

Media & *Democracy*

**TESTIMONY OF HON. MICHAEL J. COPPS
SENATE JUDICIARY COMMITTEE FIELD HEARING
“PRESERVING AN OPEN INTERNET: RULES TO PROMOTE COMPETITION
AND PROTECT MAIN STREET CONSUMERS”
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Thank you, Chairman Leahy, for the invitation to address this hearing on the crucial issue of how to guarantee an Open Internet. Traveling outside of the Washington, D.C. Beltway to hear from citizens who must live with the policies those of us in Washington create is essential. I made it my priority to do that as a Commissioner at the Federal Communications Commission, I wish the present FCC would do the same on this issue, and I especially commend you for doing so as Chairman of the Judiciary Committee. I would also like to recognize your leadership on keeping the Internet Open by introducing legislation to prevent paid-prioritization of online content.

More and more people now understand the Internet to be the most opportunity-creating tool of our time. It is, increasingly, the door to jobs, education, healthcare, equal opportunity, and to the news and information we need to sustain our civic dialogue. But the question now is: opportunity for whom? Is the Net going to be the tool of the many that helps us all live better—or will it become the playground of the privileged few that only widens the many divides that are creating a stratified and unequal America? Are we heading toward an online future with fast lanes for the 1% and slow lanes for the 99%?

Well, it's decision time. Now. The Federal Communications Commission is considering rules that would allow giant Internet Service Providers (ISPs) like Comcast, Verizon and AT&T to create fast lanes for their business partners and friends who can afford to pay what will inevitably be very heavy freight, while start-ups, innovators, and

potential competitors are priced out of the express lane. The fate of the Internet will be decided in the next few months, so this is the time for concerned citizens to speak out.

When gatekeeper control partitions the Internet, everyone other than the gatekeeper suffers. Consider what a tremendous engine the Internet can be for small business growth; you know about that right here in Vermont. Thanks to the Open Internet, consumers across the country can purchase the delicious homemade jams and jellies that Potlicker Kitchen sells online. Expensive fast lanes for the few could ruin the entrepreneurial opportunity Potlicker has created for itself. Extend that across the country and you begin to see the enormous economic opportunity costs gatekeeping entails. The same gatekeeping forces will be able to throttle innovation in other areas – by for example, foreclosing new developments in distance learning that would grant rural schools in Vermont’s Northeast Kingdom access to state of the art lectures from the University here in Burlington. We can’t build thousands of needed new businesses, we can’t have top-notch education for our kids, we can’t get America out of the economic rut it is in, when the one tool that can help make it all happen is controlled by a handful of communications and media giants whose only concern is the bottom line on the company’s quarterly report.

How did we get here? For openers, public policy has too often worked against the Internet. First, we witnessed years of telecommunications and media consolidation wherein a few giant companies gobbled up small competitors and built monopoly markets across the nation. They wielded armies of lobbyists and wheelbarrows filled with money to win government approval of these mergers and acquisitions. Second, the FCC consciously decided against meaningful public oversight of broadband and the Internet. In one of the strangest decisions ever made by a federal agency, the Commission decided over a decade ago that the broadband infrastructure on which the Internet rides wasn’t telecommunications at all and was therefore outside the consumer protection and common carriage requirements that are integral parts of the traditional

telephone service we grew up with. Those protections were part of Title II of the Telecommunications Act. ***That's where broadband telecommunications belong, too. And until the FCC puts them there, clearly and strongly, we are not going to have an Open Internet.***

Which is why the FCC's tentative plan to allow paid prioritization on "commercially reasonable" terms, provided a "minimum level of service" is so problematic. "Commercially reasonable" is an inherently subjective standard, and invites years of litigation between parties, a process which, even in the best case, would always favor incumbents with legal resources over upstarts. There are many legal reasons to fear that this approach would be thrown out just as the 2010 Order was. Many have questioned the legal viability of any Title 1 proposal – a troubling portent, since incumbent providers will surely litigate any weak plan. So we could very well find ourselves debating these issues again in another 3 or 4 years.

Additionally, the Commission's proposed minimum level of service standard is impossible to quantify. How fast is "minimum"? How would an edge provider demonstrate that its service is too slow to satisfy the minimum level of service standard? A minimum level of service for all consumers and edge providers requesting service is arguably an impermissible common carrier requirement that cannot be imposed under Title I. Just as worrying are the economic impacts – the years of litigating to resolve the legal issues will deny entrepreneurs the regulatory certainty they need to invest and innovate. But direst of all are the community and social consequences. We must not place the 21st century town square of democracy on so shoddy a foundation.

I understand the appeal of the Commission's plan – problematic as it is, the politics may appear easier at first blush; the path of least resistance often seems best in the short term. But history shows that the well-intentioned compromise hurts the public interest – that is real people – in the end.

Returning to the issue of merger madness, consider the patchwork of regulation-by-acquisition we now have. Consider how, in 2011, the Commission approved Comcast's takeover of NBC over my lone dissent. It was the marriage of content and carriage, medium and message, broadcast and broadband. Rather than stand up to industry, the Commission accepted Comcast's weak "voluntary concessions" – the centerpiece was a few years of net neutrality protection – as enough to shoehorn the merger into a good deal for consumers. We now have a patchwork of regulation by acquisition. Comcast consumers have weak net neutrality protections and others have none at all. Note, too, that the monopolists behind each of the major mergers currently under discussion has generously offered to extend the weak 2010 proposal to their users, if only we grant them ever more gatekeeper control over our informational ecosystem. Internet freedom is not a matter of *noblesse oblige*, it's a fundamental right of all broadband users.

Another seemingly positive, though ultimately problematic proposal comes from T-Mobile, which recently announced that some music apps would not count against its monthly data threshold. As a result, users would experience no throttling while using a specific set of popular music apps. Eventually, according to press reports, consumers will be able to vote for their favorite apps – those with a critical mass win exemption from throttling. Who doesn't like the sound of that?

And yet, this is a consumer-unfriendly development that undermines the fundamental Open Internet principle of non-discrimination. However well-intentioned, this privileges existing applications with a large installed base over new market entrants. Similarly, it privileges popular over alternative or minority interests. So while market leader Pandora benefits, the independent station WEQX from Manchester will never be so popular as to reap the benefits of zero-rated data for its streaming application.

Title II classification is the prerequisite of an Open Internet. It is the essential first step. There is no clever new way to get this done. After properly classifying

broadband, we must go on to deal with other challenges to the Open Internet, such as the interconnection and peering arrangements that determine how content accesses and gets distributed across the Net. And, of course, we must find our way back to a more competitive broadband environment by saying “No!” to the endless torrent of mergers and acquisitions that is distorting not just our communications, but our democracy. Additionally, we need to preempt nearly 20 state laws that limit or prohibit communities from building their own broadband instead of relying on ISPs that cherry-pick the country deciding where it profits them to build or not build. If the big guys are not going to build, why let them foreclose communities from building their own broadband? This is one reason, among several, why your country and mine has gone from broadband leader 15 years ago to broadband laggard today—Number 15 in the world according to the OECD, and far worse in other respected rankings when it comes to ubiquity of service, speed, and the prices consumers pay. And now these telecom titans are proposing more mergers to further stifle competition, ration their broadband, extract monopoly rents from consumers, and exacerbate gatekeeper control.

In the end, this all comes back to democracy. Free expression and democratic engagement suffer in a gated Internet. Consigning alternative, non-profit, and dissenting voices to the slow lane makes it harder for users to access diverse kinds of information. Moreover, since we now use broadband to both consume and produce, paid-prioritization schemes hinder the ability of citizens to speak out and truly have their voices heard. An Internet controlled and managed for the benefit of the “haves” discriminates against our rights not just as consumers but, more importantly, as citizens. Allowing powerful ISPs or giant Internet companies to control what we see and share on the Net is inimical to the health of our nation. If an ISP can slow down or block those sites who refuse to play the game, if they can decide that some good cause or advocacy group they disagree with can be voted off the Net, then we have starved the nourishing potential of this technology and truncated the rights of citizens to share in a

communications revolution that should be more about We, the People than it is about the privileged few.

Yes, I feel strongly about this. It is why I am crisscrossing the country on behalf of Common Cause and our allies in the public interest community to encourage citizens to speak up now to demand that the FCC ensure real Internet freedom. Millions have already signed on, but millions more are needed to win this battle. Whose Internet is it anyway? And whose democracy is it?

Thank you, Mr. Chairman, and I look forward to your comments and questions.