

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127
)	
Broadband Industry Practices)	WC Docket No. 07-52

COMMENTS OF THE BENTON FOUNDATION

The Benton Foundation respectfully submits these comments in response to the *Public Notice* by the Wireline Competition Bureau released on February 19, 2014, in GN Docket 14-28.¹ The Commission sought comment on how it can use its authority under Section 706 of the Communications Act to fulfill the goals of the Open Internet Order’s no-blocking and non-discrimination rules.²

The Benton Foundation works to ensure that media and telecommunications serve the public interest and enhance our democracy. Benton pursues this mission by seeking policy solutions that support the values of access, diversity, and equity, and by demonstrating the value of media and telecommunications for improving the quality of life for all. Benton is also a member of the Commission’s Consumer Advisory Committee and through which Benton is a

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

² Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules, Feb. 19, 2014, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0219/DOC-325654A1.pdf; Public Notice, GN Docket No. 14-28 (Feb. 19, 2014), at 2.

member of the broadband subcommittee. Benton has long advocated for ubiquitous telecommunications access for all citizens.

The Benton Foundation welcomes the Commission's renewed resolve to protect the Open Internet after the recent decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) striking down the Commission's Open Internet Order. Open Internet rules are necessary for the Internet to continue to be a boon to commerce and our democracy, and they remain an important policy goal of the Commission. However, the Commission's current proposal to adopt new rules using its Section 706 authority is problematic for several reasons discussed in these comments. Instead, the Commission should strongly consider the merits of protecting the Open Internet through Title II reclassification.

I. Preserving the Open Internet remains an important and vital policy goal

The Commission originally identified preserving the Open Internet as an important policy goal nine years ago. In its 2005 Policy Statement, the Commission adopted a policy ensuring consumer access to online content and devices. After the D.C. Circuit struck down the Commission's attempt to enforce the policy statement in *Comcast v. FCC*,³ the Commission adopted a rule protecting the Open Internet in 2010. The resulting Order, among other things, prevented Internet Service Providers (ISPs), such as Verizon, Comcast, and AT&T, from blocking and discriminating against specific content that travels over their networks.⁴ The Order also discussed at length ISPs' perverse incentives to block, degrade, or otherwise harm Internet content, especially third-party services that compete with services the ISP also offers.⁵ Despite these harmful incentives and a discussion of specific instances of problematic behavior,⁶ critics

³ 600 F.3d 642 (D.C. Cir. 2010).

⁴ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) (“*Order*”).

⁵ *Id.* at 17915-25.

⁶ *Id.* at 17925-27.

of the rule still decried it as a solution in search of a problem.⁷ The D.C. Circuit did not see it that way: it properly accepted the argument that there is a true need for Open Internet regulation based on the Commission’s findings and expertise in this area.⁸

The policy goal of preventing content discrimination remains just as important today as it was in 2005 and 2010, especially because harmful ISP incentives and behavior continue to plague the Internet ecosystem. At the *Verizon v. FCC* oral argument, Verizon admitted it would like to enter into arrangements allowing it to discriminate based on content or content provider. Consistent with this admission, consumers accused Verizon of throttling Netflix and Amazon shortly after the *Verizon* decision.⁹ Even though concrete evidence of these allegations did not surface, that is partially due to the lack of transparency into ISPs’ specific equipment configuration and the inability to precisely determine the cause of slow Internet speeds.

It is particularly important to enact strong Open Internet rules because of the disproportionate impact of an ISP’s discriminatory behavior on vulnerable populations, such as people of color, low-income populations, seniors, people with disabilities, and rural communities. These groups of traditionally-marginalized voices rely on the Internet as a critical—and unique—tool for communication and empowerment. The Internet provides a means for these communities to dispel misperceptions and stereotypes that restrict their political,

⁷ *E.g.*, Daniel Brenner, *Net Neutrality: A Solution in Search of a Problem*, Forbes (Sept. 25, 2012), <http://www.forbes.com/sites/ciocentral/2012/09/25/net-neutrality-a-solution-in-search-of-a-problem>.

⁸ *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (“Although Verizon dismisses the Commission’s assertions regarding broadband providers’ incentives as ‘pure speculation,’ . . . those assertions are, at the very least, speculation based firmly in common sense and economic reality.”) (“*Verizon*”).

⁹ Peter Bright, *Verizon Could Be Throttling Netflix and Amazon, but There’s No Actual Evidence of it*, Ars Technica (Feb. 5, 2014), <http://arstechnica.com/information-technology/2014/02/verizon-could-be-throttling-netflix-and-amazon-but-theres-no-actual-evidence-of-it>.

social, and economic participation.¹⁰ It enables them to connect with others, express their viewpoints, and obtain basic information and resources.¹¹ Equal access to Internet content thus means equal access to opportunities that are vitally important to vulnerable populations in light of the disadvantages and discrimination they face.

Benton appreciates the Commission's efforts to promote an Open Internet that will continue to benefit vulnerable populations and all Internet users. However, we encourage the Commission to take a close look at the issues surrounding use of Section 706, and consider a pathway to achieve meaningful protections through Title II reclassification.

II. Section 706 authority does not support a workable Open Internet standard

The Commission has indicated its preference to enact Open Internet standards under Section 706 authority and to enforce those standards on a case-by-case basis. It should carefully consider the problems with this approach, chief among them the limits of Section 706 and the uncertainty and burden of case-by-case determinations.¹²

A. The D.C. Circuit's restrictions on Section 706 authority prevent the Commission from effectuating the core principles of an Open Internet

Section 706 authorizes the Commission to regulate advanced telecommunications capability—including broadband access providers—as necessary to promote its deployment.¹³

Although this authority appears broad, the D.C. Circuit in *Verizon* limited the provision: Section

¹⁰ Comments of Media Action Grassroots Network et al., *Preserving the Open Internet*, GN Docket No. 09-191 (Jan. 14, 2010), at 4-5.

¹¹ Ex Parte Presentation by Media Access Project et al., *Preserving the Open Internet*, GN Docket No. 09-191 (Sept. 16, 2010), at 2.

¹² Benton Foundation supports the Commission's exploration of preempting state laws that restrict municipal entry into the broadband market through its Section 706 authority. Municipal broadband can improve poor competitive markets, or can provide the first high-speed broadband connection in rural areas. States should not restrict these opportunities.

¹³ 47 U.S.C. § 1302(a) (2014); *Verizon*, 740 F.3d at 635.

706 cannot be used to impose common carrier obligations, such as the nondiscrimination principle, on “information services,” such as broadband providers.¹⁴

Non-discrimination lies at the heart of the Open Internet. For example, the Commission found—and the court agreed—that broadband providers have an incentive to discriminate against and among edge providers by charging them fees either to exclude competitors or grant prioritized access to end users.¹⁵ Permitting these practices would directly contravene the principles underlying an Open Internet, yet the D.C. Circuit indicated that any standard appearing to apply a non-discrimination obligation on an information service would be rejected as common carrier treatment. Thus, without the ability to enforce a non-discrimination principle on broadband providers, the Commission cannot ensure an Open Internet.

Similarly, a Section 706 scheme may allow for a robust no-blocking standard, but would simultaneously undermine a non-discrimination standard. The D.C. Circuit suggested that the no-blocking rule could be applied to an information service through Section 706 if the service offered were defined as “access to subscribers generally” at a basic level, while leaving room for individual negotiations.¹⁶ This approach, unfortunately, would undermine a non-discrimination standard because these individual negotiations, by definition, would lead to discrimination based on content. In essence, the exception would swallow the rule as content providers with economic means increasingly negotiate with ISPs for faster transmission. This would severely disadvantage groups that cannot afford individual negotiations, such as non-profit, community-based organizations. The ultimate victims of this scheme would be the vulnerable populations who most need access to the services provided by these groups.

¹⁴ *Verizon*, 750 F.3d at 650 (“[G]iven the manner in which the Commission has chosen to classify broadband providers [as information services], the regulations cannot stand.”).

¹⁵ *Id.* at 645-46.

¹⁶ *Id.* at 658.

Given this fundamental tension between the goals of robust Open Internet principles and the express prohibition on treating information services as common carriers, standards established under Section 706 would provide an inadequate level of protection.

B. Relying on case-by-case determinations provides little certainty and is less effective than a prophylactic rule

The proposal to enforce Open Internet principles through case-by-case adjudication is problematic because it opens the Commission to new legal liability and burdens all stakeholders, including the Commission itself.

First, a case-by-case approach does not protect against “as-applied” challenges for applying obligations that amount to common carriage. The D.C. Circuit’s treatment of the Commission’s data roaming rule in *Cellco Partnership v. FCC* is illustrative. There, the court cautioned that the Commission’s case-by-case determinations regarding its “commercially reasonable” standard could still be challenged as overly restrictive and, thus, as imposing per se common carriage obligations.¹⁷ A similar risk is present here. If the Commission were to determine through an individual adjudication that a broadband provider had engaged in discriminatory conduct, the mere fact of having performed the case-by-case analysis would not shield the Commission from a challenge that it exceeded its Section 706 authority. Similarly, accumulating too much precedent, which could in total give rise to common carrier treatment, would also subject the agency to legal challenge. The likely end result would be less robust enforcement of Open Internet rules, and more litigation for the agency.

Second, case-by-case determinations burden all parties. Because this approach involves an adjudicator’s judgment of how specific circumstances square against a particular standard in every case, the discretion creates additional time and money burdens for the parties before the Commission. The Commission will also face increased burdens, both at the initial stage in

¹⁷ *Cellco P’ ship v. FCC*, 700 F.3d 534, 548-49 (D.C. Cir. 2012).

reviewing every case, and at any subsequent stage in defending against an as-applied challenge. Given that the efficacy of case-by-case determinations is only as good as their enforcement, such a burdensome process is troubling.

In total, an approach under Section 706 is problematic. To achieve its goals of promoting and protecting the Open Internet, the Commission should instead reclassify broadband delivery services as a Title II telecommunications service.

III. The Commission should reclassify broadband delivery services as a “Telecommunications Service” to support robust and effective Open Internet protections

A simpler and more comprehensive approach to achieving the Commission’s goal of ensuring an Open Internet is to reclassify broadband delivery services as a telecommunications service. Despite the fact that the Commission classified delivery of broadband as a Title I information service, these services perform functions that are typically associated with common carriage. Consumers now also view delivery services as distinct from over-the-top ISP services. Reclassification of delivery of broadband as a Title II service may be a politically difficult choice, but it is an inevitable choice if the Commission is to ensure the continued value and viability of the Internet.

A. Broadband delivery services already act like common carriers

Broadband delivery services should be reclassified because they function as common carriers. The common carrier determination is typically based on common law principles and the actions of particular industries.¹⁸ Broadband delivery closely resembles common carriage, and broadband is increasingly becoming basic infrastructure—a characteristic of common carriage.

¹⁸ There is reason to believe that if the Commission were to craft its own definition of “common carrier,” it would be entitled to *Chevron* deference. Public Knowledge Comments, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, at 24 (quoting *Cellco P’ship v. FCC*).

Broadband delivery services closely resemble a common carrier offering, such as telephone service. The delivery of broadband is just like the telephone line, through which communications, dictated by users, travel. Under this scheme, the line itself would be a telecommunications service, subject to some common carrier regulations. The content and services that pass through the line, “over-the-top services,” would still constitute an information service and would not be regulated.¹⁹

Increasingly, broadband Internet has become an essential, basic service²⁰—a characteristic of common carriers. It is now basic infrastructure, like the telephone or electricity. The role of broadband is largely overtaking the use of the traditional, telephone network. Voice-over-IP has grown substantially, and the use of landline phones has dwindled. A large and growing number of Americans communicate through IP-enabled broadband Internet. The Commission should recognize that broadband is essential infrastructure by reclassifying broadband delivery service as a Title II telecommunications service.

B. Consumers do not view their Internet access service as a wholly integrated information service

As Benton has previously argued, consumers no longer view their Internet access service as “integrated” with the other services provided by the ISP.²¹ Since then, the arguments in favor

¹⁹ The Ninth Circuit accepted this rationale fourteen years ago in *AT&T v. City of Portland*, 216 F.3d 871, 877-78, 880 (9th Cir. 2000), *invalidated by NCTA v. Brand X*, 545 U.S. 967, 980 (2005). However, after *Brand X*, where the Court held that the FCC’s classifications deserved *Chevron* deference, the Commission classified essentially all broadband services as information services. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

²⁰ Internet scholar and expert Susan Crawford often describes the Internet as a basic utility and as an input into almost everything Americans do. *E.g.*, Ezra Klein Interview with Susan Crawford, Vox (Mar. 2014), <http://www.vox.com/susan-crawford-internet-public-option>.

²¹ Benton Foundation Reply Comments, *Framework for Broadband Internet Service*, at 5-7, GN Docket No. 10-127 (Aug 12, 2010), <http://apps.fcc.gov/ecfs/document/view?id=7020706148>.

of separating the transmission and services components of broadband Internet have only been strengthened. Services typically provided by ISPs have now proliferated as third-party, cloud-based services—including email and webhosting. This proliferation has made those ISP-provided services all but superfluous. Gmail now has 425 million users.²² Webhosting can be done through a multitude of services such as Squarespace. Consumers can store their data in any number of cloud-based providers, including Box, Dropbox, Sugarsync, and Google Drive. At any rate, the over-the-top services ISPs provide still should be treated as information services by the Commission. It is the delivery service—the transmission portion of broadband—that should be classified as a Title II telecommunications service.

C. Necessary limitations on regulatory authority

After the Commission reclassifies broadband delivery services as a Title II telecommunications service, it will then have the option to forbear, under Section 10 of the Communications Act, from applying common carrier regulations that do not make sense for the medium.²³ This would allow the Commission to enforce the nondiscrimination principle while forbearing on other obligations it determines are not practical in the broadband context.

Regardless of whether the Commission reclassifies as proposed in these comments, the Commission should ensure that it will not use its Section 706 authority to hinder broadband expansion or innovation on the Internet. Section 706 authority is broad—the Commission could say that, for example, setting rates on content providers will encourage broadband buildout, and therefore the Commission could tell Netflix, Google, Yahoo, and other content providers what price to charge its users. That would be very harmful to the content providers and Internet users. It could also harm vulnerable populations that depend on certain services being available and

²² Harry McCracken, *How Gmail Happened: The Inside Story of its Launch 10 Years Ago*, Time (Apr. 1, 2014), <http://time.com/43263/gmail-10th-anniversary>.

²³ 47 U.S.C. § 160(a) (2014).

affordable. To prevent such use of Section 706, the Commission should clarify that it will not regulate anything other than the transmission (delivery) layer.

IV. Reclassification clarifies the Commission's authority for updating Universal Service Fund programs

As Benton has previously argued,²⁴ reclassifying broadband delivery services would further solidify the Commission's authority to make necessary updates to universal service programs including E-Rate, Lifeline, and Link-up. These are vital programs that primarily help disadvantaged and vulnerable populations, as well as provide schools and libraries with the Internet connections needed to foster the next generation of Internet entrepreneurs and users. The Commission should not continue to gamble on its currently-uncertain authority; instead, it should take the path that firmly grounds its authority. Reclassification of broadband delivery services to Title II is the best way to do that.

CONCLUSION

For the above reasons, the FCC should reclassify broadband delivery services as a Title II telecommunications service.

Respectfully submitted,

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Date: April 11, 2014

²⁴ Benton Reply Comments, *supra* note 21.