

United States Senate

WASHINGTON, DC 20510-2309

July 15, 2014

The Honorable Tom Wheeler
The Honorable Mignon Clyburn
The Honorable Jessica Rosenworcel
The Honorable Ajit Pai
The Honorable Michael O’Rielly
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: GN Docket No. 14-28

Dear Chairman Wheeler and Commissioners,

I am writing in response to the Federal Communications Commission’s (“FCC”) Notice of Proposed Rulemaking in the Matter of Protecting and Preserving the Open Internet (“Open Internet NPRM”). I request that this letter and the accompanying materials be submitted to the docket for that proceeding.

Net neutrality is a fundamental aspect of the Internet’s basic architecture, and it must be preserved. Because of net neutrality, the Internet has become an open marketplace for ideas and commerce – a marketplace in which everyone can participate on equal footing, regardless of one’s wealth or power. The website for the local hardware store loads as quickly as that belonging to a national chain; an email from my constituent in Minnesota reaches my inbox as quickly as an email from my bank; and a blogger can reach as many readers as can the New York Times.

The Open Internet NPRM contemplates a much different world – one in which deep-pocketed corporations could dictate the flow of Internet traffic to serve their own interests. This would hamper the free exchange of ideas, and it would be devastating to innovation and economic growth. The Internet’s level playing field would be tilted noticeably in favor of the wealthy few who could afford special access.

I urge the FCC to adopt strong net neutrality rules that protect consumers and preserve the open nature of the Internet. In particular, I request that the FCC adopt rules that (1) clearly and comprehensively ban paid prioritization; (2) provide robust protections for mobile broadband; and (3) are based on reclassified Title II legal authority.

I. Clearly and Comprehensively Ban Paid Prioritization

The Open Internet NPRM includes a proposal that would allow Internet service providers (“ISPs”) – such as Comcast, Verizon, and AT&T – to sell priority access on their networks. Under this proposal, deep-pocketed corporations could pay the ISPs a fee, in exchange for which the corporation would receive enhanced access to the ISP’s subscribers.

This paid prioritization scheme arguably is the centerpiece of the Open Internet NPRM, yet it poses the gravest threat to Internet openness. Paid prioritization is tantamount to a tollbooth on the Information Superhighway. It is the antithesis of net neutrality, and it has no place in a rulemaking that purports to value competition and openness.

Consider, for example, YouTube, which began as a little-known start-up run out of a cramped office above a pizzeria. Because of net neutrality, consumers had equal access to YouTube and to Google’s competing video service, Google Video. Although Google was a much wealthier corporation, it was prohibited from paying ISPs for an unfair advantage over YouTube. Consumers preferred YouTube, which eventually beat out Google Video. Similar stories can be told about start-ups across the country. None of this is possible in an environment that allows pay-for-priority schemes like those described in the Open Internet NPRM.

The FCC itself already has acknowledged as much. In its 2010 Open Internet Order, the FCC explained that paid prioritization would result in a well-functioning Internet for those wealthy enough to afford it and a congested, low-quality Internet for everyone else:

[I]f broadband providers can profitably charge edge providers for prioritized access to end users, they will have an incentive to degrade or decline to increase the quality of the service they provide to non-prioritized traffic. This would increase the gap in quality (such as latency in transmission) between prioritized access and non-prioritized access, induce more edge providers to pay for prioritized access, and allow broadband providers to charge higher prices for prioritized access. Even more damaging, broadband providers might withhold or decline to expand capacity in order to ‘squeeze’ non-prioritized traffic, a strategy that would increase the likelihood of network congestion and confront edge providers with a choice between accepting low-quality transmission or paying fees for prioritized access to end users.¹

The FCC now seeks to sanction the very conduct it sought to prevent just four years ago. The Open Internet NPRM proposes to “permit broadband providers to serve customers and carry traffic on an individually negotiated basis, without having to hold themselves out to serve all

¹ *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

comers indiscriminately on the same or standardized terms, so long as such conduct is commercially reasonable.”²

The “commercial reasonableness” standard that lies at the heart of the Open Internet NPRM’s proposed oversight regime relies too heavily on loosely-defined parameters and case-by-case determinations that are vulnerable to subjective interpretation. The fact of the matter is much simpler than the proposal: there is nothing reasonable about paid prioritization.

The threat of paid prioritization is not theoretical. During last year’s legal challenge to the Open Internet Order, Verizon admitted its desire to negotiate pay-for-priority deals with edge providers.³ From the repeated and extended legal battles they have waged against net neutrality rules, it is clear that ISPs have the motivation to carve the Internet into two tiers, one for haves and one for have-nots. A clear prohibition against paid prioritization would avert this highly problematic scenario.

The FCC should heavily weigh the proposed rule’s impact on the economy. Paid prioritization would upend the investment model that has made America a thriving place for online innovation. Many start-ups would need substantial upfront capital to compete with the established companies that can afford paid prioritization. Those that lack such capital would reach fewer customers, or worse, wouldn’t even get off the ground. Indeed, the mere prospect of the rules described in the Open Internet NPRM reportedly already has produced a chilling effect on start-up investment.⁴

The FCC also must weigh the proposed rule’s impact on consumers. Paid prioritization creates new costs that would be incurred by consumers. Some companies would pay ISPs a fee for priority treatment on the Internet and pass that cost along to consumers in the form of higher subscription fees or product prices. Other companies that are unable to pay the fee would be unable to compete vigorously as a result. Facing reduced competitive pressures, well-funded, established corporations could leverage their market position in the form of higher prices. Either way, consumers ultimately foot the bill.

And the Internet is not just a marketplace for goods and services – it also is a robust marketplace of ideas. The Internet has become the town square of the 21st Century, a place where everyone can give voice to their ideas and opinions. This thriving freedom of expression and participatory debate is a direct result of net neutrality, and it must be protected. Net neutrality is the free speech issue of our time. We must not take for granted the democratic and open nature of the modern Internet. These features can be taken away, as democracy activists around the world can attest. Paid prioritization would amplify the voices of those with the deepest pockets while quieting – if not silencing – everyone else.

² *Protecting and Promoting the Open Internet*, GN Docket No. 14-28 at 42, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014).

³ See Joint Reply Brief of Appellants/Petitioners Verizon and MetroPCS at 7-8, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Dec. 21, 2012).

⁴ Barbara van Schewick, *The Case for Rebooting the Network-Neutrality Debate*, *The Atlantic* (May 6, 2014).

II. Protect Mobile Broadband

The now-vacated 2010 Open Internet Order did not do enough to protect openness and competition in the mobile broadband space. The FCC has a second chance to examine the previous Order's shortcomings and to expand its scope where appropriate. I urge the FCC to adopt robust protections for mobile ISPs that expand upon the 2010 rules.

By creating different rules for fixed and mobile ISPs, the Open Internet Order effectively legitimated discriminatory conduct on the mobile Internet. This action was inconsistent with core net neutrality principles and marked a retreat from the FCC's mission to promote mobile broadband development. Mobile Internet expansion is a top priority of the National Broadband Plan, which advocates making "more spectrum available for existing and new wireless broadband providers in order to foster additional wireless-wireline competition at higher speed tiers."⁵ This is why, next year, the Commission plans to conduct an incentive auction to make low-band spectrum available for mobile broadband. This also is why the FCC unlocked "white space" spectrum in 2010.⁶ Despite these efforts, the FCC unwisely chose to give mobile ISPs greater gatekeeper power over a market in which the FCC has made substantial investments. The Commission should protect these investments with strong net neutrality rules.

Rural Americans have an especially acute need for mobile ISP rules. Fixed ISPs have chronically underserved the rural market, as well as stifled local efforts to offer municipal broadband. In these communities, mobile ISPs often are the only game in town. Wireless infrastructure costs typically are lower than comparable fixed wireline deployments, which is why rural ISP proposals often focus on mobile technologies. For example, AT&T's recent proposal to expand broadband to 13 million rural customers – only if the company is permitted to acquire DirecTV – relies entirely on a mobile technology known as "fixed wireless local loop" rather than AT&T's existing wireline U-Verse network.⁷ This underscores the FCC's hope that "wireless service will play a critical role in ensuring that broadband reaches rural areas."⁸ Mobile Internet is the best hope for broadband access in many rural communities in Minnesota and across the country, but the 2010 Order provided few meaningful protections against ISP abuse in this space.

Recent incidents – such as Verizon's refusal to allow tethering apps and AT&T's blocking of the Apple FaceTime application – underscore the need for mobile ISP rules. This is the unfinished work of the 2010 Order, and nothing in the *Verizon* opinion suggested that the rules could not apply equally to mobile ISPs.

⁵ Federal Communications Commission, *Connecting America: The National Broadband Plan* at 31 (March 16, 2010).

⁶ Federal Communications Commission, *FCC Adopts Rules for First Ever Incentive Auction, Will Make Available Additional Airwaves, Increase Competition for Mobile Broadband* (May 15, 2014); Federal Communications Commission, *FCC Frees Up Vacant Airwaves for "Super Wi-Fi" Technologies* (Sept. 23, 2010).

⁷ AT&T/DirecTV, *Description of Transaction, Public Interest Showing, and Related Demonstrations* (June 11, 2014).

⁸ Federal Communications Commission, *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy* at 41 (May 27, 2009).

The FCC should expand the rule's scope to include all applications that compete with mobile ISP services, not just voice or video telephony applications. Mobile ISPs have the incentive to offer more than just telephony services. For example, consumers often access the mobile Internet for music streaming and GPS mapping services. A carve-out for these types of applications would be unjustified. The rules should promote choice and competition in every corner of the mobile telecommunications market, not just telephony.

Thus, in the current rulemaking, I urge the Commission to create the same rules for mobile and fixed ISPs, with the understanding that "reasonable network management" may mean different things for different technologies.

III. Reclassify Broadband Internet Under Title II

The FCC must carefully consider the legal authority under which it enacts new net neutrality rules. The D.C. Circuit Court of Appeals twice has rejected the legal theories advanced by the FCC.⁹ The Open Internet NPRM suggests an approach that relies on section 706 of the Telecommunications Act. I fear this approach will lead to a third judicial rebuke.

The most straightforward and effective way to protect the Open Internet is to reclassify broadband Internet as a common carrier under Title II of the Telecommunications Act. The FCC's 2002 decision to classify broadband under Title I has haunted the agency ever since, and it is the primary reason that the courts blocked the Commission's prior efforts to protect net neutrality. I urge the Commission to finally remedy this error.

The Title II regime is the most appropriate conceptual framework for the Internet and for net neutrality. It treats broadband as the telecommunications service it widely is thought to be, and it gives the FCC the clearest legal authority to promulgate net neutrality rules. The common carriage principles codified in Title II have been a cornerstone of federal communications law since the 1930s. Telephony services have been subject to common carrier rules for the past eight decades, to the great benefit of consumers and citizens. This is why telephone users can dial up Domino's Pizza as easily as a mom-and-pop pizza shop. These rules did not prevent the telephone industry from becoming a highly profitable part of the American economy – an important reminder that protecting the public interest and promoting economic development are not mutually exclusive goals. Most importantly, reclassification would give the FCC its strongest case for prohibiting paid prioritization.

By contrast, section 706 offers little more than short-term political expediency. Any meaningful net neutrality protections adopted under section 706 are unlikely to withstand judicial scrutiny. The Commission should not struggle to fit a round peg into a square hole when reclassification remains viable – indeed, the only durable option that remains after a decade of legal battles over this issue. Title II, with appropriate forbearance, is the best path forward. I strongly urge the Commission to take this long overdue step.

⁹ *Comcast v. Federal Communications Commission*, 600 F.3d 642 (D.C. Cir. 2010); *Verizon v. Federal Communications Commission*, 740 F.3d 623 (D.C. Cir. 2014).

It is difficult to overstate the importance of the issues addressed in the Open Internet NPRM. I urge the Commission to choose an approach that is in the best interest of consumers, small businesses, and the public – an approach that bans paid prioritization, applies equally to the mobile Internet, and embraces common carriage principles.

Sincerely,

A handwritten signature in blue ink that reads "Al Franken". The signature is fluid and cursive, with a long horizontal stroke at the end.

Al Franken
United States Senator

APPENDIX OF ACCOMPANYING MATERIALS

<i>Item</i>	<i>Document</i>	<i>Date</i>
1	Letter from A. Franken to T. Wheeler re: Response to <i>Verizon v. FCC</i> decision	Jan. 16, 2014
2	Press Release and Bill Text for S. 1981, the Open Internet Preservation Act	Feb. 3, 2014
3	Letter from R. Wyden, A. Franken, et. al., to T. Wheeler re: Adoption of New Net Neutrality Rules	Feb. 10, 2014
4	Letter from A. Franken to T. Wheeler re: Paid Prioritization	April 29, 2014
5	Letter from R. Wyden, A. Franken, et. al. re: Paid Prioritization	May 9, 2014
6	A. Franken, Op-Ed, "Tomorrow Could be the Beginning of the End for Net Neutrality,"	May 14, 2014
7	Press Release and Bill Text for S. 2476, the Online Competition and Consumer Choice Act	June 17, 2014
8	Letter from E. Markey, A. Franken, et. al. re: Reclassification under Title II	July 15, 2014