Prioritizing Traffic: The Interest Fast Lane

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It is a cold winter night in February and you decide that it is a good time to finally binge your way through House of Cards season three on Netflix. The season begins with the usual fourth wall monologue and episode one finishes with another unexpected twist. Netflix queues up episode two, but suddenly you receive a notification that states: “High Speed Data Limit Reached.” This is where that crisp high definition quality video suddenly drops to standard definition. That is until you call your Internet service provider and pay the service charge for premium Internet service. Now imagine it is the 2016 election season. You hear rumors that a few of the candidates were involved in bribery. To verify these claims you decide to check out one of the better known and unbiased but small time news outlets. Suddenly, you receive a pop-up notification: “Content Provider Limit Reached.” Unfortunately, this unbiased and reliable news source could not afford the Internet service provider is premium services. These are only two examples of discrimination against a content provider. In Netflix is case this is far closer to reality, as users have already experienced the throttling1 of their services.2 The latter example may be an extreme, though the general scheme is simple. Larger businesses that can afford to receive preferential treatment will prevail over those smaller businesses that are unable to pay the premium.

In 2014, the Federal Communications Commission (FCC) proposed an order, Protecting and Promoting the Open Internet3, which would alter rules originally provided by the 2010 Preserving

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1. Throttling is when an Internet Service Provider slows down the data transfer rate intentionally.
the Open Internet Order.\(^4\) The new proposal would alter key language that previously prohibited an Internet Service Provider ("ISP") from unreasonably discriminating against the transmission of lawful network traffic and would effectively allow ISPs to discriminate against content providers.\(^5\) In response, Congressional members proposed The Online Competition and Consumer Choice Act of 2014 ("the ‘14 Act"), which would compel the FCC to promulgate regulations to ensure ISPs could not give preferential treatment or priority of network traffic to one content provider over another.\(^6\) The FCC proposal had been instigated by the recent decision in Verizon v. FCC, whose opinion effectively neutered the effects of net neutrality.\(^7\) However, the FCC only has itself to blame as it had previously classified cable broadband providers outside the scope of net neutrality.\(^8\)

The FCC faced immediate backlash from the public and in particular strong net neutrality advocates.\(^9\) Confusion, anger, and disappointment were among the countless reactions from the online community, which included a recent effort by content providers to hold an “Internet Slowdown” day.\(^10\) To understand the community

5. Protecting and Promoting the Open Internet at Appendix A § 8.7 (2014), compare to Preserving the Open Internet at Appendix A § 8.7 (The change from “no unreasonable discrimination” to “no commercially unreasonable practices” allows ISPs to discriminate, as long as the FCC does not find it to be commercially unreasonable, which thus far remains undefined).
8. Inquiry Concerning High-Speed Access to the Internet Over Cable and other Facilities, 17 F.C.C.R. 4798, 4824.
response, factors such as the history of legislation and regulation (or lack thereof) of broadband services, recent court decisions that reflect the boundaries the FCC may work within, and the potential impact on ISPs, content providers, and the end user must be examined.

In section II, the necessary background information will be discussed. The 1996 Telecommunications Act ("the '96 Act") was the first form of legislation to include Internet services, it would cover broadcasting and telecommunications, and most notably it established the foundation for the FCC is regulations.11 The majority opinion in *Brand X* secured the FCC is regulatory ruling on broadband services, an issue with its own muddled past.12 The 2010 Open Internet Order codified the concept of net neutrality, the shining light in this dimly lit hallway of legislation, regulation, and private interests.13 The *Verizon* case blew the fuse on the bulb of the 2010 Order, as the Court would deny the FCC is ability to impose net neutrality.14 The final piece of background is the current proposal, touted by the FCC as being in line with net neutrality principles, contrary to the basic tenets of net neutrality.15

Section III focuses on the proposed legislation, S. 2476. The legislation pinpoints a single issue, in an attempt to rectify the *Verizon* decision and properly codify a major principle of net neutrality. Section IV begins an analysis of the situation. Beginning with the impact of the FCC is proposal; the possible positives and negatives are summarized from differing viewpoints. Aside from S. 2476, a solution called upon by much of the public is discussed, the common carrier classification. A parallel is drawn from another telecommunication service, mobile broadband. Common misconceptions are briefly discussed, as some content providers continue to face obstacles, they have begun taking the road less

traveled, though it is a well-known road that runs in and out of the scope of net neutrality, the use of content delivery networks. President Barack Obama recently spoke on the subject, urging the common carrier solution, however the effectiveness of his sponsorship is up for debate. Finally, section V concludes the overall discussion with a summarization of the situation and the possible routes the Internet will venture in the near future.

II. BACKGROUND

Before considering the current proposed legislation, pertinent technology must be examined. Net neutrality is the principle that all data transmitted over broadband is to be treated equal; Professor Tim Wu of Columbia Law School popularized this principle in 2003. The general notion of net neutrality can encompass several different aspects, below is a discussion on the particular definition of net neutrality as it pertains to this article. Generally, it would require that all content providers must have open access without fear of discrimination from an ISP. By 2005 the FCC had established its own principles, which would lay the groundwork for the 2010 Order. The four key principles revolved around the consumers,

...To ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers, the Commission adopts the following principles:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice;


17. Id.

To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; 
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network; and 
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.¹⁹

These principles were derived from notions of net neutrality and the general policies underlying the '96 Act.²⁰

The '96 Act, the 2010 Order, and the new proposal all refer to ISPs and content providers. However, there are many variants to the terms used; as technology develops, terminology changes form until settling on the most common usage. Broadband service provider is mostly interchangeable with Internet Service Provider, while the same applies to edge providers who are more commonly referred to as content providers. An ISP, such as Comcast, Cablevision, Verizon, Time Warner or COX, supplies the highway for which all the data travels upon while charging a general toll. The data (or content) itself primarily originates from content providers, such as Netflix, YouTube, Google, or Amazon. Data/content can also originate from end users, who are essentially the consumers of the ISP.

¹⁹. Id., (internal citations omitted).
²⁰. Id. at 3 note 14.
A. Network Neutrality

Net neutrality is a broad term. What does neutral mean in terms of Internet service? Does it only apply to the end user, the content provider, the ISP, or a combination? Where do content delivery networks factor in? This article constrains net neutrality to the effect on content providers and end users by the broadband providers’ efforts to prioritize traffic. Most importantly, an end user should have equal access to all lawful content, while a content provider should be able to provide content at an equal rate to all consumers without fear of an ISP discriminating to provide a third party with prioritized access.

The underlying policy of net neutrality consists of promoting fair evolutionary competition in the realm of the Internet.\(^{21}\) In order to successfully execute fair evolutionary competition, ISPs must not make content choices for the end user. The prioritizing of traffic will force the end user towards the content provider that the ISP deems fit, in other words the content provider who pays the highest fee. This will sound reminiscent to Content Delivery Networks (CDNs), discussed below, and many academics will give CDNs the rubber stamp of being anti-net neutrality.\(^{22}\) However, that requires one to apply a broad definition of net neutrality that would effectively categorize CDNs as a type of ISP. Focusing on S. 2476, this article discusses net neutrality violations by local ISPs when delivering content to the end user, by way of prioritization of content providers.

B. The 1996 Telecommunications Act

1. Beginning with the Communications Act of 1934

The origination of the FCC began with the Communications Act of 1934 ("the '34 Act").\(^{23}\) Enacted by President Franklin D. Roosevelt during the New Deal, the Communications Act brought reg-

\(^{21}\) See Wu, supra note 16.


\(^{23}\) 47 U.S.C. § 151 et seq.
ulation to telephone and radio communications via the FCC.\textsuperscript{24} It would take Congress sixty-two years before amending the '34 Act, by enacting the '96 Act.\textsuperscript{25} The purpose of the amendment was to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunication technologies.\textsuperscript{26}

2. Title II of the '96 Act

The '96 Act made an important distinction between telecommunication services and information services.\textsuperscript{27} Two categories were defined: basic services of telecommunication carriers and enhanced services of information service providers.\textsuperscript{28} The distinction would allow for Title II common carrier regulations to be applied to those deemed telecommunication carriers.\textsuperscript{29} This would lead to an increase in competition between telecommunication services, where smaller telephone service providers would compete by renting infrastructure to provide their own services; it would also ensure a standard level of quality for the consumer. Title II of the '96 Act provided several regulations for any party deemed a common carrier, including making it unlawful for a common carrier to engage in unjust or unreasonable discrimination.\textsuperscript{30} The implication being that the larger and well established utility services could not discriminate against smaller businesses or consumers, which would provide an even competitive field for all those who ventured into the market.

\begin{itemize}
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.}
  \item \textsuperscript{27} \textit{Verizon}, 740 F.3d at 630.
  \item \textsuperscript{28} 47 U.S.C. § 153(24), (51).
  \item \textsuperscript{29} \textit{Brand X}, 545 U.S. at 975-76.
  \item \textsuperscript{30} 47 U.S.C. § 202(a).
\end{itemize}
C. National Cable & Telecommunications Association v. Brand X Internet Services

In response to the growth of cable broadband, the FCC issued a *Declaratory Ruling* stating that ISPs were an information service and therefore not subject to the Title II regulations of the '96 Act. The Supreme Court in *Brand X* would later uphold this 2002 *Declaratory Ruling*.

In *Brand X*, small-time ISPs attempted to classify broadband service providers as common carriers in order to maintain an even playing field. During the dial-up days of the Internet, because several ISPs had access to phone lines, they were regulated under Title II as a common carrier, more commonly referred to as a public utility. Essentially, services such as AOL and CompuServe could rent phone lines laid by other companies. To maintain a competitive edge against the growing cable broadband providers, these small ISPs sought to use the telecommunication infrastructure established by the cable companies who began offering high-speed Internet access, they would essentially piggyback on the infrastructure. Without compelling cable providers to sell access to their networks, the smaller dial-up based ISPs began to dwindle. Essentially, these smaller ISPs could no longer piggyback on the pre-built infrastructure, without which their services were unnecessary. By 2005, only 28% of adults connected to the Internet via dial-up while currently the number is less than 3%.

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32. *Brand X*, 545 U.S. at 1002.
33. See id., at 967.
34. Id., at 974.
35. Id.
36. See id., at 975.
38. Id.
In deciding Brand X, the Ninth Circuit relied upon stare decisis of its own ruling in AT&T Corp. v. City of Portland. In Portland, the Ninth Circuit determined broadband service providers were a telecommunications service, which it reaffirmed in Brand X, therefore adhering to its precedent. While the Supreme Court took note of the FCC not being a party to the suit in Portland, it should be noted here that the FCC still filed an amicus brief in Portland. In the FCC is amicus brief, it is clear that it did not take a specific position on the matter, but instead it encourages the Ninth Circuit to construe narrowly and take note of “agency preemption,” where the FCC believes their declarations may prevail. In light of this, the Ninth Circuit acted accordingly, with the agency silent on the matter the Ninth Circuit interpreted 47 U.S.C. § 153 to include cable modem broadband Internet service.

It was only after the Ninth Circuit’s decision in Portland that the FCC classified broadband service providers as an information service in its Declaratory Ruling. In the Declaratory Ruling, the FCC relied on its findings in Universal Service Report. The Universal Service Report focused on non-facilities-based ISPs, those who did not own the facilities used but merely provided the Internet service, deeming them information service providers because they did not own the physical transmission facilities. Using the Universal Service Report, the FCC declared cable companies that offered broadband services to likewise fall under an information service.

As mentioned above, the FCC failed to take a stance in its amicus brief in Portland, even though the Universal Service Report

39. See AT&T, Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).
40. Id., at 880.
41. Brand X, at 980.
42. See Brief of the FCC as Amicus Curiae, AT&T Corp., 216 F.3d 871.
43. Id.
44. AT&T Corp., 216 F.3d at 880.
47. See id.
48. Brand X, 545 U.S. at 973.
had already been published. The FCC’s Declaratory Ruling only established the agency is “preemptive” decision following the Ninth Circuit’s ruling. It is clear that the FCC’s intent here was to override the Ninth Circuit’s decision, subordinating the jurisprudence to its own interests in what can be considered a power reserved to Congress, though this specific discussion could write an article of its own.

The Court in Brand X ultimately held that Chevron deference required a federal court to accept an agency’s construction of a statute, even if it would differ with a court is best statutory interpretation.49 The Supreme Court is resident administrative law expert, Justice Scalia, dissents for clear and convincing reasons.50 Aside from the obvious telecommunicative aspects of broadband Internet service (voice, video, and textual communication via the Internet), Justice Scalia points to the majority is possibly unconstitutional creation: subjecting judicial decisions to reversal by executive officers.51 The implications of this case would extend beyond net neutrality, as it was applicable to all agencies, but it was clear here that the power was in the FCC’s hands. This very important notion is returned to below, though the FCC is reaction is far less constructive. It is the FCC is own stance here that broadband service is an information service, that would cripple its own attempts to serve the public needs in the near future (using Title II regulations on a telecommunication service), though once again the Courts do provide the FCC with the power to make change.

D. The 2010 Open Internet Order

As discussed above, in 2005, the FCC established four major principles of the open Internet.52 Later, the 2009 address of then-FCC Chairman Julius Genachowski to the Brookings Institute in

49. Id. at 980 (citing Chevron, U.S.A. v. NRDC, Inc., 467 U.S. 837, 843-844, n. 11 (1984). Here, Chevron deference refers to the Courts deference to an agency’s interpretation of statutes unless the interpretation is unreasonable).
50. Brand X, 545 U.S. at 1005-20 (Justice Saclia, dissenting).
51. Id. at 1016-17 (Justice Saclia, dissenting).
52. FCC, supra note 18.
WASHINGTON followed. In his address, the Chairman wished to supplement the four principles with two more, transparency and (our focus here) nondiscrimination. The Chairman was targeted the throttling of traffic, whether specific protocols or content providers. The address was in response to the holding in Comcast v. FCC. The FCC had attempted to censure Comcast is unwarranted throttling of peer-to-peer network services following complaints from several of its subscribers. The Court in Comcast held that the FCC’s orders to cease the discrimination of traffic were not a proper “statutorily mandated responsibility” under its ancillary authority, while simultaneously informing the FCC of an alternative route of relief under other titles of the Communications Act. The FCC would then deliberate and eventually promulgate the 2010 Order.

The section of the 2010 Order involved in these recent events centers on the “no unreasonable discrimination” section, and states:

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer is broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.

The key language resides in the terms “shall not unreasonably discriminate.” This provision echoed the Chairman is additional open

54. See id.
55. See id.
56. See Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
57. Id. at 644-45.
58. Id. at 646, 661.
Internet principle, non-discrimination. At the time and as it currently stands, this ensures that ISPs cannot allow favoritism of any one content provider over another. As Comcast had previously shown, ISPs were already willing to subvert traffic for its own gain, and it would not be long before they would take action against the 2010 Order.

E. Verizon v. FCC

In January 2014, the D.C. Circuit struck down the anti-discrimination rule established by the 2010 Order. It is important to clarify that the Court did not eliminate the 2010 Order. To the contrary, the Court held that the FCC had properly interpreted its statutory mandate under 47 U.S.C. § 1302 in that it may promulgate rules governing the treatment of Internet traffic by broadband service providers. The issue arose with regards to the previous classification of broadband service providers, discussed above in Brand X. The D.C. Circuit emphasized that due to the previous classification of broadband service providers as an information service, the FCC could not impose regulations reserved statutorily for Title II common carriers. The implication here, as it was in Comcast, was that the FCC had the authority to impose the 2010 Order upon common carriers; all that remained was reclassification of broadband service providers as a public utility, that is, a telecommunication service falling under Title II common carrier regulations. As mentioned, the FCC took a stance that would deny them the ability to impose the 2010 Order.

In a statement on February 19, 2014, the current FCC Chairman, Tom Wheeler, ultimately decided not to appeal the decision. The Chairman explained that the FCC would return to the net neutrality rules, and revise them in order to effectively enforce them follow-

60. Anderson, supra note 53.
61. Verizon, 740 F.3d at 659.
62. Id. at 641.
63. FCC, supra, note 3 at 4802-03; Brand X, 545 U.S. at 1002.
64. Verizon, 740 F.3d at 650.
65. See Statement by FCC Chairman Tom Wheeler on The FCC’s Open Internet Rules, § 3 (February 19, 2014).
The Chairman also explained that the FCC is Title II authority was still “on the table,” implying that the FCC would reclassify broadband service providers as a last resort. This implies that the FCC may attempt a hybrid policy, one that may prohibit discrimination; though it is unclear how the FCC could impose non-discrimination without reclassification, under *Verizon*. Reclassification is where the major contention lies. It is the simplest answer to this issue, an answer that the Courts implied would allow for proper imposition of net neutrality, however the FCC has been reluctant in asserting this authority, with theories ranging from litigation scare and lobbying demands.

**F. Notice of Proposed Rulemaking GN Docket No. 14-28**

As discussed above, the current language of the 2010 Order states, “. . . [ISPs] shall not *unreasonably discriminate* in transmitting lawful network traffic.” The current proposal by the FCC targets this language, altering the provision and specifically reading, “. . . [ISPs] shall not engage in *commercially unreasonable practices*. ” This boils down to the objective principle of net neutrality (no discrimination) in contrast to a subjective standard focused on commercial application (and whether the FCC deems a commercial practice reasonable).

The essence of this change is embodied in what is known as the Internet fast lane, as dubbed by the media. By allowing ISPs to engage in commercially *reasonable* practices, content providers may become subject to an increased fee to offer a quality of service expected of them. From a more nefarious perspective, ISPs could intentionally throttle content providers until they complied with tariffs on bandwidth, or completely rule out the use of one

66. See FCC Chairman Tom Wheeler, Statement on The FCC’s Open Internet Rules, preamble (February 19, 2014).
67. See id.
69. 47 CFR § 8.7 (*emphasis added*).
70. FCC, *supra* note 3.
content provider in lieu of its own services. Critics prefer to call the prioritization of traffic the Internet slow lane. The distinction is important, as the fast lane implies that one route will be faster with no consequences to the remaining traffic. The slow lane approach takes into account the effect of a prioritized lane on the remaining traffic. As many experts have predicted, including Professor Wu, the originator of net neutrality, any fast lane (prioritized) would negatively impact the remaining traffic leading to slow lanes. The FCC has thus far stood by its pending proposal, claiming that it is still in line with net neutrality principles, albeit without any justification. However, the principles established by the FCC in the 2010 Order prohibits discrimination of traffic; the implication of a prioritized delivery system, though to be reasonable, is no different from discriminating against other traffic.

G. Public Comments

Following the new proposal the FCC sought public input on its proposed rules to help determine the best viable approach to preserving an open Internet. Initially, the FCC planned to take in comments for two months. Overwhelmed by the initial com-


73. See id.

74. FCC, supra, note 3.

75. FCC, supra, note 4.


77. Id.
menting period, which heralded over 780,000 comments, the FCC ultimately extended the commenting period until September 15, 2014. Controversy erupted when the FCC released its initial comment count. Public (and possibly private) interest groups took to analyzing all the data the FCC publicly provided. Initial claims were that anti-net neutrality comments heavily outweighed pro-net neutrality comments, until some groups noticed over half a million comments were missing. Both sides of the debate made claims that the loss of comments was detrimental to their respective viewpoints. In order to clear the air, the FCC published an informational post on its website to address the issue.

Initially, the FCC had taken comments through its website but was unable to manage the volume of commenters. The FCC then allowed individuals to comment via e-mail. With multiple methods of communication in place, comment data appeared in multi-
In delivering this information to the public, the FCC ran into technical difficulties. In a notice to the public, the FCC explained how 680,000 comments were unaccounted for in the information delivered via XML files. Although these comments were not in the XML files, the comments were appropriately counted for in its original Electronic Comment Filing System (ECFS). Ultimately, the FCC estimates that the total count has reached nearly 4 million, in line with what had been predicted by the public interest groups.

The sheer volume of individuals commenting on the proposed rules is reflective of the crucial importance of net neutrality. While there have been concerns of special interest groups attempting to bolster their agenda by encouraging commenting, this is mostly true of each side of the debate. The Internet has become an essential to education, employment, and social activity. Net neutrality seeks to ensure that the Internet remains a place where all individuals may take the opportunity to enjoy and make use of the Internet is limitless potential, without their Internet service provider interfering. For these reasons, the public has been very outspoken on the issue. It is possible that without the implementation of net neutrality principles, even those who have hoped to comment against net neutrality could face an uphill battle in having their voices heard.

87. Pendleton, supra note 81.
88. Id.
89. Id.
90. Id.
91. Id.
III. PROPOSED LEGISLATION

A. S. 2476 — "The Online Competition and Consumer Choice Act of 2014"

The proposed legislation, sponsored most notably by Senators Leahy, Franken, and Sanders, was drafted in direct response to the regulation proposed by the FCC. Several members of Congress took immediate notice of the Verizon decision, and subsequently the non-response by the FCC. The legislation in pertinent provides,

SEC. 2. FCC REGULATIONS PROHIBITING CERTAIN PREFERENTIAL TREATMENT OR PRIORITIZATION OF INTERNET TRAFFIC.
(a) In General- Not later than 90 days after the date of the enactment of this Act, the Commission shall promulgate regulations that—
(1) prohibit a broadband provider from entering into an agreement with an edge provider under which the broadband provider agrees, for consideration, in transmitting network traffic over the broadband Internet access service of an end user, to give preferential treatment or priority to the traffic of such edge provider over the traffic of other edge providers; and
(2) prohibit a broadband provider, in transmitting network traffic over the broadband Internet access service of an end user, from giving preferential treatment or priority to the traffic of content, applications, services, or devices that are provided or operated by such broadband provider, or an affiliate of such broadband provider, over the traffic of other content, applications, services, or devices.93

The prohibition on preferential treatment or priority treatment would reestablish one of the anti-discrimination principles of net neutrality. The bill is very straightforward; the FCC must regulate broadband service providers by imposing anti-discrimination policies.\footnote{Id.} The implication that follows from the previous case law lends to the FCC being congressionally mandated to reclassify broadband service providers, so they may effectively order anti-discriminatory rules against all ISPs.

B. Defeating the Subjective Standard

The FCC proposal sets out to adjust net neutrality by leaving it susceptible to subjective reasoning. As stated in the proposal, the FCC may deem certain practices commercially unreasonable.\footnote{Protecting and Promoting the Open Internet at Appendix A § 8.7.} Those efforts to prioritize traffic that are deemed commercially reasonable would not be found in violation of net neutrality. From this several questions arise such as: (1) what is commercially unreasonable; (2) will these decisions be made on a case-by-case basis; and (3) will there be any further standards from which consumers can anticipate and accordingly decide which ISP to prefer. Predictions of countless litigation stemming from this subjective standard are not unfounded, where ISPs have already engaged in litigation over regulatory rules.\footnote{Verizon, 740 F.3d 623.} The effect on consumer choice is also severe, limiting the decisions of consumers via the ISP's ability to discriminate.\footnote{Protecting and Promoting the Open Internet at Appendix A § 8.7.} Here, it is only possible to defeat the subjective standard by providing an objective solution: an anti-discrimination policy that treats all traffic equal.

\footnotetext[94]{Id.}
\footnotetext[95]{Protecting and Promoting the Open Internet at Appendix A § 8.7.}
\footnotetext[96]{Verizon, 740 F.3d 623.}
\footnotetext[97]{Protecting and Promoting the Open Internet at Appendix A § 8.7.}
Supporters of the fast lane assert the initiative as driving innovation. As broadband service market penetration increases, congestion will increase. As users increase, Internet traffic will only continue to rise. Technological innovation leads to higher quality content e.g. 4K-resolution video content. This requires a wider highway, to avoid congestion and allow traffic to freely move. Those ISPs who prioritize and provide tiered service can then strengthen their networks without passing the cost directly to consumers. Otherwise, the networks stay congested as each player blames the other for failing to strengthen the backbone.

While it can be said that competition would drive consumers away from those ISPs who do not develop a stronger infrastructure, many ISPs have contracts with municipalities that provide exclusivity to certain areas. Those consumers do not have a choice, and those consumers amount to nearly seventy-five percent of all broadband users. However, this deals with the concept of regulatory capture and lobbied gains. The most primary example of these oft-mentioned forms of corruption lies in the FCC Commissioner, and those of the past. There has been a long record of cable industry lobbyists that have helmed the seat of Chairman. It would seem counterintuitive to appoint an individual friendly to

98. See Letters from Congress to Thomas E. Wheeler, to Chairman of the Federal Communications Commission (May 15, 2014).
the very industry they are meant to regulate. Though, it should be noted that the FCC has shown interest in ensuring these exclusivity contracts do not stop municipalities from developing their own broadband service networks.\(^\text{102}\)

The implications of the proposed rules provide broadband service providers with the ability to offer priority access to those willing to pay for the extra service.\(^\text{103}\) This has been argued to inevitably cause any “standard” access edge providers to slow down.\(^\text{104}\) With priority given to those corporations that can afford it, start-ups who are unlikely to be capable of paying for priority access step into the world at an inherent disadvantage. The implications of this are clear with fewer start-ups developing into successful companies that pose a real competitive threat to the larger companies, ultimately hurting competition and narrowing consumer choice.

**B. Solutions**

1. **S. 2476**

The proposed legislation would be an effective solution by providing a specific provision to prohibit prioritization of any web traffic.\(^\text{105}\) It would restrict ISPs from playing favorites with content providers, particularly those who competed with the ISP itself, such as an ISP is OnDemand service and Netflix.\(^\text{106}\) ISPs that happen to provide services other than Internet may favor their own services over competitors, in providing bandwidth or Internet service. ISPs such as Verizon could throttle Netflix to cripplingly


\(^{104}\) Thayer, *supra* note 71.


\(^{106}\) Id. at § 2(a)(1).
NET NEUTRALITY

slow speeds, forcing their customers into using Verizon's own RedBox. In the most extreme case, an ISP may force users to use their own search engine or pay a premium to use Google. The anti-discrimination provision in S. 2476 would prevent ISPs from prioritizing traffic and enforce the requirement of equality amongst content providers. However, even with Congressional authorization the Courts have implicated that in order to impose net neutrality-like regulations, the FCC would have to re-classify ISPs. Essentially, S. 2476 may ultimately require the FCC to re-classify, which brings us to the common carrier solution.

2. Common Carrier

A common carrier is defined as, “a commercial enterprise that holds itself out to the public as offering to transport [goods/services] for a fee.” They are generally required by law to transport [goods/services] without refusal. As defined, public utilities are effectively common carriers. Under Title II of the Telecommunications Act, telecommunication services are common carriers. As mentioned above, broadband service providers are currently classified as an information service, but reclassification of broadband service providers as a telecommunication service is the single best solution.

Title II provides a laundry list of regulations, applicable to all telecommunication services. However, many of these regulations are essentially bans against bad behavior, such as discrimination against a content provider, rather than restrictions on doing business. For example, as a Title II telecommunication service ISPs must charge just and reasonable nondiscriminatory rates to their customers; design their systems so other carriers may interconnect and make use of their backbone network; and contribute to the universal service fund under 47 U.S.C. § 254(d) among other obligations.

108. Id.
110. Id.
111. Id.
The FCC could then exercise the ability to properly regulate and monitor broadband service providers. This opportunity would allow for the FCC to impose net neutrality in its fullest, spurring innovation and progress while promoting competition. Critics of this solution claim this may lead to overly burdensome regulation, with the assumption that it may stifle innovation. These critics fail to recognize that innovation is currently being stifled by the lack of competition, and any allowance of an ISP to favor its own services would further detract newcomers. Net neutrality is not typical regulation. Regulation is thought to bind activity, reigning in an unstable market. However, net neutrality simply requires all activity to be treated equally, providing an even playing field while giving consumers the power of choice. Reclassification of broadband Internet as a telecommunication service under Title II common carrier regulations would help continue the growth that has been expected of the information technology industry.

3. Debate over the Effects of Title II Reclassification

Most recently, the discussion surrounding net neutrality has focused on Title II reclassification. Anti-net neutrality advocates have claimed that reclassification of broadband services, as a telecommunications service, would lead to a heavier burden on consumers. Specifically, a study by the Progressive Policy Institute (PPI) has estimated a $15 billion increase in user fees across the

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112. Brand X, 545 U.S. at 975.
United States. The policy brief by PPI has already been debunked and labeled, colorfully, as “bullshit.”

PPI’s policy brief claims that under Title II, Internet services will become subject to new federal and state fees. In particular, PPI mentions that state and local municipalities will generate new fees and taxes, and that the cost will be shifted onto consumers as it has historically with other telecommunication services. To be clear, what PPI is implying may have very well be true, but they fail to mention why Internet services will become subject to these new costs under Title II. The answer to that question lies in the Internet Tax Freedom Act (ITFA).

The ITFA was signed into law in 1998 and prohibited state and local governments from taxing Internet services. Since it is enactment, the ITFA has been extended four times, with the most recent extension occurring on December 16, 2014 under a $1.1 trillion government spending bill more commonly referred to as the Cromnibus spending bill. The PPI policy brief was published on

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119. See id.

120. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999., 105 P.L. 277, Title XI.

121. Id.

December 1, 2014 prior to the recent extension, and reflected a supposed outcome of an expired ITFA (which would have occurred in December 2014). As mentioned, the ITFA has seen extension after extension, and efforts have also been taken to establish a permanent moratorium with the most recent effort having passed the House on July 16, 2014.

In response to the PPI study, Senator Ron Wyden clarified that the ITFA would still be effective, regardless of whether Internet services were classified under Title II. As author of the ITFA, Senator Wyden is definitely an appropriate source for determining whether or not the ITFA will apply to a Title II telecommunications service. Senator Wyden is clarification on the ITFA, combined with the consistent extensions of the IFTA, cut strongly against PPI is findings.

The $15 billion increase could only occur under two major assumptions. First, the moratorium provided by the ITFA would have to lapse with failure of all renewal attempts; and second, costs would have to be shifted to consumers. Without the first assumption, the second is moot, but even if we assume the IFTA expired cost shifting may not occur under the new Title II circumstances. As discussed above, under Title II ISPs would have to allow the use of their backbone networks. We can infer that this would provide more competition, certainly more than what exists today, because third parties would gain access to providing their own services via the backbone networks. The increase in competi-

124. See Masnick, supra note 117.
127. Pendleton, supra note 81; Brand X, 545 U.S. at 975.
tion will likely lead to competitive pricing, therefore any increase in cost may essentially be cured.

However, it is important to note that ISPs under Title II could be subjected to federal taxation under the Universal Service Fund (USF). If reclassified under Title II, the FCC has the ability to impose fees to provide additional funding to the USF. Recently, the FCC has planned to increase the current fees imposed, in an effort to increase funding to help provide broadband Internet access to schools. In the same vein, the USF is funded by all telecommunications services and is not required to impose a fee on Internet services. Essentially, the FCC has the option to impose a nominal fee to help provide services for the public good, a fee that is already imposed (on current telecommunication services) and does not immediately require further funding.

When addressing concerns of Title II regulations, the source of regulation (the related statute) is critical. Similar to the taxation issue, many of the rules and regulations that affect the Internet are already in place. Any purported “new” fees or taxes are typically arising out of previously established statutes. Extrapolating from other telecommunication services can be misleading because of the current lack of competition in the broadband industry, and the likely increase in competition from reclassification. Unfortunately, debate over the effects of reclassification will continue until the FCC enacts its new rules.

C. Content Delivery Networks

First, we should address important terminology. A content delivery network (CDN) is a dynamic network, a data center that

133. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, 105 P.L. 277, Title XI.
sends, receives, and stores information from content providers. They provide redundancy for content providers while also shortening the distance between the end user and the content. A peering agreement between two services establishes direct interconnectivity between the networks of those services, historically cost-free and for mutual benefit. The last-mile is a phrase that refers to the line that connects the ISP to the end user, and where an Internet query usually starts.

As an example let us assume website-A has its original data stored on a server in New York. A user in Switzerland wants to access website-A and a query begins at the last-mile. The Switzerland ISP will direct the query towards website-A's servers in New York and when accessing the information the user will feel the delay due to the great distance between the content and user as well as congestion from all users who access the same content from the same server. To avoid this problem, website-A will contract with a CDN. The CDN will have servers all over the globe, in our example we'll assume the CDN has a server located in Norway. Website-A will store its data on the CDN's Norway server. Now, when the user requests website-A the Switzerland ISP will direct the query to the Norway server diminishing delay and easing congestion. Keep in mind, when thousands of users are accessing content all over the world, a CDN (with servers all over the globe) will have copies of content to provide to users in close proximity.

At the most basic level, a content delivery network violates net neutrality. A CDN charges a fee to certain content providers then it will provide the content to an ISP (which will be a separate

135. See Yoo, supra note 22 at 1881-82.
136. Id. at 1882.
137. For the article's purposes, we assume the two services are a content provider and an ISP.
138. See Yoo, supra note 22 at 1871.
139. This is a major simplification of the Domain Name System, for a great summarization; see Jacqueline D. Lipton, Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy, 40 WAKE FOREST L. REV. 1361, 1366.
140. This requires a very broad definition of net neutrality, as discussed above.
agreement). This, to some extent, prioritizes content, but without CDNs many users will suffer from a content provider is inability to deliver its content in a reasonable fashion. Aside from CDNs, content providers (and other network services) can establish peering agreements with ISPs. In the past, peering agreements were typically cost-free, however most of these agreements have become costly with the increase in data, network size, and technology.\textsuperscript{141} The direct interconnection of networks between a content provider and an ISP provides the best scenario, but this is not feasible for all content providers. Peering agreements are also maintained by CDNs, allowing for strong interconnection between all parties.\textsuperscript{142} Whether by CDN or by peering, these agreements are meant to provide content and service at higher speeds and better quality. However, it cannot be said for certain that any cost shifting towards consumers is an effect of net neutrality violations. These agreements are the cost of doing business, in efforts to provide the end user with content, and have an expectation that consumers will bear the burden.

Recently, Netflix established a peering agreement with Comcast to alleviate congestion that affected the end user experience.\textsuperscript{143} However, the activity of congestion is suspicious and should be noted. Prior to the negotiations, Netflix experienced degradation in the service they provided to their customers using Comcast.\textsuperscript{144} The average data transfer suddenly fell over 25\% from January 2013, with a miraculous increase of 24\% from the average days


\textsuperscript{144} See Max Ehrenfreund, \textit{This hilarious graph shows the importance of net neutrality}, THE WASHINGTON POST (April 24, 2014), http://knowmore.washingtonpost.com/2014/04/25/this-hilarious-graph-of-netflix-speeds-shows-the-importance-of-net-neutrality.
following the agreement with Comcast.145 This is evidence that lends to the idea that Comcast purposefully degraded the service of Netflix, in order to strong-arm it into an agreement it found suitable.146

There is also controversy over whether congestion at the last-mile is fabricated by the ISPs, and that the ISPs should bear the burden of further developing infrastructure to avoid any congestion.147 Unfortunately all members involved play the blame game, with the upper hand going to the ISPs, for now.

D. Priority Interests in Cellular Networks

When the 2010 Order was promulgated, the FCC treated mobile broadband with a much softer hand. Mobile broadband was excluded from the entirety of the anti-discrimination provision and only required to refrain from blocking applications that would compete with their own voice or video services.148 Although, FCC Chairman Tom Wheeler has expressed dissatisfaction with recent claims of throttling mobile broadband by Verizon.149 Wheeler mentions that mobile broadband has changed significantly since the 2010 Order.150 A prime example of change is the current discriminatory practices by cellular carriers. An average consumer may consider it a feature, but T-Mobile is “Music Freedom” is a blatant violation of net neutrality.

145. Id. at graphic, percentage change in Netflix download speed since Jan. 2013, by I.S.P.
146. More evidence is Netflix’s Open Connect Initiative (https://openconnect.itp.netflix.com), a peering agreement Netflix offers to all ISPs at no cost; an agreement Comcast essentially refused.
150. See id.
T-Mobile, partially owned by Europe’s Deutsche-Telekom, began exempting certain radio applications from their consumer’s data allotment.\textsuperscript{151} Content providers such as Pandora Radio, Spotify, and iTunes Radio, no longer affect the data allotments of T-Mobile consumers and the list continues to grow.\textsuperscript{152} Now consumers who were weary of using Internet radio can enjoy it at no extra cost. This seemingly innocuous “feature” for customers is precisely the type of activity S. 2476 wishes to protect against for in the cable broadband realm.

While beneficial to consumers, this business practice is somewhat disingenuous. The current data-allotment-exempt content providers essentially have a leg up on smaller competition. The realm of mobile applications has been a playground for several start-ups. Now as far as Internet radio is concerned, start-ups will have a difficult time overcoming the inherent advantage of those well-established exempt content providers. Unless T-Mobile provides a policy to treat all data equally, start-ups will be deprived of a fair playing field, while consumers will have limited choices.

\textit{E. Presidential Response}

Recently, President Obama took a clear stance on the subject of net neutrality.\textsuperscript{153} The President advocated for reclassification of broadband service providers as a public utility under Title II common carrier regulations.\textsuperscript{154} In 2007, then Senator Obama, took a similar stance.\textsuperscript{155} Unfortunately, FCC Chairman Tom Wheeler would not take as strong a stance. In response to the President is statement, the Chairman expressed his opposition to the fast lane (which his commission proposed) while refraining from stating a Title II solution, but reserved possible hybrid solutions of its own.

\begin{flushright}
152. \textit{See id.} \\
153. \textit{See generally} http://www.whitehouse.gov/net-neutrality. \\
154. \textit{See id.} \\
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The public is quick to note however, that President Obama did appoint Tom Wheeler, the former CEO of the Cellular Telecommunications & Internet Association and President of the National Cable & Telecommunications Association.

V. CONCLUSION

Net neutrality is a simple concept. Internet service providers should not discriminate against content providers. Consumers who pay for use of the provider is telecommunication services are the sole arbiters of what content they wish to lawfully access. ISPs build the highway and charge a toll; content providers fill it with valuable information sought by consumers.

As discussed above, in response to the immediate public reaction to the recent proposal, the FCC invited public comment on the proposal. In the course of the open comment period, the FCC received over 4 million comments. The sheer level of public response and the President is own statements to the proposal should make the answer clear to the FCC. Re-classification of ISPs as common carriers would provide the public with non-discriminating broadband service and equal access to all content providers. Consumers will have the power of choice and greater competition will exist within the industry.

The consumer is ability to choose ISPs has already been devastatingly strangled, with fewer than 15% of all US residents having the option to choose from more than one provider. The Internet is a tool by which individuals from around the world and of all ages obtain knowledge. Where non-regulation could have provided robust competition, lobbying has brought us to the point where we

156. See FCC Chairman Tom Wheeler’s Statement On President Barack Obama’s Statement Regarding Open Internet, FCC News (November 10, 2014).
158. See Gigi B. Sohn and David A. Bray, Setting the Record Straight on Open Internet Comments, FCC (December 23, 2014 11:22am), http://www.fcc.gov/blog/setting-record-straight-open-internet-comments.
159. Gross, supra, note 128.
Net neutrality is vital to innovation and progress and the power of choice must remain with individuals. In order to preserve, protect, and promote an open Internet, net neutrality is essential.

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