

**REMARKS OF FCC GENERAL COUNSEL THOMAS M. JOHNSON, JR.
AT FREE STATE FOUNDATION**

WASHINGTON, DC

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Thank you, Randy, for the kind introduction. It is an honor to be here to address the Free State Foundation to talk about our Restoring Internet Freedom litigation. I admire the Foundation's dedication to free markets and the rule of law and thank the Foundation for its interest and participation in the Restoring Internet Freedom proceeding.

When it comes to the Restoring Internet Freedom litigation, I'm reminded of that preeminent legal scholar and oral advocate Yogi Berra who purportedly said, "this is déjà vu all over again." This is now at least the fourth time (depending on how you count) that the Commission will appear before the D.C. Circuit Court of Appeals on orders that attempt to grapple with how best to employ the agency's limited authority under the Communications Act to regulate broadband Internet access service. And I'd like to talk to you today about why I believe that this time, the Commission has gotten the balance exactly right—both in terms of the regulatory classification of broadband and the light-touch regulatory framework that the Commission has put in place.

Let's start with classification. While the debate over "net neutrality," as it is popularly known, has generated intense public interest and passionate opinion, the most important legal question in this case is, I'm afraid, a relatively dry matter of statutory interpretation. But the stakes involved in how the Commission answers this question have profound consequences for the Internet economy.

The question, simply put, is this: Is broadband an "information service" under Title I of the Communications Act or is it a "telecommunications service" under Title II of the Act? For most of the 22 years since these terms of art were adopted by Congress in 1996, there was a bipartisan consensus that broadband was a Title I information service—the same classification that the Commission adopted in the Restoring Internet Freedom Order. That classification entails a light-touch approach to broadband regulation.

This bipartisan consensus has its origins in the text, structure, and Congressional purposes expressed in the 1996 amendments to the Act. Those amendments declared that the Internet should be "unfettered by federal or State regulation," and made clear that "information services"—those Title I services subject to light-touch regulation—were included, as set forth in Section 230(f) of the Act, "a service or system that provides access to the Internet." That includes broadband.

Two years later, in 1998, the Commission submitted a report to Congress (known as the *Stevens Report*) that concluded that Internet access service was an information service. Applying the statutory definition of "information service," the Commission reasoned that Internet service was an "offering" of a "capability for ... acquiring, ... retrieving ... and utilizing information." In layman's terms, service providers enabled consumers to access and use content on the Internet. Starting in 2002, the Commission adopted a series of orders concluding that broadband delivered over different media were all properly classified as "information services"—including cable modem service, wireline facilities, wireless networks, and power lines.

Until 2015, this bipartisan consensus persisted. While the Commission made some attempts during this era to apply new rules under Title I to broadband providers, those rules (with the important exception of a market-based disclosure requirement, which I'll return to shortly) were deemed by the federal court of appeals in DC to exceed the Commission's authority under the Communications Act. As a result, Commission efforts to intervene in the broadband market during this time could best be described as minimal and case-specific.

A funny thing happened, though, during this extended period of light-touch regulation: Broadband providers invested over \$1.5 trillion in new networks to connect Americans to new products and services; the Internet and social media revolutionized how we interact and the world in which we live; and the Internet economy created millions in new jobs and trillions of dollars in value for consumers. The Internet, in other words, appeared far from broken or in need of a regulatory correction course from the FCC.

Now, as you know, the story did not end there. In 2015, the Commission under the prior administration reclassified broadband as a Title II “telecommunications service.” Title II operates a lot differently than Title I. It applies to covered services the same utility-style regulatory approach that applied to the old Ma Bell telephone network. By reclassifying broadband as a Title II service, the Commission assumed the authority to impose conduct rules—popularly known as “net neutrality” rules—to prohibit certain practices of internet service providers. Those rules included both *per se* prohibitions and a broadly-worded Internet conduct standard with a vague admonition that providers may not unreasonably interfere or disadvantage users’ ability to access the content of their choice.

Then, in 2017, under Chairman Pai’s leadership, the Commission took a fresh look at the regulatory classification of broadband. The Commission detailed the bipartisan consensus over two decades that broadband was properly classified as an information service. The Commission further noted the significant benefits of broadband investment and innovation that occurred while the prior light-touch approach was in effect, and concluded, as a legal and policy matter, that the longstanding Title I classification of broadband should be restored and the conduct rules repealed.

In place of those rules, the Commission adopted a market-based transparency regime in which broadband providers will need to disclose their network management practices, performance, and commercial terms of service. This will provide consumers with critical information when choosing among providers. Furthermore, the Commission facilitated information-sharing with the Federal Trade Commission and noted that providers who engage in practices that are demonstrably anticompetitive or harm consumers can be held accountable on a targeted, case-by-case basis by consumer protection and antitrust authorities.

This Restoring Internet Freedom Order, as you know, has been challenged in court. Sixteen petitions have been filed challenging the legality of the new rule. These cases have been consolidated before the U.S. Court of Appeals for the D.C. Circuit and are currently being briefed. Oral argument is scheduled for February 1, 2019, and we can expect a decision later that year.

So, returning to classification, how am I confident that the Commission’s decision is consistent with law and likely to be upheld? Well, if oral argument in this case were to adopt the rules of the classic TV game show “Name That Tune,” I would say I could argue this case in two words: *Brand X*. (I’m not actually advocating this as an oral argument strategy.) *Brand X* is the name of the U.S. Supreme Court case that held, back in 2005, that the Commission acted reasonably by classifying broadband as a Title I information service.

In our brief, our principal response to the petitioners who have challenged the Restoring Internet Freedom Order is simple: They are attempting to relitigate *Brand X*.

Petitioners, of course, recognize that they need to distinguish this case, but their efforts to do so are unpersuasive. Their principal response is that the state of broadband technology has evolved from the time of the 2005 decision. Petitioners argue that the types of Internet service providers that the Court had in mind at the time were so-called “walled garden” providers like AOL or Netscape. Those providers typically offered consumers not only access to the Internet, but also a host of “add-on” applications like email, news feeds, and online chat groups. Petitioners argue that these additional services were critical to the Court’s determination in *Brand X* that cable modem service is an “information service.” Today, Petitioners argue, when consumers make much more use of third party apps and websites for email, news,

and other content, the broadband access service itself is more like a traditional telephone network— simply transmitting data back and forth.

There are factual problems with this narrative: The Internet service market had already started evolving away from the AOL “walled garden” by the time of *Brand X*, and broadband providers today still provide email and other add-on applications. But the most compelling reason this argument doesn’t work is that the Court in *Brand X* rejected it. For the Supreme Court, it didn’t matter whether consumers were getting Internet content from their service provider or somewhere else.

As the Court concluded, “[w]hen an end user accesses a third party’s Web site, ... he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company’s own [services].” In the 2018 Order now under review, the Commission adopted that same insight, concluding that the user’s ability to retrieve and utilize content via the Internet made it an information service under the definition provided in the Act.

The Supreme Court in *Brand X* also said it was reasonable for the Commission to classify broadband as an “information service” because two processing functions that provide important value to consumers are functionally integrated into the service—DNS (or domain name service) and caching. If you don’t know, domain name lookup occurs whenever you type in a web address on your browser or click on a link: Your service provider locates the host server for the Web page in order to determine what content you’ve requested. Caching is a function where the provider stores popular content on local servers so that consumers can enjoy more seamless access to Internet content. In the Restoring Internet Freedom Order, the Commission again took its cues from *Brand X* and relied in part on the processing capabilities of DNS and caching. Petitioners claim this is unreasonable, but their arguments run right up against *Brand X*.

Now, you may be aware that in 2015, the D.C. Circuit upheld the Commission’s prior Title II classification of broadband, concluding that this too was a reasonable decision for the Commission to make. But the Court also noted, in language that we highlight prominently in the current litigation, that under the Supreme Court’s *Brand X* decision, “classification of broadband as an information service was permissible.” In other words, this case presents a classic example of agency discretion to make a regulatory choice under the statute the agency is charged to administer. (As I explained, however, we think we have the much better reading of the statute, even if courts have held so far that our reading is not compelled.)

What’s good for the goose should be good for the gander—especially since this gander (Title I classification) already has a stamp of approval from the Supreme Court and past Commissions from both parties.

On that note, I’d like to touch briefly on the public policy rationale for the Commission’s action, which the Commission offered as an independent basis for its decision. Looking at the record evidence, the Commission made the reasonable predictive judgment that a utility-based regulatory framework, consisting of inflexible conduct rules with uncertain future application in light of rapidly evolving technology, was likely to stunt investment in broadband networks, limit access to consumers, and stifle smaller start-up broadband providers who might otherwise deploy networks and enhance competition in poorer and more rural areas. The Commission noted the sporadic and contested allegations of harm in the record cited as support for the conduct rules and concluded that any incremental benefits from retaining those rules would be outweighed by the costs to innovation and investment. Accordingly, based on that record, the Commission chose instead to rely on a mix of transparency rules, market pressures, and targeted, case-by-case enforcement of consumer protection and antitrust laws to hold service providers accountable. In other words, the Commission made an assessment that a lighter-touch regulatory regime would better advance the common goals of a free and open Internet. Under Supreme Court and D.C. Circuit case law, federal agencies are fully entitled to adopt a different philosophical approach to regulation in precisely this manner following a change of administrations.

One other aspect of our Order worth mentioning is the Commission's decision to preempt any state laws that impose conduct rules similar to the 2015 rules the Commission repealed. Critics of the Commission's approach have claimed that the FCC created a regulatory "vacuum" by reclassifying broadband as a Title I service and therefore lacks authority to step in and prevent states from imposing their own restrictions. But nothing could be further from the truth. Instead, the Commission made a conscious policy decision to replace one federal regulatory scheme (across-the-board conduct rules) with another federal regulatory scheme (market-based transparency and ex-post enforcement). Under the Communications Act, the Commission has the authority to preempt contrary state laws under either regulatory approach for interstate services like broadband. In our case, the Commission reasonably concluded that a patchwork quilt of conflicting conduct rules at the state level would inhibit the very investment and innovation in regional and national broadband networks that the Commission's light-touch approach is designed to encourage.

This has not prevented states from attempting to circumvent federal law by imposing their own Internet regulations on broadband. In one notable example, the State of California adopted Internet regulations this year that swept even further than the 2015 federal rules, because among other things they explicitly prohibited many free-data plans. Due to the uniquely broad scope of these rules and their effect on the national broadband economy, the United States sued to enjoin these rules in September of this year as inconsistent with the Restoring Internet Freedom Order.

The State of California has since agreed not to enforce its rules pending resolution of the D.C. Circuit litigation, at which point, the United States will be free to renew its motion for a preliminary injunction. The Commission views this as a positive development for the policies set forth in the Order as it will prevent California for the time being from interfering with the development of nascent 5G wireless networks.

To conclude, we feel confident in the legal arguments we are bringing to the D.C. Circuit. While I would never want to predict the outcome of an appeal, it is always nice to have both the United States Supreme Court and the court of appeals on record saying that the federal agency you represent has discretion to make the very decision you are now defending. So, we look forward to answering the Court's questions at oral argument early next year and, in early preparation for that, I'm happy to take a few of your own questions now.