

No Need To Change

A Comment On "Restoring Internet Freedom," NPRM – WC Docket No. 17-108, April 27, 2017
<https://www.fcc.gov/document/restoring-internet-freedom>

July 17, 2017

Comment Summary

1. There is NO COMPELLING NEED TO CHANGE the current regulatory framework established by the Open Internet Order of 2015.
2. The current "common carrier" classification for broadband Internet access providers is consistent with my Internet usage, is effective in helping to define the non-discriminatory, "neutral" terms of service I prefer and require, and, under current law, according to legal precedent, is the ONLY classification capable of providing the market stability and capacity for growth currently enjoyed in the broadband provider, edge provider, and Internet consumer marketplaces.
3. The current application of Title II authority, combined with the FCC's judicious use of forbearance, as outlined in the Open Internet Order of 2015, should be retained without alteration, as it has resulted in the legal sustainability of its regulatory framework, which, in turn, has led to the technological and market stability we now enjoy.
4. The wide-ranging benefits of technological and market stability far exceed the narrowly-defined, ideologically-based cost savings of "reduced regulation" proposed in the NPRM.
5. While my current Internet usage seldom requires the highest possible transmission speeds, I do require highly reliable, stable, interference-free transmission qualities the current "Bright-Line" Rules were established to ensure.
6. The proposal to reclassify broadband Internet access services as "information services" should be rejected, since any regulation based on such reclassification has already been rendered legally indefensible by previous court precedent.
7. The proposal to return jurisdiction over Internet service providers' privacy practices to the FTC should be rejected, because previous court precedent has already voided the FTC's regulatory authority over such matters in many States.
8. The so-called "Bright-Line" Rules – ALL of them – should be retained in their current form and in their entirety without alteration and as administered under Title II provisions, since they were specifically designed to address real (not merely hypothetical) abuses conducted by a number of broadband service providers in the past, and since, in their enforceable absence, such abuses would almost certainly resume. Their enforceable presence over the past two years is directly linked to the currently enjoyed stability, confidence, growth, and innovation in the broadband, edge provider, and Internet consumer markets.
9. The Transparency Rule should also be retained in its entirety and with its Title II enhancements intact, since effective regulation and dispute resolution may otherwise be difficult or impossible.

I. The Mission

The FCC was established to "make available so far as possible, to all the people of the United States, without discrimination ... rapid, efficient, Nationwide, and world-wide wire and radio communication services with adequate facilities at reasonable charges." [1] More recently, in its own Strategic Plan, the FCC proclaimed as its goals for broadband service regulation that: "All Americans should have affordable access to robust and reliable broadband products and services. Regulatory policies must promote technological neutrality, competition, investment, and innovation to ensure that broadband service providers have sufficient incentives to develop and offer such products and services."

II. The Mission Plan

After more than a decade of experience in dealing with many of the ways in which various providers of "broadband products and services" acted to violate, oppose, or compromise the affordability, accessibility, robustness, and/or reliability of services to consumers and/or from competitors [2], the FCC promulgated the Open Internet Order of 2010. [3] The Order was a carefully-crafted compromise designed to ensure a form of net neutrality (including Transparency and the so-called 'Bright-Line' Rules of No Blocking, and No Unreasonable Discrimination – e.g., throttling, paid prioritization) while still promoting broadband market competition, investment, and innovation. In short, it was designed to achieve the FCC's strategic planning goals and accomplish its stated mission objectives; and it would have succeeded, too, except for one thing: it didn't use the FCC's "Title II" [1] authority.

III. Mission Failure

In 2014, the Open Internet Order of 2010 failed to withstand legal challenge brought by broadband provider Verizon, because it did not invoke the FCC's "Title II" authority. In its decision [4], the court stated that "even though the Commission has general authority to regulate in this arena [in 'the deployment of broadband infrastructure' and in 'governing broadband providers' treatment of Internet traffic'], it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers [the classification to which Title II applies], the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose *per se* common carrier [i.e., Title II] obligations, we vacate those portions of the Open Internet Order [i.e., the portions which promulgated the so-called 'Bright-Line' rules]."

In other words, by law, the only way left to the FCC to establish enforceable rules for an open Internet that include No-Blocking, No-Throttling, and No-Paid-Prioritization provisions that could withstand legal challenge was to reclassify broadband service providers as "common carriers" subject to Title II authority. As others have pointed out [5]: "The legal mandate was clear: if it wanted meaningful open Internet rules to pass judicial scrutiny, the FCC had to reclassify broadband service under Title II. It was also clear to neutral observers that reclassification just made sense. Broadband looks a lot more like a "telecommunications service" than an "information service." It entails delivering information of the subscriber's choosing, not information curated or altered by the provider."

IV. Mission Success

After much debate, and under much pressure, both popular and political, the FCC re-cast its open Internet rules in a Title II framework by reclassifying broadband service providers as "common carriers." The result was the Open Internet Order of 2015. [6] Like its 2010 predecessor, it was designed to achieve the FCC's strategic planning goals and accomplish its stated mission objectives AND to withstand legal challenge. And after two full years of operation, the results are clear: FCC strategic planning goals achieved; FCC official mission statement requirements satisfied; Mission Success!

Here's how, in combination with the FCC's judicious application of its forbearance authority, the success of the Open Internet Order of 2015 (OIO-2015) looks, point-by-point:

- Legal Sustainability. The OIO-2015 has satisfied the requirements of previous court rulings and has now withstood additional, repeated legal challenges [7,8]. As others have stated: "The FCC and the courts have spent a significant amount of time and effort over more than a decade on various Open Internet policies, and the current law has shown itself to be both legally sustainable and market effective." [9]
- Technological Neutrality. The OIO-2015 has re-established the protections of the so-called "Bright-Line"

rules that prohibit blocking, throttling, and paid prioritization [6], and that foster the "technological neutrality" called for in the FCC's own strategic planning documents. These protections benefit consumers and edge providers alike. Widespread recognition of this fact is clearly reflected in the active participation by dozens of major Internet businesses and hundreds of smaller ones in the "Internet-wide Day of Action to Save Net Neutrality" campaign held on Wednesday, July 12, 2017, all over the Internet [10,11], not to mention the many millions of comments that have poured into the FCC's comments website [12] urging retention of the current net neutrality rules and their Title II implementation since publication of its Notice of Proposed Rule-Making [13].

- Competition. The OIO-2015 has encouraged competition in the broadband provider market [14,15,16,20] and in the wider edge provider market [17,18,19,20] by creating level playing fields in both arenas. It has done this by limiting and monitoring the anti-competitive practices that some of the larger, incumbent broadband providers and local exchange carriers have used in the past [2], by judiciously applying its forbearance authority to exempt said providers and carriers from those portions of Title II that did not or should not apply, and then by simply allowing all legitimate businesses to engage in free market enterprise and competition on the level playing fields created by the so-called "Bright-Line" rules (No Blocking, No Throttling, No Paid Prioritization). In many ways, this approaches the *laissez-faire* ideal for the vast majority of Internet businesses and service providers – truly a "light-touch" regulatory approach.

As pointed out in the OIO-2015 itself [6]: "Carefully-tailored rules need a strong legal foundation to survive and thrive. Today, we provide that foundation by grounding our open Internet rules in multiple sources of legal authority – including both section 706 of the Telecommunications Act and Title II of the Communications Act. Moreover, we concurrently exercise the Commission's forbearance authority to forbear from application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations. This is a Title II tailored for the 21st century, and consistent with the "light-touch" regulatory framework that has facilitated the tremendous investment and innovation on the Internet. We expressly eschew the future use of prescriptive, industry-wide rate regulation. Under this approach, consumers can continue to enjoy unfettered access to the Internet over their fixed and mobile broadband connections, innovators can continue to enjoy the benefits of a platform that affords them unprecedented access to hundreds of millions of consumers across the country and around the world, and network operators can continue to reap the benefits of their investments."

Over the last two years, the "light-touch" regulatory framework of the OIO-2015 has made possible the unprecedented growth seen in many Internet-centered enterprises [17,18,19,20], while not unduly burdening [5] – and in many ways greatly benefiting [20,21,22,23] – broadband providers, large and small. Business is Booming!

- Investment. Also over the last two years, and contrary to the claims made in the NPRM [13], broadband industry investment in infrastructure and technology has not suffered under the OIO-2015 tailored implementation of Title II. Rather, it has flourished and is even now gaining in momentum, as the most recent annual reports to investors of every major, publicly traded broadband provider show [20,21,22,23]. Similarly, within the same period, edge provider industries have seen unprecedented growth in investments and market shares, particularly in the streaming media sector [17,20]. Just look at what has been happening with companies like NetFlix, Hulu, Amazon, YouTube, and even up-and-comer Vimeo!

- Innovation. Technological and service-centered innovation have also continued apace under the OIO-2015's "light-touch" policies. As just mentioned above, media streaming segment of the edge provider market has enjoyed unprecedented, almost explosive growth, with offerings of many appealing new options and higher definitions from an ever increasing number of sources. As one report has summarized: "The FCC's Open Internet Order and Title II Restoration Created Marketplace Certainty Followed by Massive Growth in Online Video Investment, Competition and Innovation" [20]. Continued adoption of new technology can also be seen in the broadband provider market, as evidenced by ongoing addition of fiber-optic transmission lines and associated high-speed technologies [20]. Broadband speeds have continued their upward trend without pause during the two years the OIO-2015 has been effect [24,25], rendering null and void the argument that Title II hampers innovation.

- Robustness & Reliability. With the level playing field created by the OIO-2015 has come market stability and confidence, increased competition, continued investment in new infrastructure and in the acquisition and/or development new, marketable broadband products and services, and ongoing adoption of innovative applications and technologies [20,24,25]. For the vast majority of consumers and service providers alike, the overall Internet experience has never been more robust or reliable than it is right now.

- Availability & Affordability. While more Americans than ever before now have access to some form of high-speed Internet service, the FCC's strategic planning goal of making affordable Internet access available to all Americans continues to be a work in progress. The fact that that work has continued to progress, in keeping with FCC strategic plans and ISP business plans, as evidenced by the continued broadband industry infrastructure investments mentioned above, argues strongly that the OIO-2015 has in no way diminished efforts toward that goal and has in fact provided a functioning regulatory framework that allows for that goal's eventual achievement. As to the matter of affordability, while there is still much room for improvement, it can at least be said that, under the OIO-2015's "light-touch" influence, the average cost of broadband Internet access to consumers has risen no more than the average cost-of-living, making it no less affordable over time.

- "To All The People Of The United States". No declaration of "Mission Success!" could ring true without the affirmative consensus of the mission's beneficiaries. What DO the American people think about the overall effect of the OIO-2015, the net neutrality rules it enforces, and the Title II authority that is required for them to work? Concomitantly, what do they think about the current FCC Chairman's plans to revoke the OIO-2015 and Title II authority, and to re-cast a smaller, weaker subset of the net neutrality rules in a regulatory framework, as yet only vaguely defined, the basis for which has already been proven in court [4] to be legally indefensible?

One possible set of answers might be forthcoming from a detailed analysis, yet to be performed, of the more than 7 million comments that have been submitted to the FCC [12] regarding its recent Notice of Proposed Rule-Making (NPRM) [13] on the matter. While we wait for the results of that analysis, it is at least possible to note that a majority of those 7-million-plus comments favored the retention of the net neutrality rules in their current (i.e., Title II-supported) form, and/or opposed their replacement by the weaker, less well-defined subset of rules offered in the NPRM.

Another, and at the moment more detailed, set of answers may be found in two recent polls that asked these exact questions or their near equivalents. [26,27] The first, published July 10, 2017, was conducted by Civis Analytics on behalf of the independent, liberal-leaning consulting firm, Freedman Consulting LLC (<https://tfreedmanconsulting.com>). The second, released July 13, 2017, was conducted by the conservative corporate advocacy and political strategy firm, IMGE (<https://imge.com/>) on behalf of INCOMPAS, a leading conservative, internet-business advocacy trade group (<http://www.incompas.org/>). What is remarkable about these two very different polls from opposite ends of the political spectrum is that they substantially agree in almost every particular: the vast – VAST! – majority of Americans support the current net neutrality protections and their Title II underpinnings; they agree that their Internet experience, whether for business or personal use, has improved in the years in which the OIO-2015's "light-touch" policies have been in effect; and they reject the conditions that the changes presented in the FCC's NPRM [13] would likely impose. Just LOOK at the results of these polls! They speak directly to many of the specific requests for comments listed in the NPRM. They are the answers you seek. LOOK AT THEM!

While more extensive polls would likely be needed to extend the level of confidence in the representativeness of these results, one thing is abundantly clear: the affirmative consensus of a majority of Americans confirms that the success of the OIO-2015 rings true. MISSION SUCCESS!

The Open Internet Order of 2015 (OIO-2015) has more than adequately addressed the FCC's strategic planning goals and overall mission objectives, has done so since its inception to the satisfaction of a majority of US citizens and US-registered businesses, and is well-enough equipped to continue doing so for the near future.

In summary, then, and to reiterate: There really is NO COMPELLING NEED TO CHANGE, discard, or replace the current regulatory framework established by the Open Internet Order of 2015.

V. Mission Substance

Throughout the initial commenting period established for this Notice of Proposed Rule-Making (NPRM) [13], FCC Chairman Ajit Pai has repeatedly stated that "... the raw number [of submitted comments] is not as important as the substantive comments that are in the record." However, as the final point of the previous section of this comment has indicated, the affirmative consensus of a majority of US citizens responding to the FCC's call for comments IS SUBSTANTIVE. This is the very nature of our system of government: that WE, THE PEOPLE OF THE UNITED STATES have, in aggregate, a substantive, directive, and, to a degree, determinative role in governance. Failure to perform a proper analysis that considers all legitimate comments submitted by US citizens would be contrary to the very principles on which the U.S. Constitution is based.

With the proven success of the OIO-2015, it remains unclear what compelling need, if any, exists that would require the sweeping changes proposed in the NPRM. The arguments Chairman Pai presents therein, while extensive, are largely founded on limited, selective, and biased evidence, and on ideological principles that, while seemingly logical in theory, have repeatedly failed in practice. In other words, they lack sufficient substance to satisfy the burden of proof that a compelling need exists for the proposed changes.

One particular, MAJOR CONCERN is the proposed "ENDING PUBLIC-UTILITY REGULATION OF THE INTERNET" and "Reinstating the Information Service Classification of Broadband Internet Access Service" described in Section III of the NPRM. Deliberately abandoning the current "common carrier" classification and returning broadband providers to the "information service" classification would effectively and deliberately return the FCC to "Mission Failure" status, because the legal precedent set in 2014 [4] would still apply and would void any regulation made for broadband providers so reclassified.

A second, related MAJOR CONCERN is the proposed abandonment of Title II authority, because, by that same legal precedent, any regulation of broadband providers that does not invoke Title II would likewise fail.

A third, related and CRITICAL CONCERN is the proposed reconsideration of the so-called "Bright-Line" Rules – the No-Blocking, No-Throttling, and No-Paid-Prioritization Rules that collectively define "Net Neutrality" in its current form. These Rules, supported and made enforceable by the legally sustainable Title II authority and the "common carrier" classification for broadband providers, are directly responsible for creating a level playing field for edge providers, and a stable, reliable, non-discriminatory platform for consumers. These, in turn, have led to increased competition and innovation, increased consumer confidence and interest, increased broadband subscribership, and greater market stability and growth. It doesn't take an industry insider to see it; the evidence is everywhere apparent. Right now, everybody's winning (or at least the vast majority is). To deliberately tamper in any significant way with these "Bright-Line" Rules in their current form and regulatory framework would be to directly invite market uncertainty and instability, loss of consumer confidence and participation, and a downturn in Internet-based economy. And, of course, it would also be a deliberate choice for FCC "Mission Failure."

A fourth MAJOR CONCERN is the proposal to "... return jurisdiction over Internet service providers' privacy practices to the FTC ..." As others have pointed out [5]: "Some have looked to the FTC to take up the mantle, but just last year AT&T persuaded a federal appeals court [28,29] that, as a company that also owned a telephone business, the FTC had no power over any aspect of AT&T. That precedent covers the entire west coast and leaves millions of Americans without recourse for privacy violations by their Internet service provider. And there's no doubt that AT&T and others will try to extend that precedent across the country." In other words, the FTC NO LONGER HAS ANY JURISDICTION over Internet service providers' privacy practices for a significant portion of the country! And, since the court's decision [28] was rendered back in August, 2016, Ajit Pai KNEW this when he wrote this proposal into the NPRM! This is a clear-cut case of deliberate choice for FCC "Mission Failure," and there's no "would be" to it; it simply, clearly, IS.

The FCC's official Mission Statement is not merely a matter of public record; IT IS WRITTEN, FEDERAL LAW – the same federal law that created the FCC in the first place. A deliberate choice to abandon a successful, effective regulatory program that satisfies the stated Mission objectives AND that achieves over time the duly-established strategic planning goals set for it, only to replace it with a program deliberately designed to FAIL where it succeeded, would not merely be *faux pas* in the exercise of FCC legal authority; it would be, or could be construed to constitute, WILLFUL CONTRAVENTION OF WRITTEN, FEDERAL LAW.

VI. Mission Recommendations

I urge the FCC to consider and adopt the following recommendations:

1. Immediately reject the proposals of the NPRM identified above as MAJOR or CRITICAL CONCERNS.
2. Set aside for further review any and all corollary and antecedent proposals to the proposals of the NPRM identified above as MAJOR or CRITICAL CONCERNS, pending a proper, detailed analysis of the initial and rebuttal comments submitted to the FCC on the matter of the NPRM.
3. Perform said proper, detailed analysis of the initial and rebuttal comments, and make public the results of the analysis. Respect the fact that, in our system of government, the consensus of the governed is substantive.
4. Examine with due care the polls [26,27] referenced in this Comment and any similar polls that may exist relating to the matter of the NPRM. Respect their substantive nature, and take note of how they address the many requests for comment in the NPRM.

Final Thoughts

As the CEO of one Conservative telecommunications advocacy firm put it: “I think the open Internet has been the most successful expansion of free-market capitalism in world history.” [30]

I agree; and the preponderance of evidence supports this claim, particularly over the last two years, under the "light-touch" of the Open Internet Order of 2015.

Don't Mess With Success. Keep the Open Internet Order of 2015 in place, and keep the good times rolling.

Respectfully,

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