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Throttle Me Not: 2015 Open Internet Order Protects Unlimited Data Plan Users

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Cellphone carriers, also known as mobile broadband Internet access service ("BIAS") providers, often implement throttling policies to avoid investing in infrastructural development and to save on their bottom line. Throttling is an intentional action to degrade or limit one's access to the Internet, and speed limits are a great analogy to throttling policies. The most visible throttling policies affect unlimited data plan users, where mobile BIAS providers choose to severely degrade unlimited data users' access speed to the Internet once they reach a specified data cap—a limit on the amount of data a user may use within a pay period. However, by definition, an unlimited data plan cannot have a data cap.

Just recently, the Federal Communications Commission ("FCC") released three new prophylactic rules in the 2015 Open Internet Order that regulate how BIAS providers are to manage the Internet. This Comment considers whether the "no throttling" rule successfully prohibits cellphone carriers from targeting unlimited data users and throttling them or whether targeting and throttling unlimited data users fits within the exception to the "no throttling" rule. This Comment also considers the negative impacts of throttling, especially on rural areas.

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INTRODUCTION

Throttling is an intentional practice that mobile broadband Internet access service ("BIAS") providers use to slow down users' data throughput speeds. One major issue has arisen over the past few years: unlimited data users have seen their Internet speeds dramatically slowed down after using more than a predetermined amount of data within a pay-period even though these users are supposed to receive “unlimited” data. See generally Mark Sullivan, What Happens When You Get Throttled?, PCWORLD.COM (Feb. 29, 2012, 6:00 PM), http://www.pcworld.com/article/251008/what_happens_when_you_get_throttled_.html. See Phil Goldstein, T-Mobile: Throttling Policy for Unlimited Customers Who Hit 21 GB is OK Under Net Neutrality, FIERCEWIRELESS (June 25, 2015), http://www.fiercewireless.com/story/t-mobile-throttling-policy-unlimited-customers-who-hit-21-gb-ok-under-net-n/2015-06-25; Joel Hruska, AT&T claims it will throttle
Bill Clinton even pointed out on Jon Stewart’s Daily Show that cellphone carriers like AT&T Inc. (“AT&T”) and T-Mobile US, Inc. (“T-Mobile”) want to quickly regain their infrastructural investments by implementing throttling policies to side-step an open Internet instead of continuing to develop mobile broadband infrastructure in rural areas.\^3

Throttling unlimited data is analogous to an unlimited mileage automobile rental agreement. Consider a car rental agreement which clearly states that a rental car may be driven as far as desired during the rental period. Imagine that the renter takes the car for a drive under the impression that she can drive unlimited miles. After she drives 100 miles, the car automatically slows down to five miles per hour and can go no faster for the rest of the rental period. Clearly, no one would find this unlimited mileage car rental plan to be practical, or even as fitting with the deal that was advertised, if the unlimited plan only applied to the distance and not the speed at which the car may be operated. Likewise, mobile Internet users do not find their unlimited data plans to be what they paid for when their data is intentionally throttled after reaching a certain data cap.\^4

This Comment argues that the FCC’s 2015 Open Internet Order’s “no throttling” rule successfully prohibits cellphone carriers—here, mobile BIAS providers—from targeting unlimited data users and throttling them. Considering the FCC’s past regulatory problems in this area, the “no throttling” rule must be proven applicable to mobile BIAS providers and within the regulatory jurisdiction of the FCC. Additionally, the carriers’ practice of throttling unlimited data users must be shown to fall within the purview of the “no throttling” rule and not its exception.

\^3 Interview by Jon Stewart with President Clinton, in New York, NY (June 17, 2015) [hereinafter “President Clinton Interview”].

\^4 See, e.g., Goldstein, supra note 2 (upsetting customers when T-Mobile’s new policy throttles its unlimited data users’ mobile Internet speeds once they use twenty-one gigabytes of data); Margaret Harding, AT&T Hit With Class Action Over Misleading Data Plans, LAW360 (June 23, 2015, 3:40 PM), http://www.law360.com/articles/671122/at-t-hit-with-class-action-over-misleading-data-plans (reporting that a woman filed a class action lawsuit because AT&T breached its contract by throttling unlimited data users).
Section II of this Comment provides background on the throttling issue and illustrates a need for throttling regulation. It then shows how past regulatory attempts at throttling failed. Finally, it presents the FCC’s latest attempt at regulating throttling. From this background, Section III concludes that targeting and throttling unlimited data users is illegal under the FCC’s latest regulatory attempt. To do so, Section III(A) analyzes the reasonableness of the FCC’s reclassification of mobile BIARIO providers as telecommunications. Section III(B) considers whether the “no throttling” rule is within the FCC’s regulatory jurisdiction. Section III(C) discusses how the targeting and throttling of unlimited data users does not fit within the legitimate network management practice exception to the “no throttling” rule.

Lastly, Section IV recommends that the FCC’s “no throttling” rule remain unchanged and effective because it is good public policy that promotes business competition in the United States. Consequently, Section V concludes that the “no throttling” rule is good for the public because it not only considers the needs of mobile BIARIO providers, but it also takes into account the interests of cellphone carriers’ customers, while enhancing economic stability throughout the United States via more reliable mobile broadband in rural areas.

II. BIARIO PROVIDERS’ CLASSIFICATION IMPACTS THROTTLING PRACTICES

This Section will illustrate the need for regulation. First, it will reveal who is throttling and how prevalent throttling is in the mobile broadband market. Afterwards, this Section will explain why throttling has not been regulated. And third, it will describe the FCC’s current attempt to regulate the practice.

A. Prevalent Throttling Policies Illustrate the Need for Regulation

Limited competition in the mobile broadband market contributes to the increased use of throttling policies. There are only four cellphone carriers that provide mobile BIARIO for most of the mobile broadband users in the United States.\(^5\) However, in many rural areas, there are even fewer carriers.\(^6\) With a small mobile BIARIO market, users are limited in their

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5. See Implementation of Section 6002(h) of the Omnibus Budget Reconciliation Act of 1993, Seventeenth Report, 29 FCC Rcd. 15311, 15317, ¶ 12 (2014) [hereinafter “2014 Mobile Wireless Competition Report”] (“As of year-end 2013, there were four facilities-based mobile wireless service providers in the United States that industry observers typically describe as ‘nationwide.’ These providers include AT&T, Sprint, T-Mobile, and Verizon Wireless. Although none of these four providers has a network that covers the entire land area or population of the United States, each has a network that covers a significant portion of both . . . .”).

6. See National Broadband Map: Number of Broadband Providers, FCC,
choice of a cellphone carrier with favoring policies. At the time of this writing, Verizon Wireless ("Verizon") is the only national mobile BIAS provider of the four nationwide providers—AT&T, Sprint Corporation ("Sprint"), and T-Mobile—to give up its unlimited data throttling policies. As a result, if an unlimited data user lives in an area not covered by Verizon, then that user will likely experience throttled data after consuming a predetermined amount of data. For example, Sprint just recently decided to throttle its unlimited data customers after they use more than twenty-three gigabytes in a monthly pay period.

Moreover, cellphone carriers argue that throttling is an effective way to manage networks because of the increased use of mobile broadband. Consequently, most nationwide cellphone carriers have implemented or are currently implementing throttling polices. To put this in perspective, almost all mobile broadband users are customers of the four major BIAS providers, where, at one time, all four throttled their customers and where, now, three continue to throttle for what they claim are network management purposes. Similarly, throttling users in underdeveloped, rural areas is easier than investing in upgrading the rural infrastructure by building new towers and updating old ones. As such, carriers often do


7. See id.; see also supra note 2.
8. See supra note 2.
9. See supra note 2 (pointing out that T-Mobile throttles after 21 GB; AT&T throttles after 22 GB; and Sprint throttles after 23 GB).
10. See Jenkins, supra note 2.
11. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5636–37, ¶ 90 (2015) [hereinafter “2015 Open Internet Order”] (illustrating that “consumers... increasingly rely on mobile broadband as a pathway to the Internet”); id. at 5636, ¶ 89 ("[T]here has been an increase of more than 200,000 percent in the number of LTE subscribers, from approximately 70,000 in 2010 to over 140 million in 2014. Concurrent with these substantial changes... mobile data traffic has exploded, increasing from 388 billion MB in 2010 to 3.23 trillion MB in 2013."); id. at 5639–40, ¶ 96 ("[S]ignificant concern has arisen when mobile providers have attempted to justify certain practices as reasonable network management practices, such as applying speed reductions to customers using ‘unlimited data plans’ in ways that effectively force them to switch to price plans with less generous data allowances.") (emphasis added); see also, e.g., id. at 5636, ¶ 89 (raising AT&T’s and T-Mobile’s comments that their wireless data traffic has grown exponentially year after year).
12. See supra note 2.
13. See 2014 Mobile Wireless Competition Report, supra note 5, at 15317, ¶ 12; see also Thomas Gryta, An Early Net-Neutrality Win: Rules Prompt Sprint to Stop Throttling, WALL ST. J. (June 17, 2015, 10:41 PM), http://www.wsj.com/articles/an-early-net-neutrality-win-rules-prompt-sprint-to-stop-throttling-1434595276 (reporting that Sprint stopped throttling as soon as it saw AT&T got fined for throttling right after the 2015 Open Internet Order became effective); Jenkins, supra note 2 (showing that Sprint now throttles as a way to manage its network).
14. See Connecting America: The National Broadband Plan, FCC at 136 (Mar. 17,
not have or want to spend the capital to invest in rural broadband infrastructural development.15

The prevalence of throttling policies among mobile BIAS providers is concerning for rural areas.16 There are many rural areas where access to mobile broadband is limited to only a few choices (and in some locations, only one choice) of mobile BIAS providers.17 So, when a mobile BIAS provider throttles these users’ data, these users have degraded broadband access to the Internet, which typically means they have no broadband access at all during the throttling times. Additionally, with fewer choices or even no choices at all in mobile BIAS providers, rural broadband users have little to no means of evading unfavorable policies like throttling.18 For example, the costs facing subscribers to switch providers is high and likely prohibitive for many users to move to another carrier’s mobile broadband service.19

B. BIAS Providers’ Prior FCC Classification Prevented Regulation

The FCC has the responsibility to take immediate action to remove

15. See supra note 14; cf Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 30 FCC Rcd. 1375, 1402, ¶ 42 (2015) [hereinafter “2015 Broadband Progress Report”] (adopting broadband at similar rates, where rural Americans adopt at twenty-eight percent and urban Americans at thirty percent).

16. See 2015 Open Internet Order, supra note 11, at 5636–37, ¶ 90 (noting, after considering several studies, that “rural consumers . . . are more likely to rely on mobile as their only access to the Internet”).

17. See supra note 14; cf. id. (“[R]ural consumer and businesses often have access to fewer options for Internet service, meaning that these customers may have limited alternatives when faced with restrictions to Internet openness imposed by their mobile provider.”).

18. See supra notes 17 and 19; see also 2015 Open Internet Order, supra note 11, at 5636–37, ¶ 90.

19. See 2015 Open Internet Order, supra note 11, at 5641, ¶ 98 (“Based on results from surveys, . . . switching costs have depressed mobile wireless churn rates, meaning that customers may remain with their service providers even when they are dissatisfied.”); see also id., at 5641–42, ¶ 98 (“Choices may be particularly limited in rural areas, both because fewer service providers tend to operate in these regions and because consumers may encounter difficulties in porting their numbers from national to local service providers.”).
barriers to infrastructural investment and to promote competition in the telecommunications marketplace so that broadband Internet access is “deployed to all Americans in a reasonable and timely fashion.” In carrying out this responsibility bestowed by Congress, the FCC determined that the Internet needed to be regulated to prevent unfavorable policies—like throttling—from keeping the Internet open and unrestricted for its users. However, for nearly a decade, the FCC has failed to regulate the Internet in a manner that prevents harmful policies while keeping the Internet equally open to all.

The FCC’s regulatory tribulations started in 1980 when it defined “basic services” as common carrier services regulated under Title II and “enhanced services” as non-common carrier services not to be regulated under Title II. The difference between a “basic service” and an “enhanced service” was how the service processed information. For example, a telephone call simply transmits a sound between recipients without processing any information. In fact, the FCC “characterized telephone service as a ‘basic’ service ... because it involved a ‘pure’ transmission that was ‘virtually transparent in terms of its interaction with customer supplied information.’” However, a service that allows an individual to access the Internet must process the transmitted information it receives, making it an “enhanced service.” For example, BIAS providers must translate e-mails into binary code, which are then subdivided into packets, to be carried out and delivered to the e-mail’s respective recipient. Therefore, BIAS providers must operate a service that requires more than just transmitting e-mail in “pure” textual form, thereby qualifying as “enhanced services” not subject to Title II common carrier regulations under this definition.

Against this backdrop, Congress defined telecommunications providers—telephone operators—as “basic service” providers and information service providers—BIAS providers—as “enhanced service”

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21. See 2015 Open Internet Order, supra note 11, at 5606, ¶ 11.
25. Id.
27. See id.
28. See id.
providers in the Telecommunications Act of 1996. As a result, telecommunications providers were subject to the Title II common carrier rules whereas information service providers were not. However, Congress left to the FCC the power to define these terms.

In the 1998 Advance Service Order, the FCC defined Digital Subscriber Line ("DSL") providers—Internet services via telephone lines—as telecommunications providers because they could exempt their Internet services from the Title II common carrier restrictions since they were operating their Internet services through a quasi-independent entity. However, the FCC's 2002 Cable Broadband Order defined cable broadband providers—Internet services via cable television lines—as information service providers because cable BIAS providers offered no telecommunications services to separate out like a telephone communications service, essentially blocking these providers completely from Title II regulation.

Up until this point, the FCC took an unregulated approach to Internet service providers to stimulate broadband infrastructural growth, but that approach soon changed. In National Cable & Telecommunications Ass'n v. Brand X Internet Services, the FCC tried to apply Title II common carrier regulations on cable Internet service providers under the theory of Title I ancillary jurisdiction in the 2002 Cable Broadband Order. The agency applied common carrier obligations to "non-common carrier" services so that it could carry out its statutory function of ensuring the advancement of telecommunications and information services. However, in Brand X, the Supreme Court did not approve of this ancillary jurisdiction approach,

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31. See Verizon, 740 F.3d at 630.
33. See id. at 631 (citing In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802, 4824 (2002) [hereinafter "2002 Cable Broadband Order"]).
35. See United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968) (ruling that the FCC may exercise authority under its general subject matter jurisdictional grant in Title I of the Communications Act to matters that are "reasonably ancillary to the effective performance of the [FCC]'s various responsibilities" set out in other titles of the Communications Act and other statutes); see also Am. Library Assoc. v. FCC, 401 F.3d 689, 700–03 (D.C. Cir. 2005) (holding that the FCC may exercise ancillary jurisdiction if (1) the FCC's general jurisdictional grant under Title I covers the subject of regulation and (2) the regulations are ancillary to the FCC effectively performing its statutory responsibilities).
reasoning that the FCC’s classification of Internet service providers as non-telecommunications providers was a reasonable interpretation of the 1996 Telecommunications Act’s ambiguous telecommunications provision.\textsuperscript{36}

Therefore, regardless of ancillary jurisdiction, the FCC’s classification of Internet service providers barred application of Title II regulations to those entities providing Internet services.\textsuperscript{37}

After Brand \textit{X}, the FCC continued to classify Internet services as non-telecommunications services. The FCC’s 2005 Wireline Broadband Order defined all wired services providing Internet access as information service providers—even including DSL—and placed the two main forms of wired Internet (cable and DSL) under the same classification, consequently barring Title II application.\textsuperscript{38} Additionally, in its 2007 Wireless Broadband Order, the FCC defined all wireless Internet services as non-telecommunications services, thus exempting cellphone carriers from Title II common carrier regulation.\textsuperscript{39} Therefore, the FCC defined all Internet service providers as non-telecommunications service providers, meaning that all Internet service providers were explicitly exempt from Title II common carrier regulation.\textsuperscript{40}

Nevertheless, the FCC announced that if any BIAS provider attempted to violate its intention to “preserve and promote the open and interconnected nature of the public Internet,” it would not hesitate to take action, even if that meant applying common carrier obligations on broadband providers via ancillary jurisdiction.\textsuperscript{41} Just one year later, the FCC presented the 2008 Comcast Order after it discovered that Comcast Corporation (“Comcast”) was blocking and degrading its customers’ access to BitTorrent Inc., a peer-to-peer file sharing service.\textsuperscript{42} The 2008 Comcast Order once again asserted ancillary jurisdiction to place a common carrier obligation—that a broadband provider may not manage its network with policies that intentionally blocked or degraded its customers’ access to legal websites—


\textsuperscript{37}. See \textit{Brand X}, 545 U.S. at 976–77.


\textsuperscript{40}. See supra notes 29–39.

\textsuperscript{41}. \textit{Verizon}, 740 F.3d at 631 (quoting 2005 Wireline Broadband Order at 14,988).

\textsuperscript{42}. See id. (citing \textit{In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications}, 23 FCC Rcd. 13028, 13059-60 (2008) [hereinafter “2008 Comcast Order”].
—on Comcast, a non-common carrier, broadband provider.\textsuperscript{43}

However, in \textit{Comcast Corp. v. FCC}, the D.C. Circuit Court vacated the 2008 Comcast Order as an improper exercise of ancillary jurisdiction.\textsuperscript{44} Simply put, the FCC was bound by its interpretation of broadband Internet service providers as non-telecommunications service providers, and therefore, it could not impose common carrier obligations on non-common carrier services when the FCC explicitly classified broadband Internet service providers as non-telecommunication services.\textsuperscript{45} The court found that the FCC may change its interpretation of broadband Internet service providers with adequate reasons for a policy reversal.\textsuperscript{46} With good justification, the FCC could reclassify broadband Internet service providers as telecommunications providers so that Internet service providers are regulated under Title II common carrier obligations.\textsuperscript{47}

Instead of reclassifying Internet service providers as telecommunications so that the FCC could regulate them under Title II and impose common carrier obligations—for example, preventing the intentional slowing down of Internet services (\textit{i.e.}, no throttling)—the FCC kept the classification the same in the 2010 Open Internet Order, implementing ancillary jurisdiction once again.\textsuperscript{48}

In the 2010 Open Internet Order, the FCC created three prophylactic rules that required BIAS providers to (1) be transparent and (2) not discriminate or (3) block access to lawful websites.\textsuperscript{49} The FCC created these rules because it needed to do something to promote the advancement and preserve the integrity of the Internet when a study showed that seventy percent of the nation did not get adequate or any broadband service at all.\textsuperscript{50} Once again, the D.C. Circuit Court of Appeals in \textit{Verizon v. FCC} vacated most of the 2010 Open Internet Order on the same grounds as it did in \textit{Comcast} and as the Supreme Court did in \textit{Brand X}: because the FCC attempted to exercise improper ancillary jurisdiction to attach common carrier obligations to entities it had explicitly defined as non-common

\textsuperscript{43} \textit{Id.} But see Am. Library Ass'n v. FCC, 401 F.3d 689, 700–03 (D.C. Cir. 2005); Computer and Comm. Indus. Ass'n v. FCC, 693 F.2d 198, 202 (D.C. Cir. 1982).

\textsuperscript{44} 600 F.3d 642, 661 (D.C. Cir. 2010).

\textsuperscript{45} \textit{Id.}; see also Computer and Comm. Indus. Ass’n, 693 F.2d at 202.

\textsuperscript{46} \textit{Comcast Corp.}, 600 F.3d at 661.

\textsuperscript{47} \textit{Id.}


\textsuperscript{49} \textit{Id.}

\textsuperscript{50} See \textit{id.} at 640–41, 47; see also 47 U.S.C. § 1302(b) (2015) (stating that the FCC is to encourage broadband "deployment on a reasonable and timely basis").
Although the court upheld the transparency requirement of the 2010 Open Internet Order, which did not impose common carrier obligations but instead competitive market values, it vacated the anti-blocking and anti-discrimination rules because these rules imposed common carrier obligations on broadband Internet service providers, limiting what BIAS providers could do with their own services.

Notice that up until this point, the courts never overruled the FCC’s classification of Internet service providers’ as non-telecommunication services nor did the FCC ever reclassify these services to apply Title II common carrier obligations on BIAS providers.

C. 2015 Open Internet Order: BIAS Providers’ Reclassification and Common Carrier Obligations

In response to the BIAS provider’s unreasonable policies like throttling and the unsuccessful attempts to regulate BIAS providers, the FCC implemented the 2015 Open Internet Order under the same enabling statutes as the 2010 Open Internet Order—Section 706 of the 1996 Telecommunications Act and Title II of the revised 1934 Communications Act. The 2015 Open Internet Order achieves two main objectives: (1) it reclassifies BIAS providers as telecommunications service providers,
which applies Title II common carrier obligations to broadband providers; and (2) it implements three prophylactic, common carrier rules—no blocking, no throttling, and no paid prioritization.\(^5\) For the purposes of this Comment, only the "no throttling" rule will be presented and subsequently analyzed.

The "no throttling" rule states that a BIAS provider may not slow down Internet access to any lawful Internet use except for a reasonable network management purpose:\(^6\)

A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.\(^7\)

The FCC deems this exception necessary to the rule because broadband providers need the ability to optimize their network performance to maintain a quality experience for their customers while not being unfair to their customers.\(^8\) For this exception to apply to an infringing throttling practice, the FCC notes that a BIAS provider must show that a technical network management matter—instead of some other business reason—justifies its practice.\(^9\) However, the FCC considers targeting and throttling unlimited data plans to be a practice where the "reasonable network management" exception does not apply.\(^10\)

Moreover, the 2015 Open Internet Order dedicates an entire section to mobile broadband services because a significant portion of its record concerned mobile BIAS providers’ practices.\(^11\) In this Section, the FCC addressed the incentives and technical abilities that mobile BIAS providers

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5. See 2015 Open Internet Order, supra note 11, at 5604 (executive summary).

6. See id. at 5651, ¶ 119 ("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.").

7. Id. at 5700, ¶ 215.

8. Id.

9. Id. ¶ 216 ("If a practice is primarily motivated by such an other justification, such as a practice that permits different levels of network access for similarly situated users based solely on the particular plan to which the user has subscribed, then that practice will not be considered under this exception.").

10. Id. at 5639–40, ¶ 96 ("[S]ignificant concern has arisen when mobile providers’ [sic] have attempted to justify certain practices as reasonable network manage practices, such as applying speed reductions to customers using ‘unlimited data plans’ in ways that effectively force them to switch to price plans with less generous data allowances.") (emphasis added).

11. Id. at 5635–43, ¶¶ 86–101.
have to limit the open Internet with policies like throttling.\textsuperscript{62} It illustrated that mobile broadband has blossomed over the past five years due to faster network deployment.\textsuperscript{63} The growth of the mobile broadband network is so fast, in fact, that more and more people are relying on mobile BIAS.\textsuperscript{64} The FCC even pointed out that the "evidence shows that . . . rural consumers . . . are more likely to rely on mobile as their only access to the Internet."\textsuperscript{65} Likewise, the National Health Interview Survey presented data showing a large uptick in the number of wireless-only households.\textsuperscript{66}

Furthermore, the FCC looked at the technology behind mobile BIAS providers and found that mobile BIAS providers have better means to manage their networks in accordance with the three prophylactic rules in the 2015 Open Internet Order.\textsuperscript{67} Consequently, they have the technological means to implement restrictive policies as well, like targeting unlimited data users and throttling them.\textsuperscript{68}

The FCC also illustrated that mobile BIAS providers act as gatekeepers to the Internet, which contributes to increased market power that allows them to implement unfavorable, restrictive policies.\textsuperscript{69} Since there are typically few mobile BIAS providers in rural areas, and since they have the technical means to implement harmful policies, mobile BIAS providers will implement these policies, like throttling, so long as they maintain strong market power.\textsuperscript{70} One anticompetitive policy that all providers implement with their gatekeeper status is unfair switching costs—a measure they employ to keep customers tied to a mobile broadband policy.\textsuperscript{71} Switching costs can be extremely high especially when a user has to move every member of a shared plan to another provider.\textsuperscript{72} As such,

\begin{itemize}
\item \textsuperscript{62} \textit{Id.} at 5631–32, ¶ 81.
\item \textsuperscript{63} \textit{Id.} at 5636, ¶ 89.
\item \textsuperscript{64} \textit{Id.} at 5636–37, ¶ 90.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} ("44 percent of households were ‘wireless-only’ during January-June 2014, compared to 31.6 percent during January-June 2011.").
\item \textsuperscript{67} \textit{Id.} at 5639–49, ¶ 96.
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{Id.} at 5608, ¶ 20.
\item \textsuperscript{70} \textit{Id.} ("[T]his has been a period of market and spectrum consolidation, which has decreased the choices available to consumers in many parts of the country. For example, . . . recent mergers . . . have reduced the ability of wireless end users to switch to competing providers . . . ") (internal quotations omitted).
\item \textsuperscript{71} \textit{Id.} at 5640, ¶ 97 (citing comments from Microsoft Corp., which provided that "even if there is more than one mobile broadband access provider in a specific market, there may not be effective competitive alternatives . . . and these mobile broadband access providers retain the ability to act in a manner that undermines the competitive neutrality of the online marketplace").
\item \textsuperscript{72} \textit{Id.} at 5642–43, ¶ 99.
\end{itemize}
market power coupled with policies that keep customers tied to a particular service provider allow for mobile BIAS providers to implement throttling policies and the like more easily without customers leaving.73 Therefore, the FCC illustrated in the 2015 Open Internet Order that high demand, technical ability, and limited competition incentivize restrictive policies like throttling, and thus a need for regulation to keep the Internet open and free from these restrictive policies.74

III. THROTTLING IS ILLEGAL AND NEGATIVELY AFFECTS ECONOMIES

Nevertheless, the real question that remains is whether the FCC’s 2015 Open Internet Order will be successful upon judicial review or will it sink like the 2010 Open Internet Order did upon the Verizon court’s review. For the 2015 Open Internet Order to be successful upon judicial review, the FCC’s reclassification of BIAS providers as telecommunications must be reasonable, and the Order’s rules must be within the FCC’s regulatory authority. After analyzing whether the 2015 Order will be successful upon judicial review, this Comment will answer whether the FCC successfully prohibits mobile BIAS providers from targeting and throttling unlimited data plans under the 2015 Open Internet Order’s “no throttling” rule.

A. Reasonable Reclassification of BIAS Providers

Judicial history supports the FCC’s reclassification of BIAS providers as telecommunications providers as reasonable,75 and thereby, these providers are subject to the 2015 Open Internet Order’s common carrier obligations. In 2005, the Supreme Court in Brand X reasoned that the FCC could reclassify BIAS providers if it “adequately explains the reasons for reversal of policy.”76 However, the Supreme Court here upheld the FCC’s classification of BIAS providers as non-telecommunications because that was the FCC’s classification at the time and because that was a reasonable interpretation of the 1996 Telecommunications Act’s ambiguous provision defining telecommunications services.77

Then, in 2010, the D.C. Circuit Court in Comcast Corp. restated that the Administrative Procedure Act allowed the FCC to define any ambiguous

73. See id.
74. Id. at 5628, ¶ 78.
76. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (finding that the FCC’s classification was entitled to deference even if the FCC’s interpretation of its classification is inconsistent with its prior interpretation).
77. Id. at 991–92.
enabling statute as it as it saw fit, so long as its interpretation was reasonable.\textsuperscript{78} The court even stated that the FCC might have had a good reason to reclassify broadband Internet service providers as telecommunications, but the FCC decided not to make a reclassification and instead attempted to implement common carrier obligations on non-common carrier entities via ancillary jurisdiction.\textsuperscript{79} As a result, the court held that the FCC lacked the statutory authority to regulate non-common carriers with common carrier obligations under the FCC's classification scheme at the time.\textsuperscript{80}

Subsequently, in 2014, the \textit{Verizon} court found that the FCC's classification of broadband Internet service providers as non-telecommunications defers to the FCC's interpretation of the ambiguous 1996 Telecommunications Act, which gives the FCC power to define broadband providers as it sees fit for regulatory purposes.\textsuperscript{81} As such, the court allowed the FCC's classification so long as it is reasonable and not arbitrary or an abuse of discretion.\textsuperscript{82} Nevertheless, the FCC kept its classification of broadband Internet service providers as non-telecommunications providers,\textsuperscript{83} resulting in the failure of the 2010 Open Internet Order upon judicial review when the Court upheld that classification.\textsuperscript{84}

As a result of the failed attempts at trying to regulate broadband providers as non-telecommunications providers and after the courts repeatedly stated the FCC could reclassify with good reason, the FCC reclassified BIAS providers as telecommunications in the 2015 Open Internet Order.\textsuperscript{85} However, the question still remains as to whether the

\textsuperscript{78} Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} See \textit{Verizon} v. FCC, 740 F.3d 623, 635 (D.C. Cir. 2014).
\textsuperscript{82} Id.
\textsuperscript{83} See Hurst, \textit{supra} note 75, at 61-62 ("One motivation the [FCC] may have had to avoid such a reclassification was that it had previously faced opposition to the proposal of reclassifying broadband providers as common carriers. Besides industry opposition to common carrier regulation, forty-eight members of Congress had requested that the Commission leave any such change in policy to the legislature in a 2010 congressional resolution.").
\textsuperscript{84} See \textit{Verizon}, 740 F.3d at 659.
\textsuperscript{85} See Sheraz Syed, \textit{Prioritizing Traffic: The Internet Fast Lane}, 15 DEPAUL J. ART TECH. & INTELL. PROP. L. 151, 160 (2014) (explaining that the FCC prevented itself from regulating BIAS providers due to its past classification of these providers even though the Courts, including the Supreme Court, assured that the FCC had the power to reclassify them telecommunications service providers); see also 2015 Open Internet Order, \textit{supra} note 11 at 5614, ¶ 43 ("Exercising our delegated authority to interpret ambiguous terms in the Communications Act, as confirmed by the Supreme Court in \textit{Brand X}, . . . the record reflects . . . that broadband providers are offering . . .
FCC's reclassification of BIAS providers as telecommunications providers is reasonable such that the FCC's policy reversal will be upheld upon judicial review.

The FCC explained at length in the 2015 Open Internet Order why its policy reversal of reclassifying BIAS providers as telecommunications providers is reasonable.86 Besides stating that the courts support the reclassification as shown above, the FCC also illustrated that broadband services have changed so much in recent years that a reclassification is needed to compensate for this change.87 Therefore, the FCC has likely justified its policy reversal.88

B. "No Throttling" Rule is Within the FCC's Regulatory Jurisdiction

The FCC, in developing the 2015 Open Internet Order, relied mainly on Title II of the Communications Act of 1934 and Section 706 of the Telecommunications Act of 1996.89 This Section will first consider whether the 2015 Open Internet Order's prophylactic "no throttling" rule is statutorily permitted by the 1996 Telecommunications Act. Afterward, this Section will consider whether the Communications Act of 1934 prohibits the implementation of the "no throttling" rule as it did with 2010 Open Internet Order's rules.90 If the "no throttling" rule is justified by Section 706 of the Telecommunications Act and does not conflict with the Communications Act of 1934, then the rule is within the FCC's regulatory jurisdiction, which will be the conclusion of this Section.

Section 706(a) of the Telecommunications Act gives the FCC regulatory authority to encourage the deployment of advanced telecommunications capability "by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove straightforward transmission capabilities that the Communications Act defines as a 'telecommunications service.'"91

86. See 2015 Open Internet Order, supra note 11 at 5615, ¶ 47 ("Based on this updated record, this Order concludes that the retail [BIAS] available today is best viewed as separately identifiable offers of (1) a [BIAS] that is a telecommunications service . . . and (2) various 'add-on' applications, content, and services that generally are information services. This finding more than reasonably interprets the ambiguous terms in the Communications Act . . ."); see also id. at 5747–48 ¶ 338 (finding that BIAS providers are reasonably classified as telecommunications services).

87. See id. at 5614, ¶ 42.

88. See id. at 5615, ¶ 49 ("By classifying [BIAS] as a telecommunications service under Title II of the [Communications] Act, . . . the [FCC] addresses any limitations that past classification decisions placed on the ability to adopt strong open Internet rules, as interpreted by the D.C. Circuit in the Verizon case.").

89. Id. at 5614, ¶ 41.

barriers to infrastructure investment."\textsuperscript{91} The Verizon court agreed with the FCC "that Congress . . . necessarily invested the Commission with the statutory authority to carry out those acts"\textsuperscript{92} that will "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."\textsuperscript{93} However, the court also found that Congress limited that grant of regulatory authority by two principles: (1) the grant of authority must be read in conjunction with the Communications Act; and (2) the FCC must design its regulation of BIAS for the specific purpose to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."\textsuperscript{94} The FCC, under Section 706(a), may carry out this responsibility via "other regulating methods that remove barriers to infrastructure investment."\textsuperscript{95} The "no throttling" rule could be an "other method" and, consequently, could fit into the statutory jurisdiction of the FCC under Section 706(a).\textsuperscript{96}

Section 706(b) of the Telecommunications Act of 1996 grants the FCC the ability to "take immediate action to accelerate deployment" if it finds "that broadband is [not] being reasonably and timely deployed."\textsuperscript{97} The Verizon court found that the FCC had correctly interpreted Section 706(b), giving the FCC the power accelerate broadband deployment whenever it finds that deployment is not "reasonable and timely."\textsuperscript{98} The court also agreed with the FCC that Section 706(b) can be interpreted to permit the FCC to implement measures that remove barriers to promote competition and invest in infrastructural development.\textsuperscript{99} Consequently, the FCC found that throttling was in fact a barrier that needed to be remedied with the 2010 Open Internet Order and 2015 Open Internet Order.\textsuperscript{100} Therefore, and

\begin{itemize}
\item \textsuperscript{91} 47 U.S.C. § 1302(a) (2015).
\item \textsuperscript{92} Verizon, 740 F.3d at 637–38.
\item \textsuperscript{93} 47 U.S.C. § 1302(a).
\item \textsuperscript{94} See Verizon, 740 F.3d at 640 (quoting 47 U.S.C. § 1302(a)).
\item \textsuperscript{95} 47 U.S.C. § 1302(a) (emphasis added).
\item \textsuperscript{96} See Verizon, 740 F.3d at 635–49 (illustrating that the anti-blocking and anti-discrimination common carrier rules of the 2010 Open Internet Order fit into the regulatory jurisdiction of the FCC because there are other methods to knock down barriers to infrastructure development).
\item \textsuperscript{97} 47 U.S.C. § 1302(b).
\item \textsuperscript{98} See Verizon, 740 F.3d at 640 (quoting 47 U.S.C. § 1302(b)).
\item \textsuperscript{99} Id. at 641.
\item \textsuperscript{100} See 2015 Open Internet Order, supra note 11, at 5607 ¶ 16–17 ("The 2010 open Internet rule against blocking contained an ancillary prohibition against the degradation of lawful content, applications, services, and devices, on the ground that such degradation would be tantamount to blocking. This Order creates a separate rule [(‘no throttling’)] to guard against degradation targeted at specific uses of a customer’s broadband connection . . . . The ban on throttling is necessary both to fulfill the
in accordance with the Verizon judicial review, under Section 706, the FCC has the "valid affirmative authority to enact measures[,] like the ones in the 2010 Open Internet Order[,] encouraging the deployment of broadband infrastructure."\(^{101}\)

Hence, one question remains: does the 2015 Open Internet Order's "no throttling" rule fit within the limitations of Section 706? Fortunately, the "no throttling" rule is similar and rightly dissimilar to both the anti-blocking and anti-discrimination rules of the 2010 Open Internet Order such that it likely fits within Section 706. The Verizon court deemed that both of these 2010 rules fit within the second limitation of Section 706—providing that the FCC must design its regulation of the Internet for the specific purpose to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"\(^{02}\) because, for example, the FCC could impose an anti-blocking rule to prevent barriers to fast broadband deployment.\(^{103}\) However, neither of these rules met the first limitation—requiring the grant of authority to be read in conjunction with the Communications Act\(^{104}\) because these rules were common carrier obligations that the FCC would impose on clearly defined non-common carriers.\(^{105}\) As a result, the FCC had the authority to make the 2010 Open Internet Order's anti-blocking and anti-discrimination rules, but it could not carry out these rules because these rules were common carrier obligations to be imposed on BIAS providers classified as information service providers at the time.\(^{106}\)

The "no throttling" rule is similar and dissimilar to the 2010 rules in a manner that allows it to fit squarely within the courts' interpretation of Section 706. The "no throttling" rule supplements the "anti-blocking" reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet, and to avoid gamesmanship designed to avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable." (emphasis added).

101. See Hurst, supra note 75, at 45 (citing Verizon, 740 F.3d at 628).
102. Verizon, 740 F.3d at 628, 639 (quoting 47 U.S.C. § 1302(a)).
103. See 2015 Open Internet Order, supra note 11, at 5636–38, 3639–40, ¶¶ 90–92, 96 (blocking lawful Internet traffic allows BIAS providers to handle congestion and priority of Internet access; however, it encourages BIAS providers not to invest in further broadband deployment, but instead to slow down traffic to save costs).
104. Verizon, 740 F.3d at 628, 639.
105. See id. at 649 ("Even though [S]ection 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers, the Commission may not, as it recognizes, utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act.").
106. See Hurst, supra note 75, at 46 ("However, even though the majority [in Verizon] found that the Commission was authorized to make these rules, the Order contravened one of the Commission's earlier rulings that expressly exempted information services providers from treatment as common carriers.").
rule—completely degrading access to lawful Internet activity—because throttling can serve the same purpose as blocking when degradation would be so severe that it renders access just as worthless as being blocked from lawful Internet activity.\(^{107}\) In this respect, the “no throttling” rule is similar to, if not the same as, the 2010 rules which the Verizon court found that the FCC had the authority to make.\(^{108}\) However, the “no throttling” rule is rightfully dissimilar to the 2010 anti-blocking and anti-discrimination rules because the FCC reasonably reclassified BIAS providers as telecommunications under the 2015 Open Internet Order that imposes this rule.\(^{109}\) Therefore, the “no throttling” rule is a common carrier obligation applied to common carriers, allowing them to work in conjunction with the Communications Act and meeting the second limitation of Section 706.\(^{110}\) Therefore, the “no throttling” rule falls within the FCC’s regulatory jurisdiction by meeting both limitations of Section 706.\(^{111}\)

**C. 2015 Open Internet Order Prohibits Throttling Unlimited Data Plans After Reaching a Certain Data Cap**

After illustrating that the FCC’s reclassification of BIAS providers as common carriers is reasonable and that the 2015 Open Internet Order’s “no throttling” rule is within the FCC’s regulatory jurisdiction, this Section analyzes whether the “no throttling” rule prohibits mobile BIAS providers from targeting and throttling unlimited data users, or whether this BIAS practice falls within the reasonable network management exception to the “no throttling” rule. At first glance, the “no throttling” rule clearly prohibits cellphone carriers from throttling unlimited data plans.\(^{112}\) However, the “no throttling” rule states that mobile BIAS providers may not throttle unless that throttling practice fits within the “reasonable

\(^{107}\) See supra parenthetical accompanying note 100.

\(^{108}\) See supra text and parenthetical accompanying note 106; see also 2015 Open Internet Order, supra note 11, at 5614, ¶ 42 (“The Verizon decision thus made clear that [S]ection 706 affords the Commission substantive authority, and that open Internet protections are within scope of that authority.”).

\(^{109}\) See 2015 Open Internet Order, supra note 11, at 5615–16 ¶ 50 (“Having classified broadband Internet access service as a telecommunications service, we respond to the Verizon court’s holding, supporting our open Internet rules under the Commission’s Title II authority and removing any common carriage limitation on the exercise of our [S]ection 706 authority.”); see also supra Section III(A) (deducing that the FCC reasonably reclassified BIAS providers as telecommunications providers by looking at judicial history and the FCC’s reasons for reclassification in the 2015 Open Internet Order).

\(^{110}\) See supra note 109.

\(^{111}\) See supra note 109.

\(^{112}\) See supra parenthetical accompanying note 56 (presenting the “no throttling” rule).
network management” exception. 113 Hence, this Section proceeds to determine whether cellphone carriers’ targeting and throttling of unlimited data plans is a practice that fits within the “reasonable network management” exception to the “no throttling” rule. To make this determination, this Section will first consider whether cellphone carriers throttle for business incentives by presenting gatekeeper and market power analyses. If the carriers do, then their throttling is not a “reasonable network management” practice,” 114 and consequently, as this Section will conclude, the 2015 Open Internet Order’s “no throttling” rule prohibits such throttling.

1. Business Incentives to Throttle

To determine whether cellphone carriers’ decision to target and throttle unlimited data users is a reasonable network management practice, any other reason than one that serves as a legitimate network concern will prohibit the throttling practice under the “no throttling” rule. 115 Accordingly, Subsection III(C)(1)(a) of this Comment analyzes economic and technical ability reasons for throttling, and Subsection III(C)(1)(b) analyzes market power reasons for throttling. From these analyses, there are adequate justifications as to why targeting and throttling unlimited data users is a practice that falls outside the “reasonable network management” exception and is prohibited by the “no throttling” rule.

a. Gatekeeper Analysis: Economic and Technical Ability to Throttle

Mobile BIAS providers act as Internet access gatekeepers, where all mobile access to and from the Internet must go through them. 116 As a result, mobile BIAS providers are in a position to easily interfere with mobile user access to the Internet, including slowing down Internet traffic

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113. Id.; see also supra text accompanying note 57 (presenting the “reasonable network management” exception).

114. See supra notes 59–60.

115. See supra notes 56–60 and accompanying text (illustrating how the “no throttling” rule works in conjunction with its “reasonable network management” exception and pointing out what kind of practice the FCC considered did not fit within the exception).

116. See Hurst, supra note 75, at 55 (quoting Verizon v. FCC, 740 F.3d 623, 646–47 (D.C. Cir. 2014)) (stating “the [Verizon] court recognized that because end users typically receive broadband from a single provider, that provider “functions as a terminating monopolist with power to act as a “gatekeeper” to [content] providers” and as a “gatekeeper” to consumers because of high switching costs). See generally JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 220–26 (2d ed. 2013) (presenting arguments from both sides of the open Internet debate to illustrate the affect).
to and from a user (i.e., throttling). Consequently, this model provides economic incentives to throttle so long as the mobile BIAS providers have the technical ability to do so.

First, mobile BIAS providers have the technical ability to throttle at varying levels. Instead of limiting the speed of all users on a congested tower (i.e., cell site), some mobile BIAS providers may choose to throttle particular customers with certain plans, while others may choose to limit their heaviest data consumers. Hence, cellphone carriers are able to determine specific tower usage and limit any particular usage as they deem necessary.

Second, mobile BIAS providers have economic incentives to throttle especially in rural areas. Building cell towers for few customers is an expensive venture for mobile BIAS providers because low population densities provide for slow investment recovery. In many rural areas, the population is so low that the number of cellphone users in these rural areas hardly justifies the cost of mobile broadband infrastructure development—i.e., cellphone subscriptions may be too few in some areas to pay for infrastructural investment. Furthermore, thanks to the broadband

117. See Hurst, supra note 75, at 55 (citing Verizon, 740 F.3d at 645–46) (emphasizing that Verizon did not deny it had the ability to throttle).

118. Id.

119. See id.; see also 2015 Open Internet Order, supra note 11, at 5639–40, ¶96.

120. See, e.g., supra note 2 (throttling after 21 GB by T-Mobile, after 22 GB by AT&T, and after 23 GB by Sprint).


122. See 2015 Open Internet Order, supra note 11, at 5628–34, ¶¶ 78–85; see also, e.g., id.; supra note 2.

123. See 2015 Open Internet Order, supra note 11, at 5639–40, ¶ 96 (pointing out that mobile providers throttle customers using unlimited data plans “in ways that effectively force them to switch to price plans with less generous data allowances”); see also The National Broadband Plan, supra note 14, at 136–37 (finding that carriers providing BIAS in rural areas have no business case to offer untainted broadband services because the cost of deploying and operating BIAS in low population densities makes it difficult to recover investment costs).


125. See generally 2014 Mobile Wireless Competition Report, supra note 5, at 15367–68, ¶¶ 112–13 (“Based on the data, tower operators build and operate more towers and [distributed antenna systems (DAS)] nodes in densely populated areas in order to support better coverage and more wireless data usage. For example as of September 2013, the average number of tower and DAS sites per county is 29 for
availability gap, there are many more upfront costs associated with bringing mobile broadband to rural areas with no broadband access as compared to upgrading already existing urban infrastructure. Therefore, private investment is unlikely to fill in the broadband availability gap when it is easier to throttle than build or upgrade a rural tower to handle the higher demand on the network.

Therefore, throttling allows mobile BIAS providers to unreasonably manage networks instead of investing in infrastructure. Slowing down heavy data users, rather than building new towers or updating old towers to handle the data consumption needs of their customers, is easier and cheaper. In fact, many popular speakers, including former President Clinton, have spoken on this matter. As such, throttling seems to be a pure business policy especially when targeted at a particular customer base. Hence, targeting and throttling unlimited data users is not a

counties with a population density between 75 and 100 persons per square mile, compared with an average of 377 per county for counties with a population density between 2000 and 4000 . . . . In addition, there are also more tower operators in densely populated counties . . . than less populated counties . . . . The numbers range from two operators per county in rural counties with one person or less per square mile and an average land size of 11,122 square miles to more than seven operators in dense urban counties with a population density of more than 4000 and an average land size of 98 square miles . . . ."

126. Id. at 136–38.

127. See id. at 15369, ¶ 114 (“[A] significant constraint[] faced by wireless infrastructure providers that need to add or modify tower . . . sites [is] capital expenditure . . . . In terms of capital expenditure, collocating wireless equipment on existing structures is often the most efficient and economical solution for mobile wireless service providers that need new cell sites, either to expand their existing coverage area, increase their capacity, or deploy 4G broadband services. The average cost to build a new tower is between $250,000 and $300,000, whereas the average cost of collocation on an existing tower is less than 25 percent of the total cost of a new tower.”); see also 2015 Broadband Progress Report, supra note 15, at 1457, ¶ 146 (“Broadband service reliability remains a key factor to broadband availability. Low broadband service quality has the potential to affect adoption rates, which in turn may affect customer demand, leading to less deployment.”).

128. See supra notes 123–127 (providing that costs associated with building and updating cellphone towers are high, where cellphone carriers take business incentive to throttle to avoid high investment costs—slowing unlimited data customers down so much that they effectively force customers to switch to more limited data plans that are less demanding on networks, preventing the need to build and update cellphone towers to handle increased demand on broadband networks).

129. See explanatory parenthetical accompanying supra note 128.

130. See President Clinton Interview, supra note 3 and corresponding text.

131. See 2015 Broadband Progress Report, supra note 15, at 1457, ¶ 146 (“Broadband service reliability remains a key factor to broadband availability. Low broadband service quality has the potential to affect adoption rates, which in turn may affect customer demand, leading to less deployment. Broadband service quality remains an essential component of broadband deployment. Providers must maintain and upgrade their broadband offerings to ensure that high-quality broadband remains
“reasonable network management” practice because it is just a business tactic creating user dissatisfaction.\(^\text{132}\)

\textit{b. Market Power Analysis: Mobile BIAS Providers Throttle Because They Can “Get Away With It”}

Mobile BIAS providers have significant market power to implement unfavorable policies in many parts of the United States,\(^\text{133}\) with little to no backlash from customers,\(^\text{134}\) because many rural customers only have access to one or two cellphone carriers.\(^\text{135}\) For example, if a cellphone carrier is the only mobile BIAS provider in the area, then it has considerable market power, and its customers inevitably suffer the unfavorable policies it implements, or they go without cell service.

Likewise, there may be multiple cellphone carriers in an area that act in concert and implement collectively unfavorable policies,\(^\text{136}\) rendering switching cellphone carriers practically ineffective. Similarly, maybe not all of the carriers in an area implement unfavorable policies like the practice of throttling, but the switching penalties may be so high that the

\(^{132}\) See supra note 4 (showing customer dissatisfaction).

\(^{133}\) Compare NUECHTERLEIN & WEISER, supra note 116, at 220–21 (citing 2010 Open Internet Order) (“[M]ost economic advocacy for net neutrality regulation begins with the argument that there is inadequate competition in the residential broadband marketplace and that the government should step in to prevent abuses of the resulting market power . . . [that] ‘is highest in markets with few competitors.’”), with id. at 220–24 (presenting the general view of the net neutrality opponents that “the retail Internet access market is more competitive and dynamic than net neutrality advocates contend” because, even when there are only a few broadband providers in an area, they will act competitively and fairly for their own interests of keeping their customers satisfied and to attract new customers).

\(^{134}\) See 2015 Open Internet Order, supra note 11, at 5642, ¶ 99 (“The provision of wireless service involves the interaction between the wireless network operator, the various edge providers, the customer’s handset or other equipment, and the conditions present in the specific location the customer wishes to use the service. In this environment, it can be very difficult for customers to ascertain the source of a service disruption, and hence whether switching wireless providers would solve the problem.”); see also 2014 Mobile Wireless Competition Report, supra note 5 at 15325 (Chart II.B.6) (illustrating that only 1.3% to 4% of customers on any of the four national cellphone carriers actually switch).

\(^{135}\) See National Broadband Map: Number of Broadband Providers, supra note 6 (selecting “wireless” for provider type and comparing minimum at two and three providers and seeing a significant decrease in mobile broadband coverage with three providers. After comparing the minimum provider count at four and five, there is only a small portion of the United States with five or more mobile BIAS providers—keep in mind that data is likely overstated because mobile broadband service may not exist in the entire census block.).

\(^{136}\) See, e.g., supra notes 2, 4 (pointing out that all of the major mobile BIAS providers implemented throttling polices at one time or another).
cost of switching outweighs avoiding the throttling policy.\footnote{137}

Regardless of the situation presented above, cellphone carriers can make the business move to target and throttle unlimited data users, especially in rural areas, without worrying that they will lose business in these throttled areas\footnote{138} because of their significant market power, which is not throttling for “reasonable network management” purposes.

2. Throttling Unlimited Data Plans Does Not Meet the Network Management Practice Exception

Knowing how and why mobile BIAS providers throttle their customers,\footnote{139} the question that this Comment seeks to answer still remains: can cellphone carriers target and throttle unlimited data users? This Subsection will answer this question in the negative.

The previous sections illustrate that mobile BIAS providers target and throttle unlimited data users for business purposes, not “reasonable network management” purposes.\footnote{140} Since cellphone service providers have the economic incentive and technical ability to throttle, then viewing their throttling practices as “reasonable network management” is mentally taxing, especially when targeting specific groups of customers (like unlimited data plan users).\footnote{141}

Moreover, a “reasonable network management” practice is not one that treats similarly situated users differently.\footnote{142} Cellphone carriers claim that they throttle as a means to manage their networks, where they throttle their unlimited data users over their limited data users as a means to give all its customers an equal opportunity to use fast Internet.\footnote{143} However, this

\begin{itemize}
\item \footnote{137} See supra parentheticals accompanying note 134 (explaining churn rates and low percentage of customer switching).
\item \footnote{138} See supra notes 133–135.
\item \footnote{139} See supra Section III(C)(1)(a) (explaining mobile BIAS providers’ gatekeeper power); supra Section III(C)(1)(b) (explaining mobile BIAS providers’ market power).
\item \footnote{140} See supra Section III(C)(1)(a) (explaining that mobile BIAS providers have economic and technological abilities to throttle, and they do so by targeting unlimited data users or other specific groups of users for purposes other than network management); supra Section III(C)(1)(b) (explaining mobile BIAS providers have strong economic incentives to throttle because they simply can when there is little-to-no competition in many areas in the United States).
\item \footnote{141} See supra parentheticals and text accompanying notes 56–60 (explaining the “no throttling” rule and its exception).
\item \footnote{142} 2015 Open Internet Order, supra note 11, at 5700, ¶ 216.
\item \footnote{143} See, e.g., John Saw, Protecting the 97%, SPRINT (Oct. 17, 2015, 12:00 AM) http://newsroom.sprint.com/blogs/sprint-perspectives/protecting-the-97.htm (“As we continue to improve our network, and as data usage across the industry continues to skyrocket, we’re always looking at ways to better manage our network resources and improve the customer experience. One way we aim to make the customer experience better is to protect against the possibility that a small minority of customers might
throttling practice permits different levels of network access to similarly situated users. So long as a limited data user has not reached her specified data cap, she receives top speeds for the agreed upon price of the limited data plan. By definition, however, unlimited data users cannot reach a data cap, so they are users in the same situation as limited data users who have not reached their limited data caps, yet the unlimited data users are the only ones throttled for network management. This practice is discriminatory and does not satisfy the “reasonable network management” exception to the “no throttling” rule. Therefore, targeting and throttling unlimited data users does not meet the “reasonable network management” exception when throttling everyone for a legitimate network issue would be more reasonable.

Additionally, the other result is that throttling unlimited data users in rural areas does not meet the “reasonable network management” exception on two grounds: (1) it targets a specific group; and (2) it occurs because it is cheaper to do so in rural areas than investing in rural infrastructure. Neither of these are “reasonable network management” practices; rather, they are business choices that are not exception-worthy and are prohibited by the “no throttling” rule.

IV. FCC GOT IT RIGHT WITH THE “NO THROTTLING” RULE

The 2015 Open Internet Order’s “no throttling” rule should remain unchanged and effective because it completely bans throttling except for “reasonable network management” and because it serves both consumers and providers equally well, making it a good public policy. For example, a “reasonable network management” practice would be throttling everyone’s data usage and not just targeting and slowing down certain users when there is high bandwidth demand on a tower or some other
legitimate reason. In this scenario, the mobile BIAS providers benefit because they are able to reasonably manage their mobile networks when they see fit, and the consumers benefit because they receive a consistent service while not being discriminated against by their BIAS providers.

However, targeting and throttling unlimited data plan customers (or customers in the top percent of data users) is not an acceptable practice that falls within this exception to the "no throttling" rule.150 In this situation, the mobile BIAS providers benefit because their throttling practices allow them to save on costs for needed infrastructural development151 while the consumers do not benefit because they are discriminatorily being throttled. In fact, the throttling here occurs on a small percentage of the customers (i.e., unlimited data users), which is likely not enough to provide a better service for all consumers using the mobile BIAS.152 The following two sections will provide additional reasoning for the recommendation that the "no throttling" rule and its exception ought to remain unchanged and effective.

A. In a United States Where Unreasonable Throttling Is Allowed

Today's America does not make imagining the lack of a "no throttling" rule difficult considering the FCC just released the rule in March 2015,153 and cellphone carriers continue to throttle their unlimited data customers as if the rule does not exist.154 However, if the "no throttling" rule does not exist, not only will mobile data consumers suffer at the expense of the mobile BIAS providers filling their coffers,155 but consumers will also

150. See supra parentheticals and text accompanying notes 59–60 (explaining that the FCC will not consider the practice of targeting and throttling unlimited data users under the "reasonable network management" exception).

151. See supra parenthetical and text accompanying notes 125–127 (explaining that the costs associated with building and updating cellphone towers are high and that mobile service providers take the business incentive to throttle to avoid high investment costs. These actions slow unlimited data customers down so much that they effectively force these customers to switch to more limited data plans that are less demanding on the networks, and they also aid these mobile providers by preventing the need to build and update cellphone towers to handle the increased demand on mobile broadband networks.).

152. But see, e.g., Saw, supra note 143 (claiming that throttling only "a small minority of customers [who] might occupy an unreasonable share of network resources" will improve overall customer experience).


154. See supra note 2.

155. See 2015 Open Internet Order, supra note 11, at 5640–42, ¶¶ 97–98 (illustrating that, because of limited competition in many areas and stringent switching policies, consumers will likely be stuck with throttling and other unfavorable policies).
suffer from a lack of broadband infrastructure development. As a result, the United States will likely lose its place as an international leader in broadband development when many American communities still lack sufficient broadband access, which prevents the United States from competing at full economic potential—a consequence that is neither far-fetched nor too far from realization.

1. Case Study: Economic Impact on Rural Areas

Consider the negative economic effects of throttling on rural areas. Allowing throttling in rural areas, just because it is easier and cheaper than investing in rural infrastructure to meet users needs, is bad policy for two reasons: (1) quality broadband access brings jobs; and (2) mobile broadband may be the only efficient way to build up a broadband network in some rural areas.

First, sufficient broadband access brings jobs, causing local economies to thrive since today’s economies rely on fast, reliable Internet access. For instance, mobile broadband supports and builds rural economies because rural producers and storeowners can put their products online and manage their online presence on the go. Furthermore, many jobs require broadband access. For example, technology companies thrive in today’s market; however, none of these companies are going to move to a rural area that lacks fast, reliable broadband access.

Even though approximately ninety-nine percent of the United States population has access to broadband, only a small percentage of rural areas actually have access to quality broadband service. The same holds true

156. See supra parentheticals and text accompanying notes 123–131 (throttling affects broadband infrastructure development in rural areas, negatively affecting economic opportunities in rural areas).


158. See supra notes 125–127 (providing the costs associated with building and updating cellphone towers are high, where mobile service providers take the business incentive to throttle to avoid high investment costs in low population).

159. See White House Net Neutrality Press Release, supra note 54.

160. See, e.g., The National Broadband Plan, supra note 14, at 136–37 (“Diller, Neb., population 287, is home to Blue Valley Meats, which has seen its business grow more than 30% and its employee ranks double over the last five years [at the time of this study], thanks in large part to the creation of a website to extend its product reach.”).


for mobile broadband, except coverage is much more spotty in rural areas, resulting in such an unreliable quality of service that there may be no service where coverage maps show otherwise. As such, some rural users statistically have mobile broadband access but actually do not for a variety of reasons—e.g., a mountain blocks a user's signal, or a user lives at the very edge of a cellphone tower's range. Therefore, there are many areas in the United States that do not have sufficient broadband access to successfully compete economically.

Second, since mobile broadband may be the only efficient way to build up a broadband network in some rural areas, throttling policies threaten infrastructural growth of broadband access in these areas. For example, consider the case of rural Africa where, instead of building costly-wired broadband networks, cellphone towers are installed, and cellphones are passed out to get a very rural community online. However, once demand on these towers outgrows their throughput capabilities, then cellphone carriers have two options: to invest in more capable towers or to throttle the towers' users to keep demand pegged at the capabilities of the towers. As a result of the second option, the economy of the affected area will suffer because it will not be able to compete with other areas that have non-throttled access to broadband Internet. Rural America suffers the same fate when trying to compete with non-throttled, more capable urban broadband networks because jobs likely leave or do not even come to these rural areas.

Hence, throttling and similar policies stifle innovation and infrastructural growth, which is a huge detriment to rural communities lacking adequate broadband access. In fact, throttling is a way to settle with existing infrastructure to handle user capacity instead of building it up to meet consumer needs. Moreover, since cellphone carriers would rather throttle in rural areas for business purposes (it is cheaper to throttle than to

163. See 2015 Broadband Progress Report, supra note 15, at 1457, ¶ 146; see also 2014 Mobile Wireless Competition Report, supra note 5, at 15405, ¶ 190 (explaining carriers claim broader service coverage area than actually provided).


167. See The National Broadband Plan, supra note 14, at 136–37 (explaining the availability broadband gap); see also supra note 135 (showing the need for mobile broadband in many rural areas).

168. See 2015 Open Internet Order, supra note 11, at 5703-04, ¶ 223.

169. See supra notes 123–128.
invest in infrastructure), the 2015 Open Internet Order's "no throttling" rule is especially good policy for rural America since throttling in these areas is not a "reasonable network management" practice necessary to avoid the applicability of the "no throttling" rule.

B. In a United States with the "No Throttling" Rule in Effect

If the "no throttling" rule of the 2015 Open Internet Order were to remain unchanged and effective, then the pace of mobile broadband infrastructure development in the United States would likely quicken because the rule de-incentivizes the idea that throttling is easier than developing broadband infrastructure. Consequently, the United States would prosper from all of its regions having adequate broadband access to sustain economic tranquility and from being able to compete at its full potential in the international arena.

Furthermore, the rule provides a balanced, beneficial situation for both consumers and mobile BIAS providers. This rule permits one to imagine an America without throttling, where mobile BIAS providers implement policies that allow their customers to access the Internet at full speed regardless of the data plan they choose. Accordingly, to ensure that their customers have this full access, they are incentivized to develop mobile broadband infrastructure and create better policies to manage networks.

170. Id.

171. See supra notes 56–57 and accompanying text (presenting the "no throttling" rule and its exception); see also 2015 Open Internet Order, supra note 11, at 5653, ¶ 124 ("We emphasize, however, that to be eligible for consideration under the reasonable network management exception, a network management practice that would otherwise violate the no-throttling rule must be used reasonably and primarily for network management purposes, and not for business purposes.").

172. See 2015 Open Internet Order, supra note 11, at 5700, ¶ 216; see also Marc S. Martin, Janis Claire Kestenbaum, and Brendon P. Fowler, A Closer Look At FCC's $100M AT&T Penalty, Law360 (July 7, 2015, 10:10 AM) http://www.law360.com/articles/675909/a-closer-look-at-fcc-s-100m-at-t-penalty ("[T]he language used in the [notice of apparent liability] suggests that the FCC's [proposed $100 million penalty against AT&T] is not merely guided by a neutral mathematical calculation but by broader policy objectives.").

173. See 2015 Open Internet Order, supra note 11, at 5703, ¶ 223 ("We believe that the reasonable network management exception provides... mobile broadband providers sufficient flexibility to manage their networks. We recognize... that the additional challenges involved in mobile broadband network management [as compared to fixed broadband] mean that mobile broadband providers may have a greater need to apply network management practices... to balance supply and demand while accommodating mobility.").

174. See id. at 5663, ¶ 142 ("As the Verizon court recognized, Internet openness drives a 'virtuous cycle' in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge.").
without consumer disadvantages like targeting and throttling unlimited data users.175

CONCLUSION

Throttling—a popular way for cellphone carriers to manage their networks by slowing down their users—is prohibited by the 2015 Open Internet Order’s “no throttling” rule. Considering that the rule is supported by judicial precedent and is within the FCC’s regulatory jurisdiction, it is likely to survive judicial review. Moreover, targeting and throttling unlimited data users is not a “reasonable network management” practice but a practice prohibited by the “no throttling” rule. Therefore, the “no throttling” rule should remain unchanged and effective because it protects unlimited data plan users and promotes growth and development of broadband infrastructure, especially in rural areas.

175. See id.