

Via ECFS  
October 20, 2017  
Marlene H. Dortch  
Secretary  
Federal Communications Commission

Re: Ex Parte Communication of Brent Skorup; In the Matter of Restoring Internet Freedom, WC 17-108

Dear Ms. Dortch:

On October 19, 2017, Canyon Brimhall, Mike Jayne, and I met with Brooke Ericson, Chief of Staff to Commissioner O’Rielly and Amy Bender, Legal Advisor to Commissioner O’Rielly, to discuss the Commission’s proposal to revisit the 2015 Open Internet Order and eliminate Internet regulations.<sup>1</sup>

During the meeting I highlighted arguments made in my August 30 reply comments in the proceeding.<sup>2</sup> First I pointed out that the Supreme Court decision in *NCTA v. Brand X* never held that the classification of Internet access was ambiguous and never questioned that Internet access is an information service.<sup>3</sup>

Second, I explained the First Amendment vulnerabilities of the Open Internet Order. The OIO on its face draws distinctions based on the content conveyed by ISPs. In footnote 575 of the order, the FCC says that offering “family friendly” filtering to users is a form of “beneficial,” permitted network management.<sup>4</sup> The Order therefore imposes content-based burdens on media distributors (Internet service providers) that cannot survive strict scrutiny from a court.

The Supreme Court stated in *Town of Gilbert* that facially content-based regulations—like the OIO’s “reasonable network management” exception—are automatically “subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”<sup>5</sup> The *Town of Gilbert* case was released in June 2015, a few months after the release of the Open Internet Order, and the FCC should reevaluate the constitutionality of the Order in light of the Supreme Court decision.

Third, I noted that the Order undermines open Internet norms. That’s because the Order injects a brand-new regulatory asymmetry into the broadband market: conventional broadband service is regulated heavily under Title II but any curated Internet service is a lightly-regulated service falling outside Title II. In the words of the FCC attorney when defending the OIO before the DC Circuit Court of Appeals in 2015, a curated service will “drop out of the definition of Broadband Internet Access Service and the

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<sup>1</sup> FCC, “In the Matter of Restoring Internet Freedom,” WC Dkt. No. 17-108, Notice of Proposed Rulemaking, para. 31, released Apr. 27, 2017, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344614A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf).

<sup>2</sup> Reply Comments of Brent Skorup, August 30, 2017, WC Dkt. No. 17-108, <https://ecfsapi.fcc.gov/file/10830271311126/Skorup-Restoring-Internet-Freedom-Mercatus-Comment-v1.pdf>.

<sup>3</sup> *Nat’l Cable Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 996-97 (2005) (holding that the Communications Act “fails unambiguously to classify facilities-based *information-service providers* as telecommunications-service offerors. . .”) (emphasis added).

<sup>4</sup> FCC, Protecting and Promoting the Open Internet, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order 102–3 n.575 (rel. Mar. 12, 2015).

<sup>5</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

rules don't apply. . . ."<sup>6</sup> Therefore, the Order is, at best, ineffective at encouraging open Internet norms. At worst, it actively encourages Internet service providers to filter content and escape regulation.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Respectfully submitted,  
Brent Skorup  
Research fellow, Mercatus Center at GMU

cc: Brooke Ericson  
Amy Bender

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<sup>6</sup> Brent Skorup, Why the FCC's Net Neutrality Rules Could Unravel, Plain Text (Mar. 1, 2016), <https://readplaintext.com/why-the-fcc-s-net-neutrality-rules-could-unravel-cc26c6b96418> (quoting audio from U.S. Telecomm. Ass'n oral arguments).