

To the Commission:

Neutrality is a founding principle of the Internet's architecture. As with other communications networks that preceded it (broadcasting, telephony, postal routes), the thrust behind the Internet's development (and indeed, much of the rhetoric surrounding its popularization and continued growth) emphasized not only the ability to communicate and connect, but to do so openly.

A common claim by corporate ISPs and other opponents to true net neutrality is that advocates of the principle have "created a solution in search of a problem." Yet since 2005, we have seen numerous instances of ISPs degrading consumers' access to legal content and services online, underscoring that there is a very real problem here; namely, that the corporate oligopoly of ISPs in the United States has a stake in directing the flow of Internet traffic and controlling what users can or can't access, and with what level of quality they access that content.

Take for example, Madison River's blocking subscribers' access to Vonage; Comcast and Cox Communications blocking of subscribers' receipt of anti-war emails from Cindy Sheehan's organization; Comcast's similar blocking of anti-war group AfterDowningStreet from reaching their subscribers; AT&T's censoring of Eddie Vedder's criticisms of George W. Bush on the audio stream of a Pearl Jam concert that the ISP was hosting; Verizon blocking Naral Pro-Choice messages from reaching the ISP's subscribers who had messages from the organization; and of course, Comcast's throttling of BitTorrent users. More recently, AT&T blocked Apple's FaceTime app unless subscribers paid extra fees, while Comcast privileged its own X-Box streaming service over those of Netflix, Amazon, et al. Notably, these last two examples occurred during the period that the Commission's 2010 rules were in place.

Moreover, ISPs such as Comcast and Verizon spent the fourth quarter of 2013 degrading delivery speeds of Netflix's service to subscribers. With the D.C. Circuit Court's ruling in *Verizon v. Federal Communications Commission* in effect dismantling the 2010 rules earlier this year, ISPs were free to demand interconnection deals from edge providers. Again, the Netflix example is instructive, as the network speeds provided for the service by ISPs showed a dramatic increase once Netflix acquiesced and agreed to pay interconnection fees.

The Chairman has publicly stated that his proposal "does not provide or mandate paid prioritization ... There is nothing in this proposal that authorizes a fast lane." However, the proposal (and recent practice) suggests otherwise. The proposal "would allow broadband providers sufficient flexibility to negotiate terms of service individually with edge providers [...] [and] should adopt a rule requiring broadband providers to use 'commercially reasonable' practices in the provision of broadband Internet access service ... [this rule] could permit broadband providers to serve customers and carry traffic on an individually negotiated basis, 'without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms'" (para 97 & 116). The contradiction is clear. We can call them "interconnection deals," but they in effect provide paid prioritization, access to the so-called "fast lane," while edge providers unable to afford whatever fees corporate ISPs consider "commercially reasonable" are not put at a competitive disadvantage. Moreover, to refer to such paid prioritization as the result of an amiable "negotiation" is rather presumptuous, and fails to recognize the incredible market power wielded by the corporate oligopoly that dominates

broadband service in the U.S. Netflix's recent interconnection deals underscore this fact; it's not that Netflix came to a mutually agreeable arrangement with Comcast and Verizon—Netflix was strong-armed into paid prioritization if it wished to continue providing service to its own subscribers via networks owned by Comcast and Verizon.¹ Netflix CEO Reed Hastings' public statements regarding these interconnection deals makes this point clear. The Commission needs to provide rules that will protect and preserve a truly open Internet; allowing for paid prioritization and strong-arming edge providers to cough up cash for access does not achieve this goal, but disregards it entirely. It hurts consumers (who will either suffer through slower speeds, or shoulder the cost of paid prioritization), and it hurts innovation online. What incentive is there for the next Facebook, YouTube, or Google when young developers know that without the capital of their corporate peers, they are on an incredibly uneven playing field, making it nearly impossible to build an audience and grow their innovations?

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Along with ISPs' abuses of neutrality principles over the last decade, the failure of the Commission's 2010 rules indicate a need for strong regulations protecting the Open Internet. The Commission's previous rules were misguided in a few key ways. They provided an "open Internet" in name only, most glaringly in exempting mobile broadband providers from the same blocking and discrimination rules levied at fixed wireline connections. This was a particularly damaging misstep, considering that the mobile Internet is arguably the fastest growing sector of online communications.

The second major failure of the Commission's 2010 rules was the reliance on Section 706 of the Telecommunications Act for its authority in making and enforcing broadband regulation. Chairman Wheeler's proposal states its intention that the new Open Internet rules (whatever they ultimately may be) will again rely on Section 706 to justify its authority. The D.C. Circuit Court's ruling *Verizon v. Federal Communications Commission* makes it abundantly clear that the Commission's legal footing in this approach is shaky at best. The Court's ruling in favor of Verizon was not based on an interpretation of the 2010 rules as fundamentally flawed or Constitutionally unsound regulations; rather, it was that the Commission's current classification of broadband as a Title I telecommunications service severely limits the manner in which the Commission may regulate broadband services:

Even though section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers, the Commission may not ... utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act. ... We think it obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers. Given the Commission's still-binding decision to classify broadband providers not as providers of

¹ As an illustration, consider the incredible disparity of speed that Comcast offered Netflix before and after the latter paid for prioritization. Despite having come to a similar arrangement with Verizon, that ISP continues to offer comparably sluggish speeds to edge provider Netflix: See for example <http://knowmore.washingtonpost.com/2014/04/25/this-hilarious-graph-of-netflix-speeds-shows-the-importance-of-net-neutrality/> and <http://blog.netflix.com/search/label/ISP%20speed%20index>

“telecommunications services” but instead as providers of “information services,” such treatment would run afoul of section 153(51).

The Court’s ruling raises a path of regulation that has growing public support from advocacy groups (Free Press, the Electronic Frontier Foundation, Public Knowledge, et al.), web services (Reddit, Netflix, Mozilla, Etsy, et al.), legislators (Al Franken, Ron Wyden, Bernie Sanders, Mike Doyle, et al.) and numerous others: reclassifying broadband as a Title II telecommunications service.

Nearly a decade ago, the Commission made a drastic misstep in its approach to broadband. Under the Chairmanship of Michael Powell, the Commission opted to change course and classify broadband as a Title I information service, severely limiting the Commission’s ability to regulate how ISPs structure their services. This deregulatory move grants ISPs a great deal of latitude and power in their relationships with consumers and edge providers. The Chairman’s current proposal works to continue that trend, taking ISPs at their word that “they will continue to honor the safeguards articulated in the 2010 Open Internet Order” — but as noted above, a number of ISPs to date have violated the conditions of that order, before, during, and after its active period (it’s also worth noting that in *Verizon v. FCC*, the corporation’s counsel relayed the company’s intent to block content and engage in pay-to-play fast lanes for edge providers. (“I’m authorized to state from my client today,” Verizon attorney Walker said, “that but for these rules we would be exploring those types of arrangements.”))

It has never been more clear that the most reliable path forward to preserving a truly open Internet is Title II reclassification. Since 1934, Congress has authorized this Commission to regulate communications in a manner pursuant to “the public interest, convenience, or necessity.” The unprecedented comments filed in this proceeding underscore that this is an issue of great public importance. In reviewing the immense amount of comments in this proceeding, I strongly urge the Commission to pay close attention to those filed by the public. It is they whom you are appointed to serve. Sometimes this fact gets lost among the din of corporate lobbying and backroom meetings with the industry. But we are at a critical juncture with the very foundation of the way that the Internet operates. The Chairman’s current proposal takes us toward a cannibalization of the Internet by the oligopoly of corporate ISPs (which will shrink further if the proposed Comcast-Time Warner merger is approved). Reclassification of broadband under Title II is the only way to guarantee that the Internet remains a space that facilitates innovation and exchange be it from a profitable corporation or a group of college students experimenting with the next big online platform development. Title II reclassification levels the playing field. Title II reclassification invites startups, invention, and entrepreneurship. Title II reclassification provides the only means of guaranteeing preservation of a truly open Internet, as this rulemaking purports to do.

Sincerely,

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