

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	DA No. 14-211
)	

COMMENTS OF THE CONSUMER ELECTRONICS ASSOCIATION

The Consumer Electronics Association (“CEA”)¹ respectfully files these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice² requesting comment on how the Commission should proceed in light of the D.C. Circuit’s guidance in the *Verizon v. FCC* opinion.³

In theory, CEA supports an open Internet and we believe that the *Verizon* opinion provides a way forward for the Commission to re-establish open Internet rules through a different statutory vehicle. The Commission must exercise extreme caution, however, if it articulates a new legal framework. CEA applauds Chairman Wheeler’s commitment that

¹ CEA is the principal U.S. trade association of the consumer electronics and information technologies industries. CEA’s more than 2,000 member companies lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services, that are sold through consumer channels. Ranging from giant multi-national corporations to specialty niche companies, CEA members cumulatively generate more than \$208 billion in annual factory sales and employ tens of thousands of people in the United States.

² *New Docket Established to Address Open Internet Remand*, Public Notice, DA No. 14-211 (Feb. 19, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0219/DA-14-211A1.pdf (“Public Notice”).

³ See *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Jan. 14, 2014), *available at* [http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf).

“[r]egulating the Internet’ is a non-starter,”⁴ and his willingness to permit competitive markets to thrive.⁵ As a competitive market, broadband Internet providers do not need additional regulation to preserve an open Internet. Reinstating the non-discrimination and no-blocking rules as a preventative measure would merely increase regulatory burdens without a corresponding benefit to consumers. Should the Commission decide to act, it should recognize the limits of its own authority and also consider the key facts about the broadband market.

I. COMPETITIVE FORCES PRESERVE THE OPEN INTERNET

Competitive market forces naturally encourage an open Internet because competition empowers consumers to choose the services that best suit their needs. Today, consumers have a choice among many national and regional wireline broadband providers and, according to 2010 data, 97.8% of the population has access to two or more mobile broadband providers.⁶ This choice makes it possible for consumers to switch services if their provider’s quality of service falls below expectations.

While broadband providers work to increase broadband deployment, the Commission has not been idle. Its programs and initiatives that encourage broadband deployment have a positive effect on consumer choice. For example, the Commission’s ongoing proceedings exploring the allocation of unlicensed spectrum in the 3.5 GHz and 5 GHz bands will ultimately enable

⁴ Speech, Prepared Remarks of FCC Chairman Tom Wheeler, at 3 (Dec. 2, 2013), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324476A1.pdf (“Wheeler Remarks”).

⁵ *Id.* at 3 (“Competitive markets produce better outcomes than regulated or uncompetitive markets.”).

⁶ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Report, 28 FCC Rcd 3700, ¶ 2 (2013). See FCC, INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2012, at 10 (Dec. 2013), http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1224/DOC-324884A1.pdf.

broadband providers to expand the services they offer consumers.⁷ Overall, increased broadband availability for mobile and wireline connections inoculates the market against anticompetitive behavior.

In addition, the Commission should recognize that competitive forces can be measured by more than the number of competitors a consumer may choose. Consumer demand for edge services acts as positive competitive pressure in two ways. First, the pressure to deliver edge services drives broadband providers to compete to deliver those services efficiently.⁸ Consumers will switch providers, complain, or incentivize others to develop competing applications if they are unable to use edge services. Second, strong demand for edge services means that blocking or discrimination against these services invites close regulatory, media, and public scrutiny. Perhaps more than any regulation, the potential for damage to a provider's reputation through negative media attention and investigation into its alleged practices discourages behaviors contrary to open Internet principles.⁹

These competitive circumstances suggest that Commission action to supplement its regulatory authority is not necessary at this time. Moreover, the Public Notice does not identify ongoing harms the Commission seeks to remedy. Imposing *ex ante* rules would only increase

⁷ See *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Notice of Proposed Rulemaking and Order, 27 FCC Rcd 15594 (2012); *Revision of Part 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, Notice of Proposed Rulemaking, 28 FCC Rcd 1769 (2013).

⁸ This is part of the "virtuous cycle" the Commission described in its *Open Internet Order*. See *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, ¶ 14 (2010) ("*Open Internet Order*").

⁹ See, e.g., Brendan Sasso, *AT&T Backs Down from FaceTime Restriction Following Net-Neutrality Complaints*, THE HILL (Nov. 8, 2012), <http://thehill.com/blogs/hillicon-valley/technology/266937-atat-backs-down-from-facetime-restriction-following-net-neutrality-complaints>.

regulatory uncertainty without any corresponding benefit to consumers or the broadband industry.

II. IF THE COMMISSION ACTS, THEN IT MUST GIVE EFFECT TO THE LIMITS ON ITS AUTHORITY, AS ARTICULATED BY THE *VERIZON* COURT

The *Verizon* decision articulates a possible path forward for the Commission to reinstate open Internet rules using section 706 of the Telecommunications Act (“Act”).¹⁰ However, the decision also clearly states that section 706 is not an unlimited grant of power.

The court identifies two limiting principles applicable to both section 706(a) and (b). First, the whole of section 706 must be read in conjunction with other provisions of the Communications Act, which are limited by their language and previous decisions interpreting the boundaries of the Commission’s ancillary authority.¹¹ Second, the Court recognized that any regulations must fulfill section 706’s specific statutory goal: to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”¹² This suggests that the Commission should focus on the limited mandate of section 706, which is directed at the deployment of broadband capacity to end-users, not applications or services. In contrast, an all-encompassing regulation significantly increases the likelihood of unintended consequences, especially because the Commission would be crafting new rules based on sporadic evidence of harm.

¹⁰ *Verizon*, No. 11-1355, slip op. at 4; 47 U.S.C. § 1302.

¹¹ *Id.* at 26.

¹² 47 U.S.C. § 1302(a); *Verizon*, No. 11-1355, slip op. at 26-27, 30 (the scope of section 706(b) is limited “both by the boundaries of the Commission’s subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment”).

The Commission must not fall into the trap of creating broad or vague regulations in the interest of firmly establishing its authority to regulate broadband providers' potential conduct.¹³ New nondiscrimination and no-blocking rules will create uncertainty for broadband providers. Even if it fully intends to limit its enforcement activities,¹⁴ this Commission cannot guarantee that future Commissions or courts will not expand the scope of any rules beyond their original intent.

III. IF THE COMMISSION ACTS, THEN IT SHOULD TAKE A CAUTIOUS AND FACTUAL APPROACH

CEA appreciates the Commission's decision to not immediately move to reclassify Internet services as telecommunications services under Title II.¹⁵ Reclassification would be a solution out of proportion to the perceived problem, especially given that discriminatory behaviors are mitigated by a competitive market. Furthermore, reclassification—an option that the Commission itself thoroughly considered and rejected¹⁶—would reignite an unproductive and unnecessary debate.

¹³ Although the Commission demonstrated in the *Open Internet Order* that broadband providers have theoretical incentives to engage in blocking or discriminatory conduct, it cites few instances where such conduct has occurred. *See Open Internet Order* ¶¶ 35-37 (citing only two instances—*Madison River* and *Comcast*—where the Commission took enforcement action).

¹⁴ Wheeler Remarks, at 4 (“Here’s the bottom line on competition. Our goal should be to ask how competition can best serve the public—and what, *if any*, action (including governmental action) is needed to preserve the future of network competition in wired or wireless networks.” (emphasis in original)).

¹⁵ Public Notice, at 2 (requesting comment on what actions the Commission should take consistent with its authority under section 706).

¹⁶ *See Open Internet Order* ¶ 117 (grounding the Commission’s authority to implement open Internet rules in section 706). *See also* Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, FCC, at 3 (May 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf (“But this full Title II approach would trigger a detailed regulatory regime (comprising 48 sections of the United States Code) that the Commission has successfully refrained from applying to broadband Internet

We strongly agree with Chairman Wheeler that the Commission should not impose new regulations on a competitive market “just because we can.”¹⁷ Prudence dictates that the Commission should tailor regulations to address specific and demonstrated harms. So far, the record shows that blocking and discrimination are rare behaviors.¹⁸ They should not form the basis of potentially far-reaching and overbroad regulations.

services. Although there would be clear rules of the road for broadband, those rules would be inconsistent with the current consensus approach of regulatory restraint.”).

¹⁷ Wheeler Remarks, at 4.

¹⁸ *Open Internet Order* ¶¶ 35-37.

IV. CONCLUSION

Competition puts pressure on broadband providers to offer the best Internet experience possible to consumers. After all, consumers will choose broadband providers that best deliver the services they demand. Overbroad regulations will stifle competition and may curtail legitimate network management practices. If the Commission chooses to implement new rules, it must do so very carefully.

Respectfully submitted,

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