

Clarifying the No-Throttling Rule

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The new Open Internet Order needs to clearly prohibit ISPs from speeding up and slowing down applications and classes of applications.

The FCC proposes to restore the 2015 no-throttling rule, which prohibits ISPs from “impair[ing] or degrad[ing]” apps or classes of apps, subject to reasonable network management.²

The proposed no-throttling rule clearly prohibits ISPs from slowing down apps or classes of apps.³ That’s important. It prohibits ISPs from distorting competition and interfering with user choice by degrading disfavored apps or kinds of apps.

ISPs may not slow down the online services of security camera services, giving the ISP’s own home security services an advantage. ISPs may not limit the amount of bandwidth available to online video services, while allowing all other apps and services to use all available bandwidth, either. We should be free to choose how we use our data, not our ISPs.

Neither the 2015 no-throttling rule nor the proposed no-throttling explicitly prohibited ISPs from speeding up an application or class of applications.⁴

However, the 2015 Open Internet Order implicitly prohibited ISPs from favoring apps or classes of apps over others, and the FCC should clarify that its proposed no-throttling rule prohibits ISPs from speeding up *and* slowing down applications and classes of applications.

Clarifying this in the Order is critically important.

Mobile ISPs have been testing 5G fast lanes for certain kinds of apps. These 5G fast lanes use a 5G technology called network slicing to provide preferential treatment to the apps in the fast lane. For example, AT&T has tested 5G fast lanes for online gaming. T-Mobile has tested 5G fast lanes for video conferencing, and says it wants to pick other kinds of apps to get this treatment.

Even if the FCC believes the proposed no-throttling rule prohibits ISPs from speeding up apps or classes of apps, the lack of an explicit ban means mobile ISPs could exploit the rule’s ambiguity to introduce 5G fast lanes for certain kinds of apps, argue it’s allowed, and essentially dare the FCC to enforce.

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² 2023 Open Internet Notice of Proposed Rulemaking (“2023 Open Internet NPRM”), paras. 154-155. The text of the 2015 no-throttling rule and the proposed no-throttling rule is identical. See 2015 Open Internet Order, Appendix A, § 8.7 (“**No-Throttling**. A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall **not impair or degrade** lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.” Emphasis added); 2023 NPRM, Appendix A, § 8.2(c) (same).

³ 2023 Open Internet Notice of Proposed Rulemaking (“2023 Open Internet NPRM”), paras. 154-155.

⁴ See the text of the rule in Fn. 2 above.

For example, T-Mobile could create a new 5G home internet plan with Netflix and Max in the fast lane, claiming it is “optimized for streaming video.” Verizon could speed up YouTube and TikTok, marketing the plan to teenagers, while all other video, including other social video sites, buffers.

That might sound innocuous, but these plans distort competition and put ISPs, rather than users, in charge of what’s important and should get preferential treatment. As we saw with widespread zero-rating plans in Europe – another way of favoring some apps over others – these kinds of ISP-run “plans” almost always benefit the incumbents, even when ISPs claim the plan is open to all apps in a category.⁵

The lack of a clear prohibition would force the FCC to litigate the issue, a fraught and expensive process that can take years to resolve administratively and in the courts. By contrast, clarifying now that the no-throttling rule prohibits ISPs from speeding up or otherwise favoring apps or classes of apps would provide certainty to the market and keep enforcement costs low.

The 2015 no-throttling rule implicitly prohibited ISPs from speeding up or otherwise favoring apps or classes of apps.

While the text of the 2015 no-throttling rule as codified in 47 C.F.R. Part 8 only included the terms “impair” and “degrade”, the title of the rule, the text, the logic, and the goals the 2015 Open Internet Order all suggest that the prohibition was broader and prohibited ISPs from treating apps differently in positive and negative ways.

Prohibiting ISPs from picking winners and losers by putting disfavored apps in a slow lane or favored apps in a fast lane is at the heart of net neutrality. This is not controversial: President Obama’s 2014 net neutrality proposal and 2015 net neutrality draft bills by leading Republicans in the House and in the Senate, as well as subsequent net neutrality bills introduced by Congressional Republicans, all included no-throttling rules that prohibited ISPs from speeding up and slowing down apps, and that’s how FCC Commissioners who voted for the 2015 Order, participants in the proceeding, and the public understood the no-throttling rule in the 2015 Order. This understanding is consistent with the non-discrimination rule in the FCC’s 2010 Open Internet Order, which applied to positive and negative differential treatment of traffic.

First, the title of the rule is “No Throttling.” In the net neutrality context, the term “throttling” is generally understood to encompass both positive and negative forms of differential treatment.

This is not controversial. During the FCC’s 2014/2015 Open Internet Proceeding, net neutrality proposals by President Obama and leading Republicans in Congress used the term this way.

In November 2014, President Obama published a statement calling for the FCC to adopt net neutrality protections based on Title II of the Communications Act, which was also filed with the FCC:

“The rules I am asking for are simple, common-sense steps that reflect the Internet you and I use every day, and that some ISPs already observe. These bright-line rules include: ...

No throttling. Nor should ISPs be able to intentionally **slow down** some content or **speed up**

⁵ van Schewick, 2022, Facebook, Google & Big Telecoms Want to Keep Violating Net Neutrality in Europe. Regulators Should Stop Them, Section “Discriminatory Zero-Rating Cements the Market Power of Dominant Platforms,” <https://cyberlaw.stanford.edu/blog/2022/05/facebook-google-big-telecoms-want-keep-violating-net-neutrality-europe-regulators>.

others — through a process often called “**throttling**” — based on the type of service or your ISP’s preferences.”⁶

In January 2015, leading Congressional Republicans in the Senate and the House – Senator Thune (then-Chair of the Senate Commerce Committee), Representative Upton (then-Chair of the House Energy and Commerce Committee), and Representative Walden (then-Chair of the House Energy and Commerce Subcommittee on Communications and Technology) – published a neutrality discussion draft intended to stave off the adoption of the 2015 Open Internet Order. The discussion draft included the following no-throttling rule:

An ISP “may **not throttle** lawful traffic by selectively **slowing, speeding, degrading, or enhancing** Internet traffic based on source, destination, or content, subject to reasonable network management.”⁷

Second, the text of the 2015 Order suggests that the Order shared this understanding of the term “throttling” as encompassing both positive and negative forms of differential treatment.

The text of the order clarified that “impair” and “degrade” are only some examples of practices included in the prohibition, but not the only ones.⁸

The footnote accompanying these examples clarified that “the **term ‘throttling’** is not limited to the technique of slowing down or delaying Internet packets, but **more broadly refers to methods that can be used to differentiate, or ‘shape’ Internet traffic.**”⁹ In line with this understanding, the definition of paid prioritization in the 2015 Open Internet Rules used the term “**traffic shaping**” as one of several examples of **preferential traffic management techniques that are used “to directly or indirectly favor some traffic over others,”** along with prioritization and resource reservation.¹⁰

Third, the interpretation that the 2015 no-throttling rule implicitly prohibited ISPs from speeding up certain apps or types of apps directly follows from the logic of the Order.

The 2015 Open Internet Order was based on the understanding that prioritizing some favored apps effectively degrades the performance of the apps that are not prioritized, which violates the no-throttling rule’s prohibition on “degrad[ing]” apps or classes of apps.

As the FCC 2015 Order’s discussion of paid prioritization explained, prioritization is the flipside of degradation:

⁶ Emphasis added, <https://obamawhitehouse.archives.gov/net-neutrality>.

⁷ Emphasis added, House Draft Bill, Sec. 1, §13(a)(3), <https://cyberlaw.stanford.edu/sites/default/files/publication/files/RepublicanNetworkNeutralityBill-BILLS-114hr-PIH-OpenInternet.pdf>; Senate Draft Bill, Sec. 1, §13(1)(3).

⁸ 2015 Open Internet Order, para. 120 (“We interpret this prohibition to **include, for example**, any conduct by a broadband Internet access service provider that impairs, degrades, slows down, or renders effectively unusable particular content, services, applications, or devices, that is not reasonable network management.”)

⁹ Emphasis added, 2015 Open Internet Order, Fn. 273 to para. 120 (“... *see also* Waxman Oct. 3, 2014 *Ex Parte* Letter at 10, n.32 (“The term ‘throttling’ is not limited to the technique of slowing down or delaying Internet packets, but more broadly refers to methods that can be used to differentiate, or ‘shape’ Internet traffic.”).

¹⁰ 2015 Open Internet Rules, Appendix A, §8.9(b) (“Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.”)

“As several commenters observe, allowing for the purchase of priority treatment can lead to degraded performance—in the form of higher latency, increased risk of packet loss, or, in aggregate, lower bandwidth—for traffic that is not covered by such an arrangement.”¹¹

The accompanying footnote cited several commenters in support of this insight:

“Prioritization is inherently a zero-sum practice, and inherently creates fast and slow lanes and prevents a level playing field.”¹² (Mozilla Comments)

“At a moment in time, there is a fixed amount of bandwidth available to all applications, content, etc. on a given network. If one application has paid for more of that bandwidth (and this is how the priority is achieved) then there is less ‘best efforts’ bandwidth remaining for all other applications and content.”¹³ (Sandvine Comments)

As these citations to the 2010 record make clear, nothing in this analysis depends on the fact that someone pays for the preferential treatment.

Thus, while the above analysis occurred in the context of the no-paid prioritization rule, the analysis directly applies to prioritization that does not involve payment from content providers as well.

Fourth, understanding the 2015 no-throttling rule as prohibiting both positive and negative discrimination is required by the goals of the 2015 Open Internet Order.

Open Internet protections prohibit ISPs from distorting competition and interfering with user choice by picking winners and losers online. This idea is at the core of net neutrality.

In this respect, speeding up some applications but not others, is just as harmful as slowing down some applications but not others.¹⁴

An ISP can distort competition and interfere with user choice by slowing down the disfavored apps or by speeding up the favored apps. Putting Google Meet in a fast lane, while leaving Microsoft Teams in the slow lane directly distorts competition among video conferencing apps. Offering a 5G fast lane only to online games, but not to online telephony apps, makes it harder for Signal, WhatsApp, or Vonage to compete with carriers’ traditional telephony services.

In short, ISPs can pick winners and losers by putting disfavored apps in a slow lane or favored apps in a fast lane.

Thus, not explicitly banning ISPs from speeding up websites, applications or services creates a potential loophole that bypasses the ban on slowing down websites, applications or services.

This is not controversial. Net neutrality proponents and observers routinely define net neutrality as prohibiting both the speeding up and slowing down of content:

"What is Net Neutrality? ... Net Neutrality is the basic principle that prohibits internet service providers like AT&T, Comcast and Verizon from **speeding up, slowing down** or blocking any content, applications or websites you want to use. Net Neutrality is the way that the internet has

¹¹ 2015 Open Internet Order, para. 126.

¹² 2015 Open Internet Order, Fn. 287 to para. 126, citing Mozilla Comments at 20; Mozilla Reply at 15.

¹³ 2015 Open Internet Order, Fn. 287 to para. 126, citing Sandvine Comments at 9.

¹⁴ 2015 Open Internet Order, para. 126.

always worked.”¹⁵ (Free Press)

“Network neutrality—the idea that Internet service providers (ISPs) should treat all data that travels over their networks fairly, **without improper discrimination in favor of particular apps**, sites or services—is a principle that must be upheld to protect the future of our open Internet.”¹⁶ (Electronic Frontier Foundation)

"Net neutrality definition. Net neutrality is the belief that an internet service provider, or ISP, should give all consumers fair and equal access to legal content and applications. Providers **should not favor some**, or block others and charge content providers for speedier delivery of their content on "fast lanes," and **deliberately slow down content** from content providers that compete with ISPs."¹⁷ (USA Today)

And just like the no-throttling rules in President Obama’s 2014 net neutrality proposal and leading Republicans’ 2015 net neutrality discussion draft bills, the no-throttling rules in subsequent Republican net neutrality draft bills continue to explicitly prohibit ISPs from speeding up and slowing down apps.

Here’s a draft bill introduced in 2019 by Representative Walden, then-Ranking Member of the House Energy and Commerce Committee, and co-sponsored by 19 Republicans:

An ISP “may not **throttle** lawful traffic by selectively **slowing, speeding, degrading, or enhancing** internet traffic based on source, destination, or content, subject to reasonable network management.”¹⁸

Here’s a draft bill by Rep. Coffman (R-Denver), introduced in 2018:

“**No throttling.** A broadband internet access service provider may not:
(1) **impair, degrade, slow down, speed up, or enhance** lawful internet traffic on the basis of internet content, application, source, destination, service, or use of a non-harmful device, or any particular class of content, application, source, destination, service, or non-harmful device, subject to reasonable network management.”¹⁹

Fifth, Commissioners who voted to adopt the 2015 Open Internet Order and participants in the debate understood the 2015 Order as prohibiting ISPs from speeding up and slowing apps and kinds of apps.

For example, Commissioner Clyburn’s statement accompanying the Order said:

“No Blocking, No Throttling, No Paid Prioritization. The item contains **strong, clear rules to ensure that all content, all applications and all bits are treated equally.** These are all essential

¹⁵ Free Press, Net Neutrality: What You Need to Know Now, <https://www.freepress.net/issues/free-open-internet/net-neutrality/net-neutrality-what-you-need-know-now>.

¹⁶ Electronic Frontier Foundation, Net Neutrality, <https://www.eff.org/issues/net-neutrality>.

¹⁷ Amritpal Kaur Sandhu-Longoria, 2023, As FCC chair weighs return, what to know about the internet rule, USA Today, <https://www.usatoday.com/story/money/2023/10/02/fcc-net-neutrality-rules-2023/70993060007/>

¹⁸ HR 1101, Section 1, Section 14(a)(3), <https://www.congress.gov/bill/116th-congress/house-bill/1101/text?s=1&r=98>.

¹⁹ HR 6393, Section 2, Section 801(b)(1), <https://www.congress.gov/bill/115th-congress/house-bill/6393>

to the free market and this is pro-competitive.”²⁰

Public interest group Common Cause, whose comments are cited seven times in the 2015 Order, described the no-throttling rule as “speeding or slowing content:”

“In 2015, the Federal Communications Commission (FCC) comprehensively codified net neutrality protections by using its authority under Title II of the Communications Act of 1934 to classify ISPs – like Comcast and AT&T – as common carriers. Under this approach, the FCC articulated three bright line rules that ISPs must adhere to: (1) no blocking content; (2) **no speeding or slowing content**; and (3) no engaging in paid prioritization schemes.”²¹

Sixth, this understanding is consistent with the non-discrimination rule in the FCC’s 2010 Open Internet Rules, which applied to positive and negative forms of differential treatment of traffic.

The non-discrimination rule codified in 47 C.F.R. Part 8 prohibited ISPs from “unreasonably discriminating in transmitting lawful traffic over a consumer’s broadband internet access service.”²² The text of the 2010 Order discussing the non-discrimination rule defined discrimination as “differential treatment”²³ and discussed both performance-enhancing and performance-reducing examples of practices that would or would not violate the rule.²⁴

Finally, interpreting the 2015 no-throttling rule as prohibiting only slow lanes, but not fast lanes, would directly contradict the public perception of the 2015 Order.

In 2015, the public clearly differentiated between fast lanes and paid fast lanes. The 2015 Open Internet Order discussed the Knight Foundation’s analysis of the comments,²⁵ which found three main themes, one of which was:

²⁰ FCC 2015 Open Internet Order, Statement of Commissioner Clyburn.

²¹ Emphasis added, <https://www.commoncause.org/our-work/media-and-democracy/net-neutrality/>.

²² 2010 Open Internet Order, Appendix A, § 8.7 (“No Unreasonable Discrimination. 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’s broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.”).

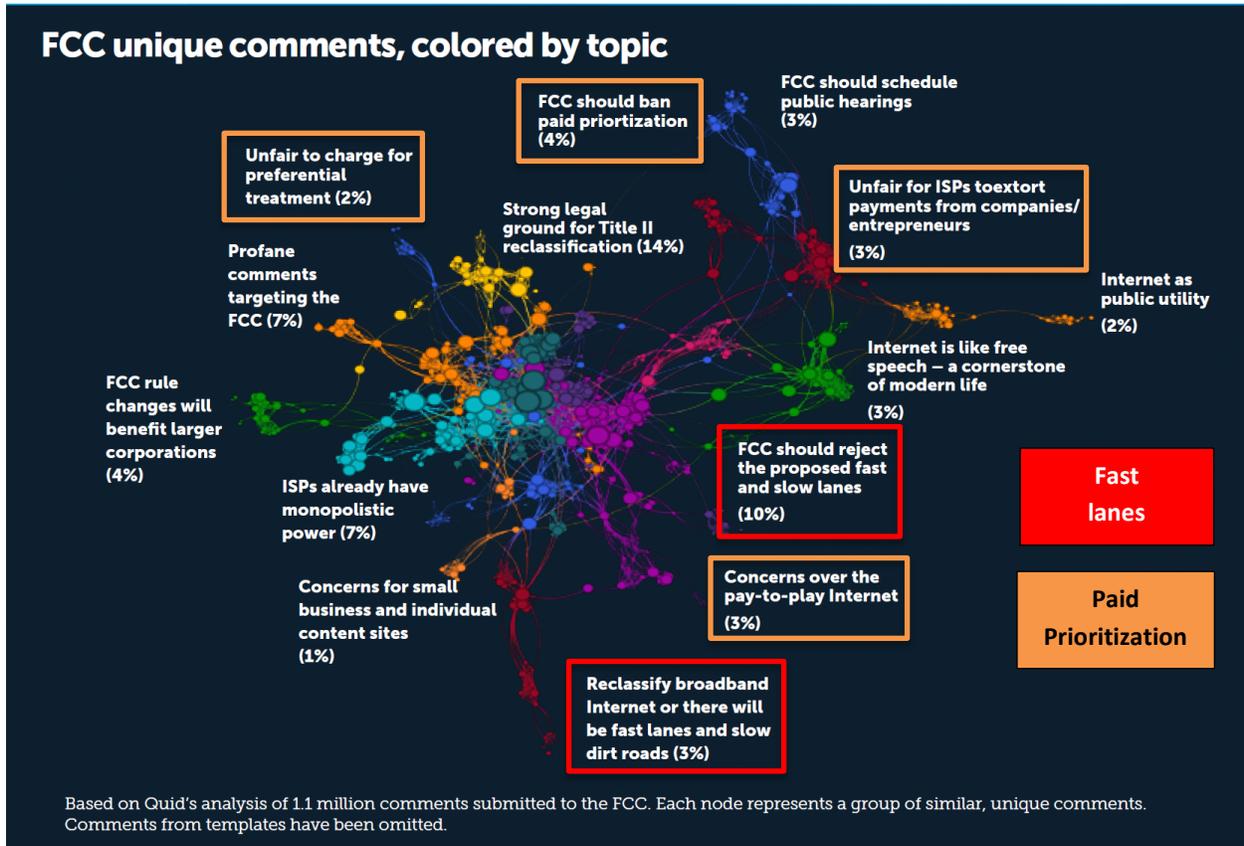
²³ 2010 Open Internet Order, paras. 70 (“*Transparency*. Differential treatment of traffic is more likely to be reasonable the more transparent to the end user that treatment is.”), 73 (“*Use-Agnostic Discrimination*. Differential treatment of traffic that does not discriminate among specific uses of the network or classes of uses is likely reasonable.”).

²⁴ See, e.g., 2010 Open Internet Order, paras. 71 (discussing performance-enhancing practices that would not violate the rule), 75 (discussing performance-reducing practices that would violate the rule), and 76 (discussing performance-enhancing practices that would violate the rule).

²⁵ 2015 Open Internet Order, para. 74 (“The public seized on these opportunities to comment, submitting an unprecedented 3.7 million comments by the close of the reply comment period on September 15, 2014, with more submissions arriving after that date. This record-setting level of public engagement reflects the vital nature of Internet openness and the importance of our getting the answer right in this proceeding. Quantitative analysis of the comment pool reveals a number of key insights. Comments regarding the continuing need for open Internet rules, their legal basis, and their substance formed the core of the overall body of comments. In particular, support for the reclassification of broadband Internet access under Title II, **opposition to fast lanes and paid prioritization**, and unease regarding the market power of broadband Internet access service providers **were themes frequently addressed by commenters.**”) (emphasis added).

“The FCC should reject the proposed fast and slow lanes on the Internet.”²⁶

Looking at the report’s diagramming of comment clusters, it’s clear that commenters opposed both fast lanes *and* paid prioritization, recognizing they weren’t the same thing. A full 13% of unique comments said fast lanes and slow lanes should be rejected, while concerns about paid prioritization were significant *but separate*.



If the FCC’s intent in issuing the 2024 Order is restoring the 2015 Open Internet Order’s protections, millions of people will be dumbfounded and outraged if ISPs start introducing fast lanes immediately after the Order gets voted on. That’s because everybody *knows* the 2015 Order banned fast lanes, which is why it was celebrated as a victory for internet users over the largest ISPs.

The FCC should clarify that its proposed no-throttling rule prohibits ISPs from speeding up *and* slowing down applications and classes of applications.

Doing so would ensure that ISPs cannot pick winners and losers by determining which apps and kinds of apps should be in a fast lane and save the FCC from having to go through the expensive and time-consuming process of litigating obvious net neutrality violations.

²⁶ Emphasis added. Knight Foundation, 2014, Decoding the Net Neutrality Debate, p. 13 (“The largest clusters of comments had the following [three] themes: ... The FCC should reject the proposed fast and slow lanes on the Internet.”), <https://knightfoundation.org/reports/decoding-net-neutrality-debate/>.

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**Unless covered by event organizers.*