



MEMORANDUM

February 4, 2019

To: Subcommittee on Communications and Technology Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on “Preserving an Open Internet for Consumers, Small Businesses, and Free Speech”

On **Thursday, February 7, 2019, at 11 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Communications and Technology will hold a hearing entitled “Preserving an Open Internet for Consumers, Small Businesses, and Free Speech.”

I. BACKGROUND

A. Before the Open Internet Order

The ability for network operators to disallow or discriminate against computing services that require transmission over the network to function, such as electronic mail and the World Wide Web, was first recognized by the Federal Communications Commission (FCC or Commission) in its *Computer Inquiries* proceedings.¹ Under its *Computer II* proceeding, the FCC clarified that “basic” network transmission services remained a common carrier service under the Communications Act of 1934, as amended (Communications Act), subject to anti-discrimination provisions, whereas “enhanced” services would not be so subjected.² Consequently, the FCC concluded that it could enforce common carrier prohibitions disallowing network operators from favoring their offerings or the offerings of affiliated entities. Congress generally carried these distinctions into law when it passed the 1996 Telecommunications Act

¹ See Federal Communications Commission, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Final Decision and Order, Docket No. 16979, 28 FCC 2d 267 (1971) (Computer I); Federal Communications Commission, *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Final Decision, Docket No. 20828, FCC 80-189 (rel. May 2, 1980) (Computer II); and Federal Communications Commission, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986) (Computer III).

² Computer II at ¶ 96-97.

(1996 Act), creating a regulatory regime that classifies such services as either a “telecommunications service” or an “information service.”³

In 2002, the FCC concluded that cable modem service providing “high-speed access to the Internet, as well as many applications or functions that can be used with that access,” is an “information service,” without a separate telecommunications service.⁴ The Commission’s decision enabled some broadband service providers to offer internet access service without the application of common carriage and non-discrimination requirements. The Supreme Court upheld the FCC’s decision in 2005, as one reasonable reading of the statute.⁵

As the use of computers and internet service grew, reports of Internet service providers (ISPs) blocking over-the-top (delivery of content via the Internet) services, including those that competed with their own offerings, began surfacing.⁶ The FCC adopted a policy statement in 2005 setting forth principles “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.”⁷ These principles were incorporated into conditions placed on major mergers approved by the Commission and certain wireless license and enforcement proceedings.⁸ However, when the FCC brought an action to enforce the principles, the U.S. Court of Appeals for the D.C. Circuit held that the Commission’s enforcement of the Policy Statement exceeded the agency’s authority under the Communications Act.⁹

B. The 2010 Open Internet Order

In response, the FCC adopted the 2010 Open Internet Order, which consisted primarily of three rules: (1) public disclosure of network management practices, (2) no blocking, and (3) for wireline broadband providers, no discrimination.¹⁰ These rules were challenged and vacated in

³ See Telecommunications Act of 1996, Pub. L. 104-104 (1996).

⁴ Federal Communications Commission, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185 (Mar. 15, 2002).

⁵ *National Cable & Telecommunications v. Brand X*, 545 U.S. 967 (2005).

⁶ See, e.g., *Voice-Over-IP’s Unlikely Hero*, Wired (May 1, 2005); *Comcast Really Does Block BitTorrent Traffic After All*, CNET (Oct. 19, 2007); *Group Asks FCC to Probe iPhone Skype Restrictions*, Fortune (Apr. 3, 2009).

⁷ Federal Communications Commission, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, CC Docket No. 02-33, FCC 05-151 (rel. Sept. 23, 2005).

⁸ 2015 Order. See also *infra* note 12 at ¶ 65.

⁹ *Comcast Corp. v. FCC*, 600 F3d 642, DC Cir. Ct. of Appeals (2010).

¹⁰ Federal Communications Commission, *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191 and WC Docket No. 07-52, *Report and Order* (Dec. 2010).

Verizon v. FCC, although the transparency rule survived.¹¹ During the same time period, the FCC settled an enforcement action against a major ISP accused of blocking consumers' access to free tethering applications that could circumvent a monthly fee it charged for the same service.¹² It also took several enforcement actions against ISPs for failure to adequately disclose network practices like usage-based throttling and web tracking, in violation of the transparency rule.¹³ Allegations of ISPs blocking new, innovative over-the-top services that competed with the companies' own services continued to emerge.¹⁴

C. The 2015 Open Internet Order

After the *Verizon v. FCC* court decision, the FCC adopted a similar set of protections to ensure consumers' access to lawful content, applications, and use of non-harmful devices, this time grounded in common carriage law set out in the Communications Act.¹⁵ The 2015 Order included three bright-line rules, applicable to wireline and wireless broadband internet access: (1) no blocking of lawful content, applications, services, and non-harmful devices; (2) no throttling of lawful content, applications, services, and non-harmful devices; and (3) no paid prioritization—using network management techniques to directly or indirectly favor some traffic over others, in exchange for consideration. In addition, the 2015 Order adopted protections preventing broadband service providers from unreasonably interfering with, or unreasonably disadvantaging consumers' access to the content of their choice (*i.e.* the “general conduct rule”) and enhancing the network practice disclosure requirements that survived from the 2010 rules. The 2015 Order also included a complaint process for resolving interconnection disputes violating the Communications Act.

Although the FCC applied common carriage requirements to ISPs, it opted for a light-touch regulatory regime by forbearing from applying over 700 applicable common carrier

¹¹ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

¹² Federal Communications Commission, *In the Matter of Cellco Partnership d/b/a Verizon Wireless*, Order and Consent Decree, File No. EB-11-Ih-1351, DA 12-1228 (rel. July 31, 2012).

¹³ See Federal Communications Commission, *In the Matter of AT&T Mobility*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-IHD-14-00017504, FCC 15-63 (rel. June 17, 2015); Federal Communications Commission, *In the Matter of T-Mobile USA, Inc.*, Order and Consent Decree, File No. EB-IHD-15-00018093, DA 16-1125 (rel. Oct. 19, 2016); Federal Communications Commission, *In the Matter of Cellco Partnership, d/b/a Verizon Wireless*, Order and Consent Decree, File No. EB-TCD-14-00017601, DA 16-242 (rel. March 7, 2016).

¹⁴ See *Google Wallet Rolls Out To More Devices – Nope, Still No Love for Verizon, AT&T, Or T-Mobile Owners*, TechCrunch (May 16, 2013) (available at <https://techcrunch.com/2013/05/16/google-wallet-rolls-out-to-more-devices-nope-still-no-love-for-verizon-att-or-t-mobile-owners/>).

¹⁵ Federal Communications Commission, *Protecting and Promoting the Open Internet*, Report and Order, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015); *AT&T Lifts FaceTime Restrictions on Apple Phones*, Washington Post (Nov. 8, 2012).

regulations to broadband providers, including rate setting and last-mile unbundling. The FCC continued to apply Sections 201 and 202 of the Communications Act to broadband internet access service, giving the FCC authority to prevent future unjust, unreasonable and discriminatory practices. The FCC also maintained several key common carrier provisions for broadband, including those that support access for people with disabilities and universal service. Though the FCC also maintained some provisions related to privacy, and later adopted new internet privacy rules in 2016, those rules were overturned by Congress under a Congressional Review Act resolution of disapproval in 2017.¹⁶

Opponents of the network neutrality protections challenged the 2015 Order in court. In June 2016, the U.S. Court of Appeals for the D.C. Circuit upheld the 2015 Order in its entirety, holding that the FCC appropriately exercised its authority in classifying broadband Internet access service as a common carrier telecommunications service.¹⁷ Last November, the Supreme Court declined a petition to review the case, which effectively validated the Circuit Court's opinion.¹⁸

D. The Repeal of the 2015 Open Internet Order

With new leadership in place, the FCC in May 2017 proposed to roll back the 2015 Order's protections, including the classification of broadband internet as a telecommunications service.¹⁹ The Commission received nearly 24 million comments from members of the public on the proposed repeal and reclassification, including members of Congress.²⁰ The FCC finalized the Order in December 2017, and it took effect in May 2018 (RIF Order).²¹

In the RIF Order, the FCC reclassified broadband internet service as an information service and disclaimed any common carriage authority over broadband internet service providers or any authority under section 706 of the Communications Act.²² As a result, the FCC stated that it lacked statutory authority to maintain the 2015 rules, and repealed the 2015 protections in

¹⁶ Pub. L. No 115-22 (2017).

¹⁷ *U.S. Appeals Court Upholds Net Neutrality Rules in Full*, NPR (June 14, 2016).

¹⁸ *Supreme Court Won't Hear Net Neutrality Challenges*, New York Times (Nov. 5, 2018).

¹⁹ Federal Communications Commission, *Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (rel. May 23, 2017).

²⁰ See Federal Communications Commission, *Restoring Internet Freedom*, Total Filings, Electronic Comment Filing System, WC Docket No. 17-108 (available at https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&sort=date_disseminated,DESC) (accessed Feb. 4, 2019).

²¹ Federal Communications Commission, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166 (rel. Jan. 4, 2018); Federal Communications Commission, *Chairman Pai Statement on Restoring Internet Freedom Order Taking Effect*, Press Release (May 10, 2018).

²² RIF Order at ¶ 20.

their entirety, including the transparency enhancements. The FCC reverted back to the 2010 transparency disclosure requirements with minor adjustments.

The Commission noted that the Federal Trade Commission (FTC) is able to take action against ISPs that engage in unfair or deceptive practices.²³ Importantly, however, the FTC lacks general Administrative Procedure Act rule making authority, including for broadband internet access services, lacks civil penalty authority for first offenses, and lacks specialized subject-matter expertise in telecommunications and data network management practices. At oral arguments in the legal challenge to the RIF Order, the FCC acknowledged that its current rule does not prohibit blocking and throttling practices that are disclosed under its transparency rule, and such practices would not be deceptive and may not be unfair under the FTC Act.²⁴

II. WITNESSES

The following witnesses have been invited to testify:

Mr. Tom Wheeler
Fellow
Brookings Institution

Ms. Jessica J. González
Vice President of Strategy and Senior Counsel
Free Press and Free Press Action Fund

Ms. Denelle Dixon
Chief Operating Officer
Mozilla

Miss Ruth Livier
Actress, Writer, and UCLA Doctoral Student

Mr. Michael Powell
President and CEO
NCTA – The Internet & Television Association

Mr. Joseph Franell
General Manager and CEO
Eastern Oregon Telecom

²³ Brief for Respondents at 37, *Mozilla Corp., et al. v. FCC*, D.C. Cir (No. 18-1051) (Oct. 11, 2018).

²⁴ Oral Arguments of Respondent Federal Communications Commission, *Mozilla Corp., et al. v. FCC*, D.C. Cir (No. 18-1051) (Feb. 1, 2019).