



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**COMMENTS OF THE  
COMPETITIVE ENTERPRISE INSTITUTE**

July 17, 2017

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## I. Introduction

On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit these comments regarding the FCC's proposed rule in the matter of restoring Internet freedom.<sup>1</sup> CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise. We have previously participated in the Commission's proceedings regarding how Internet service providers should be regulated,<sup>2</sup> and we filed amicus briefs with the U.S. Court of Appeals for the D.C. Circuit when it reviewed the Commission's previous efforts to regulate the Internet in *Verizon v. FCC*<sup>3</sup> and *US Telecom Association v. FCC*.<sup>4</sup>

We commend the Commission's proposal to undo the 2015 Order's classification of broadband Internet access service as a telecommunications service subject to Title II of the Communications Act of 1934.<sup>5</sup> Consumers would be far better served if the FCC were to reinstate its longstanding, pre-2015 interpretation of the Communications Act:<sup>6</sup> that Internet service providers (ISPs) are "information services" under the Act and are thus free from the panoply of Title II mandates.<sup>7</sup> The FCC should also abandon its bright line rules that bar ISPs from engaging in discrimination, paid prioritization, or blocking with respect to Internet traffic. Finally, we urge the Commission to refrain from imposing new rules on how Internet service providers may manage their networks based on any source of legal authority other than Title II.

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1. Restoring Internet Freedom, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434 (May 18, 2017) [NPRM], available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-17-60A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1_Rcd.pdf).
  2. See, e.g., Comments of CEI, Framework for Broadband Internet Service, Protecting and Promoting the Open Internet, GN Docket Nos. 10-127, 14-28 (2016), available at <http://cei.org/sites/default/files/CEI%20comments%202014%20Open%20Internet%20NPRM%20Crews.pdf>.
  3. Brief of TechFreedom, CEI, the Free State Foundation, and the Cato Institute as *amici curiae* supporting appellants, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), available at <https://docs.google.com/file/d/0B2pNWHJ8ackuaWN5MVdkUTBfZXc/edit>.
  4. Brief of CEI as *amicus curiae* supporting petitioners, *US Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), available at <https://cei.org/sites/default/files/U.S.%20Telecom%20v.%20FCC%20-%20No.%2015-1063%20-%20CEI%20Amicus%20Brief%20FILED.pdf>.
  5. Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [2015 Order].
  6. See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002), and Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (finding that wireline broadband access is not a telecommunications service under the Communications Act).
  7. 47 U.S.C. §§ 201 *et seq.*

## 2. The 2015 Order's bright line rules proscribe potentially beneficial practices and discourage ISP innovation

The 2015 Order's bright line rules presume that consumers are necessarily better off if their ISP is barred from restricting usage on an application-by-application basis, subject to very limited exceptions.<sup>8</sup> But not every consumer perceives every byte of Internet traffic to be equally valuable. If, for example, a mobile ISP were to degrade video content from ultra-high-definition to "ordinary" high-definition, how many consumers could tell the difference? The answer depends on the technical sophistication of the ISP's customers, the capabilities of their mobile devices, and even their visual acuity. ISPs have been willing to experiment with a variety of strategies to handle network congestion, seeking the practices that work best for them and their customers. The Commission's bright line rules, however, thwart such exploration, ultimately reducing consumer choice.

Real-world examples of ISPs engaging in harmful network management practices are extremely few and far between.<sup>9</sup> One of the most prominent alleged examples of such misconduct occurred in 2007, when Comcast was found to have been alleviating network congestion by degrading certain subscribers' BitTorrent uploads.<sup>10</sup> In hindsight, although this practice may not have been the optimal decision, it surely represented a rational approach to limiting network congestion.<sup>11</sup> Other ISPs have adopted a variety of strategies, such as placing an application-agnostic limit on each subscriber's overall usage, or a cap on each subscriber's usage during peak hours when congestion is most likely. For instance, Verizon Wireless currently offers an "unlimited" mobile broadband plan that begins limiting a subscriber's usage once she transmits over 22 gigabytes in a month—albeit only when the subscriber is using a congested cell tower.<sup>12</sup> And until recently, T-Mobile offered an "unlimited" wireless

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8. 2015 Order, 30 FCC Rcd at 5651–5652, paras. 119–123.

9. *Cf. id.* at 5933 (Pai, Comm'r, dissenting) (noting the lack of evidence of any "continuing threats" to Internet openness).

10. Peter Svensson, *Comcast Blocks Some Internet Traffic, AP Testing Shows*, ASSOCIATED PRESS, Oct. 19, 2007, [http://www.nbcnews.com/id/21376597/ns/technology\\_and\\_science-internet/t/comcast-blocks-some-internet-traffic/](http://www.nbcnews.com/id/21376597/ns/technology_and_science-internet/t/comcast-blocks-some-internet-traffic/).

11. See Thomas W. Hazlett, *The Fallacy of Net Neutrality*, ENCOUNTER BROADSIDE, No. 23, at 48–49 (2011).

12. Jon Brodtkin, *Verizon Offers Unlimited Data and Won't Throttle Video (Unlike T-Mobile)*, ARSTECHNICA, Feb. 13, 2017, <https://arstechnica.com/information-technology/2017/02/verizon-offers-unlimited-data-and-wont-throttle-video-unlike-t-mobile/>.

data plan that reduced streaming video quality when a subscriber exceeded a specified monthly threshold.<sup>13</sup>

The 2015 Order’s prohibition of paid prioritization—also known as “fast lanes”—is particularly problematic.<sup>14</sup> This is akin to the federal government telling a grocery store it cannot make business arrangements with food or distribution companies for prominent shelf placement or special end-of-aisle displays. The justification would be the grocery store’s potential power to favor its own generic brands and “shake down” Kraft and Nestle. But it is absurd to suggest that huge companies like those would need regulatory protection.<sup>15</sup> And it is no less absurd to assert that giants like Google, Facebook, or Amazon need regulatory protection from the FCC. As for smaller edge providers, such firms actually stand to *benefit* from the ability to bargain with ISPs for prioritization, as it might enable these small companies to differentiate themselves from much larger rivals and thus compete more effectively against them.<sup>16</sup>

### **3. The FCC should not impose new rules on ISPs based on Section 706 of the Telecommunications Act of 1996**

In the NPRM, the Commission asks whether Section 706 of the Telecommunications Act of 1996<sup>17</sup> affords the agency the authority to regulate ISP network management practices. Although the U.S. Court of Appeals for the D.C. Circuit indicated in *Verizon v. FCC* that Section 706 includes an independent grant of legal authority to the FCC,<sup>18</sup> the *Verizon* court erroneously deferred under *Chevron*<sup>19</sup> to the agency’s interpretation of the Telecommunications Act. *Chevron* is applicable only when an agency construes a statutory provision that it administers.<sup>20</sup> Section 706 of the 1996 Act is a freestanding enactment that Congress deliberately chose not to insert into the

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13. *See id.*

14. 2015 Order, 30 FCC Rcd at 5607, para. 18.

15. For a detailed discussion of payments by manufacturers for shelf space in the grocery retailing market, see Joshua D. Wright & Benjamin Klein, *The Economics of Slotting Contracts*, 50 J.L. & ECON. 473 (2007).

16. *Cf.* Ronald H. Coase, *Payola in Radio and Television Broadcasting*, 22(2) J.L. & ECON. 269 (1979) (discussing the economic effects of the payment system for radio airtime by record labels).

17. Telecommunications Law of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56 (codified at 47 U.S.C. § 1302).

18. *Verizon v. FCC*, 740 F.3d 623, 636–42 (D.C. Cir. 2014).

19. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

20. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013).

Communications Act of 1934.<sup>21</sup> Yet it is the Communications Act—not the 1996 Act—that Congress has authorized the FCC to administer. Moreover, Congress has explicitly limited the FCC’s rulemaking authority to prescribing “such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter”—i.e., the Communications Act of 1934, as amended.<sup>22</sup> Because Section 706 of the 1996 Act was never added to the Communications Act, the Commission’s interpretation of Section 706 is entitled to no deference by the courts.

In enacting the 1996 Act, Congress did add one particularly important provision to the Communications Act: Section 230, which made it the policy of the United States to promote the continued development of broadband Internet access services with a minimum of government regulation.<sup>23</sup> Since 1996, Congress has enacted at least three statutes addressing the Commission’s responsibilities regarding broadband deployment. As in the 1996 Act, in each of these statutes, Congress withheld from the FCC the authority to regulate the Internet.<sup>24</sup> In light of Congress’s “consistent judgment”<sup>25</sup> to deny the FCC the authority to regulate broadband by rulemaking, it is clear that Congress did not intend for Section 706 to serve as an independent grant of authority to the FCC to prescribe rules governing ISPs. Had Congress intended Section 706 to give the FCC such a broad grant of authority, then “it surely would have done so expressly,” especially given the “deep ‘economic and political significance’” of the question.<sup>26</sup>

#### 4. Conclusion

In the event that genuinely harmful ISP practices manifest themselves, the Federal Trade Commission and the Department of Justice have the authority to enforce laws such as the Sherman, Clayton, and FTC Acts.<sup>27</sup> Although markets are generally well-

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21. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999) (distinguishing between 1996 Act provisions that amended the Communications Act from “freestanding enactment[s] that Congress did not insert into the Communications Act”).

22. 47 U.S.C. § 201(b); see *id.* § 303(r) (the FCC may make “such rules and regulations . . . , not inconsistent with law, as may be necessary to carry out the provisions of this chapter”).

23. 47 U.S.C. § 230(b)(2).

24. See generally Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008), Broadband Data Act, Pub. L. 110-385, 122 Stat. 4096, 4096–97 (2008), American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

25. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000).

26. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

27. 15 U.S.C. §§ 1–7, 15 U.S.C. §§ 12–27, 15 U.S.C. §§ 41–58.

equipped to solve problems stemming from concentration.<sup>28</sup> However, as long as existing competition laws remain on the books, they offer an alternative means for after-the-fact government intervention in broadband disputes that does not entail ex ante FCC intervention. To the extent that consumers would benefit from greater competition among ISPs, the proper FCC response is to adopt policies that promote such competition, rather than seek to regulate existing providers. The Commission is already exploring such policies, having recently established a Broadband Deployment Advisory Committee and opened two proceedings on accelerating wireline and wireless broadband deployment by removing barriers to infrastructure investment.<sup>29</sup> We welcome such efforts, and urge the Commission to act promptly to issue rules that restore Internet freedom.

Respectfully submitted,

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28. Cf. Fred L. Smith, Jr., *Why Not Abolish Antitrust*, AEI J. GOV'T & SOC'Y (1982), available at <https://cei.org/content/why-not-abolish-antitrust>.

29. Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, 32 FCC Rcd 3266 (2017); Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Revising the Historic Preservation Review Process for Wireless Facility Deployments, *Notice of Proposed Rulemaking and Notice of Inquiry*, WT Docket Nos. 17-79, 15-180 (2017).