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Good morning. I want to thank the Commission for inviting me to the beautiful city of Seattle to talk about how the Commission can best preserve an open Internet. The FCC couldn't have picked a better venue. As the home to Microsoft, RealNetworks and numerous other high tech companies, few cities have benefitted more from an open Internet.*

Introduction

As the Commission has recognized, an open Internet is vitally important for all manner of political discourse, social interactions, commercial transactions, innovative entrepreneurship and continued economic development in the United States. Some do assert, however, that there is no need for Commission rules designed to ensure the open nature of this vital piece of 21st century infrastructure. Public Knowledge and its allies in the public interest community strongly disagree – rules such as those set out in the Commission's *Notice of Proposed Rulemaking* in the

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open Internet docket are undeniably necessary for preserving the essential character of the open Internet and the tremendous value that it engenders.

The multitude of public interest benefits created and augmented by the Internet are far too important to leave to the vagaries of a so-called "free" market that is nothing of the sort. This is especially true in view of the present and potential threats to the Internet's open architecture. These threats arise from the current structure of the market for broadband Internet access services and economic incentives that naturally would lead the incumbent telephone and cable companies that provide Internet access to the vast majority of Americans to discriminate against the content flowing over their networks. Threats to the open Internet are not limited to anticompetitive behavior, but include overbroad "network management" techniques that interfere with lawful uses of the Internet. For example, Comcast was found to be interfering with *all* content on its network using a peer-to-peer protocol, not just the video content that poses a threat to its pay TV business. Detrimental changes to the open architecture and standards of the Internet– including network owners' use of technologies designed to invade, inspect, block, filter, slow or degrade lawful content transmitted over their networks – would harm not just competition among access providers and commercial providers of content, applications and services delivered over the Internet, but innovation as well. In the absence of rules, the FCC has been unable to preserve an open Internet – it was recently reported, for instance, that RCN cable may have been interfering with peer-to-peer traffic.

The loss of an open Internet would irrevocably diminish the freedom of expression of all Americans, who already have and increasingly will come to rely on this most accessible and democratic communications medium. The loss of such freedoms would be especially devastating to typically marginalized demographic groups, such a low-income individuals, rural populations, and people of color. Thus, it is critical that the Commission adopt rules to protect both citizens and companies from the activities of access providers that would change the fundamental open nature of this revolutionary medium.

I. Sections 201 and 202 of the Communications Act as a Model for Open Internet Rules

Now that I've convinced all of you that the FCC needs to have rules to ensure that the Internet remains open, the next important question is "what should those rules look like?" The rules the Commission has currently proposed would codify the FCC's four broadband principles and add two more principles. The broadband principles ensure that a broadband Internet access provider cannot 1) prevent users from sending or receiving lawful content of the user's choice; 2) prevent users from running the lawful applications or using the lawful services of the user's choice; 3) prevent users from connecting to and using the user's choice of lawful devices; and 4) deprive users of their entitlement to competition among network providers, applications, content and service providers. The first new principle would prohibit an Internet access provider from favoring or disfavoring any particular content, application or service travelling over its network, subject to a "reasonable network management" exception. The second would require and Internet access provider to

disclose information about its network management and other practices "as is reasonably required for users and content, application, and service providers to enjoy the protections" of open Internet rules.

I want to focus on the four principles and non-discrimination rule, and suggest a possible alternative framework to the rules that the FCC has proposed. That alternative is modeled on relevant portions of Sections 201 and 202 of the Communications Act,[1] both of which prohibit carrier activities that are "unjust or unreasonable." Section 201(a) requires "every common carrier…to furnish…communication service upon reasonable request therefor;…" Section 201(b) states, in relevant part, that

> All charges, practices, classifications, and regulations for and in connection with…communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.

Section 202(a) states that

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with…communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular persons, or locality to any undue or unreasonable prejudice or disadvantage.

Focusing on Sections 201 and 202 as a model for open Internet rules is particularly important in light of the District of Columbia Circuit's recent decision in

[1] 47 U.S.C. §§ 201-202

Comcast v. FCC,[2] which calls into question not only the FCC's legal authority to adopt open Internet rules, but also its authority to implement significant parts of its recently released National Broadband Plan. Some, including Public Knowledge, have suggested that the FCC reverse its oft-criticized 2002 decision to deregulate broadband Internet access by classifying it as an "information service," [3] and find that such Internet access is a telecommunications service under Title II of the Communications Act, which includes Sections 201 and 202. We believe that doing so would put the FCC on firmer legal footing to ensure that the Internet remains the most democratic medium the world has ever known.

While it is not necessary for the Commission to reverse the 2002 decision to model its open Internet rules on Sections 201 and 202, there are many advantages to doing so. The first advantage is that the statutes are familiar to many broadband Internet access providers. Sections 201 and 202 have applied to telephone companies for over 75 years, and apply to wireless phone companies as well, and until 2005 applied to some kinds of broadband Internet access services (DSL). Even today, a telephone network (a common carrier) must connect customers to the dial-up ISPs of their choice. There is a considerable body of FCC and court precedent interpreting what is considered both unjust and unreasonable "charges, practices, classifications, regulations, facilities or services," and unjust and unreasonable discrimination in "charges, practices, classifications, regulations, facilities or

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[2] *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. 2010).

[3] Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798 (2002).

services." Rules that are merely similar to Sections 201 and 202, though better than what we have now, do not necessarily tap into that large body of precedent.

A second advantage is that the robust framework of Sections 201 and 202 fixes a number of the problematic portions of the Commission's current proposed rules. Specifically, the proposed rules all include the exception "subject to reasonable network management." In the context of the preexisting language of Sections 201 and 202, the "reasonable network management" exception is redundant. A reasonable network management practice would simply be found to be either just or reasonable, and would be permitted as such. Eliminating this redundancy would lead to a greater certainty for providers, removing an additional layer of interpretation of what is and isn't "reasonable."

Eliminating the reasonable network management exception also has the benefit of limiting the possibility that access providers will make difficult and possibly illegal judgments about the content that flows over their networks. In its initial comments in the open Internet proceeding, Public Knowledge expressed grave concern that the Commission's definition of reasonable network management included actions that were not necessary to maintain, protect and ensure the efficient operation of a network, but were instead were intended to scrutinize the quality, source, content or legality of the data that flows on the network. For example, the Commission's definition of reasonable network management would permit broadband access providers to prevent "the transfer of unlawful content" and the "unlawful transfer of content." Of course, the Open Internet rules do not

protect unlawful content, and it is unnecessary to write an "exception" into the rules for a subject they do not cover. It is not merely confusing to do so, however. Equating content inspection with network management invites network operators to begin looking through their customers' traffic with a fine-toothed comb, and it could require customers to prove their content is lawful as a prerequisite to using the network. If network operators block lawful content under the guise of an overbroad "reasonable network management" technique, subscribers would have little recourse. By contrast, under a system that recognizes that content management is different from network management, such as one based on Sections 201 and 202, customers would be able to allege a violation when lawful content is blocked. No law provides any protection for the transmission of unlawful content, but recognizing the distinction between content inspection and network operation, unlike the proposed Open Internet rules, does not give network operators *carte blanche* to use overbroad methods to block content it suspects might be unlawful, leaving customers helpless to stop them.

Another advantage of grounding Commission authority in Sections 201 and 202 is that enforcement mechanisms need not be organized *de novo*. Enforcing the Open Internet Rules would simply be a matter of aggrieved parties bringing complaints under Section 208. As an adjudicatory mechanism, Section 208 allows the Commission to make fact-based determinations of practices alleged to be violations, preventing the need for extensively detailed *ex ante* regulations.

II. How Prioritization Would be Treated Under a Section 201/202 Standard

Few would dispute that the Section 201/202 standard would render unlawful most – if not all – activities prohibited in the four principles. That is, network operators would not be permitted to prevent a broadband user from accessing and using the content, applications, service and devices of the user's choice, and would not be able to prevent the user from benefitting from competition between network providers, applications, service and content providers. The more difficult question arises when a broadband access provider chooses to favor or prioritize certain content, applications or services over others. Under what circumstances would such discriminatory behavior rise to the level of "unjust or unreasonable"? Some carriers and others argue that so long as prioritization is offered to all content, applications and service providers on the same rates, terms and conditions, such behavior could be considered just and reasonable under Sections 201 and 202.

But, as Public Knowledge said in its initial comments, prioritization of certain types of traffic is neither reasonable nor unreasonable *per se*, as prioritization and practices regarding different types of traffic may alternately be discriminatory measures that violate the open nature of the Internet and limit competition; or reasonable network management practices; or rarely, steps taken to comply with legal obligations. Whether the Commission chooses to operate under a strict non-discrimination standard with a "reasonable network management" exception or a Section 201 /202 "unjust or unreasonable" standard, the Commission should be

mindful of these differences and distinguish between beneficial and harmful discrimination.

Ultimately, under whatever rules the Commission adopts, the goal should be to balance the limited utility of prioritization against the potential harm prioritization introduces. While prioritization of certain very specific and limited types of control traffic is necessary for the network to function or recover as efficiently as possible, this control traffic is not user traffic and does not represent any kind of competitive advantage or harm. Prioritization of users' traffic can raise competitive concerns, introduce incentives to increase scarcity and collaterally damage the free flow of speech and the ability to create and innovate. Thus, we recommend that the Commission deem prioritization reasonable only when it is either essential to the network's operation or undertaken in compliance with legal obligations – and in this latter case, pursuant only to the direction of courts, law enforcement authorities, or other appropriate government bodies. On the flip side, the Commission should find prioritization presumptively unreasonable when it

- involves the use of deep packet inspection or other tools that invade users privacy;
- degrades another user's service; or
- allows the access provider to pick winners and losers among application, services and content providers, thereby changing the fundamental nature of the Internet.

These are outcomes that have no precedent under Sections 201 and 202 – they are new creatures of so-called "smart" networks and are both radical and anti-

consumer. The mere fact that prioritization is "offered" to everyone on non-discriminatory rates, terms and conditions should not absolve those practices from being considered unjust or unreasonable if any one or more of those three outcomes result. To prioritize one customer is to deprioritize another, and degrades the service that the deprioritized customer paid for. Furthermore, by its very nature, "prioritization" is not available to everyone; if everyone has "priority," no one does. This could make the pursuit of prioritized service futile. On the other hand, if network operators begin to charge unreasonably high rates for prioritized service to prevent oversubscription, it is no longer reasonably available to "everyone."

Under the standard for prioritization articulated above, two kinds of prioritization would likely be considered "unjust" or "unreasonable" under a Section 201/202 standard: quality of service prioritization and access prioritization.

A. Quality of Service Prioritization

There are two kinds of Quality of Service (QoS) prioritization. The first, Quality of Service (QoS) customer prioritization, gives customers the ability to prioritize their packets over the packets of other customers. This undermines the fundamental nature of the best-efforts public Internet. If service providers wish to empower users to select a prioritization scheme over the usual best-efforts model, QoS, properly limited, would permit only consumers to prioritize how data is treated over their own connection to the Internet.

Similarly problematic is QoS controlled by Internet access providers, where the providers pick and choose which applications, content and services get favored

treatment. This opens the door to access providers favoring their own offerings over those of competitors. For example, an access provider that also provides traditional MVPD services will have an incentive to disfavor any Internet-based streaming video content that competes with its subscription offering. This behavior would also violate the FCC's fourth principle, which prevents a broadband access provider from depriving a user from his "entitlement to competition among…applications providers, service providers and content providers."

The Commission should be skeptical of broadband access providers' claims that so-called type-based discrimination is either necessary or desirable. Very few, if any, applications absolutely depend on QoS. Even VoIP and video services, which are often held out by access providers as most in need of prioritization, are fully functional over today's best efforts Internet. Neither Skype, a provider of VoIP; nor Netflix or Amazon.com, providers of high-definition digital video content; nor providers of highly interactive and graphics-intensive games such as Blizzard require special prioritization to provide their services online.

B. Allowing Third Parties to Purchase Prioritized Access to Broadband Customers

Near the heart of the debate over open Internet rules is whether broadband access providers should be able to sell prioritized access to applications, service and content providers. Essentially, access providers would charge third party purchasers (*e.g.,* Google, Netflix or Hulu) for access to a "fast lane," guaranteeing that the third party's offering would be prioritized over others, including the third party's competitors (*e.g.* Yahoo, Amazon Unbox or Vuze).

If offered as a type of Internet access service, this type of activity would be undeniably unjust and unreasonable discrimination and thereby unlawful. Prioritizing one party's packets over all others inevitably degrades all other packets. This is never reasonable.

Furthermore, allowing third-party purchasers to pay for prioritization distorts competition in a number of ways. A broadband provider has a "terminating access monopoly" over its own subscribers, and if it demands extra payment to connect some Internet traffic to its customers, Internet applications must pay whatever toll the provider demands to reach those customers. Customers have no way of knowing what fees are demanded from Internet applications, and would simply blame the application, not the ISP, if ISPs start throttling or blocking an application. This advantages wealthy incumbents and disadvantages startups that may be unable to pay for prioritization. This will also reduce the type of rapid innovation at the edge of the Internet that is so vital to our economy. It also advantages incumbents because it is unlikely that new entrants will have the ability (both financially and with regard to information) to negotiate with every access provider that serves the markets in which they are interested. In other words, market entrants would have to negotiate separate prioritization deals with the hundreds of ISPs that serve the United States before having an opportunity to be nationally competitive. Imagine if, 10 years ago, the student founders of what is now Google had to pay telephone and cable companies around the country for priority service so their search engine could compete with lead search engines of

the time, such as AltaVista and HotBot. In all likelihood, one of the most successful companies in the world would never have gotten off the ground.

Second, allowing prioritization at the expense of others creates the conditions for a two-tier Internet. Large, established and well-funded Internet applications providers will operate at a high speed, while local startup providers will languish in the "slow lane." As access providers profit handsomely on prioritization fees, the incentive to maintain this segregated service, and to protect those already paying for prioritization, will grow.

Like QoS prioritization, the anticompetitive effects of access prioritization most likely would violate the FCC's fourth "competition" principle. To the extent that such prioritization degrades the service of other applications, service and content providers and allows the access providers to pick winners and losers, it is also "unjust and unreasonable" discrimination.

Conclusion

Using Sections 201 and 202 of the Communications Act as a basis for the Commission's open Internet rules would have some decided advantages and would not necessitate sweeping changes to the FCC's proposed open Internet rules, which are already quite spare.

For the most part, however, an "unjust and unreasonable discrimination" standard is not that much different than a so-called "strict" non-discrimination standard with a "reasonable network management" exception. Both turn on what

the Commission would consider "reasonable." Therefore, broadband access providers should not be lulled into thinking that somehow a Section 201/202 standard will permit discriminatory activity that would be prohibited under the reasonable network management exception. Activity that puts the provider in the position of picking winners and losers, degrades the services of others, or uses technologies that invades users' privacy are never reasonable or just under any standard.

I want to thank the FCC again for giving me the opportunity to speak about an open Internet and its importance to the future of our democracy, our society and our economy. I look forward to continuing to assist the Commission with crafting its rules.