



1300 Pennsylvania Avenue NW, Suite 190-325, Washington, DC, 20004 US

July 17, 2018

Ajit Pai, Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

The Commission's plan to join the pro-Internet regulation Respondents arguing the Restoring Internet Freedom (RIF) Order **moots** the Supreme Court challenge to the Obama Administration's Open Internet Order (OIO) threatens the best hope to end the Internet regulation controversy. The mootness claim ignores the reliance of the RIF Order on the same Chevron deference applied by the appeals court to the Open Internet Order (OIO).

There remains an opportunity for the Commission to help obtain a grant of certiorari in the challenge to the Open Internet Order via the agency's reply to ***Daniel Berninger, et al v. Federal Communications Commission*** due by August 15, 2018. A Supreme Court decision declaring Chevron deference unconstitutional in the context of OIO ends the presumption of discretionary authority to regulate the Internet underlying RIF Order (and removes the need for the RIF Order.)

The litany of troubles suffered by efforts to proceed with the RIF Order (see attached) expose agency action as the **cause** not the **solution** to anarchy roiling one of the largest and most important sectors of the economy. Endless cycling through the Court of Appeals to the District of Columbia Circuit cannot resolve the controversy.

The RIF Order provided an interim answer to the Wheeler Commission to assertion Title II classification, but no one believes the RIF Order holds any hope to end the controversy. Commission support for a grant of certiorari in ***Daniel Berninger, et al v. Federal Communication Commission*** on the question of discretionary authority over the Internet holds the further merit of freezing RIF Order litigation.

Chevron deference makes you Communication Czar and invites the ugly partisan "tug-of-war" you have suffered. The havoc caused by the abuse and divergent application of the Chevron U.S.A., Inc. v. Natural Resources Defense Council precedent threatens the basic legitimacy of government. Certiorari might even push legislative action forward as proved the case for the data localization controversy addressed by the Supreme Court in United States v. Microsoft.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Dn', written over a light blue horizontal line.

Daniel Berninger, founder, dan@danielberninger.com

Enclosed: **FCC RIF Order: *Chevron deference produces case study in ANARCHY***



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FCC RIF Order: *Chevron deference produces case study in ANARCHY*

I. Personal attacks on Chairman Pai foreclose the prospect for civil discussion and debate:

- Activists terrorize Chairman Pai, his children, and neighbors
- Death threats trigger personal security detail for Chairman Pai and cancel CES keynote
- Bomb threat interrupts RIF Order vote on December 14, 2017
- Chairman Pai cannot make public appearances without metal detector screening of audience
- Audience in RIF Order announcement April 26, 2017, made invitation only due to threats
- FBI tracks down and charges person sending death threats via email.

II. Partisan investigations of Chairman Pai, audits of FCC process, Congressional repeal:

- CRA vote succeeds in Senate and CRA vote in House a possibility through January 3, 2019
- CRA creates still more litigation around differences between "Order" and "Rule"
- NY Attorney General investigates "fraud" in RIF commenting process
- Democratic leaders win GAO investigation of RIF comment process
- FCC Inspector General opens investigation into "corruption" by Chairman Pai
- Internet regulation activists rally millennials for midterm elections
- Partisan divides make prospects for a Congressional fix remote.

III. All aboard likely endless litigation against RIF Order:

- 22 State (plus DC) Attorney Generals challenge RIF Order
- List of plaintiffs include usual suspect activist groups
- Internet Association joins challenges as a proxy for big tech
- Five most valuable companies Google, Apple, Amazon, Facebook, Microsoft oppose RIF
- Small tech also joins in challenging the RIF Order
- Dispute moved to DC Circuit which must defend the merits of the OIO decision

IV. States pursue 50 different self-help means to impose Title II obligations on the Internet:

- Six states add rules to procurement processes as means to bypass RIF Order
- 30 + states pursue legislation means to bypass the RIF Order
- State interventions set up additional litigation around Commission preemption in RIF Order
- Service providers must navigate state by state litigation and rule changes
- Governors and attorney generals join in public vilification service providers
- Activists raise funds from major foundations to pursue state by state regulation of the Internet

V. Vilification of Service Providers as foundation energizing government regulation of Internet:

- A decade plus of vilification produces public opposition to mergers
- Vilification and government intervention leaves AT&T et al worth less today than in 1996.
- Activists schedule regular days of rage to vilify evil service providers and Chairman Pai
- Foundations fund cottage industry to vilify and litigate against service providers
- Promotion of government intervention creates regulatory game entrepreneurs cannot afford
- Regulatory intervention invites competitive arbitrage schemes