Before the   
Federal Communications Commission  
Washington, DC 20554

In the Matter of )   
 )  
Restoring Internet Freedom ) WC Docket No.17-108  
  
Adopted May 18, 2017 Released May 23, 2017

**COMMENTS OF DAVID C. OLSON**

I am David Olson, past Director of Cable Communications for the City of Portland, Oregon. I offer these comments in my personal capacity and without footnotes, as all of the authority cited in my comments is readily available. Applicable citations to references in my comments are already included in the FCC's NPRM in this docket (WC Docket No. 17-108) as well as the prior FCC Docket (GN Docket No. 14-28, released March 12, 2015, hereinafter “Open Internet Order”) so there is no need to duplicate such citations here. I must also stress that these comments are not official comments of the City of Portland, Oregon or the Mt. Hood Cable Regulatory Commission. My comments are offered strictly in my personal and professional capacity, as a citizen and adjunct law professor with considerable knowledge in the field.

By way of explanation, I authored the requirement imposed (by unanimous vote of the City Council of Portland, Oregon (December, 1998) that nondiscriminatory open access to the Internet be provided as a condition of the proposed transfer of ownership of TCI cable franchises (in the City of Portland) to AT&T. This requirement led to litigation (AT&T v. City of Portland et. al.) where the City's position was initially upheld by Oregon District Court (June 1999), but was later overruled by the 9th Circuit Court of Appeals (June 2000) on the grounds that broadband Internet access provided via a cable system was not a "cable service" under Title VI, but in essence partook of a telecommunications service under Title II. The City of Portland lost jurisdiction (under Title VI) due to this ruling, but we were content that (as a telecommunications service) nondiscriminatory access to the Internet would continue to be mandated under applicable federal law, as provided under Title II (the Title under which the public Internet itself was birthed and blossomed on the telephone dial-up platform).

The FCC subsequently ruled (Cable Modem order, 2002) that broadband Internet service provided by cable operators was neither a cable service under Title VI, nor a telecommunications service under Title II (as those terms are defined in the Communications Act) but rather an "Information Service" under Title I, subject to "light touch" deregulation under FCC policies dating back to the line of Computer decisions (c. 1970s). The FCC later extended this reasoning to Internet access via DSL (telephone platform). The effect was substantial deregulation of broadband Internet access via cable or telco wireline systems (presently relied on by the vast majority of USA households).

In the meantime, Professor Tim Wu authored the seminal article “Network Neutrality, Broadband Discrimination” (Journal of Telecommunications and High Technology Law, Vol. 2, 2003) giving birth to the term “Net Neutrality” as we know it today. The opening paragraph of that article refers to the “open access” debate which began in Portland, Oregon and suggests adoption of “net neutrality” doctrines as a less invasive, more attainable step toward Internet non-discrimination. So, in Portland, Oregon we rightfully feel we were “present at the creation” of the net neutrality issue as it stands today, virtual “Godparents” to be frank.

As the FCC is entirely aware, the FCC's 2002 decision that Internet access cable modem service was a deregulated “information service”, even though this decision post-dated the 9th Circuit ruling recognizing broadband Internet Access as a telecommunications service, was upheld by a divided US Supreme Court in the Brand X Internet Services case (2005), applying "Chevron deference" to the FCC's determination. This “deference” effectively allowed an administrative agency to overrule the previously-expressed ruling of a US Court of Appeals. The Brand X ruling came over a vigorous dissent by the always memorable late Justice Antonin Scalia, who among other things declared: "...what the Commission hath given, the Commission may well take away---unless it doesn't." Justice Scalia observed that the FCC's classification decision in 2002 "is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretion." Justice Scalia goes on to observe that the Commission had achieved its intended outcome "not by changing the law....but by reserving the right to change the facts." The late Justice declared: "After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is "offering" telecommunications." Justice Scalia concluded that FCC decision/s in the cable modem (and subsequently DSL) in effect took decisions of the US Supreme Court (and two US Courts of Appeals) and found them "unlawful." Justice Scalia concluded: "This is not only bizarre. It is probably unconstitutional."

As the late President Reagan famously observed in another context, "there (you) go again." This observation is a fair characterization of my reaction to the Notice of Proposed Rulemaking In the Matter of Restoring Internet Freedom (WC Docket No. 17-208 issued May 23, 2017). (Hereafter: “NPRM”).

The legal and factual errors and omissions in the NPRM are for the most part too numerous to inventory, and my hope is that other filers and commenters will call them out in detail. But I would like to take this opportunity to emphasize a few details:

* the notion that the public Internet was birthed and developed under "light touch" Title I Information Services regulation *is nonsense* and is not supported by relevant facts; to the contrary the public Internet in the USA was developed on the telephone platform under Title II and subject to standard common carrier requirements for the lion's share of the first 10 years of Internet development and growth; FCC statements to the contrary are no substitute for the actual truth (both legal and factual);
* the notion that the "telecommunications component" of cable modem Internet access is "inextricably" bound up with the ultimate finished service (requiring the cable operator to be the default ISP) is nonsense and has always been nonsense. This unsubstantiated viewpoint put most independent ISPs out of business throughout the USA after 2002 (a massive loss of jobs and investment that harmed countless local businesses). The "inextricable" linkage (that the FCC decided cannot be disentangled, and prevents cable operators from providing a separate “Internet access” only service) can be rebutted from a technical standpoint by any arms-length, qualified communications engineer. Most will be happy to tell you that this premise is built on sand[[1]](#footnote-1). The only possible explanation for the FCC and the Courts accepting this spurious argument may lie in Justice Scalia’s observation about “credulous courts” – a view that should also be extended to “credulous” federal agencies. I myself wondered why on earth the FCC accepted this deeply flawed argument – and am led back to my personal conversation with FCC Chairman Bill Kennard (in his office) in 1999 – Chairman Kennard told me that it was too difficult from a regulatory standpoint to unbundle the cable platform to provide for separate “naked” Internet access, that the agency was exhausted from having attempted to do this on the telephone platform (per Congressional mandate in the 1996 Telecommunications Act), and (more or less) the Chairman was too tired to take this on; I guess the lesson (for me) was that the expert federal agency was “too tired” to do the right thing (very sad);
* the notion that the Commission’s 2015 Open Internet Order will “put at risk online investment and innovation” is nonsense and remains unsupported by objective empirical data; it is as nonsensical today as it was in the 1990s and the 2000s; there is no objective financial analyst not in the pay of a self-interested telco or cableco who will now (or has ever) advised not investing in the Internet under almost any regulatory scenario; the large companies who dominate the Internet to the present day laugh at this notion, and their advice to investors (in quarterly conference calls) is the same: to continue to invest in the Internet as an essential utility of modern life;
* the fact of the matter is that the Commission’s 2015 Open Internet Order, rather than effecting a radical restructuring of Internet regulation in the USA, simply restored the *status quo ante*; that is, restoring the requirement for nondiscrimination in the delivery of an essential service, as it existed in the first 10 years (approximately) of the dial-up Internet;
* It may be worth mentioning that the initial and most prominent complaint regarding cablecos’ ongoing and inevitable (due to economic incentives) violation of net neutrality principles (following FCC release of its initial Internet Policy Statement (2005) also came out of Portland, Oregon; in fact, I want to take this occasion to call out Mr. Robb Topolski[[2]](#footnote-2) for filing the primary complaint against Comcast that helped lead to the initial FCC decision fining Comcast, though this was reversed by the DC Circuit (2010) on jurisdictional grounds (primarily that the FCC had no statutory authority to order Net Neutrality under Title I); I would also like to take this opportunity and apologize to the FCC for Portland, Oregon being such a bother;
* Let us also review the relevant court decisions, including Verizon v. FCC (DC Circuit, 2011) which recognized a degree of FCC authority under Section 706, but rejected specific FCC rules (in the FCC’s initial 2010 effort) based on Title I: “*Given the Commission’s still-binding decision to classify broadband providers [as] providers of “information services” open Internet protections that regulated broadband providers as common carriers would violate the (Communications) Act*;”
* Given the clear command of the DC Circuit, the FCC rightfully returned to Title II in 2015, the only basis for authority to impose a form of Net Neutrality over the Internet legally validated and recognized by the courts; moreover, such basis of authority was hardly “new”; in fact it was the legal basis of authority during the first 10+ years of the Internet’s existence on the dial-up telephone platform;
* The FCC’s rightful decision to return (in the 2015 Open Internet Order) to the initial Internet regime of nondiscrimination under Title II was properly upheld on June 14, 2016 by the D.C. Circuit Court of Appeals, which was a decisive victory for the 2015 FCC on all key points; *En banc* review was denied;
* Comes now a new federal administration; and a new FCC majority; the FCC NPRM now labels the 2015 Open Internet Order as the “Title II Order” and claims (falsely) that the new NPRM is designed to return to the status quo BEFORE the 2015 Open Internet Order;
* As is evident in these comments, the notion that the 2015 Open Internet Order represented a radical change to Title II regulation is entirely false; the public Internet was birthed and blossomed under Title II nondiscrimination requirements during the first 10+ years of the existence of the public Internet (which I myself count from the Xmas shopping season, 1995);
* Therefore, the supposition of the NPRM that the 2015 Open Internet Order is a radical change from prior law is false; and the supposition of the NPRM that the 2015 Open Internet Order put at risk Internet investment and innovation is also false, and not supported by valid, arms-length empirical data.

Thank you for considering my comments, which are submitted entirely on my own behalf.

Sincerely,

David C. Olson

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1. I tell my Telecommunications Law Class at Lewis & Clark Law School (Portland, Oregon) that the FCC’s reasoning (upheld by the Courts) that cable modem ISP service is inextricable from cable Internet access reminds me of Jessica Rabbit’s explanation of her scandalous dress and behavior to intrepid Detective Eddie Valiant in the memorable Hollywood film “Who Framed Roger Rabbit?” (1988). Jessica states: “I’m not bad; I’m just drawn that way.” So it is: the cable modem platform is not and has never been inextricable from standalone Internet access, the cable engineers just designed it that way (at the direction of the cable companies, to maximize profit). [↑](#footnote-ref-1)
2. <https://en.wikipedia.org/wiki/Robb_Topolski> [↑](#footnote-ref-2)