



**Written Testimony of Eric Null  
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*Respectfully submitted to the*

**Council of the District of Columbia  
Committee on Government Operations**

*Regarding*

**Public Roundtable PR22-0691  
Sense of the Council Opposing the Repeal of Net Neutrality  
Rules Resolution of 2017**

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## Introduction

Thank you Councilmember Todd and other distinguished councilmembers for holding this net neutrality roundtable, and for beginning the process of returning net neutrality protections to the District of Columbia.

I represent New America's Open Technology Institute (OTI), a consumer advocacy organization that is focused on ensuring that Americans everywhere have equitable access to an open and secure internet. OTI has been part of the net neutrality debate for nearly a decade. We played an integral role in the adoption of the 2015 Open Internet Order (2015 Order), which enacted strong net neutrality rules and consumer protections that were grounded in strong legal authority.

We are at a crucial point in the net neutrality debate. At no point in the history of this issue has the Federal Communications Commission (FCC) so blindly deregulated, so glibly disregarding the public interest and public opinion, and so blatantly put the interests of the nation's biggest communications incumbents ahead of consumers and small businesses. With the recent so-called "Restoring Internet Freedom" (RIF) order,<sup>1</sup> the FCC took a giant step back in consumer protection, giving internet service providers (ISPs) the ability to fundamentally alter the way the internet functions—all to increase ISPs' bottom line. Given the FCC's near-complete abdication of its role as consumer protector and overseer of ISPs, it is imperative that states and localities get involved to return these important protections to Americans.

In this testimony, I will attempt to explain why strong net neutrality rules are vital in today's modern communications networks, how we got to where we are today in the regulatory landscape, and the role states and localities can and have played so far in returning net neutrality protections to their citizens. Specifically, I will argue that

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<sup>1</sup> Declaratory Ruling, Report and Order, and Order, Restoring Internet Freedom, Dkt. 17-108, FCC 17-166, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-17-166A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf) ("RIF Order").

the Vermont bill presents the best example of a state approach to preserving net neutrality thus far. Lastly, I will argue that the DC City Council should pair its broadband privacy legislation from last year with any net neutrality legislation, as the two issues are related.

### **I. The internet is open by design, but now strong rules are necessary to keep it open**

Since its inception, the internet has been open, meaning ISPs were unable to discriminate based on content. Even in the mid-1990s, when the commercial internet took off, ISPs mostly lacked the technological capability to discriminate. At that time, the internet exemplified the “end-to-end” network design principle, which dictates that users (who are at the ends of internet connections) decide what traffic they want to see and when and how they choose to see it.<sup>2</sup> ISPs typically played a passive role, merely facilitating that communication. The development of over-the-top applications, and generally the entire internet ecosystem, relied on this end-to-end principle.<sup>3</sup>

As time went on, network technology improved. New technologies such as packet sniffing<sup>4</sup> and deep packet inspection<sup>5</sup> allowed ISPs to more efficiently and effectively inspect and discriminate based on certain traffic.<sup>6</sup> Today, ISPs can engage

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<sup>2</sup> Tim Wu, How the FCC’s Net Neutrality Plan Breaks with 50 Years of History, *Wired* (Dec. 6, 2017), <https://www.wired.com/story/how-the-fccs-net-neutrality-plan-breaks-with-50-years-of-history/>; *see* Vint Cerf, How to Save the Net: Keep it Open, *Wired* (Aug. 19, 2014), <https://www.wired.com/2014/08/save-the-net-vinton-cerf>.

<sup>3</sup> Wu, *supra* note 1 (“All of these inventions [the World Wide Web, email, video applications and social networking] depended heavily on the internet’s end-to-end design, which made possible “permissionless” innovation, and an extraordinary and fabled era of change.”).

<sup>4</sup> Andy O’Donnell, What Are Packet Sniffers and How Do They Work?, *Lifewire* (July 9, 2017), <https://www.lifewire.com/what-is-a-packet-sniffer-2487312>.

<sup>5</sup> Dan Patterson, Deep Packet Inspection: The Smart Person’s Guide, *TechRepublic* (Mar. 9, 2017), <https://www.techrepublic.com/article/deep-packet-inspection-the-smart-persons-guide>

<sup>6</sup> *See generally* Paul Ohm, The Rise and Fall of ISP Surveillance, 2009 U. Ill. L. Rev. 1417, <https://illinoislawreview.org/wp-content/ilr-content/articles/2009/5/Ohm.pdf>.

in this behavior at scale and could dramatically affect the internet's functionality if given limitless ability to use these and other similar technologies.

Net neutrality regulation has become more necessary as changes in technology increasingly allow ISPs to discriminate. But even with the FCC's rules and policies in place, ISPs have continued to cause harm by discriminating based on content.

### **A. Net neutrality regulation has generally kept up with technology and new threats of harm**

Until last December's RIF Order, the FCC's regulatory framework for net neutrality has generally reflected technological developments and new threats of harm. Since 2004, the FCC recognized that allowing ISPs to have unfettered ability to moderate traffic was problematic. That year, Republican FCC Chairman Michael Powell argued that "consumers are entitled to 'internet freedom'" and challenged the industry to honor four specific net neutrality principles.<sup>7</sup> Enforcement was swift and sweeping. Before adopting these principles in an informal policy statement the following year,<sup>8</sup> the FCC took action in response to complaints that an ISP was blocking VoIP traffic. The case resulted in a consent decree.<sup>9</sup> Once the policy statement was adopted, the FCC began conditioning mergers on the principles, specifically in 2005 and 2007.<sup>10</sup>

Successive FCC chairmen continued this work. The FCC opened a proceeding in 2007, under then-Chairman Martin (and continued under the next chairman, Julius Genachowski), to formalize these principles. The proceeding resulted in the 2010

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<sup>7</sup> Michael K. Powell, Preserving Internet Freedom: Guiding Principles for the Industry, at 5 (Feb. 8, 2004), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

<sup>8</sup> Policy Statement, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14986, ¶¶ 4-5 & n.15 (2005).

<sup>9</sup> Order, Madison River Communications LLC, 20 FCC Rcd 4295 (2005).

<sup>10</sup> Memorandum Opinion & Order, SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd 18290 (2005); Memorandum Opinion & Order, AT&T Inc. and BellSouth Corporation Application for Transfer of Control, 22 FCC Rcd 5662, app. F, at 5814-15 (2007).

Open Internet Order (2010 Order).<sup>11</sup> That order included rules against blocking, unreasonable discrimination, and had transparency requirements.<sup>12</sup> On appeal in 2014, the D.C. Circuit vacated much of that order, arguing that the FCC lacked authority to pass such rules using so-called “Title I” authority, under which the FCC has limited authority. In response to the court order, the FCC initiated another proceeding to again determine how to best protect net neutrality. After extensive public comment, the FCC finally put the open internet rules on firm legal grounding by reclassifying broadband internet access service as a Title II telecommunications service. This gave the FCC the authority necessary to enact the strong protections OTI and many other organizations and online businesses fought for in the 2015 Order.<sup>13</sup>

The FCC had good reason to impose strong net neutrality rules on broadband providers. In particular, the FCC focused on ISPs’ ability and incentive to discriminate based on traffic. The FCC engaged in an extensive analysis describing how ISPs have the ability and incentive to favor their own affiliated content, or may even discriminate against traffic they simply disagree with, or may act on content for any other reason.<sup>14</sup> Consumers can rarely, if ever, protect themselves against harmful ISP behavior. A lack of competition among high-speed broadband providers, along with high switching costs associated with changing ISPs, means consumers are generally at the mercy of their provider and whatever practices the provider implements.<sup>15</sup> Combine these incentives with the examples of harm detailed below, and there exists an extensive case for net neutrality rules. Thus, for 15 years, under chairmen of both major political parties, the FCC has protected net neutrality in some way. These actions have largely served as a deterrent to ISPs engaging in harmful discrimination.

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<sup>11</sup> Report & Order, Preserving the Open Internet, 25 FCC Rcd 17905 (2010) (“2010 Order”).

<sup>12</sup> *Id.*

<sup>13</sup> Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 3601 (2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf) (“2015 Order”).

<sup>14</sup> *See id.* ¶¶ 78-85.

<sup>15</sup> *Id.*

**B. Without meaningful net neutrality rules, the internet will fundamentally change as ISPs take actions that harm communities of color, consumers, and innovation**

Strong net neutrality protections remain vital today. First, communities of color stand to feel the effects of the net neutrality repeal acutely. At an event in June 2017, activist Anika Collier Navaroli noted that “[o]ne of the largest group[s] of entrepreneurs that exists is black women. You don’t hear that very much... Small businesses are being started by black women online and those voices are important and they need to be heard and they need to survive.”<sup>16</sup> Further as comedian W. Kamau Bell explained, an open internet has created the space and opportunity for black comedians to succeed: “This fair internet, where everyone from an amateur comedian to a celebrity to a huge media company plays by the same rules, means you don’t need a lot of money or the backing of someone with power to share your content with the world.”<sup>17</sup>

Second, the internet has been a democratizing force, changing how Americans access news and information and evolving into a critical platform for grassroots organizing and political change. The internet is a level playing field for content creators that has given rise to an entirely new media landscape that was reflected in a Pew Research Center study conducted last year: Half of all adults surveyed aged 18-to-29 said they “often” get news online, as did 49 percent of adults aged 30-to-49 (pluralities in both age demographics).<sup>18</sup> In the modern media and information landscape, a lack of enforceable rules increases the threat of ISPs favoring certain news or information over others based on the political ideology of that company’s

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<sup>16</sup> Anika Navaroli, Net Neutrality and the Economy, New America Panel Discussion, Washington, DC, June 21, 2017.

<sup>17</sup> W. Kamau Bell, Net Neutrality: Why Artists and Activists Can’t Afford to Lose It, New York Times (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/opinion/netneutrality-artists-activists.html>.

<sup>18</sup> Amy Mitchell *et al.*, Pathways to News, The Pew Research Center (July 7, 2016), <http://www.journalism.org/2016/07/07/pathways-to-news>.

leadership, by manipulating the speeds of politically-bent news organizations' websites, or blocking content.<sup>19</sup>

Third, many entrepreneurs have argued that without network neutrality protections, their businesses would have never made it off the ground. More than 150 companies told the FCC in 2014 that net neutrality was “a central reason why the Internet remains an engine of entrepreneurship and economic growth.”<sup>20</sup> Etsy, an online retail platform that hosts 1.3 million small business owners, a majority of whom are women, has noted that a lack of strong net neutrality rules would undermine its ability to attract investment capital.<sup>21</sup> Similarly, video streaming service Vimeo stated that it “has flourished due to network neutrality.”<sup>22</sup> Countless other companies, from online retailers to payment service apps, rely on network neutrality to ensure their ability to compete with established, well-resourced companies.

### **C. ISPs have discriminated based on content even with net neutrality rules and policies in place**

Even with essentially unbroken regulatory oversight since 2004, documented and direct threats to internet openness have persisted, with serious harms to consumers. One of the first violations of net neutrality occurred in 2005, when Madison River, a North Carolina ISP, blocked Voice over Internet Protocol (VoIP) telephone calls, a practice that prevented Madison River customers from using third-party VoIP services such as Vonage.<sup>23</sup> Because VoIP was a competitor to Madison

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<sup>19</sup> See, e.g., David Goodfriend, <https://www.newsmax.com/davidgoodfriend/comcast-fcc-pai/2017/04/26/id/786478/>.

<sup>20</sup> See Letter from Amazon, *et al.*, Dkt. No. 14-28 (May. 07, 2014), [https://static.newamerica.org/attachments/9594-over-100-companies-call-on-fcc-to-protect-networkneutrality/Company\\_Sign\\_On\\_Letter\\_051414.e2e8cb6a80ce4d5d85c7728673b39668.pdf](https://static.newamerica.org/attachments/9594-over-100-companies-call-on-fcc-to-protect-networkneutrality/Company_Sign_On_Letter_051414.e2e8cb6a80ce4d5d85c7728673b39668.pdf).

<sup>21</sup> See Comments of Etsy, Inc., Dkt. No. 14-48 (July 8, 2014).

<sup>22</sup> Comments of Vimeo, LLC, Dkt No. 14-28 (July 15, 2014) at 6.

<sup>23</sup> 2015 Order, ¶ 65 n.69; Electronic Frontier Foundation Comments, Dkt. 17-108 (July 17, 2017) at 34, <https://ecfsapi.fcc.gov/file/1071761547058/Dkt.%2017-108%20Joint%20Comments%20of%20Internet%20Engineers%2C%20Pioneers%2C%20and%20Technologists%202017.07.17.pdf> (“EFF Comments”).

River's voice service, it meant that the ISP was using its gatekeeper position to block competitors and left customers without the ability to make VoIP calls, including to emergency services.

Next, in 2007, Comcast installed software to selectively interfere with certain BitTorrent peer-to-peer file-sharing communications as well as other protocols, a finding the FCC deemed "significantly" impeded "consumers' ability to access the content and use the applications of their choice."<sup>24</sup> While the practice may have been implemented to address congestion or even copyright piracy, Comcast customers were impeded from downloading even public domain works and from proper use of non-P2P software like Lotus Notes.<sup>25</sup>

More recently, ISPs have favored their own affiliated content over competitors, which directly harms consumers and has clear implications for competition. In 2009, AT&T blocked the Sling media player from streaming video over AT&T's 3G network, but streaming video from AT&T affiliates such as its "AT&T CV" service were allowed on the network.<sup>26</sup> In 2012, Comcast began exempting from its artificially-imposed data cap traffic that went through its Xbox Live streaming video app.<sup>27</sup> Also in 2012, AT&T blocked Apple's FaceTime application on its network, prompting consumer complaints.<sup>28</sup> AT&T admitted it was blocking FaceTime "*as a lever to get users to switch over to the new plans which charge for data usage in tiers.*"<sup>29</sup> In 2013, Verizon and T-Mobile blocked their customers' access to the Google Wallet mobile

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<sup>24</sup> 2015 Order, ¶ 65 n.69; EFF Comments at 34.

<sup>25</sup> EFF Comments at 34.

<sup>26</sup> Alex Curtis, AT&T Blocks SlingPlayer over its 3G Network, Still Permits its Own Video Services, Public Knowledge (May 14, 2009), <https://www.publicknowledge.org/news-blog/blogs/att-blocks-slingplayer-over-its-3g-network-st>

<sup>27</sup> Kyle Orland, Comcast: Xbox 360 On Demand Streams Won't Count Against Data Caps, Ars Technica (March 26, 2012), <https://arstechnica.com/gaming/2012/03/comcast-xbox-360-on-demandstreams-wont-count-against-data-caps>; EFF Comments at 35.

<sup>28</sup> 2015 Order, ¶ 96; EFF Comments at 34.

<sup>29</sup> David Kravets, AT&T: Holding FaceTime Hostage Is No Net-Neutrality Breach, Wired (Aug. 22, 2012), <https://www.wired.com/2012/08/facetime-net-neutrality-flap>.

payment app in 2013.<sup>30</sup> Verizon claimed it was blocking the application for security reasons,<sup>31</sup> but T-Mobile admitted they were blocking Google’s payment system to favor their own service.<sup>32</sup>

Mobile carriers have also been favoring their own content and affiliated content through “zero-rating” programs. With zero-rating, providers need not block or throttle traffic; they can simply impose an artificial data cap and then exempt their own affiliated services from that cap, accomplishing the same end—favoring the ISP’s content over others’. Among these problematic zero-rating schemes is AT&T’s Sponsored Data program. AT&T offers Sponsored Data to third party content providers at terms and conditions that are “effectively less favorable than those it offers to its affiliate, DirecTV,” according to the FCC’s Wireless Telecommunications Bureau January 2017 report on zero-rating programs.<sup>33</sup>

Verizon also offers customers a problematic zero-rating program. It recently began zero-rating its own video service, go90, while charging third party content providers more money to zero-rate data.<sup>34</sup> As the FCC noted of the Verizon program, “[t]here is the same potential for discriminatory conduct in favor of affiliated services, and its competitive impacts in the short-form portion of the market exist today.”<sup>35</sup>

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<sup>30</sup> Sarah Perez, Google Wallet Rolls Out To More Devices – Nope, Still No Love For Verizon, AT&T Or T-Mobile Owners, TechCrunch (May 16, 2013), <https://techcrunch.com/2013/05/16/googlewallet-rolls-out-to-more-devices-nope-still-no-love-for-verizon-att-or-t-mobile-owners>.

<sup>31</sup> Karl Bode, Verizon: We're Blocking Google Wallet for Good Reason, Honest, Techdirt (Dec. 13, 2012), <https://www.dslreports.com/shownews/Verizon-Were-Blocking-Google-Wallet-for-GoodReason-Honest-122415>.

<sup>32</sup> Karl Bode, T-Mobile Blocking Google Wallet to Benefit Isis, Techdirt (May 17, 2013), <https://www.dslreports.com/shownews/T-Mobile-Blocking-Google-Wallet-to-Benefit-Isis124298>.

<sup>33</sup> FCC Wireless Telecommunications Bureau Zero-Rating Report, January 2017, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0111/DOC-342982A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf) (“WTB Report”).

<sup>34</sup> WTB Report at 16; Anu Passary, Verizon Go90 Goes Zero Rating, Allows Customers To Watch Video Without Worrying About Data Cap, Tech Times (Feb. 6, 2016), <http://www.techtimes.com/articles/131330/20160206/verizon-go90-goes-zero-rating-allowscustomers-to-watch-video-without-worrying-about-data-cap.htm>. Although Chairman Pai has since retracted the report, the harms outlined by FCC staff are significant and worth consideration by the DC City Council.

<sup>35</sup> *Id.*

ISPs have made it no secret they would like to use their gatekeeper power over the network to favor their own content at the expense of other competitors and online services for a variety of reasons. These violations have resulted in substantial and concrete harms for consumers, but are not limited to these cases. The FCC has received over 47,000 consumer complaints alleging harmful behavior from ISPs that violated the 2015 Order. These complaints reflect that American consumers have continued to experience what they considered to be harmful behavior from ISPs even since 2015.<sup>36</sup>

#### **D. Net neutrality violations have occurred at interconnection points**

Nondiscrimination issues do not exist solely between ISPs and their end users. In recent years, some of the most egregious network discrimination occurred between ISPs and transit providers, content delivery networks, and edge services with whom they interconnect. Interconnection points are important in the net neutrality debate because they exist between access and transit networks, and are capable of manipulation such that ISPs can discriminate based on content. Moreover, the impact of interconnection disputes on consumers has been devastating: when interconnection disputes arise, millions of people end up not receiving the broadband service they paid for, in some cases experiencing speeds that fell to nearly unusable levels for months on end.<sup>37</sup>

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<sup>36</sup> National Hispanic Media Coalition, NHMC Releases New Net Neutrality Documents to Public Showing Importance of Open Internet Order, Urges FCC to Open New Comment Period to Examine, <http://www.nhmc.org/foia-release/>. The FCC has not cooperated in the release of these documents, and has had to be dragged kicking and screaming by NHMC to release the limited documents they have released. *See* Jon Brodtkin, 50,000 Net Neutrality Complaints Were Excluded from FCC's Repeal Docket, *Ars Technica* (Dec. 5, 2017), <https://arstechnica.com/tech-policy/2017/12/fcc-refused-to-include-50000-net-neutrality-complaints-in-repeal-docket>.

<sup>37</sup> Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes, *New America* (Nov. 12, 2014), <https://www.newamerica.org/oti/policy-papers/beyond-frustrated-the-sweepingconsumer-harms-as-a-result-of-isp-disputes>.

In 2014, OTI released a report called *Beyond Frustrated*, in which we used data from the Measurement Lab platform, with which OTI partners, to document widespread interconnection disputes in 2013 and 2014.<sup>38</sup> For example, Level 3 Communications explained in the FCC’s most recent net neutrality record that before the FCC’s assertion of jurisdiction over interconnection disputes in the 2015 Order, many of the largest consumer BIAS providers “refused to augment interconnection capacity with Level 3 unless Level 3 would agree to pay new, recurring tolls.”<sup>39</sup> The tolls levied by these ISPs for interconnection contracts were “entirely unrelated to costs,” which the ISPs admitted, according to Level 3. Because of these large ISPs’ actions, interconnection points between the Level 3 network and the ISPs’ networks became extremely congested, and consumers’ experiences were subsequently harmed.<sup>40</sup>

Based largely on OTI’s research, the FCC developed a strong body of evidence to support its conclusions about interconnection in the 2015 Order.<sup>41</sup> In that order, the FCC decided to monitor the interconnection market, but refrained from imposing specific requirements. Since then, there is evidence that such oversight decreased the number of interconnection disputes.<sup>42</sup>

Not only do ISPs want to manipulate the last mile internet connection, they also seek to manipulate interconnection points. These schemes violate the principles of net neutrality and risk undermining the guiding principles of the internet. The FCC was right to begin monitoring interconnection agreements. With the repeal, DC City

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<sup>38</sup> *Id.*

<sup>39</sup> Level 3 Communications Comments, at 8-9, Dkt. 17-108 (“Level 3 itself has direct experience with large consumer ISPs engaging in precisely the kinds of harmful practices the Commission’s framework is designed to address.”).

<sup>40</sup> *Id.*

<sup>41</sup> 2015 Order, ¶ 205.

<sup>42</sup> Collin Anderson, Monitoring Interconnection Performance Since the Open Internet Order, Measurement Lab (Aug. 9, 2017), [https://www.measurementlab.net/blog/interconnection\\_update](https://www.measurementlab.net/blog/interconnection_update).

Council should consider enacting similar protections for interconnection points that exist within the District.

## **II. The Restoring Internet Freedom order was a substantial step backward in consumer protection and ISP oversight**

The RIF Order represents the first time the FCC has taken a step back in net neutrality protections, much less engaged in a complete abdication of responsibility in the space. Where there were once rules protecting consumers against ISP blocking, throttling, and paid priority, as well as imposing general oversight of ISP practices through the general conduct rule and interconnection monitoring, there is now no meaningful federal oversight targeted specifically at preserving net neutrality. All that remains is a minimal transparency requirement.

Transparency is the most straightforward, common sense net neutrality requirement, but transparency alone is insufficient. The FCC has had transparency requirements since the 2010 Order, which dictated ISPs disclose information about, for example, network management practices, performance, and commercial terms.<sup>43</sup> These were the only part of the 2010 Order the DC Circuit upheld in the 2014 case *Verizon v. FCC*.<sup>44</sup> The 2015 Order expanded on these transparency measures, requiring not just information about pricing, speeds, and latency (as previously required), but information about additional fees charged by ISPs, data caps, and packet loss to be disclosed to consumers.<sup>45</sup> Despite transparency requirements, we still saw the extensive harmful actions taken by ISPs, and consumers were essentially powerless because of a lack of competition and high switching costs,<sup>46</sup> as discussed above.

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<sup>43</sup> RIF Order, ¶ 211.

<sup>44</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

<sup>45</sup> 2015 Order, ¶¶ 157-166.

<sup>46</sup> 2015 Order, ¶¶ 97-99

The RIF Order returns us to a modified version of the 2010 Order's transparency requirements. In other words, the order simultaneously removes all conduct-based rules for ensuring net neutrality, and then also walks back transparency requirements. The logic, so it goes, is that transparency will discipline bad actors.<sup>47</sup> But transparency *and* conduct rules in the 2010 Order did not discipline ISPs, and it is difficult to understand how transparency without conduct rules will fare any better.

Thus, after 14 years of back and forth debates about how *best* to protect net neutrality, the current FCC leadership has decided that it should no longer protect net neutrality at all. This approach is nonsensical. States and localities are right to consider protecting net neutrality, in an effort to restore substantive net neutrality protections and ensure their citizens can continue to access a neutral internet.

### **III. DC is joining a long list of states and localities looking to restore net neutrality**

Since the repeal of net neutrality, at least 18 states have proposed legislation or have issued executive orders to help fill the gap left by the FCC.<sup>48</sup> Several others are

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<sup>47</sup> RIF Order, ¶ 240.

<sup>48</sup> Alaska HB277, <http://www.legis.state.ak.us/PDF/30/Bills/HB0277A.PDF>; California SB460, [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB460](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB460); Georgia SB310, <http://www.legis.ga.gov/Legislation/20172018/171466.pdf>; Hawaii Executive Order (now effective), <https://www.mediapost.com/publications/article/314144/hawaii-becomes-fourth-state-to-require-net-neutral.html>; Massachusetts SD2428, <https://malegislature.gov/Bills/190/SD2428/Cosponsor>; Montana Executive Order 3-2018 (signed), [http://governor.mt.gov/Portals/16/docs/2018EOs/EO-03-2018\\_Net%20Freedom.pdf?ver=2018-01-22-122048-023](http://governor.mt.gov/Portals/16/docs/2018EOs/EO-03-2018_Net%20Freedom.pdf?ver=2018-01-22-122048-023); Oregon (language not available), [http://www.oregonlive.com/business/index.ssf/2018/01/oregon\\_will\\_take\\_up\\_net\\_neutra.html](http://www.oregonlive.com/business/index.ssf/2018/01/oregon_will_take_up_net_neutra.html); Nebraska LB856, <https://nebraskalegislature.gov/FloorDocs/105/PDF/Intro/LB856.pdf>; New Jersey Executive Order 9 (signed), <http://nj.gov/infobank/eo/056murphy/pdf/EO-9.pdf>, and A5257, [http://www.njleg.state.nj.us/2016/Bills/A9999/5257\\_I1.PDF](http://www.njleg.state.nj.us/2016/Bills/A9999/5257_I1.PDF); New Mexico SB39, <https://www.nmlegis.gov/Sessions/18%20Regular/bills/senate/SB0039.pdf>; New York Executive Order 175 (signed) [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_175.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_175.pdf), and A8882, [http://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A08882&term=&Text=Y](http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08882&term=&Text=Y), and A1958, [http://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A01958&term=2017&Summary=Y&Text=Y](http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01958&term=2017&Summary=Y&Text=Y); Pennsylvania (language not available), <http://www.publicnow.com/view/0BB98151782236C1F92ADAF4ECA476B9C67478F2?2018-01-22-16:00:20+00:00-xxx372>; Rhode Island H7076, <http://webserver.rilin.state.ri.us/BillText18/HouseText18/H7076.pdf>; South Dakota SB195, <https://legiscan.com/SD/text/SB195/id/1713828>; Tennessee SB1756, <http://www.capitol.tn.gov/Bills/110/Bill/SB1756.pdf>; Vermont H680,

reported to be working on similar approaches.<sup>49</sup> Each state’s approach has pros and cons. This testimony will focus on one state, Vermont, as the best example so far of a strong net neutrality law.<sup>50</sup> These suggestions generally apply to any potential executive order out of the executive branch as well. Additionally, DC City Council should not be deterred from moving forward by threats of preemption.

### **A. States and localities should emulate the Vermont proposal as much as possible**

There are several aspects of the Vermont bill that make it the strongest bill proposed so far. The first is the extensive legislative findings section. The second is pointing to several areas where the state has authority to impose these requirements and including a severability clause.

#### **1. Legislative findings will help reviewing courts discern legislative intent**

Legislative findings should be included in any net neutrality legislation. Such findings help reviewing courts discern the intent behind the legislation. In Vermont’s case, it included extensive legislative findings that explained in detail the history of the internet and net neutrality, the specific situation that led to the bill (including the lack of ISP competition in Vermont and the FCC’s repeal of the 2015 Order), the interests

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<https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/H-0680/H-0680%20As%20Introduced.pdf>; Virginia HB705, <http://lis.virginia.gov/cgi-bin/legp604.exe?181+ful+HB705+pdf>; and Washington HB2284-S, <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/2284-S.pdf#page=1>.

<sup>49</sup> See, e.g., Connecticut: Casey Donahue, Duff to Introduce Connecticut Net Neutrality Legislation in 2018, Norwalk Daily Voice (Dec. 29, 2017), <http://norwalk.dailyvoice.com/politics/duff-to-introduce-connecticut-net-neutrality-legislation-in-2018/729611>; Pennsylvania: Rep. Tim Briggs, Bill to Protect Net Neutrality Moving Through House, PA House (Feb. 1, 2018), <http://www.pahouse.com/InTheNews/NewsRelease/?id=96530>.

<sup>50</sup> Oregon is rumored to have a bill that addresses both net neutrality and broadband privacy, which is another approach that DC City Council should consider. Mike Rogoway, Oregon Will Take Up Net Neutrality in Legislation, Initiative Drive, Oregonian (Jan. 18, 2018), [http://www.oregonlive.com/business/index.ssf/2018/01/oregon\\_will\\_take\\_up\\_net\\_neutra.html](http://www.oregonlive.com/business/index.ssf/2018/01/oregon_will_take_up_net_neutra.html). See Section IV, below, as well.

Vermont has in protecting a neutral internet, and why the state believes the bill is not preempted.<sup>51</sup>

The DC City Council, in any potential future legislation, should follow this lead. The DC City Council, in its legislative drafting manual, encourages findings “if there is a reasonable suspicion that the law might be challenged on constitutional grounds.”<sup>52</sup> Because preemption is a Supremacy Clause, and therefore constitutional, issue, it would be prudent for the DC City Council to include extensive legislative findings.

These legislative findings should include at least the following: (1) a history of the internet, including how its openness has contributed to significant economic and social benefits; (2) how the FCC has recognized, for at least 14 years, that net neutrality protections are vital for the continued success of and innovation over the internet; (3) that DC-based businesses and start-ups rely on an open internet to serve their customers; and (4) that the RIF Order will take all of this away and therefore DC feels compelled to reinstitute those protections. Of course, there is no limit to the amount of legislative findings a city council can include, so the more the better.

## **2. Invoking more areas of state authority, with a severability clause, will increase the likelihood that the legislation will be upheld on judicial review**

States and localities retain significant authority over communications services in their areas. The wisdom of the Vermont bill is that it invokes many of these sources of authority, including state contracting, public lands, rights of way, pole attachments and cable line extensions, state universal service, and general policymaking authority.<sup>53</sup>

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<sup>51</sup> Vermont H680, at 1-9, <https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/H-0680/H-0680%20As%20Introduced.pdf>.

<sup>52</sup> Legislative Drafting Manual, DC City Council (2014), at 56 [http://dccouncil.us/files/user\\_uploads/event\\_testimony/Legislative%20Drafting%20Manual%20-%202014%20Edition.pdf](http://dccouncil.us/files/user_uploads/event_testimony/Legislative%20Drafting%20Manual%20-%202014%20Edition.pdf). The manual generally discourages savings clauses otherwise, however.

<sup>53</sup> Vermont H680. Another option may be cable franchising.

Using all areas of authority increases the chances that a reviewing court upholds the requirements for at least some communications providers in the state.

Severability clauses are important in state statutes where it would not make sense for a court to strike down the entire statute should the court hold part of it illegal or unconstitutional.<sup>54</sup> States often have their own severability requirements and norms, and those should be followed.<sup>55</sup> The District of Columbia allows for their use.<sup>56</sup>

Including a severability clause in a net neutrality bill that cites several areas of authority would be prudent. The purpose of any net neutrality law would be to apply strong net neutrality principles to as many communications providers in the state as possible. Invoking pole attachments, state contracting, and other sources of authority will help extend those protections to in-state communications providers. To the extent a reviewing court decides that some of these sources of authority are insufficient, the severability clause would allow the court to strike down only those that are insufficient and not others that it finds appropriate.

### **B. Preemption concerns should not deter DC City Council from moving forward now**

In the RIF Order, the FCC claimed broad preemption power and then purported to preempt all states and localities from enacting rules that the FCC refrained from applying in the order. There are at least three reasons DC should not wait to move on net neutrality legislation.

First, it may take years for the FCC's authority over preemption to be sorted out in the courts. Petitioners and intervenors to the appeal will likely make

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<sup>54</sup> See Mark Movsesian, *Severability in Statutes and Contracts*, St. Johns L. Scholarship Repository (1995), [http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1113&context=faculty\\_publications](http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1113&context=faculty_publications).

<sup>55</sup> *Savings Clauses*, National Conference of State Legislatures, [http://www.ncsl.org/documents/lss/Saving\\_Clauses.pdf](http://www.ncsl.org/documents/lss/Saving_Clauses.pdf).

<sup>56</sup> *Legislative Drafting Manual*, DC City Council (2014), at 56, [http://dccouncil.us/files/user\\_uploads/event\\_testimony/Legislative%20Drafting%20Manual%20-%202014%20Edition.pdf](http://dccouncil.us/files/user_uploads/event_testimony/Legislative%20Drafting%20Manual%20-%202014%20Edition.pdf).

preemption part of their arguments in challenging the RIF Order. To further bolster that argument, the New York Attorney General has compiled a coalition of 22 states to challenge the order, including the District of Columbia.<sup>57</sup> Even if the RIF Order is upheld in that challenge, it is possible that preemption would not be decided until a later case. DC should not wait until all those cases resolve before protecting net neutrality here.

Second, the FCC's claimed preemption is extraordinarily broad. Typically the FCC does not attempt to preempt so broadly, and certainly does not at the same time as it disclaims its authority over broadband.<sup>58</sup> In most cases, the FCC will claim preemption power but then will review potentially problematic laws on a case-by-case basis.<sup>59</sup> The sheer breadth of the preemption in the order increases its likelihood that it will not be upheld in court.<sup>60</sup>

Third, states and localities retain significant authority in communications practices (especially intrastate practices) and consumer protection. For instance, the states have authority over some aspects of universal service, while the federal government retains authority over other parts.<sup>61</sup> The RIF Order had to clarify that its extraordinarily broad claims of preemption did not "disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general

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<sup>57</sup> Press Release, Office of the New Jersey Attorney General, Attorney General Announces New Jersey Participation in Multi-State Suit Opposing Repeal of Net Neutrality, <http://www.nj.gov/oag/newsreleases18/pr20180205a.html>.

<sup>58</sup> To see a thorough argument that the FCC lacks preemption authority here, see Harold Feld, *Can the States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes*, Wet Machine (Feb. 6, 2018), <http://www.wetmachine.com/tales-of-the-sausage-factory/can-the-states-really-pass-their-own-net-neutrality-laws-heres-why-i-think-yes>.

<sup>59</sup> Report and Order, *Protecting the Privacy of Customers of Telecommunications and Other Services*, 31 FCC Rcd 13911, ¶ 326 (2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-148A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-148A1.pdf).

<sup>60</sup> There are yet other reasons the preemption may be overturned, including the lack of notice of state preemption in the Notice of Proposed Rulemaking. *See* Open Technology Institute, *Notice of Ex Parte*, Dkt. 17-108 (Dec. 7 2018), at 1, <https://ecfsapi.fcc.gov/file/1207093350065/OTI%20Preemption%20Ex%20Parte.pdf>.

<sup>61</sup> *E.g.*, 47 USC § 254(a), (f).

commercial dealings...”<sup>62</sup> Thus, there are areas, as discussed above, where states can invoke authority and increase their chances of surviving a preemption challenge.

#### **IV. The Council should pair its broadband privacy legislation with net neutrality legislation, as the issues are related**

Net neutrality and broadband privacy are related issues. When the FCC reclassified broadband internet access services as a Title II service, they also indicated they would pass broadband privacy rules. Part of the FCC’s (and Congress’) rationale was that communications networks were special, in that consumers contract with ISPs for internet service and are forced to share scores of information with those providers, such as web browsing and app usage history, name, address, social security number, and other pieces of private, personal information.

In October 2016, the FCC passed robust, common-sense broadband privacy rules that OTI supported. The approach adopted was one similar to the FTC’s sensitivity regime, where ISPs needed opt-in consent from customers before ISPs could use, disclose, or permit access to sensitive information, including identifiable technical information.

With the administration change in January 2017, however, the broadband privacy rules were not long for this world. The privacy rules were caught up in the deregulator fervor that swept Congress in the early part of the Donald Trump presidency. Consumers were rightly incensed by this cruel and illogical repeal of one of the first significant improvements in privacy rights in several years.<sup>63</sup>

Councilmember Todd and others introduced the Broadband Internet Privacy Act in July 2017 in response to the repeal of the FCC’s rule.<sup>64</sup> The Council should set

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<sup>62</sup> RIF Order, ¶ 196. *See also* 47 USC § 152(b); Danielle Citron, The Privacy Policymaking of State Attorneys General, 92 Notre Dame L. Rev. 747, 753-54 (2017), <https://scholarship.law.nd.edu/ndlr/vol92/iss2/5>.

<sup>63</sup> Eric Null, Redrawing the Battle Lines in the ISP Privacy Debate, Slate (Apr. 17, 2017), [http://www.slate.com/articles/technology/future\\_tense/2017/04/how\\_to\\_continue\\_the\\_fight\\_to\\_protect\\_consumer\\_broadband\\_privacy.html](http://www.slate.com/articles/technology/future_tense/2017/04/how_to_continue_the_fight_to_protect_consumer_broadband_privacy.html).

<sup>64</sup> Broadband Internet Privacy Act of 2017, DC City Council (introduced July 11, 2017), <http://lims.dccouncil.us/Legislation/B22-0403>.

this bill for a hearing as soon as it can, or at the very least should set it for a hearing alongside any future net neutrality bill. Consumers need privacy protections from their ISPs just as they need protections against content discrimination.

## **Conclusion**

Thank you to the DC City Council for hosting a roundtable on this vitally important issue. I look forward to continuing to work with the Council on net neutrality, broadband privacy, and other important communications issues.