

**STATEMENT OF AJIT PAI
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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY**

**“WRECKING THE INTERNET TO SAVE IT?
THE FCC’S NET NEUTRALITY RULE”**

MARCH 25, 2015

Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you for inviting me to testify today. I appreciate the opportunity to share with you my views on one of the most important regulatory decisions in recent history: the Federal Communications Commission’s decision to regulate the Internet.

As background, I began my career as an antitrust lawyer. Between 1998 and 2001, I served as an Honors Program attorney in the U.S. Department of Justice’s Antitrust Division, working in the then-Telecommunications Task Force. Later, while working in the private sector between 2001 and 2003, I had the opportunity to handle a variety of antitrust matters.

1. Title II is a Solution That Won’t Work for a Problem That Doesn’t Exist

Let me start by offering what should be a universally shared proposition: A federal agency should adopt industry-wide regulations only when (1) there is evidence of an existing industry-wide problem, such as market failure or rampant anticompetitive behavior, and (2) the regulatory solution is narrowly tailored to solve that problem. In this case, however, the FCC failed both tests. Put simply, Title II Internet regulation is a heavy-handed solution that won’t work for a problem that doesn’t exist.

First, I’ll address the lack of an industry-wide problem. The FCC’s *Order* itself confirms a basic truth: The Internet isn’t broken. There was nothing for the FCC to fix. Indeed, the Internet ecosystem in the United States is the envy of the world.

It is striking how thin the factual foundation for the *Order* is. 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 are hardly enough to justify regulating the entire broadband industry in 2015. A federal court complaint this weak would not survive a motion to dismiss.

In lieu of facts, the *Order* parades a number of hypothetical horrors. “[B]roadband providers have both the incentive and the ability to act as gatekeepers.” They have “the potential to cause a variety of other negative externalities that hurt the open nature of the Internet.” They have “the incentive and ability to engage in paid prioritization” or other “consumer harms.” The common thread linking these and countless other examples is that they simply *do not exist*. They’re theorized harms that haven’t materialized in this increasingly competitive environment.

Nonetheless, the FCC reclassified Internet service providers as common carriers and broadband Internet access as a telecommunications service. In so doing, it erased a bipartisan consensus dating back to the Clinton Administration that the Internet should be unfettered from government regulation. And it adopted conduct-based Internet regulations (broadband providers can’t block Internet traffic, throttle traffic, or engage in “paid prioritization” of traffic) that are chasing phantoms. Internet service providers do not block lawful content of consumers’ choosing. They don’t throttle applications. They don’t offer paid prioritization or “fast lanes.”

Second, the FCC’s Title II solution isn’t narrowly tailored to solve even the hypothetical net neutrality problem. If the FCC were solely interested in preventing ISPs from ever blocking, throttling, or

engaging in paid prioritization, then the agency would have had no need to adopt the expansive regulations it did.¹ It would have been unnecessary, for example, for the FCC to adopt a broad and general “Internet conduct” rule, threaten Internet service providers with rate regulation, claim authority to regulate Internet interconnection, and apply a variety of Title II provisions that have nothing to do with net neutrality now or in the all-too-soon future.

The result of this pervasive regulation? Higher broadband prices, lower broadband speeds, fewer service plan choices, and less competition in the broadband marketplace. That’s a raw deal for consumers.

Let me focus on that last point, since antitrust teaches that robust competition is the best way to protect consumer welfare: Title II will reduce competition among Internet service providers.²

Reclassifying broadband, applying the core of Title II rules, and half-heartedly forbearing from applying the rest “for now” or “at this time” (as the *Order* suggests) will drive smaller competitors out of business and leave the rest in regulatory vassalage. Monopoly rules designed for the monopoly era will inevitably move us in the direction of a monopoly. In that regard, this plan is little more than a Kingsbury Commitment for the digital age.³

Today there are thousands of smaller Internet service providers—wireless Internet service providers (WISPs), small-town cable operators, municipal broadband providers, electric cooperatives, and others—that don’t have the means or the margins to withstand a regulatory onslaught. Imposing on competitive broadband companies the rules designed to constrain the continent-spanning Bell telephone monopoly will do nothing but raise the costs of doing business. Smaller, rural competitors will be disproportionately affected, and the FCC’s decision will diminish competition—the best guarantor of consumer welfare.

This isn’t just my view. The President’s own Small Business Administration admonished the FCC that its proposed rules would unduly burden small businesses. The SBA urged the FCC to “address[] the concerns raised by small businesses in comments” and “exercise appropriate caution in tailoring its final rules to mitigate any anti-competitive pressure on small broadband providers as well.”⁴ The FCC ignores this admonition by applying heavy-handed Title II regulations to each and every small

¹ See Julian Hattem and Mario Trujillo, “OVERNIGHT TECH: FCC aims to close auction loophole,” *The Hill* (Mar. 18, 2015) (quoting Eric Schmidt, Executive Chairman of Google, Inc. as saying “As a general rule, less regulation is better. . . . So the problem with where we are now is trying to figure out where the harms are and we have benefited from essential government staying out of the Internet and I’m worried that we’re now on a path starting to regulate an awful lot of things on the Internet.”), available at <http://thehill.com/policy/technology/overnights/236202-overnight-tech-fcc-plans-to-combat-auction-loophole>.

² This is just one of the ways in which consumers will be harmed by the application of Title II to the Internet. I detail the other negative effects—higher broadband prices, lower broadband speeds, fewer service plan choices, and more—in my dissent from the *Order*. See Dissent at 5–10 (Feb. 26, 2015), available at <http://bit.ly/1xVeDDs>.

³ The Kingsbury Commitment was the 1913 agreement between the Justice Department and AT&T that essentially allowed the company to monopolize the telephone market under the mantra “one policy, one system, and universal service.” With the market subject to onerous common carrier regulations, independent competitors—and with them competition—became extinct. See Remarks of FCC Commissioner Ajit Pai at TechFreedom’s Forum on the 100th Anniversary of the Kingsbury Commitment (Dec. 19, 2013), available at <http://go.usa.gov/3cKdk>.

⁴ Small Business Administration Office of Advocacy, Fact Sheet: Advocacy Submits Comments to the Federal Communications Commission regarding Small Business Engagement and Regulatory Flexibility Act Compliance, <http://go.usa.gov/3cKdP> (Sept. 25, 2014); Letter from Winslow L. Sargeant, Ph.D., Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 13-5, 12-353, WC Docket Nos. 05-25, 10-90, RM-10593 (Sept. 25, 2014), available at <http://go.usa.gov/3cKsm>.

broadband provider as if it were an industrial giant. As a result, small providers will be squeezed—perhaps out of business altogether. If they go dark, consumers they serve will be thrown offline.

Unsurprisingly, small Internet service providers are worried. I heard this for myself at the Texas Forum on Internet Regulation, which I convened in October 2014. One of the panelists, Joe Portman, runs Alamo Broadband, a WISP that serves 700 people across 500 square miles south of San Antonio. As he put it, his customers “had very limited choices for internet service before we came along. The big names, the telcos and cable companies, when it comes to rural areas such as the areas we serve don’t see the value and won’t invest the capital (at least if it’s their money) to build infrastructure and bring service to the people that live there. We, and thousands others like us, have found a way to do it.”⁵

Mr. Portman thinks Title II is “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.” In his view, Title II will just impede broadband deployment.

Numerous WISPs told the FCC they agreed with him. These WISPs have deployed wireless broadband to customers who often have no alternatives. They rely heavily on unlicensed spectrum, take no federal subsidies, and 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.”⁶

The FCC also heard from dozens of the country’s smallest Internet service providers, each with fewer than 1,000 residential broadband customers. The largest, FamilyView Cablevision, has just 900 customers in Pendleton, South Carolina. The smallest, Main Street Broadband, has just four—four!—residential customers in Cannon Falls, Minnesota. These companies told us that Title II “will badly strain our limited resources” because these Internet service providers “have no in-house attorneys and no budget line items for outside counsel” and the “rules of the road . . . could change anytime the issues an advisory, rules on a complaint, or adopts new rules. To subject small and medium-sized ISPs to such a regime, no less the very smallest of ISPs, is simply unreasonable.”⁷

Even government-owned broadband projects think Title II is a tremendous mistake. Forty three of them flatly told the FCC that “there is no basis for the Commission to reclassify our Internet service for the purpose of imposing any Title II common carrier obligations.”⁸ They continued, “Title II regulation will undermine the business model that supports our network, raises our costs and hinders our ability to further deploy broadband.” Their closing was a stinging rebuke to those who argue that Title II is harmless to those providers who don’t harm consumers:

⁵ Testimony of Joe Portman, President and Founder, Alamo Broadband Inc., Elmendorf, Texas, at the Texas Forum on Internet Regulation, at 1 (Oct. 21, 2014), *available at* <http://go.usa.gov/3cpPe>.

⁶ Letter from Dustin Surran, Aerux.com, Castle Rock, Colorado, Bryan Robinson, Affordable Internet Solutions, Waverly, Nebraska, and 140 other WISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket No. 14-28 (Feb. 19, 2015), *available at* <http://go.usa.gov/3c8rH>.

⁷ Letter from Robert J. Dunker, Owner/President, Atwood Cable Systems, Inc., Atwood, Kansas, Richard A. Nowak, Owner/President, Bellaire TV Cable Company, Bellaire, Ohio, and 22 other small ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127 (Feb. 17, 2015), *available at* <http://go.usa.gov/3cpPw>.

⁸ Letter from Randy Darwin Tilk, Utility Manager, Alta Municipal Broadband Communications, Alta, Iowa, Loras Herrig, City Administrator, Bellevue Municipal Cable, Bellevue, Iowa, and 41 other municipal ISPs to the Honorable Thomas Wheeler, Chairman, FCC, GN Docket Nos. 14-28, 10-127, at 1 (Feb. 10, 2015), *available at* <http://bit.ly/1Mmw89f>.

[W]e ask that you not fall prey to the facile argument that if smaller ISPs are not blocking, throttling, or discriminating amongst Internet traffic on their networks today, they have nothing to fear because they will experience no harm under Title II regulation. The economic harm will flow not from following net neutrality principles, which we do today because we think it is beneficial to all, but from the collateral effects of a change in regulatory status that 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.

It’s for these reasons that the Small Business & Entrepreneurship Council, a nonprofit organization representing nearly 100,000 small businesses nationwide, wrote to us that Title II “will deeply erode investment and innovation, which will dramatically harm entrepreneurs and small businesses.”⁹ Similarly, the National Black Chamber of Commerce, the National Gay & Lesbian Chamber of Commerce, the U.S. Hispanic Chamber of Commerce, and the U.S. Pan Asian American Chamber of Commerce told us that “Forcing the Internet into a Title II classification can only make it more difficult for individuals to make the highest and best use of this important tool The last thing small businesses in America need are more forms to fill out; more regulations to track; and more rules to follow.”¹⁰

In sum, the FCC’s Title II regulations not only address a non-existent problem in the marketplace. They’ll actually harm consumers by limiting their broadband choices. As Justice Breyer has written, “Regulation is viewed as a substitute for competition, to be used only as a weapon of last resort—as a heroic cure reserved for a serious disease.”¹¹ There was no indication of disease here, and even if there were, Title II is no cure.

2. The Best Guarantor of Consumer Welfare Online is Antitrust

Even if there were evidence of anticompetitive behavior in the broadband marketplace, antitrust laws would provide the appropriate framework for addressing the problem. The scalpel of antitrust, not the sledgehammer of Title II common-carrier regulation, is the best guarantor of consumer welfare online.

The U.S. Department of Justice’s Antitrust Division and the Federal Trade Commission are quite capable of vindicating the public interest by investigating and, as appropriate, prosecuting business practices that threaten competition. Under the “rule of reason,” the Department or FTC could pursue every (hypothetical) broadband Internet access provider practice targeted in the FCC’s *Order*. For instance, if an Internet service provider entered into a contractual arrangement with a content provider to allow prioritized delivery of the content provider’s Internet traffic to the ISP’s customers, the government could evaluate the arrangement under well-established principles on exclusionary vertical agreements. This would be better for consumers than the FCC’s flat ban, which I believe is both unlawful (because common carriage regulation has permitted different pricing for different services since the 1800s) and unwise (because the economic literature makes clear that some exclusive vertical deals can promote consumer welfare, a nuance the FCC’s rules reject out of hand).

Similarly, the Federal Trade Commission has authority under Section 5 of the Federal Trade Commission Act to prohibit “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”¹² As FTC Commissioner Maureen Ohlhausen has

⁹ Small Business & Entrepreneurship Council Comments at 2.

¹⁰ National Black Chamber of Commerce et al. Comments at 2.

¹¹ Stephen G. Breyer, “Antitrust, Deregulation, and the Newly Liberated Marketplace,” 75 Cal. L. Rev. 1005, 1007 (1987).

¹² 15 U.S.C. § 45.

explained, Section 5 “allows the FTC the prosecutorial flexibility to try to achieve the greatest social welfare possible” and allows a “flexible, normative, and rigorously fact-based approach to enforcement [that] is a perfect fit for overseeing the dynamic businesses tied to the Internet.”¹³ Particularly to the extent that the FTC endorses Commissioner Joshua Wright’s call to issue guidelines on Section 5¹⁴—for instance, by defining an “unfair method of competition” to incorporate rule-of-reason principles—the private sector would have much greater certainty and freedom to innovate than they would under the FCC’s approach. Antitrust’s rule of reason, after all, has been developed by the courts over the course of a century, whereas the FCC’s ahistorical Internet conduct standard is so broad and vague that no one knows how it will be applied, leaving room for abuse by favored parties with insider influence.

Additionally, the application of Title II to Internet service providers is likely to be less effective than antitrust enforcement. *For one thing*, the meat of the *Order* isn’t the bright-line rules (which prohibit practices no one uses) but instead labor-intensive, after-the-fact judgments based on individual complaints. Whereas antitrust authorities can evaluate the competitive effects of a particular company’s practice with dispatch given extensive experience, the FCC’s new standard has no precedent, and inquiries are likely to be free-ranging and expansive. Whereas antitrust complaints are few because good actors know the safe harbors and there are tell-tale signs of wrongdoing, complaints may abound at the FCC since no one knows what is permissible and what is prohibited. And whereas the antitrust focuses on failures in a generally competitive market, the FCC has declared competition a failure from the outset, so the Commission will need to evaluate *de novo* whether the rates are just and reasonable for each of our nation’s 4,462 ISPs.

For another thing, antitrust allows a focus on the abuse of market power, appropriately targeting only actors that could have both the incentive and the ability to behave in an anticompetitive manner. By contrast, the FCC’s Title II regulations presume that each and every Internet service provider is *per se* an anticompetitive gatekeeper against edge providers that must be restrained through heavy-handed, *ex ante* rules. This view of the marketplace has no basis in economics or the agency’s record. The notion that corporate behemoths like Netflix, Facebook, and Google need to be protected from Main Street Broadband, with its four customers in Cannon Falls, Minnesota, is absurd.

Further, and on a related note, the *Order* targets only one corner of the Internet economy—ISPs—on the theory that at some time in the future, such providers may impede innovation among nascent edge providers. Yet the online economy is an ecosystem, and evidence suggests that startups face a greater, and *existing*, threat from a different corner: dominant edge providers.¹⁵ Antitrust authorities

¹³ “Net Neutrality vs. Net Reality: Why an Evidence-Based Approach to Enforcement, And Not More Regulation, Could Protect Innovation on the Web,” *Engage*, 82, 83 (Feb. 2013), *available at* <http://1.usa.gov/1BnzwaP>.

¹⁴ “Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority” (Feb. 26, 2015), *available at* <http://1.usa.gov/1BIw4rg>.

¹⁵ For instance, two weeks ago, on only two hours’ notice, Twitter blocked a startup called Meerkat—which allows users to livestream video from a smartphone—from accessing Twitter’s “social graph,” which enabled Meerkat users to import their contacts from Twitter. *See* “Twitter Chokes Off Meerkat’s Access To Its Social Network,” *BuzzFeed News* (Mar. 13, 2015), *available at* <http://bzfd.it/1CR9FZ>. Coincidentally, just days before, Twitter purchased a company that was a direct competitor to Meerkat. Many believe that Twitter’s decision will harm Meerkat’s ability to compete. *See, e.g.*, “Twitter cuts Meerkat off from its social graph just as SXSW gets started,” *The Verge* (Mar. 13, 2015) (“[S]ome of the things that have made Meerkat compelling could degrade significantly”), *available at* <http://bit.ly/1FluCkL>; *Business Insider* (Mar. 18, 2015) (“There’s no doubt that Twitter’s limitations have crippled Meerkat for now.”), *available at* <http://read.bi/1GLyNVu>. But because the FCC’s Internet regulations do not extend to edge providers, it would have no power to evaluate concerns in the app developer community about possible anticompetitive conduct. *See* “Twitter’s Meerkat crackdown reignites concerns among developers,” *Mashable* (Mar. 16, 2015), *available at* <http://on.mash.to/1BuyUzV>; *cf.* “Why Twitter faves #NetNeutrality,” *Twitter Blog*, *available at* <https://blog.twitter.com/2015/net-neutrality> (“We strongly support

have a mandate to view the entire marketplace and target any bad actor, a far better outcome for consumers than a myopic focus on ISPs.

Finally, the entire FCC *Order* itself is certain to be challenged in court, miring the agency in litigation for a long, long time. Judging from recent experience—the FCC’s 2008 Comcast-BitTorrent decision was voided in 2010, and its 2010 “Open Internet” rules were vacated in 2014—and the likelihood of Supreme Court review, the fate of the FCC’s third attempt at Internet regulation may not be resolved until the end of this decade.

For all of these reasons, I believe that the FCC’s heavy-handed Internet regulations will harm consumers. Increased competition and antitrust enforcement would be a far superior option for protecting consumer welfare.

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Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee, thank you once again for inviting me to testify at this hearing. I look forward to your questions.

ensuring that such [FCC net neutrality] rules include prohibitions against blocking or throttling of sites and services.”).