

If It Isn't Broken, You're Not Looking Hard Enough: Net Neutrality and Its Impact on Minority Communities

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I. INTRODUCTION

A rose by any other name may smell as sweet, but the same is most certainly not true of Internet Service Providers under the authority of the Federal Communications Commission (FCC). In the FCC's garden of regulations, an entity's classification matters more than the substantive characteristics of said entity. By regulating Internet Service Providers (ISPs) under Title I of the Communications Act of 1934, the FCC initially forfeited its right to strongly regulate these entities, leading to a debate that has become one of the most hot-button issues to the American public: net neutrality.

When cogitating on net neutrality, many fail to consider all aspects of the debate, including the effect it has on minority communities. However, it is the unique struggles of these underrepresented communities that make FCC regulation of ISPs necessary. This Note will tackle the Net Neutrality debate by considering the disproportionately negative impact on minority groups that would result from ISPs' discriminatory behavior. While there may be no perfect solution, light must be shed on the unique challenges that minority groups face when dealing with Open Internet issues. There is a very real threat that Internet fast lanes can have a negative impact on the public in the long run, especially on these underrepresented minority communities.

The FCC is responsible for ensuring that telecommunications, cable, and broadcast companies continuously carry out the policies established by the Communications Act of 1934.¹ With the mission of promoting competition to "secure lower prices and higher quality services for American telecommunications consumers," the Telecommunications Act of 1996 ("1996 Act") gave the FCC both the responsibility and the means to ensure innovation and the continued deployment of new telecommunications technology.²

The Internet has rightfully been credited for the accelerated innovation that characterizes this generation, and this innovation must be protected as it continues to grow and contribute to the United States economy. Net neutrality is the general concept that ISPs should enable access to all content and applications equally, regardless of the source, without favoring or blocking particular online services or websites. Simply put, the company that connects you to the Internet should not be able to control what you do on the Internet or how you do it. The net neutrality

1. See 47 U.S.C. § 151 (2012).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, pmb1., 110 Stat. 56, 56; see 47 U.S.C. § 1302 (2012) (directing the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment").

policy debate must work to foster continued innovation and progress to the public as a whole, which includes our silenced communities and not just the loud majority.

Bringing broadband providers (ISPs) under the authority of the FCC via Title II regulation is a controversial yet necessary move to prevent a disproportionate negative impact on minority communities who have categorically been underrepresented in the media. The courts have confirmed that the FCC does not have authority to enforce strong net neutrality rules on ISPs as Title I entities. Because of this, protecting minority communities can only be adequately done by reclassifying ISPs as Title II entities.

Minority communities in the United States are categorically underrepresented in the media because of a disproportionately low number of opportunities and financial resources. The Internet is currently the primary means for minority communities to have their voices heard. Without an open Internet, their presence in both traditional and new Internet-based media will remain disproportionately underrepresented. Further, minority groups are often negatively stereotyped in the media, which furthers the negative impacts these particular groups face. Net neutrality ensures an open Internet for which minority groups can equally and fairly be heard.

Bringing ISPs under Title II regulations but only subjecting them to certain regulations (forbearance) will promote innovation and equality while also keeping the “open Internet” as open and unregulated as possible. This modified regulatory control over ISPs will also allow the FCC to ensure that minority communities do not suffer a disproportionately negative impact as their primary means of participating in the media will continue to be protected.

While the FCC has taken bold moves to regulate ISPs, the issue of zero-rating, or not charging users for using particular web-based applications, has not been fully addressed. Part II will discuss the path the FCC has taken through net neutrality while Part III of this Note will delve into the impact on minority communities as well as the validity of zero-rating as an option going forward.

II. BACKGROUND AND LEGAL HISTORY

A. *The FCC and the Development of Net Neutrality*

The Communications Act of 1934 put an end to the Federal Radio Commission and created the FCC to regulate interstate and foreign communication by wire or radio.³ The Communications Act of 1934 also

3. See Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.).

created title classifications, with Title II subjecting common carriers to stricter regulatory control under the FCC.⁴

The distinction between what was and was not regulated under Title II first came in 1980 with the *Computer II* regime.⁵ The Commission drew a line between “basic” services which purely involved the transmission of information and were subject to Title II common carrier regulations and “enhanced” services which involved the processing of said information and were not subject to Title II.⁶

The *Computer II* regime continued for more than twenty years until 1996, when the Communications Act underwent its biggest overhaul since its enactment with the passage of the Telecommunications Act of 1996.⁷ Congress designed the 1996 Act to open up the market and foster competition by removing unnecessary barriers to entry into the market.⁸ In removing these barriers, the 1996 Act was aimed at increasing competition and sparking innovation in a fast-paced and ever-changing field.⁹ Further, the 1996 Act defined telecommunication services as what was formerly “basic” services and defined information service providers as what was once known as “enhanced” services.¹⁰

With this newfound purpose, however, the FCC was faced with several important decisions that would have a deeper impact on its regulatory scheme than it could have ever imagined. The FCC also chose to codify its longstanding distinction between telecommunications service and information service.¹¹ In what many consider a game-changing decision, the FCC chose to classify broadband cable service (ISPs)¹² as an information service rather than a telecommunication service.¹³ This excused ISPs from the stricter regulatory control of Title II common carriers and instead

4. *See id.* §§ 201-21.

5. *See generally* Amendment of Section 64.702 of the Comm’n’s Rules & Regs. (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384 (1980).

6. *See id.* at paras. 5-7, 96-97.

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *see* Nicholas Economides, *The Telecommunications Act of 1996 and Its Impact*, ECONOMICS OF NETWORKS (Sept. 1998), <http://www.stern.nyu.edu/networks/telco96.html>.

8. Telecommunications Act § 101, 47 U.S.C. §§ 251-261 (2012).

9. Telecommunications Act pmbl.

10. 47 U.S.C. § 153(24), (50), (51), (53); *see* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 976-77 (2005).

11. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facils., *Declaratory Ruling*, 17 FCC Rcd 4798, para. 34 (2002); *see also* Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *Report and Order*, 20 FCC Rcd 14853, para. 13 (2005).

12. *Definition of: Broadband*, PC MAG, <http://www.pcmag.com/encyclopedia/term/38932/broadband> (last visited Jan. 24, 2016) (defining “broadband” as “high-speed transmission . . . [and] commonly refers to Internet access through a variety of high-speed networks, including cable”); *Definition of: ISP*, PC MAG, <http://www.pcmag.com/encyclopedia/term/45481/isp> (last visited Jan. 24, 2016) (defining “ISP,” an acronym for “Internet Service Provider,” as “an organization that provides access to the Internet”).

13. Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *supra* note 11, at para. 14.

subjected them to Title I regulation.¹⁴ This allowed for media cross-ownership, as Congress intended, as phone, cable, and internet providers converged.¹⁵ In bringing all of these providers together, some feel that power in the field was consolidated into fewer big players, leading to less innovation and undercutting the goals of the 1996 Act.¹⁶ However, it is important to note the opposite stance. With cable companies now providing phone services or companies like Verizon now offering new services that their competitors did not, competition in these fields increased, leading to innovative technologies and solutions in an ever-changing field.¹⁷

The Supreme Court upheld the FCC's decision not to regulate ISPs under Title II almost ten years later in *National Cable and Telecommunications Ass'n v. Brand X Internet Services*.¹⁸ The Court held that the FCC's intended purpose in its classification was to promote innovation and entry into the broadband market, which was best achieved by treating cable service providers differently because of the current market conditions.¹⁹ Brand X had argued that the FCC should classify broadband cable internet access as a common carrier, regulated under Title II, but the Court applied *Chevron* deference²⁰ to the Commission's decision.²¹ With the Supreme Court providing the final, definitive word on the matter, ISPs were able to evade the tighter restrictions of Title II regulation.

In 2005, the FCC then released an Internet Policy Statement, to "ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."²² The Statement adopted 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

14. *Id.* at para. 102.

15. Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 301-302, 110 Stat. 56, 114-18.

16. *Fighting Media Consolidation*, FREE PRESS, <http://www.freepress.net/media-consolidation> (last visited Jan. 13, 2016).

17. Larry Pressler, *Reflecting on Twenty Years under the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 52, 52-53 (2016).

18. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000-01 (2005) (holding that the FCC is entitled to change its mind in regards to cable Internet service treatment because the FCC provided a reasonable explanation for its actions).

19. *Id.* at 1001-02.

20. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

21. *Brand X*, 545 U.S. at 1003-05 (Breyer, J., concurring) (explaining that agency action is entitled to *Chevron* deference when Congress delegates the authority to fill any "statutory" gaps that may arise to the agency); *see also Chevron*, 467 U.S. at 843-44. This is important to keep in mind as the courts must also uphold any future decisions the FCC makes and grant it the same deference, making it hard for ISPs to win claims against the FCC should they disagree with net neutrality decisions made.

22. Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *Policy Statement*, 20 FCC Rcd 14986, para. 4 (2005).

their choice, . . . to run applications and use services of their choice, subject to the needs of law enforcement . . . , to connect their choice of legal devices that do not harm the network . . . , [and to promote] competition among network providers, application and service providers, and content providers.²³

In 2010, the District of Columbia Circuit confined the FCC to its previous decision yet again in *Comcast Corp. v. FCC*.²⁴ The FCC, claiming its authority from the Communications Act of 1934, attempted to condemn and censure Comcast for interfering with its subscribers' use of peer-to-peer software.²⁵ However, the District of Columbia Circuit held that the FCC could not extend their control over Comcast, because the FCC previously classified ISPs as information services, limiting the extent of regulations it could apply.²⁶ The Court explained that, while the FCC has authority to modify its regulations and *Chevron* deference will apply to its new interpretation of the Act, the FCC does not have the authority to go beyond its own classification and regulate Title I information service as if they are Title II common carriers.²⁷

In May 2010, Julius Genachowski, then chairman of the FCC, proposed a "third way" to reclassify Internet services as telecommunications services to bring them back under the regulatory control of the FCC.²⁸ The proposed reclassification would prohibit ISPs from discriminating against certain websites, users or applications while prohibiting the FCC from regulating the content and services that said sites provide.²⁹ This approach allowed the FCC to play its essential yet limited role in the development of broadband communications.³⁰

Opponents of this proposal, including large telecommunication companies like Comcast and Verizon, highlighted the contradictory nature of the FCC's justification.³¹ The FCC previously argued a completely opposite view to the Court when it originally chose to classify ISPs as Title I entities.³² These companies believe allowing the FCC to switch its views

23. *Id.* at para. 4.

24. *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

25. *Id.* Comcast chose to block BitTorrent on its network, which the FCC responded by opening an investigation of Comcast's practices after several groups, including Public Knowledge and Free Press, filed grievances. The FCC then ordered Comcast to stop discriminating against BitTorrent and Comcast appealed.

26. *Id.*

27. *Id.* (explaining that Commission authority to create and modify regulations within its statutory power does not then extend to authority to go beyond said regulations).

28. Edward Wyatt, *F.C.C. Proposes Rules on Internet Access*, N.Y. TIMES (May 6, 2010), <http://www.nytimes.com/2010/05/07/technology/07broadband.html>. This proposal also placed limits on the FCC's regulatory authority.

29. *Id.*

30. *See generally* Preserving the Open Internet, *Report and Order*, 25 FCC Rcd 17905 (2010) [hereinafter *2010 Order*].

31. Wyatt, *supra* note 28.

32. *Id.*

so easily would only lead to confusion and inhibit innovation in the future.³³ FCC Chairman Genachowski's proposal however, is fully permissible under the Court's ruling in *Brand X* as the Supreme Court ruled that the FCC has authority to modify its regulations as it sees best fit so long as it justifies the modification.³⁴

The FCC decided against the proposed regulations but claimed authority under Section 706 of the 1996 Act to issue the *2010 Open Internet Order* (2010 Order), which took effect in November 2011 and tackled the issue of net neutrality³⁵ head on.³⁶ In enacting the 2010 Order, the FCC continued its pursuit of an innovative and open forum for its users.

The 2010 Order created two classes of Internet access: fixed-line providers, which were subject to aggressive net neutrality regulations; and wireless networks, which were handled with a more lenient approach as their technical limitations constrained them.³⁷ Under the 2010 Order, both classes of Internet access are subject to the Transparency Clause, requiring disclosure of network management practices, as well as terms and conditions of services.³⁸ Both classes of Internet access are also subject to the No Blocking Clause with fixed-line providers subject to more restraints.³⁹ Lastly, only fixed-line providers were subject to the No Unreasonable Discrimination provision, which applies in the transmission of lawful network traffic.⁴⁰

The District of Columbia Circuit reeled in the FCC's authority to regulate Title I information services in *Verizon v. FCC*, in which Verizon pushed back against the FCC's attempt to again regulate ISPs with its 2010 Order.⁴¹ The Court found the FCC's anti-discrimination and anti-blocking rules to impose per se common carrier obligations to ISPs, which the Court already held were exempt from common carrier treatment.⁴² Losing the biggest battle yet in the fight for net neutrality, the FCC took a major hit

33. *Id.*

34. *Id.*; see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000-01 (2005).

35. See generally *A Timeline of Net Neutrality*, PUB. KNOWLEDGE, <http://whatisnetneutrality.org/timeline> (last visited Jan. 13, 2016).

36. 47 U.S.C. §1302(a) (2012) (authorizing the FCC to enact measures encouraging the deployment of broadband infrastructure, including the promulgation of rules governing ISPs treatment of Internet traffic); *2010 Order*, *supra* note 30, at para. 117.

37. *2010 Order*, *supra* note 30, at paras. 49, 93-96. For many, access to both fixed-line and wireless net services is simply not an option and this growing trend calls for the FCC to shift its focus on the arbitrary distinction to a means that will regulate the open Internet to keep it open.

38. *Id.* at app. A, § 8.3 (to be codified at 47 C.F.R. § 8.3).

39. *Id.* at app. A, § 8.5 (to be codified at 47 C.F.R. § 8.5).

40. *Id.* at app. A, § 8.7 (to be codified at 47 C.F.R. § 8.7).

41. See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

42. *Id.* at 657-59 (vacating the anti-discrimination and anti-blocking rules imposed on ISPs because the FCC treated them like Title II common carriers instead of Title I information services).

when the Court reaffirmed that the 2010 Order applied only to common carriers, which did not include ISPs.⁴³

B. After Extensive Debate, the FCC Enshrined Net Neutrality in the Open Internet Order

The FCC was left with minimal means to regulate ISPs under Title I and arguably needed to reconsider its classifications to regain a grip on net neutrality. Otherwise, many feared that large ISPs like Comcast and Verizon would be left to control the not-so-open Internet in the way that they deem fit.⁴⁴ While many argue that the FCC could impose some net neutrality rules without regulating under Title II, companies like Verizon have admitted that the FCC's regulations under the 2010 Order were the only thing preventing them from violating net neutrality principles in the past.⁴⁵ Meaning, without a leash to pull them back in, ISPs would push the boundaries as far as they could while technically still staying within the limits.

Many also fear that this will lead to the introduction of Internet fast lanes being sold to companies that can afford them, leaving smaller companies and start-ups in the dust of slow Internet speed.⁴⁶ By imposing this financial hurdle on smaller start-up companies with less means than large ISPs and large content companies, innovation will suffer.

Further, large content providers like Netflix that buy up these fast lanes from large ISPs will have to eventually pass on the financial burden to their users, meaning that consumers will be forced to pay more to get the same services they are getting now.⁴⁷ This may not mean as much for some users, but for those that already struggle to afford means to the Internet, this could have an exponentially detrimental effect.⁴⁸

Under its 2014 *Notice of Proposed Rulemaking*, the FCC sought to find authority under Section 706 of the 1996 Act to regulate ISPs.⁴⁹ The FCC also reconsidered Title II reclassification, but expressed hesitation to do so until recently.⁵⁰ With opposing sides pulling at different directions, the

43. *Id.* The Court only upheld the Transparency Clause as it pertained to ISPs under Title I.

44. Barbara van Schewick, *Is the Internet About To Get Sloooooow?*, CNN (Sept. 10, 2014, 11:23 AM ET), <http://www.cnn.com/2014/09/10/opinion/van-schewick-Internet-slowdown>.

45. *See Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (emphasis added) (citing Transcript of Oral Argument at 31, *Verizon*, 740 F.3d 623 (No. 11-1355)) (“[A]t oral argument, Verizon’s counsel announced that ‘but for [the Open Internet Order] rules [sic] we would be exploring [paid prioritization] arrangements.’”).

46. Van Schewick, *supra* note 44; *see also* Doug Gross, “Pay to Play” on the Web?: *Net Neutrality Explained*, CNN (Jan. 15, 2014, 7:17 PM ET), <http://www.cnn.com/2014/01/15/tech/web/net-neutrality-explained>.

47. Gross, *supra* note 46.

48. Van Schewick, *supra* note 44.

49. Protecting & Promoting the Open Internet, *Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, para. 142 (2014) [hereinafter *2014 Open Internet NPRM*].

50. *Id.*

FCC focused on the importance of an open Internet for all and made a decision that balances the demands of conglomerate ISPs with a wide spectrum of consumers.⁵¹

Added difficulty lies in the expansive range of consumers affected by the FCC's decisions.⁵² While some may be unaffected regardless of the FCC's recent decision, some populations, like minority communities, have a lot to lose. Without FCC intervention, the open and fair Internet that net neutrality promises could cease to exist and the reality of equal access to the Internet will come to an end.

On November 10, 2014, President Barack Obama took a clear stand on net neutrality, further pressuring the FCC to reclassify ISPs as Title II common carriers to regulate the large ISPs that threaten the continuing existence of an open and fair Internet.⁵³ Though the media has attempted to portray President Obama and FCC Chairman Tom Wheeler as adversaries in the net neutrality debate, the reality is that Chairman Wheeler's views seem to align more with the President's than not.⁵⁴ Despite the extraordinary complex and important nature of net neutrality, it is in the hands of the FCC alone to resolve.⁵⁵

C. In the Matter of Protecting and Promoting the Open Internet

On April 13, 2015, the FCC published its final rules on Net Neutrality, which took effect on June 12, 2015.⁵⁶ The FCC's *2015 Open*

51. See generally *2014 Open Internet NPRM*, *supra* note 49.

52. Gigi B. Sohn, *FCC Releases Open Internet Reply Comments to the Public*, FCC BLOG (Oct. 22, 2014, 4:07 PM), <https://www.fcc.gov/news-events/blog/2014/10/22/fcc-releases-open-internet-reply-comments-public>. The Commission eventually received nearly four million comments regarding the *2014 Open Internet NPRM*. Jon Sallet, *The Process of Governance: The FCC & the Open Internet Order*, FCC BLOG (Mar. 2, 2015, 3:22 PM), <https://www.fcc.gov/news-events/blog/2015/03/02/process-governance-fcc-open-internet-order>.

53. Ezra McHaber, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules*, WHITE HOUSE: BLOG (Nov. 10, 2014, 9:15 AM ET), <http://www.whitehouse.gov/blog/2014/11/09/president-obama-urges-fcc-implement-stronger-net-neutrality-rules>.

54. Tony Romm, *FCC's Wheeler in Step with Obama on Net Neutrality*, POLITICO (Jan. 7, 2015, 9:41 PM), <http://www.politico.com/story/2015/01/tom-wheeler-net-neutrality-114069.html>.

55. Administrative Procedure Act § 2, 5 U.S.C. § 551 (2012) (entitling congressionally created administrative agencies of the federal government to promulgate rules in regards to the Agency's expertise); see also 5 U.S.C. § 706 (2006). Section 706(1)(A) defines the scope of review to be used when evaluating agency decisions. An agency decision may only be overturned if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" by the reviewing court. An agency's action may not simply be overturned because the reviewing court, or even the President, disagrees with it. Instead, an agency's rule promulgation is given extreme deference. See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). It is therefore, fair to say that it is solely up to the FCC to resolve the issue of net neutrality as it sees best fit.

56. *Protecting and Promoting the Open Internet*, 80 Fed. Reg. 19738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, 20).

Internet Order prevents blocking, throttling, and paid prioritization by broadband providers to promote enhanced transparency and prevent unreasonable interference with consumers and edge providers.⁵⁷

As Chairman Wheeler pointed out, the Order, although imposing more regulation than the FCC initially intended, the product of over four million comments from the American people.⁵⁸ The FCC heard Americans' concerns and responded. The FCC has only implemented nine sections of Title II regulations.⁵⁹ The portions of Title II being implemented are targeted at consumer protection, promoting competition, and advancing universal access to the internet.⁶⁰ The FCC explains why it cannot easily change the rules that the *2015 Open Internet Order* has put into motion within the 400 pages of the Order itself.⁶¹ It is finally important to note that the FCC undertook a lengthy and complicated rulemaking process before issuing its *2015 Open Internet Order*.⁶² The FCC would have to follow the same process in the future if it had any plans of applying more provisions of Title II – this process is a safeguard against any more invasive future FCC action.⁶³

Some also fear an eventual expansion in the FCC's power to regulate with the adoption of more Title II provisions and broadband providers are skeptical of the FCC's actions. Many believe that the FCC's Order gives the Commission power to set rates and impose tariffs on broadband service, eventually increasing the cost of service, decreasing innovation and discouraging the creation of new networks.⁶⁴

Though the FCC's new net neutrality regulations are a significant step in the right direction, they are not without objection. The United States Telecom Association, an ISP consortium, recently lost an appeal seeking to enjoin enforcement of the *Open Internet Order* filed mere minutes after it was published in the Federal Register.⁶⁵ The group claimed, and the Court rejected, that the new rules violated federal law and that the FCC's actions

57. *Id.*

58. Protecting and Promoting the Open Internet, *Report and Order on Remand*, 30 FCC Rcd 5601, 5914 (2015) [hereinafter *2015 Open Internet Order*] (statement of Chairman Wheeler).

59. Marguerite Reardon, *13 Things You Need To Know about the FCC's Net Neutrality Regulation*, CNET (Mar. 14, 2015, 5:00 AM PDT), <http://www.cnet.com/news/13-things-you-need-to-know-about-the-fccs-net-neutrality-regulation/>. The FCC is omitting more than 700 Commission rules and regulations. *2015 Open Internet Order*, *supra* note 58, at para. 3.

60. Protecting & Promoting the Open Internet, 80 Fed. Reg. at 19744.

61. Reardon, *supra* note 59. In detailing its rationale for the adoption of Title II regulations, the FCC also effectively created a record which can be used against it to prevent future action by the Agency.

62. *See id.* (describing the intricacies of notice-and-comment rulemaking).

63. *See id.*

64. *Id.*

65. Don Reisinger, *Net Neutrality Laws Get Published – Let the Lawsuits Begin*, CNET (Apr. 13, 2015, 1:52 PM PDT), <http://www.cnet.com/news/fccs-net-neutrality-rules-hit-federal-register-lawsuit-underway/>. *See also generally* Supplemental Petition for Review, U.S. Telecom Ass'n v. FCC, No. 15-1063, 2016 WL 3251234 (D.C. Cir. June 14, 2016).

were “arbitrary, capricious and an abuse of discretion.”⁶⁶ Several parties, including Public Knowledge, filed motions for leave to intervene, standing up to support the FCC as it defended its *Open Internet Order* in the District of Columbia Circuit.⁶⁷ Despite this action, and several others to come, the FCC stands strongly by its net neutrality rules as it pushes forward towards an open and fair Internet for all,⁶⁸ a stance supported by the District of Columbia Circuit.⁶⁹ The impact of the *U.S. Telecom* decision signifies the Court’s willingness to embrace the FCC’s net neutrality regulations and its continued discouragement of all content discrimination on behalf of broadband providers.⁷⁰ It is a step in the right direction, but the opposition’s existence in itself demonstrates the substantial legal challenges net neutrality continues to battle.

D. Minority Groups Are Categorically Underrepresented in the Media

It comes as no surprise that minority communities are underrepresented in the media, especially in mainstream sitcoms, which feature largely homogenous characters and casts.⁷¹ While diversity in media programming has increased, it is not doing so fast enough. Several factors contribute to this underrepresentation, including a lower proportion of the general population as well as the negative characterization of minority communities in the media.

The Ralph J. Bunche Center for African American Studies at UCLA conducted a study to draw attention to the disparity in minority representation in the media, both on screen and behind the scenes.⁷² In 2011, minorities portrayed only 10.5% of the lead roles in 172 reviewed films despite the fact that, in 2010, minorities made up 36.3% of the U.S. population.⁷³ This means that even taking their proportionate presence in the total population into consideration, minorities were underrepresented a

66. Supplemental Petition for Review at 2, *U.S. Telecom Ass’n*, 2016 WL 3251234 (No. 15-1063).

67. Motion for Leave to Intervene, *U.S. Telecom Ass’n*, 2016 WL 3251234 (No. 15-1063).

68. See, e.g., Dave Calpito, *FCC Defends Net Neutrality in Court as ISPs Continue to Challenge Its Authority*, TECH TIMES (Dec. 7, 2015, 4:35 AM EST), <http://www.techtimes.com/articles/113819/20151207/fcc-defends-net-neutrality-in-court-as-isps-continue-to-challenge-its-authority.htm>.

69. See *U.S. Telecom Ass’n*, 2016 WL 3251234. See also Jonathan H. Adler, *Divided D.C. Circuit Upholds FCC “Net Neutrality” Rule*, WASH. POST (June 14, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/14/divided-d-c-circuit-upholds-fcc-net-neutrality-rule/>.

70. See *U.S. Telecom Ass’n*, 2016 WL 3251234.

71. See *Media Diversity: Frequently Asked Questions*, LEADERSHIP CONF. ON CIVIL AND HUMAN RIGHTS, http://www.civilrights.org/action_center/media-diversity/faq.html (last visited Feb. 14, 2016).

72. DARNELL HUNT ET AL., RALPH J. BUNCHE CTR. FOR AFRICAN AM. STUDIES AT UCLA, 2014 HOLLYWOOD DIVERSITY REPORT: MAKING SENSE OF THE DISCONNECT 5 (2014).

73. See *id.* at 6.

factor of more than three to one.⁷⁴ The movies in which minorities filled the lead roles were primarily ethnic-targeted films, although some were more mainstream.⁷⁵

In a further breakdown of each of the studied films, each individual film also underrepresented minorities in the featured cast. In more than half of the films, minorities constituted less than 10% of the cast.⁷⁶ In fact, only an astonishing 2.3% of the films featured a number of minorities proportionate to their U.S. population.⁷⁷ And again, most of these films targeted smaller niche minority groups.⁷⁸

This pattern of underrepresentation carries on behind the scenes as well. Minorities directed only about 12% of the studied films, with a majority of these films being marketed to minority groups.⁷⁹ In regards to film writers, minorities made up only 7.6% of the total group, at a shocking five-to-one ratio.⁸⁰ Again, a majority of these positions were linked to films targeting minority groups.⁸¹

The numbers for minorities are even worse in regards to television contribution. In 2011, minority actors made up a shockingly low 5.1% of lead roles in broadcast dramas and comedies and 14.7% in cable dramas and comedies.⁸² Compared to the total population, this means that minorities were underrepresented by a ratio of seven-to-one in broadcast and two-to-one in cable.⁸³ This trend of higher representation in cable as compared to broadcast is also true of minorities in reality shows and the number of minority creators.⁸⁴ Additionally, minorities directed less than 10% of episodes in more than 70% of both broadcast and cable comedies and dramas.⁸⁵ Most recently, the lack of minority representation in the Oscars has been dominating the news as films like *Selma*⁸⁶ failed to receive the

74. *See id.*

75. *See id.* (naming titles such as Tyler Perry's *Madea* series and *Jumping the Broom*, which target minority communities, as well as mainstream-oriented films like *Columbiana* and *Fast Five*).

76. *Id.* at 6-7. Additionally, only 11% to 20% of the featured cast featured minorities in more than 22% of the studied films.

77. *Id.*

78. *Id.*

79. *Id.* For example, Tyler Perry films as well as *Apollo 18*.

80. *Id.*

81. *Id.*

82. *Id.* at 8.

83. *Id.*

84. *Id.* at 9-10, 12.

85. *Id.* at 15.

86. *Selma* tells the story of voting rights marches that occurred between Selma and Montgomery in the 1960's and is described as a mix of a drama and documentary. *Selma*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1020072> (last visited Jan. 13, 2016). It received four nominations, including a win for Best Original Song, at the Golden Globes. *See id.* It also received two nominations at the 87th Academy Awards, including a win for Best Original Song, startling critics nationwide due to its box office success and critical acclaim. *See id.*

nominations many believed it deserved.⁸⁷ Similarly, minorities are less likely to win an Emmy, especially if they are cast in a cable series with other minority cast members.⁸⁸

The statistics have remained at a static low in the last year as well.⁸⁹ In 2012, a USC study found that African Americans only played 10.8% of movie roles, Asians only played 5%, and other minority groups only played 3.6%.⁹⁰ Unfortunately, one thing that studies all agree on is that minority communities have categorically been underrepresented in film and television, and continue to be underrepresented, even when their proportion in the total U.S. population is taken into consideration.⁹¹ As history tends to repeat itself, minority communities will face the same underrepresentation without the FCC's presence in the net neutrality issue.

III. ANALYSIS

The question that remains is, why does an open Internet matter? Is it really that beneficial to protect net neutrality? If so, who is benefitting? The FCC's decision to reclassify ISPs as common carriers and bring them under Title II classification to protect net neutrality is especially important to minority communities. Minority communities are categorically underrepresented in the media because of a disproportionately low number of opportunities and financial resources.⁹² Without the continuance of an open Internet, their presence in the media will remain disproportionately underrepresented.

A. *The FCC Was Correct to Reclassify Broadband Companies as Common Carriers to Protect and Ensure Net Neutrality*

Many wonder why the Internet must be changed if it is currently "open" and "fair"? If things are seemingly going fine as they stand, why should the FCC expend valuable time and money to change it? Why not allow the open Internet to continue regulating itself?⁹³ Simply put, if it is not broken, why fix it? The reality is that the Internet may not be broken, but it is quickly breaking; and we cannot simply wait around for it to completely

87. See David Carr, *Why the Oscars' Omission of "Selma" Matters*, N.Y. TIMES (Jan. 18, 2015), <http://www.nytimes.com/2015/01/19/business/media/why-the-oscars-omission-of-selma-matters.html> (focusing on the importance of recognizing and celebrating such a historical and creative achievement, especially as it pertains to minority communities).

88. HUNT, *supra* note 72, at 19, 21.

89. Rebecca Keegan, *USC Study: Minorities Still Under-Represented in Popular Films*, L.A. TIMES (Oct. 30, 2013), <http://articles.latimes.com/2013/oct/30/entertainment/la-et-mn-race-and-movies-20131030>.

90. *Id.*

91. See *id.*

92. See *Proposed Combination of Comcast and NBC/Universal: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2, (2010) (statement by Darnell M. Hunt, Director, Ralph J. Bunche Center for African American Studies).

93. See *2015 Open Internet Order*, *supra* note 58, at para. 8.

shatter – the Internet will not remain open if left to its own devices.⁹⁴ The FCC must step in to fulfill its obligation to ensure that ISPs continue to play the game fairly. The FCC was right to rely on Title II reclassification of ISPs to protect and ensure Net Neutrality because their authority under Section 706 of the Telecommunications Act is not sufficient to do this on its own.⁹⁵

As it stands, content providers (ranging from streaming sites like Netflix and YouTube to sites like Amazon and Google) pay ISPs to deliver their content to users every day.⁹⁶ However, ISPs like Comcast and Verizon began to interfere with Internet speeds and had slowed down certain websites.⁹⁷ During negotiations with Netflix, Comcast slowed download speeds by more than 20%, with speeds skyrocketing back up by more than 40% after Netflix agreed to Comcast's higher fees.⁹⁸ This is certainly not a coincidence and this is exactly how the Internet is beginning to break.

This Note emphasizes the importance of the FCC's actions to reclassify ISPs as Title II common carriers, bringing them under stricter FCC control. However, there is inarguable support for the FCC limiting its regulatory control. Normally, Title II classification would allow the FCC to regulate ISPs in the same way that telephone companies were once regulated.⁹⁹ It is important to remember, however, that although the FCC has ample authority, it is not required to use all of it when regulating.¹⁰⁰ To ensure the success of net neutrality reform, the FCC will need to refrain from treating ISPs exactly like phone companies of the 1980s. In order to limit its authority, the FCC must first be sure that it has such authority.

While Section 706 grants the FCC authority to regulate broadband deployment, it does not give them the authority to go beyond other provisions of the 1996 Act.¹⁰¹ The FCC simply cannot regulate non-

94. Michael Weinberg, *But for These Rules...*, PUBLIC KNOWLEDGE (Sept. 10, 2013), <https://www.publicknowledge.org/news-blog/blogs/these-rules>. Verizon admitted its interest in entering into agreements with edge providers (namely, websites) in oral arguments. Net neutrality rules are admittedly the only thing keeping ISPs like Verizon "from turning the Internet into cable TV."

95. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

96. Reuters, *FCC Looking into Slow Internet Download Speeds By Reviewing Agreements between Netflix, Internet Service Providers*, N.Y. DAILY NEWS (Jan. 13, 2014, 7:38 PM), <http://www.nydailynews.com/news/politics/fcc-slow-Internet-download-speeds-article-1.1829348>.

97. Max Ehrenfreund, *This Hilarious Graph of Netflix Speeds Shows the Importance of Net Neutrality*, WASH. POST: WONKBLOG (Apr. 24, 2014, 11:20 AM), <http://knowmore.washingtonpost.com/2014/04/25/this-hilarious-graph-of-netflix-speeds-shows-the-importance-of-net-neutrality/>.

98. *Id.*

99. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064; *see* Romm, *supra* note 54.

100. *Id.*

101. S. Derek Turner & Matt Wood, *Wonkblog Gets It Wrong: The FCC's Shrinking Authority Isn't Enough to Save Net Neutrality*, FREE PRESS (Jan. 16, 2014), <https://www.freepress.net/blog/2014/01/16/wonkblog-gets-it-wrong-fcc-s-shrinking-authority-isn-t-enough-save-net-neutrality>.

common carriers as common carriers.¹⁰² The FCC was correct in classifying ISPs as common carriers, therefore bringing them under Title II classification, in order to fully utilize the authority it derives from Section 706.¹⁰³

B. What Net Neutrality Means for Minority Communities

So what does this all mean? Why does it matter that these populations are underrepresented in the media? What does it have to do with net neutrality? While many of us see the Internet as a luxury, for others it is a necessity. For many, especially those in underrepresented minority communities, an open Internet is the only chance at having their voices heard and their communities represented. For many, traditional media has failed them and has even done them injustice in the way it represents them. For many, it is in their own hands to fix a problem that is prevalent everywhere we look today. For many, it has everything to do with net neutrality.

On September 17, 2014, the Senate Judiciary Committee held a hearing on net neutrality where it heard testimony from a panel of individuals with varying views and stakes in the matter.¹⁰⁴ Independent producer, writer and actress Ruth Livier spoke about the special set of challenges that minority entertainers face in today's media.¹⁰⁵ As an American Latina, Livier shared a common feature with many other minorities in the industry: she was faced with immediate skepticism and overall disinterest, and no one cared about her story.¹⁰⁶ Livier was not the first, nor will she be the last, member of a minority community to experience such adversity because such skepticism only grows stronger as it continues.¹⁰⁷ As the general population accepts such inequality more easily, it becomes the norm and continues to grow in force.¹⁰⁸ As it grows and spreads, it unfortunately becomes harder and harder to change.¹⁰⁹

Even worse, minority communities are often times represented in negative and stereotypical ways, leading to further normalization of inequality in the media.¹¹⁰ Dr. Darnell Hunt explains this concept as a cyclical and strengthening chain of events that begins and ends with the

102. *Id.*

103. See generally *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (ruling that the FCC could not regulate ISPs as Title II common carriers if the agency had classified them as Title I information services).

104. *Why Net Neutrality Matters: Protecting Consumers and Competition through Meaningful Open Internet Rules: Hearing Before the S. Comm. on the Judiciary*, (Sept. 17, 2014) [hereinafter *Why Net Neutrality Matters*] (statement of Ruth Livier, writer, independent producer, and actress).

105. *Id.*

106. *Id.*

107. HUNT, *supra* note 72, at 5.

108. *Id.*

109. *Id.*

110. *Id.*

“circulation of outrageously insensitive and offensive portrayals of minorities.”¹¹¹ Regardless of the instant outrage that follows, minorities have continuously been viewed in stereotypical and negative lights when they are represented at all.¹¹² This kind of behavior teaches society to view minorities as less than others, as nothing more than stereotypes to poke fun at.¹¹³ This system forces minority communities into the shadows, with their stories at the mercy of others to tell.¹¹⁴

Because of this cycle of underrepresentation and misrepresentation, people like Livier have turned to the open Internet as a soundboard for their underrepresented voices.¹¹⁵ Regardless of income disparity or access to means, everyone can use the Internet on a level playing field, including (and arguably most importantly) minority communities.¹¹⁶ This trend towards online media is rooted in minimal barriers to entry, which in turn minimizes the costs associated with production and distribution of material.¹¹⁷ For the first time, minorities had an opportunity to make their stories available to the public without “their visions diluted by corporate gatekeepers.”¹¹⁸ This is exactly why net neutrality matters to minority communities: it gives a voice to the silenced.

The open Internet has proven to be the most equal playing field for minority communities in the media. Due to this open platform, minorities have not only been able to further their own careers in the field, but have also created jobs for support staff.¹¹⁹ In expanding their reach, minority communities have been able to portray their stories in a more accurate and meaningful way, rid of all the negative stereotypes.¹²⁰ In addition, an open Internet extends to minority users as well, allowing them to connect with the content they can now access more easily online.¹²¹ Livier explains the importance of building this kind of community: a support system that

111. *Proposed Combination of Comcast and NBC/Universal*, *supra* note 92. Dr. Hunt explains this process with five key stages. It begins with an incredibly offensive portrayal of a minority group followed by public outrage or pressure to react. Then, there is always some release of shocking statistics about minority underemployment and underrepresentation in the media followed quickly by a token initiative to calm the critics. Lastly, all is returned to normal and minority underrepresentation goes back to its shockingly low number.

112. *Id.*

113. HUNT, *supra* note 72, at 5.

114. *Why Net Neutrality Matters*, *supra* note 104.

115. *Id.*

116. *Id.*

117. Reply Comments of National Association of Broadcasters at 56, *Promoting Diversification of Ownership in the Broadcasting Services*, MB 09-33 (Mar. 5, 2012), <http://apps.fcc.gov/ecfs/comment/view?id=6017022785>. NAB points out that the largest barrier to entry in the media for minorities is the lack of access to capital. Because of this, a large number of minority communities have found solace in the open Internet, which provides a more equitable alternative.

118. *Why Net Neutrality Matters*, *supra* note 104.

119. *Id.* Support staff includes writers, costars, producers, etc.

120. *Id.*

121. *Id.*

continues to grow and strengthen, counteracting the negative cycles taking place through traditional media outlets.¹²²

Lastly, many minority groups in support of FCC regulation, such as the Color of Change and the Center for Media Justice, fear that if the FCC does not step in, companies that have to pay more for faster speeds will pass on the higher costs to the consumers, many of whom can hardly afford the Internet as is.¹²³ As mentioned earlier, many view the Internet as a luxury while others see it as a necessity—a means to do more versus the only means to keep up with everyone around them.¹²⁴ If these expenses are passed onto consumers, many will be left behind to suffer from the greediness of ISPs.

All of the statistics, the history of underrepresentation and typecasting of minorities, and the rise of minority presence in online media speak for themselves. When considering the open Internet and its continuance, the FCC must consider the effect that it will have on minority communities. The recent progress credited to an open Internet can only continue for so long without the FCC stepping in to ensure net neutrality remains.

C. *The FCC Must Actively Protect the Open Internet*

The FCC must take actions to protect the open Internet because, if left unregulated, ISPs would control the Internet as they have continued to control traditional media. As explained earlier, ISPs have already shown what they are truly capable of when left to their own devices.¹²⁵ And as they have admitted themselves, ISPs have every incentive to control the Internet and turn a blind eye to net neutrality as we know it.¹²⁶ How do we know that this will happen? How do we know that ISPs like Comcast are concerned only with their personal growth and domination of the field? How do we know that we cannot trust ISPs to self-regulate? Because ISPs have fought net neutrality at every stage and have already proven they are solely concerned with their own growth.¹²⁷ The FCC would be foolish to stand aside and allow history to repeat itself with regard to the open Internet as we know it.

At the end of 2009, Comcast's holiday gift to the public was an announcement of its intent to acquire a majority share of media

122. *Id.*

123. Gerry Smith, *Why Is the NAACP Siding with Verizon over Net Neutrality?*, HUFFINGTON POST (July 31, 2014, 12:49 PM ET), http://www.huffingtonpost.com/2014/07/31/net-neutrality-naacp-verizon_n_5630074.html.

124. *Id.*

125. Ehrenfreund, *supra* note 97 (illustrating the decrease in Internet download speeds that Netflix experienced while in negotiations with Comcast last year).

126. *See Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) (emphasis added) (citing Transcript of Oral Argument at 31, *Verizon*, 740 F.3d 623 (No. 11-1355)) (“[A]t oral argument, Verizon’s counsel announced that ‘but for [the Open Internet Order] rules [sic] we would be exploring [paid prioritization] arrangements.’”).

127. *See id.*

conglomerate NBC Universal.¹²⁸ Though the deal originally left Comcast with just enough ownership to qualify as a majority owner (51%), Comcast now owns NBC Universal in full.¹²⁹ This deal made Comcast the largest cable provider in the United States, setting them on a dangerous path.¹³⁰

In February 2014, Comcast struck again. Comcast and Time Warner issued a proposal for the largest cable telecommunications company in America to acquire the second largest cable telecommunications company in America.¹³¹ This proposed merger would result in a stock swap valued at more than \$45 billion at the time of Comcast's announcement.¹³² Because of the magnitude and scope of this merger, Comcast again was required to gain approval from not only the FCC but the United States Department of Justice as well.¹³³ Many shared the same concern: this will definitely end badly.¹³⁴ With two large companies joining forces, consumers were beyond concerned.¹³⁵ In fact, both Comcast and Time Warner themselves were so aware of this that they all but threw in the towel in trying to convince the public and instead focused their energy on winning over Capitol Hill.¹³⁶

So how exactly has Comcast been getting away with all of this despite the clear warning signs of negative effects? Admittedly, their initiatives had minority communities in mind as they promised new channels to be put in play.¹³⁷ In pursuit of their NBC Universal acquisition, Comcast made deals

128. Tim Arango, *G.E. Makes It Official: NBC Will Go to Comcast*, N.Y. TIMES (Dec. 3, 2009), <http://www.nytimes.com/2009/12/04/business/media/04nbc.html>.

129. Amy Chozyck & Brian Stelter, *Comcast Buys Rest of NBC in Early Sale*, N.Y. TIMES: MEDIA DECODER (Feb. 12, 2013, 4:54 PM), <http://mediadecoder.blogs.nytimes.com/2013/02/12/comcast-buying-g-e-s-stake-in-nbcuniversal-for-16-7-billion/>. In further illustrating the motives of ISPs, Comcast acquired the remaining 49% interest in NBC Universal by buying out GE's stocks in a sale that accelerated what was meant to be a gradual process to take place over several more years. Comcast's Chief Executive Brian Roberts described the decision in his own words as a "commitment to NBC Universal and its *highly profitable* cable channels." *Id.* (emphasis added).

130. *Id.*

131. Brian Stelter, *Comcast Buys Time Warner Cable for \$45 Billion*, CNN (Feb. 13, 2014, 3:09 PM ET) <http://money.cnn.com/2014/02/13/technology/comcast-time-warner-cable-deal/index.html>.

132. Alex Sherman, Jeffrey McCracken & Edmund Lee, *Comcast Agrees To Buy Time Warner Cable for \$45.2 Billion*, BLOOMBERG TECH. (Feb. 1, 2014, 4:39 PM EST), <http://www.bloomberg.com/news/2014-02-12/comcast-said-to-agree-to-pay-159-a-share-for-time-warner-cable.html>.

133. Comm'n Seeks Comment on App'n's of Comcast Corp., Time Warner Cable Inc., Charter Comm., Inc. & Spinco to Assign & Transfer Control of FCC Licenses & Other Authorizations, *Public Notice*, 29 FCC Rcd 8272, 8274 (2014) [hereinafter *Comm'n Seeks Comment*].

134. Brad Reed, *New Poll Shows the More Education You Have, The More You Hate the Comcast-TWC Merger*, BGR (Mar. 28, 2014, 2:20 PM), <http://bgr.com/2014/03/28/comcast-twc-merger-poll/>.

135. *Id.* (noting that both Comcast and Time Warner have "horrendous" customer service ratings, which adds additional concern).

136. *Id.*

137. App'n's of Comcast Corp. & Time Warner Cable Inc. for Consent to Transfer Control of Licenses & Authorizations, *Applications and Public Interest Statement*, MB 14-

with the FCC to expand minority-focused programming on their networks and they have in fact done so. In the last few years, Comcast launched four independent networks with minority ownership and management.¹³⁸ Owners of these new networks include producer Sean Combs, who launched REVOLT at the end of 2013, and former basketball player Magic Johnson, who launched Aspire as a family-oriented network.¹³⁹ These minority-based channels include Combs' REVOLT and El Rey, which was also launched at the end of 2013.¹⁴⁰ Additionally, Comcast has expanded its distribution of diverse minority content throughout its audiences by changing the channel packages under which such channels are included.¹⁴¹

However, the reality of these situations only further emphasizes the importance of net neutrality to minority groups. Though ISPs like Comcast are seemingly paving the way for minority groups to finally have a voice, the reality is not as clear. This voice that Comcast has promised minority groups is not as new as they let on. Controversy stems from the fact that these new minority networks are simply recycling and reshuffling their managers and programs from existing programs and networks.¹⁴² For example, the lineup of Johnson's network Aspire included a number of reruns instead of original broadcasting.¹⁴³ The lineup includes shows like *The Cosby Show* (which aired its last new episode more than a decade ago in 1992),¹⁴⁴ *Flip*, and *Julia* (both of which aired their last episodes in the early 1970s).¹⁴⁵ In addition, the managers were taken from the old Gospel Music Channel that previously aired.¹⁴⁶

Again, why does this all matter? What does it mean for minority communities? Though it may be a considerable effort, Comcast has illustrated the importance of minority communities truly taking charge of their representation in the media. The real issue is the purpose behind the

57, at 114 (2014), <http://apps.fcc.gov/ecfs/comment/view?id=6017611309> [hereinafter *App'ns of Comcast & Time Warner*].

138. *Id.* "Minority" means African American or Hispanic American in this context.

139. Mandalit Del Barco, *Comcast Deal Puts New Minority-Run Channels In Play*, NPR (Nov. 12, 2013, 3:08 AM ET), <http://www.npr.org/2013/11/12/244558834/comcast-deal-puts-new-minority-run-channels-in-play>. Both of these networks resulted from the merger deal Comcast made with the FCC.

140. Sarah Rodman, *Minority-Owned Cable Networks Hope To Blaze a Trail*, BOSTON GLOBE (Jan. 25, 2014), <http://www.bostonglobe.com/arts/television/2014/01/25/new-minority-owned-networks-hope-blaze-trail/X4EMY3zvOR314XOqZFrg0K/story.html>.

Director Robert Rodriguez, of the *Sin City* and *Spy Kids* franchises, created the El Rey Network with help from the network Univision. REVOLT currently airs in approximately 20 million homes while the El Rey Network reaches an astonishing 40 million homes. *Id.*

141. *App'ns of Comcast & Time Warner*, *supra* note 137, at 114.

142. Del Barco, *supra* note 139.

143. *Id.*

144. *The Cosby Show*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0086687/> (last visited Jan. 13, 2016).

145. *Flip*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0065294/>, (last visited Jan. 13, 2016); *Julia*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0062575/> (last visited Jan. 13, 2016); Del Barco, *supra* note 139.

146. *Id.*

creation of these stations: they are a compromise with the FCC to allow Comcast to keep control acquisition after acquisition. The issue only deepens when focusing on the control Comcast still exhibits over these minority stations. Unequal funding and opportunity still dominates the market as a key concern and the ultimate inhibitor for minority communities. Though progressing, the facts tell the FCC a very clear story—minority communities must continue to rely heavily on an open Internet, protected by net neutrality, if they stand a chance to be heard.

D. Why Minority Groups Seem to Be Split on the Issue

Some argue that minority groups themselves are in support of the FCC staying out of the net neutrality debate and leaving the Internet open to regulate itself as it has always done in the past.¹⁴⁷ Some minority communities have issued public comments in response to the FCC's proposal stating their support for the same conglomerate companies that other organizations claim minority communities need protection from. However, as is the case with most issues, there is much more than meets the eye. Though some minority communities seem to side with ISPs on the issue of net neutrality, there are underlying factors, such as ISPs making financial contributions to minority groups and influencing certain viewpoints, which must be taken into consideration.

Groups like the National Association for the Advancement of Colored People (NAACP) and National Urban League have sided with ISPs in the net neutrality debate and advocated for an FCC-free Internet.¹⁴⁸ But the underlying story is key. For starters, several of these groups receive a substantial amount of funding from large companies, which also explains their support of the Comcast merger with NBC Universal.¹⁴⁹ In fact, between 2009 and 2011, the Minority Media and Telecommunications Council (MMTC) received more than \$700,000 in sponsorships and donations from ISPs like Verizon and Time Warner.¹⁵⁰ MMTC is the same organization that has historically opposed the consolidation of industry players but has recently changed its tune.¹⁵¹ This sudden change in views makes more sense when Verizon's direct contribution of \$40,000 to MMTC

147. See Josh Peterson, *Minority Conflict over Net Neutrality Goes to Root of Tech Divide*, WATCHDOG.ORG (Oct. 21, 2014), <http://watchdog.org/177555/minority-net-neutrality/>.

148. Smith, *supra* note 123.

149. *Id.*

150. Jason McLure, *Civil Rights Group's FCC Positions Reflect Industry Funding, Critics Say*, PUB. INTEGRITY (June 6, 2013, 6:00 AM), <http://www.publicintegrity.org/2013/06/06/12769/civil-rights-groups-fcc-positions-reflect-industry-funding-critics-say>.

151. *Id.* Though MMTC has publicly announced its support for the relaxation of consolidation rules, it failed to disclose the amount of sponsorships it has received from the same companies arguing before the FCC. In 2011, MMTC received more than \$1.5 million from these entities, yet did not feel the need to disclose this information.

is taken into account.¹⁵² Additionally, the NAACP, another strong supporter of ISPs, has received more than \$1 million in donations from AT&T in 2009.¹⁵³ The National Hispanic Media Coalition received more than \$15,000 from Verizon in the preceding years.¹⁵⁴ This friendly relationship cooled down rather quickly after the organization's president, Alex Nogales, began seeking stronger net neutrality rules in 2010.¹⁵⁵ Nogales said it best: "[W]hen we took an [opposing] position on net neutrality, that was the end of the relationship."¹⁵⁶ Concerns have been raised as this trend of financial support runs rampant throughout the minority organizations that claim to support ISPs in the net neutrality debate.¹⁵⁷

Even worse, many minority groups have taken a "eat or be eaten" mentality in the net neutrality war. Some of these minority groups that oppose Title II reclassification are not only receiving funding from ISPs, but they are also working with them.¹⁵⁸ The Hispanic Technology and Telecommunications Partnership (HTTP) worked to host an event on Capitol Hill last year in opposition of Title II reclassification.¹⁵⁹ Upon further investigation, Martin Chavez, the HTTP worker that hosted this event, is also on the staff of the Ibarra Strategy Group, one of Verizon's lobbying firms.¹⁶⁰ These minority groups were quite literally working for their adversaries. Though it is common and perfectly acceptable for groups to work with companies they have similar views with, it is important to ask which came first: the chicken or the egg, the funding or the "similar views."

A recent lawsuit has called this matter into the public eye for scrutiny and questioning. The National Association of African-American Owned Media (NAAAOM) filed a complaint on February 20, 2015 with a California court alleging racial discrimination of Comcast and Time Warner.¹⁶¹ The NAAAOM claims that the two companies have actively refused to contract with media companies that are entirely owned by African Americans.¹⁶² Though some have questioned how the NAAAOM will bring factual proof of these allegations, it certainly calls into question the

152. *Id.* At the height of the Net Neutrality debate, MMTC listed \$160,000 in sponsorships from Verizon on their tax returns.

153. Smith, *supra* note 123.

154. *Id.*

155. *Id.*

156. *Id.*

157. Lee Fang, *Leading Civil Rights Group Just Sold Out on Net Neutrality*, NATION (July 25, 2014, 10:11 AM), <http://www.thenation.com/blog/180781/leading-civil-rights-group-just-sold-out-net-neutrality/>. The Organization of Chinese Americans considers Comcast as a major sponsor for its events and a large donor to the organization. Additionally, the League of United Latin American Citizens has received more than \$5 million from Comcast in exchange for their support against FCC regulation of net neutrality.

158. *Id.*

159. *Id.*

160. *Id.*

161. Complaint at 1, Nat'l Ass'n of African-Am. Owned Media v. Comcast, No. 2:15 CV-01239-TJH-MAN (C.D. Cal. Feb. 20, 2015).

162. *Id.* at 6.

“diversity initiatives” these companies make.¹⁶³ This lack of true progress only solidifies the notion that minority communities must rely more heavily on the open Internet to get their stories out into the media. This can only be done if the FCC steps in to ensure net neutrality and the continuance of the open Internet.

It is easy to make sense of the split in minority communities when the underlying information is brought to light. Minority groups that are quick to support ISPs are the same minority groups that are not facing the financial challenges of their peers. For this reason, the argument that minority groups support minimal FCC interference cannot be taken entirely at face value.

E. Is Zero-Rating Still a Valid Option?

Zero-rating is the concept that ISPs do not count the data used from certain applications against users’ data caps.¹⁶⁴ In a way, it is a different means to the same end: instead of paying more to have faster lanes, ISPs charge less for users to access certain sites.¹⁶⁵ Unlike fast lanes, many view zero-rating as a solution to the problem that many face: users cannot access websites because they cannot afford them.¹⁶⁶ Unfortunately in the long run, it involves the same underlying concept: big companies are paying ISPs to have their content “favored” over others.¹⁶⁷ Therein lies the problem.

Content providers pay AT&T to deliver certain content to end users that does not count against the end users’ data caps, causing end users to favor those sites over others.¹⁶⁸ This concept, like fast lanes, will leave smaller businesses and start-ups in the dust as they likely will not be able to keep up with this kind of competition.¹⁶⁹ Minority communities that have not been able to break into such a competitive market will continue to fail as they attempt to compete with companies like Netflix, YouTube, and Hulu who have the means to pay their way to the top and keep all other competition out.¹⁷⁰

Gigaom’s Antonios Drossos explains it quite simply: zero-rating is “blunt anti-competitive price discrimination designed to favor [telecommunications companies’] own or their partners’ [applications]

163. Eriq Gardner, *Comcast, Al Sharpton Hit with \$20 Billion Racial Discrimination Lawsuit*, HOLLYWOOD REP. (Feb. 23, 2015, 7:29 AM PT), <http://www.hollywoodreporter.com/thr-esq/comcast-al-sharpton-hit-20-777015>.

164. Jon Healey, *Netflix, “Zero Rating” and the Net-Neutrality Drama*, L.A. TIMES (Feb. 3, 2015, 1:10 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-net-neutrality-netflix-zero-rating-20150203-story.html>.

165. *Id.*

166. *Id.*

167. *Id.*

168. Antonios Drossos, *Forget Fast Lanes. The Real Threat for Net-Neutrality Is Zero-Rated Content*, GIGAOM (Apr. 26, 2014, 10:30 AM PDT), <https://gigaom.com/2014/04/26/forget-fast-lanes-the-real-threat-for-net-neutrality-is-zero-rated-mobile-traffic/>.

169. *See id.*

170. *Id.*

while placing competing [applications] at a disadvantage. A zero-rated [application] is an offer consumers cannot refuse.”¹⁷¹ It is also an offer smaller, minority-owned companies will not be able to compete with.

While the idea of zero-rating data may seem to benefit end users, it cannot stand because it undermines the underlying principle of net neutrality. The FCC has ruled to handle this issue on a case-by-case basis for now because of the complexity of the issue.¹⁷² It does not appear that this concept can remain in the long run however because it destroys the concept of net neutrality on a much larger level despite the benefits it provides end users. Minority communities in particular will bear the brunt of the negative consequences as ISPs continue to overpower or soften their voices.

Though the debate will continue for years to come, the FCC must take a stand. It must step in and regulate the Internet to ensure it remains open. While the FCC must ensure that innovation and development continues in the field, it also has a responsibility to the people it governs. This includes minority communities that are categorically underrepresented in the media. In weighing its options and making decisions, the FCC must consider the disproportionately negative impact that the loss of Net Neutrality would have on said minority communities.

IV. CONCLUSION

The FCC must take a stand and reclassify ISPs as Title II common carriers under the 1996 Act to bring them back under the domain of the FCC’s regulatory control, as its authority under Section 706 is not sufficient. In doing this, the FCC must also ensure that its forbearance provisions are effectively executed so that ISPs are not as heavily regulated as the phone companies originally brought under Title II control. The FCC has successfully taken these steps with its *2015 Open Internet Order* and has begun the move towards an open and fair Internet for all.

In doing this, the FCC can prevent ISPs from implementing fast lanes for companies that are able and willing to pay more for faster broadband speeds, leaving those without the means to afford faster broadband speeds to fall behind the competition. This prohibition of Internet fast lanes will allow the Internet to remain truly open, preserving an even playing field for minority communities. This even playing field allows minority communities an opportunity to share their work and their stories, through their own eyes, without the negative stereotypes that often times plague the media.

Further, the prohibition of Internet fast lanes will prevent large companies from passing on their additional costs to their users, many of whom struggle to afford Internet access in the first place. ISPs, and the

171. *Id.*

172. Phil Goldstein, *FCC Approves Net Neutrality Rules for Wireless, Putting Future Zero-Rating Plans on Notice*, FIERCE WIRELESS (Feb. 26, 2015), <http://www.fiercewireless.com/story/fcc-approves-net-neutrality-rules-wireless-putting-future-zero-rating-plans/2015-02-26>.

financial support they offer to many minority groups, actually influence the seemingly split views of minority groups on the net neutrality issue. In reality, minority groups that do not buy into the pressures of these conglomerate companies face the same risk of being cast aside while catching up with ISPs' profit-seeking objectives.

History has shown us that ISPs cannot be left to their own devices and trusted to regulate their own actions. If left unregulated, these companies will likely transform the "open" Internet in the same way that they transformed and consolidated the cable field. The FCC must step in and reclassify ISPs as Title II common carriers to regulate their behavior and prevent the continued underrepresentation of minority communities.