

**DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Restoring Internet Freedom*, WC Docket No. 17-108.

“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.”¹

– Commissioner Pai, *2014 Open Internet NPRM Dissent*

Last Wednesday, I took part in a public listening session in Skid Row. For those unfamiliar, Skid Row is a Los Angeles community, housing one of the largest homeless populations in the United States. It was there I met a fascinating woman who calls herself “Frenchie.” She would stop me about three times over the course of the evening; first going on about how much I looked just like my picture; next letting me know, how happy she was that someone like me would not only visit, but listen; but the third time turned out to be the most telling.

I was moments away from politely but firmly asking to be excused, when Frenchie said something that made me pause: When she was without a home in the traditional sense, she was able to secure an address, a stable, personal email address, which helped to ground her and enabled her to keep in touch with the world, through the power of the internet. That continuity, that identity, that stable electronic footprint, was at times the only permanent presence she had when much in her physical life was in turmoil. She got through the hardest times, she said, thanks to an open internet because those very same connections, led her to the services that appear to be providing her a more stable life.

I also heard from Marco that night. The former filmmaker lost his family, his livelihood, and for a time, struggled with mental health issues. He lived in Skid Row, but the doctor who made the greatest headway with his recovery was more than 200 miles away in Fresno.

Rather than having to spend hours on public transportation, he was able to Skype with his therapist, and along with a friend in Argentina who spoke his language, and a clinician who was willing to pronounce his name correctly, he has gotten through the hardest of times, thanks to the power of an open internet.

Denise, an artist, writer and mother of six, felt separated from the world because of the challenges of being a stay-at-home mom. She first turned to blogging as an avenue of expression, but that blog eventually became a retail outlet for her artistic work, as well as a source of income, that has enabled her and her husband, to support their family, thanks to the power of an open internet.

These are just three of the millions of examples of those whose lives have been uplifted by one of the most enabling platforms for speech, commerce, and innovation of our time. Like the nearly four million voices who weighed in on the previous proceeding just over two years ago, these three individuals asked that this agency keep the internet open and free.

We can get hung up on semantics, debate classification, or whether the internet is a luxury, but broadband is a necessity in the 21st century and access to it allows the most vulnerable among us to hold on during our darkest moments, and lift ourselves up to a brighter tomorrow.

For those of us who are fortunate enough to have broadband access at home, and do not have to trek to a library and wait for a free terminal or troll for free Wi-Fi on street corners or fast food establishments, not only are you fortunate, but you know that it is among the first utilities you make sure is working, right after your electricity and water. And just what does one expect when you get connected?

¹ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 29 FCC Red 5561, 5657 (2015) (Dissenting Statement of Commissioner Ajit Pai) (*Pai OI NPRM Dissent*).

That you can run your online business, access content over the internet, and exercise free speech, without your service provider or anyone else getting in the way.

Those expectations, it pains me to say, are now, at risk.

Today's Notice of Proposed Rulemaking, more appropriately known as the *Destroying Internet Freedom NPRM*, deeply damages the ability of the FCC to be a champion of consumers and competition in the 21st century. It contains a hollow theory of trickle-down internet economics, suggesting that if we just remove enough regulations from your broadband provider, they will automatically improve your service, pass along discounts from those speculative savings, deploy more infrastructure with haste, and treat edge providers fairly.

It contains ideological interpretive whiplash, boldly proposing to gut the very same consumer and competition protections that have been twice-upheld by the courts. And it contains an approach to broadband that will throw universal service money to broaden its reach, but abandon users, when something goes wrong, particularly if they are faced with anti-competitive or anti-consumer practices. It jeopardizes the ability of the open internet to function tomorrow as it does today. But if you unequivocally trust that your broadband provider will always put the public interest over their self-interest or the interest of their stockholders, then the *Destroying Internet Freedom NPRM* is for you.

I find it ironic, however, that many of the voices who support this item, including the majority at the Commission, said that it should be Congress's place to decide the future of broadband regulation. If that is so, then why are we debating this today? Just why is it that the majority proposes to undo a twice-affirmed classification, and twice-affirmed rules? Is it so Congress can act? A vacuous assertion.

But what I find particularly troubling, is that this proposal has the potential to damage our authority to help provide broadband for the poorest and most remotely-located Americans, unless the underlying goal, is to actually weaken our ability to support broadband through our universal service programs.

The future of the internet is under attack. And so, I must vociferously dissent.

Process

This NPRM has all the indicia of a political rush job. Month after month, I listened to repeated calls from the current leadership, about how economic analyses were missing from the last administration's items, how troubling that was, and because of the absence of this analysis, we were jeopardizing our ability to make sound decisions. But unless I missed it, and I would welcome a correction if I am in error, there was no FCC staff economist or technologist, consulted during the drafting of this item. If they were, and I majored in Banking, Finance and Economics, but admittedly, I am out of practice, I cannot find any evidence of it, given the dearth of economic and technical depth in this NPRM.

For one, there is no cogent economic analysis to be found in this item. There is no discussion of consumer welfare, of two-sided markets, of market power, or any other standard economic concept that an item dealing with the regulatory structure of an entire industry would contain. While there is discussion of doing a cost-benefit analysis in the ultimate order, the NPRM does not seem to grapple with the fact that it is proposing an entirely different regulatory structure for the most vital communications service of the 21st century.

As an example of the lack of depth, the NPRM contains a question that asks whether we have robust "intermodal broadband competition given the 4,559 Internet service providers now in the market?" This factoid fails to consider that most Americans lack options for robust fixed broadband because most of these providers are not competing against each other. By this logic, intermodal residential water

competition must be even more robust than broadband competition, since there are over 156,000 public water systems in the United States.² Yet everyone I know has one water line into their house.

Nor is there any technical depth to the item either. There are passing descriptions and assertions regarding how technology works, but for an item that purports to change direction based on how broadband technologies map onto technology-neutral regulatory definitions, there is precious little work done to show how that is the case.

For example, one paragraph asserts that broadband providers change the “form or content” of information and then cites firewalls and IPv4 and IPv6 address translation as proof of that assertion. Aside from the fact that firewalls generally function by blocking information that is *not* requested by the user, and that such firewalls usually are located at CPE at the demarcation point between the local area network and the wide area network (i.e., not within the broadband provider’s network), the NPRM does not even cite a technical basis for this contrary assertion. And, it similarly proclaims that dual-stack IP addressing somehow transforms the broadband service into an information service. This kind of protocol processing was always treated as a basic service.³

And that is entirely apart from the process associated with this proceeding. The last time we started a proceeding like this, then-Commissioner Pai had some choice words for the Chairman on process. Let’s see whether he takes his own advice this time around:

- “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.”⁴
- “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.”⁵
- “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.”⁶
- “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.”⁷
- “And [decisions made] should avoid embroiling everyone, from the FCC to industry to the average American consumer, in yet another years-long legal waiting game.”⁸

² EPA, Building the Capacity of Drinking Water Systems, <https://www.epa.gov/dwcapacity/learn-about-small-drinking-water-systems> (last visited May 16, 2017).

³ In the past, the Commission identified three categories of protocol processing services that would be treated as basic services. These categories include protocol processing: (1) involving communications between an end user and the network rather than between or among users; (2) in connection with the introduction of a new network technology which requires protocol conversion to maintain backwards compatibility; and (3) involving internetworking (conversions taking place solely within carrier networks to facilitate provision of a basic service that results in no net protocol conversion). *Computer III Phase II Order*, 2 FCC Rcd at 3081-82, paras. 64-71; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106. IPv4/IPv6 conversion neatly falls into one of these categories, depending on how the protocol processing is utilized.

⁴ *Pai OI NPRM Dissent*, 29 FCC Rcd at 5653.

⁵ *Id.* at 5654.

⁶ *Id.* at 5656.

⁷ *Id.*

⁸ *Id.* at 5657.

How did the Chairman fare against the standard he himself set? He fails on all accounts. Deciding to go it alone rather than wait for Congress to act? Check. No evidence of consultation with FCC staff economists or other outside economists? Check. No consultation of FCC staff technologists or other technologists? Check. More litigation on the horizon despite the D.C. Circuit's double-stamp of approval? Check.

Now, let's see whether some of Chairman Pai's predictions when we adopted the *2015 Open Internet Order* came true:

- “The courts will ultimately decide this Order’s fate. And I doubt they will countenance this unlawful power grab.”⁹
- “[T]he FCC will regulate the rates that Internet service providers may charge.”¹⁰
- “[I]t’s actually quite easy to envision this same Commission deciding to discard the predictive judgment that *ex ante* rate regulation is unnecessary.”¹¹

Again, he was wrong on all counts. The courts have upheld the *2015 Open Internet Order*, and the FCC has not regulated rates for broadband any more than they have regulated rates for mobile voice service, which was originally subjected to Title II over two decades ago.

Economics

Despite all of the misleading talk about a lack of economic analysis in the *2015 Open Internet Order*, this NPRM fares much worse. One would think that this would be a prime candidate for waiting until the Chairman's Office of Economics and Data was stood up, but since this is such a political rush job, it is unsurprising that the Chairman declined to wait. Since this item fails to discuss the economics of an open internet, let me be the one to do so.

Today's broadband networks are multi-sided platforms. They create value by bringing together customers, services, and devices and facilitate interactions between all of them to create value for the entire internet ecosystem. When there is no platform competition, consumer and social welfare can suffer.

Most platform economics discussion relates to paid prioritization, which is offered up as a paean to standard economic theory of differential pricing, and of letting a two-sided market work to its fullest. The theory goes that by allowing payment for broadband providers prioritizing traffic, it incentivizes efficient use of the network by the application and services side of the market. But, this argument ignores that it is generally impossible for a customer or edge service to avoid going through the broadband provider, and thus survive a small but significant non-transitory increase in price (SSNIP). This pricing power has significant ramifications for the edge-side of the market, a point over which venture capitalists and edge providers have expressed significant concern.

A broadband provider is a monopoly platform when it comes to connecting edge providers to the broadband providers' end-user customers. Every internet business depends on externalities associated with the broadband provider platform in order to function. If the broadband provider demands payment, the internet service must either pay, or lose a potential portion of its customer base. This is precisely the risk that the *2015 Open Internet Order* sought to address: that a broadband provider as platform will set its overall price level in a way that does not maximize social welfare. And, there is no guarantee that introduction of additional friction into the broadband delivery model, by permitting broadband providers to erect tolls for content, will benefit anyone except the broadband provider and their shareholders.

Take the following example. If Netflix wishes to reach Comcast's broadband customers, it cannot avoid going through Comcast. If Comcast begins imposing a toll for access to its customers, Netflix must

⁹ *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5921 (2015) (Dissenting Statement of Commissioner Ajit Pai) (*Pai 2015 OI Order Dissent*).

¹⁰ *Id.* at 5922.

¹¹ *Id.*

make the decision either to pay the toll or to forego accessing Comcast's millions of broadband customers. The choice is clear, if unsavory: You pay the toll. That is why it is particularly concerning that this item proposes to decline to assert jurisdiction over interconnection. Even if the end-game of this proceeding is to adopt open internet rules—a proposition which I seriously doubt—this gives broadband providers a loophole big enough to drive a truck through. Indeed, we have seen evidence of these actions at the interconnection point in the past.¹² Consider how much more a small content provider would have to worry about tolls or interconnection blockades when it does not even have the clout of a much larger company.

Or, on the other end of the platform, consider a rural consumer with just one option for broadband. In order to save money, the consumer would like to use free or lower cost over-the-top voice services rather than subscribe to the local broadband provider's voice service. But the provider blocks the ports necessary for that competing service to function. That is again leveraging the consumer-facing side of the two-sided market to harm edge competition and reduce consumer welfare. Each member of this Commission—myself included—feels strongly about not supporting multiple broadband providers in a given geographic area with federal universal service money. But it makes no sense to stand up a broadband monopoly in an area and simultaneously be unwilling to provide consumer protections to prevent that broadband provider from leveraging its market position to reduce consumer welfare.

More broadly, permission-less innovation has been the bedrock of American internet policy for decades. The principle is simple: those at either end of the network should not have to worry about actions of those in the middle to negatively impact their business. The construct the majority would stand up here would ensure that, on the content and device side, the little guys on the edge of the network will have to worry about negotiating with thousands of broadband providers to ensure their services reach their customers. And, on the consumer side, customers with little to no choice of broadband providers will have to live with whatever their broadband provider decides to enable them to access. That is entirely inconsistent with consumer and business expectations about the open and free nature of the internet.

Debunked Predictions about Title II

There have been so many false claims about what reclassification would do to the internet, the economy, and the consumer. None has come to pass.

For example, leading up to the adoption of the *2015 Open Internet Order*, detractors of Title II predicted that consumer broadband would become significantly more expensive. The Progressive Policy Institute claimed that \$15 billion in new state and federal taxes would be imposed as a result of the decision to adopt strong, Title II open internet rules.¹³ One company's CEO claimed that average household broadband bill would increase by \$19 a month as a result of these new taxes and fees.¹⁴ Those predictions did not come to pass. Not surprising, they do not merit a mention in this NPRM.

Then-Commissioner Pai devoted his entire dissent to *2015 Open Internet Order* on legal disagreements with the majority.¹⁵ Twice, the D.C. Circuit upheld the Order. Yet, we move forward into the breach with more uncertainty and legal risk.

¹² See, e.g., Zachary M. Seward, *The Inside Story of How Netflix Came to Pay Comcast for Internet Traffic*, Quartz (Aug. 27, 2014), <https://qz.com/256586/the-inside-story-of-how-netflix-came-to-pay-comcast-for-internet-traffic/>.

¹³ Hal Singer & Robert Litan, *Outdated Regulations Will Make Consumers Pay More for Broadband*, Progressive Policy Institute (Dec. 1, 2014), <http://www.progressivepolicy.org/slider/outdated-regulations-will-make-consumers-pay-broadband/>.

¹⁴ Randall Stephenson, CEO, AT&T, Interview on MSNBC News (Dec. 3, 2014), <http://www.nbcnews.com/video/cnbc/56544551/#56544551> (at 1:05).

¹⁵ See *Pai 2015 OI Order Dissent passim*.

Another amorphous allegation is that the *2015 Open Internet Order* puts the brakes on numerous new features and services that people are now afraid to roll out. Yet, I have not heard a single concrete example a service or feature that was not offered because of the open internet rules.

The only factual question about the effects of the *2015 Open Internet Order* that the majority keeps trying to drive home is their assertion that it has harmed investment. But the NPRM presents at most one third of the economic picture of the market. From reading the item, it would be reasonable to assume that the key open internet policy question is whether a policy increases or decreases broadband provider capital expenditures. It is *a* relevant question, but the only econometric analysis that the majority cites for support clearly states that it is “inappropriate [to] use . . . investment as a policy objective.”¹⁶

The NPRM trots out numerous anecdotes of harmed investment, but even these are of questionable value. For example, Wisper is a wireless ISP that filed for stay of the *2015 Open Internet Order*, stating it that planned to expand its network but the Commission’s reclassification decision had forced Wisper to put those plans on hold.¹⁷ But just one month later, Wisper decided to purchase another broadband provider. “We look forward to upgrading the network, expanding coverage and providing super-fast speeds in the Lincoln County areas,” their CEO said in a statement.¹⁸ Then, a year ago, they bought another provider. “Wisper plans to upgrade the current Stouffer network to Wisper standards and hopes to offer faster speeds in the future,” their CEO said again.¹⁹ As with Wisper, I wonder how many ISPs simply made the minor adjustments necessary to adapt to the new regulatory reality and moved on with their business. I suspect that many signatories of the letters that the Chairman cites as concrete evidence that Title II has hurt investment will do the same.

Even if I accepted the majority’s premise that the key question is investment, the NPRM’s analysis fails to take into account what entrepreneurs invest in their internet business, what risk venture capitalists plow into the internet and telecom market, and what consumers pay for and how they use all these services to create economic value. It even fails to account for broadband investments made beyond narrow capital expenditures, including spectrum purchases and M&A, both of which are indicia of a robust and profitable market for broadband services. The majority seems willfully blind to these aspects of broadband investment.

Even if we were to ignore all those points and narrowly focus on the affirmative case that the majority puts forth, it is lackluster at best. As I have mentioned previously, I have yet to see a credible analysis that suggests that broadband provider capital expenditures have declined as a result of our *2015 Open Internet Order*. But of course, that does not keep those dead set on dismantling the open internet protections as we know them from repeating the same tired and unproven talking points.

For example, Chairman Pai told the Mobile World Congress in Barcelona this year that investment in broadband was down. The source of his statistic? USTelecom, a group that lobbied against net neutrality at the FCC and Congress, and sued the Commission over its imposition of strong net

¹⁶ See George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2 (April 25, 2017), <http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf>.

¹⁷ See, e.g., Joint Petition For Stay of United States Telecom Association, CTIA, AT&T Inc., Wireless Internet Service Providers Association, and CenturyLink, GNWC Docket No. 14-28, Exh. 1, at 5–6 (Declaration of Nathan Stooke, Founder and CEO of Wisper ISP, Inc.) (filed May 1, 2015).

¹⁸ Press Release, Wisper ISP, Inc. Acquires Troy, MO Internet Provider, Thunderbolt Broadband (June 1, 2015), <http://www.wisperisp.com/wp-content/uploads/2014/10/Thunderbolt-Broadband-Press-Release.pdf>.

¹⁹ Todd Nighswonger, *Wisper ISP acquires Stouffer Communications*, Neosho Daily News (Mar. 19, 2016), available at <http://www.neoshodailynews.com/article/20160319/NEWS/160318919>

neutrality protections.²⁰ So, in this NPRM, the Commission adds a new source—the author of the study that made the now-debunked “\$15 billion in new taxes” prediction.²¹ While alternative analyses have suggested investment increases,²² underlying that approach is a methodology that ignores the need for advance capex planning and other forms of capital expenditures that are not neatly captured on the single line of a provider’s 10-K statement. Even if this analysis was correct that broadband investment has decreased, it is still deeply flawed because it assumes correlation is causation. Using the same logic that the NPRM uses, one could suggest that the FCC’s classification of cable modem service as an information service in 2002 resulted in an even more precipitous drop in broadband provider investment.²³ *Indeed, the highest levels of broadband investment in the past two decades were under the Title II line sharing and network unbundling regime in the late 1990s and early 2000s.*²⁴ The NPRM cites only *one* econometric study that purports to use a causative approach to investment, and even it uses too broad a time period for Title II treatment and does not use telecommunications data for the counterfactual to analyze the impact of Title II, subjecting the regressions to all sorts of errors.

The most recent analysis on the market suggests that total capital investment by publicly-traded ISPs was up five percent since the *2015 Open Internet Order* was adopted. Edge investments are up. Broadband revenues are up. This makes sense, since *no broadband provider has ever told Wall Street or the Securities and Exchange Commission that the 2015 Open Internet Order was responsible for decreases in capital expenditures.*

So why is it literally a he-said she-said exchange on this issue? One analyst articulates that “it’s impossible to tell whether the open internet rules have affected investment. There’s no way to provide a serious answer that rises above simply trying to reverse engineer the answer you want to find.”²⁵ There simply has not been enough market experience with this framework in order to tell what caused what.

So what then should we look to for answers on this question?

With all of the assertions about how burdensome and draconian the current framework is, what should be instructive is that the Title II framework the FCC adopted for broadband in 2015 was actually less intrusive than the one that was applied to mobile voice in the early 1990s. Now we all know how much of a bust that wireless industry has been, right? Between 1993 and 2009, the mobile industry invested more than \$271 billion, in building out networks. During the same time period, industry revenues increased by 1300 percent, and subscribership grew over 1600 percent. So answer this: why is it that the leadership is now proposing to get rid of what is essentially the same legal framework that we know was a highly successful driver in the mobile industry context?

²⁰ Chris Moran, *FCC Chair Claims Broadband Investment at Historic Low Level Because of Net Neutrality; That’s Not What the Numbers say*, Consumerist (Feb. 28, 2017), <https://consumerist.com/2017/02/28/fcc-chair-claims-broadband-investment-at-historic-low-level-because-of-net-neutrality-thats-not-what-the-numbers-say/>

²¹ *NPRM* at para. 45.

²² S. Derek Turner, *It’s Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, Free Press (May 2017), <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf>.

²³ USTelecom, *Historical Broadband Provider Capex* (last visited May 20, 2017), <https://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex> (comparing \$72 billion of broadband investment in 2002 to \$57 billion in 2003). One could argue that the information service classification spree in 2002-2008 resulted in essentially flat investment ever since.

²⁴ *Id.*

²⁵ David Kaut, *Broadband Investment Seen Key to Pai FCC Plan on Title II Net Neutrality*, Comm. Daily (May 10, 2017) (quoting Craig Moffett).

Whither Telecommunications Services?

On to the legal analysis.

It is clear that this majority is willing to read the definition of telecommunications service out of the Communications Act altogether—not only for broadband, but for all consumer telecommunications services. *Show me one modern consumer service that the majority will unequivocally say is a telecommunications service and its provider should be regulated as a common carrier.* Broadband, VoIP, VoLTE messaging—all of these I suspect the majority would say are either unequivocally or most likely information services. There is much sound and fury about applying a Depression-Era Communications Act to modern communications services, but none about applying the Revolutionary-Era First Amendment to speech on the Internet. The point is this: technology-neutral definitions do not become obsolete by advances in technology.

How can we give meaning to all statutory language if we decide to read, not only a word or phrase, but an entire Title out of the Communications Act? Rather than recognizing this and having an honest conversation about the underlying technology and consumer broadband market, statutory definitions are twisted to fit a deregulatory bent. But, by declining to classify VoIP, messaging, VoLTE and other services, the majority chips away at Congressionally-delegated authority service-by-service. The end-game is this: get the FCC out of the business of regulating in the public interest. This reclassification is but a step towards that goal.

But, let us turn to broadband specifically. Those in lock-step with the majority seem to be on board—at least so far—with a whiplash about-face on Title II and net neutrality under this Administration. But many are forgetful that their lodestar for Constitutional and statutory interpretation would conclude they are engaging in “interpretive jiggery-pokery”.

The Heritage Foundation called the late Supreme Court Justice Antonin Scalia “a standard-bearer” for conservative legal theory, and a “champion[] of originalism and textualism.”²⁶ FreedomWorks heralded his “enormous intellect and untiring devotion to objective, text-based interpretation.”²⁷ His guiding framework for legal interpretation was that “laws should be interpreted based on their actual text and original public meaning.”²⁸ But how quickly people forget when it comes to an issue where they have a preferred policy outcome that diverges from rigorous textualism.

Remember, we have been here before. The FCC went before the Supreme Court in 2005 when it attempted to classify cable broadband as an information service. The majority of the court felt that such an interpretation was within the interpretive discretion of the FCC. But not Justice Scalia. In his withering dissent in *NCTA v. Brand X*, he accused the Commission of attempting to “concoct a whole new regime of regulation . . . under the guise of statutory construction.”²⁹ And its attempt to achieve this scheme of non-regulation? Done so “through an implausible reading of the statute.”³⁰ It is unsurprising that his opinion is not mentioned once in the NPRM.

²⁶ Elizabeth Slattery et. al., *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law*, Heritage Foundation (Aug. 30, 2016) <http://www.heritage.org/courts/report/the-legacy-justice-antonin-scalia-remembering-conservative-legal-titans-impact-the>.

²⁷ Jason Pye, *FreedomWorks Foundation Mourns Loss of Justice Antonin Scalia*, FreedomWorks (Feb. 13, 2016), <http://www.freedomworks.org/content/freedomworks-foundation-mourns-loss-justice-antonin-scalia>.

²⁸ Elizabeth Slattery et. al., *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law*, Heritage Foundation (Aug. 30, 2016) <http://www.heritage.org/courts/report/the-legacy-justice-antonin-scalia-remembering-conservative-legal-titans-impact-the>.

²⁹ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Scalia, J., dissenting).

³⁰ *Id.*

Congress in its wisdom tied many of our competition and consumer protection functions to the nature of the service being offered. And indeed those services are changing, but the underlying transmission remains largely the same. Innovation, has, and will continue in the network. We have moved from copper to glass, and from circuit-switching to packet-switching. But using interpretive gymnastics to shirk those responsibilities is the antithesis of putting #ConsumersFirst. We cannot let broadband providers define the rules of engagement when Congress has clearly entrusted the Commission with that responsibility.

The arc of technology continues to bend away from legacy protocols like TDM and SS7 and towards modern ones like IPv6 and MPLS. Indeed, the majority believes that those trends should be supported and encouraged. Just last month we voted to explore ways to accelerate those transitions. But the majority forgets a simple fact: A shift in technology that powers the transmission of information via telecommunications does not alter the fact that telecommunications is occurring. We saw this in the shift from semaphore to telegraph, telegraph to telephone, and telephone to broadband.

But, the Commission here looks to skip down the same mistaken path of statutory interpretation that Justice Scalia complained of in 2005. Then, it was the word “offer.” Now, it is the words “capability” and “points.” If you were to believe the majority, broadband providers only offer you the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” There are two major problems with these readings: one legal, one practical.

First, the legal. Interpreting “capability” this broadly reads “via telecommunications” out of the definition of information service all together. It is a basic canon of construction that we must read meaning into all parts of the statute. Putting aside that the majority would read the entirety of Title II out of the Act for all modern consumer services, under the majority’s proposed reading of the definition of information service, there is no provider of telecommunications whatsoever. And it would read into the term “capability” all of the functionality at the endpoint of the telecommunications.

And, interpreting the definition of “telecommunications” so narrowly as to require consumers to specify the points along which they would like their communications routed would effectively read the definition out of the statute for any telecommunications service except for the most basic. No, users *almost never specify the physical points to and by which their communications should be routed*. Nor should they. It would be like ordering a package from Amazon and telling the USPS what warehouse you would like your package to originate from and what intermediate depots along the way you would like your package to terminate. The genius of the Telecommunications Act of 1996 is that definitions permit abstraction.

Second, the practical. No one seriously suggests, that by signing up for AT&T’s mobile broadband product that you will automatically be able to watch the latest episode of “Orange is the New Black”. Nor does anybody seriously suggest that by hopping in your car and driving to McDonalds that you automatically get a Big Mac. We do not conflate the origination of a separate service that utilizes the telecommunications network with the ability of a network to get you to that point in the first place.

For example, telegraph service was always considered a Title II service. No one seriously argued that, for example, because wireless telegraph service was a broadcast service and the user did not know who would receive the telegraph signal, that it was any less a Title II service. Indeed one of the most famous uses of the telegraph was from the Titanic, a broadcast S.O.S. and several follow-up conversations with individual ships.³¹ Nor did the advent of the Telecommunications Act of 1996 bring the underlying nature of the service into question.

³¹ Megan Garber, *The Technology that Allowed the Titanic Survivors to Survive*, The Atlantic (Apr. 13, 2012), <https://www.theatlantic.com/technology/archive/2012/04/the-technology-that-allowed-the-titanic-survivors-to-survive/255848/>.

Similarly, telephone service was always considered a Title II service. A telephone subscriber never knew exactly where geographically she was dialing when she dialed an 800 number, but that did not change the fact that she was using a telecommunications service. A telephone subscriber never knew exactly where geographically a voice commercial mobile radio service (CMRS) customer was located, but that did not change the fact that she was using a telecommunications service. Nor did a telephone subscriber know what “points” along the network she was using when she used her telephone service as a dial-up internet service, but that did not change her telephone service into an information service. All this suggests that “points” should be interpreted much more abstractly than the actual physical location of a server, switch, or end-user. This is entirely consistent with viewing a service from the perspective of a consumer: they always know what they want to do, but they need the telecommunications service to make that happen.

But, if we take the NPRM’s logic at face value, legacy voice providers would have always been information services providers, because a voice subscriber could acquire information from another person on the other end of the phone line. As the logic goes, dialing a random phone number and asking someone a question is just like typing in a random website and seeing what pops up on your screen. News flash: the advent of the internet and the ability to utilize the same sort of telecommunications service used for making voice calls for broadband access did not somehow transform the underlying network itself. This was the genius of the basic and enhanced distinction, transmuted into the telecommunications and information service distinction (courtesy of Congress).

The NPRM purports to use other contortions to find that broadband is not a telecommunications service. This includes relying on a facially unconstitutional statute,³² an unenforceable policy statement,³³ and lawfully delegated and exercised Congressional authority,³⁴ as support for the “fact” that broadband is an information service.

Just what are we doing here?

Would the same logic hold for mobile services? Do we seriously believe that mass-market mobile broadband, the broadband service that is most highly-adopted by Americans, is a “private carrier”-like service? The *2015 Open Internet Order* offered independent justifications as to why this service is a CMRS.³⁵ The D.C. Circuit upheld these findings. We will certainly see logical contortions to find that a broadband service that runs over the exact same infrastructure as a voice CMRS service, and uses NANP numbers or IP addresses, is not interconnected with the public switched network. We will also see arguments that it is not even a functional equivalent of a CMRS service. Finally, we will even see efforts to write “telephone” into “public switched network” when Congress did no such thing and was more than capable of doing it themselves. They certainly knew how to do so with the multiple provisions in the Communications Act.³⁶

And, just to make it absolutely clear that this is an ends-justified than a legally-justified proceeding, one need only look to the toll-free numbering database for answers. That *database* is a tariffed common carrier service.³⁷ If mass-market broadband, which transmits data across the globe in the blink of an eye, is *not* a common carrier service and numbering database access *is*, this classification exercise is just an expedition into whimsical absurdity.

³² *NPRM* at para. 32.

³³ *Id.* at para. 31.

³⁴ *Id.* at para. 33.

³⁵ *2015 Open Internet Order*, 30 FCC Rcd at 5778-90, paras. 388-408.

³⁶ *See, e.g.*, 47 U.S.C. §§ 221, 226, 227.

³⁷ *Toll Free Service Access Codes et al.*, CC Docket No. 95-155, 15 FCC Rcd 11939, 11940, para. 1 (2000).

In sum, it simply makes no sense in the era of 21st century connectivity to say that there is no such thing as a telecommunications service. What are consumers purchasing, when they sign-up for broadband, if not the ability to transmit and receive?

The majority claims it has an eye towards the future, but both feet are firmly stuck in the past, hearkening back to dial-up days where a subscriber purchased both a basic TDM telephony service, and a separate dial-up service in order to access the internet. No matter that most of us no longer dial-up to the internet, no matter that consumers buy broadband because all the information services they want to access and use, require the broadband subscription as a necessary prerequisite. But I should not be surprised that the majority is peering through the lens of yesteryear, for we just revived a 1985 technologically-obsolete UHF discount, so why not continue to wind back the clock and base our regulatory structure on a 1990's version of the internet?

Rules, or No Rules?

As far as the open internet rules go, this is Schrödinger's NPRM: the text devoted to the open internet rules is so open-ended that the rules are both alive and dead until the Commission adopts an Order in this proceeding.

Will any of the open internet rules survive this rulemaking? I am doubtful given both the tenor of the questioning, and the fact that the rulemaking is proposing to get rid of the only authority that would underpin strong open internet rules. Tellingly, the majority does not propose any provision of law to underpin any of the open internet rules on which it seeks comment.

The need for, and value of the open internet rules was lucidly articulated in both the *2010 Open Internet Order* and *2015 Open Internet Order*, so I will not repeat those here.

However, this proposal is frightening in its disregard for the actual experiences of consumers. How else could the majority suggest that basic transparency to consumers be more burdensome than it is worth? Rather than having to advertise and disclose in concrete detail what service is actually sold, we will see even more important consumer information buried in monolithic terms of service, enforceable via mandatory arbitration. That is, if such information is even disclosed at all.

The proposal to eliminate the general conduct rule is precisely in line with an end-game of ensuring there is no referee on the field for broadband. Many of the complaints regarding the rule, which simply states that a broadband provider may not unreasonably interfere or disadvantage the ability of consumers and edge providers to reach one another, could just as easily be levied at the statutory language that the Commission has interpreted and applied for decades—sections 201 and 202 of the Act. Using adjudication to define the contours of permissible conduct is a textbook example of well-functioning administrative law.

As far as the bright line rules go, even the most vocal advocates for rolling back Title II are generally in favor of those rules. Why are we seeking comment on getting rid of them? In part, because we are getting rid of the authority for strong bright line rules, and even proposing to get rid of the authority that would have underpinned the weaker rules that were proposed in the *2014 Open Internet NPRM*.

Of course, I am talking about section 706 of the Telecommunications Act of 1996. While paying lip service to the idea that we could ground open internet rules in other forms of statutory authority, like section 230(b)—which the *Comcast* court rejected—I am also concerned at the proposal to reinterpret section 706 as merely hortatory. We have litigated the statutory history, and courts have upheld our use of section 706 as a substantive grant of authority. Walking that interpretation back—particularly in a world where we do not have Title II—is a sure death sentence for any open internet rules.

Undermining Universal Service

Like many of the Chairman's other actions regarding Lifeline, I am concerned that the proposal to support broadband in the Lifeline program without Title II is a proposal to gut the program couched in

language that is masked as a desire to keep the program. The Chairman has said that “It’s vital that low-income Americans have access to . . . broadband Internet, which Lifeline helps to achieve.” But, he kicked providers out of the program, shut the door on others trying to get in, and made clear he wants to revisit the mechanism for allowing broadband providers into the Lifeline program.

Section 254 requires support to go to telecommunications services and facilities supporting those services. It is clear that if broadband is a telecommunications service, it can be a Lifeline-supported service. But if broadband is not a telecommunications service, I ask: how will we bridge the affordability gap for those who cannot afford advanced telecommunications services?

We have confronted this problem before in the high-cost context in 2011. Then, it was logical and upheld by the courts that we could support a telecommunications service, but condition that support on the provision on funding broadband-capable networks and offering broadband service. But as networks continue to evolve, legacy voice popularity continues to decline, and VoIP and broadband become the communications services of the day, I again ask: what services can we legally support? In addition, many states have prohibited their public utility commissions from giving VoIP or broadband ETC designations. How will a broadband provider become certified to provide Lifeline broadband if there is no state authority to designate it as an ETC?

The proposal in the NPRM also seems to unduly limit the ability to participate in Lifeline to only facilities-based providers. This appears to be yet another way to undermine the program. It seems unthinkable to limit participation in the program in this way, particularly when some facilities-based providers are actively seeking to relinquish their Lifeline ETC designations.

This reclassification also goes to the core of our universal service programs more generally. At a time when Members of Congress on a bicameral, bipartisan basis are en-masse suggesting that the FCC address the rural broadband issue, it seems odd that the Commission would propose moving forward on an item that would undermine our legal authority to support broadband in rural areas. As telephone service (i.e., the supported telecommunications service) continues to go the way of the dodo, can we support broadband-capable networks (i.e., the supported facilities) when there is no lawfully supported telecommunications service to which universal service funding will attach? Given that no modern communications service is a telecommunications service in the eyes of this Commission majority, how do we continue to base our universal service policies on the *2011 USF/ICC Transformation Order’s* support of broadband networks and voice services?³⁸ Again, what is the supported telecommunications service?

No More Privacy?

The item proposes to quietly ensure that broadband customers have no privacy protections whatsoever, shirking our privacy responsibilities under the Communications Act. The majority knows that we cannot simply let the Federal Trade Commission (FTC) take the helm on broadband provider privacy practices while there is still a chance that if a provider offers legacy voice their broadband service—irrespective of classification—is likely out of bounds for the FTC. While it is heartening for consumers that the case that limits the FTC’s authority is slated for rehearing, it is still unclear whether the FTC can enforce broadband privacy until the full 9th Circuit opines.³⁹

Cost-Benefit Analysis

I am supportive of properly evaluating the costs and benefits of proposed regulations. However, in the case of this proceeding, calls for a cost benefit analysis appear to be no more than a charade to suggest that open internet regulation has onerous effects.

First, the Chairman has not sought any credible economic input on the NPRM we are adopting today. Again, my understanding is that no staff economist or technologist at the FCC was consulted on

³⁸ *Connect America Fund et. al*, 26 FCC Rcd 17663, 17685, para. 64 (2011).

³⁹ *FTC v. AT&T Mobility*, No. 15-16585, 2017 WL 1856836 (9th Cir. May 9, 2017).

the details of this item. This is contrary to his dissent of the *2014 Open Internet NPRM* where he suggested we needed ten independent economic studies before moving forward on an item. Might makes right, apparently, since we are willing to dispense with what he previously suggested we should do simply because he believes the FCC did the wrong thing and he is now in charge.

Second, the NPRM waxes eloquent about needing to select the correct baseline, but then proposes to select the wrong baseline. As OMB Circular A-4 explains, “[t]his baseline should be the best assessment of the way the world would look absent the proposed action.”⁴⁰ The proposed action here is reversing the telecommunications service classification for broadband, and eliminating all open internet rules. Yet the item says it proposes to select the regulatory state of affairs at the end point of this proceeding (i.e., a world without open internet rules) as the baseline for judging the action taking during this proceeding.

Conclusion

While the majority engages in flowery rhetoric about light-touch regulation, and so on, the endgame appears to be no-touch regulation and a wholesale destruction of the FCC’s public interest authority in the 21st century: Undermining the ability of poor people to get broadband, knee-capping funding for rural telecommunications, declining to review an \$85 billion transaction with massive public interest implications, encouraging consolidation and higher prices in business broadband, enabling massive broadcasting conglomerates to gobble up more local voices. Each action is a cut against the public interest, and the majority will keep it coming, unless Americans stand up, make their voices heard and challenge the FCC in court, because it is glaringly obvious, with each open meeting, that the willingness and the ability of the majority to protect consumers and competition in a broadband era, has come to a screeching halt.

Nonetheless, I thank the staff of the Wireline Bureau and Office of General Counsel for their work on this item. I may think this rulemaking takes us down a horrible path, but your hard work should be recognized, regardless.

⁴⁰ OMB, Circular A-4 (Sept. 17, 2003), available at https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.