



July 15, 2014

Marlene H. Dortch
Secretary, Office of the Secretary
Federal Communications Commission
445 12th St. SW, Room TW-A325,
Washington, DC 20554

**Re: Protecting and Promoting the Open Internet,
WC Docket No. 14-28**

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Dear Secretary Dortch:

The American Civil Liberties Union (“ACLU”) writes in response to the Federal Communications Commission’s (the “Commission” or the “FCC”) Notice of Proposed Rulemaking of May 15, 2014 (the “Notice”), which sought comment on the Commission’s draft “open internet” rules.¹

As explained in more detail below, we urge the Commission to reclassify broadband service providers as common carriers and to abandon the proposed case-by-case enforcement regime under § 706 of the Telecommunications Act of 1996.

1. Introduction

The ACLU has, for almost a century, served as one of the preeminent defenders of the First Amendment. While we more often object to state restrictions on free expression, we recognize the danger posed by concentration in communications markets. Accordingly, we support “network neutrality” policies that prevent a lack of competition in these markets from harming Americans’ access to information and information technology.²

¹ *In re Protecting and Promoting the Open Internet*, 79 Fed. Reg. 37,448 (July 1, 2014) (proposed May 15, 2014).

² Although “network neutrality” does not yet enjoy a technical definition, we use the term to apply to anti-discrimination, anti-blocking and transparency rules that prevent broadband providers from leveraging their market position to, among other things, impose an overcharge on content (“edge”) providers; to regulate content by blocking or slowing data for reasons unrelated to network architecture; or to provide an unfair competitive advantage to affiliated edge applications, services or devices.

The equitable provision of high quality access to a free and open internet, and especially the closing of the digital divide, represents one of the most important free speech challenges of the information age. As information technology advances apace, the meaningful exercise of our constitutional rights—including the freedoms of speech, assembly, press and the right to petition government—has become literally dependent on broadband internet access. Accordingly, we applaud the Commission’s prompt action to respond to the D.C. Circuit’s decision in *Verizon v. Federal Communications Commission*, which vacated the existing open internet rules as inconsistent with the FCC’s current statutory classification of broadband service, while also recognizing the Commission’s authority to impose open internet rules so long as it does so under an appropriate legal framework.³

However, we urge the Commission to abandon its proposed “commercially reasonable” case-by-case enforcement policy⁴ under § 706 of the Telecommunications Act of 1996⁵ in favor of reclassifying fixed broadband internet access service as a “telecommunications service” rather than an “information service”⁶ and mobile broadband access service as a “commercial mobile service” rather than a “private mobile service.”⁷ Doing so would permit the Commission to apply legally defensible anti-discrimination and anti-blocking rules, which the D.C. Circuit found in *Verizon* to be per se common carriage regulation.⁸ Under the court’s reasoning, common carriage regulation would be allowed under existing law only were the Commission to

³ 740 F.3d 623, 642-50 (D.C. Cir. 2014).

⁴ Notice ¶ 3.

⁵ 47 U.S.C. § 1302 (2012).

⁶ A “telecommunications service” is the provision of “telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(53) (2012). “Telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50) (2012). By contrast, an “information service” is the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(24) (2012). In other words, the two are distinguished by provider intercession as the signal flows over the network. In the former case, the provider moves bits or other data “dumbly,” without regard for the nature of that data (subject to practices like reasonable network management). In the latter, the provider modifies or processes the data.

⁷ A “commercial mobile service” is any mobile service, defined under 47 U.S.C. § 153(33) (2012), that is “provided for profit and makes interconnected service available . . . to the public or . . . to such classes of eligible users as to be effectively available to a substantial portion of the public. . . .” 47 U.S.C. § 332(d)(1) (2012). “Interconnected service” is defined as “service that is interconnected with the public switched network. . . .” 47 U.S.C. § 332(d)(2) (2012). “Private mobile service” is defined as anything that is not commercial mobile service or the functional equivalent. 47 U.S.C. § 332(d)(3) (2012).

⁸ *Verizon*, 740 F.3d at 655-59.

reclassify both fixed and mobile broadband services as telecommunications⁹ and commercial mobile services,¹⁰ respectively.

Reclassification is especially important in light of the potential First Amendment risks posed by § 706 case-by-case enforcement.¹¹ As we explain in more detail below,¹² we fear an overly aggressive future administration could conceivably and abusively cite § 706 in regulating edge providers, and could potentially extend § 706 to content regulation. In our view, any such application would be a gross abuse of the plain terms of the statute, but there is no assurance such a future administration would concur.

Beyond reclassification, however, we reserve comment on the details of ideal anti-discrimination or anti-blocking rules. In this initial comment period, we offer brief thoughts on how

⁹ The regulatory distinction between “dumb” data transmission and the processing of that data is as old as the early days of the modern internet. Under the *Computer II* inquiry, in which the FCC had to grapple with the explosion of data processing services plugging into the public telecommunications networks, the Commission distinguished between the mere point-to-point transmission of data (“basic” services) and some intercession in the transmission, like data processing (“enhanced” services). *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 F.C.C.2d 384, 387 ¶¶ 5-7, 420-21 ¶¶ 96-97 (1980) (“*Second Computer Inquiry*”) (“We find that basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different or restructured information, or involve subscriber interaction with stored information.”). Basic services—resembling as they do regulated utilities and other natural monopolies—would be subject to common carriage regulation; enhanced services would not be so regulated. That distinction was codified in the Telecommunications Act. Pub. L. No. 104-104, 110 Stat. 56 (1996). “Telecommunications carriers” offer point-to-point “telecommunications services” (similar to basic services), see *supra* note 6, and are subject to common carriage regulation to the extent they offer such services. 47 U.S.C. § 153(51) (2012). “Telecommunications carriers” stand in contrast to providers of “information services” (similar to enhanced services). Because common carriage regulation under Title II of the Communications Act of 1934, 47 U.S.C. §§ 201-31 (2012), is restricted definitionally to telecommunications services, information services may not be treated as common carriers. See *Nat’l Cable and Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976-77 (2005).

¹⁰ Under 47 U.S.C. § 332(c)(1) (2012), a commercial mobile service shall be treated as a common carrier to the extent it is engaged in providing such services. The Commission may forbear from Title II regulation (save §§ 201, 202 and 208) of a commercial mobile service if it makes certain determinations that forbearance will not harm competition or consumers. Private mobile service providers may not be treated as common carriers. 47 U.S.C. § 332(c)(2) (2012).

¹¹ Section 706 of the Telecommunications Act requires the Commission (and state utility commissions) to “encourage the deployment [of broadband internet access] on a reasonable and timely basis . . . to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302 (2012).

¹² See *infra* p. 8.

competitive dynamics in the two-sided market for broadband service lead us, as an organization foursquare opposed to telecommunications content regulation, to support network neutrality. We also offer comments on the importance of network neutrality to free expression generally.

2. The Civil Liberties Case for Network Neutrality Flows From Natural Concentration in the Local Markets for High Speed Broadband Service That Cannot Be Addressed Through the Antitrust Laws

The market for broadband internet service is two-sided. That is, broadband networks sit between their consumers and the edge (and other networks). Ideally, problematic conduct by broadband providers—including the blocking or slowing of traffic for political or other non-economic reasons—would be disciplined by consumers voting with their feet and defecting to another provider.

Unfortunately, the market for broadband service is invariably local, characterized by “differentiated products subject to large economies of scale (relative to the size of the market),” and guarded by significant other barriers to entry.¹³ All of these features encourage monopoly or, at best, oligopoly.¹⁴ Additionally, switching costs are high and consumers are, in practice, unlikely to be able to determine whether lag, jitter or other service issues are due to providers unduly interfering with edge traffic.¹⁵

As the Commission notes, concentration and consumer lock-in are particularly acute in the fixed broadband market.¹⁶ At speeds above 6 Mbps downstream and 1.5 Mbps upstream (only slightly above the minimum recommended speed for high definition streaming video¹⁷), only one third of households report more than three options.¹⁸ Many have one or two.¹⁹

¹³ Ex Parte Submission of the U.S. Dep’t of Justice at 7, *In re Economic Issues in Broadband Competition*, GN Docket No. 09-51 (Jan. 4, 2010). The market for mobile broadband service may be both local and national, but is also highly concentrated and we fear similar competitive dynamics apply. See Complaint, *United States v. AT&T, Inc.*, 1:11-cv-01560 (D.D.C. Aug. 31, 2011).

¹⁴ See *In re Economic Issues*, *supra* note 13, at 7 (“[T]he Department does not expect to see a large number of suppliers.”); 11 (“We do not find it especially helpful to define some abstract notion of whether or not broadband markets are ‘competitive.’ Such a dichotomy makes little sense in the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures.”).

¹⁵ *Verizon v. Fed. Commc’ns Comm.*, 740 F.3d 623, 646-47 (D.C. Cir. 2014).

¹⁶ Given the rapid advance of streaming video services—and especially the recent success of content originated by streaming services like Netflix, Hulu or Amazon—we fear that DSL is quickly becoming less of a substitute, and certainly less of a constraint, on high speed fixed broadband delivered over cable or by a former regional bell operating company (“RBOC”). See Notice ¶ 47.

¹⁷ See Internet Connection Speed Requirements, Netflix.com (last visited July 14, 2014), <http://nflx.it/1v1HhCM>.

¹⁸ Notice ¶ 48.

Accordingly, as recognized by the D.C. Circuit in *Verizon*, broadband providers continue to have the ability and incentive, undisciplined by consumer defection, to, among other things, interfere with third party edge providers of competing services, applications or content, and collect fees from edge providers to either disadvantage an edge provider's competitor or provide prioritized access to the network's consumers.²⁰ And, although the court did not directly address the issue, the logical corollary to this incentive and ability is the potential for broadband providers to engage in content-based regulation of edge providers' applications, services, devices or programming. For instance, a cable company could potentially start enforcing ersatz indecency regulations on streaming video providers.

Were consumers able to switch easily to another high speed internet provider, "this gatekeeper power might well disappear."²¹ Unfortunately, as noted, high speed fixed broadband markets are local and many are effective monopolies or, at best, partial duopolies. Further, many consumers are unlikely to know their broadband provider is acting in a "non-neutral" manner.

Many opponents of network neutrality policies argue that net "non-neutrality" should be treated primarily as an antitrust problem.²² And, while some neutrality violations are undoubtedly anticompetitive and harmful to consumer welfare, an antitrust approach would be both highly inefficient, requiring as it does costly monitoring and case-by-case enforcement, and insufficient as a legal matter to address most of the threats to internet openness.

First and foremost, antitrust laws would be of little help in those instances where a broadband provider is interfering with edge traffic for reasons other than rent-seeking. The ACLU has already documented numerous cases of non-economic abuse by broadband providers, including, for instance, providers blocking controversial political content, union speech during a labor dispute and what the provider claimed was profanity during a webcast.²³

¹⁹ *Id.*

²⁰ *Verizon*, 740 F.3d at 645-46 (finding Commission's "speculation" about paid prioritization and other anticompetitive incentives "based firmly in common sense and economic reality").

²¹ *Id.* at 646.

²² See, e.g., Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 Ind. L. Rev. 767, Pt. IV (2012); Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. Chi. Legal F. 179 (2008).

²³ Jay Stanley, Am. Civil Liberties Union, *Net Neutrality* 101 6-9 (2010), available at <http://bit.ly/1wlGivZ>. The details in these cases are telling. In 2007, Verizon Wireless cut off access to a text messaging program by the abortion rights group NARAL, stating that it would not service programs from any group "that seeks to promote an agenda or distribute content that, in its discretion may be seen as controversial or unsavory to any of our users." *Id.* at 8. In 2005, the large Canadian provider Telus blocked access to a website run by a union that was on strike against the company. *Id.* at 9. In August 2007, during a Pearl Jam concert webcast by AT&T, the company shut off the audio as Eddie Vedder

Second, “non-neutral” behavior is unlikely to involve collusion, requiring the government to make a much more difficult monopolization or monopoly maintenance case under § 2 of the Sherman Act, which would likely require a showing of market power at the edge.²⁴

In the case of slowing the data flowing among users of a peer-to-peer service, for instance, a market leveraging claim—that is, taking advantage of power in one market to gain power in another—would necessarily fail given that the broadband provider does not operate a peer-to-peer application. And, even in the case of a broadband provider slowing, for instance, a competing streaming video provider on the edge, the relevant edge market is (fortunately) likely to be extremely competitive.²⁵

Third, there is a mismatch between the geographic scope of the edge and broadband markets. That is, broadband markets are necessarily local whereas edge providers reach consumers nationally (or globally). Accordingly, even in a case where a broadband provider is active in the relevant edge market, it may be difficult to show sufficient market power nationally in the broadband market. Many cable providers, for instance, enjoy effective monopoly status in their local markets but have a much more modest share of the cable market if defined nationally. Accordingly, while they can impose a significant overcharge as the gatekeeper to their consumers, they cannot create the kind of foreclosure that would present a solid § 2 case.²⁶

In sum, while the economic incentives that threaten internet openness are the product of the two-sided and local nature of the broadband market, existing U.S. competition law is inadequate to the task of regulating non-neutral behavior. This is, in fact, one of the reasons why common carriage regulation exists in the first place. While we oppose online content regulation by the government in all cases, we strongly support robust net neutrality policies and Title II reclassification.

sang “George Bush, leave this world alone” and “George Bush find yourself another home.” AT&T initially said it censored the phrases to shield the audience from “excessive profanity.” *Id.* at 7.

²⁴ 15 U.S.C. § 2 (2012); *see also* U.S. Dep’t of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 9-18 (2008).

²⁵ It’s also difficult to tell exactly what unilateral conduct theory could support enforcement action in a paid prioritization or throttling case. In something other than a vertical leveraging case, the closest theory applicable to such an agreement appears to be a refusal to deal, which poses significant enforcement challenges, or anti-competitive price discrimination under the Robinson-Patman Act, which is an equally difficult hill to climb. *See id.* at 119-29; *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

²⁶ *See* Barbara van Schewick, *Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like*, 67 Stanford L. Rev. (forthcoming 2015) (manuscript at 38-41), available at <http://bit.ly/1qabAIR>. A similar mismatch applies in the mobile space. For consumers, the relevant geographic markets are effectively local but the “big four” wireless carriers—Verizon, AT&T, T-Mobile and Sprint—compete nationally. In all cases, wireless markets are concentrated. *See Complaint*, *supra* note 13, at 8-11.

3. The First Amendment is Served By Net Neutrality Regulation Under Title II and Threatened By Case-By-Case § 706 Enforcement

The functions of government, and especially the FCC, include not only forbearance from infringing on Americans’ liberties but also responsibility in some cases to vouchsafe individual liberties from private infringement. In the case of speech, the government has an affirmative obligation to act when economic concentration threatens to deny the public equitable and high quality access to information and information services.²⁷ The absence of effective network neutrality regulation presents several distinct risks for free expression.

First, we fear the growing power of broadband providers to interfere directly in the provision of data from edge to consumer for political, economic, moral or any other reason unrelated to network management. Just as the First Amendment bars the government from restricting speech because it disagrees with the message conveyed, internet “gatekeepers” should also, consistent with their First Amendment rights, be discouraged from doing so.

Second, concentration in a two-sided market begets concentration and does so at the expense of the participant with the least market power—namely, consumers. Were paid prioritization or other differential treatment permitted, edge providers with a first mover advantage would be able to entrench their market position *on the edge*, and then to pass along any overcharge imposed by broadband providers to consumers in their fees. The big content, application or device providers would be able to afford greater, faster or better access to broadband consumers while newer competitors would be put at an ever-growing disadvantage.

Third, network non-neutrality could widen the digital divide. As recognized by the court in *Verizon*, interference with edge providers could diminish the value of broadband service generally, leading to less broadband deployment and adoption.²⁸ Ideally, competitive pressures would encourage demand growth at all points in the broadband market. Unfortunately, given the oligopolistic nature of the local broadband market, many providers can collect the overcharge represented by a paid prioritization or similar agreement while not taking the hit from lowered demand flowing from poorer or more expensive internet service.²⁹

Finally, the proposed case-by-case “commercially reasonable” test under § 706 could actually create a First Amendment risk. In *Verizon*, the dissent argued that § 706’s grant of statutory

²⁷ This is especially true when the information provider is acting like a common carrier by holding itself out to the general public as a vehicle for the transmission of data without regard to legal content.

²⁸ *Verizon v. Fed. Comm’ns Comm.*, 740 F.3d 623, 646 (D.C. Cir. 2014).

²⁹ *Id.* (“[T]he Commission explained that the resultant harms to innovation and demand will largely constitute ‘negative externalities’: any given broadband provider ‘will receive the benefits of . . . fees but [is] unlikely to fully account for the detrimental impact on edge providers’ ability and incentive to innovate and invest.” (quoting *In re Preserving the Open Internet Broadband Industry Practices*, 25 F.C.C.R. 17,905, 17,923 ¶ 31 (2010) (“*Open Internet Order*”))).

authority to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” is effectively unbounded. “[A]ny regulation that, in the FCC’s judgment might actually make the Internet ‘better,’ could increase demand,” Judge Silberman reasoned. “I do not see how this ‘limitation’ prevents § 706 from being *carte blanche* to issue any regulation that the Commission might believe to be in the public interest.”³⁰

To be clear, we do not believe this was the FCC’s argument, nor do we think that any regulation that makes the internet “better” is authorized by § 706. On the contrary, the “triple-cushion shot” argument presented by the FCC in defense of anti-discrimination and anti-blocking rules under § 706 is as follows: (1) edge innovation without permission or high barriers to entry (2) preserves user demand, which (3) encourages broadband deployment.³¹ That is, the key inquiry is whether the relevant practice *devalues* the content, applications, services or devices at the edge, which is a much tougher row to hoe than any regulation that makes the internet “better.”

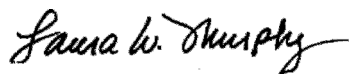
Nonetheless, while the legal argument may be legless, we do fear overly aggressive enforcement by a future administration, and especially enforcement against the edge. Common carriage regulation, by contrast, is limited by statute to telecommunications carriers and to those enumerated authorities in Title II, precluding unbounded content regulation.

* * *

In sum, we urge the Commission to reclassify broadband internet service as a telecommunications service subject to regulation under Title II of the Communications Act. We reserve comment on what appropriate regulations should look like, but we generally support anti-discrimination and anti-blocking rules. An open internet serves a myriad of First Amendment values. As an organization dedicated to protecting and promoting those values, we strongly urge reclassification.

Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman at 202-675-2325 or grottman@dcaclu.org if you have any questions or comments.

Sincerely,



Laura W. Murphy
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³⁰ *Id.* at 662 (Silberman, J., dissenting).

³¹ *Id.* at 643.