

In this document I submit evidence for why the FCC should reclassify broadband as a public utility telecommunications service under Title II.

Throughout years of debate on open Internet protections, cable and telecommunications carriers have continually argued that strong net neutrality rules will hurt investment. They maintain that regulation to forbid discrimination in network management would cause them to back away from building and upgrading broadband infrastructure nationwide. These flawed arguments are intended to deter FCC Chairman Genachowski from imposing nondiscrimination rules for fear that investment will decline or even come to a halt, leaving the U.S. even farther behind in broadband penetration than it already is. So far, the arguments have worked.

But this is far from the first time the FCC has shown a lack of political courage or will to protect consumers in the face of powerful industry pressure. History shows us that the FCC has presided over a progressive decline in investment and competition in the Internet space over the last decade, due to deregulation brought on by the agency's willingness to bend to pressure from the cable and telecommunications lobby Goliath. From placing broadband Internet access under a weak regulatory regime in 2002 and 2005, to weakening infrastructure build-out requirements from communications franchising rules in 2006, the FCC has erased more and more important policies that ensured competition and innovation in the Internet marketplace.

It is time for the FCC to end this downward spiral of deregulation, and to stand up for what is best for the economy, the public, and the future of competitive business. Contrary to the agency's actions earlier this decade, it is not the absence of regulation that will ensure investment and consumer protection. In fact, without the strong likelihood of a financial return, companies cannot be trusted to spend funds strictly for the benefit of the public without adequate regulation. (I wish I had a penny for the number of times this was proven true.) An effective government demonstrates the leadership necessary to ensure that the free market system operates fairly. It proactively eliminates opportunities for companies to place the bottom line before the public interest.

The following review of Internet policy deregulation in the last decade should be a significant cause for alarm.

From Competition to Duopoly

The 1990s was the age of dialup Internet, with its myriad of Internet service providers vying for the attention of consumers. America Online, Earthlink, NetZero – many of these companies still serve low-income and rural households.

The kind of intense competition available for dialup, but not for cable, DSL, FiOS, or mobile wireless, is due to “common carriage” rules imposed on carriers by Title II of the Communications Act of 1934. Among other things, Title II requires these companies to open up their networks to competing Internet service providers. Telephone service has had to abide by these requirements for a century or more (and thus, dialup does too).

Cable carriers soon entered the Internet service provision market – but in 2002, their massive lobbying might convinced the FCC not to impose the same requirements for cable modem service. Cable carriers used the same threats about investment to avoid common carriage that they are using today to avoid net neutrality rules: they said competition from other Internet service providers would place too much of a financial burden on them to carry out upgrades and build-out needed for increased bandwidth capacity, or would diminish their incentive to invest if they cannot monopolize the returns on that investment.

The result of this harmful FCC decision is evident in today’s cable broadband market: subscribers in most markets can receive cable Internet only via one incumbent cable carrier. The carrier gets to name the price for its services, and unsurprisingly, Internet users pay much more for slower service than those in other nations do. They also receive about half the broadband speed advertised by their providers.

In 2005, in another radical policy departure in support of large incumbents, the FCC extended the same treatment to telephone company broadband offerings. The agency reclassified DSL, which is transmitted via the same phone lines used to provide dialup, removing it from Title II of the Communications Act. The ruling thus removed common carriage requirements on DSL providers, diminishing consumer protections for the vast majority of high-speed Internet service users.

Today, DSL carriers offer similarly high prices for snail-like speeds compared to the broadband offerings of other developed and even developing nations. They also fail to provide consumer choice for DSL service in most regions.

In 2006, deregulation continued when the FCC dramatically eased build-out requirements in local franchising laws across the United States. Franchise agreements are made between local and state governments on one hand, and providers of video services like

cable television on the other. The agreements dictate the terms by which companies build their video systems, which typically are the same systems they use to provide Internet service. The Bush-era FCC's decision limited state and local governments' ability to require companies to connect underserved and unserved regions in their own communities. Instead, it permitted carriers to cherry-pick lucrative areas to provide broadband service.

The Investment Scare Continues

For a few short months, current FCC Chairman Genachowski gave the public impression that he understood the importance of an effective regulatory agency. He asked an independent team to develop a National Broadband Plan. He spoke in support of strong network neutrality rules applicable to both wireline and wireless networks. Later, in response to new challenges, he developed an agenda to "reclassify" broadband under Title II, albeit with some new limitations on FCC authority.

He even commissioned the Berkman Center for Internet & Society at Harvard University in 2009 to study "open access" in the broadband context, tipping his hat to the Telecommunications Act of 1996, which encouraged line sharing to ensure broadband competition.

The Berkman study came out with strong, compelling evidence, based on international comparisons and economic analysis, that line sharing is a critical component of a country's strong broadband development. In the countries studied, the report stated,

"open access policies – unbundling, bitstream access, collocation requirements, wholesaling, and/or functional separation – [...] provided an important catalyst for the development of robust competition which, in most cases, contributed to strong broadband performance across a range of metrics" (13).

But after asking for public comment on the Berkman report, the FCC did not follow through on the report's recommendations. Blair Levin, former director of the National Broadband Plan team, poured cold water on any hopes of FCC action on the issue in an interview earlier this year.

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Instead, the FCC hosted closed door meetings without public interest involvement to develop a watered-down industry compromise on what only the carriers could believe passes for network neutrality. Worse, because the agency has not acted to make sure that it can oversee broadband access, it is unclear how any net neutrality rules it creates could be enforced. All because some large providers threaten to withhold investment in their infrastructure if the FCC dares impose any tangible regulations on them. (Yet somehow, Comcast, AT&T, and Verizon can afford to pay for expensive commercials, billboards, sponsorships, and outdoor advertising like virtually no other commercial industry in business today.)

Time for a Stronger FCC

When carriers warn of the looming downfall of investment due to network neutrality rules or broadband reclassification, their scare tactics should rouse considerable feelings of *déjà vu* in any historian or longtime advocate of communications policy. These are not new arguments. They are tried-and-true weapons used to weaken the FCC's political will. And the long-term memory loss of the Washington policy world provides a perfect excuse for their continued use.

The solution to the FCC's rightful concern about investment is not the abandonment of net neutrality protections. Doing so would leave carriers free to discriminate against or block traffic on the Internet, gutting free expression, technological innovation, and competition in online commerce. Doing so would also fail to provide any concrete assurance that carriers will in fact invest to expand and upgrade broadband networks, as they promise to do.

If the FCC is truly concerned with investment, it will strengthen its competition policy, not weaken it. It will create rules to ensure consumer choice and infrastructure development, instead of bowing to carriers' intimidation tactics by enacting diluted, unenforceable network neutrality provisions.