Problems*, New Yorker: Elements Blog (May 9, 2014), <http://www.newyorker.com/online/blogs/elements/2014/05/tom-wheeler-fcc-net-neutrality-problems.html>.

⁴⁰ *See* Letter from Henry A. Waxman, Ranking Member, U.S. House Comm. on Energy & Commerce, to Tom Wheeler, Chairman, FCC, at 2-3 (Mar. 14, 2014), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Wheeler-Title-II-Backup-Option-2014-5-14.pdf>.

⁴¹ MDTC Reply Comments, *In re Framework for Broadband Internet Service*, NOI, GN Docket No. 10-127 (Aug. 12, 2010). In response to the FCC's Notice of Inquiry regarding, among other things, the suitability of identifying Internet connectivity service as a telecommunications service and forbearing from certain provisions of Title II, the MDTC asserted that the FCC should at a minimum, exclude from forbearance sections 214(e), 224, 251, 253 and 261, in addition to sections 201, 202, 208, 222, 254 and 255. *Id.* at 2.

III. CONCLUSION

The MDTC supports an open Internet free from traffic discrimination and blocking. To the extent that commercially reasonable discrimination and blocking is necessary, the MDTC suggests that the FCC establish a Net Neutrality Council that creates best practices through consensus. Finally, the MDTC asks the FCC to provide guidance as to the circumstance under which it might reclassify ISPs as telecommunications carriers. The MDTC welcomes this opportunity to comment and thanks the FCC for its consideration.

Respectfully submitted,

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