

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
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Open Internet Remand ) GN Docket No. 14-28  
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**COMMENTS OF CONSUMERS UNION**

**I. Introduction**

Consumers Union appreciates the opportunity to comment on the most effective way for the FCC to proceed in its efforts to protect an open, affordable, and accessible Internet. The recent *Verizon v. FCC* decision by the U.S. Court of Appeals for the D.C. Circuit created uncertainty regarding the Commission’s ability to ensure that all Internet users are protected against any anticompetitive, anti-consumer behavior by an Internet Service Provider (ISP). Consumers Union appreciates the Commission’s decision to fully explore what it is able to accomplish under Section 706 of the Communications Act. At the same time, we believe the Commission should seriously consider Title II as a way forward to address any limitations in its ability to meaningfully protect and ensure an open Internet.

**II. RECLASSIFICATION UNDER TITLE II IS THE BEST WAY TO PROTECT CONSUMERS MOVING FORWARD**

Consumers agree that they deserve nondiscriminatory and unfettered access to the online content that they value. A February 2014 national survey by *Consumer Reports* found that broadband subscribers are opposed to ISPs interfering with their access to the

Internet, with seventy-one percent of respondents saying that they would attempt to switch to a competing service provider if their provider blocked or slowed down popular services such as Netflix, Pandora, and Skype.<sup>1</sup> Unfortunately, these are the exact types of threats that consumers now face after the federal court's ruling in *Verizon vs. FCC*.

The recently struck-down nondiscrimination and no-blocking rules leave ISPs free to experiment with anticompetitive and anti-consumer practices that are contrary to the longstanding principles underlying the Open Internet rules. When originally proposed, the rules were prompted by concerns that Internet providers would use their dominance to censor or discriminate against services of competitors or non-affiliated content providers. Today, strong regulatory mechanisms continue to be necessary for affordable and accessible broadband, and to ensure that large incumbent providers do not degrade or obstruct access to content that consumers have paid for and rightly expect to receive.

In overturning the non-discrimination and no blocking rules, the D.C. Circuit Court of Appeals noted that the Commission did retain its authority over broadband under Section 706. In doing so, it affirmed the notion that the Commission has an important role to play in the formation of broadband policy. However, we believe that Section 706 is not the best path forward to restoring the protections against discrimination and blocking. We are concerned that the provision, which gives the FCC the ability to use its expert judgment to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” is too general,

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<sup>1</sup> See Press Release, Consumer Reports, “71% of U.S. Households Would Switch From Providers That Attempt to Interfere With Internet” (Feb. 18, 2014), *available at* <http://www.consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm> (last visited Mar. 24, 2014).

lacks meaningful mechanisms to deter harmful conduct by ISPs, and provides little clarity about the extent to which a broadband ISP can interfere with traffic before it is deemed to have infringed upon consumers' rights.

We agree with other public interest stakeholders that reclassification of broadband as a telecommunications service under Title II of the Communications Act provides a clear path forward to achieving the underlying principles of an open Internet. Reclassification would firmly bring broadband providers' treatment of Internet traffic under the jurisdiction of the Commission, allowing it to enact meaningful consumer protections in a space that has important implications for the entire video marketplace. This regulatory framework has protected consumers in the traditional phone marketplace and is appropriate for broadband Internet access. Title II would clearly restore the FCC's ability to forbid discrimination and blocking, promote competition, and ensure network reliability in emergencies and at all other times.

### **III. THE CURRENT STATE OF THE ISP MARKET FURTHER REINFORCES THE NEED FOR STRONG NET NEUTRALITY RULES**

The need for strong rules is all the more important in light of the current state of the ISP market. Consumers are increasingly turning to broadband video services for their viewing options. But broadband providers have a great deal of control over the information that passes through their networks, and many of the largest ISPs are becoming increasingly vertically integrated with programmers or have their own content. With control over both the pipes and the content, these providers have the leverage and incentive to favor their own content over the programming of their competitors and engage in practices that prevent their competitors' content from reaching consumers. A

robust set of rules is necessary to prohibit unfair methods of competition and to prevent ISPs from discriminatorily impeding competitors' online delivery of programming. This is especially important in light of the trend towards consolidation in the market, and in light of proposed deals such as the recently announced merger between Comcast and Time Warner Cable. This proposed deal could result in a single behemoth that could control much of the nation's access to high-speed Internet, and make it difficult for competitors' video offering to reach consumers.

#### **IV. THE COMMISSION SHOULD LOOK MORE CLOSELY AT PEERING ARRANGEMENTS, PROVIDERS' TRANSPARENCY PRACTICES, AND THEIR IMPACT ON CONSUMERS**

Already some Internet Service providers are using their leverage and position to strike unprecedented deals with content companies. Without strong network neutrality rules in place, these deals are only likely to increase in frequency. Just this week, for example, it was reported that Comcast and Apple are in discussions about a set-top box arrangement that would treat content streamed from Apple as a managed service, allowing Apple content to be delivered free from the congestion problems that would otherwise afflict regular Internet traffic.<sup>2</sup> Consumers Union has concerns about such agreements which provide special treatment to deep-pocketed companies and could negatively impact consumers and smaller competitors alike.

Similarly, Consumers Union recently wrote to the Commission and Department of Justice to express concern over the peering arrangement struck by Comcast and Netflix, after a series of service disruptions and streaming delays for Netflix customers.

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<sup>2</sup> See Chris Morran, "Apple, Comcast Chatting About Streaming TV Service That Would Make End-Run Around Net Neutrality," CONSUMERIST (Mar. 24, 2014), *available at* <http://consumerist.com/2014/03/24/apple-comcast-chatting-about-streaming-tv-service-that-would-make-end-run-around-net-neutrality/> (last visited Mar. 24, 2014).

Netflix agreed to pay to improve the streaming of its content on Comcast. The Open Internet rules have always discouraged companies from anticompetitive, anti-consumer actions that selectively harm the ability of consumers to fully take advantage of the opportunities enabled by the Internet. Selectively improving the service of one edge provider is a slippery slope that would favor only edge providers with the resources to pay for high-tier throughput.

Furthermore, we urge the Commission to consider carefully whether Comcast's actions in this instance violated the Open Internet's transparency rule. If the FCC determines that the actions do not violate the rules, it should consider modification of the rules so that consumers are properly informed about these peering disputes and the reasons behind any service disruptions.

## **V. Conclusion**

Consumers Union shares the Commission's interest in preserving the ability for consumers to access an open, affordable, and accessible Internet. We strongly believe that Title II is the best path to reaching this goal. We appreciate that the Commission will explore other ways to protect a free and open Internet. We look forward to working with the Commission during this important process.

Respectfully submitted,



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