



MEMORANDUM

March 8, 2019

To: Subcommittee on Communications and Technology Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Legislative Hearing on “Legislating to Safeguard the Free and Open Internet”

On **Tuesday, March 12, 2019, at 10 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Communications and Technology will hold a legislative hearing entitled “Legislating to Safeguard the Free and Open Internet.”

I. BACKGROUND

A. The 2015 Open Internet Order

In 2015, the Federal Communications Commission (FCC) adopted protections to ensure consumers’ access to lawful internet content, applications, and use of non-harmful devices, clarify its consumer protection authority over broadband services, and buttress support for rural broadband deployment and the Lifeline program.¹ 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. In addition, the 2015 Order adopted protections preventing internet service providers (ISPs) from unreasonably interfering with, or unreasonably disadvantaging consumers’ access to the content of their choice (*i.e.* the “general conduct rule”). The FCC also enhanced network practice disclosure requirements. The 2015 Order also included a complaint process for resolving interconnection disputes implicating protections in the Communications Act.

The FCC also applied certain longstanding Commission authority to broadband, including Sections 201 and 202 of the Communications Act, giving the Commission authority to prevent future unjust, unreasonable, and discriminatory network practices. The FCC maintained provisions to ensure access to services by people with disabilities, and universal service—provisions the FCC used to support and fund better broadband access for low-income Americans and those living in rural areas. Though the FCC also applied statutory privacy protections to broadband service, and later adopted new broadband privacy rules in 2016, those rules were overturned by Congress pursuant to a Congressional Review Act resolution of disapproval in

¹ Federal Communications Commission, *Protecting and Promoting the Open Internet*, Report and Order, GN Docket No. 14-28, FCC 15-24 (rel. Mar. 12, 2015) (2015 Order); *AT&T Lifts FaceTime Restrictions on Apple Phones*, Washington Post (Nov. 8, 2012).

2017.² Beyond those specific, identified protections, the FCC opted for a light-touch regulatory regime by forbearing from applying the majority of common carrier provisions in the Communications Act and over 700 applicable regulations, including provisions relating to rate setting and mandatory last-mile unbundling.

Opponents of these 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.³ Last November, the Supreme Court declined a petition to review the case, which effectively validated the Circuit Court's opinion.⁴

B. The Repeal of the 2015 Open Internet Order

With new leadership in place, the FCC proposed in May 2017, to roll back the 2015 Order's protections in their entirety.⁵ The Commission received millions of public comments on the proposed repeal and reclassification, including from members of Congress,⁶ and 98.5 percent of unique comments opposed the FCC's repeal.⁷ The FCC finalized a new Order in December 2017, which took effect in May 2018 (RIF Order).⁸ In the RIF Order, the FCC repealed its net neutrality protections and, in the process, disclaimed many of its own authorities that have been central to supporting broadband access and adoption.⁹

C. Implications of Repeal for Consumers

The repeal of the 2015 Order has broader implications for consumers and small businesses accessing the internet. Under the 2015 Order, the FCC was obligated to enforce

² Pub. L. No 115-22 (2017).

³ *U.S. Appeals Court Upholds Net Neutrality Rules in Full*, NPR (June 14, 2016).

⁴ *Supreme Court Won't Hear Net Neutrality Challenges*, New York Times (Nov. 5, 2018).

⁵ Federal Communications Commission, *Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (rel. May 23, 2017).

⁶ 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).

⁷ *98.5% of Unique Net Neutrality Comments Oppose Ajit Pai's Anti-Title II Plan*, ARS Technica (Aug. 30, 2019) (arstechnica.com/tech-policy/2017/08/isp-funded-study-finds-huge-support-for-keeping-current-net-neutrality-rules/).

⁸ 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).

⁹ RIF Order at ¶ 20.

explicit prohibitions on blocking, throttling, and pay-for-priority arrangements, and retained the power to address future discriminatory, unreasonable, or unjust network practices.¹⁰ After the repeal, people with disabilities are without protections that ensure their access to broadband service.¹¹ The repeal also did away with provisions that ensure fair access to utility poles, ducts, conduits, and rights-of-way.¹² Finally, the repeal undermined the FCC’s authority to fund rural broadband access and adoption efforts for low-income individuals by relinquishing the FCC’s authority to accelerate to deployment of broadband.¹³

II. LEGISLATION

A. H.R. 1644, Save the Internet Act of 2019

On March 8, 2019, Rep. Mike Doyle (D-PA) introduced H.R. 1644, the “Save the Internet Act of 2019”, with 132 original co-sponsors. If enacted, this bill would codify the FCC’s 2015 Order. Specifically, it would restore: (1) the Report and Order on Remand, Declaratory Ruling, and Order adopted by the FCC in February 2015; (2) Part 8 of title 47, Code of Federal Regulations; and (3) any other rule that the RIF Order modified or repealed.

III. WITNESSES

The following witnesses have been invited to testify:

Francella Ochillo

Vice President of Policy and General Counsel
National Hispanic Media Coalition

Matt Wood

Vice President of Policy and General Counsel
Free Press Action

Gregory Green

Chief Executive Officer
Fatbeam

Robert M. McDowell

Senior Fellow, Hudson Institute
Partner, Cooley LLP

¹⁰ 2015 Order at ¶ 15-24.

¹¹ Compare 2015 Order at ¶ 468 with RIF Order at ¶ 21.

¹² Compare 2015 Order at ¶ 478 with RIF Order at ¶ 21.

¹³ RIF Order at ¶ 268.