Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

TO THE COMMISSION:

Comment of National Religious Broadcasters in Response to

Notice of Proposed Rulemaking In the Matter of

Protecting and Promoting the Open Internet

July 14, 2014

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INTRODUCTION

National Religious Broadcasters (NRB) is a non-profit association that exists to keep the doors of electronic, broadcast, and digital media open and accessible for the Christian Gospel. NRB's President & CEO is Dr. Jerry A. Johnson. Our members, most of whom are radio and television broadcasters that produce and/or telecast faith-based programming, reach millions of Americans daily. In addition, we draw our membership from other entities, including Christian book publishing companies, film, video and television production companies, public relations agencies, legal organizations and law firms, charitable relief organizations, churches with media outreach programs, and public policy organizations. All of them utilize the Internet as a valuable and integral part of their communications outreach, which includes the use of websites, web-streaming, blogs, social networking sites, email, electronic delivery of images, and transmission of audio and video files and other broadcasting content.

More specifically, NRB has a vested interest in insuring that the Internet remains open for the widest range of lawful viewpoints, opinions, and information. We believe that given an open, fair, level playing field in the marketplace of ideas, good ideas will ultimately rise and bad ideas will fall. How to best foster, protect, and promote that level playing field is a question that must be of paramount importance. While the fostering of Internet innovation and communications technology is an essential element of free enterprise, it is not the only essential element.

The idea of liberty certainly presupposes the freedom of entrepreneurship and innovation. Nevertheless, in this Notice of Proposed Rulemaking ("NPRM") proceeding we are addressing a monumentally important communications platform – the Internet – where the "end-product" is

not simply a better smart phone or a faster access to the web, but public access to information, opinions, and ideas. If this proceeding ends up merely making enough regulatory sense to withstand appellate scrutiny while satisfying the national drive for innovational excellence and the business need for a free market, but in the process sacrifices the free speech rights of citizens ("end users"), then we suggest that this Commission will have lost its way. After all, what would it profit us to gain the whole world of innovation and yet lose our First Amendment soul?

We recognize, of course, that the First Amendment protections of speech, religion, and press – interests that are implicit in this proceeding – only come in to play in a legal sense when those citizen interests are threatened by the actions of government, or by "state actors," and not when they are threatened by the actions of purely private businesses, including "edge providers." Thus, for purposes of this Comment, we are willing to make the assumption that broadband providers or edge providers are probably not bound by the strictures of the First Amendment to honor the free speech interests of citizen users. However, we do believe that there are such things as First Amendment "values," which, even if they are not constitutional "rights" in the strict legal sense, should still energize and direct all discussions that would impact the ability of citizen users to post, disseminate, or otherwise transmit viewpoints over the Internet.

In seventeenth-century England, John Milton, a towering literary figure of his day, made the case for citizen access to the printing press in his famous essay, *Areopagitica* (1644).[1] We submit that the Internet is the printing press of our day.[2] But unlike the multiple printing presses of England in the 1600s, there are not multiple Internets but a singular, though incredibly

[1] That essay has been described by one legal expert as the "single most influential plea known to the Framers for unlicensed access to the printing press." *See* Archibald Cox, *The Court and the Constitution*, 187 (New York: Houghton Mifflin Co., 1987).

[2] One member of the Commission agrees with this characterization. The Internet has been described as "our modern town square. It is our printing press." NPRM, page 92, Concurring Statement of Commissioner Jessica Rosenworcel.

complex, Internet; further, it is entirely unlike the old printing presses that could be cobbled together by a carpenter, metal worker or blacksmith with a modicum of training. The companies that control the gates to broadband service, and those edge providers who have developed an array of astounding web-driven communication platforms and devices have done so through the genius of computer engineers and digital technicians who operate at a specialized technical level unapproachable by most citizens, even highly educated ones.

SUMMARY

The Commission seeks comment on the "impact of the openness of the Internet on free expression and civic engagement," and "propose[s] to adopt a factor or factors in applying the commercially reasonable standard that assess the impact of broadband provider practices on free exercise of speech and civic engagement."[3] Our Comment, here, focuses primarily on those lines of inquiry. Jurisdictionally, section 706 of the Telecommunications Act does grant the Commission narrow, limited authority to regulate broadband providers' treatment of Internet traffic, and while we believe that Title I is a relevant source of some authority, we do not believe that Title II is an appropriate basis.

Any regulation of broadband providers requires a broad picture that includes an evaluation of the policies and practices of edge providers in order to protect the free speech interests of citizen users. To help develop that picture, more than three years ago NRB began its John Milton Project for Free Speech, with Craig Parshall, Senior Vice-President & General Counsel as its founding Director. After multiple studies, and after hosting numerous public roundtable discussions in Washington with participating experts in law, media technology, government, and public policy, we are convinced of two things: first, that a pattern of censoring,

[3] NPRM, ¶ 35, page 13; *see also* ¶ 131, page 47.

blocking, or impeding otherwise lawful and non-injurious citizen viewpoints on the web has been practiced by several powerful edge providers. Second, if we do not find a solution to this dilemma in a way that also satisfies the essential demands of free enterprise and innovation, then the values of citizen free speech, free exercise of religion, and a free press on the Internet will be at great danger of being eroded, if not fatally damaged. In this Comment we give examples of this pattern of censorship and we suggest an analytical paradigm for the Commission to apply to this proceeding.

Edge providers should be viewed as more than just beneficiaries of the Commission's next regulatory order. The Commission, in the NPRM, cites the D.C. Court of Appeals' statement that "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' carriers."[4] That implies that broadband providers might owe a duty to edge providers. Beyond that, however, we would suggest that in the "virtuous circle" of innovation that this Commission is seeking to preserve,[5] edge providers may, in turn, owe a duty to protect the free speech interests of public end-users, and this Commission should take cognizance of that.[6]

More precisely, to the extent that this Commission contemplates a regulatory scheme that would endorse broadband providers' provision to edge providers of enhanced or specialized services, including such things as paid priority for higher data transmission speeds, or higher quality access, it should consider doing so only if: (1) there is substantial evidence that such bargaining will not create an unfair, near-monopoly position for those edge providers as against

[4] *See* NPRM, ¶ 55, page 21 (citing *Verizon v. FCC*, 740 F.3d 623, 653 (D.C. Cir. 2014)).
[5] NPRM, ¶ 118, page 43.
[6] The Commission's "theory" as noted by the *Verizon* court, is that edge providers should be protected because they will serve innovation, stimulate consumerism, and benefit competition. *Verizon*, 740 F.3d at 642. Absent in that theory, though, are the free speech interests of the American public.

existing competitors or likely start-up competitors, and (2) there is substantial evidence that edge providers serving as a platform or conduit for user-generated content are *voluntarily committed* in their practices and policies governing decisions on blocking, takedowns, deliberate delays, suspensions of accounts, or other adverse treatment of user-generated content, to hewing as close to those strictures of the First Amendment as would be required if they were deemed "state actors," except as to those aspects of First Amendment jurisprudence that would, if put into practice by private edge providers, work such an interference with their operations or services that, in the interests of "business necessity," they should be considered unfeasible.

DISCUSSION

I. Jurisdiction should be Limited

As a preliminary matter, we address the matter of jurisdiction. The Commission proposes to assert its authority under section 706 of the Telecommunications Act of 1996,[7] and requests comment on that proposal.[8] We concede that, under section 706, the Court of Appeals found that the Commission has "affirmative authority to enact measures encouraging the deployment of broadband infrastructure ... [and is empowered] to promulgate rules governing broadband providers' treatment of Internet traffic;" while also noting that "general authority to regulate in this arena may not impose requirements that contravene express statutory mandates."[9]

We believe that the Commission has sufficient, though narrow, authority under section 706, as well as ancillary jurisdiction under Title I of the Communications Act of 1934,[10] to provide an adequate basis for limited, restrained jurisdiction; but asserting jurisdiction under

[7] 47 U.S.C. § 1302 (1996).
[8] NPRM, ¶ 143, page 50.
[9] *Verizon*, 740 F.3d at 628 (finding that the prior Internet Order classified broadband providers in a way that exempted them from treatment as common carriers while nevertheless improperly regulating them as if they were).
[10] 47 U.S.C. § 151–62 (1934).

Title II with its heavy hand of telecommunications regulations is ill-advised. In the *Brand X* case,[11] the Supreme Court confirmed the use of Title I, stating that "the Commission remains free to impose *special* regulatory duties on facilities-based ISPs [broadband providers] under its Title I ancillary jurisdiction."[12]

In other words, the Commission should continue to treat "information service[s]" over the Internet as the primary classifying factor for jurisdictional purposes when it is functionally integrated also with telecommunications transmission. In addition, we believe that Title I ancillary jurisdiction also provides a narrow scope of jurisdiction of the Commission over an Internet "information service" when it is offered separate from a "telecommunications" service, as long as it is an "offering of a *capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications …"[13]

Moreover, we believe that this narrow range of FCC authority should be fixed on two objectives: (1) fostering competitive, free enterprise innovation regarding Internet services, applications, and devices, and (2) promoting the values of free speech, free exercise of religion, and a free press for citizen user-generated content that is transmitted over the Internet. To the extent that all of this probably cannot be accomplished under Title I jurisdiction, the Commission should request that Congress be the one to consider any further, necessary adjuncts to the Commission's Internet jurisdiction.[14]

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[11] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 996 (2005).
[12] *Id*.(emphasis added).
[13] 47 U.S.C. § 153(20) (emphasis added). *Brand X*, 545 U.S. at 977.

[14] Some commentators have indicated that the FCC has no authority to regulate purely online content. *See* testimony of former FCC Commissioner Robert McDowell before the House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Statement of The Hon. Robert M. McDowell, June 20, 2014, page 5. http://judiciary.house.gov/index.cfm/hearings?Id=CCF704C2-E445-4D9A-8B84-26F6B9A59CC6&Statement_id=6A0077BC-E011-4A5D-BD28-2B42ABF9CAB7.

II. Edge Providers, Broadband Providers, and Public Liberty

The Court of Appeals defined "edge providers" this way: "Edge providers are those who, like Amazon or Google, [and we could add – Facebook, Apple or Twitter] provide content, services and applications over the Internet, while end users are those who consume edge providers' content, services, and applications."[15] When the Commission speaks of edge providers it is "referring to content, application, service and device providers, because they generally operate at the edge rather than the core of the network."[16] For purposes of this Comment, we focus here only on those edge providers who provide "application, service and device[s]" that substantially rely on user-generated content, making those edge providers more like platforms for delivery of public viewpoints and user-generated comments than generators or providers of content and information. By analogy to the traditional newspaper function before the advent of the Internet, such edge providers would be more akin to the printing operation in the basement than to the news desk on the main floor or the editorial offices on the top floor.

Some edge providers, like Google, can operate in more than one capacity: delivering the "mail" of user-generated content in its Gmail function which requires no editorial discretion, while also utilizing editorial decision-making in running its online Google News feed. We stress that we have no interest in obstructing the business decisions or innovations of edge providers. Rather, our focus is on edge providers that act primarily as conduits for citizen user-generated content. Such edge providers, like Facebook, "do[ ] not create or develop content when [they] merely provide[ ] a neutral means by which third parties can post information of their own choosing online."[17] Such edge providers, akin to the printing press operators of old, should be

[15] *Verizon*, 740 F.3d at 629.
[16] NPRM, ¶ 6, page 4, n. 3.
[17] *Klayman v. Zuckerberg*, No. 13-7017, 2014 WL 2619847, at *4 (D.C. Cir. 2014).

given strong incentives to respect and promote the free speech, freedom of religion, and free press interests of the American public because those members of the public are the true content and information providers.

However, it is worth noting that currently, edge providers are in the remarkable position of having it both ways when it comes to deciding whether to block certain public ideas from their platforms for no better reason than that they find the ideas offensive or disagreeable. No FCC regulations restrain them, and they are immune from legal ramifications regardless of whether they block the most harmless content, or fail to block the most vicious incitements to violence.[18]

III. Edge Providers Have Censored Citizen Viewpoints

Our John Milton project has spent several years analyzing and documenting the policies and practices of the most prominent edge providers, like Facebook, Google, Apple, and Twitter. The results have been set out in an extensive white paper report, *True Liberty in a New Media Age* (2011),[19] and in two subsequent reports, *A Free Speech Charter for the Internet* (2013)[20] and *The Future of Free Speech, Free Press, and Religious Freedom on Facebook, Google, Apple, etc."* (2013).[21]

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[18] *See Klayman, supra* note 17, at *4–5 (holding Facebook immune from suit under the Communications Decency Act of 1996, 47 U.S.C. § 230 (1996) for temporarily allowing a Facebook page that called on Muslims to rise up and kill Jewish people).

[19] The John Milton Project for Free Speech, A Project of the National Religious Broadcasters, Office of the General Counsel, nrb.org, September 15, 2011. http://content.nrb.org/Webdocs/Legal/True%20liberty-in-a-New-Media-Age9-15-11.pdf.

[20] The John Milton Project for Free Speech, A Project of the National Religious Broadcasters, Office of the General Counsel, nrb.org, revised September 20, 2013. http://content.nrb.org/webdocs/Legal/FreeSpeechCharter2013.pdf.

[21] The John Milton Project for Free Speech, A Project of the National Religious Broadcasters, Office of the General Counsel, nrb.org, October 3, 2013. http://nrb.org/files/6213/9819/8017/The_Future_of_Free_Speech_Free_Press_and_Religious_Freedom_on_Facebook_Google_Apple_etc__A_Current_Assessment.pdf.

Facebook, Google, and Apple have shown, overall, a pattern of viewpoint censorship as documented in our three reports, often at the insistence of those holding opposing views. In late 2010 Apple removed Chuck Colson's *Manhattan Declaration* (a statement of orthodox Christian positions on family, faith, and freedom) from its iTunes App store. In 2011, Apple also removed an app from a Christian ministry that reached out to gay persons. In 2012, Google-owned YouTube blocked the video of a youth minister who preached against same-sex marriage, and Facebook also took down for twelve hours Gov. Mike Huckabee's post supporting the fast food chain Chick-fil-A, as well as taking down posts on a Facebook page managed by former special ops members of the military who were critical of President Obama's handling of the Benghazi attack.

In 2013 blocking increased: Facebook removed posts by the conservative "Chicks on the Right" who criticized the White House Press Secretary; it temporarily suspended accounts of political activists who were sharing views on the budget debates on Capitol Hill on multiple like-minded pages; Facebook also banned a Texas man who satirized President Obama, but left undisturbed posts calling for the killing of Sarah Palin; Facebook temporarily closed the page of an Israeli journalist who posted criticisms of the Palestinian Authority, and citing its "Community Standards," Facebook removed posts and blocked access to the page of Fox News commentator Todd Starnes when he voiced his support for the Bible, Gospel Music, controversial Southern cooking celebrity Paula Deen, and the NRA. It also blocked the page of Military with PTSD because of religious references. In that same year it also put a twelve hour suspension on the page of a UNC-Wilmington professor who posted against same-sex marriage.

Other actions of viewpoint discrimination have occurred in addition to those incidents documented in our three reports. In 2014, former Rep. Lt. Col. Allen West questioned whether

Facebook had intentionally censored his conservative posts, because he documented that after a long, consistent meteoric rise in the number of "shares" his posts were receiving, those "shares" suddenly dropped precipitously.[22] Facebook, once again citing its "community standards," removed a satirical post about immigration and the Nevada rancher standoff by Fox's Todd Starnes.[23] It also temporarily banned Christian evangelist Ray Comfort's Facebook post, where he included a photo of the members of the controversial Westboro Baptist Church holding rude protest signs, even though Comfort's post had criticized the group.[24]

The parade of viewpoint censorship continues. Apple has banned a satirical iPhone game called "Phone Story," that focused on the ethical problems with smart phone manufacturing in countries with conflict minerals, environmental waste and problematic labor practices, striking it from its iTunes app store.[25] The company also banned an app that sent out notifications whenever U.S. military drones hit a target, calling it "objectionable and crude." [26] Apple also banned a satirical app named "Sweatshop" that depicted the brutal conditions of workers in other parts of the world.[27]

To a large degree, these censorious practices of edge providers are not the isolated result of random actions taken by content reviewers or their staff. Rather, they are the result of vague,

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[22] Allen West, "Is Facebook censoring conservative content?," allenbwest.com, March 10, 2014. http://allenbwest.com/2014/03/facebook-censoring-conservative-content/#w7iXIowPIbC6Z3qC.pp.
[23] Todd Starnes, "Facebook removes my post about Nevada rancher Cliven Bundy," FoxNews.com, April 17, 2014. http://www.foxnews.com/opinion/2014/04/17/facebook-removes-post-about-nevada-rancher-clive-bundy/.
[24] Lauren Leigh Noske, "Christian Evangelist Ray Comfort Banned from Facebook for Anti-Hate Speech Remarks Concerning Westboro Baptist Church." gospelherald.com, March 19, 2014. http://www.gospelherald.com/articles/50652/20140319/christianevangelist-ray-comfort-banned-from-facebook-for-anti-hate-speech -remarks-concerning-westboro-baptist-church.htm.
[25] "Apple bans satirical iPhone game Phone Story from its App Store," theguardian.com, September 14, 2011. http://www.theguardian.com/technology/appsblog/2011/sep/14/apple-phone-story-rejection.
[26] "Apple bans 'drone strike' app," infosecurity-magazine.com, August 31, 2012. http//www.info security magazine.com/view/27914/apple-bans-drone-strike-app/.

[27] Matt Peckham, "Apple's Wrongheaded, Dangerous Censorship of Satirical Sweatshop for iPad," techland.com, March 22, 2013. http:// techland.time.com/2013/03/22/apples-wrongheaded-dangerous- censorship-of-satirical-sweatshop-for-ipad.

overly broad content policies. We have found that all of them forbid variations of "hate speech," an undefined standard that permits blocking of politically incorrect viewpoints. Apple prohibits "offensive, mean spirited" content and information that is "unacceptable" or "inappropriate." Facebook promises to take down "hateful" messages, or "inflammatory religious content," or views that express "politically religious agendas ..." Google's policies disapprove of "hate" toward groups based on "religion ... or sexual orientation ..." or content that "advocates against" any group or organization on the subject of religion or sexual orientation. Clearly, these kinds of policies clash with the free speech values articulated by the Supreme Court, when it noted: "As a nation, we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[28] We urge the Commission, as it ponders the issues in this proceeding, to keep the values of citizen free speech front and center. In the next section below, we suggest a paradigm by which that could be accomplished.

IV. Two Conditions to Protect Citizen Free Speech on the Internet

We suggest a two-pronged *sine qua non* test before the Commission considers creating a scheme that would regulate broadband providers' provision to edge providers of enhanced or specialized services, including such things as paid priority for higher data transmission speeds or higher quality access.[29] It must first assure itself, and the public, based on substantial evidence, that such a scheme would likely *increase*, and not decrease (1) a vibrant and competitive environment for innovation, and (2) protection and promotion of the free speech interests of

[28] *Snyder v. Phelps*, 131 S.Ct. 1207, 1220 (2011).

[29] We suggest these only as prerequisites before deciding *whether* to regulate broadband provider-edge provider services agreements, but not as conditions that, if met, should necessarily counsel the Commission to regulate this area. There is also evidence that such agreements are already taking place in the market. In any event, we have indicated that a separate proceeding would be necessary to address the second prong. See text following above and n. 30 below.

citizen users of the Internet. We believe that these two elements are interrelated. While this proceeding may yield sufficient data for the Commission to decide element (1), we believe that it will not likely address element (2) sufficiently.[30] Therefore a subsequent proceeding will be necessary to address the free speech interest of the public.

Element (1) should require the Commission's judgment that there is substantial evidence that bargaining between broadband providers and edge providers respecting enhanced services and/or fast lane priority will not create an unfair, near-monopoly position for those edge providers as against existing competitors or likely start-up competitors. Insuring fair competition among edge providers has two benefits. First, a competitive marketplace among online communication platforms will help insure competitive pricing for consumers. Second, restraining the monopoly power of one or two major edge providers that dominate a single market will increase the possibility that each edge provider will be responsive to the free speech demands of citizen users.

To satisfy element (2), the Commission should demand substantial evidence that such edge providers, in their services as a platform or conduit for user-generated content, manifest *voluntary* practices and policies governing their decisions on blocking, takedowns, deliberate delays, suspensions of accounts, or other adverse treatment of user-generated content that conform to those strictures of the First Amendment as would be required if they were deemed "state actors;" subject only to excluding from consideration any aspect of First Amendment jurisprudence that would, if applied by analogy to private edge providers, work such an

[30] Other than being used in a general sense in the separate statements of some Commissioners, the concept of citizen "free speech" does not appear in the text of the NPRM itself. Further, there are only scant substantive requests for comment concerning the expressive interests of the public: e.g. NPRM, ¶ 35, page 13 and ¶ 131, page 47. Further, the Commission should request authority from Congress if it considers regulating the platforms of edge providers as a means to protect citizen end-user free speech.

interference with the edge provider's operations or services that those aspects should be excluded in the interests of "business necessity."

Because this "business necessity" approach is already embedded in federal law as part of the Civil Rights Act of 1991,[31] it is readily definable. Under the terms of the 1991 Act, a company's discriminatory practice cannot successfully be defended as "necessary" if a less discriminatory alternative is available. Because the Act requires employers to adopt the least discriminatory alternative, the Act permits only those challenged practices that are *essential* to the business.[32] We believe this is an appropriate approach to use in assessing element (2), i.e. in determining whether edge providers' content and viewpoint standards are reasonably close enough to First Amendment standards to justify regulatory protection for their receipt of enhanced service or fast track priority from broadband providers. If broadband providers desire unfettered negotiations in granting higher priority status for edge providers, the Commission must satisfy itself that on the whole, such edge providers are discriminating against *content* only when it is essential to the business itself. We believe, however, that as opposed to content discrimination, *viewpoint* discrimination by edge providers regarding citizen user-generated opinions should rarely be practiced, except when it could be justified under the free speech doctrines established by the Supreme Court.

Our test for element (2) described above is designed to be an *incentive* for edge providers to raise themselves to a higher free speech standard. The best course – for the entire industry of web-based communications platforms as well as for citizen free speech – is for edge providers to *voluntarily* tailor their practices and their policies in such a way that they would pass First

[31] Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (1991).
[32] *See id.*

Amendment muster if they were state actors rather than private businesses. This would mean that citizen viewpoints should be censored by edge providers only if they fit within existing, narrow exceptions: **obscenity;**[33] **the equivalent of broadcast indecency if accessible to minors;**[34] **fraud**;[35] **incitement to violence**;[36] **or speech that is integral to criminal or unlawful conduct**.[37] The United States Supreme Court has refused to expand the list of exceptions to free speech under the First Amendment.[38] Edge providers should *voluntarily* follow suit.[39] And that approach would not be a radical imposition. In fact, in Europe, Google, as an example, is now *mandated* to conduct a kind of quasi-judicial balancing test in which it weighs "individuals' right to privacy against a public interest in having certain information available."[40] However, companies can still develop creative alternatives in their policies that impose remedies that fall

[33] *Roth v. U.S.*, 354 U.S. 476, 483 (1957). *See Ashcroft v. ACLU*, 535 U.S. 564, 574–76 (2002) (upholding "community standards" element of federal statute that outlawed indecent and patently offensive communications over the Internet if they are deemed "harmful to minors"). But *see also Ashcroft v. ACLU* (*Ashcroft II*), 542 U.S. 656, 666–69 (2004) (finding Congress failed to consider less restrictive means to protect children online, such as blocking or filtering technology, and that was fatal to the law).

[34] *FCC v. Pacifica Found*., 438 U.S. 726 (1978); *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009); *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307 (2012); *see also Ashcroft* cases, *infra* note 32; *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) and *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) (concluding that sexually explicit communications, even if falling short of "obscenity," may, consistent with the First Amendment, be restricted where aimed at or accessible to minors).

[35] *Virginia Bd. of Pharmacy v. Citizens Council, Inc*., 425 U.S. 748, 771 (1976).

[36] *Brandenburg. v. Ohio*, 395 U.S. 444, 447–449 (1969) (per curiam). This would also include, of course, true threats of violence or intimidation as well.

[37] *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). This would include any other use of the Internet that is deemed unlawful by, for instance, the regulations established by the Federal Trade Commission, Federal Communications Commission, or other agencies of competent jurisdiction.

[38] *U.S. v. Stevens*, 559 U.S. 460, 468–69 (2009); *see also Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011).

[39] Because we stress this *voluntary* aspect, it differs from the failed and discredited "Fairness Doctrine" approach of years past. Secondly, that doctrine mandated a *forced balance of opinions*; here we promote a First Amendment, "market place of ideas" approach instead. Thirdly, under that doctrine, broadcasters (content providers) were the targets of that ill-advised mandate. On the Internet, citizen end-users who generate content are akin to broadcasters, and thus, should be the ones entitled to free speech consideration.

[40] Sam Schechner, "Google Starts Removing Search Results Under Europe's 'Right to be Forgotten," online.wsj.com, June 26, 2014. http"//online.wsj.com/articles/google-starts-removing-search-results-under europes-right-to-be-forgotten-140377402.

short of censorship, blocking, or Internet takedowns.[41] Nor does this mean that edge providers should not be able to police their own platforms for blatantly false advertising claims.[42] In the end, however, those companies should err on the side of free speech. That approach will serve their customers and users which in turn will better insure the long-term success of their innovations, and it will also serve their industry by fostering a healthy, honest free speech precedent to be followed in the future by their innovational partners and their industry successors.

CONCLUSION

The Commission should only exercise its narrow authority under section 706 and ancillary jurisdiction under Title I regarding the Internet; and if it determines that additional authority is needed, it should seek it from Congress. It should not view edge providers merely as beneficiaries of its future regulations, but as obligors with free speech responsibilities to the public. In light of the pattern of viewpoint censorship committed by the largest edge providers, it is appropriate that before considering regulations impacting broadband providers' agreements with edge providers for pay-for-priority or similar plans creating "fast lanes" for data or enhanced services, the Commission first determine that: (1) such agreements will not likely damage the competitive innovational marketplace, and (2) edge providers can and will generate

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[41] *See* Danielle Keats Citron, & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B. U. L. REV. 1435 (2011) (providing a helpful discussion of the topic).

We do not endorse all of the proposals, however, as the authors propose blocking free-speech troublesome categories such as "hate speech," or speech that inflicts several emotional distress, which was a category rejected by the Supreme Court in *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988), as well as suggesting other categories for blocking that are equally problematic. On the other hand, we do support the editorial First Amendment rights of websites, and blogsites, for example, as opposed to new media "gatekeepers," to be selective about the expression they allow on their sites, much as a newspaper can select what news it covers or what letters to the editor they permit to be printed.

[42] *See* Sarah Perez, "Apple is Taking Action Against Fake Ratings on the App Store," tech crunch.com, June 13, 2014. http://tech crunch.com/2014/06/13/apple-is-taking-action-against-fake-ratings-on-the-app-store/.

voluntary policies and practices that aspire to First Amendment values, excepting only matters that are of "business necessity," all in accordance with the recommendations of this Comment.

Dated this 14th day of July, 2014.

Respectfully submitted,

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