Frequently Asked Questions

IFBA
INTERNET FREEDOM BUSINESS ALLIANCE

General FAQ on the FCC's Open Internet Rules

What are the Open Internet rules?

Historically, the Internet has enabled market access without discrimination or preferences. Technically, the Internet's guiding principle of nondiscrimination preserves our right to communicate freely online.

The term "open Internet" or "net neutrality" are used for the broad principle that local cable monopolies, telecom monopolies, and wireless providers must offer access to open networks — and should not block or discriminate against any applications or content that ride over those networks. Just as your phone company cannot decide who you could call and what you say on that call, your ISP should not be concerned with what content you view or post online.

This principle is what enables the Internet to be such a hotbed for innovation. If your small business or startup brings a new service online, the cable/telecom companies should deliver it just like they'd deliver content from a corporate behemoth like Google or NBC.

The principle is what gives every startup the same chance to reach customers and users as any existing company. Simply, without Net Neutrality, startups and small business will be subject to discrimination based on a pay-to-play Internet, and the open Internet and the economic growth it has represented will be at risk.

What's the regulatory context?

On May 15, 2014, the Federal Communications Commission proposed rules that would permit Internet service providers "substantial room" for "discrimination" online, undermining the Internet's founding principle and limiting equal market access for startups, small businesses, and individuals. The FCC made this proposal after the FCC lost its second major court decision regarding open Internet rules. Both times, the FCC relying on jurisdiction that could not support nondiscrimination rules.

How would the Internet change?

Increasingly, we use the Internet not just for social media, news, booking travel, and buying books, but also for fitness and health, payments, education, urban transportation, business logistics, national security, and everything else. Changing the Internet would have a huge impact on multiple industries.

Under the proposed rules, cable and phone giants like AT&T, Comcast, and Verizon would be able to create a two-tiered Internet, with slow lanes (for most of us) and fast lanes (for wealthy corporations that are willing pay fees in exchange for fast service). They would be able to strike “exclusive” deals for priority on their networks, picking winners and losers in different industries based on contracts not on consumer demand. This would impact the vast majority of web companies—not just the largest companies that use the most bandwidth.

What does the public think?

More than **4 million people** have already spoken out in support of an open Internet— more than have ever weighed in on an issue in front of the FCC — *and upwards of 99% of commenters are on the same side!* In favor. Several hundred companies sent a joint letter in favor of nondiscrimination and no access fees or paid prioritization, as did over 100 venture capitalists and dozens of nonprofit and advocacy organizations. Private sector support for the FCC Chairman is almost exclusively from the cable and phone companies, particularly AT&T, Verizon, and Comcast.

More Specific Legal FAQs and Rebuttals

Claim: The FCC’s legal authority in Section 706 is enough to preserve an open Internet. There is no need for the FCC to pursue rules using its stronger authority in Title II.

Reality: A federal court already clearly rejected this argument, so it is clearly wrong. In January 2014, the DC Circuit court struck down the FCC’s 2010 Net Neutrality rules, which were grounded in Section 706. The court explained that unless it relies on Title II, the FCC must permit cable and phone companies to have “substantial room” for “discrimination” to make special deals with different websites, online services and apps. That includes the ability to charge websites for paid prioritization. Discrimination is the rule, not the exception, under 706. If the FCC uses Section 706 again, it has to authorize discrimination and access fees. The FCC has already lost twice in court on this path. Using Section 706 again will make it lose a *third* time.

Claim: The FCC is an independent agency and Congress has no impact.

Reality: The FCC is independent of the White House, but the agency is a creation of Congress. With enough votes, Congress can overrule an agency's rules, so the FCC needs some support from lawmakers. Congress can also impact the FCC's actions in advance with oversight hearings and threats to the agency's funding.

Claim: The FCC has no authority to act on net neutrality after a court decision in January. Congress has to pass new legislation.

Reality: The court decision made it clear that the FCC has the authority to adopt open Internet rules so long as it adopts them under its existing authority, which is in Title II of the Communications Act. Additional legislation is not needed. Title II is still the law today, and it's still just as valid and as necessary as it was when Congress wrote it. The FCC should follow the law, not keep looking for a way around it.

Claim: Common-carrier regulation in Title II was designed for monopoly-era telephone companies and applying it to modern broadband companies would be a poor fit, creating unnecessary new costs.

Reality: Title II currently applies to a variety of deregulated and competitive telecom services like mobile phone, rural broadband, and data connections for large business. Providers on all of these industries have thrived under this "light touch" Title II model. The wireless industry alone had nearly $200 billion in revenue in 2013 alone, the majority of it for Title II services. Wireless voice remains a Title II service, and it's largely deregulated except we make sure that wireless providers don't block our conversations or prioritize traffic to favored partners.

Claim: Title II would give states too much power over broadband Internet access, and would lead to state-by-state regulation of broadband service and prices.

Reality: No one is talking about rate regulation for broadband. Think of wireless voice again. Wireless is not subject to state rate regulations. The same framework applies to business broadband services, which are often Title II services but not regulated at the state level. The FCC has the power, under Title

II laws like Section 253 and under Section 332 of the Communications Act, to preempt state agency regulations on interstate services like broadband. There's a special irony to the notion that somehow Section 706 will keep the states out of it. Section 706 itself actually *gives* authority to state agencies (right along with the FCC) the power to use "price cap regulation," so price regulation is more likely under Section 706.

Claim: Even if the FCC pursued Title II, its rule would apply only to the "last mile," meaning that it would fail to prevent "tolls" at interconnection points with ISPs' local networks.

Reality: Title II empowers the FCC to address charges that carriers make "in connection with" the service offered to the public. The first and most important sections in Title II (like Sections 201, 202, and 251) also give the FCC oversight of how telecom providers "establish physical connections with other carriers." These laws prevent discrimination "in facilities," and require carriers to connect their networks with other carriers. So the FCC has clear power to prevent abuses at interconnection points.

Claim: Classification of the Internet as an "information service" not subject to Title II led to substantial broadband infrastructure investment by avoiding regulatory burdens and uncertainty. Reclassification could slow the pace of future broadband investment, harming consumers.

Reality: Both phone and cable companies had much higher investment rates before the FCC declared their broadband services to be information services. Phone company investments in broadband were 55% higher, and cable's investments in networks were 250% higher. Despite the alarmist rhetoric from phone and cable lobbyists, the reality is that market factors like competition and access to capital – not regulatory classification -- are the key drivers of investment. Cable and phone executives routinely convey the facts to stock analysts and investors, telling Wall Street that regulatory classification decisions won't drive their future investment decisions. (For more, see pages 90-122 of Free Press's excellent analysis.) Their lobbyists tell a different story because they want to influence public policy.

Claim: There have been few, if any, instances of ISPs actually implementing any form of paid prioritization, so reclassification is a solution in search of a problem.

Reality: During Verizon's lawsuit against the FCC's previous net neutrality rules, the company's lawyer stated on at least five separate occasions a desire to violate the 2010 rules. She said: "I'm authorized to state from my client today that but for these rules we would be exploring those types of arrangements."

So while it's no surprise that companies behaved while the rules were still in place, they've promised to start charging new tolls as soon as they can.

The carriers can also engage in other types of discrimination besides speeding up some traffic in the last mile of the network. For three years, Comcast interfered with popular background peer-to-peer technologies, until it was caught and sanctioned for doing this. Mobile carriers blocked Google's mobile payments option; while AT&T contracted with Apple to limit Skype on the iPhone for years, did the same thing with Google Voice, and crippled Apple's FaceTime when that video calling app first became available on mobile networks. Verizon interferes with tethering apps that let you use your phone as a WiFi hotspot for laptops and tablets. And for two years, Comcast has been trying to prioritize its own video service on the Microsoft Xbox platform over other video services like Netflix and Hulu.

European ISPs also demonstrate what happens without net neutrality, as many national markets show considerable discrimination against online voice services. Meanwhile, even though it's been based on a patchwork of different legal approaches, the US has kept at last some net neutrality protections in place over the last decade through policy statement s, complaints, rulemakings, merger conditions, and spectrum auction conditions. See Marvin Ammori's posts on violations and on FCC actions.

Claim: The FCC cannot even ban paid prioritization deals under Title II. Title II allows for different rates and types of service, as long as these differences are not "unjust or unreasonable" and as long as they are offered to all comers.

Reality: Under Title II, the FCC can declare that certain practices and kinds of discrimination are inherently unreasonable. For example, the FCC could declare that discrimination based on content or application is inherently unjust and unreasonable discrimination. And it could declare that imposing tolls for access and priority are inherently unreasonable practices. (These powers reside in Sections 201 & 202 in Title II; precedents include the FCC's historic *Carterfone* decision.)

Claim: Congress should be responsible for making any determination on reclassification in the context of an update to the Telecommunications Act. The FCC should not act without specific statutory authority, as the courts have acted on multiple occasions to strike down the agency's attempts to do so.

Reality: The FCC has been struck down precisely because it strayed away from the law. The FCC left Title II behind, and that's why it lost. In 1996, Congress provided the FCC with specific statutory authority to regulate telecommunications services under Title II. The legislative history clearly demonstrates that Congress was aware of the Internet and that it wanted to ensure the FCC had adequate authority to promote broadband competition and protect consumers from discrimination, just as the agency has done with every telecommunications platform before broadband. The FCC clearly has the power to declare broadband access a Title II service, according to the Supreme Court in the Brand X decision.

Claim: Transit and peering with phone and cable companies should operate outside of net neutrality regulation.

Reality: Advocates are not suggesting regulation of true transit or peering arrangements, which mostly take place in a competitive market. But the FCC can and should act when phone and cable companies have what the law calls a "terminating access monopoly" over their own subscribers. The kind of control that cable and phone companies have means that online services and applications cannot reach consumers without going through these ISP gatekeepers. The ISPs can extract tolls, and they can discriminate both inside of their networks or at the interconnection points that open into those networks. It doesn't matter to the app maker or to the broadband user where this discrimination takes place: it's still a problem. Every major FCC order concerning the open Internet has discussed the importance of guaranteeing an interconnected Internet too. See Ammori post.

Claim: Fee-based Internet backbone services (i.e., transit and peering) and Content Delivery Networks (also called "CDNs") demonstrate both that the Internet is not currently neutral and that this lack of neutrality is not a bad thing.

Reality: CDNs are different from discrimination and prioritization by a terminating access monopoly like a cable or phone company's last-mile broadband network. CDNs simply move traffic closer to the ultimate end-user to make delivering and storing that data more efficient. They do *not* block or degrade other people's traffic in order to prioritize their own. On the hand, prioritization of data in the last mile is a zero-sum game: you can't have fast lanes without slowing someone else's traffic down. Transit and peering are also available in a competitive market. CDNs are at the edge of the last-mile network. Just as any user can make her connection feel faster by buying a faster computer to attach to the edge of the network, any user can take advantage of CDNs -- but they're not a fast lane on the network that slows other traffic down. Applications can also pay CDNs that attach to the network. In fact, due to competition, CDNs are inexpensive for startups, and some are even free. Cable and telecom companies also can and do provide CDNs. But in order for a phone or cable company to be able to charge for priority," it would need to ensure congestion either at the interconnection points or inside of its network.

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Claim: Antitrust law already provides legal authority for the FCC and/or FTC to prevent anti-competitive behavior, so reclassification is unnecessary.

Reality: Antitrust law is very poorly suited to ensure market access online. First, we need an open Internet for freedom of expression and not just freedom of commerce, and antitrust is focused purely on economic concerns. Second, antitrust law injects uncertainty and high costs, as we cannot expect startups to go through full-fledged antitrust litigation just to get online and reach customers. Antitrust law uses a vague “rule of reason” standard, lasts for years, and costs millions of dollars in legal and expert witnesses fees. Startups can’t go through that kind of process just to get the same access to the network that their larger competitors already have. Finally, telecommunications law has long required nondiscriminatory access to the network in light of the peculiar bottleneck that the network operators control, because society benefits when all of us have access to the network. An antitrust model would harm free speech and devastate the vibrant startup Internet ecosystem.

Claim: Any FCC attempt at reclassification will result in repeated lawsuits from ISPs that will stall the process and paralyze the agency.

Reality: Since 2013, the FCC has participated in more than three dozen lawsuits over its decisions. And the last time the FCC passed Net Neutrality rules relying on Section 706, Verizon challenged them in court forcing the FCC to go back to the drawing board. The same thing happened when the FCC punished Comcast for online discrimination in 2008. The bottom line is that unless they’re allowed to discriminate and prioritize what they want, the phone and cable companies will sue the FCC. They always sue. The claim is that we should throw in the towel rather than go to court, but an open Internet is worth fighting for. And the choice in front of the FCC is clear: it can follow the law and use the strong authority it has under Title II to protect the open Internet; or it can try to avoid the law again and lose in court for a third time on its weak and compromised legal theories.