

## ORAL DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

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

Americans love the free and open Internet. We relish our freedom to speak, to post, to rally, to learn, to listen, to watch, and to connect online. The Internet has become a powerful force for freedom, both at home and abroad. So it is sad this morning to witness the FCC's unprecedented attempt to replace that freedom with government control.

It shouldn't be this way. For twenty years, there's been a bipartisan consensus in favor of a free and open Internet. A Republican Congress and a Democratic President enshrined in the Telecommunications Act of 1996 the principle that the Internet should be a "vibrant and competitive free market . . . unfettered by Federal or State regulation." And dating back to the Clinton Administration, every FCC Chairman—Republican and Democrat—has let the Internet grow free from utility-style regulation. The results speak for themselves.

But today, the FCC abandons those policies. It reclassifies broadband Internet access service as a Title II telecommunications service. It seizes unilateral authority to regulate Internet conduct, to direct where Internet service providers (ISPs) make their investments, and to determine what service plans will be available to the American public. This is not only a radical departure from the bipartisan, market-oriented policies that have served us so well for the last two decades. It is also an about-face from the proposals the FCC made just last May.

So why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is broken? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so.

On November 10, President Obama asked the FCC to implement his plan for regulating the Internet, one that favors government regulation over marketplace competition. As has been widely reported in the press, the FCC has been scrambling ever since to figure out a way to do just that.

The courts will ultimately decide this *Order's* fate. Litigants are already lawyering up to seek judicial review of these new rules. Given the *Order's* many glaring legal flaws, they will have plenty of fodder.

But if this *Order* manages to survive judicial review, these will be the consequences: higher broadband prices, slower speeds, less broadband deployment, less innovation, and fewer options for American consumers. To paraphrase Ronald Reagan, President Obama's plan to regulate the Internet isn't the solution to a problem. His plan is the problem.

In short, because this *Order* imposes intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have, I dissent.

### I.

The Commission's decision to adopt President Obama's plan marks a monumental shift toward government control of the Internet. It gives the FCC the power to micromanage virtually every aspect of how the Internet works. It's an overreach that will let a Washington bureaucracy, and not the American people, decide the future of the online world.

One facet of that control is rate regulation. For the first time, the FCC will regulate the rates that ISPs may charge and will set a price of zero for certain commercial agreements. And the *Order* goes out of its way to reject calls to forbear from section 201's authorization of rate regulation and expressly invites parties to file such complaints with the Commission. A government agency deciding whether a rate is lawful is the very definition of rate regulation.

Although the *Order* plainly regulates rates, the plan takes pains to claim that it is not imposing further “*ex ante* rate regulation.” Of course, that concedes that the new regulatory regime will involve *ex post* rate regulation. But even the agency’s suggestion that it today “cannot . . . envision” *ex ante* rate regulations “in this context” says nothing of what a future Commission—perhaps this very Commission—could envision.

Just as pernicious is the FCC’s new “Internet conduct” standard, a standard that gives the FCC a roving mandate to review business models and upend pricing plans that benefit consumers. Usage-based pricing plans and sponsored data plans are the current targets. So if a company doesn’t want to offer an expensive, unlimited data plan, it could find itself in the FCC’s cross hairs.

Our standard should be simple: If you like your current service plan, you should be able to keep your current service plan. The FCC shouldn’t take it away from you. Banning diverse service plans would just hurt consumers, especially the middle-class and low-income Americans who are the biggest beneficiaries of these plans.

In all, the FCC will have almost unfettered discretion to decide what business practices clear the bureaucratic bar, so these won’t be the last plans targeted by the agency. As the Electronic Frontier Foundation wrote just this week: This open-ended rule will be “anything but clear” and “suggests that the FCC believes it has broad authority to pursue any number of practices.” And “a multi-factor test gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence.”

Then there is the temporary forbearance. Although the *Order* crowds that its forbearance from some Title II rules yields a “‘light-touch’ regulatory framework,” in reality it isn’t light at all, coming as it does with the caveats that the public has come to expect from Washington, DC. In discussing additional rate regulation, tariffs, last-mile unbundling, burdensome administrative filing requirements, accounting standards, and entry and exit regulation, the plan repeatedly states that it is only forbearing “at this time.” For other rules, the FCC will refrain “for now.”

To be sure, with respect to some rules, the agency says that it “cannot envision” going further. But as the history of this proceeding makes clear, assurances like these don’t tend to last very long. In other words, expect forbearance to fade and the regulations to ratchet up as time goes on.

#### A.

Consumers will be worse off under President Obama’s plan to regulate the Internet. Consumers should expect their bills to go up, and they should expect that broadband will be slower going forward. This isn’t what anyone was promised, to say the least.

*1. New broadband taxes.*—One avenue for higher bills is the new taxes and fees that will be applied to broadband. Here’s the background. If you look at your phone bill, you’ll see a “Universal Service Fee,” or something like it. These fees—what most Americans would call taxes—are paid by Americans on their telephone service. They funnel about \$9 billion each year through the FCC. Consumers haven’t had to pay these taxes on their broadband bills because broadband has never before been a Title II service.

But now it is. And so the *Order* explicitly opens the door to billions of dollars in new taxes. Indeed, it repeatedly states that it is only deferring a decision on new broadband taxes—not prohibiting them.

This is fig-leaf forbearance. Indeed, the FCC has already referred the question of assessing federal and state taxes on broadband to the Federal-State Joint Board on Universal Service and “has requested a recommended decision by April 7, 2015,” right before Tax Day. It’s no surprise that many view this referral as a question of *how*, not *whether* to tax broadband, and states have already begun discussions on how they will spend the extra money.

And the agency's preference is clear. The *Order* argues that taxing broadband “potentially could spread the base of contributions” and could add “to the stability of the universal service fund.” For those not familiar with this Beltway argot, let me translate: “Taxing broadband would make it easier to spend more of your money with minimal public oversight.”

We've seen this game played before. During reform of the E-Rate program in July 2014, the FCC secretly told lobbyists that it would raise USF taxes after the election to pay for the promises it was making. Sure enough, in December 2014, the agency did just that—increasing E-Rate spending (and with it telephone taxes) by \$1.5 billion per year.

Public reports indicate that the federal government is eager to tap this new revenue stream soon to spend more of consumers' hard-earned dollars. So when it comes to broadband, read my lips: More new taxes are coming. It's just a matter of when.

2. *Slower broadband.*—These Internet regulations will work another serious harm on consumers. Their broadband speeds will be slower.

The record is replete with evidence that Title II regulations will slow investment and innovation in broadband networks. Remember: Broadband networks don't have to be built. Capital doesn't have to be invested here. Risks don't have to be taken. The more difficult the FCC makes the business case for deployment, the less likely it is that broadband providers big and small will connect Americans with digital opportunities.

The Old World offers a cautionary tale here. Compare the broadband market in the United States to that in Europe, where broadband is generally regulated as a public utility. Today, 82% of Americans have access to 25 Mbps broadband speeds. In Europe, that figure is only 54%. Moreover, in the United States, average mobile broadband speeds are 30% faster than they are in Western Europe.

It's no wonder that many Europeans are perplexed by what is taking place at the FCC. Just this week, the Secretary General of the European People's Party, the largest party in the European Parliament, observed that the FCC, “at the behest” of President Obama, was about to impose the type of “[r]egulation which . . . has led Europe to fall behind the US in levels of investment.”

Making it all worse is the fact that the FCC now welcomes litigation—from individual claims about the justness and reasonableness of ISP pricing to sprawling class actions for violations of the new Internet conduct rule—as an appropriate means of regulating the Internet economy. Judging from what we've seen in the patent world, this will be a boon for trial lawyers.

And these are just the intended results of reclassification!

There are unintended consequences as well. The fees that broadband providers—from small-town cable operators to new entrants like Google—must now pay to deploy broadband using things like utility poles will go up by an estimated \$150–200 million per year. And reclassification will expose many small companies to higher state and local taxes. Here in Washington, for instance, companies will face an instant 11% increase in taxes on their *gross receipts*. That big bite will leave a welt on consumers' wallets.

All of these new fees and costs add up. One estimate puts the total at \$11 billion a year. And every dollar spent on fees and new costs like lawyers and accountants has to come from somewhere: either the pockets of the American consumer or projects to deploy faster broadband. And so these higher costs will lead to slower speeds and higher prices—in short, less value—for the American consumer.

B.

So do American consumers want slower speeds at higher prices? I don't think so.

That's certainly not what I heard when I hosted the Texas Forum on Internet Regulation in College Station, the FCC's *only* field hearing on net neutrality where audience members were allowed to speak. There, Internet innovators, students, everyday people told me they wanted something else from the FCC—something that I thought had a familiar ring to it. These consumers wanted competition, competition, competition.

And yet, literally nothing in this *Order* will promote competition among ISPs. To the contrary, reclassifying broadband will drive competitors out of business. Monopoly rules designed for the monopoly era will inevitably move us in the direction of a monopoly. President Obama's plan to regulate the Internet is nothing more than a Kingsbury Commitment for the digital age. If you liked the Ma Bell monopoly in the 20<sup>th</sup> century, you'll love Pa Broadband in the 21<sup>st</sup>.

This isn't just my view. The President's own Small Business Administration—apparently acting independently—admonished the FCC that its proposed rules would unduly burden small businesses. Following the President's lead, the FCC ignores this admonition by applying heavy-handed Title II regulations to each and every small broadband provider as if it were an industrial giant.

Unsurprisingly, small Internet service providers are worried. I heard this for myself at the Texas Forum on Internet Regulation. One of the panelists, Joe Portman, runs Alamo Broadband, a wireless ISP, or WISP, that serves 700 people across 500 square miles south of San Antonio.

What does Joe think of Title II? He thinks it's "pretty much a terrible idea." His staff "is pretty busy just dealing with the loads we already carry. More staff to cover regulations means less funds to run the network and provide the very service our customers depend on."

Other WISPs feel the same way. Just last week, 142 WISPs joined the chorus. These WISPs have deployed wireless broadband to customers who often have no alternatives. They often run on a shoestring budget with just a few people to run the business, install equipment, and handle service calls. They have no incentive and no ability to take on commercial giants like Netflix. And they say the FCC's new "regulatory intrusion into our businesses . . . would likely force us to raise prices, delay deployment expansion, or both."

Or consider the views of 24 of the country's smallest ISPs, each with fewer than 1,000 residential broadband customers. They wrote us that Title II "will badly strain our limited resources" because they "have no in-house attorneys and no budget line items for outside counsel."

Or how about the 43 municipal broadband providers that flatly told the FCC that Title II "will trigger consequences beyond the Commission's control and risk serious harm to our ability to fund and deploy broadband without bringing any concrete benefit for consumers or edge providers that the market is not already proving today without the aid of any additional regulation."

There's a special irony given that right before this vote, the FCC voted to preempt state laws regarding city-owned broadband projects. This is an initiative President Obama announced just last month in Cedar Falls, Iowa, and the FCC is dutifully implementing it. But Cedar Falls Utilities, the very municipal broadband provider the President promoted, tells us that Title II is a tremendous mistake.

So what does the *Order* tell Americans whose ISP isn't a Comcast, an AT&T, a Google, or a Sprint? What does it tell those whose service will be more expensive as a direct result of reclassification? What does it tell those who may lose their Internet service if their small operator goes out of business? What does it tell those who worked for years to serve their community and build a business, one that's finally in the black? There's no explanation. There's not even an acknowledgement. There's just the smug assurance that it won't be that bad.

### C.

So the FCC is abandoning a 20-year-old, bipartisan framework for keeping the Internet free and open in favor of Great Depression-era legislation designed to regulate Ma Bell. But at least we're getting something in return, right? Wrong. The Internet is not broken. There is no problem for the government to solve.

That the Internet works—that Internet freedom works—should be obvious to anyone with an Apple iPhone or Microsoft Surface, a Samsung Smart TV or a Roku, a Nest Thermostat or a Fitbit. We live in a time where you can buy a movie from iTunes, watch a music video on YouTube, listen to a personalized playlist on Pandora, watch your favorite Philip K. Dick novel come to life on Amazon Streaming Video, help someone make potato salad on Kickstarter, check out the latest comic at XKCD, see what *Seinfeld*'s been up to on Crackle, navigate bad traffic with Waze, and do literally hundreds of other things all with an online connection. At the start of the millennium, we didn't have *any* of this Internet innovation.

And no, the federal government didn't build that. Somebody else made that happen.

For all intents and purposes, the Internet didn't exist until the private sector took it over in the 1990s, and it's been the commercial Internet that has led to the innovation, the creativity, the engineering genius that we see today.

Nevertheless, the *Order* ominously claims that “[t]hreats to Internet openness remain today.” It argues that broadband providers “hold all the tools necessary to deceive consumers, degrade content or disfavor the content that they don't like,” and it asserts that the FCC continues “to hear concerns about other broadband provider practices involving blocking or degrading third-party applications.”

The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria. A small ISP in North Carolina allegedly blocked VoIP calls a decade ago. Comcast capped BitTorrent traffic to ease upload congestion eight years ago. Apple introduced Facetime over Wi-Fi first, cellular networks later. Examples this picayune and stale aren't enough to tell a coherent story about net neutrality. The bogeyman never had it so easy.

So what is there to fear? A sober reader might borrow from the father of Title II: “The only thing we have to fear is fear itself.” But the FCC instead intones the nine scariest words for any friend of Internet freedom: “I'm from the government, and I'm here to help.”

To put it another way, Title II is not just a solution in search of a problem—it's a government solution that creates a real-world problem. This is not what the Internet needs, and it's not what the American people want.

### D.

So—that's substance. A few words on process. When the Commission launched this rulemaking, I said that we needed to “give the American people a full and fair opportunity to participate in this process.” Unfortunately, we have fallen woefully short of that standard.

Most importantly, the plan in front of us today was not forged in this building through a transparent notice-and-comment rulemaking process. Instead, *The Wall Street Journal* reports that it was developed through “an unusual, secretive effort inside the White House.” Indeed, White House officials, according to the *Journal*, functioned as a “parallel version of the FCC.” Their work led to the President's announcement in November of his plan for Internet regulation, a plan which “blindsided” the FCC and “swept aside . . . months of work by [Chairman] Wheeler toward a compromise.”

Of course, a few insiders were clued in about what was transpiring. Here's what a leader for the government-funded group Fight for the Future had to say: “We've been hearing for weeks from our allies in DC that the only thing that could stop FCC Chairman Tom Wheeler from moving ahead with his sham



proposal to gut net neutrality was if we could get the President to step in. So we did everything in our power to make that happen. We took the gloves off and played hard, and now we get to celebrate a sweet victory.”

What the press has called the “parallel FCC” at the White House opened its doors to a plethora of special-interest activists: Daily Kos, Demand Progress, Fight for the Future, Free Press, and Public Knowledge, just to name a few. Indeed, even before activists were blocking Chairman Wheeler’s driveway late last year, some of them had met with executive branch officials. But what about the rest of the American people? They certainly couldn’t get White House meetings. They were shut out of the process. They were being played for fools.

And the situation didn’t improve once the White House announced President Obama’s plan and “ask[ed]” the FCC to “implement” it. The document in front of us today differs dramatically from the proposal that the FCC put out for comment last May. It differs so dramatically that even zealous net neutrality advocates frantically rushed in recent days to make last-minute filings registering their concerns that the FCC might be going too far. Yet the American people to this day have not been allowed to see President Obama’s plan. It has remained hidden.

Especially given the unique importance of the Internet, Commissioner O’Rielly and I asked for the plan to be released to the public. Senate Commerce Committee Chairman John Thune and House of Representatives Energy and Commerce Chairman Fred Upton did the same. And according to a survey last week by a respected Democratic polling firm, 79% of the American people favored making the document public. But still the FCC has insisted on keeping it behind closed doors. We have to pass President Obama’s 317-page plan so that the American people can find out what is in it.

This isn’t how the FCC should operate. We should be an independent agency making decisions in a transparent manner based on the law and the facts in the record. We shouldn’t be a rubber stamp for political decisions made by the White House.

And we should have released this plan to the public, solicited their feedback, incorporated that input into the plan, and then proceeded to a vote. There was no need for us to resolve this matter today. There is no immediate crisis in the Internet marketplace that demands immediate action.

The backers of the President’s plan know this. But they also know that the details of this plan cannot stand up to the light of day. They know that the more the American people learn about it, the less they will like it. That is why this plan was developed behind closed doors at the White House. And that is why the plan has remained hidden from public view.

## II.

These are not my only concerns. Even a cursory look at the plan reveals glaring legal flaws that are sure to mire the agency in the muck of litigation for a long, long time. But rather than address them today, I will reserve them for my written statement.

\* \* \*

At the beginning of this proceeding, I quoted Google’s former CEO, Eric Schmidt, who once said: “The Internet is the first thing that humanity has built that humanity doesn’t understand.” This proceeding makes abundantly clear that the FCC still doesn’t get it.

But the American people clearly do. The threat to Internet freedom has awakened a sleeping giant. And I am optimistic that we will look back on today’s vote as an aberration, a temporary deviation from the bipartisan path that has served us so well. I don’t know whether this plan will be vacated by a court, reversed by Congress, or overturned by a future Commission. But I do believe that its days are numbered.

For all of these reasons, I dissent.