

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Protecting) GN Docket No. 14-28
and Promoting the Open Internet)
)
)

REPLY COMMENTS OF CONSUMERS UNION

Consumers Union, the policy and advocacy arm of Consumer Reports, appreciates the opportunity to share the consumer perspective on the Commission’s proposed path forward to restoring the Commission’s net neutrality rules. Consumers Union’s mission is to ensure a fair, just, and safe marketplace for consumers. In the context of an open Internet, this means ensuring that all consumers can access the full capabilities of the Internet and stream the online content of their choice, without interference from Internet Service Providers (ISPs) who can engage in harmful discriminatory practices. As we have argued at length in our earlier comments,¹ the best way to protect consumers from harmful discriminatory practices by ISPs is to reclassify broadband services under Title II, ban paid prioritization deals, and apply net neutrality protections equally to mobile and fixed broadband services. We take the opportunity below to address why alternative proposals are insufficient to protect consumers.

¹ See Comments of Consumers Union, MB Docket No. 14-28 (filed July 15, 2014) (“Consumers Union July 2014 Comments”); Comments of Consumers Union, MB Docket No. 14-28 (filed Mar. 24, 2014) (“Consumers Union March 2014 Comments”).

I. A Case-by-Case Commercially Reasonable Standard that Permits Flexible Individualized Agreements is Insufficient to Protect Consumers from Harm

Consumers will be harmed by a vague, unenforceable standard that allows individualized negotiations to be left to private parties with motivations that may not necessarily be in the interest of consumers. The largest ISPs, in particular, wield a great deal of power over consumers and competitors, and weak net neutrality rules would only increase their ability to affect the prices and quality of services and the flow of information online. The Commission should adopt a Title II framework to ensure that consumers, rather than a handful of large incumbents, have maximum control over their access to the Internet.

Providers argue for the flexibility to negotiate individual agreements, assuring the Commission that they will act in the best interest of consumers. For example, Comcast suggests that its future actions will not be contrary to consumer interests when it argues that “[i]f a provider were to block or degrade Internet applications or content, that provider would incur substantial subscriber losses and reputational harm.”² However, these types of assurances are nothing but empty promises, and some providers’ past behaviors have been contrary to the principles of an open Internet.

Even if providers do not block content outright, providers can still utilize their market power to harm consumers in more subtle ways, such as by lowering data caps or exempting their own services from such caps. Indeed, Comcast has previously engaged in such behavior by imposing data caps on residential video customers and subsequently punishing consumers for going over these caps by either expelling them from the network or charging them fines for

² Comments of Comcast at 5.

exceeding its arbitrarily-imposed monthly limits.³ Comcast has applied these limits to competing services, while exempting its own services from such caps. This behavior is exactly the type of anti-consumer behavior that net neutrality proponents are concerned about in the absence of strong net neutrality protections.

Vertically integrated companies, in particular, have an incentive to raise costs for consumers and stifle emerging online competitors.⁴ With control over both the content and the means by which that content reaches consumers, vertically integrated providers are in a particularly powerful position to put in place data caps and strike deals with certain parties to exempt services. Allowing them the freedom to strike individualized deals has the potential to seriously distort competition and raise costs for consumers and competitors alike. As the Commission has previously recognized, vertically integrated providers can restrict access to affiliated content or block, degrade, or otherwise act contrary to open Internet principles with respect to delivery of unaffiliated online video to their broadband subscribers.⁵

The need for strong net neutrality rules is especially important as consumers increasingly turn to broadband video services. Consumers view online video services as welcome additions and alternatives to traditional pay-TV options. A March 2014 issue of Consumer Reports noted that twenty-six percent of subscribers say that they have cut back on cable services because they watch Internet video instead, although less than five percent have replaced subscribing to cable TV with online video options. As more consumers seek to move away from reliance on cable,

³ Joint Petition to Deny of Consumers Union and Common Cause, MB Docket No. 14-57 (filed Aug. 21, 2014) (“CU and CC Joint Petition to Deny”).

⁴ See Comments of Comptel at 11-12 (noting that vertically integrated companies can raise the costs of others); Roku Comments at 1 (noting that such ISPs have incentives to favor their own content and content delivery systems).

⁵ CU and CC Joint Petition to Deny at 18-19 (discussing the Commission’s acknowledgement in 2011 that as a vertically integrated company, Comcast will have the incentive and ability to engage in harmful behaviors).

weak net neutrality rules will only further the ability of the largest vertically integrated ISPs to act in ways that threaten emerging online competitors and degrade online video services that compete with their own services. The problem is only further exacerbated by the recent string of mergers in the telecommunications and media marketplace. The market for last-mile Internet access is already controlled by a handful of powerful companies and additional consolidation will only increase the leverage of providers to engage in harmful discriminatory practices.

II. Any Net Neutrality Protections Should Apply Equally to Fixed and Mobile Broadband Providers

Consumers deserve strong net neutrality protections whether they access content online from a computer or from a mobile phone. Consumers Union believes that any net neutrality protections should apply equally to fixed and mobile broadband providers. Our concerns regarding mobile broadband are not unlike those in the fixed broadband ISP marketplace. With enormous subscriber bases and control over the means by which content reaches consumers, the largest wireless carriers are in a prime position to exert leverage over smaller competitors, app developers, and consumers, and dictate how consumers can receive content and what prices they must pay.

Since 2010, wireless carriers have demonstrated that they have an incentive and ability to engage in behaviors that harm an open Internet. AT&T has argued that the “purported incentives to engage in discriminatory practices ignore[] the countervailing incentives that broadband Internet access providers have to maximize . . . unfettered access to all safe and lawful Internet content, applications, and services.”⁶ But as Senator Franken has pointed out, “AT&T has a

⁶ Comments of AT&T at 5-6.

history of skirting the spirit, and perhaps the letter” of the net neutrality rules.”⁷ As Senator Franken went on to note, AT&T previously “allegedly blocked services that compete with its own voice and messaging services,” including Apple’s Face Time, which it only stopped blocking after the FCC began investigating AT&T’s practices.⁸ This behavior calls into question whether the Commission can rely on assurances from such companies that they will act in the best interests of consumers in the future.

More recently, AT&T’s “sponsored data” plan, announced earlier this year, enables web sites and services to pay AT&T to exempt their services from data caps.⁹ As discussed above, the power to exempt selective services from data caps seriously distorts competition, favors companies with the deepest pockets, and prevents consumers from exercising control over what they are able to access over the Internet. While such offers are touted as pro-consumer, AT&T’s sponsored data plan is certainly contrary to the underlying principle of net neutrality to treat all data equally. The decisions as to what services should be exempted take control out of users’ hands and put them into the hands of wireless providers. If the largest wireless carriers exempt certain uses from their data caps, the effect is to push consumers to watch affiliated content out of fear that doing otherwise will count against their monthly caps.

⁷ Letter from Senator Al Franken to Chairman Wheeler, FCC, and Assistant Attorney General Baer, DOJ, (July 9, 2014), *available at*

http://www.franken.senate.gov/?p=press_release&id=2890.

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⁹ See Marguerite Reardon, CNET, “AT&T Says ‘Sponsored Data’ Does Not Violate Net Neutrality” (Jan. 9, 2014), <http://www.cnet.com/news/at-t-says-sponsored-data-does-not-violate-net-neutrality/>.

Despite arguments to the contrary,¹⁰ there is ample evidence in the record to suggest that developments since 2010 warrant reconsideration of the application of the rules to mobile broadband services. Since 2010, consumer demand has skyrocketed for bandwidth-heavy streaming services and the proliferation of the application market has impacted consumers and the economy in unprecedented ways. Consumers are demanding higher speeds for a variety of purposes, including online gaming and streaming of music and video, and the average mobile user is shifting use away from calling and texting towards more heavy data-based applications.¹¹ Furthermore, while it does not serve as a perfect substitute for traditional viewing methods,¹² online viewing of video on mobile phones is becoming more popular among consumers.

For many Americans, including rural residents, low-income consumers, and communities of color, mobile devices have become the primary – and sometimes the sole – means of access to the Internet. All consumers are equally deserving of a fair, just, and safe marketplace, but without comparable net neutrality protections for mobile services, these particular groups have the potential to be disproportionately impacted by anti-consumer practices. Ninety-one percent of American adults now own some kind of cell phone, and cell phone adoption rates are especially high among communities of color and low-income communities, and these populations are also more likely to be unbanked or underbanked.¹³ According to a March 2014 Federal Reserve report, consumers are increasingly using their phones to make purchases at the point of sale,

¹⁰ Comments of Cisco at 20; Comments of CTIA at 38.

¹¹ The Complete Smart Phone Shopping Guide, Consumer Reports, (January 2014).

¹² See Kate Cox, “Comcast Says Mobile Data is Competitive, But It Costs \$2K to Stream Breaking Bad Over LTE”, THE CONSUMERIST, (Aug. 18, 2014), <http://consumerist.com/2014/08/18/comcast-says-mobile-data-is-competitive-but-it-costs-2k-to-stream-breaking-bad-over-lte/>.

¹³ Comments of Consumers Union to CFPB, Docket (filed Sep. 10, 2014), *available at* http://consumersunion.org/wp-content/uploads/2014/09/CU_comments_CFPB_mobile_finance.pdf.

through mobile apps, and online.¹⁴ Mobile payments are an example of an application that has the potential to provide a real opportunity for improving access to financial services among unbanked and underbanked consumers. A weak set of net neutrality rules which empowers the providers and not the consumers could put these apps out of reach for these consumers in need.

Mobile broadband is increasingly becoming integrated in all aspects of consumers' lives, and consumers are increasingly adopting smart-connected devices and broadband-connected products that connect consumers to the Internet either directly or indirectly.¹⁵ These devices are expected to become far more prevalent in the near future, with 37 billion smart products expected on the market by the year 2020.¹⁶ A Consumer Reports survey suggests that consumers are looking forward to adopting such technologies. According to poll of subscribers in June 2014, almost 20% already use their phone or tablet to remotely control some functions in the home, and nearly 70% of those who don't expressed interest in doing so in the future.¹⁷ Broadband has enabled tremendous societal and economic benefits with vast innovations in healthcare, education, and energy. But innovation could be stifled unless the Commission can ensure an open and free Internet.

In 2010, the Commission decided to apply limited net neutrality protections to mobile broadband services, citing the unique difficulties facing wireless services as part of the

¹⁴ Consumers and Mobile Financial Services, Federal Reserve, March 2014, *available at* <http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201403.pdf>.

¹⁵ "What Is The Internet of Things, and Why Should You Care?", Consumer Reports, (Aug. 14, 2014), <http://www.consumerreports.org/cro/news/2014/08/what-is-the-internet-of-things/index.htm> (defining the Internet of Things and predicting its widespread adoption by consumers in the near future).

¹⁶ *Run Your Home From Your Phone*, CONSUMER REPORTS (June 2014).

¹⁷ *Run Your Home From Your Phone*, CONSUMER REPORTS (June 2014).

justification.¹⁸ The FCC rules allow for wireless companies to engage in “reasonable network management” for the purposes of reducing or mitigating the effects of congestion on the network. Many parties in the proceeding argue that wireless providers require flexibility to manage congestion in light of limited spectrum resources.¹⁹ But Chairman Wheeler himself has expressed his concern that carriers may be using the concept of reasonable network management as an excuse to limit the services that consumers have properly paid for in an effort to generate additional revenue.²⁰

We disagree with parties who argue that the transparency rule is working as intended and that additional open Internet rules are therefore unnecessary to prevent harms to wireless consumers.²¹ For example, CTIA argues that application of the no-blocking rule is not necessary for wireless services because “providers have strong incentives to meet these expectations by optimizing the delivery of all content or applications that will not harm the network or undercut the experience of other users.”²² But the transparency rule requires ISPs to “publicly disclose accurate information regarding the network management practices . . . sufficient for consumers to make informed choices regarding use of such services.” Not only do carriers engage in harmful throttling practices, but they fail to adequately disclose these practices to the public.

Verizon’s network optimization policy, which it put in place in 2011, is a perfect example of why the transparency rules are insufficient to protect wireless consumers from harms to an

¹⁸ See Open Internet Order, 25 FCC Rcd at 17956-59, paras. 93-98.

¹⁹ Comments of CTIA at 14, 17, 20; Comments of Mobile Future at 5; Comments of AT&T at 6.

²⁰ Letter of Chairman Wheeler, Federal Communications Commission, to Daniel S. Mead, Verizon Wireless, (July 30, 2014) (noting that it is “disturbing that Verizon Wireless would base its network management distinctions among its customers data plans, and arguing that network management “is not a loophole designed to enhance your revenue streams”).

²¹ Comments of CTIA at 11, 27 (arguing that no additional regulation is necessary); Comments of Mobile Future at 8; Comments of Verizon at 9, 21.

²² Comments of CTIA at 28.

open Internet. The policy explains that consumers may be subject to restrictions when users connect to “a cell site experiencing high demand,” then go on to explain that there is no way for consumers to know when they would be connected to such a cell site and accordingly subject to restrictions on their uses.”²³ Consumers continue to pay high prices for access to the Internet. They should be told clearly of practices that have the potential to impact their access to the Internet, including the decision to throttle and thresholds that trigger such practices. Unfortunately for consumers, the information they currently receive under Verizon’s policy is insufficient because it provides consumers with no warning or explanation of when their speeds will be slowed down.

Conclusion

As discussed above, Consumers Union continues to argue that Title II is necessary in order to protect consumers from individualized negotiations by carriers who have the incentive and ability to engage in practices that harm consumers. Wireless carriers have similarly demonstrated an incentive and ability to interfere with the content that reaches consumers. The FCC should reconsider its 2010 decision and apply stronger, comprehensive net neutrality protections to wireless services. Finally, the current transparency rules are not adequate and do not provide consumers with the relevant information to encourage carrier accountability and competition.

²³ Network Optimization Practices for Consumers with Unlimited Data Plans, Verizon Wireless, available at http://www.verizonwireless.com/support/information/data_disclosure.html (noting that “there is no way for [consumers] to easily determine [which cell sites are experiencing high demand]” and that there are “many variables that can contribute to a cell site experiencing high demand including . . . the number of active users and the type of applications being used on that site.”).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Delara Derakhshani', with a horizontal line extending to the right.

Delara Derakhshani
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Consumers Union

September 15, 2014