

Chairman Tom Wheeler
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Dear Chairman Wheeler:

In late March a [WSJ story](#) revealed that as the Net Neutrality debate swirled here in Washington, for five years Netflix intentionally throttled the video quality of the customers of wireless carriers AT&T and Verizon, while leaving the customers of T-Mobile and Sprint unmolested and favored by its discriminatory policy.

Disturbingly, [WSJ's Holman Jenkins, Jr. writes](#):

“The company did so for good reason—to protect users from overage penalties. But it never told users at a time when Netflix was claiming carriers generally were deliberately slowing its service to protect their own TV businesses—a big lie, it turned out.” (Emphasis added)

You may remember that Netflix played a central role in decrying the potential for throttling, (among other purportedly anti-competitive practices by ISPs) as the Open Internet rules (OIO) were being crafted. The Commission's majority bought fully into this specious narrative because it supported issuing its rules, noting that:

“...broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls. Such conduct would, as the Commission concluded in 2010, “reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.” In other words, when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply.”

Netflix's own comments before the agency in the docket bark this same spiel. But they're more “nuanced,” too, in particular stating:

“Through an open Internet, the consumer, not the ISP or the edge provider, picks the winners and the losers.” (Emphasis added)

It is the rough equivalent of saying, “Trust us. Netflix would never engage in untoward, gatekeeping acts that could harm the Open Internet. Never. That's just not our schtick.”

It turns out, however, that these written comments made before the FCC were simply a charade. We know now that Netflix, as an edge provider, was saying one thing in public but doing something quite different in private, actively picking winners (T-Mobile and Sprint) and losers (AT&T and Verizon) in an intentional and anti-competitive effort to skew the competitive wireless marketplace to its liking.

The Commission must properly and forcefully address this matter.

While MediaFreedom has long taken issue with the concept of regulatory Net Neutrality, as

well as the rules associated with it in the OIO, those rules are nevertheless the law. Netflix's behavior tortiously interferes with the healthy, organic growth of the Open Internet – its virtuous cycle / circle – choking consumer demand by intentionally damaging the reputation of rivals in the marketplace. It is concrete behavior, not speculation. It is hard to imagine a problem more fitting for the Commission to correct than this.

Further, it is inconceivable that this behavior should be allowed to stand. Consumers will suffer. Openness will cease. “Competition, competition, competition,” to use your own words, will founder, being easily perverted by edge gatekeepers to their selfish ends, with little fear of retribution.

In enacting the OIO, the Commission proudly said it was establishing itself as the Internet's cop on the beat, *not half cop*. It is time to slap the cuffs on edge provider Netflix and take it on a well-deserved perp walk.

Thankfully, Netflix does not need to be a common carrier for the Commission to police this willful act against the Open Internet. The company's egregious malfeasance can be addressed via the FCC's Section 706 authority, which the agency avers “provide[s] an express, affirmative grant of authority to the Commission,” to protect the Open Internet and its so-called virtuous cycle of development. Though the Commission goes out of its way to note that its OIO bright-line rules apply only to ISPs, the affirmative, independent grant within Section 706 to encourage broadband deployment remains a duty that stands above the rules' parochial Net Neutrality and Title II proscriptions.

In this regard, Netflix's action can be policed through the OIO's broad no-unreasonable interference / disadvantage standard (Internet Conduct Standard), which the FCC states:

“...represents our interpretation of sections 201 and 202 in the broadband Internet access context *and, independently, our interpretation—upheld by the Verizon court—that rules to protect Internet openness promote broadband deployment via the virtuous cycle under section 706 of the 1996 Act.*” (Emphasis added)

Stated more succinctly, MediaFreedom believes that *any conduct* which threatens the Open Internet and its virtuous cycle is fair game for the FCC to reconnoiter via the Internet Conduct Standard / examination.

Netflix has violated the Internet Conduct Standard by limiting end-user control through obfuscation of transparency / choice, distorting competitive markets through intentional subterfuge, and bilking AT&T and Verizon consumers by willfully providing them less than what they paid for. It has harmed the open nature of the Internet through its actions – deceptive, conniving behavior perpetuated repeatedly over a five year period that was designed to make it appear like AT&T and Verizon were the culprits of Netflix's poor video quality when they plainly were not, all to gain regulatory and market advantage.

If the Commission somehow believes it lacks the jurisdiction to police Netflix via its no unreasonable interference standard, the FCC also has at its disposal its ancillary, Title I jurisdiction, properly tethered to its 706 authority, to promote Internet openness. While MediaFreedom harbors general concerns about such “flexible” authority, this option, if narrowly tailored, may also permit the FCC to combat the scourge perpetuated by Netflix.

The bottom line is this: The public interest demands that the Internet's so-called cop on the beat – the FCC – deny a windfall to Netflix for its bad faith, gatekeeper-narrative fraud, one which was spun (along with other shenanigans) openly and notoriously in FCC-sponsored fora, academic “research,” think-tank advocacy, industry association lobbying, direct congressional lobbying, “consumer rights” / partisan group activism, and press release, traditional media, and social media communications. It was not accidental. It was a practiced, calculated lie by Netflix to achieve a tactical win and reap a subsidy.

To this end, the Commission should significantly fine the company with a monetary penalty far in excess of that which the FCC imposed for recent apparent throttling “violations.” In accord with its rules, it should also censure, suspend or disbar those who trafficked in the fraud before the FCC. Further, Netflix's comments should be stricken from the record, or at the very least heavily asterisked, noting Netflix's admitted yet seemingly remorseless transgressions. This, of course, should lead the agency to issue an FNPRM to revisit, revise and supplement the OIO record, it being built in large measure on a fallacy.

In short, the agency must send a powerful message to others in the ecosystem – especially FCC-issued, get-out-of-jail-card-holding edge companies – that this type of anti-consumer, market-disabling behavior is abhorrent and will not be tolerated. Though the Chairman and his two other majority Commissioners have all but invited edge companies to do as they want in this regulatory milieu, they owe it to consumers and “competition, competition, competition” to rectify the debilitating signal they have sent through the OIO, which clearly encourages and promotes such reprehensible activity.

Respectfully submitted,

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