

**ORAL STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

As Prepared for Delivery

Re: *Restoring Internet Freedom*, WC Docket No. 17-108.

The order before us represents the culmination of extensive work by agency staff to carefully consider whether net neutrality rules are truly warranted, thoroughly reviewing the legal underpinnings, economic analyses, and practical effects, as debated exhaustively in the record of this proceeding. I agree with the decision, and I support such a well-reasoned and soundly justified order.

While I have long-standing views on this topic, I approached this proceeding with an open mind. I read the substantive comments with interest, and I met with everyone I could, no matter the particular viewpoint. In the end, I am simply not persuaded that heavy-handed rules are needed to protect against hypothetical harms. In all this time, I have yet to hear recent, unquestionable evidence of demonstrable harms to consumers that demands providers be constrained by this completely flawed regulatory intervention. I still cannot endorse guilt by imagination.

It is a shame that this topic has been plagued by baseless fearmongering. Many small businesses have been blatantly misled into thinking that they are going to be forced to pay more to continue to do business online. Others have been told that free speech and civil rights are on the line. It simply isn't true – and we know that from experience.

The Internet has functioned without net neutrality rules far longer than with them. Having rules has been the exception, not the norm. So, what happened during that time? Did ISPs start scouring the web in the hopes of charging a small business more to run an online shop? Did they block advocacy groups from expressing their views? Of course not. In fact, nobody can name more than a handful of examples that occurred over the course of an entire decade prior and that were readily dealt with, whether actual violations or not. The legend of a cable company trying to break the Internet may make a scary bedtime story for the children of telecom geeks, but it isn't reality.

Far from being an Internet dark age, those periods without net neutrality rules were times of innovation and investment. The most well-known edge providers came into being and flourished, including Google in 1998, Facebook in 2004, YouTube in 2005, and Twitter in 2006. Broadband deployment boomed. And, consumers and small businesses were freely able to access all lawful content.

Now, companies have made enforceable commitments to uphold net neutrality and consumer advocates are actively watching for violations to trumpet. Therefore, it is even less likely that we will see bad conduct in the future. Indeed, the fact that some have felt compelled to resort to shameful scare tactics only serves to highlight that there are no real problems for the FCC to solve.

So, for those of you out there who are fearful of what tomorrow may bring, please take a deep breath. This decision will not break the Internet. What we are doing is reverting back to the highly-successful, bipartisan, governmental approach that existed before.

As the order makes clear, we depart from the prior Commission approach because we determine that the decision was flawed, we believe that our statutory interpretation and course of action is the better one, and our decision is grounded in and supported by the record. The text has been publicly available for over three weeks, and our good staff has summarized it for us today, so there is no need for me to step through the policies and reasoning again in detail. Instead, I will highlight a few key parts and address some of the false arguments and misconceptions regarding the substance and process.

Replacing the Damaging Title II Framework with a Proven Light-Touch Approach

While repealing net neutrality rules grabs headlines, reversing the classification of broadband Internet access service as a Title II telecommunications service is far more consequential. Net neutrality

started as a consumer issue, but it soon became a stepping stone to impose vastly more onerous common carrier regulations on broadband companies. Even the previous Chairman initially attempted to reinstate net neutrality rules under more limited legal authority. And many companies would have accepted the compromise and lived with net neutrality rules as long as the Commission didn't impose Title II. But thanks to one infamous YouTube video posted by the prior Administration, this so-called independent agency was quickly railroaded into treating ISPs like public utilities instead.

As discussed at length in the order, the record, and the dissents that Chairman Pai and I wrote in response to the 2015 order, there were fundamental legal problems and factual errors underlying the decision to treat fixed and mobile broadband services as “telecommunications services.” Additionally, that decision opened the door to much broader regulation of broadband providers.¹ And, as we saw, the Commission quickly walked through that door. The agency next adopted privacy regulations that would have disrupted the interworking of the Internet, upended consumer expectations and preferences, and created asymmetrical obligations on the companies that have the least amount of access to consumers' online data. Fortunately, Congress rescinded those rules. However, companies continued to face uncertainty that other business decisions, commercial negotiations, service offerings, and pricing decisions would be scrutinized by the Commission.² I believe that these legitimate concerns were well founded and, if there had not been a change in Administration, the agency would have proceeded further down that path, as demonstrated by its zero-rating witch hunt.

The decision to reinstate the classification of both fixed and mobile broadband Internet access service as an “information service” under section 3, and to reinstate the classification of mobile broadband as a “private mobile service” under section 332, eliminates these concerns and restores a sensible bipartisan approach to broadband services.³ Under this proven framework, the FCC asserts jurisdiction over broadband Internet access service as an interstate information service, but applies regulation only to the extent warranted to address specific, concrete concerns.

Eliminating the Bright Line Rules and General Conduct Standard

With the elimination of Title II, there is no remaining legal basis for the net neutrality bright line rules and general conduct standard, so we must repeal them. In many proceedings before this agency, I have questioned the need for rules that impose costs but do not solve real problems, so their removal is completely appropriate and necessary. That isn't necessarily the end of the story, however. Congress may enact legislation providing new rules and the legal authority to support them. I firmly believe that would be the better course and the only way to bring finality to this issue.

As some have already argued, the issue of FCC authority over the Internet is a “major question.”⁴ Specifically, it is a matter of such “economic and political significance,” that if Congress intended the FCC to wield the power to regulate it, then Congress would have clearly stated its intent.⁵ Our current statute is devoid of any such statement.⁶ On the contrary, what little is said in the law is aimed at keeping the Internet free from state and federal regulation. However, new legislation, should Congress deem it appropriate, would provide that clarity and end the game of regulatory ping pong.

¹ See AT&T Comments at 49-52.

² See *id.*

³ See Verizon Comments at 27-60.

⁴ See TechFreedom Comments at 2-6.

⁵ See *id.*

⁶ See Free State Foundation Comments at 20-21.

I would humbly suggest, however, that the general conduct standard remain forever in the ash heap. This policy gave the Commission's Enforcement Bureau unbounded power to make the rules up as it went along – a frightening prospect. Businesses could find themselves subject to investigation without any prior notice that conduct could be considered a violation.⁷ One public interest group even called the catch-all a “recipe for overreach and confusion.”⁸ It was the height of regulatory capriciousness and should never be resurrected.⁹

Similarly, I am hopeful that if Congress goes down this path, it will see merit in rejecting a ban on paid prioritization. On that note, I am pleased to see that the House Energy and Commerce Committee plans to hold a hearing on this topic, as there are several misconceptions about how it could optimize the use of networks and traffic delivery for all involved. Clearly, there are cases today and many more that will develop in time in which the option of a paid prioritization offering would be a necessity based on either technology needs or consumer welfare. I, for one, see great value in the prioritization of telemedicine and autonomous car technology over cat videos, benefits I anticipate the House Hearing will highlight.

And speaking of autonomous cars, we must ensure that wireless providers can manage their systems. Wireless networks have capacity constraints based on the physics of the spectrum they use. Generally, wireless use is booming, and more and more Americans are using wireless networks to access the Internet, but this is just the beginning. In 2016, the average person generated 250 MB of data per day and, in 2020, it is predicted that number will increase to 1.5GB per day – a 200 percent increase in data traffic. Now, consider that each autonomous vehicle is predicted to generate an additional four terabytes of data a day, much of which will be carried by wireless networks.¹⁰ It is hard to imagine that some prioritization of traffic will not be necessary, further undermining attempts to ban such practices.

Retaining Transparency Rules and Partnering with the FTC to Enforce Them

Although the order eliminates the bright line rules and general conduct standard, it does leave a version of the transparency requirements in place. In fact, the requirements are more extensive than those first adopted back in 2010. While I remain skeptical of the legal authority for them, or their value given the FTC's existing authority, I am without a mechanism to get them removed.

The transparency rules mean that anyone who is interested in monitoring the impact of this order will be able to stay informed about how providers are implementing it. Should companies choose to discriminate against certain types of traffic, for example, they are required to say so. Given that companies have already promised not to engage in such behavior, however, I do not expect the disclosures themselves to be that shocking.

Of course, if a business fails to disclose relevant information or its practices differ from what is described, it will be subject to an investigation and enforcement, as outlined in the recent FCC-FTC Memorandum of Understanding. But, I sincerely doubt that legitimate businesses are willing to subject themselves to a PR nightmare for attempting to engage in blocking, throttling, or improper discrimination. It is simply not worth the reputational cost and potential loss of business. More likely, and unfortunately,

⁷ See Testimony of Robert M. McDowell, Chief Public Policy Advisor of Mobile Future, before the U.S. House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, “Net Neutrality and the Role of Antitrust” at 10 (November 1, 2017) (McDowell Testimony); Free State Foundation Comments at 55-56.

⁸ Corynne McSherry, Electronic Frontier Foundation, *Dear FCC: Rethink The Vague “General Conduct” Rule* (Feb. 24, 2015), <https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules>.

⁹ NCTA Comments at 43-48.

¹⁰ See Brian Krzanich, Intel Newsroom, *Data is the New Oil in the Future of Automated Driving* (Nov. 15, 2016), <https://newsroom.intel.com/editorials/krzanich-the-future-of-automated-driving/>.

the transparency requirements will keep companies from offering services or features that could actually benefit consumers.

While I understand the decision to rely on section 257 as authority for the transparency requirements, I do not believe that section 218 or the provisions of Title III cited in the circulated version of the order should be invoked here. I am relieved that they have been removed from the item at my request. Based on the conversations that my staff and I have had over the last few weeks, I am confident that they would not be necessary to uphold the transparency rules, should those be challenged.

Moreover, opening the door to their use could prove costly and damaging in the long run. Those provisions contain very broad language and I could envision a more regulatory Commission in the future attempting to extend their use to require burdensome disclosures delving into the minutiae of service providers' businesses. Additionally, because the provisions apply only to certain subsets of providers, their use would create asymmetric burdens within the industry.

Even the prior Commission, over the objections of public interest advocates, forbore from applying section 218 to broadband providers.¹¹ The agency determined that section 218 and related provisions were customarily used to implement traditional rate-making authority over common carriers and were unnecessary to protect consumers in the net neutrality context. Therefore, I do not want this Commission to be responsible for reviving its use. In fact, I recommend that it be included in a future forbearance item to ensure that the provision is removed from the books once and for all.

Preempting State and Local Requirements that Undermine our Federal Framework

Last, but certainly not least, the order contains a clear declaration that broadband is an interstate information service and a robust preemption analysis. The order makes plain that broadband will be subject to a uniform, national framework that promotes investment and innovation. This is eminently reasonable and completely consistent with the Constitution's Commerce Clause.¹² Broadband service is not confined to state boundaries and should not be constrained by a patchwork of state and local regulations.¹³ And, this is particularly germane to wireless services where mobile devices and the transmissions they carry can easily cross state lines. This could have drastic results where it is possible for such communications to be prioritized in one state, but not in another. A hodgepodge of state rules could severely curtail not only the next generation of wireless systems that we have been working so hard to promote, but also the technologies that may rely on these networks in the future. Accordingly, any laws or regulations that conflict with or undermine federal broadband policies are preempted. Given my druthers, I would actually go even further on preemption, but I could only carry the debate so far today.

This is not a new or novel position.¹⁴ The 2015 order also announced a "firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme."¹⁵ While the rules we adopt today are

¹¹ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, para. 508 (2015).

¹² See U.S. CONST. art. 1 § 8, cl. 3. See also Roslyn Layton, *The Federalist and Anti-Federalist Arguments for Internet Freedom*, AEIdeas (Nov. 15, 2017), http://www.aei.org/publication/the-federalist-and-anti-federalist-arguments-for-internet-freedom/?utm_source=newsletter&utm_medium=paramount&utm_campaign=cict.

¹³ See Verizon White Paper, FCC Authority to Preempt State Broadband Laws, WC Docket No. 17-108 (Oct. 25, 2017) (Verizon White Paper); McDowell Testimony at 12-15; CTIA Comments at 54-58; NCTA Comments at 63-68; Letter from USTelecom to FCC, WC Docket No. 17-108 (filed Nov. 17, 2017).

¹⁴ Verizon White Paper at 5-9.

¹⁵ *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, para. 433 (2015).

obviously different than the 2015 order, the concept that we will preempt inconsistent state and local requirements is well-established.¹⁶

Although the order does acknowledge an extremely limited state role in enforcing their traditional police powers, state actions that go beyond this realm will be subject to scrutiny and challenge. The order makes clear that any requirements akin to common carrier regulation are barred. At my request, the order also specifies that states may not adopt their own transparency requirements, whether labeled as such or under the guise of “consumer protection.” I would also view state broadband privacy actions as outside the scope of what is permissible. The purpose of this order is to restore a light-touch approach through deregulation. Therefore, any action to increase regulatory burdens on broadband providers would run directly counter to our efforts.¹⁷

I hope that most states and localities will not waste time and resources attempting to push the boundaries, but I realize that some will do so regardless. I expect the agency to be vigilant in identifying and pursuing these cases. I also commit to work closely with the Chairman and OGC to help quash any conflicts that arise.

Responding to Baseless Process Complaints

Before concluding, I want to address the atmospherics surrounding the process in this proceeding. I’ll start with the number and identity of the comments submitted. Some would have us believe that the comment process has been irreparably tainted by the large number of fake comments. That view reflects a lack of understanding about the Administrative Procedure Act. The agency is required to consider and respond to all significant comments in the record. Millions of comments that simply say something along the lines of “keep net neutrality” or other colorful language we can’t say in public – whether they are submitted by real people, bots, or honey badgers – have no impact on the decision. As the order makes clear, we do not rely on any such comments. While it is possible that the agency may want to tighten the comment filing system going forward, the fact of the matter is that fake comments are not unique to this proceeding and had no impact on the substance or propriety of the decision.

To be clear, that does not mean that comments were ignored. I commend staff for the extra effort they had to take to sift through the extraneous comments. Many were simply obscenity laced tirades. Yet the order reflects a careful evaluation and response to all significant comments, including those that took a different position. Unlike the 2015 order where opposing viewpoints were relegated to footnotes and dismissed without commentary, often in the form of lengthy “but see” string cites, this order engages with and responds to such comments in a credible and substantive way.

Additionally, I disagree with the suggestion that the Commission should have held public hearings. Any member of the public that wanted to express a view could have done so through the standard comment process, and many, many did. Public hearings may bring out some additional people in a particular location, but it is inefficient for reaching large numbers of interested parties from around the country.

Finally, I see no merit in the suggestion that the agency should have delayed this vote until after the Ninth Circuit issues a decision en banc in the *FTC v. AT&T Mobility LLC* case. While the panel decision raised some questions about the FTC’s jurisdiction, it was widely viewed with skepticism. Moreover, the court’s order granting en banc rehearing of the panel decision rendered it a “legal

¹⁶ See CTIA Comments at 54-58; NCTA Comments at 63-68; Letter from Kathryn A. Zachem, Comcast to Marlene Dortch, FCC, WC Docket No. 17-108 (filed Nov. 15, 2017).

¹⁷ See Verizon White Paper at 2-4.

nullity.”¹⁸ Therefore, the FTC is not precluded from enforcing ISPs’ net neutrality commitments.¹⁹ In short, there is no basis for a delay.

I commend the Chairman, his team, and our hardworking and diligent staff for the enormous effort to produce an order of this quality and significance. I am sure that this task required long days and much time spent away from family and friends and I hope that you will be able to rest and reconnect over this holiday season. It is very deserved and you have my full respect and profound appreciation for your work. I vote to approve.

¹⁸ See NCTA Comments at 55.

¹⁹ See *id.*