

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**REPLY COMMENTS OF
PUBLIC KNOWLEDGE
& BENTON FOUNDATION**

Charles Duan
Harold Feld
Kate Forscey
Laura Moy
Sherwin Siy
Michael Weinberg
Public Knowledge
1818 N St, NW
Suite 410
Washington, DC 20036
(202) 861-0020

Amina Fazlullah
Benton Foundation
1250 Connecticut Ave, NW,
Suite 200
Washington, DC 20036
(202) 638-5770

September 15, 2014

Table of Contents

- I. The Overwhelming Majority of Comments Supported the Open Internet.....3**
 - A. The Number of Individual Commenters Speaking in Their Own Words Was Unusually High, and Almost All Individual Comments Were Pro-Net Neutrality5
 - B. Most Individual Commenters Think About Net Neutrality in Ways Not Addressed by Mainstream Coverage.....6
 - C. The American Public Expects the Regulation of the Internet to Reflect Our Fundamental Values.....7
- II. Rules that Rely on § 706 Cannot Protect the Open Internet8**
- III. Existing Remedies at Law or Antitrust Cannot Protect the Open Internet9**
 - A. Antitrust Laws Offer Little Certainty of Protection.....9
 - 1. Antitrust Cannot Prevent an ISP from Imposing Differential Pricing on its Customers.....10
 - 2. Aggrieved Broadband Customers Are Likely Barred from Bringing Class Actions Against ISPs12
 - B. FTC Authority Is Similarly Limited13
 - C. Broadband Access Providers Can Evade Litigation Under Antitrust or Consumer Protection Laws Through Mandatory Arbitration Clauses14
 - D. Even if Antitrust or Consumer Protection Laws Were More Effective in this Context, the Public Interest in Free Expression Mandates Additional Open Internet Rules.....14
- IV. Title II Offers Stability with Strong and Flexible Protection16**
 - A. Title II Reclassification Would Bring Clarity and Stability to Open Internet Rules.....16
 - B. Title II Reclassification Would Bring Strength and Flexibility to Open Internet Rules.....18
 - C. Title II Maximizes Consumer Protection from Undue Discrimination While Preserving Deference of the Commission to Potentially Approve Prioritization Proposals when Just and Reasonable19
 - D. A Title II Prohibition Against Discrimination Is Necessary to Protect Consumer Privacy.....20
- V. To Avert End-Runs Around Rules, the Commission Should Place the Burden of Proof that Network Management Tools Are Reasonable on Service Providers.....22**
- VI. To Address Questions About Forbearance, the Commission Should Implement Interim Rules, then Conduct An Additional Rulemaking to Determine Forbearance.....23**
- Conclusion.....25**

Summary

Public Knowledge and Benton Foundation¹ respectfully submit these comments in response to initial comments filed in the above-referenced dockets. Public Knowledge and Benton Foundation urge the Commission to reclassify broadband as a Title II service and adopt bright line open internet protections under that authority that prohibits paid prioritization and discrimination of content as a rule, subject to limited exceptions.

From the initial comments filed in this proceeding, it is clear that commenters prefer a Title II solution. An unprecedented number of individuals filed comments, overwhelmingly in favor of net neutrality. Analysis of the large number of individual comments shows that Americans expect the regulation of the internet to reflect our fundamental values – an expectation that will be honored best by reclassification.

A Title II solution is also the solution best suited to address the concerns that necessitate open internet rules. Initial comments established that rules that rely on § 706 cannot protect the open internet. Contrary to what some commenters suggested, existing remedies in consumer protection or antitrust law cannot protect the open internet either. In contrast, Title II reclassification will bring stability, strength, and flexibility to open internet rules. Title II reclassification will also provide the Commission with the authority it needs to ensure that consumer privacy is protected and to preserve a space for innovation of new privacy protective technologies.

On the question of what constitutes “reasonable network management,” the Commission should adopt a policy that assumes tools that discriminate among or block traffic are unreasonable unless demonstrated to be reasonable, and should place the burden of that showing on internet service providers

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

("ISPs"). This is the only way to prevent ISPs from making an end-run around the rules, using new and unforeseen methods to create fast lanes and slow lanes.

Finally, to create a smooth transition to net neutrality under a Title II regime, the Commission should simply adopt interim rules, then conduct an additional rulemaking to determine which Title II rules to forbear from and which to apply in the broadband context. The Commission has ample experience using interim rules to smooth a transition.

Argument

I. The Overwhelming Majority of Comments Supported the Open Internet

The overwhelming majority of commenters both big and small filed in support of net neutrality. For example, dozens of companies called explicitly for a Title II solution, including Netflix,² Meetup,³ Kickstarter,⁴ Etsy,⁵ FourSquare,⁶ Gilt,⁷ Spotify,⁸ Tumblr,⁹ Cogent,¹⁰ Mozilla,¹¹ and reddit.¹² In addition, comments filed by a large number of public interest groups – both those who participate in FCC proceedings on a regular basis and those who do not – supported Title II reclassification.¹³ While the raw number of comments for or against a policy option should never be the single determining factor in policymaking, the massive and one-sided outpouring of interest in this issue is relevant to

² Comments of Netflix, GN Docket No. 14-28 (filed July 15, 2014) [hereinafter Comments of Netflix].

³ Notice of Ex Parte of Kickstarter, Meetup, Tumblr, New York City Tech Meetup, and Engine, GN Docket No. 14-28 (filed May 6, 2014).

⁴ *Id.*

⁵ Notice of Ex Parte of Etsy, GN Docket No. 14-28 (filed May 8, 2014).

⁶ Notice of Ex Parte of Etsy, Tumblr, VHX, Kickstarter, FourSquare, Meetup, General Assembly, Spotify, Gilt, Warby Parker, Dwolla, CodeAcademy, Upworthy, BuzzFeed, Reddit, Vimeo, and Union Square Ventures, GN Docket No. GN 14-28 (filed July 17, 2014).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Comments of Cogent Communications Group, Inc., GN Docket No. 14-28 (filed July 15, 2014).

¹¹ Comments of Mozilla, GN Docket No. 14-28 (filed July 15, 2014).

¹² Comments of reddit, Inc., GN Docket No. 14-28 (filed July 15, 2014).

¹³ *See, e.g.*, Comments of Consumers Union, GN Docket No. 14-28 (filed July 15, 2014); Comments of Free Press, GN Docket No. 14-28 (filed July 17, 2014) [hereinafter Comments of Free Press]; Comments of Internet Freedom Supporters, GN Docket No. 14-28 (filed July 18, 2014); Comments of the Open Technology Institute at the New America Foundation and Benton Foundation, GN Docket No. 14-28 (filed July 17, 2014); Comments of Access, GN Docket No. 14-28 (filed July 18, 2014); Comments of Open MIC, GN Docket No. 14-28 (filed July 14, 2014); Comments of the Future of Music Coalition, GN Docket No. 14-28 (filed July 15, 2014).

understanding the importance of protecting an open internet to large swaths of our society.

But more notably, analysis of comments filed by individuals in this proceeding shows remarkably deep engagement by the general public – even when compared to other proceedings with similar numbers of comments.¹⁴ The analysis conducted by Quid under a grant from the Knight Foundation is particularly telling.¹⁵ Quid separated out individual comments (as opposed to comments from organizations like Public Knowledge, corporations like Verizon, or trade associations) and further distinguished between “unique or organic” comments by individuals and individual comments that appeared to be “derived from a template.” Quid found that this proceeding included a disproportionately high number of non-template individual comments. Template-based comments are a valuable barometer of public opinion in a proceeding such as this. However, moving beyond a template and crafting a unique comment demonstrates a

¹⁴ A number of third parties have conducted analysis of the individual comments since the FCC released them in searchable XML format. *See, e.g.,* Bob Lannon & Andrew Pendleton, *What Can We Learn from 800,000 Public Comments on the FCC’s Net Neutrality Plan?*, Sunlight Foundation Blog (Sept. 2, 2014), <http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan/>; Alex Wilhelm & Cat Zakrzewski, *Inside The FCC’s 1.1 Million Net Neutrality Comments*, TechCrunch (Aug. 5, 2014), <http://techcrunch.com/2014/08/05/inside-the-fccs-1-1-million-net-neutrality-comments/>; Anne L. Kim, *Women File Fewer FCC Net Neutrality Comments Than Men*, Roll Call (Aug. 12, 2014), <http://blogs.rollcall.com/technocrat/women-file-fewer-fcc-net-neutrality-comments-than-men-and-there-were-a-lot-of-john-oliver-stories-analysis-says/>; Max Woolf, *The Data From Our Comments to the FCC About Net Neutrality*, *minimaxir* (Aug. 8, 2014), <http://minimaxir.com/2014/08/comments-about-comments/>; *see generally* Harold Feld, *What Do We Learn From Big Data Generalizations Of Net Neutrality Comments?*, *Wetmachine* (Aug. 18, 2014), <http://www.wetmachine.com/tales-of-the-sausage-factory/what-do-we-learn-from-big-data-visualizations-of-net-neutrality-comments/>.

¹⁵ *See* Elise Hue, *A Fascinating Look Inside those 1.1 Million Open Internet Comments*, NPR Blog (Aug. 11, 2014), <http://www.npr.org/blogs/alltechconsidered/2014/08/12/339710293/a-fascinating-look-inside-those-1-1-million-open-internet-comments>.

higher level of engagement by the individual commenter and is noteworthy. Quid's analysis demonstrates that the American public cares and thinks deeply about questions connected to an open internet, is very supportive of net neutrality, and ties net neutrality to fundamental American values.

A. The Number of Individual Commenters Speaking in Their Own Words Was Unusually High, and Almost All Individual Comments Were Pro-Net Neutrality

Quid's analysis reveals that an unusually large number of individuals participating in this proceeding filed unique comments. Virtually none of those comments were found to be anti-net neutrality.

In contrast with most proceedings with significant individual public comments, in which 80% typically come from templates or petitions, in this proceeding 50% of individual comments were found to be "unique or organic."¹⁶ This unusually high number of individual comments bespeaks a very high level of engagement by the public. Members of the public who commented in this proceeding were moved to draw from their own experiences and to express their specific opinions. They overwhelmingly made the extra effort to add their own personal feelings in their own words.

Analyzing well over a million comments, Quid found that "there weren't enough unique or organic anti-net-neutrality comments to register on the map."¹⁷ This is not to say there were no anti-net neutrality comments from individuals. But the fact that *virtually no one who opposed net neutrality regulation cared enough to write their own comments in their own words* speaks volumes to the level of engagement and the importance of the issue to those who support an open internet.

¹⁶ *Id.*

¹⁷ *Id.*

B. Most Individual Commenters Think About Net Neutrality in Ways Not Addressed by Mainstream Coverage

More importantly, the individual comments did not simply reflect a common set of talking points, such as those seen in mainstream media and debated in DC policy circles. Commenters took time to think about this issue and decide why it is important to them personally. Not surprisingly, they quickly concluded that their support for an open internet did not hinge on cat videos or Netflix. Many commenters viewed this debate as going to fundamental values of basic fairness, opportunity, the American Dream, and preserving free expression and diversity of views.

The biggest clusters of themes that emerged among these hundreds of thousands of individual comments were the impact that a non-neutral internet would have on diversity of voices and diversity of views, followed by the importance of fundamental fairness and the “American Dream” of giving upstarts an equal shot.¹⁸

These themes of diversity and fundamental fairness have *not* been the dominant messaging points in the news media. Rather, the most prominent themes in the mainstream media, and among policy makers, have been around competition, consumer impact, market power issues, and the degree to which the FCC and public policy generally are shaped by large corporations.¹⁹ While these

¹⁸ *Id.* 15% of individual commenters indicated that “a pay-for-play system would harm the diversity of the Internet,” 9% indicated that “all content should be equally accessible,” and 7% of the comments related to the “need for equality in promoting the American Dream.”

¹⁹ Sean Gourley & Sarah Pilewski, *Aspen Forum Examines Ways Of Maintaining Open Internet*, Knight Blog (August 11, 2014) (“The data shows us that the conversation in mainstream media has focused heavily on the impact of net neutrality on the consumer. For example, the media is more likely to draw on the example of higher Netflix costs than to question the impact on political engagement or access to ideas.”), <http://www.knightfoundation.org/blogs/knightblog/2014/8/11/aspen-forum-examines-ways-maintaining-open-internet/>.

themes were also present in individual comments, they did not predominate nearly as much as one might expect.

This cuts directly against the claim, made by opponents of net neutrality, that people are engaged with this issue because of “misinformation” or “misunderstanding.” If that were the case, the comments would have mirrored the press framing. But they did not. Rather, the data show that people are engaged on this issue to a remarkable degree, and filed comments drawing their own conclusions about it rather than echoing talking points.

C. The American Public Expects the Regulation of the Internet to Reflect Our Fundamental Values

Individual public comments filed in this proceeding also illustrated that the concerns of the public fall squarely within the traditional concerns of the Communications Act.²⁰ The American people see the internet as a foundational element of society. As such, regulation of this service must go beyond the usual concern for consumer protection and antitrust. Rather, the regulation of our broadband networks must reflect and support our basic values as Americans.

More broadly, when we look at these sentiments, we see a lot of support for the idea that broadband service is so essential to participation in modern society that we do not simply leave it to the kindness of kings, the benevolence of corporate barons, or the indifference of the unfettered market. Large numbers of individual comments explicitly asked the FCC to reclassify broadband as a Title II service. And even those that did not explicitly invoke Title II were more consistent with the concept of reclassification than with treating broadband as simply another consumer service. People do not commonly speak of access to consumer goods or services as essential to the American Dream, or tie them to values of fundamental fairness. That people now add “broadband access” to this short list of resources that should reflect our values is quite telling.

²⁰ See, e.g., 47 U.S.C. § 257(b).

The American people strongly agree with Chairman Wheeler that this proceeding is a critical moment for the “network compact” between the American people and broadband network operators. They strongly disagree, however, that the FCC’s proposed rules reflect these fundamental values.

II. Rules that Rely on § 706 Cannot Protect the Open Internet

Open internet rules that rely on § 706 cannot protect the open internet in the manner called for in initial comments filed by the general public, policy groups, and tech industry. A defining principle of an open internet is the nondiscrimination of data transmission over broadband services. This means prohibiting paid prioritization and discrimination of content as a rule, subject to exceptions in cases where the FCC deems discriminatory practices to be “just and reasonable.”²¹ This is the standard under which the internet was born and has flourished, and this standard is fundamental to ensuring the internet’s continued effectiveness as instrument of innovation, investment, and democratic participation.²²

As a number of commenters explained, however, rules under § 706 cannot both meet this strong standard and still pass court scrutiny.²³ In *Verizon v. FCC*, the DC Circuit specifically said that under any provision other than Title II, the FCC *must* allow discriminatory practices by ISPs.²⁴ Thus under § 706, the FCC would have no choice but to allow room for discrimination.²⁵

²¹ For further discussion, see section IV.C, *infra* p. 19.

²² See, e.g., Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, GN Docket 14-28, at 33 (filed July 15, 2014) [hereinafter Comments of Public Knowledge]; Comments of Netflix at 22; Comments of Consumers Union, GN Docket 14-28, at 7 (filed July 15, 2014).

²³ See Comments of Public Knowledge; Comments of Netflix, at 22; Comments of Free Press.

²⁴ *Verizon v. FCC*, 740 F.3d 623, 658 (D.C. Cir. 2014)(holding that any rules imposed by the FCC without reclassifying “must leave sufficient room for individualized bargaining and discrimination’ so as not to run afoul of the statutory prohibitions on common carrier treatment.”).

²⁵ *Id.*

Were the Commission nevertheless to attempt a nondiscrimination policy under § 706, it would almost certainly be struck down by the court.²⁶ And even if the Commission designated a system with two tiers, one allowing prioritization agreements and one providing for a minimum speed with no discriminatory principles, the minimum “open” speed tier would likely still violate the court’s holding in *Verizon*.²⁷

Under § 706, the Commission cannot effectively implement rules that would protect the real open internet as it is considered to be defined by the majority industry, public interest, and the general public.

III. Existing Remedies at Law or Antitrust Cannot Protect the Open Internet

Contrary to the suggestion of some commenters,²⁸ existing consumer and antitrust protections are not sufficient to prevent discriminatory practices. Such claims are transparent attempts to forestall any meaningful oversight of practices that are harmful to consumers. This is particularly evident when – as in this proceeding – the very parties who claimed that antitrust laws are sufficient are the same parties that argue constantly against the applicability of those laws in circumstances of network discrimination.

A. Antitrust Laws Offer Little Certainty of Protection

The broadband and telecommunications industry has a storied history of working to limit the applicability of the very antitrust laws it now claims will

²⁶ *Id.*

²⁷ See Comments of Public Knowledge at 42 (“The only foreseeable outcome of the ‘minimum access’ rule that the Commission currently proposes would be to leave sufficient room for individualized bargaining and discrimination in terms so as not to run afoul of the statutory prohibitions on common carrier treatment,” or else be thrown out. Even a slow lane would then require “different edge providers to negotiate at different prices.”)

²⁸ Comments of the American Cable Association, GN Docket No. 14-28 (filed July 17, 2014) at 23; Comments of Verizon and Verizon Wireless, GN Docket No. 14-28 (filed July 15, 2014) at 17; Comments of CTIA, GN Docket No. 14-28 (filed July 18, 2014) at 34.

protect its consumers from its practices. Supreme Court decisions finding for Pacific Bell (now part of AT&T) and Verizon have reinforced the notion that a firm's unilateral actions will often not support an antitrust action. Another decision, in Comcast's favor, severely restricts would-be plaintiffs' ability to form a class. Under these cases, consumers who hope to rely on antitrust protections to defend against the most troubling threats to the open internet would find the potency of their tools to be uncertain at best.

1. Antitrust Cannot Prevent an ISP from Imposing Differential Pricing on its Customers

Under recent Supreme Court Cases *Pacific Bell v. linkLine* and *Bell Atlantic Corp. v. Twombly*, it is unlikely that antitrust law could be used to prevent an ISP from imposing differential pricing on content providers.

In *Pacific Bell v. linkLine*, the Supreme Court held that network access provider Pacific Bell was not violating antitrust law when it engaged in a "price squeeze" against competing retailers who sold consumers internet access.²⁹ As a last-mile internet access provider, Pacific Bell sold wholesale access to retail DSL providers. Simultaneously, it competed with those some retailers by selling DSL service directly to customers. In its gatekeeper role, Pacific Bell could therefore set the price of access as high as it wanted without affecting its own costs of providing access to its direct customers. By raising these access costs for its retail competitors while also lowering its retail prices for direct customers, Pacific Bell could thus squeeze any profit margin of its competitors at both the cost and revenue sides of the equation.

Despite Pacific Bell's position as a vertically integrated upstream monopolist, the Supreme Court refused to allow an antitrust action against it, saying that the wholesale price increase, even combined with the retail price lowering, did not support a claim under the Sherman Act. In setting high wholesale prices as the last-mile monopolist, the Court held, Pacific Bell had no

²⁹ *Pac. Bell v. linkLine Communications, Inc.*, 555 U.S. 438 (2009).

duty to deal with other retailers.³⁰ Only the Commission could impose such a duty.³¹

Worse, even if all major ISPs were to engage in the same discriminatory behavior, this would likely not be considered a “contract, combination . . . or, conspiracy, in restraint of trade” for purposes of establishing a Sherman Act violation.³² Under *Bell Atlantic Corp. v. Twombly*, the fact that each ISP might independently decide to discriminate against less lucrative users would not necessarily rise to the level of any of those firms acting in combination or conspiracy to restrain trade.³³

Following these cases, an ISP could likely charge whatever differential pricing it liked to edge providers without repercussions at antitrust. As both a producer of content and a seller of access to that (and other) content, Comcast-NBC Universal sits in a vertically-integrated position remarkably similar to that of Pacific Bell in the *linkLine* case. By raising the cost for its rivals in the content creation market, or even raising the costs to infinite levels by blocking their content, Comcast could easily squash competition. Furthermore, Comcast would have the ability to charge users more for access to independently created content than for access to its own sites. In response to allegations that either of these actions was an antitrust violation, Comcast could simply cite *linkLine*³⁴ and *Verizon v. Trinko*³⁵ for the proposition that it had no duty to deal – at any cost – either with those competitors seeking access to individual subscribers, or with customers seeking access to independent content.

³⁰ *linkLine*, 555 U.S. at 450–51.

³¹ And the Commission *could* impose such a duty, which is precisely what providers seek to prevent in this proceeding.

³² 15 U.S.C. § 1.

³³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

³⁴ *linkLine*, 555 U.S. 438.

³⁵ *Verizon v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 3998 (2004).

2. Aggrieved Broadband Customers Are Likely Barred from Bringing Class Actions Against ISPs

Further weakening any remedies that could be sought under antitrust, the current case law also undercuts the ability of harmed consumers to seek redress via class action suit. In *Comcast v. Behrend*, the Supreme Court seemingly indicated that for a class action antitrust case to even be certified, plaintiffs must be able to show that as a class, they are uniformly harmed in the same way, using the same methodology. Plaintiffs must also be able to allege damages due to each separate theory of harm separately, instead of calculating the harm caused but for the anticompetitive actions.³⁶

Not only would this require a customer of a discriminating ISP to engage experts for a multiplicity of models and estimates—a difficult obstacle by itself—it would also raise a particular barrier in an open internet case. Because an ISP could selectively discriminate against certain content providers for different users, down to a near-individual level, it would be difficult to use a single common methodology for those affected.

For example, if Verizon began deliberately slowing traffic from an unaffiliated site—like YouTube, Netflix, or the Library of Congress’s *Experiencing War* veterans’ interview collection—different customers would be damaged to different extents. A common methodology would not necessarily capture this, depending on a given court’s criteria for determining whether or not a damages methodology is “common” or not. Different users would naturally have different preferences for different sites and content, and would be willing to pay different amounts to access them at the same speed as Verizon-affiliated content.

Assembling similarly affected consumers into a class would also be difficult if, for example, an ISP decided to apply subscriber-specific tiering, exploiting a household’s particular preferences to bundle particular speeds for particular content together. If faced with a class action challenge, the ISP could

³⁶ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

claim that only those plaintiffs who shared a common bundle plan *and* had the same preferences could be said to face damages that could be calculated by a common methodology. Every one of its customers would likely face higher prices individually. But because customers would each be affected to a different extent and with regard to different content, their ability to effectively seek a remedy at law for this discrimination would be difficult under the current antitrust regime.

B. FTC Authority Is Similarly Limited

Just as antitrust law will not protect an open internet, nor will FTC authority, contrary to the unsupported assertions of opponents of the Commission's rules.

The Federal Trade Commission has the power to enforce against unfair and deceptive trade practices.³⁷ To the extent that practices might be unfair, the FTC's authority is guided – if not strictly limited – by the contours of the antitrust laws, which provide uncertain relief, as indicated above. Where the FTC can assess behaviors that are not per se antitrust violations, it generally will act only when there is a net negative effect on consumer welfare.³⁸ Unfortunately for consumers, their welfare in the FTC's context tends to be measured in terms of price effects, which are very difficult to quantify in the case of content discrimination. A consumer who receives content from independent sources more slowly is harmed both by the slower speed and by the effective reduction in independent media sources, and as consumer comments show, access to independent media is crucial. However, measuring such effects on the pocketbook is difficult at best.

The FTC's mandate against deceptive practices provides little additional comfort, because it is all too easy for ISPs to simply disclose their discriminatory

³⁷ 15 U.S.C. § 45.

³⁸ U.S. Fed. Trade Comm'n, *Broadband Connectivity Competition Policy Staff Report* 121–22 (2007), available at <http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

practices to escape any scrutiny for blocking or discriminating against traffic. Whether such a notice would be buried in one of the numerous pieces of voluminous text that accompanies any consumer's subscription to a service, or even if such a disclosure were prominently mentioned, the notice of a discriminatory practice alone does nothing to help a consumer facing a concentrated market, or even, in many cases, a local monopoly.

C. Broadband Access Providers Can Evade Litigation Under Antitrust or Consumer Protection Laws Through Mandatory Arbitration Clauses

Even if a consumer were able to meet the higher hurdles left under today's antitrust jurisprudence, ISPs have one more way to effectively bar an antitrust action by consumers: through the use of mandatory arbitration clauses. In *AT&T Mobility v. Concepcion*, the Supreme Court ruled that the Federal Arbitration Act operates broadly to compel arbitration even in contracts of adhesion.³⁹ Such contracts are ubiquitous in customer service agreements with carriers, and are easily added where they are absent. The breadth of the FAA's sweep under *Concepcion* makes it trivially easy for a carrier to force consumers into arbitration for any complaints, which consumer advocates warn is problematic for aggrieved consumers for a number of reasons.⁴⁰ This further closes the door for consumers to use antitrust or other consumer protection statutes to seek redress.

D. Even if Antitrust or Consumer Protection Laws Were More Effective in this Context, the Public Interest in Free Expression Mandates Additional Open Internet Rules

Even if antitrust and consumer protection laws were adequate to address financial and competitive harms, the key justifications for open internet rules would remain unaddressed.

³⁹ *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011).

⁴⁰ *Forced Arbitration*, National Association of Consumer Advocates, <http://www.naca.net/issues/forced-arbitration> (last visited September 12, 2014).

The value of an open internet is not solely or even primarily an issue of lower prices for consumers or ensuring competition between ISPs. If competition were sufficient, it would still only be a means to the end of ensuring that internet users can speak and receive speech without the interference of their access providers. The ability of any individual or group—including those who are economically or socially disadvantaged—to reach the public is a basic value of the internet that cannot be supported by market forces alone. Similarly, antitrust and consumer protection laws are not designed to promote innovative media and services, which would be severely disadvantaged against media incumbents if they cannot provide carriers with profit margins comparable to the incumbents.

Moreover, antitrust and consumer protection laws would not apply to what is perhaps the most well-known net neutrality violation that has happened so far: Comcast's blocking of BitTorrent. In 2007, a number of Comcast subscribers complained that they were having trouble using BitTorrent.⁴¹ Public Knowledge and Free Press filed a formal complaint against Comcast,⁴² and the Commission ruled that Comcast's actions contravened Commission policies.⁴³ But the concern raised would not fall under antitrust law or the FTC's § 5 authority, so the antitrust and consumer protection authorities cited by opponents of the Commission's rules would be powerless to address a case like this.

⁴¹ See, e.g., Ernesto, *Comcast Throttles BitTorrent Traffic, Seeding Impossible*, TorrentFreak (Aug. 17, 2007), <http://torrentfreak.com/comcast-throttles-bittorrent-traffic-seeding-impossible/>; Scott Gilbertson, *It's Comcastic: Is Comcast Blocking Users from Seeding Torrents?*, Wired Monkey Bites (Aug. 20, 2007), <http://blog.wired.com/monkeybites/2007/08/its-comcastic-i.html>.

⁴² *Formal Complaint of Free Press and Public Knowledge against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518 (Nov. 1, 2007).

⁴³ See *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

Antitrust and other consumer protection laws are a threadbare substitute for strong open internet rules for the precise reason that the Commission retains the authority to promote the public interest in telecommunications separate from those distinct statutes. This additional authority was not granted lightly. It exists because the provision of communications through networks forms critical infrastructure for a wide variety of civic, economic, educational, and social activities. This public interest authority, which goes beyond the economic focus of antitrust and consumer protection laws, is essential to preserving the open internet.

IV. Title II Offers Stability with Strong and Flexible Protection

Neither rules that rely on 706 nor antitrust nor consumer protection laws – nor all of the above combined – would be enough to protect the aspects of the open internet that the public knows and cherishes. Fortunately, the Commission has the power to promulgate the necessary rules to protect an open internet once it has reclassified broadband as a Title II service. Title II reclassification would provide open internet rules with stability, strength, and flexibility.

The open internet requires nondiscrimination principles that protect consumers from unreasonable ISP practices while preserving the FCC's discretion to make exceptions when applicable. There is ample authority and precedent under Title II to reassure us that it provides the necessary regulatory authority paired with the ample discretion specifically granted to the Commission by Congress to ensure the law's continued flexibility. We know this because history has demonstrated it to be so.

A. Title II Reclassification Would Bring Clarity and Stability to Open Internet Rules

Regulation under Title II would be clear and stable because the most fundamental aspects of telecommunications regulation have been in place for some 80 years, since the Communications Act was first passed. During that time,

the fundamental principles of the Act have remained constant even while the Commission successfully implemented the Act to accomplish its intended purpose, Congress frequently updated it to keep pace with changing technologies and policy imperatives, and Courts interpreted the Act. The scope and general applicability of terms in the Communications Act are therefore well understood by lawmakers and industry stakeholders alike, even as the implementation of specific provisions remains flexible and suitable to addressing updated technologies.

The rich history of the Communications Act ensures that its application is clear in a staggering variety of contexts. When the Act was first passed in 1934, less than 40% of American households had a telephone.⁴⁴ The telegraph was still a common mode of communication. Under the Act's flexible framework, innovation flourished and advanced communications methods spread. By 2013 91% of adults had cell phones, 56% had smartphones, and the total number of mobile devices in use in the country exceeded the population.⁴⁵ The Communications Act has also seen the transition from the beginning of AM radio broadcast through the birth and development of FM radio, television, digital television and multicasting, cable, and satellite.

Unlike § 706, for which we have one case alone that tells us the scope of authority,⁴⁶ the scope with regard to Title II is well understood. The advantage of

⁴⁴ Karl Hartig, *Tuning In: Communications Technologies Historically Have Had Broad Appeal for Consumers*, Wall St. J. Classroom Edition (1998), available at <http://www.karlhartig.com/chart/techhou>.

⁴⁵ Lee Rainie, *Cell Phone Ownership Hits 91% of Adults*, Pew Research Fact Tank (June 6, 2013), <http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/>; Cecilia Kang, *Number of Cellphones Exceeds U.S. Population: CTIA Trade Group*, Washington Post Post Tech Blog (October 11, 2011), http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEcL_blog.html.

⁴⁶ See *Verizon v. FCC*, 740 F.3d at 645 (2014) (affirming that § 706 is an independent source of authority and that the FCC can therefore promulgate rules that serve its goals as long as they do not violate an express statutory provision).

having a well-known and well-understood statute is that we understand how it works when applied and tested in a variety of real circumstances, to a variety of real networks.⁴⁷

B. Title II Reclassification Would Bring Strength and Flexibility to Open Internet Rules

Critics argue that the long and detailed history of telecommunications regulation is a disadvantage, not an asset. They claim that “antiquated, heavy-handed” provisions of Title II, if applied to broadband, would forever tether internet to technologies of the past.⁴⁸ But those critics overlook the fundamentally flexible nature of Title II regulation. Title II is based on a series of principles that have lasted so long in myriad industries⁴⁹ precisely *because* they are flexible and because they address concerns that we have seen repeatedly in so many network environments.⁵⁰ Without Title II, these principles, crucial for the Commission to properly accomplish its fundamental tasks, cannot be invoked.

⁴⁷ Those who would cling to this argument that old laws should necessarily be discarded because they are old might bear in mind that the oldest provision with regard to communications in America is the First Amendment. That was written before typewriters, yet has continued to evolve as necessary despite emerging technologies never dreamed of by its authors. It has proven for all its age to be both extremely flexible and an absolutely vital protector of liberty.

⁴⁸ See, e.g., Comments of Verizon and Verizon Wireless, GN Docket 14-28, at 12-13 (filed July 15, 2014); Comments of TechFreedom, GN Docket 14-28, at 52-54 (filed July 17, 2014); Comments of CTIA, GN Docket 14-28, at 46 (filed July 18, 2014); see also Sarah Criser, *Press Release: Latta Introduces Legislation to Keep Internet Open*, Congressman Bob Latta (May 28, 2014), <http://latta.house.gov/news/documentsingle.aspx?DocumentID=381409>; *House Republicans to FCC: Take Title off Table*, Broadcasting & Cable (May 13, 2014), <http://www.broadcastingcable.com/news/washington/house-republicans-fcc-take-title-ii-table/131127>.

⁴⁹ See Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* 42-61 (2010), (discussing the successful flexible application of common carrier principles to industries such banking, energy, transportation, and telecommunications).

⁵⁰ *Id.*; see S. Derek Turner, *Fighting the Zombie Lies: Sorry ISPs, Title II Is Good for the Economy*, Free Press (May 14, 2014), <http://www.freepress.net/blog/2014/05/14/fighting-zombie-lies-sorry-isps-title-ii-good-economy>.

In the 80 years since the Communications Act was passed, the communications industry has seen explosive evolution *because* telecommunications regulation does its job so well and with appropriate flexibility. Indeed, under these laws, the internet saw its inception and successful transformation from a nascent fringe technology to the essential and complex worldwide communications network we currently seek to protect today.

Furthermore, over the years, Congress has amended the Act to provide additional flexibility so that provisions of Title II that are no longer useful or relevant to a particular service – but nonetheless remain relevant to the other services still in existence – can be addressed either by administrative interpretation or through forbearance.⁵¹

C. Title II Maximizes Consumer Protection from Undue Discrimination While Preserving Deference of the Commission to Potentially Approve Prioritization Proposals when Just and Reasonable

The flexibility inherent in Title II regulation is critically important when it comes to determining how open internet rules would apply to content discrimination. Title II does not per se ban *all* forms of content prioritization outright. It merely directs the Commission to prohibit any “unjust and unreasonable discrimination,”⁵² rather than the much broader and more problematic legal standard of “commercially unreasonable” the Commission would be required to allow under § 706 in the wake of the *Verizon* decision.⁵³ Reclassification under Title II would restore us from a world where there is a presumption that discrimination is a generally acceptable practice, to one where discrimination is not acceptable *unless* those seeking to discriminate can demonstrate that the reasons for doing so are just and reasonable ones.⁵⁴

⁵¹ See section VI, *infra* p. 23.

⁵² 47 U.S.C. §§ 201, 202; *see* Comments of Public Knowledge, at 102.

⁵³ *Verizon v. FCC*, 740 F.3d at 60-61.

⁵⁴ *See* Comments of Public Knowledge, at 102-104.

As such, Title II reclassification strikes a proper balance by preventing the kind of discrimination induced by the overwhelming economic incentive and technical ability ISPs currently have while preserving the flexibility of the FCC to allow discrimination that serves a legitimate public interest or network purpose.

It also places the onus of proving whether discrimination should be allowed on those entities that are in the best position to make the case. It is right to place the burden of proving reasonableness of discrimination on ISPs, instead of forcing end users to prove discrimination is unreasonable.

In a world where discriminatory agreements are the norm, consumers stand to be harmed most. They are likely to be in the least capable position to (1) identify when such practices are detrimentally affecting their online experience and (2) successfully challenge and prove harmful practices are not “reasonable.” ISPs, on the other hand, have far greater financial and legal resources at their disposal to pour into demonstrating that a particular prioritization agreement is legitimate.

Finally, the Title II standard for discrimination minimizes the amount of time and energy likely to be spent by the Commission enforcing the rules because ISPs are less likely to approach the Commission with a practice that they know is likely to fail.

D. A Title II Prohibition Against Discrimination Is Necessary to Protect Consumer Privacy

Some commenters pointed out that strong net neutrality rules under Title II are necessary to protect consumer privacy and encourage the development of innovative privacy-protective technologies. For example, the i2 Coalition argued that “[t]he proposed rules fail to account for encryption technologies,”⁵⁵ and Golden Frog asserted that “encryption blocking is occurring today and the

⁵⁵ Comments of i2Coalition, GN Docket No. 14-28 (filed July 15, 2014), at 38.

proposed rules would not stop it.”⁵⁶ New America Foundation’s Open Technology Institute noted that “the Commission’s ability to continue to implement [privacy] rules under § 222 of the Telecommunications Act may be thwarted without clear authority over broadband service.”⁵⁷

Public Knowledge and Benton Foundation agree. As the Commission is no doubt aware, privacy is a central concern for many Americans, and encryption of network traffic is a key component of protecting that privacy. However, if ISPs are allowed to prioritize some internet traffic over other traffic, then their interests will not be aligned with these privacy concerns. Discrimination of internet traffic depends on ISPs’ ability to interpret that traffic, and often a prerequisite to interpreting Internet traffic is that the data not be encrypted. Thus, ISPs would have a financial incentive to disfavor encrypted data, and would likely deprioritize it in favor of interpretable—and thus more valuable—unencrypted traffic. Indeed, Golden Frog alleges that one ISP is already blocking STARTTLS email encryption.⁵⁸

Providers could also interpret traffic in order to inject their own data into the content that consumers view, as Comcast has already begun to do to consumers browsing the internet over Comcast’s 3.5 million publicly accessible wi-fi spots.⁵⁹ This could enable ISPs to use their customers’ private information to market products back to them, directly at odds with the purpose of the Commission’s rules governing telecommunications customer proprietary network information.

Moreover, as New America Foundation’s Open Technology Institute pointed out, the Commission’s rules governing telecommunications customer

⁵⁶ Comments of Golden Frog, GN Docket No. 14-28 (filed July 18, 2014), at 7 [hereinafter Comments of Golden Frog].

⁵⁷ Comments of the Open Technology Institute at the New America Foundation and Benton Foundation, GN Docket No. 14-28 (filed July 17, 2014), at 9.

⁵⁸ Comments of Golden Frog at 7.

⁵⁹ David Kravets, *Comcast Wi-Fi Serving Self-Promotional Ads Via JavaScript Injection*, ArsTechnica (Sept. 8, 2014), <http://arstechnica.com/tech-policy/2014/09/why-comcasts-javascript-ad-injections-threaten-security-net-neutrality/>.

proprietary network information could not be extended to apply to broadband subscribers' private information without reclassifying broadband as a Title II service.

V. To Avert End-Runs Around Rules, the Commission Should Place the Burden of Proof that Network Management Tools Are Reasonable on Service Providers

In initial comments, a number of commenters, including Public Knowledge and Benton Foundation, were generally supportive of the Commission's proposal to provide for "reasonable network management" in its adoption of new open internet rules. However, some commenters also expressed concern that flexibility for reasonable network management could open the door for ISPs to create fast lanes and slow lanes through practices they claim constitute reasonable network management. For example, the Internet Freedom Supporters coalition⁶⁰ noted that "it is important that the definition of reasonable

⁶⁰ The members of the Internet Freedom Supporters are Voices for Internet Freedom; Center for Media Justice; ColorOfChange; Free Press; National Hispanic Media Coalition (NHMC); AimHigh LA; Appalshop; Art Is Change; Chicago Media Action; Clarisel Media; Common Cause; Common Frequency; Dignity and Power Now; Easton Community Access Television; Families For Freedom, Inc.; Generation Justice; Hispanic Association of Colleges and Universities (HACU); Iguana Films; Institute for Intellectual Property and Social Justice; Iraq Veterans Against the War; Latino Rebels; LatinoJustice PRLDEF; Librotraficante Movement; Line Break Media; Main Street Project; Martinez Street Women's Center; May First/People Link; Media Action Grassroots Network (MAG-Net); Media Alliance; Media Literacy Project; Media Mobilizing Project; Message Media Education; Mexican American Opportunity Foundation (MAOF); MujerLatinaToday.com; National Association of Hispanic Journalists (NAHJ); National Association of Latino Independent Producers (NALIP); National Consumer Law Center, on behalf of its low-income clients; National Institute for Latino Policy (NiLP); National Latina Institute for Reproductive Health; News Taco; Organizing Apprenticeship Project; Paper Tiger TV; Presente.org; Radio Bilingüe; Ruth Livier; St. Paul Neighborhood Network; The Greenlining Institute; The People's Press Project; TURN (The Utility Reform Network); Women In Media & News (WIMN); Women, Action & the Media; Working Films; Working Narratives; and Young Women United. Comments of Internet Freedom Supporters, GN Docket No. 14-28 (filed July 18, 2014)

network management not be interpreted so expansively that it becomes an exception that swallows the rule.”⁶¹ The Independent Film & Television Alliance cautioned that “[t]he Commission must . . . be extremely careful that reasonable network management cannot be used to compromise the principles of transparency, no-blocking, and non-discrimination.”⁶²

Public Knowledge and Benton Foundation agree with these commenters’ concerns, which are well-founded. In 2008 Comcast asserted that secretly degrading peer-to-peer applications – a non-transparent blocking practice – constituted reasonable network management.

Thus, to effectively prevent ISPs from creating fast lanes and slow lanes in creative and unforeseen ways, the Commission should assume network management tools that implicate open internet rules are unreasonable unless proven reasonable, and place the burden of demonstrating that such tools are reasonable on network operators.

VI. To Address Questions About Forbearance, the Commission Should Implement Interim Rules, then Conduct An Additional Rulemaking to Determine Forbearance

As Public Knowledge and Benton Foundation discussed in initial comments, the Commission can easily forbear from any Title II regulations found to be inapplicable to broadband internet access services. This need not be a laborious, front-loaded process; with a clear set of required and prohibited practices laid out, the Commission can implement them as interim rules. Other provisions of Title II can be addressed in additional rulemakings during the pendency of the interim rules as the Commission works with affected stakeholders to address what forbearances may be necessary.

The Commission has a significant history of using interim rules to facilitate transitions. It did so in its implementation of the Omnibus Budget

⁶¹ *Id.* at 21 n. 52.

⁶² Comments of the Independent Film & Television Alliance, GN Docket No. 14-28 (filed July 15, 2014) at 8-9.

Reconciliation Act of 1993, putting in place the framework that led to rules surrounding CMRS. It did so even more recently in its implementation of rules protecting consumers against high calling rates for inmates. Likewise, the Commission implemented interim rules with the broadband framework order in 2005 and with the gradual implementation of its orders on IP-enabled services. The Commission also used interim rules in the intercarrier compensation and Connect America Fund proceedings. In each of these cases, the Commission was able to implement interim rules to take effect and resolve key questions promptly, leaving the implementation of details and edge cases for further refinement over time.

Far from being a thicket of regulation, this process allows maximum clarity and flexibility, since the basis of the rules remains clear and in effect even as rarer specifics can be addressed in turn. This way, all stakeholders will have notice that those aspects of the Communications Act that are most related to the Commission's expressed goals in the future open internet order are more likely to be applicable; conversely, those farther from the stated objectives are more likely to be subject to forbearance.

Proceeding with interim rules and a further notice of proposed rulemaking on forbearance issues will allow the smooth transition into a new open internet framework, without creating the instability predicted by opponents. The forbearance process can take place with the same deliberation and the same strength of authority that the Commission applies in any rulemaking proceeding.

Conclusion

For the above stated reasons, the Commission should classify broadband internet access as a Title II telecommunications service and implement clear, universal rules that prevent ISPs from blocking and discriminating online.

By:

/s/

Laura Moy
Public Knowledge
1818 N St, NW
Suite 410
Washington, DC 20036
(202) 861-0020 ext. 106

Respectfully submitted,

Public Knowledge
Benton Foundation

Filed: September 15, 2014