

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Framework for) GN Docket No. 10-127
)
Broadband Internet Service)

COMMENTS

OF

**THE AMERICAN CIVIL LIBERTIES UNION (“ACLU”) AND
THE SPEECH, PRIVACY AND TECHNOLOGY PROJECT OF THE ACLU**

COMMENTS OF THE ACLU

The ACLU's views are well represented in the comments submitted by the Open Internet Coalition (OIC), of which we are a member, and we agree with most of the specific elements set forth in that document. However, in these separate comments we would like to additionally emphasize several issues that are of particular interest and concern to our organization and its over 500,000 members.

The ACLU supports the proposal of the Federal Communications Commission (FCC or Commission) to reclassify Internet connectivity services as a "telecommunications service" to which all the requirements of Title II of the Communications Act would apply, while forbearing from applying unnecessary or inapplicable provisions of Title II, and reaffirming that Internet information services should remain unregulated. The ACLU supports this "third way." Reclassification is necessary to allow the Commission to carry out its vital role enforcing network neutrality principles and provide robust privacy protections for Internet connectivity.

I. INTERNET CONNECTIVITY SERVICES SHOULD BE CLASSIFIED AS A "TELECOMMUNICATIONS SERVICE"

A. Internet connectivity and the provision of information are clearly separate functions

A division between the provision of Internet connectivity and the provision of information services is clear, conceptually simple, easily maintained, and reflected in the popular understanding of Internet services. Such a division is not only an entirely natural and productive way of dividing up the functions that make up the Internet, which comports with the understanding of Internet users, but is actually vital to protecting the free speech interests of Americans.

As providers of Internet connectivity, telecommunications providers maintain their physical infrastructure and provide a conduit – a ‘pipe’ that carries data to and from customers. The content reflected by the particular patterns of ones and zeros carried at any one time are immaterial to the physical pipeline; that data could be video, voice communication, text, or signals generated by a particular game, social network, or an infinite number of other applications. The data could originate from or be destined for any computer attached to the Internet anywhere in the world. Regardless of how or what information is ultimately transmitted from one end of the network to the other, or who is sitting at either end, or how that data may be interpreted once it arrives – while it is being transmitted, it all takes the same form: a digital stream of ones and zeroes. The job of the Internet broadband provider is simply to carry those bits quickly and reliably from one end to the other.

Congress has supplied a name for this sort of operation – “the transmission,

between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received”: it is called a “telecommunications service.”¹

That service, as defined in the Communications Act, is clearly different and separable from the myriad ways that individuals and companies *use* telecommunications services. An e-mail provider or a company such as Facebook or Google, for example, sets up computers that run software of their own design, and may provide that software to others, and then exchanges information with others around the world. Despite the enormous variety of applications being used to transmit data, all use the standard protocols of the Internet. Such services and communicators offer the capability for publishing, “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via* telecommunications” – in short, they are each an “Information Service” as Congress defined the term in the Communications Act.²

Individuals who use Facebook, Google, voice or text chat, e-mail, or online games expect, accurately, to be able to access those services regardless as to whether they might be connected to the Internet through their home DSL provider, their friend’s cable subscription, or a Wi-Fi hotspot at their local coffee shop. In 2002 when the Commission first classified cable modem service as an “Information Service,” at the trailing end of the era of Internet dialup connectivity, the distinction between telecommunications and information services was not as clear because customers of dial-up ISPs usually obtained

¹ 47 U.S.C. §§ 153(43).

² 47 U.S.C. §§ 153(20). Emphasis added.

information services such as e-mail, access to news groups, and the ability to create a personal web page from their ISP. But today that is frequently not the case. Those functions are no longer exclusively or even typically provided by the company that provides Internet connectivity, and the distinctiveness and separateness of the Internet transmission and connectivity function from those services has become clearer than ever. Even in 2002, as the FCC notes in its NOI, the Commission recognized that “Internet Connectivity” was a distinct portion of cable modem service, and that recognition continued to run through the legal battles and debates over broadband classification.³

Today one of the hottest topics when it comes to the evolving Internet is the growth of “cloud computing” – the utilization of Internet applications that reside not on one’s own computer, but on the Internet. The big advantage and driver of that trend is precisely the fact that it allows individuals to access data and applications from anywhere on the Internet – regardless of who is providing the connectivity service.

B. The Commission’s approach should be based on function and be technologically neutral

Although broadband providers, like any other company, may maintain web sites, offer online applications, transmit content of their own, and offer information services to their subscribers, few Internet customers today are paying them for those services, when they can obtain a vast ocean of similar services from anywhere on the Internet once they

³ Federal Communications Commission, Notice of Inquiry, FCC No. 10-114, June 17, 2010 (hereafter, “NOI”), paragraphs 14-21.

obtain connectivity to it. Users seek access to the Internet for a broad variety of purposes, but rarely do they care who or what company is providing them that telecommunications service. If they want to access Facebook, they will not be satisfied with Google, or vice-versa – but cable modem service, DSL, fiber, or coffee-shop Wi-Fi will do equally well (given equivalent connection speed and quality – and often even when not).

In all those cases, whether wireline or wireless, the Commission’s approach to regulation of broadband telecommunications services should be, to the maximum extent possible under the law as Congress has written it, technology-neutral. In this it should reflect the common everyday experience and understanding of actual Internet consumers and end-users. Just as they do not generally care (all other things being equal) whether their high-speed Internet access comes from a wireless provider, cable, DSL, or fiber, they do not care about the different regulatory approaches that have historically been applied to these facilities. What they care about is neutral, unimpeded access to Internet services.

**C. Protection of free speech requires reclassification of broadband under
Title II**

In the 1996 Telecommunications Act, Congress specifically charged the FCC with acting in the public interest when regulating broadband. The Act requires the Commission to

promote “diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”⁴

For an agency charged with protecting the public interest, and having “Communications” in its name, protection of free speech must always remain a central part of its mission.

The First Amendment protects speech only when a state actor is present. But protecting the interests and values embodied in the First Amendment requires protecting the methods by which communication actually takes place – and today that means, above all, the Internet. Since access to the Internet is provided by private corporations (enabled by government), free speech principles dictate that the government should create strong, clear policies that will prevent speech-restrictive abuses by companies that are fundamentally profit-seeking rather than civic-minded.

Without such policies, Internet telecommunications service providers would be free to filter, block, impair, or degrade Internet traffic based on any factor they wished, including the nature of the application, the identity of the sender or recipient, or the content of the speech that is flowing across the network. Internet access is not just any business; it involves the sacred role of making available to citizens an arena for speech, self-expression, and association.

The FCC needs to have the power to enforce network neutrality to ensure that the Internet remains a free and robust place for communications of all kinds. Free speech principles

⁴ 47 U.S.C. § 257(b) (2000).

require that the Commission solidify the de facto network neutrality protection that Internet users have been enjoying as a result of public pressure and attention combined with the Commission's actions. In the wake of the decision in *Comcast v. FCC*⁵, in which the court limited the Commission's authority to regulate Internet transmission services so long as they are improperly classified as "Information Service," it is clear that network neutrality and the free speech values that underlie it can only be securely preserved through Title II regulation.

Broadband Internet providers have both the technical means and the financial incentive to interfere with the neutral operation of the Internet as a free and open communications medium. Given a lack of clear standards, there will be immense pressure for large profit-driven companies to begin exerting control over our Internet infrastructure – by, for example, giving favored partners preferential treatment on the network (and thereby discouraging innovation by small players) or degrading the transmission of speech that runs contrary to their "business interests." As a result, it is vital that the government protect network neutrality through regulatory policies that are sufficiently robust to withstand that pressure. Despite the pleas of certain telecom foxes that they be allowed to continue guarding the Internet henhouse, in the wake of the *Comcast* decision it is now clear that policies of sufficient firmness and robustness can only be achieved by regulating broadband connectivity as a telecommunications service as a common carrier under Title II.

⁵ *Comcast Corp. v. Federal Communications Commission*, 2010 U.S. App. LEXIS 7039 (D.C. Cir. Apr. 6, 2010).

By claiming Title II authority, the Commission will be acting entirely in line with the long American tradition of regulating utilities and common carriers of all kinds, from railroads and airlines to the telephone network. That tradition evolved in response to pattern of abuses that took place over many years, and it has been proven by the test of time to be a useful and productive response to those abuses. The Internet has always been either a legal or de facto common carrier, and the Commission needs to ensure that doesn't change.

D. The Commission should reaffirm that Internet information services will remain unregulated

Just as it is vital that the Commission regulate broadband connectivity service as a telecommunications service, it is equally vital that the commission refrain from regulating true Internet information services. We applaud the fact that the FCC is considering, as part of its “third way” proposal, to “reaffirm that Internet information services should remain generally unregulated.”⁶ The FCC has no role in regulating the constitutionally protected content delivered by those who are merely using Internet transmission services. Indeed, any attempt to do so would almost certainly violate the First Amendment.⁷

⁶ NOI, paragraph 2.

⁷ *See, e.g., ACLU v. Reno*, 521 U.S. 844 (1997) (invalidating federal statute regulating “indecent” speech on the Internet as violative of the First Amendment).

But that constitutional truism would in no way justify a decision not to regulate transmission services. These separate functions require separate legal and factual analyses.

Insofar as telecommunications companies offer information services in addition to their telecommunications (connectivity) services, those information services would be protected by the First Amendment. Many telecoms deliver video feeds, web pages and other content of their own, which constitute online speech entitled to protection from regulation by the FCC or any other government agency under the First Amendment. The best example of such an information service that cannot be regulated is the content of a network provider's home pages.

II. THE COMMISSION SHOULD ENFORCE THE PRIVACY PROVISIONS OF TITLE II WITHOUT DELAY.

The Commission's NOI states that under the "third way" now under consideration, the Commission would

forbear from applying all but a handful of core statutory provisions.... Two other provisions that have attracted longstanding and broad support in the broadband context – sections 222 and 255 – might also be implemented for the connectivity

service, perhaps after the Commission provides guidance in subsequent proceedings as to how they will apply in this context.⁸

While the NOI states that section 222 “might” be forborne, the ACLU believes that it is vital that 222 not be forborne.

Section 222 of the Communications Act governs the privacy of customer information. It has played an important role in preventing telephone companies from disclosing details about Americans’ telephone calls for such uses as marketing. Without it, telecommunications carriers would be permitted, for example, to make note of the fact that a person regularly calls a psychiatrist’s office and use that fact to market Prozac to that person.

Without robust regulatory restraints, Internet providers will be tempted to engage in analogous behavior online. They will inevitably succumb to that temptation. Broadband providers have the technological capacity to exercise complete monitoring and control of their customers’ use of the Internet using techniques such as deep-packet inspection, in which carriers read the content of packets crossing the network (as opposed to just the addressing information, which is all they need to do to route the packet to its destination). In fact, several broadband telecommunications providers in the United States and United Kingdom have already flirted with exploiting that power for monetary gain by spying on their customers’ communications and using the information gained about those customers

⁸ NOI, paragraph 68.

for marketing purposes.⁹ Although public pressure has so far helped prevent broadband providers from monetizing their control over Internet connectivity,¹⁰ the unremitting pressures of profit and the ease of hiding such activities from the public make it vital that those activities be explicitly curbed through the application of section 222.

Telephone companies have never been permitted to listen in to customers' telephone calls in order to collect information about them that would make marketing efforts more efficient. Although that would arguably create jobs and increase economic efficiencies, such behavior would constitute an enormous invasion of Americans' privacy and runs contrary to our nation's and our culture's long-established values. In this respect the Internet is no different, and such activities must be banned as firmly for providers of Internet connectivity as they have always been for telephone companies.

If such routine privacy invasions are permitted to take place, awareness of that fact will lead some to curb or modify their use of the communications medium in order to protect their privacy. Therefore, such invasions will have the effect of *lessening the value* of Internet communications as a social good, which would be contrary to the mission of the FCC.

The NOI also asks whether "it would be in the public interest to apply Section 222 to broadband Internet connectivity service immediately," or whether its enforcement should

⁹ See e.g., "Peter Whoriskey, "Every Click You Make," *Washington Post*, April 4, 2008; online at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/03/AR2008040304052.html>.

¹⁰ See e.g., Ellen Nakashima, "NebuAd Halts Plans For Web Tracking," *Washington Post*, Sept. 4, 2008; online at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/03/AR2008090303566.html>.

be delayed pending the FCC's issuance of rules interpreting the application of the section to the Internet.¹¹ The ACLU believes that Section 222 should take effect as soon as possible, lest Internet users be left without protection from privacy-invading behavior by providers for an extended period of time. The classification of Internet connectivity as a telecommunications service will decisively remove it from the jurisdiction of the Federal Trade Commission, the agency that has properly taken the lead with respect to protecting privacy among Information Services. Therefore it is vital that the FCC apply Section 222 to broadband providers, and right away.

For companies that might express doubt and confusion over how the section applies to broadband, let them operate conservatively under the assumption that it does, in fact, apply in any circumstances that might be in question. Our technology is changing rapidly. Such change often outpaces Americans' comprehension of the degree to which their privacy has eroded. As a result, there is no reason why companies must maintain, or rush to implement, practices that are potentially invasive enough that they could fall under section 222, before such practices are subject to open discussion and analysis through the Commission's standard rulemaking procedures.

CONCLUSION

The American Civil Liberties Union supports the proposed rule and hopes that the Commission will move forward with its "third way" proposal for reclassifying broadband connectivity services as "telecommunications services" as defined in Title II of the

¹¹ NOI, paragraph 82.

Communications Act, while forbearing from applying sections of the Act that are not pertinent to broadband service. We regard such steps as vital to preserving the Commission's ability to protect free speech by enforcing network neutrality principles in the wake of the *Comcast* decision. We also urge the Commission to continue to reaffirm that it will not attempt to regulate Information Services, including Internet content. Finally, we urge the Commission to apply Section 222, and to do so right away, lest Americans be left without privacy protection in their online communications.