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 AOL INC.

I. INTRODUCTION AND SUMMARY

AOL Inc. ("AOL") supports the Commission's efforts to protect the open Internet. To that end, the Commission should adopt a firm no-pay-to-play rule preventing broadband Internet access providers from attempting to levy charges on edge providers in addition to the hefty subscription fees they receive from consumers. The Commission should base such a rule on all of the jurisdictional sources at its disposal. The debate over Section 706 versus Title II as the basis for the Commission's open Internet rules sometimes allows the inference that the two are mutually exclusive. They need not be. For example, the Commission can rely on Section 706 for the primary no-pay-to-play rule, and can use its Title II authority as a backstop that will be triggered in certain circumstances if the primary rule proves insufficient.

The Internet provides a unique level playing field that allows small, medium, and large content providers to reach customers across the country and around the globe. AOL is a leading global Web services company, providing original, local, and national content, advertising, and communications services to the public. AOL also has the honor of being one of the first commercially available Internet access providers. As an Internet pioneer, AOL has witnessed first-hand both the value that the Internet has brought to America and the world at large, and can continue to generate, if left unfettered. AOL has also witnessed the need for intelligent regulation of the pipes that lead on and off it.

II. OPENNESS WAS, AND IS STILL, A CRITICAL ELEMENT TO THE INTERNET'S GROWTH

The Internet's openness has fostered innovation and investment—both in advancements in network deployment and the services that ride upon them—creating what the Commission and the D.C. Circuit have agreed is a virtuous circle, where richer and more diverse content on the "edge" jump-starts demand, which brings about infrastructure investment, which brings about even richer and more diverse content.[1]

The economic effect of this virtuous circle is hard to miss. By 2016, the Internet is estimated to reach 3 billion users globally, and the Internet economy will reach $4.2 trillion in the G20 countries alone.[2] As the Commission has recognized, in the United States, the Internet has generated revenues of $263.3 billion.[3] That investment in over-the-top services has been a boon for landline broadband Internet Service Providers ("ISPs") as well, incentivizing them to invest significantly in additional capacity. As the Commission has stated, since 2009, nearly "$250 billion in private capital has been invested in U.S. wired and wireless broadband."[4]

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[1] The D.C. Circuit endorsed the Commission's identification of a virtuous circle of innovation in which "new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses. *See Verizon v. FCC* 740 F.3d 623, 661 n.4 (D.C. Cir. 2014).

[2] Boston Consulting Group, *The Internet Economy in the G-20* (Mar. 19, 2012), available at https://www.bcgperspectives.com/content/articles/media_entertainment_strategic_planning_4_2_trillion_opportunity_internet_economy_g20/.

[3] Promoting and Protecting the Open Internet, GN Docket No. 14-28, *Notice of Proposed Rulemaking*, FCC 14-61 ¶ 7 (rel. May 15, 2014) (*Open Internet NPRM*).

[4] *Open Internet NPRM* at 11 ¶ 30 (citation omitted).

Similarly, "broadband capital expenditures have risen steadily, from $64 billion in 2009 to $68 billion in 2012,"[5] and "[a]nnual investment in U.S. wireless networks grew more than 40 percent between 2009 and 2010, from $21 billion to $30 billion, and exceeds investment by the major oil and gas or auto companies."[6] Simultaneously, revenues from streaming videos grew 175 percent between 2010 and 2013, from $1.86 billion to $5.12 billion.[7] In addition, the mobile application economy alone was worth $53 billion in 2012,[8] and is expected to reach $151 billion in 2017.[9]

And the numbers tell only half the story. This openness permits everyone to create and consume content, sell or buy products and services, and engage in democratic discourse. It also ensures that everyone can be heard, regardless of their political power, financial status, or size. Most importantly, however, it places the power to determine the winners and losers in the global economy in the hands of consumers—allowing them to choose among increasingly diverse competitors for everything from video content, to news, to the purchase of goods and services. To be sure, consumers pay for that power. Currently a 15 Mbps connection from Verizon or a 25 Mbps connection from Comcast costs a Washingtonian about $50 a month.[10] For a more robust

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[5] *Id.* (citation omitted).

[6] *Id.* (citation omitted).

[7] *Id.* at 12 ¶ 32.

[8] DeveloperEconomics, *Sizing the App Economy Report (Q3 2013)*, http://www.developer economics.com/report/sizing-the-app-economy/ (last visited July 15, 2014).

[9] APPNATION Research, *APPNATION: State of the App Economy (2013)*, available at http://appnationconference.com/main/research/.

[10] *See* Connectnationwide, http://connectnationwide.com/verizon-fios/wasington-dc/20007/ (last visited July 15, 2014); *see also* Comcast Business Authorized Dealer, http://www.switch tobroadband.com/20007-internet-service-providers-page1.htm (last visited July 15, 2014).

connection, subscribers pay significantly more—in Washington the prices are $114.95 per month for 105 Mbps (Comcast), and $209.99 per month for 300 Mbps (Verizon).[11]

But these fees have meant, and should continue to mean, that the broadband provider is not supposed to tip the scales in the vast marketplace of ideas, goods, and services to which its pipes connect users. AOL's success is a direct function of the Internet's openness. AOL has never controlled the Internet access "on-ramp" facilities, and its dial-up service has long relied on the Commission's regulation of the underlying telephone network pipes. In addition, several years ago, AOL shifted its primary strategic focus from dial-up access to the advertising-based Internet services model, and has played a significant role in promoting widespread adoption of that model. AOL aims to entertain, educate, and connect the world—all through free, ad-supported services. For example, it owns and operates The Huffington Post, an online news aggregator and blog which focuses on politics, business, entertainment, and culture, among others. The Huffington Post was the first online-only news organization to win the Pulitzer Prize in 2012.[12] AOL also owns and operates TechCrunch, which covers information technology companies online, hosts an annual conference for innovators and investors, and operates CrunchBase, a database of start-ups. Furthermore, AOL owns and operates MapQuest, a free online web mapping service.

But this openness, and the mutually reinforcing win-win that comes with it, is fragile. No less of an authority than the D.C. Circuit has agreed with the Commission's findings not only

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[11] *See* Comcast Business Authorized Dealer, http://www.switchtobroadband.com/20007-internet-service-providers-page1.html (last visited July 15, 2014); *see also* Connectnationwide , http://connectnationwide.com/verizon-fios/wasington-dc/20007/ (last visited July 15, 2014).

[12] Michael Calderone, *Huffington Post Awarded Pulitzer Prize*, Huffington Post, http://www.huffingtonpost.com/2012/04/16/huffington-post-pulitzer-prize-2012 _n_1429169.html (last visited July 15, 2014).

that "edge-provider innovation leads to the expansion and improvement of broadband infrastructure,"[13] but also that:

- "Continued innovation at the edge, 'depends upon low barriers to innovation and entry by edge providers,' and thus restrictions on edge providers' 'ability to reach end users . . . reduce the rate of innovation.'"[14]

- Broadband providers, however, "represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[15]

- The open Internet Rules "preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet."[16]

The *Verizon* court thus agreed with the Commission that rules are necessary to preserve the Internet's openness. The question, then, is what those rules should be, and on what jurisdictional bases they should be predicated. AOL believes that the Commission should promulgate a firm no-pay-to-play rule preventing broadband access providers from creating a second revenue stream by selling fast lanes, and that the Commission should use the entire legal arsenal available to it in support of such a rule.[17]

III. PAY-TO-PLAY IS WRONG

The beauty of the Internet, as noted above, is that it places power in the hands of consumers to decide what content and what services they want. Increasingly, those consumers

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[13] *Verizon*, 740 F.3d at 644.

[14] *Id.* at 645.

[15] *Id.*

[16] *Id.* at 628.

[17] AOL agrees with the Commission that the proposed rules should not extend to dial-up Internet access service providers. *Open Internet NPRM* at ¶ 55. For one thing, AOL's dial-up business does not depend on its own control of any access facilities—AOL has none. The same is true of most other dial-up providers. As is well known, AOL's dial-up subscriber base is declining. That business cannot afford a totally unnecessary layer of rules.

are seeking products that require high-bandwidth capacity (like high-definition video), low-latency (like video games), or some combination of the two (like remote access for work). Broadband ISPs do not know, of course, which services will prove popular among their subscribers. So there is presently an incentive to meet consumer demand by building out sufficient capacity for any services that the consumer may want now, and to keep pace with potential future demand for new products, such as 4K video content.

For well-run networks, congestion is the greatest of enemies because it interrupts the enjoyment of the content and services chosen by the ISP's subscriber. Prioritization in an uncongested network is unnecessary, of course, because all content already moves at an optimal rate. So there is no need for edge providers to purchase it. In other words, in an uncongested network, prioritization is a solution in need of a problem.

The great concern, then, with the idea of authorizing prioritization of network traffic is that it provides broadband ISPs with the absolutely wrong incentive: to commoditize congestion, rather than network performance. If allowed, pay-to-play would be very lucrative to the gatekeepers in a congested network, where packets move based on their place in the queue. But because monetizing congestion requires ISPs to forego network upgrades, it is unlikely that ISPs will actually be making available a "fast lane" that could open the door to better and more unique services.

Instead of a fast lane, edge providers will merely be purchasing a place in the queue. And an edge provider will enjoy uninterrupted (but probably not "faster") service relative only to its ability to pay more than other edge providers for a place high up in the queue. The services of edge providers who are low in the queue, or who cannot afford to bid for a place at all, will be unusable by consumers—particularly at peak usage times. As a result, market cap will prevail over innovation every time, and the uniquely level playing field provided by the Internet will be at an end. Consumers will suffer the most. Broadband ISPs have lured the public into purchasing increasingly expensive broadband services on the promise of faster and more stable access to content. Prioritization undermines that promise, and places a giant asterisk on consumers' ability to access their content of choice: "Many restrictions apply."

Creating an incentive for broadband ISPs to build congested networks also flies directly in the face of the FCC's mandate under Section 706. That provision requires the agency to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[18] When, as the Commission has continuously found, broadband ISPs are not deploying that capability in "a reasonable and timely fashion," the Commission is required to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[19] Prioritization is precisely the kind of barrier that Section 706 requires the Commission to eliminate.

IV. THE FCC HAS SUFFICIENT AUTHORITY TO PREVENT ISPS FROM UNDERMINING THE INTERNET'S OPENNESS

Section 706 provides the Commission with both the obligation and the power to prevent broadband ISPs from undermining the virtuous circle.[20] To fulfill its mandate, however, the Commission must adopt firmer rules than it has proposed. The rules can be simple:

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[18] 47 U.S.C. § 1302(a).

[19] *Id.* § 1302(b).

[20] *See id.* ("In [its annual] inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.").

- no pay-to-play when a broadband access provider is affiliated with an upstream edge provider;
- no pay-to-play when a broadband access provider has market power;
- no pay-to-play when a broadband access provider also charges end users (i.e., no double-charging); and
- outside of these cases, any pay-to-play proposal only subject to Commission prior-approval.

These rules are sufficiently different from common carrier rules to pass muster under *Verizon*. For example, Title II's prohibition on discrimination applies to all carriers regardless of affiliation and market power. And there is nothing common-carrier-specific about a prohibition on double-charging.

This does not mean that Title II is not necessary or valuable. Combatting pay-to-play is so important to the Internet industry and therefore, via the virtuous circle, to broadband infrastructure deployment, that the Commission needs its entire jurisdictional arsenal. Tile II can serve as a backdrop that is triggered (along with a set of appropriately firm Title II rules) if Section 706 rules prove insufficient.

The Commission has also asked how to "ensure that a broadband service provider would not be able to evade our open Internet rules by engaging in traffic exchange practices that would be outside the scope of the rules."[21] While the Commission is examining interconnection practices more broadly elsewhere, AOL believes that the Commission should not allow form to prevail over substance. What matters most is the consumer. If the consumer rights that are meant to be protected by the open Internet rules are affected by a gatekeeper's interconnection practices, the label of a charge as an interconnection fee or a fast-lane fee may not matter, and the Commission should prohibit attempts to evade or circumvent the open Internet rules.

[21] *Id.* at 22 ¶ 59.

V. CONCLUSION

Crafting a strong rule prohibiting pay-to-play arrangements is essential to preserving the open Internet and the virtuous circle that it perpetuates. Section 706 and Title II need not be mutually exclusive means to that end. In order to achieve the paramount objective of protecting consumers, they can, and should, both be used—the first as a basis for a no-pay-to-play rule stronger than the Commission has proposed, and the other as a backstop to the extent necessary.

Respectfully submitted,

/s/
Pantelis Michalopoulos
Andrew W. Guhr
Georgios A. Leris
Steptoe & Johnson LLP
1330 Connecticut Ave. NW
Washington, DC 20036
202-429-3000
Counsel for AOL Inc.

/s/
Leigh Freund
Chief Counsel for Global Public Policy
1750 Pennsylvania Avenue, NW
Washington, DC 20006
AOL Inc.

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