

**ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015**  
**No. 15-1063 (and consolidated cases)**

---

---

**In the United States Court of Appeals  
for the District of Columbia Circuit**

---

UNITED STATES TELECOM ASSOCIATION, *et al.*,

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

---

**On Petition for Review of an Order of the  
Federal Communications Commission**

---

***AMICUS CURIAE* BRIEF OF CONSUMERS UNION  
OF THE U.S., INC. IN SUPPORT OF RESPONDENTS**

---

Delara Derakhshani  
*Telecommunications Policy Counsel*  
George P. Slover  
*Senior Policy Counsel*  
Consumers Union  
1101 17th Street NW, Suite 500  
Washington, DC 20036  
Phone: (202) 462-6262

Eric G. Null  
1375 Kenyon Street NW  
Apartment 515  
Washington, DC 20010  
Tel: (802) 578-7223  
Email: eric.g.null@gmail.com  
*Of Counsel to Consumers Union*

September 21, 2015

---

---

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties**

All parties are listed in the Brief for Petitioners and the *amicus curiae* brief for Internet Association.

### **B. Ruling Under Review**

*Protecting and Promoting the Open Internet*, 30 FCCRcd 5601 (2015)(JA\_\_).

### **C. Related Cases**

The FCC issued the *Order* in response to this Court's remand in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). *Amicus curiae* Consumers Union is not aware of any pending cases related to this one.

**CORPORATE DISCLOSURE STATEMENT**

In accordance with Fed. R. App. P. 26.1 and 29(c)(1), *amicus curiae*

Consumers Union of United States, Inc., D/B/A Consumer Reports, states that it is nonprofit membership organization representing the interests of consumers. It has no parent corporation and there is no corporation that has an ownership interest of any kind in it.

Respectfully submitted,

/s/Eric G. Null

---

Eric G. Null

1375 Kenyon Street NW

Apartment 515

Washington, DC 20010

Tel: (802) 578-7223

Email: eric.g.null@gmail.com

*Of Counsel to Consumers Union*

Delara Derakhshani  
*Telecommunications Policy Counsel*  
George P. Slover  
*Senior Policy Counsel*  
Consumers Union  
1101 17th Street NW, Suite 500  
Washington, DC 20036  
Phone: (202) 462-6262

September 21, 2015

**CERTIFICATE OF COUNSEL REGARDING NECESSITY  
OF SEPARATE *AMICUS CURIAE* BRIEF**

Pursuant to D.C. Cir. R. 29(d), Consumers Union certifies that it requires a separate *amicus curiae* brief because of its specialized expertise and extensive experience working with and understanding consumers. To its knowledge, Consumers Union is the only *amicus curiae* filing a brief reflecting this specialized expertise and experience. The FCC supported its open Internet decision in large part on protecting consumers. Consumers Union can offer a unique perspective on the issues in this case, the needs of consumers, and the harm consumers could experience without open Internet protections. For example, Consumers Union has conducted numerous national consumer surveys regarding the needs and desires of consumers with respect to Internet access.

Therefore, Consumers Union certifies that a separate brief is necessary.

September 21, 2015

/s/ Eric G. Null

---

Eric G. Null

## TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES .....	ii
CORPORATE DISCLOSURE STATEMENT .....	iii
CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE <i>AMICUS CURIAE</i> BRIEF .....	iv
TABLE OF CONTENTS.....	v
TABLE OF AUTHORITIES .....	vi
GLOSSARY.....	ix
STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE .....	x
STATEMENT OF AUTHORSHIP OF BRIEF.....	x
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I. WITHOUT OPEN INTERNET RULES, ISPS COULD HARM CONSUMERS BY LIMITING THEIR CHOICES OF AND ACCESS TO ONLINE SERVICES AND BY ARTIFICIALLY RAISING PRICES THROUGHOUT THE INTERNET ECOSYSTEM.....	3
A. ISPs could block, throttle, or de-prioritize online services, which would undermine consumer freedom and choice and degrade consumers’ online experience.....	3
B. ISPs could further increase costs for consumers online.....	7
II. CONSUMERS WANT AN OPEN INTERNET WITH EFFICIENT ACCESS TO ONLINE SERVICES WITHOUT ISP INTERFERENCE. ....	9
III. RECLASSIFYING BROADBAND AS A TITLE II SERVICE AND IMPOSING CLEAR, BRIGHT-LINE RULES AGAINST SPECIFIC ISP BEHAVIOR IS THE MOST APPROPRIATE AND EFFECTIVE WAY TO PROTECT CONSUMERS.....	13
CONCLUSION .....	15
CERTIFICATE OF COMPLIANCE.....	17
CERTIFICATE OF SERVICE .....	18

## TABLE OF AUTHORITIES\*

### Cases

<i>Nat'l Cable &amp; Telecomms. Ass'n v. Brand X Internet Servs.</i> , 545 U.S. 967, 991-92 (2005) .....	15
* <i>Verizon v. FCC</i> , 740 F.3d 623 (D.C. Cir. 2014) .....	1, 3, 6, 10

### Statutes

47 USC §§201-202 .....	1, 13
------------------------	-------

### Administrative and Other Authorities

Andy Serwer, <i>Verizon &amp; AOL: An Inevitable Match</i> , Yahoo! Finance (May 12, 2015), <a href="http://finance.yahoo.com/news/the-inevitable-deal--verizon---aol-140714573.html">http://finance.yahoo.com/news/the-inevitable-deal--verizon---aol-140714573.html</a> .....	5
<i>AT&amp;T/FaceTime Case Study</i> , Mobile Broadband Working Group at 2 (Aug. 20, 2013), <a href="https://transition.fcc.gov/cgb/oiaac/Mobile-Broadband-FaceTime.pdf">https://transition.fcc.gov/cgb/oiaac/Mobile-Broadband-FaceTime.pdf</a> .....	6
*Barbara van Schewick, <i>Internet Architecture and Innovation</i> at 281 (MIT Press, 2010) .....	6, 14
Bob Lannon & Andrew Pendleton, <i>What Can We Learn from 800,000 Public Comments on the FCC's Net Neutrality Plan?</i> , Sunlight Fdn. (Sept. 2, 2014), <a href="http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan">http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan</a> .....	12
Brendan Sasso, <i>Why the FCC Is Being so Vague About Net Neutrality</i> , Nat'l J. (May 22, 2014), <a href="http://www.nationaljournal.com/tech/2014/05/22/why-fcc-is-being-so-vague-about-net-neutrality">http://www.nationaljournal.com/tech/2014/05/22/why-fcc-is-being-so-vague-about-net-neutrality</a> .....	14
Brian Fung, <i>Sunlight: 99 Percent of Net Neutrality Comments Wanted Stronger FCC Rules</i> , Wash. Post (Sept. 2, 2014), <a href="https://www.washingtonpost.com/news/the-switch/wp/2014/09/02/sunlight-99-percent-of-net-neutrality-comments-wanted-stronger-fcc-rules">https://www.washingtonpost.com/news/the-switch/wp/2014/09/02/sunlight-99-percent-of-net-neutrality-comments-wanted-stronger-fcc-rules</a> .....	12

---

\* Authorities principally relied upon are marked with an asterisk.

Casey Johnston, <i>Netflix Comes Through with Price Hike after Struggles with Comcast, Verizon</i> , Ars Technica (May 9, 2014), <a href="http://arstechnica.com/business/2014/05/netflix-comes-through-with-price-hike-after-struggles-with-comcast-verizon">http://arstechnica.com/business/2014/05/netflix-comes-through-with-price-hike-after-struggles-with-comcast-verizon</a> .....	9
Chris Morran, <i>Advocates File Net Neutrality Complaint Over AT&amp;T's FaceTime Policy</i> , Consumerist (Sept. 18, 2012), <a href="http://consumerist.com/2012/09/18/advocates-file-net-neutrality-complaint-over-atts-facetime-policy">http://consumerist.com/2012/09/18/advocates-file-net-neutrality-complaint-over-atts-facetime-policy</a> .....	6
*CU Comments, GN Dkt. 14-28 (July 15, 2014) .....	4, 6, 9, 14, 15
Gigi Sohn, <i>FCC Releases Open Internet Reply Comments to the Public</i> , FCC Blog (Oct. 22, 2014), <a href="https://www.fcc.gov/blog/fcc-releases-open-internet-reply-comments-public">https://www.fcc.gov/blog/fcc-releases-open-internet-reply-comments-public</a> .....	11
Jon Brodtkin, <i>FCC Commissioners Disagree over Whether Internet Access Is a "Necessity,"</i> Ars Technica (July 9, 2015), <a href="http://arstechnica.com/business/2015/07/fcc-commissioners-disagree-over-whether-internet-access-is-a-necessity">http://arstechnica.com/business/2015/07/fcc-commissioners-disagree-over-whether-internet-access-is-a-necessity</a> .....	4
Jon Henshaw, <i>The Internet: A Necessary Resource for Career Development</i> , Am. College Healthcare Executives, <a href="https://www.ache.org/newclub/career/GUIDES/internet.cfm">https://www.ache.org/newclub/career/GUIDES/internet.cfm</a> .....	4
Julie Bort, <i>AT&amp;T Won't Let This Man FaceTime His Kids, So He's Taking It To The Feds</i> , Bus. Insider (Oct. 17, 2012), <a href="http://www.businessinsider.com/consumer-fcc-complaint-att-facetime-2012-10">http://www.businessinsider.com/consumer-fcc-complaint-att-facetime-2012-10</a> .....	6
<i>Last Week Tonight with John Oliver: Net Neutrality</i> , Youtube (June 1, 2014), <a href="https://www.youtube.com/watch?v=fpbOEOrrHyU">https://www.youtube.com/watch?v=fpbOEOrrHyU</a> .....	11
Michael Weinberg, <i>5 Reasons Why Internet Fast Lanes Can Never Make Sense</i> , Public Knowledge (May 15, 2014), <a href="https://www.publicknowledge.org/news-blog/blogs/5-reasons-why-internet-fast-lanes-can-never-make-sense">https://www.publicknowledge.org/news-blog/blogs/5-reasons-why-internet-fast-lanes-can-never-make-sense</a> .....	5
Notice of Proposed Rulemaking, <i>Protecting and Promoting the Open Internet</i> , 29 FCC Rcd 5561, 5602-04 (2014) .....	14

- Press Release, Consumer Reports, *71% of U.S. Households Would Switch from Providers that Attempt to Interfere with Internet* (Feb. 18, 2014), <http://www.consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm> ..... 10, 11
- Press Release, Consumer Reports, *Net Neutrality: 58% Say Government Should Not Allow Paid Prioritization Deals in New Consumer Reports Survey* (June 20, 2014), <http://consumersunion.org/news/net-neutrality-58-say-government-should-not-allow-paid-prioritization-deals-in-new-consumer-reports-survey> ..... 11
- Susan Crawford, *Be Very Afraid: The Cable-ization of Online Life is Upon Us*, *Wired* (Apr. 26, 2012), <http://www.wired.com/2012/04/opinion-crawford-cableization> ..... 8
- Zachary Seward, *Read Netflix’s Plea to Ban Paid “Fast Lanes” on the Internet*, *Quartz* (July 16, 2014), <http://qz.com/235736/read-netflixs-plea-to-ban-paid-fast-lanes-on-the-internet> ..... 10



## GLOSSARY

Broadband	Fixed and mobile broadband Internet access services
CU	Consumers Union
FCC	Federal Communications Commission
ISP	Internet Service Provider
Order	<i>Report and Order on Remand, Declaratory Ruling, and Order</i> , 30 FCCRcd 5601, 5607 (2015)(JA__)
The Act	The Communications Act of 1934
Title II	Title II of the Communications Act, codified as amended at 47 USC §§201–276

**STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND SOURCE  
OF AUTHORITY TO FILE**

Consumers Union (“CU”) is the policy and advocacy division of Consumer Reports. Founded in 1936, CU is an expert, independent, non-profit organization working for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. This includes promoting increased competition and other pro-consumer action, and consumer education, on communications and media issues involving telecommunications, cable, Internet, and wireless services and equipment. CU has an interest in this case because the open Internet is vital to ensuring consumers continue to have the opportunities and choices they have grown to depend on and enjoy online. CU has long participated in FCC proceedings, including the several open Internet proceedings.

CU filed a Notice of Intent to File an *Amicus Curiae* Brief on September 1, 2015, indicating all parties consented to, or did not oppose, its filing.

**STATEMENT OF AUTHORSHIP OF BRIEF**

Consumers Union and its counsel authored this brief in whole. No party or its counsel, and no person other than *amicus curiae*, made a monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

On February 26, 2015, the Federal Communications Commission (“FCC”) took a number of actions in response to this Court’s remand in *Verizon v. FCC*.<sup>1</sup> It established strong, pro-consumer open Internet rules that apply to fixed and mobile broadband Internet access services (“broadband”), including prohibitions against blocking or throttling content and against “paid prioritization.”<sup>2</sup> It established a conduct rule that prohibits, generally, unreasonable interference or disadvantage to consumers or edge providers.<sup>3</sup> The FCC will also begin considering disputes involving interconnection.<sup>4</sup>

The FCC grounded its authority for these rules in Title II of the Communications Act, reclassifying the transmission portion of broadband as a telecommunications service.<sup>5</sup> Under Title II, broadband services would be subject to Sections 201 and 202 of the Act, which prohibits, among other things, discrimination and unreasonable charges.<sup>6</sup> The FCC also chose to forbear from applying other Title II requirements to broadband.<sup>7</sup>

---

<sup>1</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

<sup>2</sup> *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCCRcd 5601, 5607-08 (2015) (“*Order*”)(JA\_\_-\_\_).

<sup>3</sup> *Id.* at 5608-09 (JA\_\_-\_\_).

<sup>4</sup> *Id.* at 5611 (JA\_\_).

<sup>5</sup> *Id.* at 5734 (JA\_\_).

<sup>6</sup> 47 USC §§201-202.

<sup>7</sup> *Order*, at 5804-05 (JA\_\_-\_\_).

Consumers Union (“CU”) supports the FCC’s decision to reclassify broadband services and to retain the most important Title II consumer protection regulations while forbearing from applying other Title II requirements, as an appropriate and carefully measured use of its statutory authority. An open Internet promotes online innovation, competition, free expression, and infrastructure deployment, all of which greatly benefit consumers in the form of promoting more choice online, better affordability, greater Internet access speeds, and greater ability and freedom to communicate and receive information.

This brief explains that, in reclassifying and applying strong open Internet rules to broadband, the FCC acted within its authority to protect consumers against ISP behavior that could cause significant harm. First, the brief describes harms to which consumers could be vulnerable absent open Internet rules, including undue restrictions on their online choice and undue increases to their costs. Then, it explains that the *Order* meets the consumer need for efficient Internet access without ISP interference. Last, it explains that the FCC acted appropriately to protect consumers by reclassifying broadband as a Title II service and imposing clear, bright-line rules.

## ARGUMENT

### **I. WITHOUT OPEN INTERNET RULES, ISPS COULD HARM CONSUMERS BY LIMITING THEIR CHOICES OF AND ACCESS TO ONLINE SERVICES AND BY ARTIFICIALLY RAISING PRICES THROUGHOUT THE INTERNET ECOSYSTEM.**

Every day, more decisions are made online and more commerce takes place online, as the Internet increasingly occupies a “central position in American social and economic life.”<sup>8</sup> Consumers benefit most when they have open access to online services, but that openness could be hindered by harmful and anticompetitive ISP behavior,<sup>9</sup> such as blocking, throttling, or de-prioritizing services consumers rely on, and by increasing the costs of using online services.

#### **A. ISPs could block, throttle, or de-prioritize online services, which would undermine consumer freedom and choice and degrade consumers’ online experience.**

The FCC established the open Internet rules in large part to protect consumers against harmful ISP behavior.<sup>10</sup> Without these rules, consumers would likely experience significant harm, because ISPs would be free to block, slow down, or de-prioritize services.

---

<sup>8</sup> FCC Br. 8.

<sup>9</sup> *See Verizon*, 740 F.3d at 646.

<sup>10</sup> *Order*, at 5604 (noting that “broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don’t like.”)(JA\_\_\_); *see also Verizon*, 740 F.3d at 645 (stating that ISPs “represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.”).

An ISP that blocks or throttles online services could cause substantial harm to consumers. For instance, in the modern job market, consumers rely on online services to look for employment.<sup>11</sup> If an ISP became affiliated, or entered into a favored agreement, with a specific employment service (such as Monster.com, Careerbuilder.com, or LinkedIn.com, for example), it could block, throttle, or otherwise impair access to other, perhaps better, online job services, which could restrict the ability of employers and consumers to find each other. Similarly, an ISP could block or degrade other services, such as news, communications, or entertainment, to advantage its own or a favored service, resulting in fewer choices and lower quality for consumers.

Paid prioritization could also harm consumers significantly, because it would create a “two-tiered” Internet with fast lanes and slow lanes.<sup>12</sup> In a two-tiered Internet, ISPs would decide which services get fast and slow treatment, likely based on the service’s willingness and ability to pay a premium. This system

---

<sup>11</sup> Jon Henshaw, *The Internet: A Necessary Resource for Career Development*, Am. College Healthcare Executives, <https://www.ache.org/newclub/career/GUIDES/internet.cfm> (“The Internet has dramatically changed how job seekers will search, prepare, and find employment.”); Jon Brodtkin, *FCC Commissioners Disagree over Whether Internet Access Is a “Necessity,”* Ars Technica (July 9, 2015), <http://arstechnica.com/business/2015/07/fcc-commissioners-disagree-over-whether-internet-access-is-a-necessity> (“[T]he majority of Fortune 500 companies post new job listings strictly on websites”).

<sup>12</sup> CU Comments at 5, GN Dkt. 14-28 (July 15, 2014)(JA\_\_).

would undercut consumers' ability to decide which services are best for them, and which services survive based on their usefulness. Instead, paid priority would create an ISP-dominated system favoring ISPs and already-established services with sufficient resources and willingness to pay for priority. Further, infrastructure investment would primarily flow to the fast lane as ISPs receive more revenue from services taking advantage of paid prioritization.<sup>13</sup> All other online services, including start-ups with limited capital, would be relegated to the slow lane, which would grow ever more congested and unusable. Consumers could grow so frustrated with services in the slow lane that they would be forced to use fast lane services they do not want to use and that may be of inferior quality.

Consumers could also have their choices unfairly constrained if an ISP favors its own services. ISPs do not offer only Internet connectivity; often, they are offering their own online content, or have vertically integrated with content providers, such as NBCU (owned by Comcast) or AOL (owned by Verizon).<sup>14</sup> ISPs have a profit-motivated business incentive to favor their own services over

---

<sup>13</sup> Michael Weinberg, *5 Reasons Why Internet Fast Lanes Can Never Make Sense*, Public Knowledge (May 15, 2014), <https://www.publicknowledge.org/news-blog/blogs/5-reasons-why-internet-fast-lanes-can-never-make-sense>.

<sup>14</sup> Andy Serwer, *Verizon & AOL: An Inevitable Match*, Yahoo! Finance (May 12, 2015), <http://finance.yahoo.com/news/the-inevitable-deal--verizon---aol-140714573.html>.

competitors' services.<sup>15</sup> Favoring their own services can often lead to increased profits.<sup>16</sup> However, exercising this kind of anticompetitive favoritism would dramatically restrict consumer choice online.

For example, AT&T once blocked FaceTime, a voice and video chat service that was competing with AT&T's voice service, over its cellular network for its "unlimited" subscribers.<sup>17</sup> An AT&T subscriber in San Francisco filed a complaint with the FCC over the practice because it harmed him and his family directly. The subscriber had "paid a premium for the unlimited data plan" and had relied on the service to video chat with "his wife and kids while he traveled."<sup>18</sup> This subscriber, and likely many others in similar situations, was harmed because AT&T was charging consumers extra for "unlimited" data, yet blocked the popular app

---

<sup>15</sup> *Verizon*, 740 F.3d at 645; *Order*, at 5632 (citing Consumers Union Comments at 3 (JA\_\_\_) and stating "[b]roadband providers may seek to gain economic advantages by favoring their own or affiliated content over other third-party sources.")(JA\_\_\_).

<sup>16</sup> Barbara van Schewick, *Internet Architecture and Innovation* at 281 (MIT Press, 2010) ("[I]n many circumstances a network provider has an incentive to use" its ability to block or degrade competing services "to increase its profits"; it will "often be profitable to exclude [services] that directly compete with one of [the ISP's] own...products.").

<sup>17</sup> *AT&T/FaceTime Case Study*, Mobile Broadband Working Group at 2 (Aug. 20, 2013), <https://transition.fcc.gov/cgb/oia/Mobile-Broadband-FaceTime.pdf>; Chris Morran, *Advocates File Net Neutrality Complaint over AT&T's FaceTime Policy*, Consumerist (Sept. 18, 2012), <http://consumerist.com/2012/09/18/advocates-file-net-neutrality-complaint-over-atts-facetime-policy>.

<sup>18</sup> Julie Bort, *AT&T Won't Let This Man FaceTime His Kids, So He's Taking It To The Feds*, Bus. Insider (Oct. 17, 2012), <http://www.businessinsider.com/consumer-fcc-complaint-att-facetime-2012-10>.



FaceTime for those consumers. AT&T prevented these consumers from using FaceTime, denying them choice in online chat services, and pushing them to use other chat and voice services, including AT&T's.

Had the FCC not established open Internet rules, or had it established only weak rules, ISPs would have had a green light to thwart competition and force consumers into ISP-selected and ISP-approved services that consumers might not prefer. This abusive behavior could obstruct consumer choice in a variety of markets, from job application services to communications services and entertainment services such as television, music, or social media. As a result, consumers would have fewer choices, would be more likely to be unhappy with their service, and would likely suffer economic and social harm as a result of being forced to use undesirable services. Consumers could also be forced to pay higher prices for online services.

**B. ISPs could further increase costs for consumers online.**

Without strong open Internet rules, consumers could be vulnerable to unreasonable changes to pricing for online services.

Consumers could begin seeing fragmented and complex pricing schemes that hinder their ability to access the services they want. ISPs could establish online content tiers based on self-interested business decisions, which could

change at any time.<sup>19</sup> For instance, an ISP might charge an inordinately high price for access to social media services, or it might charge by the megabit for video services in an effort to extract more money from consumers. Either way, this behavior would limit consumer access to online services and undermine the fundamental utility of the Internet in empowering consumers to choose services and enabling those services to easily reach consumers. These pricing schemes could force consumers to use different services, approved by the ISP, or to pay more to use the services they prefer.

An ISP could also force cost increases onto edge service providers, which would ultimately be borne by consumers. The open system (which the *Order* is designed to preserve) allows edge providers to compete online by purchasing Internet access at nondiscriminatory cost. If an ISP could engage in paid prioritization and similar favoritism, edge providers would incur significant additional costs, representing artificially heightened barriers to entry, in order to access that ISP's subscribers. Such increased costs and barriers would impede the ability of those edge providers to succeed in providing their services to consumers.

---

<sup>19</sup> See Susan Crawford, *Be Very Afraid: The Cable-ization of Online Life is Upon Us*, Wired (Apr. 26, 2012), <http://www.wired.com/2012/04/opinion-crawford-cableization> (“Imagine what’s possible from Comcast’s perspective: If you can slice and dice traffic, play definitional chess (“that’s not the internet, that’s a specialized service!”), and be the only game in town, you’ll get to replicate the cable model by making sure that every successful online application owes its success in part to you and pays you tribute.”).

New entrants might not be able to afford the higher cost, depriving consumers of the opportunity to experience and benefit from the new service. And to the extent those providers survived the additional costs imposed, they would likely do so by increasing prices for consumers.<sup>20</sup>

Thus, the FCC's open Internet rules protect consumers from a variety of harms caused by restrictive and anticompetitive ISP practices. ISPs have self-interested motives to steer or force consumers away from services they would prefer and onto other unfamiliar and potentially lower quality services. They also have self-interested motives to extract tolls from edge providers for access to subscribers, tolls which would be passed along in higher prices to consumers. The open Internet rules are designed to protect consumers from these abuses and harms.

## **II. CONSUMERS WANT AN OPEN INTERNET WITH EFFICIENT ACCESS TO ONLINE SERVICES WITHOUT ISP INTERFERENCE.**

Consumers want equal, nondiscriminatory access to online content, because they recognize they benefit most when they can access all online content and can

---

<sup>20</sup> Casey Johnston, *Netflix Comes Through with Price Hike after Struggles with Comcast, Verizon*, Ars Technica (May 9, 2014), <http://arstechnica.com/business/2014/05/netflix-comes-through-with-price-hike-after-struggles-with-comcast-verizon> (explaining that Netflix "hinted heavily in its shareholder letter that the [newly-announced] price increases were coming as a result of the paid peering arrangements the company has struck with providers like Comcast and Verizon, which were damping the site's traffic on the accusation that it uses too much of their resources."); CU Comments at 6, GN Dkt. 14-28 (July 15, 2014)(JA\_\_).

choose the services they prefer without their ISP acting as gatekeeper. Under an open Internet, consumers can, in general, “mix and match their telecommunications services with the software, apps, and content of their choice.”<sup>21</sup> And the corollary is true as well: edge providers can, in general, reach all consumers on equal terms.<sup>22</sup> But ISPs, with their ability and incentive to discriminate,<sup>23</sup> threaten this fundamental pro-consumer functioning of the open Internet. The *Order* is designed to neutralize that threat.

Evidence indicates that consumers overwhelmingly oppose ISP interference with their Internet access. In a February 2014 *Consumer Reports* national survey, 71% of consumers surveyed said they would switch providers if their ISP attempted to “block, slow down, or charge more for [bandwidth]-heavy services such as Amazon Instant Video, Netflix, Pandora, and Skype.”<sup>24</sup> Further, 70% of consumers surveyed said they would complain to the ISP, 46% said they would complain to the FCC or Congress, and 10% said they would go so far as to drop

---

<sup>21</sup> FCC Br. 67.

<sup>22</sup> Zachary Seward, *Read Netflix’s Plea to Ban Paid “Fast Lanes” on the Internet*, Quartz (July 16, 2014), <http://qz.com/235736/read-netflixs-plea-to-ban-paid-fast-lanes-on-the-internet> (quoting Netflix’s comments in this proceeding).

<sup>23</sup> *Verizon*, 740 F.3d at 646.

<sup>24</sup> Press Release, Consumer Reports, *71% of U.S. Households Would Switch from Providers that Attempt to Interfere with Internet* (Feb. 18, 2014), <http://www.consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm>.

Internet service altogether.<sup>25</sup> Consumers recognize that ISP interference with their access to content diminishes the Internet's value to them, and many would take action if they no longer had nondiscriminatory access to online services.

Consumers also oppose paid prioritization, such as charging an edge service, like Netflix or Youtube, extra fees for faster access to the ISP's subscribers. A June 2014 *Consumer Reports* national survey found that 58% of consumers agreed that "the government should not allow Internet service providers to charge companies to deliver their content with greater priority than other companies"; only 16% thought it was a good idea.<sup>26</sup> Again, consumers understand how detrimental paid prioritization would be to the value of the Internet, and generally oppose it.

The comments in the proceeding below were overwhelmingly filed by consumers to express their concerns about ISPs and how ISPs could harm consumers if left unchecked. This proceeding was the most active docket in FCC history, with nearly four million comments filed.<sup>27</sup> By far, most of the comments

---

<sup>25</sup> *Id.*

<sup>26</sup> Press Release, Consumer Reports, *Net Neutrality: 58% Say Government Should Not Allow Paid Prioritization Deals in New Consumer Reports Survey* (June 20, 2014), <http://consumersunion.org/news/net-neutrality-58-say-government-should-not-allow-paid-prioritization-deals-in-new-consumer-reports-survey>.

<sup>27</sup> Gigi Sohn, *FCC Releases Open Internet Reply Comments to the Public*, FCC (Oct. 22, 2014), <https://www.fcc.gov/blog/fcc-releases-open-internet-reply-comments-public>. The open Internet proceeding was even the subject of a piece on John Oliver's weekly TV program on HBO. *Last Week Tonight with John Oliver: Net Neutrality*, Youtube (June 1, 2014), <https://www.youtube.com/watch?v=fpbOEoRrHyU>.

came from consumers calling for strong open Internet rules, with many calling directly for Title II reclassification of broadband and as few as 1% opposed to stronger rules.<sup>28</sup> Consumers made their opinions known in this proceeding, and the FCC took them seriously.

The *Order* was a significant victory for consumers. The overwhelming consumer support for strong open Internet rules and the unprecedented consumer participation in this proceeding underscore the importance the open Internet has for consumers. Consumers correctly recognize that ISP interference with their Internet connections would mean fewer online services available to them and increased costs for obtaining access to those services. Without the option to choose their preferred online service, consumers would not be able to experience the full range of benefits the Internet offers.

---

<sup>28</sup> *E.g.*, Bob Lannon & Andrew Pendleton, *What Can We Learn from 800,000 Public Comments on the FCC's Net Neutrality Plan?*, Sunlight Fdn. (Sept. 2, 2014), <http://sunlightfoundation.com/blog/2014/09/02/what-can-we-learn-from-800000-public-comments-on-the-fccs-net-neutrality-plan>; Brian Fung, *Sunlight: 99 Percent of Net Neutrality Comments Wanted Stronger FCC Rules*, Wash. Post (Sept. 2, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/09/02/sunlight-99-percent-of-net-neutrality-comments-wanted-stronger-fcc-rules>.

### **III. RECLASSIFYING BROADBAND AS A TITLE II SERVICE AND IMPOSING CLEAR, BRIGHT-LINE RULES AGAINST SPECIFIC ISP BEHAVIOR IS THE MOST APPROPRIATE AND EFFECTIVE WAY TO PROTECT CONSUMERS.**

Consumers would likely experience significant harms if an ISP were to interfere with their access to online content. To best ensure that it could fashion effective rules to prevent these harms, the FCC chose to reclassify broadband as a telecommunications service under Title II of the Communications Act, and to impose clear, bright-line rules against specific, harmful ISP behavior.

Reclassification allows the FCC to most effectively protect consumers. At its core, Title II has two clear requirements: first, that telecommunications services must treat all traffic equally; and second, that all charges, practices, classifications, and regulations of telecommunications services must be just, reasonable, and non-discriminatory.<sup>29</sup> Based on these Title II requirements, the *Order* embodies several bright-line rules that are clear and enforceable: ISPs cannot block or throttle traffic, nor can they engage in paid prioritization.<sup>30</sup> At the same time, the *Order* establishes an additional conduct rule to ensure ISPs do not engage in other consumer-harming restrictive behavior the FCC did not explicitly address.<sup>31</sup> These prohibitions are designed to ensure that ISPs will not be able to experiment with

---

<sup>29</sup> 47 USC §§201-202.

<sup>30</sup> *Order*, at 5607-08 (JA\_\_-\_\_).

<sup>31</sup> *Id.* at 5608-09 (JA\_\_-\_\_).

other restrictive behaviors that interfere with consumers' meaningful choice over their online activities.

The FCC originally proposed a less robust set of rules, premised on a case-by-case, "commercially reasonable" approach.<sup>32</sup> The FCC appropriately concluded that the "commercially reasonable" approach would not have adequately protected consumers or the open Internet, in part because it is vague and would have encouraged ISPs to push the bounds of what constitutes "commercially reasonable."<sup>33</sup> Without bright-line rules, consumers would have been the guinea pigs on which ISPs would have experimented.<sup>34</sup>

Furthermore, the "commercially reasonable" standard would have put the burden of policing ISPs on the consumer. As a practical matter, consumers have difficulty identifying or understanding when an ISP (as opposed to an edge provider or other service) is the cause of service interruptions.<sup>35</sup> Even when a

---

<sup>32</sup> See Notice of Proposed Rulemaking, *Protecting and Promoting the Open Internet*, 29 FCCRcd 5561, 5602-04 (2014)(JA\_\_-\_\_).

<sup>33</sup> *Order*, at 5665 (citing Consumers Union Reply Comments at 2-3 (JA\_\_-\_\_)).

<sup>34</sup> See Brendan Sasso, *Why the FCC Is Being so Vague About Net Neutrality*, Nat'l J. (May 22, 2014), <http://www.nationaljournal.com/tech/2014/05/22/why-fcc-is-being-so-vague-about-net-neutrality> ("The commission wants a vague standard to allow Internet companies to experiment with new business models.").

<sup>35</sup> Barbara van Schewick, *Internet Architecture and Innovation* at 260 (MIT Press 2010) ("[M]any consumers will not be able to detect the true cause of [a low] quality [site], they may attribute it to poor design...[or] bad programming of the underlying databases or...insufficient server speed" rather than ISP interference); CU Comments at 8, GN Dkt. 14-28 (July 15, 2014)(JA\_\_) (commenting that consumers may not "always be aware of all of the circumstances surrounding a



consumer could determine the cause of the problem and complained to the FCC, it would take months or perhaps years to resolve the issue through a lengthy adjudication, introducing substantial uncertainty.<sup>36</sup> The FCC correctly decided that Title II reclassification would better protect consumers. This was an appropriate exercise of its statutory authority.<sup>37</sup>

Bringing broadband under Title II most effectively protects consumers against anticompetitive and harmful ISP behavior. It ensures that ISPs understand what behavior is prohibited, and places the burden on ISPs to ensure they follow those rules. Reclassifying was the correct decision for consumers and the Internet.

## CONCLUSION

A hallmark of the Internet has been that consumers could access all online services without interference from their ISPs. The FCC's *Order* is designed to prevent this access from being undermined, and consumers harmed, by discriminatory fees, blocking, throttling, de-prioritizing, and other unreasonable restrictions imposed by ISPs for their own advantage. Consumers benefit most from an open, nondiscriminatory Internet connection that maximizes consumer

---

particular practice or negotiation.”). *See also Order*, at 5713 (citing Consumers Union Comments at 8 (JA\_\_)) and allowing the shifting of evidentiary burden to broadband providers)(JA\_\_).

<sup>36</sup> CU Comments at 8, GN Dkt. 14-28 (July 15, 2014)(JA\_\_).

<sup>37</sup> FCC Br. 49-105; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 991-92 (2005) (Commission has authority to decide how to classify services in this “technical and complex area” of policy).

choice. The open Internet rules are an appropriate and well-suited means, clearly within the FCC's authority, for ensuring the Internet remains open for everyone.

Respectfully submitted,

/s/Eric G. Null

Delara Derakhshani  
*Telecommunications Policy Counsel*  
George P. Slover  
*Senior Policy Counsel*  
Consumers Union  
1101 17th Street NW, Suite 500  
Washington, DC 20036  
Phone: (202) 462-6262

---

Eric G. Null  
1375 Kenyon Street NW  
Apartment 515  
Washington, DC 20010  
Tel: (802) 578-7223  
Email: eric.g.null@gmail.com  
*Of Counsel to Consumers Union*

September 21, 2015

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 3400 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Eric G. Null

---

Eric G. Null

1375 Kenyon Street NW

Apartment 515

Washington, DC 20010

Tel: (802) 578-7223

Email: eric.g.null@gmail.com

*Of Counsel to Consumers Union*

September 21, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on September 21, 2015, I electronically filed the above *Amicus Curiae Brief of Consumers Union of the U.S., Inc. in Support of Respondents* with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using CM/ECF. All parties in the case will be served through the CM/ECF system.

/s/ Eric G. Null

---

Eric G. Null