

**DISSENTING STATEMENT OF
COMMISSIONER NATHAN SIMINGTON**

Re: *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking (October 19, 2023).

The Notice we approved today proposes rules that are unnecessary, dangerously overbroad, and unlikely to survive judicial review. They are unlikely to serve the public interest. If implemented, they would ban or cripple services and products that Americans want. As such, I have no choice but to dissent.

The Proposed Rules are Unnecessary

To show why the rules are unnecessary, let's briefly consider failed claims by Title II advocates.

Free Speech. American consumer internet service providers (ISPs) don't restrict free speech – they promote it very visibly. Americans' speech is suppressed, not by ISPs, but mostly by Big Tech platforms. Title II advocates always claimed that we needed Title II for free speech, even calling it “the First Amendment issue of our time.” It turns out that American ISPs are not the problem, and the inventor of net neutrality thinks that the First Amendment is “obsolete” anyway.

The Internet Wasn't Destroyed. When it became clear that they didn't care about free speech, Title II advocates shifted to saying that “the survival of the internet” was at risk. They helpfully made specific claims that are easy to check. Some of these were “it will cost 25 cents to send a tweet,” “it will cost two dollars to search on Google,” and “you'll get the Internet one word at a time.” Obviously, none of this happened.

People Didn't Die. This one really shouldn't need too many examples. People claimed that ending Title II net neutrality would kill people. It didn't.

But Won't It Make The Internet Faster and Cheaper? American broadband service used to be slower than Europe's. That's no longer true. Depending on the ranking, the United States is typically tenth or eleventh in the world, ahead of countries with legal net neutrality like Finland, Norway, the United Kingdom, and Germany. Most of the countries ahead of us are smaller countries like Monaco and Singapore that have fewer challenges with geography than we do. These gains came in while home broadband was a Title I service. If someone thinks it would have been even better under Title II, that's a hard case to make. We are faster than lots of countries with legal net neutrality.

As for price, the Chairwoman is on the record saying that she has no plans to regulate prices under Title II. And if we tried, it would probably be impossible to set a fair price. We couldn't do it properly when we were just regulating one big phone company. How could we do it for dozens of ISPs, including satellites and radio ISPs?

What About National Security? The FCC can ban foreign companies from having phone company licenses. These rules would extend the concept to ISPs. That isn't the worst idea, but the U.S. Government doesn't need the FCC to grab this power through Title II. It has CFIUS and the ICTS Supply Chain Rule, and Congress could pass a law tomorrow if it thinks there are any gaps.

The Proposed Rules are Dangerously Overbroad

Several effects of the rules should worry everyone who hopes for more advanced technology. It's easy to say that “regulation kills innovation,” but Americans deserve concrete examples.

5G Will Be Crippled. Once 5G technology is everywhere, a phone company can “slice” its network so that different phones and other devices get different features. For example, one “slice” could carry emergency services calls, another one could monitor traffic and report into an app, and a third could support high-volume video. Multiple services on a single network could be banned under Title II. Without advanced uses for 5G, there's no point in upgrading.

Consumers Will Pay for Traffic Dumping. Title II is attractive to Big Tech companies because “no throttling” means “you have to take all incoming traffic and charge your customer for it.” So if an internet company sends a lot of traffic your way, your ISP will have to charge you for the expense of building a network that can handle it, while the internet company makes all the profit. This is such a big problem in other countries that the EU, Canada and South Korea all adopted or are adopting laws to charge high-traffic companies for network charges.

Factories Won’t Get Service. Modern wireless technology enables reaction times 10 times faster than the fastest human and AI training can make manufacturing more efficient. This is already happening in other countries, like China. The “general conduct standard” in the proposed rules would make this technology risky to build because if there was ever any crossover with consumer service, the technology would come under Title II. Think of it this way: if having a computer put you under Title II, we’d never have put computers in factories.

The Proposed Rules are Unlikely to Survive Judicial Review

I’m not going to tell the courts how to rule on the “major questions doctrine” or on whether the Section 10 forbearances that this order uses will hold up in court. (If they don’t hold up, then the Title II regime falls apart.) But I will note that an agency constantly changing its mind without any evidence of a problem is classic arbitrary and capricious behavior.

Additionally, focusing on ISPs when they are less powerful and monopolistic than Big Tech companies raises still more questions about arbitrary and capricious action. The FCC hasn’t really addressed whether internet companies that aren’t ISPs could still be “common carriers” under the Part I rules of Title II. If they can, that should be the first place we go to protect free speech and consumer choice.

The Proposed Rules Do Not Serve the Public Interest

I can’t be the only person who’s noticed that tech seems to be slowing down. Not computers—new computer advances are happening all the time, from AI chatbots writing your grocery list to decoding burned scrolls in Ancient Greek. But not that much seems to cash out into real, tangible improvements to daily life.

The physical world is hard for computers to deal with. They can play grandmaster chess more easily than recognizing expressions on faces. I believe that we need much more connectivity and computing to solve the hard problems of safer, better cars; cheaper, more energy-efficient manufacturing; and life-saving emergency response anywhere on the planet. All these are potentially held back by Title II classification of broadband. What we’re doing right now is working fine. Service has gotten faster, better, and cheaper quickly, so much so that some of our old broadband programs don’t even count as broadband any more. Our expectations are up and we should keep them there.

Everything that “internet freedom” and “network neutrality” meant in the early days of the Internet has just become normal today, without the FCC having to enforce it. You can freely access legal content, browse sites of your choice, connect any device through any protocol you want, and run any application you want without your ISP forcing you to use slow routing. All those things happened through normal marketplace operations and consumer expectations. We are now faced with advocates who can’t accept that we have de facto net neutrality; no wonder the rationales keep changing.

One final comment on internet speeds. A lot of internet plumbing had to be re-imagined to let one home router connected to one wire carry voice, video, data and gaming all at once. Most of the growing pains in getting here weren’t about line speed. They were about technical problems like bufferbloat (routers “buffering” too much data) or router firmware that couldn’t serve the different needs of VoIP and web traffic at the same time. Network engineering is hard and competitive, and most of the advances in this area are about managing traffic.

ISPs are serving consumers better than they ever have before, and forcing utility regulation onto them now is the wrong move at the wrong time.