1050 17th Street, N.W.
Suite 1150
Washington, DC 20036
202.525.5717

Free Markets. Real Solutions.
www.rstreet.org

In the Matter of	)	
	)	WC Docket No. 17-108
Restoring Internet Freedom	)	

Comments of R Street Institute

Respectfully submitted,

/s/
Tom Struble
Technology Policy Manager

Joe Kane
Technology Policy Associate

July 17, 2017

Table of Contents

I. Introduction & Summary

The Federal Communications Commission ("FCC" or "Commission") was created by Congress in 1934[1] for the express purpose of "regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]"[2] Based on that broad grant of jurisdiction in Title I of the Communications Act,[3] regulation of broadband Internet access service ("broadband") is clearly within the FCC's purview.[4] What remains unclear is the extent to which the FCC should, or must, regulate broadband in order to fulfill its various statutory responsibilities.

For literally decades, parties have argued for and against different forms of broadband regulation at the FCC. In 2015, the FCC acceded to calls for greater regulation by reclassifying broadband under the common-carrier framework of Title II of the

---

[1] Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) ["Communications Act" or "1934 Act"], as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ["Telecommunications Act" or "1996 Act"], and the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008). The Communications Act has not been codified into positive law, so the text will refer to sections as they appear in the Act itself. However, for ease of reference, footnotes will refer to sections as they currently appear in the U.S. Code.

[2] 47 U.S.C. § 151.

[3] 47 U.S.C. §§ 151–62 ["Title I"].

[4] *Id*; *see also* 47 U.S.C. § 152 ("The provisions of this chapter apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio[.]"); 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

Communications Act,[5] while also adopting several bright-line rules and an amorphous general-conduct standard to police any behavior by broadband providers that would harm consumers or violate principles of so-called "Net Neutrality."[6] Now, the Commission has proposed to reconsider certain portions of the 2015 Order and adopt a more "light-touch" regulatory framework for broadband.[7] We support this proposal.

In these comments, we explain why light-touch regulation, based on Title I of the Communications Act and ancillary authority, is the best possible framework for broadband regulation and Net Neutrality that the Commission can construct using its current statutory toolkit.[8] We also explain why various rules from the 2015 Order should be reconsidered. Lastly, we lay out our suggestions for basic rules of the road that the Commission should adopt to regulate broadband going forward. These two regulations, regarding transparency and unreasonable discrimination, should be adequate to protect consumers and police potential unfair competition by broadband providers. This light-touch framework will also promote future innovation and competition among broadband providers and edge providers, altogether making it vastly superior to the framework adopted in the 2015 Order.

---

[5] 47 U.S.C. §§ 201–76 ["Title II"].

[6] *See* Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28 (Mar. 12, 2015) ["2015 Order"], *available at* https://goo.gl/dvjEUP.

[7] *See* Restoring Internet Freedom, *Notice of Proposed Rulemaking*, WC Docket No. 17-108 (May 23, 2017) ["NPRM"], *available at* https://goo.gl/ecJJPM.

[8] Ideally, Congress will soon resolve the policy battle over broadband regulation by passing new legislation. However, unless and until that happens, the FCC must press ahead and do the best it can within its current legislative framework.

II. Restoring the Light-Touch Regulatory Framework for Broadband

The Commission has been regulating telephony and telegraph services under Title II for nearly a century, but broadband historically has been treated with a lighter touch.[9] The FCC long made concerted efforts to spare new services, like broadband, from the "morass" of regulations in Title II that stifled innovation and competition in the telecommunications sector for decades.[10] As a result of this light-touch policy, broadband and other so-called "Enhanced Services" flourished, to the immense benefit of consumers.

Through the late 20th century and early 2000s, the wisdom of this light-touch policy was commonly accepted by Republicans and Democrats alike.[11] As recently as 2010, the Democrat-led FCC insisted on a light-touch approach to broadband regulation,[12] even amid

[9] *See, e.g.*, 2015 Order ¶¶ 310–27 (describing the classification history of broadband).

[10] *See, e.g.*, Remarks of William E. Kennard, Chairman, FCC, at the National Association of Telecommunications Officers and Advisors (Sept. 17, 1999), *available at* https://goo.gl/YhxNJ9 ("[I]f we have the hope of facilitating a market-based solution here, we should do it, because the alternative is to go to the telephone world, a world that we are trying to deregulate and just pick up this whole morass of regulation and dump it wholesale on the cable pipe. That is not good for America.").

[11] *See, e.g.*, Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC, at 1 (Mar. 23, 1998), *available at* https://goo.gl/iWiHd7 ("[W]e wish to make it clear that nothing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.").

[12] Preserving the Open Internet, *Report and Order*, GN Docket No. 09-191 (Dec. 23, 2010) ["2010 Order"], *available at* https://goo.gl/CVEDXn.

growing cries for the Commission to impose Title II.[13] However, following a legal setback,[14] cries for Title II became harder for the FCC to resist and the Commission eventually acceded to populist demands for stronger Internet regulation.[15] This dramatic change in course was an error in judgment that should be corrected.

Even though the 2015 Order imposed fewer than half of Title II's numerous provisions on broadband,[16] the full morass of laws and regulations in Title II[17] now hang over broadband providers' heads like the Sword of Damocles.[18] Given the deference afforded to agencies under administrative law precedents to uphold actions so long as they are "reasonable and grounded in substantial evidence," the threat that the rest of Title II

---

[13] *See, e.g.*, *id.* at 18046 (Concurring statement of Commissioner Michael J. Copps) ("So I pushed — pushed as hard as I could — to get broadband telecommunications back where they belonged, under Title II of our enabling statute[.]").

[14] *See* Verizon v. FCC, 740 F.3d 623 (2014) (striking down the 2010 Order's rules on blocking and unreasonable discrimination).

[15] In addition to numerous commenters calling on the FCC to use Title II, President Obama saw fit to issue a statement and YouTube video calling on the FCC to do the same, although he technically referenced the wrong Title II (he said Title II of the Telecommunications Act, when ostensibly he meant Title II of the Communications Act). *See* Letter from President Barack Obama to the Federal Communications Commission (Nov. 10, 2014), *available at* https://goo.gl/pTxYmW ("I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act[.]").

[16] Of the 48 statutory provisions in Title II of the Communications Act, the Commission broadly forbore from applying 27 of them to broadband. 2015 Order ¶¶ 493–527.

[17] *See, e.g.*, Jonathan Spalter, *Net Neutrality and Broadband Investment for All*, MORNING CONSULT (July 11, 2017), *available at* https://goo.gl/Zho7Ky ("Title II of the Communications Act has 48 Sections with more than 225 subsections. In the FCC's 'Common Carrier Services' rules, there are 20 sections, with almost 1,500 subsections.").

[18] *See, e.g.*, Daniel Lyons, *A Win for the Internet: The FCC Wants to Repeal Title II Net Neutrality Regulations*, AEI.ORG (Apr. 26, 2017), *available at* https://goo.gl/yXFnHm ("In this legal regime, Title II hangs as a sword of Damocles over the broadband industry, generating uncertainty, limiting innovation, and likely reducing capital investment in the sector.").

could be imposed on broadband is very real.[19] The FCC should act now to remove this looming threat, which is discouraging investment and innovation among broadband providers as they seek to improve their service offerings.

Properly conceived, Net Neutrality[20] can offer tremendous benefits for both competition and consumers. As we have made clear, we support Net Neutrality and want to protect it going forward.[21] However, the FCC's current heavy-handed approach to Net Neutrality is ill-conceived. The FCC can effectively protect Net Neutrality and guard both consumers and edge providers against unfair discrimination by broadband providers under a light-touch regulatory framework.

---

[19] *See, e.g.*, United States Telecomm. Ass'n v. FCC, 825 F.3d 674, 694 (D.C. Cir. 2016) (quoting Verizon, 740 F.3d at 644).

[20] The phrase "Net Neutrality" lacks precise definition. It does not mean what it literally suggests, as no reasonable person could want the Internet to be neutral in every respect. We use the phrase as we generally understand it: Net Neutrality is the policy that Internet users should generally be free to access the content and edge services of their choosing, and that any traffic-management or interconnection practices that discriminate unfairly among content providers or edge services should be illegal. *See generally* Merriam-Webster, *Net Neutrality* (last visited July 17, 2017), *available at* https://goo.gl/5f1jjc (providing a basic definition of the phrase); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003), *available at* https://goo.gl/Gxgiaj (describing the general contours of a proposed framework for Net Neutrality).

[21] *See, e.g.*, Tom Struble, *The FCC's Computer Inquiries: The Origin Story Behind Net Neutrality*, MORNING CONSULT (May 23, 2017), *available at* https://goo.gl/471DWh; Mike Godwin & Tom Struble, *Don't Freak Out About the FCC's New Approach to Net Neutrality*, SLATE (May 23, 2017), *available at* https://goo.gl/hncTc5.

A. Title II is Not Fit for Broadband

Title II of the Communications Act is a complex scheme of regulations designed for common carriers[22] in an era when competition between multiple service providers was thought to be impossible.[23] When telecommunications services were provided by a nationwide monopolist, the rate-making provisions of Title II were a logical way to protect consumers.[24] However, Congress eventually recognized that competition is a far better way to protect consumers than regulation, as made clear in the Telecommunications Act of 1996 ["1996 Act"].[25]

The 1996 Act's deregulatory framework succeeded in producing robust competition for services — like telephony and video — that previously were available only from state-backed monopolies.[26] The 1996 Act also took a very hands-off approach to broadband

---

[22] In fact, the Title II provisions adopted in the 1934 Act were the same ones used to regulate railroads during the 19th century. *See, e.g.*, Kuper Jones, *Sorry, Mr. President, The Internet Isn't a 19th Century Railroad*, AMERICANS FOR PROSPERITY (Nov. 13, 2014), *available at* https://goo.gl/Hw5KgQ.

[23] *But see* Adam D. Thierer, *Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly*, 14 Cato J. 267 (Fall 1994), *available at* https://goo.gl/G4N9pd (explaining why telecommunications is not a natural monopoly).

[24] *See, e.g.*, Orloff v. FCC, 352 F.3d 415, 419 (D.C. Cir. 2003) (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 230 (1994) ("Much of 'the Communications Act's subchapter applicable to Common Carriers . . . [had been] premised upon the tariff-filing requirement of § 203.").

[25] *See, e.g.*, 47 U.S.C. § 160 (instructing the Commission to forbear from applying any regulation "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services").

[26] *See, e.g.*, Stuart N. Brotman, *Was the 1996 Telecommunications Act Successful in Promoting Competition?*, BROOKINGS TECHTANK (Feb. 8, 2016), *available at* https://goo.gl/rV2579 ("These metrics do not demonstrate that the Telecommunications Act of 1996 was an unqualified success, but they are evidence of the law's real economic and consumer benefits.").

regulation,[27] which led to unprecedented levels of network investment by ISPs.[28] This was particularly true after the FCC made clear that the mandatory wholesaling obligations added to Title II by the 1996 Act would not be applied to broadband networks going forward.[29] However, the FCC took a dramatic change of course in the 2015 Order when, over objections from both commenters[30] and Commissioners,[31] it reclassified broadband under Title II.[32]

Although the legality of the 2015 Order has not yet been fully resolved,[33] the Commission likely has discretion to subject broadband service, or at least a portion of it, to

[27] *See, e.g.*, 47 U.S.C. § 230 ("It is the policy of the United States — . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]").

[28] *See, e.g.*, Patrick Brogan, *Broadband Investment Ticked Down in 2015*, USTELECOM (Dec. 14, 2016), *available at* https://goo.gl/NUwcwa ("USTelecom's annual analysis of broadband industry capital expenditures reveals that the industry invested approximately $1.5 trillion in network infrastructure over 20 years from 1996–2015.").

[29] *See* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185 (Mar. 15, 2002), *available at* https://goo.gl/gvtQwx (ruling that broadband service delivered via cable operators is an Information Service and not Telecommunications or a Telecommunications Service); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, CC Docket No. 02-33 (Sept. 23, 2005), *available at* https://goo.gl/RqrbFy (ruling that facilities-based wireline broadband, including its transmission component, is an Information Service, and may be provided on a common-carrier or private-carrier basis).

[30] *See, e.g.*, Protecting and Promoting the Open Internet, *TechFreedom & ICLE Legal Comments*, GN Docket No. 14-28 (July 17, 2014), *available at* https://goo.gl/MgPh3U.

[31] *See, e.g.*, 2015 Order at 321 (Dissenting Statement of Commissioner Ajit Pai); *id.* at 385 (Dissenting Statement of Commissioner Mike O'Rielly).

[32] *See id*. ¶¶ 306–433.

[33] In that legal challenge, the D.C. Circuit denied the challengers' petition for rehearing en banc, but challengers now seem intent on seeking review from the Supreme Court. *See* Application for an Extension of Time to File Petition for Writ of Certiorari to the United

some form of regulation under Title II. Title II regulated the transmission component of telco broadband for years,[34] and opinions from the D.C. Circuit[35] and Supreme Court[36] suggest that the FCC likely has discretion to apply Title II to other types of broadband, as well. We argue simply that, as a matter of policy, the FCC should not regulate broadband under Title II because the Title is not fit for that purpose. Title II is unnecessary to achieve the Commission's objectives and comes with a host of unintended consequences that will adversely affect both broadband providers and consumers. Some of these adverse effects are apparent already.

The specter of Title II has loomed over broadband providers since 2010,[37] and it has had a decidedly negative effect on innovation and network investment during that time. Dr. George S. Ford, chief economist of the Phoenix Center for Advanced Legal and Economic Public Policy Studies, conducted a robust difference-in-differences analysis and determined

---

States Court of Appeals of the District of Columbia Circuit, U.S. Telecomm. Ass'n v. FCC (July 10, 2017), *available at* https://goo.gl/tN4WYn.

[34] *See, e.g.*, 2015 Order ¶ 313.

[35] *See* United States Telecomm. Ass'n v. FCC, 825 F.3d at 697–98 ("These conclusions about consumer perception find extensive support in the record and together justify the Commission's decision to reclassify broadband as a telecommunications service.").

[36] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 996–97 (2005) ("In sum, if the Act fails unambiguously to classify nonfacilities-based information-service providers that use telecommunications inputs to provide an information service as 'offer[ors]' of 'telecommunications,' then it also fails unambiguously to classify facilities-based information-service providers as telecommunications-service offers; the relevant definitions do not distinguish facilities-based and nonfacilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap.") (alteration in original).

[37] *See* Framework for Broadband Internet Service, *Notice of Inquiry*, GN Docket No. 10-127 (June 17, 2010), *available at* https://goo.gl/dxkCxG (inquiring whether broadband should remain classified under Title I or be reclassified under Title II).

that broadband investment was $160–$200 billion less than it would have been without the threat of Title II regulation.[38] Others have published estimates suggesting that Title II did not decrease, or even increased, investment in broadband networks,[39] but these data and estimates have serious methodological flaws.[40] Indeed, when those flaws are corrected, the studies actually yield the opposite conclusions, corroborating Ford's analysis.[41]

The prohibitions in the 2015 Order and the threat of more burdensome regulations under Title II are already depressing investment in broadband networks and likely would continue to do so in the future. Investment in broadband infrastructure is essential to closing the "Digital Divide," stimulating facilities-based competition, and providing high-quality broadband to all Americans, which are topmost among the Commission's goals.[42] For that reason, the Commission should undo the 2015 Order's reclassification of broadband under Title II and adopt new Net Neutrality regulations under the light-touch framework of Title I and ancillary authority.

---

[38] George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, PERSPECTIVES (Apr. 25, 2017) *available at* https://goo.gl/jfJ9rc. It is important to note that the relevant comparison is *not* between investment before and after Title II, but between actual investment after Title II and what investment *would have been* in the same period but for Title II. *See id.* at 10.

[39] *See, e.g.*, S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, FREE PRESS (May 2017), *available at* https://goo.gl/5FQoEh.

[40] *See, e.g.*, Dr. George S. Ford, *Reclassification and Investment: An Analysis of Free Press' "It's Working" Report*, PERSPECTIVES (May 22, 2017), *available at* https://goo.gl/HZXnzn.

[41] *See, e.g.*, *id* at 1 ("Once the most basic adjustment to the data is made — accounting for inflation — Free Press' data show that capital spending fell significantly in 2016 (-2%).").

[42] *See* 47 U.S.C. § 151.

B. Title I and Ancillary Authority Provide Adequate Authority for Light-Touch Net Neutrality Regulations

The fight over Title I and Title II is fundamentally about whether broadband service should be offered on a common-carriage or private-carriage basis. Common carriers are generally required to hold "oneself out to serve the public indiscriminately[,]"[43] whereas private carriers are allowed to make "individualized decisions, in particular cases, whether and on what terms to deal."[44] The Commission gets significant deference in deciding whether its regulations constitute common-carrier obligations,[45] and FCC can regulate private carriers' broadband practices, under Title I, so long as those regulations leave "substantial room for individualized bargaining and discrimination in terms."[46] That is precisely what we want.

From the dawn of the Internet in the late 20th century up through 2014, the FCC consistently classified broadband under Title I of the Communications Act.[47] Under this light-touch approach to broadband regulation, the Internet flourished — and enabled a vast multitude of over-the-top ("OTT") edge services — all to the immense benefit of consumers. In this lightly regulated environment, software developers and entrepreneurs

---

[43] *See, e.g.*, U.S. Telecomm. Ass'n v. FCC, 825 F.3d at 740 (quoting Verizon v. FCC, 740 F.3d at 651); *but see* Orloff v. FCC, 352 F.3d at 421 (upholding the Commission's finding that certain price discounts offered by Verizon to individual customers did not constitute "unjust or unreasonable discrimination" under Section 202).

[44] *See, e.g.*, U.S. Telecomm. Ass'n v. FCC, 825 F.3d at 740 (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979)).

[45] *See, e.g.*, Cellco P'ship v. FCC, 700 F.3d 537, 544 (D.C. Cir. 2012) (quoting MCI Worldcom Network Servs. v. FCC, 274 F.3d 542, 548 (D.C. Cir. 2001)).

[46] *See, e.g.*, Verizon v. FCC, 740 F.3d at 652 (quoting Cellco P'ship v. FCC, 700 F.3d at 548).

[47] *See, e.g.*, 2015 Order ¶¶ 310–27.

were able to experiment with new and innovative service offerings without having to seek permission from the FCC or any other regulator.[48] Indeed, many have argued that we have had *de facto* Net Neutrality for decades, because norms of transparency and fairness led broadband providers and edge providers to engage in open and fair competition, even without regulations.[49]

Only in the last decade has the FCC sought to impose a *de jure* Net Neutrality regime. Its first two efforts were based on Title I and ancillary authority. In the first case, the Commission sought to punish Comcast for allegedly throttling upstream traffic from BitTorrent's peer-to-peer file-sharing application,[50] but the D.C. Circuit rejected the action because the FCC "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility[.]'"[51] In the second case, Verizon

[48] *See, e.g.*, Vinton G. Cerf, *Keep the Internet Open*, N.Y. TIMES (May 24, 2012), *available at* https://goo.gl/GHtXTc ("The Net prospered precisely because governments — for the most part — allowed the Internet to grow organically, with civil society, academia, private sector and voluntary standards bodies collaborating on development, operation and governance.").

[49] *See, e.g.*, Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality Without Regulation*, CATO POLICY ANALYSIS at 12 (Nov. 12, 2008), *available at* https://goo.gl/31ALvv ("[L]arge-scale violations of the end-to-end principle have certainly been rare and have almost always generated controversy. Neutral treatment of packets by 'dumb' networks has been the norm for a quarter century, and there are good reasons to preserve that arrangement.").

[50] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, EB-08-IH-1518 (Aug. 20, 2008), *available at* https://goo.gl/1b1pBA.

[51] *See* Comcast v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).

succeeded in overturning Net Neutrality rules from the 2010 Order on grounds that they unlawfully imposed *per se* common-carrier obligations on private carriers.[52]

Following *Verizon*, the Commission initially sought to "follow the *Verizon* court's blueprint by relying on Section 706 to adopt a no-blocking rule and a requirement that broadband providers engage in 'commercially reasonable' practices."[53] The Commission eventually turned away from this approach, opting to instead take "the *Verizon* decision's implicit invitation" and impose common-carrier rules based on Title II.[54] However, the blueprint for "commercially reasonable" rules remains a viable path forward for the Commission.

The Commission should follow the blueprint for "commercially reasonable" Net Neutrality regulations under the light-touch framework of Title I and ancillary authority. The D.C. Circuit opinions in *Cellco* and *Verizon* suggest that a "commercially reasonable" standard to regulate broadband providers' traffic management and interconnection practices would be legally permissible under Title I,[55] as a form of quasi-common carriage.[56] Multiple courts have also suggested that a transparency requirement is

---

[52] *See* Verizon v. FCC, 740 F.3d at 628 ("Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier obligations, we vacate those portions of the [2010 Order].").

[53] *See* 2015 Order ¶ 10; *see also* Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 (May 15, 2014) ["2014 NPRM"], *available at* https://goo.gl/SNMALC (seeking comment on a proposed "commercially reasonable" approach to Net Neutrality).

[54] *See* 2015 Order ¶ 42.

[55] *See id.*

[56] *See* Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN. J. OF L. SCI & TECH. 631 (June 2017), *available at* https://goo.gl/maBABU (examining the potential for mission creep when applying

"reasonably ancillary" to the Commission's specifically delegated authority in Section 257, and would therefore be legally permissible under Title I.[57] Altogether, Title I and ancillary authority provide an adequate basis for the Commission to adopt these types of light-touch Net Neutrality regulations going forward.

C. Section 706 Provides Additional Support for the Commission's Exercise of Ancillary Authority Over Broadband

Before the 2015 Order, the FCC attempted to use Section 706 of the 1996 Act to support numerous broadband regulations. Federal appellate courts in three different circuits have reviewed FCC broadband regulations, based on authority supposedly conferred to the agency by Section 706.[58] The opinions from those three cases suggest that Section 706 grants at least some regulatory authority to the FCC,[59] making it reasonable for

---

outdated regulatory frameworks to new technologies and markets). A Title I classification for broadband would help restrain the potential for mission creep in this case. *See id.*

[57] *See, e.g.*, Comcast v. FCC, 600 F.3d at 659 ("We readily accept that certain assertions of Commission authority could be 'reasonably ancillary' to the Commission's statutory responsibility to issue a report to Congress. For example, the Commission might impose disclosure requirements on regulated entities in order to gather data needed for such a report."); Verizon v. FCC, 740 F.3d at 668 n.9 (Silberman, J., dissenting) ("I do think that the transparency rules rest on firmer ground. The Commission is required to make triennial reports to Congress on 'market entry barriers' in information service, 47 U.S.C. § 257, and requiring disclosure of network management practices appears to be reasonably ancillary to that duty.").

[58] *See* Verizon, 740 F.3d at 628 (finding that Section 706 gives the FCC authority to adopt broadband regulations, but not the particular ones in question); In re FCC 11-161, 753 F.3d 1015, 1049–54 (10th Cir. 2014) (finding that Section 706 gives the FCC additional authority, apart from Section 254, to direct Universal Service Fund disbursements toward broadband); Tennessee v. FCC, 832 F.3d 597, 613 (6th Cir. 2016) (finding that Section 706 does not authorize federal preemption of state laws regarding municipal broadband).

[59] *See id.*

the Commission to inquire as to whether Section 706 could support new broadband regulations.[60]

We believe Section 706 does provide the FCC with additional authority to regulate broadband, but nothing independent of the Communications Act. Section 706 directs the FCC to encourage broadband deployment by utilizing its various tools in the Communications Act to "promote competition" and "remove barriers to infrastructure investment."[61] Tellingly, the specific regulatory tools mentioned in Section 706 — price cap regulation and regulatory forbearance — are already granted to the FCC in the Communications Act;[62] no new tools are mentioned. Section 706 clearly instructs the Commission to take action if certain conditions are met,[63] but those actions must be tied to specific grants of authority within the Communications Act.

Thus, if the Commission reclassifies broadband under Title I while relying upon ancillary authority to adopt basic rules regarding transparency and unreasonable discrimination, as we think it should, then Section 706 could serve as an additional touchstone to support the Commission's actions. Returning to a light-touch regulatory framework to promote broadband investment and deployment is perfectly in keeping with Section 706. The Commission must simply ensure that any broadband regulations designed

[60] NPRM ¶ 101.

[61] *See* 47 U.S.C. § 1302(a).

[62] *See* 47 U.S.C. §§ 160, 201–03, 205.

[63] *See* 47 U.S.C. § 1302(b) (instructing the FCC to "take immediate action to accelerate broadband deployment" if the Commission determines, via an annual inquiry, that broadband deployment is not proceeding "in a reasonable and timely fashion.").

to serve the goals of Section 706 are tied to specific grants of authority within the Communications Act.

III. Clear & Simple Rules of the Road for Net Neutrality

There should be rules of the road for Net Neutrality, and those rules should be as clear and simple as possible. The Commission sought to establish such rules following the *Verizon* decision,[64] but the 2015 Order strayed far from this initial plan. Instead of adopting simple rules, as the 2010 Order did and as the 2014 NPRM proposed to do, the 2015 Order imposed on broadband providers several rules prohibiting certain practices, as well as an amorphous general-conduct standard.[65]

In its effort to cover the field of Net Neutrality and protect edge providers from all conceivable harms, the FCC went too far. The general-conduct standard's non-exhaustive list of factors is hopelessly vague, while much of the current rules are either superfluous, counterproductive, or even unconstitutional. The Commission should reconsider its current rules, follow through with its proposal to repeal the general-conduct standard,[66] and implement two simple and clear rules of the road governing transparency and unreasonable discrimination.

---

[64] *See* 2014 NPRM ¶ 24 ("Today, we respond directly to that remand and propose to adopt enforceable rules of the road, consistent with the [*Verizon*] court's opinion, to protect and promote the open Internet.").

[65] 2015 Order ¶¶ 14–24.

[66] NPRM ¶¶ 72–75.

A. Reconsidering the Current Rules

The 2015 Order included four specific rules and a general-conduct standard. The transparency rule is appropriate and should be maintained, but everything else should be reconsidered. For various reasons detailed below, the specific prohibitions and the general-conduct standard from the 2015 Order should all be done away with and subsumed into a simple regime governing only transparency and unreasonable discrimination.

1. The Ban on Blocking is Superfluous & Unconstitutional

In both the 2010 Order and the 2015 Order, the Commission adopted rules banning broadband providers from blocking any lawful content, applications, services, or non-harmful devices from access to their networks.[67] The no-blocking rule includes an exception for "reasonable network management," but that does not save the rule. The ban on blocking should be eliminated. In terms of policy, the rule offers no protection beyond a prohibition on unreasonable discrimination, and is therefore superfluous. Also, in terms of law, the no-blocking rule is likely illegal thrice over.

As a policy matter, the no-blocking rule is superfluous. Any instance of blocking that truly harms consumers or competition would violate a rule prohibiting unreasonable

[67] 2010 Order at 17992 ("A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management. A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management."); 2015 Order at 284 ("A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.").

discrimination. A bright-line rule against blocking, therefore, provides no additional protection for consumers. This no-blocking rule should be eliminated for that reason alone, but also because it is likely illegal in three different ways.

First, a prohibition on blocking compels broadband providers to transmit speech, even against their will, likely in violation of the First Amendment.[68] This argument was raised in the challenge to the 2015 Order, but the court rejected it based on the incorrect belief that "In contrast to newspapers and cable companies, the exercise of editorial discretion is entirely absent with respect to broadband providers subject to the Order."[69] The court's reasoning is incorrect because broadband providers, like newspapers and cable companies, have finite capacity (in this case, bandwidth) and therefore cannot transmit an infinite volume of communications over their networks.[70] During periods of network congestion, a broadband provider may choose to drop some packets but not others, and transmit certain speech at the exclusion of other speech, according to whatever software-defined networking ("SDN") protocols and heuristics it employs.[71] Potentially, the exercise

---

[68] *See, e.g.*, Geoffrey A. Manne et al., *A Conflict of Visions: How the "21st Century First Amendment" Violates the Constitution's First Amendment*, 13 FIRST AMEND. L. REV. 319 (2015), *available at* https://goo.gl/8nxEdD.

[69] U.S. Telecomm. Ass'n v. FCC, 825 F.3d at 743.

[70] *See id.* at 742 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257 (1974)).

[71] *See, e.g.*, Taimur Bakhshi, *State of the Art and Recent Research Advances in Software Defined Networking*, WIRELESS COMMS. & MOBILE COMPUTING at 6 (2017), *available at* https://goo.gl/2GmdVx ("Centralized management of network elements provides additional leverage to administrators giving them vital statistics of existing network conditions to adapt service quality and customize network topology as needed. For example, during periods of high network utilization, certain bandwidth consuming services like video streaming, large file transfers, and so forth can be load-balanced over dedicated channels.").

of editorial discretion in such a situation would fall under the no-blocking rule's exception for reasonable network management, but it is unclear. Unless the Commission can show that a no-blocking rule is narrowly tailored to serve a compelling governmental interest, it is likely unconstitutional.

Second, a no-blocking rule likely violates Due Process under the Fifth Amendment, because it amounts to a regulatory taking on broadband providers by mandating a below-cost, zero-price interconnection fee.[72] Broadband providers are in the business of transmitting communications,[73] and they charge for the service because providing it imposes real costs on their networks. Most of those costs come from downstream network traffic, at a ratio of around 5:1.[74] Broadband providers recover those costs via peering and transit arrangements. Imposing a no-blocking rule on broadband providers takes away all of their leverage when negotiating service level agreements ("SLAs") to interconnect with peers, transit providers, or directly with edge companies. This unjust transfer of wealth and regulatory taking survived facial challenge, but would likely be struck down in any

---

[72] *See, e.g.*, Lawrence J. Spiwak, *USTelecom and its Aftermath*, PHOENIX CTR. POL'Y BULL. at 7 (June 2017), *available at* https://goo.gl/zX4K73 ("By directly setting a 'zero-price,' the Commission's actions violated many basic principles of ratemaking. For example, under the plain terms of the Communications Act, if edge providers are in fact customers of a [broadband provider] as the D.C. Circuit found in *Verizon* and Title II applies to this service as the [2015 Order] plainly states, then a [broadband provider] must be allowed to charge a positive 'fee' for this termination service because a common carrier is 'for hire.'").

[73] *See* 47 U.S.C. § 151 ("For the purpose of regulating interstate and foreign *commerce* in communication by wire or radio . . . there is created a commission to be known as the 'Federal Communications Commission[.]'") (emphasis added).

[74] *See, e.g.*, Sandvine, *Global Internet Phenomena Report 2H 2014* at 5 (Nov. 21, 2014), *available at* https://goo.gl/S55cTM (showing average monthly broadband consumption in North America to comprise 8.5 GB of upstream data and 48.9 GB of downstream data).

subsequent as-applied challenge. The Commission should avoid this outcome by repealing the no-blocking rule on its own motion.

Finally, the no-blocking rule is illegal because it contravenes the statutory protection Congress gave to broadband providers in Section 230 for "Good Samaritan" blocking.[75] Section 230 plainly gives broadband providers discretion to block lawful content, yet the no-blocking rule prohibits that. The Commission has a broad grant of duties and powers, but all of its actions must be consistent with the rest of the Communications Act.[76] Thus, to the extent the no-blocking rule conflicts with Section 230, it is illegal. For all these reasons, the no-blocking rule should be repealed and subsumed into a rule prohibiting unreasonable discrimination.

2. The Ban on Throttling is Superfluous & Counterproductive

In the 2015 Order, the Commission adopted a rule specifically banning the practice of "throttling,"[77] in all but a few limited cases.[78] While the no-throttling rule raises fewer legal problems than the no-blocking rule, it still is unwise as a matter of policy. Any instance of throttling by a broadband provider that harms consumers or competition

---

[75] *See* 47 U.S.C. § 230(c) ("No provider . . . of an interactive computer service shall be held liable on account of — any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]").

[76] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary in the execution of its functions.") (emphasis added).

[77] 2015 Order ¶ 119.

[78] *Id*. ¶ 120.

among edge services would be covered by a rule prohibiting unreasonable discrimination. Thus, a specific no-throttling rule is superfluous and unnecessary. Moreover, the specific ban on throttling can be counterproductive and anti-consumer in practice.

For example, T-Mobile recently began offering a zero-rated video-streaming service called Binge On, which involves throttling video traffic to slightly lower quality without regard for network congestion.[79] T-Mobile makes the program available, without charge, to all video-streaming services able to conform to T-Mobile's technical specifications. Commission staff therefore found that it likely did not violate the general conduct standard,[80] but Binge On clearly violates the ban on throttling.[81] This shows how counterproductive the no-throttling rule can be. Since the introduction of Binge On, consumers have flooded to T-Mobile,[82] demonstrating that they see the benefits of its innovative and consumer-friendly services. The Commission thankfully ended its inquiry in this and other similar programs,[83] but it should go further and strike the no-throttling rule from its books.

---

[79] Jeremy Gillula, *EFF Confirms: T-Mobile's Binge On Optimization is Just Throttling, Applies Indiscriminately to All Video*, ELECTRONIC FRONTIER FOUND. (Jan. 4, 2016), *available at* https://goo.gl/nTJPWb.

[80] *See* FCC Wireless Telecomms. Bureau Staff, *Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services* at 11 (Jan. 9, 2017), *available at* https://goo.gl/8NyueM.

[81] *See* Gillula, *supra* note 79.

[82] Kevin Tran, *T-Mobile Added More Than 1 Million Subscribers Last Quarter*, BUSINESS INSIDER (Apr. 26, 2017), *available at* https://goo.gl/hX6jTG.

[83] *See* Letter from Nese Guendelsberger, Acting Chief, Wireless Telecomms. Bureau, FCC, to Kathleen Ham, Senior Vice President, Government Affairs, T-Mobile (Feb. 3, 2017), *available at* https://goo.gl/JuAi4B (informing T-Mobile that the FCC had closed its investigation into Binge On).

3. The Ban on Paid Prioritization is Also Superfluous & Counterproductive

In the 2015 Order, the Commission adopted a rule banning "paid prioritization."[84] This rule has never been used or interpreted by the Commission, but it seemingly covers both interconnection ("paid") and traffic-management ("prioritization") practices by broadband providers. Both of these practices can be adequately covered by a rule prohibiting unreasonable discrimination, so a rule specifically banning paid prioritization is superfluous and unnecessary. Moreover, the ban on paid prioritization is likely also counterproductive, as it will discourage the development of innovative new service offerings and forms of differential traffic management. These innovations could make broadband networks work better for users and edge providers alike, while also potentially opening up new revenue streams for broadband providers, the proceeds from which can be reinvested into network upgrades or new deployments. Altogether, these considerations suggest that the FCC should repeal the ban on paid prioritization.

Real-time bandwidth-intensive edge services like telemedicine, HD VoIP, and certain forms of online gaming are especially sensitive to service disruptions. Users' quality of experience ("QoE") in using such services is heavily dependent on the quality of service ("QoS") that the services receive.[85] Affording the same level of priority to all broadband

---

[84] 2015 Order at 284–85 (defining "paid prioritization" as "the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.").

[85] *See, e.g.*, Thomas W. Struble, *On the Relationship Between QoS & QoE: Why Differential Traffic Management on the Internet Is Not a Zero-Sum Practice*, TPRC 44 (Aug. 31, 2016), *available at* https://goo.gl/weWAcY.

traffic would benefit services that are less sensitive to latency and bandwidth constraints — like email, software updates, or cached video — but harm real-time services.[86] That outcome is not "neutral" and would be harmful to both consumers and edge providers.

The focus on paid, rather than unpaid, prioritization is also problematic. Practices that benefit consumers do not suddenly become harmful just because money changes hands. Broadband networks exhibit features of a two-sided market: both edge providers and end users want to use the network infrastructure to send and receive data. In a two-sided market, the prices faced by one side of the market are partially dependent on those faced by the other side. Allowing market prices to prevail in such a market would tend to lead to more efficient cost-sharing between consumers and content providers. Banning paid prioritization effects a price control for one side of the two-sided market, and will raise prices for the other side — namely, consumers.[87]

The ban on paid prioritization also outlaws potential avenues of competition among broadband providers. Smaller broadband providers and new entrants often lack the resources to beat the prices of established competitors directly, but they can make deals and take risks to provide innovative new services. Some broadband providers in the United Kingdom, for example, have started offering plans that prioritize traffic for VoIP and gaming applications.[88] Such offerings allow broadband providers to differentiate their

---

[86] *See id.*

[87] This is known as the "waterbed effect." *See* Christos Genakos & Tommaso Valletti, *Regulating Prices in Two-Sided Markets: The Waterbed Experience in Mobile Telephony*, 36 TELECOMMS. POLICY 360 (2012), *available at* https://goo.gl/QUvy2Y.

[88] *See, e.g.*, Plusnet, *About Traffic Prioritisation* (last visited July 17, 2017), *available at* https://goo.gl/fRCerj ("All our Business broadband and fibre products (and some of our older Residential ones) have traffic prioritisation applied to them. Our Plusnet Pro 'add on'

service offerings and better compete with other providers, and any offerings that truly generate a net harm to consumers or competition could be covered by a rule prohibiting unreasonable discrimination.

Economic literature has long recognized that the welfare effects of third-degree price discrimination are ambiguous and depend on the specific features and market structure of an individual case.[89] Therefore, rather than outlawing hypothetical forms of price and service discrimination ahead of time, the Commission should presumptively allow broadband providers to experiment with innovative business models and service offerings. The Internet has changed dramatically in the decades since its invention, and regulatory frameworks that entrench specific interconnection and traffic-management practices jeopardize the future development of innovative service offerings and the evolutionary progress of the Internet ecosystem writ large.

---

also uses it to prioritize VoIP, gaming and VPN traffic above other less 'time-sensitive' traffic protocols."). Plusnet's innovative service offerings have proven to be tremendously popular among British users, with the provider having recently won multiple awards for its broadband service. *See* Plusnet, *Multi-Award-Winning Broadband Provider with UK Based Customer Service* (last visited July 17, 2017), *available at* https://goo.gl/rS5cnM.

[89] There is vast literature analyzing the ambiguous welfare effects of price discrimination in particular contexts. *See, e.g.* JOAN ROBINSON THE ECONOMICS OF IMPERFECT COMPETITION at 179–202 (2nd Ed. 1969); Hal R. Varian, *Price Discrimination and Social Welfare*, 75 AM. ECON. REV. 870 (Sept. 1985), *available at* https://goo.gl/sDqAcJ; Stephen K. Layson *Market Opening Under Third-Degree Price Discrimination*, 42 J. OF INDUS. ECON. 335 (Sept. 1994), *available at* https://goo.gl/jyuYd2; Takanori Adachi *Third-Degree Price Discrimination, Consumption Externalities and Social Welfare*, 72 ECONOMICA 171 (Feb. 2005), *available at* https://goo.gl/UF27xP.

4. The Amorphous General-Conduct Standard Should be Eliminated

In the 2015 Order, on top of four bright-line rules, the Commission also adopted an amorphous general-conduct standard,[90] with a non-exhaustive list of factors that the Commission proposed to consider in assessing whether any practices ran afoul of the standard.[91] The inherent vagueness of the general-conduct standard creates significant regulatory uncertainty, which is a major barrier to investment and growth. The Commission has now proposed to eliminate the general-conduct standard.[92] We support this proposal.

If companies are not sure if new innovations will be allowed, they will tend to invest less in them because of the risk that their plan could be outlawed. The Commission offered to issue non-binding advisories as to whether proposed practices or services would violate the standard,[93] but such a "Mother, may I"[94] approach is a terrible fit for broadband services and the dynamic Internet ecosystem. Consumers are better served by an

---

[90] 2015 Order at 285 ("Any person engaged in the provision of broadband Internet access service, insofar as such person is engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.").

[91] *See id.* ¶¶ 138–45.

[92] NPRM ¶¶ 72–75.

[93] 2015 Order ¶¶ 229–41.

[94] Steve Daines & Michael O'Rielly, *FCC, May I Please Innovate?*, FORBES (Jan. 20, 2016), *available at* https://goo.gl/wSSziL.

environment of permissionless innovation.[95] The Commission should clarify that broadband providers and edge providers are both presumptively allowed to innovate and require substantial evidence of actual or likely harm before intervening to regulate or ban any practices or services. The Commission can do so, and still maintain adequate protections for consumers and competition, by repealing the vague and amorphous general-conduct standard and implementing two clear and simple rules of the road for Net Neutrality.

B. Implementing Clear & Simple Rules of the Road

Having clear and simple rules of the road for Net Neutrality would benefit all parties. The FCC has authority to regulate broadband[96] and to adopt rules,[97] but once the Title II reclassification is undone, the FCC will not be the only cop on the beat. When broadband is once again classified as an Information Service, the Federal Trade Commission ("FTC") will regain its jurisdiction over broadband services. It could then use its authority under Section 5 of the FTC Act to protect consumers from any unfair methods of competition or unfair or deceptive acts or practices in which broadband providers engage.[98] Thus, the FCC should work collaboratively with the FTC to protect Net Neutrality going forward, with both agencies playing to their relative strengths.

---

[95] *See generally* ADAM THIERER, PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM (Revised & Expanded Ed. 2016), *available at* https://goo.gl/YWXCHE (detailing the tremendous benefits of permissionless innovation).

[96] *See, e.g.*, 47 U.S.C. §§ 151, 201(b), 257, 1302.

[97] *See* 47 U.S.C. § 154(i).

[98] *See* Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38. Stat. 719 (1914) (15 U.S.C. § 45).

The best way to do that is for the FCC to use its authority and rulemaking power to adopt two rules: one requiring transparency and one prohibiting unreasonable discrimination. The FCC already has a transparency rule in place, so that part is simple. Slightly more complex is an enforceable regime to police potentially unreasonable discrimination or anticompetitive behavior by broadband providers.[99] However, we think the FCC can use its authority in Title I and various hooks for ancillary authority to adopt a commercially reasonable regime for unreasonable discrimination and anticompetitive behavior that mirrors the FTC's antitrust and consumer-protection regimes. Doing so would ensure that there is a consistent framework for Net Neutrality throughout the Internet ecosystem. This would allow consumers and edge providers to look not only to the FCC, but also to the FTC and state attorneys general for protection if any harmful practices should arise. This is the most comprehensive and effective Net Neutrality regime that could be had under existing law, so we encourage the FCC to put it into place as soon as possible.

1. Ensuring Transparency

Sunlight is often the best disinfectant, and many potential consumer harms can be avoided simply by requiring broadband providers to be transparent about how they manage the traffic on their networks.[100] The broadband market will function better if

---

[99] *See* NPRM ¶ 75 (proposing to consider replacing the general-conduct standard with a commercially reasonable standard).

[100] As private carriers in a competitive market, publication of interconnection rates would raise potential antitrust concerns about conscious parallelism or other forms of collusion. We want individualized pricing and negotiation of peering and transit SLAs, because price regulations of interconnection agreements will likely decrease future investment and competition in broadband. Thus, we think a transparency rule should be limited to

consumers are able to make informed choices about their broadband service plans, and if edge providers have clear guidance on how to conform their services to match broadband providers' traffic-management practices.[101] Moreover, requiring broadband providers to make certain public statements means consumers and edge providers are able to hold the broadband providers to their promises down the line, which can greatly expedite the complaint-resolution process. Under the FTC's Deception authority, the agency need not even show actual or likely consumer harm to bring an enforcement action — simply breaking a material promise or failing to disclose relevant information is enough to violate the law.[102] We suggest the FCC clarify that its transparency rule conforms to the standards for disclosures that the FTC set forth in its Deception Policy Statement.

Legally, a transparency rule is on sound footing. The FCC has had one in place since 2010,[103] with no challenges yet to that aspect of Net Neutrality. Even if it were challenged, though, the transparency rule is quite arguably within the FCC's authority. Section 257(a)

---

disclosures about broadband providers' traffic-management practices and the various services available to end users.

[101] *See, e.g.*, Broadband Internet Tech. Advisory Grp., *Differentiated Treatment of Internet Traffic: A Uniform Agreement Report* at 29 (Oct. 2015), *available at* https://goo.gl/pxnczU ("In previous reports, BITAG has recommended transparency with respect to a number of aspects of network management. BITAG continues to recommend transparency when it comes to practices used to implement the differential treatment of Internet traffic.") (internal citation omitted).

[102] *See, e.g.*, Letter from James C. Miller III, Chairman, FTC, to the Honorable John Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives at 2 (Oct. 14, 1983) ["FTC Deception Policy Statement"] *available at* https://goo.gl/PSuzra (appended to Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984)) ("Thus, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."); *id* at 6 ("Injury exists if consumers would have chosen differently but for the deception.").

[103] *2010 Order* ¶ 53-61

of the Communications Act required the FCC to complete a proceeding "for the purpose of identifying and eliminating . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."[104] Section 257(c), meanwhile, requires the FCC to report to Congress every three years on regulations it has prescribed pursuant to Section 257(a) and on statutory barriers that stand in the way of Section 257(a).[105]

Judge Silberman, dissenting in *Verizon*, suggested that a transparency rule is reasonably ancillary to the FCC's duties in Section 257.[106] Judge Williams, dissenting in *USTelecom*, suggested that a transparency rule could also be upheld under a narrow reading of Section 706,[107] as we suggest above.[108] Furthermore, if the Commission pairs its reclassification of broadband under Title I with a redefinition of "public switched network" to once again refer to telephony services using the North American Numbering Plan, as it has proposed to do,[109] then certain VoIP services may remain classified as Telecommunications Services under Title II. That means that a transparency rule could also be supported as reasonably ancillary to the Commission's duties in Section 201(b) of the Communications Act.[110] The Commission tried using this authority in *Comcast*, but the

---

[104] 47 U.S.C. § 257(a).

[105] 47 U.S.C. § 257(c).

[106] *See* Verizon v. FCC, 740 F.3d at 668 n.9 (Silberman, J. dissenting).

[107] U.S. Telecomm. Ass'n v. FCC, 825 F.3d at 770 (Williams, J., dissenting).

[108] *See* discussion of Section 706, *supra* page 15.

[109] NPRM at 40.

[110] *See* 47 U.S.C. § 201(b).

court rejected it because the argument was made only in the Commission's briefs, not in the underlying order.[111] If the Commission takes better care in drafting the order this time around, this additional authority should give added support for the FCC's transparency rule. Altogether, a rule requiring broadband providers to be transparent about their traffic-management practices should be effective and legally sustainable.

2. Policing Unreasonable Discrimination & Anticompetitive Behavior

Unreasonable discrimination by broadband providers in their traffic-management and interconnection practices could harm consumers and competition among edge providers, in violation of Net Neutrality. There is very little evidence of harmful discrimination happening in the real world, but it has happened before,[112] and it may happen again. The Commission has previously proposed a commercially reasonable standard to protect consumers and competition from the harmful effects of such unreasonable discrimination,[113] and we think such a standard is a reasonable and prudent way to protect Net Neutrality going forward.

Specifically, we think the FCC should protect consumers and edge providers from unreasonable discrimination by implementing a rule requiring broadband providers'

---

[111] *See* Comcast v. FCC, 600 F.3d at 660 ("We have no need to examine this claim, however, for the Commission must defend its action on the same grounds advanced in the Order.") (citing SEC v. Chenery Corp., 318 U.S. 80, 87–88 (1943)).

[112] *See, e.g.*, Madison River Communications, LLC and Affiliated Companies, *Order*, EB-05-IH-0110 (Mar. 3, 2005), *available at* https://goo.gl/krJqii (closing an investigation into alleged blocking of competing VoIP applications by a broadband provider).

[113] *See, e.g.*, 2014 NPRM at 67 ("A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice."); NPRM ¶ 75.

practices to be "commercially reasonable." This standard should be enforced on a case-by-case basis, with the substantive guidelines for assessing commercial reasonableness identical to what the FTC uses to administer its authority under Section 5. Such a standard would provide a consistent regulatory approach throughout the Internet ecosystem, and would thus be the most comprehensive and effective approach to Net Neutrality that could be had under existing law.

Having multiple cops on the beat could potentially lead to uneven enforcement and conflicting guidance, causing regulatory uncertainty that stifles innovation and investment. However, a jurisdictional overlap between the FCC and FTC is impossible to avoid in this context, and it is unclear which agency — the generalist consumer-protection agency or the specialist communications regulator — should be in charge of Net Neutrality. Thus, rather than fighting a jurisdictional turf war with the FTC, we urge the FCC to embrace a collaborative relationship with the FTC — as has already been done in other contexts[114] — and recognize the valuable insight and experience it can offer in the context of Net Neutrality. Indeed, FTC insight into Net Neutrality is vital.

Before the FCC brought any Net Neutrality actions or even considered reclassifying broadband under Title II, FTC had conducted extensive analysis of Net Neutrality and

---

[114] *See, e.g.*, FCC-FTC Memorandum of Understanding Telemarketing Enforcement (2003), *available at* https://goo.gl/4P23pf (establishing a collaborative relationship between the FCC and FTC regarding telemarketing services) (appended to Annual Report from Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry); FCC-FTC Consumer Protection Memorandum of Understanding (Nov. 16, 2015), *available at* https://goo.gl/Xd3Vgy (establishing a collaborative relationship between the FCC and FTC regarding consumer protection online).

broadband competition, including thorough consideration of the benefits and costs of various potential forms of discrimination.[115] Many potential forms of discrimination or violations of Net Neutrality involve vertical restraints on trade (*e.g.*, SLAs) that have anticompetitive effects on certain edge providers. Yet, looking only at one market gives an incomplete picture of the situation. For example, a zero-rating service for music streaming or a prioritized service for gaming offered by a broadband provider might have anti-competitive effects in the market for music or gaming services, but also significant pro-competitive effects in the market for broadband. In fact, there are already multiple examples of broadband providers using such offerings to great success in the market.[116]

We need a regulatory framework for Net Neutrality that encourages experimentation with these types of offerings, but is able to step in and regulate them when needed to protect consumers or competition. The FCC alone could not deliver that, but it is unclear whether the FTC alone could deliver it either. Thus, in this proceeding, we encourage the FCC to implement a comprehensive Net Neutrality framework, utilizing the experience and authority of both the FCC and FTC, based on a commercially reasonable standard. Down the line, however, if it becomes clear that the FTC can enforce an effective Net Neutrality regime on its own, then we encourage the FCC to use its authority under Section 10 to forbear from applying the commercially reasonable standard where it is truly

---

[115] *See* FTC Staff Report, *Broadband Connectivity Competition Policy* (June 2007), *available at* https://goo.gl/Fd2MEC.

[116] *See, e.g.*, Tran, *supra* note *82*; Plusnet, *supra* 88.

duplicative and unnecessary for the effective performance of the Commission's various duties in the Communications Act.[117]

IV. Conclusion

We thank the Commission for launching this proceeding and proposing to restore the light-touch regulatory framework for broadband. We strongly support these efforts and look forward to further engagement with the Commission and other stakeholders on these issues.

Respectfully submitted,

/s/
Tom Struble
Technology Policy Manager

Joe Kane
Technology Policy Associate

July 17, 2017

[117] *See* 47 U.S.C. § 160.