

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28.

A few years ago, Google's then-CEO, Eric Schmidt, was quoted as saying: "The Internet is the first thing that humanity has built that humanity doesn't understand."¹ If that is so, every American who cares about the future of the Internet should be wary about five unelected officials deciding its fate.

After the U.S. Court of Appeals here in Washington struck down the agency's latest attempt to regulate broadband providers' network management practices,² I recommended that the Commission seek guidance from Congress instead of plowing ahead yet again on its own. In my view, recent events have only confirmed the wisdom of that approach.

Let's start by acknowledging the obvious: The Chairman's proposal has sparked a vigorous public debate. But we should not let that debate obscure some important common ground: namely, a bipartisan consensus in favor of a free and open Internet. Indeed, this consensus reaches back at least a decade. In 2004, then-FCC Chairman Michael Powell outlined four principles of Internet freedom: The freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information.³ One year later, the FCC unanimously endorsed these principles when it adopted the *Internet Policy Statement*.⁴

Respect for these four Internet freedoms has aided the Internet's tremendous growth over the last decade. It has shielded online competitors from anticompetitive practices. It has fostered long-term investments in broadband infrastructure. It has made the Internet an unprecedented platform for civic engagement, commerce, entertainment, and more. And it has made the United States the epicenter of online innovation. I support the four Internet freedoms, and I am committed to protecting them going forward.

It's not news that people of good faith disagree when it comes to the best way to maintain a free and open Internet—or as I think of it, how best to preserve the four Internet freedoms for consumers. Some would like to regulate broadband providers as utilities under Title II of the Communications Act. This turn to common-carrier regulation would scrap the Clinton-era decision to let the Internet grow and thrive free from price regulation and other obligations applicable to telephone carriers.⁵

¹ See Jerome Taylor, *Google chief: My fears for Generation Facebook*, *The Independent* (Aug. 18, 2010), available at <http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-chief-my-fears-for-generation-facebook-2055390.html>.

² *Verizon Communications Inc. v. FCC*, 740 F. 3d 623 (D.C. Cir. 2014).

³ Michael K. Powell, Chairman, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry* (Feb. 8, 2004), available at <http://go.usa.gov/8CZe>.

⁴ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005).

⁵ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998).

There are others—and I am one of them—who believe President Clinton and Congress got it right in the Telecommunications Act of 1996 when they declared the policy of the United States to be “preserv[ing] the vibrant and competitive free market that presently exists for the Internet . . . *unfettered by Federal or State regulation.*”⁶ They think that we should recognize the benefits made possible by the regulatory regime that has been in place for most of the last decade. After all, nobody thinks of plain old telephone service or utilities as cutting-edge. But everyone recognizes that the Internet has boundless potential. And that’s because government didn’t set the bounds early on.

Today’s item strikes yet a third approach. It’s a lawyerly one that proposes a minimal-level-of-access rule and a not-too-much-discrimination rule. It also allows for paid prioritization under unspecified circumstances. To date, no one outside the building has asked me to support this proposal. It brings to mind a Texas politician’s observation that there is nothing in the middle of the road but yellow stripes and dead armadillos.

Nothing less than the future of the Internet depends on how we resolve this disagreement. What we do will imperil or preserve Internet freedom. It will promote or deter broadband deployment to rural consumers and infrastructure investment throughout our nation. It will brighten or hamper the future of innovation both within networks and at their edge. It will determine whether control of the Internet will reside with the U.S. government or the private sector. It will impact whether consumers are connected by smart networks or dumb pipes. And it will advance or undermine American advocacy on the international stage for an Internet free from government control.

A dispute this fundamental is not for us, five unelected individuals, to decide. Instead, it should be resolved by the people’s elected representatives, those who choose the direction of government—and those whom the American people can hold accountable for that choice.

I am therefore disappointed that today, rather than turning to Congress, we have chosen to take matters into our own hands. It is all the more disappointing because we have been down this road before. Our prior two attempts to go it alone ended in court defeats. Even with the newfangled tools the FCC will try to pull out of its legal grab-bag, I am skeptical that the third time will be the charm.

For one, I see no legal path for the FCC to prohibit paid prioritization or the development of a two-sided market—which appears to be the *sine qua non* objection by many to the Chairman’s proposal. As the NPRM frankly acknowledges, section 706 of the Telecommunications Act “could not be used” for such a ban.⁷ And while the NPRM resists saying it outright, neither could Title II. After all, Title II only authorizes the FCC to prohibit “unjust or unreasonable discrimination”⁸ and both the Commission and the courts have consistently interpreted that provision to allow carriers to charge different prices for different services.⁹ Indeed, I have been unable to find even a single case in which the Commission found it unlawfully discriminatory to offer a different (faster) service to customers at a different (higher) price.

⁶ 47 U.S.C. § 230(b)(2) (emphasis added).

⁷ *Notice of Proposed Rulemaking* at para. 138.

⁸ 47 U.S.C. § 202(a).

⁹ See, e.g., *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, WT Docket No. 96-86, Second Report and Order, 15 FCC Rcd 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, “*prima facie* lawful” under section 202); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221 (1999) (granting dominant carriers pricing flexibility or special access services, allowing

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For another, the legal consequences of moving forward with net-neutrality regulation are sure to wreak havoc on the Internet economy, no matter which legal path we take. If we are to take the D.C. Circuit at its word, section 706 grants the FCC virtually unfettered authority to encourage broadband adoption and deployment.¹⁰ So if three members of the FCC think that more Americans would go online if they knew their information would be secure, could we impose cybersecurity and encryption standards on website operators? If three members of the FCC think that more Americans would purchase broadband if edge providers were prohibited from targeted advertising, could we impose Do Not Track regulations? Or if three members of the FCC think that more Americans would use the Internet if there were greater privacy protections, could we follow the European Union and impose right-to-be-forgotten mandates? And because section 706 gives state commissions authority equal to the FCC,¹¹ every broadband provider, every online innovator, every Internet-enabled entrepreneur may now have to comply with differing regulations in each of the 50 states. Tesla, Uber, Airbnb, and countless others can attest to the welcome that parochial regulators give to disruptive start-ups.

The Internet would fare no better under Title II, and the consequences are likely to be even worse. Reclassification opens the door to actual access charges—tariffed charges that Internet service providers could impose on edge providers, content delivery networks, and transit operators *without their consent*. Indeed, one Title II option on the table would guarantee new Internet tolls by giving broadband ISPs no option other than access charges to recover their regulated costs.¹² Not only that, but reclassification means a broadband price hike for every consumer in America—not exactly a move that will encourage broadband adoption.¹³ And alongside tariffed access charges and higher consumer prices, other Title II provisions—ranging from the disclosure of customer information¹⁴ to mandatory billing disclosures¹⁵—would apply to broadband providers, edge providers, or really anyone in the Internet economy. And like section 706, Title II puts state regulators on par with the FCC, meaning there may be 50 sets of access charges to be paid, 50 different broadband fees to be assessed, 50 different privacy regimes to be complied with, and 50 different types of mandatory disclosures to be made. As this suggests, a Title II regime hardly lowers the barriers to competitive entry—starting a company doesn’t get you free legal services. And it would hardly “provide certainty to all market participants and keep the costs of regulation low,” as 150 Internet companies asked us to do last week.¹⁶

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both higher charges for faster connections as well as individualized pricing and customers discounts); *GTE Telephone Operating Companies Tariff F.C.C. No. 1 et al.*, Transmittal Nos. 900, 102, 519, 621, 9 FCC Rcd 5758 (Common Carrier Bur. 1994) (approving tariffs for Government Emergency Telephone Service (GETS), a prioritized telephone service, and additional charges therefor); *see also, e.g., Interstate Commerce Commission v. Baltimore & O.R. Co.*, 145 U.S. 263, 283–84 (1892) (noting that common carriers are “only bound to give the same terms to all persons alike under the same conditions and circumstances,” and “any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge”).

¹⁰ *Verizon v. FCC*, 740 F.3d 623, 639–40 (D.C. Cir. 2014).

¹¹ 47 U.S.C. § 1302(a) (“The Commission *and each State commission* with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” (emphasis added)).

¹² *See Notice of Proposed Rulemaking* at paras. 151–52.

¹³ *See* 47 U.S.C. § 254(d) (imposing universal service fees on all telecommunications carriers).

¹⁴ *See* 47 U.S.C. § 222.

¹⁵ *See* 47 C.F.R. § 64.2401 (implementing 47 U.S.C. §§ 201(b), 258).

¹⁶ Letter from Amazon et al., to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly, GN Docket No. 14-28 (May 7, 2014).

Finally, pursuing net-neutrality regulations under section 706 or Title II places in jeopardy every other goal of this Commission in the communications marketplace. Most obviously, this pursuit injects tremendous regulatory uncertainty into the market, chilling further broadband deployment,¹⁷ threatening the \$60 billion a year that private companies invest in their broadband networks, and potentially jeopardizing some of the millions of jobs that depend on such investment.¹⁸ This brave new world will deter new entrants and reduce competition in the broadband market.

This is no academic concern. Even with the cushion of market capitalization equivalent to Comcast, Verizon, and T-Mobile combined, Google has already attested that our legacy regulations led it not to offer phone service as part of Google Fiber.¹⁹ On the other end of the size spectrum, there are thousands of smaller Internet service providers—wireless ISPs (WISPs), small-town cable operators, electric cooperatives, and others—that don't have the means or the margins to withstand a regulatory onslaught. If they go dark, consumers they serve (including my parents, who are WISP subscribers in rural Kansas) will be thrown offline.

On top of all this, undertaking such a “politically corrosive” rulemaking on dubious legal and policy grounds will swamp what should be an independent, expert agency with years of litigation and partisan division.²⁰ That is not good for broadband deployment, that is not good for consumers, and that is not good for future of the Internet.

For all of these reasons, I respectfully dissent.

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Nevertheless, if we are going to act like our own mini-legislature and plunge the Commission into this morass, we need to use a better process going forward. I agree with my colleague, Commissioner Rosenworcel, that we have rushed headlong into this rulemaking by holding this vote today²¹—and when there is any bipartisan agreement on net neutrality, that's something to pay attention to. We have seen over the past month what happens when the American people feel excluded from the Commission's deliberations. Indeed, on several recent issues, many say that the Commission has spent too much time speaking at the American people and not enough time listening to them.

Going forward, we need to give the American people a full and fair opportunity to participate in this process. And we must ensure that our decisions are based on a robust record.

¹⁷ See, e.g., Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2–3 (May 9, 2014); Letter from Kathryn A. Zachem, Senior Vice President, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1–2 (May 12, 2014); Letter from Rick Chessen, Senior Vice President, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 3 (May 14, 2014).

¹⁸ Letter from Thomas R. Stanton, Chairman & CEO, ADTRAN, et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (May 13, 2014).

¹⁹ Alyson Raletz, *Google Considers But Drops Plans to Include Phone Service, Too*, Kansas City Business Journal (Dec. 4, 2012), available at <http://www.bizjournals.com/kansascity/blog/2012/12/google-considers-drops-phone-service.html>.

²⁰ See Letter from Mitch McConnell, Senate Republican Leader, et al., to the Honorable Thomas Wheeler, Chairman, FCC (May 13, 2014); Letter from John A. Boehner, Speaker of the House, to the Honorable Thomas E. Wheeler, Chairman, FCC (May 14, 2014); Letter from Fred Upton, Chairman, U.S. House of Representatives Committee on Energy and Commerce, et al. to the Honorable Thomas E. Wheeler, Chairman, FCC (May 13, 2014).

²¹ See Remarks of Commissioner Jessica Rosenworcel at the Chief Officers of State Library Agencies Meeting (May 7, 2014), available at <http://go.usa.gov/84SG>; see also Letter from Senators Kelly Ayotte, Deb Fischer, and Dan Coats, to the Honorable Tom Wheeler, Chairman, FCC (May 14, 2014), available at <http://go.usa.gov/84Sz>.

So what is the way forward? Here's one suggestion. Just as we commissioned a series of economic studies in past media-ownership proceedings,²² we should ask ten distinguished economists from across the country to study the impact of our proposed regulations and alternative approaches on the Internet ecosystem. To ensure that we obtain a wide range of perspectives, let each Commissioner pick two authors. To ensure accuracy, each study should be peer reviewed. And to ensure public oversight, we should host a series of hearings where Commissioners could question the authors of the studies and the authors of those studies could discuss their differences. Surely the future of the Internet is no less important than media ownership.

But we should not limit ourselves to economic studies. We should also engage computer scientists, technologists, and other technical experts to tell us how they see the Internet's infrastructure and consumers' online experience evolving. Their studies too should be subject to peer review and public hearings.

Ultimately, any decisions we make on Internet regulation must be based on sound engineering and an accurate understanding of how networks actually function. They should be informed by the judicious and successful regulatory approach embraced by both Democrats and Republicans in recent years. And they should avoid embroiling everyone, from the FCC to industry to the average American consumer, in yet another years-long legal waiting game.

In short, getting the future of the Internet right is more important than getting this done right now. After all, the Internet was free and open before the FCC's net-neutrality rules took effect in November 2011. And it is still free and open today even though those rules are no longer in force. Going forward, I hope that we will not rush headlong into enacting bad rules. We are not confronted with an immediate crisis that requires immediate action. And if we are going to usurp Congress's role and make fundamental policy choices for the American people, we must do better than the process that led to today's vote.

²² FCC, 10 Research Studies on Media Ownership, <http://go.usa.gov/8YSA>.