MERCATUS CENTER
George Mason University
Bridging the gap between academic ideas and real-world problems

PUBLIC INTEREST COMMENT

# FCC Open Internet Reply Comments

# GN Docket No. 14-28

Submitted September 15, 2014
Comment period closes September 15, 2014

BRENT SKORUP
*Research Fellow, Mercatus Center at George Mason University*

## INTRODUCTION

The Technology Policy Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts independent analyses that employ contemporary economic and legal scholarship to assess agency rulemakings and proposals from the perspective of the public interest. Therefore, this reply comment does not represent the views of any particular affected party but is designed to assist the agency as it explores these issues.

## SUMMARY

Designating Internet service providers (ISPs) as telecommunications providers and common carriers subject to Title II regulations contradicts the stated intention of Congress:

> 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.[1]

The Federal Communications Commission (FCC) should tread cautiously as it considers once again bringing ISPs and parts of the Internet under greater regulatory scrutiny. The regulatory zeal and mixed messages displayed by net neutrality supporters is alarming considering the stakes and should signal to the FCC that regulatory humility is called for.

This reply comment argues that imposing regulatory burdens on ISPs and Internet companies would likely harm consumers and competition. Bringing ISPs under Title II's obligations would also be legally unsound. First, as

1. 47 U.S.C. § 230(b) (2011).

For more information, contact
Taylor Barkley, (703) 993-8205, tbarkley@mercatus.gmu.edu
Mercatus Center at George Mason University
3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

commenters point out, the Internet functions very differently from telephone networks and common carriers. This has legal import and it is uncertain, to say the least, that the FCC could reinterpret the law, "reclassify" broadband provision as "telecommunications," and have that designation upheld by a court. Second, years of carrier experimentation with priority traffic reveal that the "virtuous cycle" of online innovation is not harmed when ISPs engage in nonneutral behavior. That open Internet supporters cannot agree on whether and in what manner nonneutral behavior should be allowed reveals the ambiguity around priority treatment of broadband traffic. Because priority treatment tends to be used by smaller carriers serving consumers with idiosyncratic needs, regulators should permit nonneutral behavior except when it is anticompetitive or harming consumer welfare. Finally, Title II has several undesirable ancillary effects, including tacitly sending an encouraging message to illiberal foreign governments about Internet regulation.

## DISCUSSION

Though an effective rallying cry, there is no consensus about what "net neutrality" or the "open Internet" means when it comes to putting rules on paper. Professor Barbara van Schewick has said, "If there is no rule against blocking in a proposal, it's not a network neutrality proposal. That's the one defining factor that holds all net neutrality proposals together."[2] That limitation—a no-blocking provision—is supported by nearly every commenter in this proceeding, including the ISPs. Agreement on what else neutrality requires is difficult to ascertain. Commenters' demands for regulatory action under Title II of the Communications Act are many and often mutually exclusive, rendering the campaign spurring the FCC to act nearly incomprehensible. The motivating factor is not the legality and efficacy of Title II rules but a general sense of grievance towards ISPs. It should trouble the commission that there is no agreement on even basic facts about what the FCC should attempt to accomplish. Net neutrality proponents admit in this proceeding that while the open Internet debate originally focused on blocking and discrimination on the "last mile" connection between an ISP and its customer, "it has since evolved into a number of sub-debates,"[3] including interconnection, content delivery networks, data limitations, zero-rated applications, and even whether search algorithms need to be neutral. Those sub-debates themselves reveal disagreements in the general net neutrality community.

Commenters favoring "strong" net neutrality—like Free Press and Netflix—unconvincingly assert that common carrier regulation is deregulatory.[4] This view is undermined, ironically, by the very commenters whipped into a frenzy by these net neutrality proponents. As one representative commenter says, "I support a Title II approach—we need more regulation."[5]

Similarly, while Title II supporter Public Knowledge distances itself from designating broadband a public utility,[6] Popular Resistance, ColorOfChange.org,[7] and literally tens of thousands of commenters characterize net neutrality as making the Internet a "public utility regulated in the public interest without discrimination."[8]

The FCC has confronted similar grievances before. Many parties bemoaned the purported loss of the "end-to-end" principle in the late 1990s and the FCC's choice a few years later to decline to impose open access on cable modems.[9] Advocates wanted ISPs treated as Title II common carriers then. Many of their predictions about cable

2. "Barbara van Schewick on Internet Architecture and Innovation," YouTube video, 28:15, from a presentation at the Berkman Center for Internet and Society, posted November 16, 2010, https://www.youtube.com/watch?v=YOqHFq3h7Qg.
3. New America Foundation and Benton Foundation Comments 9, GN Dkt. No. 14-28, July 17, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521679134 (internal citation omitted).
4. Free Press Comments 4, GN Dkt. No. 14-28, July 17, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521701227 ("A return to Title II's sensible deregulatory approach . . . .").
5. Jim Hawley Comments 1, GN Dkt. No. 14-28, August 21, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521795153.
6. Public Knowledge et al. Comments 20, GN Dkt. No. 14-28, July 15, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521480282.
7. ColorOfChange.org Comments 4, GN Dkt. No. 14-28, July 15, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521710434.
8. Popular Resistance Comments 1, GN Dkt. No. 14-28, July 15, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521700816.
9. Lawrence Lessig praised in a 1999 speech, for instance, the end-to-end principle. The beauty of end-to-end, Lessig says: "The network was stupid; it processed packets blindly." Lawrence Lessig, lecture at www9, Amsterdam, Netherlands, Cyberspace's Architec-

investment and broadband innovation proved incorrect,[10] and the FCC should be skeptical of their repackaged arguments today.

## ISPs ARE NOT COMMON CARRIERS, SO DESIGNATING ISPs AS TELECOMMUNICATIONS PROVIDERS SUBJECT TO TITLE II IS UNLIKELY TO BE LEGAL

Many commenters favoring reinterpretation of "telecommunications" and bringing ISPs under Title II obligations assert that ISPs are common carriers.[11] It is not likely that those arguments would find support in court. Congress and the courts have defined "common carrier" and "telecommunications" such that ISPs do not resemble traditional telecommunications. Namely, they do not hold themselves out to companies such as Netflix nor to end users indiscriminately. Further, because the statutory definition of telecommunications includes the transmission of information "between or among points specified by the user" and consumers do not select points on the Internet, it is likely impermissible to designate ISPs Title II common carriers.

### ISPs Are Not Common Carriers in the Interconnection Market, and Price Regulation Is Impractical

It is unlikely that it would be legal for the FCC to reclassify ISPs as a common carrier like telephone companies and enforce regulated rates to content companies such as Netflix and Akamai. The leading cases concerning common carriage under Title II turn on whether the carrier holds itself out indiscriminately to a class of persons for service.[12] The DC Circuit Court of Appeals outlined the test in *Southwestern Bell*:

> Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier. While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.[13]

In sum, "the principal legal test for whether an entity is a common carrier is whether it has held itself out to serve all indiscriminately. . . ."[14]

---

tural Constitution, 7 (1999), http://cyber.law.harvard.edu/works/lessig/www9.pdf.

10. Professors Lawrence Lessig and Mark Lemley, for instance, weighed in on a previous FCC proceeding, predicting that the network effects of cable broadband would be insufficient to incentivize broadband expansion in the absence of unbundling rules: "it is emphatically not the case that [cable ISPs] benefit from adding more users to the network beyond a certain minimum subscription base." Mark A. Lemley & Lawrence Lessig, "The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era," 33 (UC Berkeley Law and Economics Research Paper No. 2000-19) (2000), http://cyberlaw.stanford.edu/e2e/papers/Lemley_Lessig_e2epaper.pdf. The professors did not foresee the substantial investments into broadband—including the expansion of fiber and node-splitting and subscribers—in the next decade-plus. In 1999, there were around 1.4 million subscribers of cable broadband. FCC, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 33, CC Dkt. No. 98-146, Second Report (released August 2000), http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/2000/fcc00290.pdf. Today, there are around 50 million cable broadband subscribers. Leichtman Research Group, "2.6 Million Added Broadband from Top Cable and Telephone Companies in 2013," news release, March 17, 2014, http://www.leichtmanresearch.com/press/031714release.html.

11. See, e.g., Public Knowledge et al. Comments, GN Dkt. No. 14-28, July 15, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521480282; Free Press Comments 4, GN Dkt. No. 14-28, July 17, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521701227.

12. *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (DC Cir. 1994); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (DC Cir. 1976); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (DC Cir. 1976).

13. *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (DC Cir. 1994) (citations omitted).

14. James B. Speta, "A Common Carrier Approach to Internet Interconnection," *Federal Communications Law Journal* 54 (2002): 225, 269.

ISPs do not serve all companies like a common carrier. Prices and service are not held out indiscriminately—experts describe interconnection negotiating as "haphazard and fluid."[15] For instance, MIT computer scientist David Clark

> said an Akamai official told him privately that the company . . . sometimes convinced ISPs to pay Akamai for access to its content delivery network. If that fails, Akamai proposes revenue-neutral exchange of traffic—and if that fails, Akamai sometimes will pay the ISP for connection rights. It's the only business where it's not clear which party is supposed to pay the other, Clark said.[16]

This description from an esteemed computer scientist undermines the notion that ISPs hold out their services to all indiscriminately. Bargaining over peering and interconnection on an individualized basis is apparently routine. Akamai is one of the largest content delivery networks in the world, serving customers such as Microsoft, Facebook, and Twitter. If Akamai as a large, savvy network provider is not offered predictable interconnection rates, many others are in a similar position (these agreements are typically under nondisclosure agreements). Therefore, ISPs resemble private carriers, not common carriers. It looks dubious, therefore, that the FCC could satisfy the legal test laid out in *Southwestern Bell*.

Further, if the FCC did somehow bring ISPs under Title II for interconnection purposes, any interconnection mandates raise serious questions of practicality. Title II requires the FCC to police the tariffs and nature of interconnection and peering.[17] Netflix and others would have the FCC believe this is an easy exercise: discover prevailing prices and mandate fair and just prices. But it would not be that simple, and articulating reasonable pricing will only get more complicated as video, telephone, and broadband markets converge. Unlike traditional telecommunications, IP traffic can be favored along several dimensions—not only according to latency, jitter, and throughput, but also UDP versus TCP, bandwidth segregation versus software-defined networking versus network-functions virtualization,[18] and other mechanisms. Different edge companies that seem similar to consumers, such as competing VoIP providers or video providers, will value different quality enhancements. FCC determinations of "fair" prices would be a regulatory quagmire.

## ISPs Are Not Common Carriers in the Retail Market

Again, "the principal legal test for whether an entity is a common carrier is whether it has held itself out to serve all indiscriminately. . . ."[19] ISPs do not serve all retail customers indiscriminately, and classifying ISPs as common carriers for subscribers would invite litigation. While ISPs have local and regional pricing that is fairly consistent between customers, that fact does not make ISPs common carriers any more than it makes cable or satellite TV companies common carriers.[20] Wireless carriers also discriminate in pricing, using device subsidies, zero-rating applications such as T-Mobile's Music Freedom program, sponsored data, and phone trade-in programs. Add these to the different pricing tiers offered to consumers by wireless and wireline ISPs, and it is apparent that ISPs do not serve customers indiscriminately.

Price discrimination is the norm for broadband service. Offerings to subscribers are diverse and broadband packages from a single provider will often include varying amounts of cloud storage, security features, email accounts, online streaming from ESPN content, wifi hotspot access, and temporary boosts of speed.[21] Whether a network is

15. Greg Piper, "Internet Architect Suggests 'Futures Market' to Avoid Policy Disputes," *Communications Daily*, February 5, 2009.
16. Ibid.
17. 47 U.S.C. § 203 (2011).
18. See Fujitsu Telecommunications Europe Ltd., "Technical Report: Carrier Software Defined Networking (SDN)," commissioned by Ofcom, January 2014, http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/SDN_Report.pdf.
19. James B. Speta, "A Common Carrier Approach to Internet Interconnection," Federal Communications Law Journal 54 (2002): 225, 269.
20. See 47 U.S.C. § 541 (d) (2011).
21. See "Expect the Best from Cox High Speed Internet Plans," Connect Your Home LLC, accessed September 15, 2014, http://www.connectyourhome.com/internet/cox-internet/.

a common carrier is a two part test: "Thus, common carriers must be 'common'—i.e., offer services to the public on a nondiscriminatory basis—and must be 'carriers'—i.e., merely transmit data without acting upon, changing, or interfering with the content of the information received and delivered."[22] Not only do ISPs fail to be "common," they are not "carriers" for purposes of the law, either.

The statutory definition of telecommunications includes the transmission of information "between or among points specified by the user."[23] ISPs are not carriers because Internet transmission points are not "specified by the user"—there is substantial processing and storing occurring when users perform even simple web browsing. An action as seemingly simple as streaming a *House of Cards* episode, for example, requires complex processing by an ISP and a content provider to transmit from the "best" endpoint, a process totally mysterious to a user. Netflix encodes 120 versions of every film and sends one version based on facts "known" by the network about the user's screen size; whether streamed on a TV, smartphone, Xbox, or other device; picture quality; and other elements.[24] Under normal circumstances, consumers do not select among Internet points.

Further, as Time Warner Cable points out, ISPs provide information services, including

> highly valued tools such as security screening, spam protection, anti-virus and anti-botnet technologies, pop-up blockers, parental controls, online email and file storage, and a customizable home page for each user—and all of these features involve "generating, acquiring, storing, transforming, processing, retrieving [and/or] utilizing" information.[25]

ISPs perform substantial processing and storage on their networks. For the reasons stated above, they are not "common" and they are not "carriers." There is substantial price discrimination between users and users do not typically specify what points on the Internet transmit information. The FCC invites immense legal risk by ruling otherwise.

## EXPERIMENTATION WITH PRIORITY TRAFFIC REVEALS THAT THE VIRTUOUS CYCLE OF ONLINE INNOVATION IS NOT HARMED WHEN ISPs USE NONNEUTRAL PRACTICES

Commenters in support of net neutrality would like a presumption against nonneutral traffic management, and most request a complete ban. Restricting the use of nonneutral traffic management would be anticonsumer because such practices are frequently used by firms without market power to improve competition and satisfy consumer needs. Further, those seeking Title II classification cannot agree on what nonneutral practices benefit consumers. In the face of that ambiguity, competitive decisions about priority treatment should be left to market participants.

### Nonneutral Behavior Is Frequently Practiced by Firms without Market Power and It Is Pro-consumer

Nonneutral behavior and so-called discrimination between types of traffic and types of applications is frequently used by firms and organizations without market power.[26] The commission knows this and previously acknowledged that priority treatment of some traffic, such as voice and subscription video (dubbed "managed services"), can provide consumer and competitive benefits and lead to increased broadband deployment.[27] Similarly, David Clark has said, "The network is not neutral and never has been;" therefore, "[y]ou've got to discriminate between

22. David L. Sieradzki & Winston J. Maxwell, "The FCC's Network Neutrality Ruling in the Comcast Case: Towards a Consensus with Europe?," *Communications & Strategies* 72 (2008): 73, 78.
23. 47 U.S.C. § 153 (50) (2011).
24. OECD, *Connected Televisions: Convergence and Emerging Business Models*, 27 (OECD Digital Economy Papers No. 231) (2014), http://dx.doi.org/10.1787/5jzb36wjqkvg-en.
25. Time Warner Cable Comments 12, GN Dkt. No. 14-28, July 15, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521480407.
26. See Thomas W. Hazlett & Joshua D. Wright, "The Law and Economics of Network Neutrality," *Indiana Law Review* 45 (2012): 767, 788–89, http://mason.gmu.edu/~thazlett/pubs/Hazlett-Wright%20L&E%20of%20NN.pdf.
27. "The existence of these [managed] services may provide consumer benefits, including greater competition among voice and subscription video providers, and may lead to increased deployment of broadband networks." FCC, *In the Matter of Preserving the Open Internet*, GN Dkt. No. 09-191, 53 (released October 22, 2009), http://apps.fcc.gov/ecfs/document/view?id=7020348622.

good blocking and bad blocking."[28] Nonneutral behavior and so-called fast lanes, therefore, should not be considered damaging to the "virtuous cycle" of online innovation[29] absent a showing of competitive or consumer harm.

The widespread evidence of nonneutral behavior suggests that nonneutral traffic management is often a competitive response to dynamic markets and heterogeneous consumer demands. Regulation of purportedly nonneutral behavior will restrict competitive responses. Further, if history is any indication, rules against discrimination will primarily harm smaller competitors attempting to serve customers with idiosyncratic needs.

That carriers are experimenting with various priority business models indicates there is customer demand for nonneutral traffic. Professor Daniel Lyons found that many wireless carriers around the globe are experimenting with "voice plus" plans that offer traditional mobile phone service with access to select online content.[30] On the wireline side, PlusNet, a mid-sized ISP in the UK, prioritizes traffic—such as VoIP and gaming—according to customer demands.[31] Some small US ISPs engage in blocking of websites for conservative religious communities.[32] There is customer demand for prioritization, and ISPs should be free to satisfy customer demands.

Many foreign wireless carriers offer zero-rated data—such as limited Facebook or Google access—with no data plan necessary. This unequivocally expands Internet usage to poorer areas.[33] Further, there are small carriers—mostly wireless carriers—in the United States that have used nonneutral practices in the past or use them presently.

It should not be controversial when a small, innovative wireless carrier like MetroPCS works with an online video company—YouTube—to compress streaming videos and bring more online capability and 4G LTE to subscribers. Yet in 2011, net neutrality proponents filed a complaint to the FCC that such practices violate net neutrality rules.[34] MetroPCS served about 3 percent of wireless carriers and had multiple nationwide and regional competitors. Because there was no market dominance, its nonneutral practices can only be described as a competitive response, not leveraging over YouTube or customers.

T-Mobile recently announced plans to zero-rate many music streaming sites—music streaming will not count against data limits for certain plans. This is a competitive response consistent with the carrier's current marketing campaign to attract younger subscribers, who listen to a lot of streaming music. Again, T-Mobile is the fourth-largest wireless company, lacking market dominance, and is attempting to supply consumer demands and increase its market share.

Further, it is not unheard of for network administrators at corporations, schools, and libraries to block or restrict certain applications because they strain the shared broadband network. Universities, including Ohio University, UC Santa Barbara, San Jose State, and the University of Minnesota, often limit the use of peer-to-peer and other types of applications.[35] Network restrictions on certain applications, therefore, are not necessarily anticonsumer or anticompetitive—restrictions by nonprofit organizations are common, after all. Restrictions and even outright blocking can be a reasonable form of preserving network use and maximizing utility for all subscribers.

Finally, wireless ISPs (WISPs) are fixed wireless companies serving small numbers of subscribers, mostly in rural areas. WISPs are not dominant broadband providers but they use nonneutral practices to make their wireless services useable and affordable. WISPA, the WISP trade organization, requests in this proceeding that its members

---

28. Piper, "Internet Architect Suggests 'Futures Market'," 2009.
29. FCC, *Protecting and Promoting the Open Internet*, 2014, 13.
30. Dan Lyons, "Innovations in Mobile Broadband Pricing" (Mercatus Working Paper No. 14-08, 2014), 17, http://mercatus.org/sites/default/files/Lyons_BroadbandPricing_v1.pdf.
31. "All about Traffic Management," Plusnet, accessed September 15, 2014, http://www.plus.net/support/broadband/speed_guide/traffic_management.shtml.
32. See, e.g., www.thejnet.com and www.koshernet.com.
33. See Lyons, "Innovation in Mobile Broadband Bricing," 2014, 17.
34. Free Press et al. Ex Parte, GN Dkt. No. 09-191, January 10, 2011, http://www.freepress.net/sites/default/files/resources/MetroPCS_Letter_1_10_11.pdf.
35. Thomas W. Hazlett & Joshua D. Wright, "The Law and Economics of Network Neutrality," *Indiana Law Review* 45 (2012): 767, 788–89, http://mason.gmu.edu/~thazlett/pubs/Hazlett-Wright%20L&E%20of%20NN.pdf.

are exempt from the no-blocking and "no commercially unreasonable practices" rules because small providers do not have the incentive to withhold content from subscribers.[36] WISPA points out that wireless carriers face well-known technological constraints and cannot necessarily permit subscribers "the ability to access streaming video from any provider, place and receive telephone calls using the VoIP service of the end user's choosing, and access any lawful web content."[37] WISPs need to limit the usage of the small fraction of subscribers who use a disproportionate amount of bandwidth.[38] No one would allege that WISPs have dominant market power over Internet companies like Google or over subscribers.

The widespread use of nonneutral practices reveals that they are a necessity or reasonable competitive response in many circumstances and provide consumers—who have heterogenous online needs—with more competitive options. A presumption against or ban of nonneutral practices would harm consumers and harm small competitors who lack market power.

### Quality of Service and "Fast Lanes" Cannot Be Prohibited by Title II and Priority Services Benefit Consumers

As MIT senior research scientist David Clark has testified,

> The Internet is not neutral, and has not been neutral for a long time. There is lots of discrimination that goes on inside the network: some good, some bad. The vision cannot be a return to a simple world with no discrimination, but to find a line that delineates acceptable and unacceptable.[39]

There is a widespread belief that Title II would eliminate the possibility of "fast lanes" and paid priority.[40]As many parties point out, that belief is incorrect.[41] Section 202(a) of the Communications Act prohibits "unjust or unreasonable discrimination." Put differently, the Title II permits just or reasonable discrimination of traffic.

The primary goal of the Title II campaign—ban prioritization and fast lanes—quite simply cannot be legally attained. Even informed commenters, such as venture capitalist Brad Burnham, wish to "ban paid prioritization."[42] The widespread ignorance of this legal matter should advise caution in pursuing Title II because many commenters are advancing arguments that are legally unsound.

As one contrary comment states, "Title II only prohibits unjust and unreasonable discrimination, and does not necessarily preclude paid prioritization arrangement or uniform pricing."[43] A few minutes' contemplation about existing common carriers would have revealed this—airlines, the Postal Service, and telephone companies are all common carriers yet can charge different customers different prices. Business class, overnight delivery, and bulk discounts all represent legal price discrimination by common carriers between customers. That hundreds of thousands of commenters did not contemplate the nature of common carriage while calling for it suggests that emotion, not thoughtful legal analysis, is driving interest in Title II regulation.

---

36. Wireless Internet Service Providers Association Comments v, GN Dkt. No. 14-28, July 16, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521632599.
37. Wireless Internet Service Providers Association Comments 27, GN Dkt. No. 14-28, July 16, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521632599.
38. Wireless Internet Service Providers Association Comments 32, GN Dkt. No. 14-28, July 16, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521632599.
39. David D. Clark, statement at FCC public hearing on network management, 3, February 25, 2007, http://transition.fcc.gov/broadband_network_management/022508/clark.pdf.
40. Netflix Comments ii, GN Dkt. No. 14-28, July 16, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521491186.
41. Wireless Internet Service Providers Association Comments 40, GN Dkt. No. 14-28, July 16, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521632599; AT&T Services, Inc. Notice of Ex Parte 3, GN Dkt. No. 14-28, June 6, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521254932; TechFreedom & ICLE Comments 19, GN Dkt. No. 14-28, July 16, 2014, http://www.laweconcenter.org/images/articles/tf-icle_nn_legal_comments.pdf.
42. Gigi Sohn, Ex Parte 1, GN Dkt. No. 14-28, July 16, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521633973 (describing Burnham's expressed position).
43. Wireless Internet Service Providers Association Comments 40, GN Dkt. No. 14-28, July 16, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521632599.

Similarly, it has escaped most commenters that many of the most knowledgeable self-styled net neutrality proponents favor fast lanes in certain circumstance. van Schewick, for example, would allow quality of service benefits, such as low-latency service, as long as the customer chose it.[44]

New America and the Benton Foundation take a similar view and say that "charging more for a guaranteed data rate that matches the customer's preference for application QOS" is "consistent with the open Internet principles:"

> no data traffic receives different priority than any other, subject to the consumer's ability to purchase a premium or guaranteed level of service. Any prioritization or congestion management techniques should place such choices on the demand side, allowing consumers to make choices rather than permitting broadband Internet access service providers to make unreasonable network management choices or otherwise impede basic end-to-end Internet access service.[45]

Professors Wu and Lessig made an exception to Internet neutrality in their comments to the FCC in 2003 and say ISPs "*may* discriminate in their treatment of traffic on the basis of local network criteria" to improve jitter and other QoS.[46] Wu and Lessig favored letting consumers pay for better QoS, citing the example of a gamer wanting a better gaming experience.[47]

"Prioritization," whether called fast lanes or QoS, could require different technical mechanisms. Some—such as VoIP and telemedicine—would sometimes require an end-to-end scheme and some vertical integration. Others—such as VOD and Netflix—would decrease buffering from a cache to a user. Others—such as gaming and live video—could be a combination of end-to-end and cloud-based prioritization.

Proponents argue that allowing ISPs to offer QoS to content companies threatens "the cycle of innovation" because it raises barriers to entry. While intuitive in some respects, commenters never wrestle with why giving customers, rather than ISPs, the choice for better QoS does not raise similar barriers. The nature of network effects means that even customer-chosen platforms create substantial barriers to entry—Google Search is completely customer chosen, but Bing and other search engines have had only a marginal impact on Google's market share.

A benefit of ISPs choosing which services to prioritize is that ISPs have significantly more engineering knowledge and which applications need priority to function well. ISP-generated priority options for consumers allows ISPs to economize on menu costs and transaction costs. It is impracticable at this time to permit consumers to choose which services they would like prioritized. QoS experiments are in their infancy globally, and it would be a mistake for the FCC to limit how ISPs try to monetize their substantial investments in order to preserve how some advocates feel the Internet "should" perform—that is, best-efforts transmission only.

## TITLE II REGULATION HAS SEVERAL UNDESIRABLE EFFECTS

Title II support reveals a collective version of tunnel vision. Designating ISPs as telecommunications providers has ancillary effects, many of which are damaging to Internet freedom and broadband investment. First, calling Internet service providers "telecommunications" providers would invite other illiberal countries to do the same. This would have negative effects on international treaties and on global Internet freedom. Second, public choice theory predicts successful attempts by regulated industries to either lobby to keep competitors out or to raise rivals' costs by persuading the FCC to extend regulations to other firms. Third, because common

---

44. "The network provider would be able to offer different types of quality of service" at the customer's request for most services, including teleconferencing and even email. "Barbara van Schewick," 2010, 41:00.
45. New America Foundation and Benton Foundation Comments 59-60, GN Dkt. No. 14-28, July 17, 2014 http://apps.fcc.gov/ecfs/document/view?id=7521679134.
46. Tim Wu & Lawrence Lessig Ex Parte 14, CS Dkt. 02-52, August 22, 2003, http://apps.fcc.gov/ecfs/document/view?id=6514683885 (emphasis in original).
47. Tim Wu & Lawrence Lessig Ex Parte 15, CS Dkt. 02-52, August 22, 2003, http://apps.fcc.gov/ecfs/document/view?id=6514683885.

carriers are heavily regulated, antitrust enforcement and remedies may be withheld from online companies who face perceived anticompetitive practices in light of the Supreme Court's *Trinko* decision. Finally, despite commenters' claims, forbearing from the most onerous Title II burdens is not an easy task, and this fact will likely inhibit broadband investment.

## Title II Would Represent a Significant and Illiberal Global Precedent, Possibly Raising Prices for Internet Services Globally

The US has publicly held an exceptionalist stance about the Internet and the incompatibility of the Internet and traditional international telecommunications regulations.[48] Currently, all Internet traffic is exempt from International Telecommunication Union routing and billing treaties, but that is by no means certain to continue. Foreign governments, especially illiberal governments, are attempting to change treaty obligations and extend telecommunications rules to the Internet.[49] A successful international campaign to change Internet rules would harm broadband investment worldwide, consumer prices, and US firms. For that reason, an OECD report warned against the possibility of telecommunications policies spreading to Internet and over-the-top (OTT) uses, such as Skype and other voice services.[50]

By designating broadband provision a telecommunications service, the United States loses significant moral and political authority in continuing to claim that the Internet is unlike traditional telecommunications. The ITU is thereby more likely to claim greater scope over the development of the Internet. "Common carrier" is a designation laden with regulatory obligations. If Title II proponents oblige ISPs to fulfill public interest responsibilities in the United States, international regulatory agencies may follow suit, and there are many countries—such as Russia, China, and Saudi Arabia—where governmental interests are illiberal and repressive.[51]

Further, while so-called sender-pays[52] is the default rule in the international telephone system, it is not the rule for international Internet transmissions, which are transmitted privately, often settlement-free, through peering.[53] If the FCC further intermingles traditional telecommunications with broadband, it may increase the probability of the ITU extending sender-pays or other tariffing and tax rules to the exchange of Internet traffic. Several countries proposed instituting sender-pays at a contentious 2012 ITU forum and the United States representatives vigorously fought sender-pays for the Internet.[54] Many developing countries, particularly, would welcome such a change in regulations, because, as Mercatus scholar Eli Dourado found, sender-pays rules "allow governments to export some of their statutory tax burden."[55] New foreign tariffing rules would function essentially as a transfer of wealth from popular US-based companies like Facebook and Google to corrupt foreign governments and telephone cartels.

---

48. Eli Dourado, "Protecting the Open Internet May Require Defunding the ITU. Here's How to Do It.," *Washington Post*, September 18, 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/18/protecting-the-open-internet-may-require-defunding-the-itu-heres-how-to-do-it/.
49. Ibid.
50. OECD, *International Traffic Termination*, 23–24 (OECD Digital Economy Papers No. 238) (2014), http://dx.doi.org/10.1787/5jz2m5mnlvkc-en.
51. Eli Dourado, "Why Reclassification Would Make the Internet Less Open," *Technology Liberation Front*, May 15, 2014, http://techliberation.com/2014/05/15/why-reclassification-would-make-the-internet-less-open/.
52. In sender-pays schemes, common in international telecommunications markets, the originating network pays the terminating network for interconnection. If sender-pays applied online, companies like Netflix that send content would be compelled to pay foreign regional or local networks for transmission of IP traffic.
53. Eli Dourado, "Do High International Telecom Rates Buy Telecom Sector Growth?" (Mercatus Center Working Paper No. 12-36, 2012), 2, http://mercatus.org/sites/default/files/Telecom_Dourado_v1-0.pdf.
54. David Talbot, "A Budding War Over Internet Economics," *MIT Technology Review*, December 1, 2012, http://www.technologyreview.com/news/507906/a-budding-war-over-internet-economics/.
55. Eli Dourado, "Do High International Telecom Rates Buy Telecom Sector Growth?" (Mercatus Center Working Paper No. 12-36, 2012), 14, http://mercatus.org/sites/default/files/Telecom_Dourado_v1-0.pdf.

## Public Choice Economics Predicts Anticompetitive and Anti-consumer Behavior after Title II Classification

Public choice theory also predicts major problems when ISPs are regulated as common carriers.[56] Interest groups will use the regulatory process to distribute benefits to themselves. As many obervers note, once an industry is regulated as a common carrier—whether telephone, taxi, or railroad—competition becomes very difficult and sometimes outlawed in certain respects. When low-cost, unforeseen, or innovative substitutes arise—such as when MCI disrupted long-distance telephone with microwave relays, Lyft and Uber disrupted taxis with smartphone-enabled ridesharing, and trucking disrupted railroads—the incumbent common carrier seeks regulatory protection with the facially sensible argument that it provides important public benefits that have been rendered unprofitable.

As ITIF points out, the definition of "telecommunications services" is broad and subject to several interpretations.[57] ISPs, as common carriers, will have a significant financial incentive and legal opportunity to persuade the FCC to make other Internet-related service providers common carriers—including "edge" providers—because it raises rivals' costs.

Further, the "extreme confidence" that Free Press has that "a return to Title II would not harm broadband investment" is misplaced.[58] Carriers, in fact, actively seek to avoid Title II regulations and discount predicted rates of return to Title II services. Google Fiber, for instance, offers broadband and television packages—not switched telephone service—to the customers it serves. When asked why it does not offer telephone service, Google representatives expressly cite the substantial costs of operating a Title II service:

> Google Inc. considered offering phone services with its ultra-fast Internet and TV packages . . . but the company took a pass once it started digging into federal and state regulations, a Google executive said. . . . [59]

In another case, in 1990, the FCC decided to exercise Title II jurisdiction over some carriers' private dark fiber service.[60] The carriers subsequently tried to withdraw from the dark fiber market because of the Title II burdens.[61] After chasing operators out of the dark fiber business, the FCC went one step further and denied those operators permission to withdraw services "because petitioners had not borne their burden of showing that such a withdrawal would not adversely affect public convenience or necessity."[62] These costly regulatory obligations often apply without notice, and it is difficult for providers to disentangle themselves once ensnared.

These, then, are the sorts of considerations carriers and Internet companies will face if Title II regulation is implemented. ISPs will rationally seek to bring possible competitors under Title II rules in order to create a level playing field. No Internet company would welcome this circumstance. ISPs themselves will only slowly learn what obligations they are subject to. Even if the FCC acts impermissibly in extending regulation to networks, judicial resolution is costly and takes several years. The irregular risks of being subjected to months- or years-long public interest proceedings will predictably—and often invisibly—drive operators from investing in their services.

## Pervasive Regulation Such As Title II Has the Effect of Limiting Antitrust Enforcement and Remedies

By bringing operators and interconnection under Title II rules, the FCC may, in effect, limit firms' abilities to be protected from perceived anticompetitive behavior. As an initial matter, the Federal Trade Commission does not

56. See George J. Stigler, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2 (1971): 3–21.
57. ITIF Comments 9, GN Dkt. No. 14-28, July 15, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521706545. See 47 U.S.C. § 153 (53) (2011) ("[t]he term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used").
58. Free Press Comments 5, GN Dkt. No. 14-28, July 17, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521701227.
59. Alyson Raletz, "Google considers but drops plans to include phone service, too," *Kansas City Business Journal*, December 4, 2012, http://www.bizjournals.com/kansascity/blog/2012/12/google-considers-drops-phone-service.html.
60. *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1479 (DC Cir. 1994).
61. Ibid.
62. Ibid, citation omitted.

have jurisdiction over common carriers. Common carriers are subject to "acts to regulate commerce" such as the Communications Act and are outside the reach of the FTC Act.[63]

Further, private antitrust actions may also be deterred. The Supreme Court ruling in *Verizon v. Trinko* appears to make antitrust enforcement and remedies for competitors subject to Title II obligations less likely.[64] That firms in extensively regulated industries cannot avail themselves of the antitrust laws is a legal principle strengthened in *Credit Suisse*.[65] In *Trinko*, small competitive telephone carriers attempted to avail themselves of Verizon's Title II telephone facilities and services.[66] Verizon did not perform as those carriers wished and—dissatisfied with FCC and state regulator enforcement—the small carriers brought an antitrust suit alleging anticompetitive discrimination in violation of several antitrust laws.[67]

The Court rejected those arguments, ruling that the Communication Act's "extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access."[68] Once under Title II rules, therefore, courts will consider the "pervasive federal and state regulations" as instructing against an antirust remedy because those existing regulations mean that the benefits of antitrust enforcement will tend to be small.[69] The antitrust agencies have decades of experience in regulating competitive behavior. Title II enforcement would potentially limit private and public enforcement of US competition laws.

## Forbearance Is Not Easy

Experts have noted for years that forbearance is not easy and costly because it requires the FCC to find that forbearance is in the public interest.[70] Because the FCC generally does not find that high-speed broadband is a competitive service, it is unlikely that it could forbear even when sensible.[71] Claims that Title II is deregulatory, therefore, are not credible. Commenters favoring Title II tip their hand in stating that forbearance would be "necessary" to eliminate any possible negative side effects.[72]

As the DC Circuit Court of Appeals has said, "The centerpiece of Title II common carrier regulation is the supervision of filed tariffs"[73] that are required to be filed by Section 203.[74] If the centerpiece of a legal regime is price controls, it cannot be characterized as deregulatory. ISPs and other carriers would be subject automatically to a host of regulations, as commenters point out.

Among those regulations, Section 214 states that

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. . . . [75]

63. 15 U.S.C. § 46(j)(6). See 15 U.S.C. § 44 (including the Communications Act as one of the "acts to regulate commerce").
64. *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2004).
65. Ibid.
66. Ibid., 404–05
67. Ibid., 404–05.
68. *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 411 (2004).
69. Ibid. (citation omitted)
70. 47 U.S.C. § 160(a).
71. See George S. Ford & Lawrence J. Spiwak, "Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service" (Phoenix Center Policy Bulletin No. 36, 2014), http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf.
72. "Forbearance from many provisions would be a necessary next step following reclassification of broadband access as a Title II service." New America Foundation and Benton Foundation Comments 26, July 17, 2014, http://apps.fcc.gov/ecfs/document/view?id=7521679134.
73. *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1479 (DC Cir. 1994).
74. 47 U.S.C. § 203.
75. 47 U.S.C. § 214(a).

The reasonable interpretation of this mandate is that ISPs would need FCC permission to extend or build out broadband networks—hardly a recipe for broadband deployment. Section 254 mandates that "[e]very telecommunications carrier" contribute to universal service mechanisms "on an equitable and nondiscriminatory basis."[76] This requirement would mean the creation of a new framework for ISP universal service contributions and would raise the compliance costs of all ISPs. Title II rules also leave some regulatory determinations to states and state utility regulators.[77] It is not clear that the FCC could forbear from state involvement, even where desirable.

The list goes on. For every significant forbearance request, there will inevitably be parties that oppose it. Other carriers, competitors, and interest groups could possibly derail the forbearance from every regulatory requirement. Forbearance would be a slow process, and many parties would likely not even attempt to risk the regulatory gauntlet that forbearance requires.

## CONCLUSION

Designating ISPs as telecommunications providers subject to Title II regulations would contradict the intention of Congress that the Internet remain free from regulatory burdens. As the FCC rapidly moves away from common carrier regulatory models of networks, net neutrality supporters are trying to drag large parts of the dynamic Internet under a rigid regulatory rubric. Mandating Title II obligations for ISPs would be legally unsound because ISPs do not hold themselves out as common carriers. Further, Title II risks harming consumers and competition with neutrality mandates. The Internet has never been neutral, and priority traffic management has been used for years. "Fast lanes" benefit consumers every day, and restricting their use would stymie future innovations and competition. The FCC also cannot ignore the undesirable ancillary effects of Title II, namely, the increased risk of greater ITU and foreign regulation of the global Internet. The Internet and mobile broadband industries are one of a few bright spots in the US economy and a source of global freedom of expression. Given all the legal and economic uncertainties, the FCC should exercise regulatory humility and permit markets and innovation to continue to operate in broadband unimpeded.

76. 47 U.S.C. § 254 (d).
77. See 47 U.S.C. § 214 (e)(2).