

Net Neutrality: The FCC's "Internet Freedom" NPRM

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tl;dr:

As widely expected, the FCC recently announced plans to roll back net neutrality protections that were implemented in 2015. As stated in its recent [notice of proposed rulemaking](#) (the "Notice"), the FCC intends to "restore internet freedom for all Americans."¹ The Notice does two things: (1) proposes reclassifying internet providers as "information services" under Title I of the Telecom Act; and (2) suggests removing some or all of the existing rules prohibiting ISPs from blocking, throttling, or prioritizing paid traffic. [In FCC Commissioner Ajit Pai's words](#), this would restore the "light touch" framework that "served us so well" during the Clinton, Bush, and early Obama administrations.

Of course, broadband internet access was virtually non-existent during the Clinton administration and fledgling during most of the Bush administration. Even more, during most of the Obama administration, the FCC enforced strict net neutrality rules similar to the 2015 rule that explicitly prohibited blocking and discrimination, among other things. As discussed in more detail below, the real shift in 2015 was a change in the legal standard to enforce those rules made in direct response to federal court rulings.

Furthermore, Commissioner Pai suggests that "voluntary" net neutrality will yield better results for both businesses and consumers. Pai's thinking here is similar to his justification for rolling back the broadband privacy protections earlier this year: The FTC is better suited to police a self-regulating industry (by holding ISPs to any promises they make regarding net neutrality).

We agree that fostering an ideal environment for robust, high-speed internet access to flourish is an important goal for the FCC, the technology industry, and the wider economy. Americans have poor access to reliable and fast broadband, relative to other countries.² And there is practically [no broadband competition](#) in the United States.³ However, the FCC has not proven that less regulation is the solution. One could argue that the FCC is attempting to solve a problem that doesn't exist, starting with principles instead of facts. In fact, this lack of evidence would likely open a revised set of rules to legal challenges, as explained further below.

¹ Restoring Internet Freedom, Notice of Proposed Rulemaking, April 27, 2017 (the "NPRM").

² See, e.g., the Akamai State of the Internet Report, [Q4 2016](#).

³ The word 'competition' does not appear once in the Notice. In addition, not much has changed since The Verge's [blistering assessment of the state of broadband competition in 2014](#).

The FCC will vote on the full text of Pai's Notice on May 18, 2017 and then will enter a public feedback period. The FCC is accepting comments until July 17 and reply comments until August 16.

The Notice

With this Notice, the FCC has reignited the same net neutrality debate everyone thought was settled in 2015, arguing that we don't need explicit regulation to ensure net neutrality. In essence, Commissioner Pai's FCC is making the bold argument that the industry can rely on a set of norms and self regulation to achieve net neutrality, despite years of evidence to the contrary.

To understand the FCC's new proposal, we need to review the structure of the Telecommunications Act of 1996 (the "Act") briefly. The FCC's mandate from Congress is to regulate all forms of communications technologies, including telephone, terrestrial radio, and cable and broadcast television. Each of these technologies has its own section or title of the Act. For example, telephone services are regulated as essentially dumb pipes ("common carriage") under Title II of the Act. Because telephone lines are considered "common carriage," telephone companies are subject to very stringent rules around content and device discrimination.

The concept of common carriage is an important one. When regulators and advocates talk of treating the internet like a utility, common carrier status is what they mean. As a society, we have decided that services essential to living in the modern world should be available to everyone on identical terms. This includes phone lines as discussed above, but also highways, electricity, and broadcast radio.

In the early days of the internet, the FCC wasn't expected to regulate the internet (much). Congress and regulators wanted to wait and see whether the internet needed regulation at all. So any regulation by the FCC would take place under its "ancillary jurisdiction" under Title I, which serves as somewhat of a catch-all. From 2010 to 2015, when the FCC attempted to impose common-carriage-like rules on ISPs to prohibit practices like blocking and throttling, the courts repeatedly found that the FCC lacked that ability under Title I. Without a congressional amendment to the Act adding a whole new section for the internet, the courts indicated that Title II is the only means for imposing net neutrality on internet service providers.⁴ It was in direct response to those legal rulings that the FCC reclassified the internet as a common carrier under Title II in 2015.

In the Notice, the FCC is saying essentially two things: (1) we should remove Title II classification to establish a self-regulatory framework; and (2) we should consider whether it makes sense to keep the net neutrality rules put in place by former Commissioner Tom Wheeler's FCC. Given the

⁴ Nine Republican senators have recently proposed amending the Telecommunications Act to further solidify the existing internet regulatory framework by making Pai's proposed changes part of the statute

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framework and precedent described above, one can understand why the reaction to Pai's proposal has been fervent and swift.

Pai's new framework would make three changes:

1. Reclassify internet providers as Title I information services;
2. Prohibit the FCC from adapting any net neutrality rules to practices that ISPs haven't yet devised; and
3. Reexamine the 2015 rules around blocking and throttling of apps and websites.

Based on some language in the Notice, it seems that the FCC is likely to retain at least one of the existing rules. The Notice says emphatically that they oppose *blocking* lawful material, and seem to agree that "the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking is essential to the Internet's openness."⁵

Given the legal precedent created by FCC's attempts under Wheeler to impose net neutrality rules under Title I, if Pai's FCC reclassifies ISPs as information services under Title I, any net neutrality rules would be vulnerable to legal challenge. And this is precisely why Pai is framing his proposal as a "light touch" voluntary regime. He knows that any post-reclassification rules would be unenforceable.

On the other hand, any sweeping changes to the 2015 rules will likely still face legal challenges. Federal agencies can't change regulations on a whim; they must show that there has been a material change in the market or some other factor to justify the change. In other words, the FCC must demonstrate that something significant has changed since the 2015 order establishing net neutrality, while maintaining its mandate to safeguard the public interest. Pai argues that a slight dip in broadband investment in 2015 is that significant event.⁶ However, [Free Press](#), a public interest group that supports net neutrality, [found that investment among publicly traded broadband companies increased](#) 5.3 percent between the 2013-14 and 2015-16. Moreover, relying exclusively on harm to ISPs' bottom lines ignores the equally important and unquantifiable benefits that net neutrality confers upon consumers and the wider startup community. It is hard to measure the lost opportunities of startups whose traffic is deprioritized under a weakened regulatory regime.

So, in theory, a failure by the FCC to provide evidence of material market changes justifying new rules opens the new rules up to legal challenges. However, this is a backstop more than a reliable attack strategy. Instead, the technology community will likely work hard to garner a sufficient groundswell of opposition to make drastic new rules a political impracticality.

⁵ Notice, p. 26, citing the prior Title II Order.

⁶ Notice, pp. 2-3. It was a small, one-year dip and [may have been caused by a decrease in oil prices](#). The Notice does not cite any broadband investment statistics from 2016. In fact, broadband investment has since [recovered](#). Furthermore, the stock price for all publicly-traded ISPs has risen steadily since the 2015 net neutrality rules were promulgated.

The ISPs

To give some sense of the stakes in this debate, supporters of the new rule include Comcast, Verizon, AT&T, Charter, and Sprint, as well as the [CTIA](#).⁷ Most of them [issued statements in response to Pai's announcement](#) underscoring their support of net neutrality while asserting that the proposed rules would spur new innovation and investment in their internet services. Only T-Mobile was silent.

For example, Comcast published a [blog post in support of the FCC's announcement](#), in which Comcast argued that the FCC can preserve net neutrality without regulations requiring it: "Title II is not net neutrality. . . We support strong, legally enforceable net neutrality protections that ensure a free and Open Internet [sic]." Unfortunately this ignores the historical fact that reclassifying under Title II was the only legally enforceable way the FCC found to impose net neutrality rules on ISPs (history that Comcast references later in that same blog post).

This list of discriminatory ISP behavior in the past 10 years suggests that "voluntary," self-regulatory policing by these companies is unlikely to preserve net neutrality. Here are just a few examples from the past few years:⁸

- T-Mobile [lied](#) about throttling internet traffic
- AT&T [favored](#) their own content over other internet traffic
- Comcast [held customers hostage](#) until Netflix paid for more bandwidth

Tech Industry Response, Next Steps

On May 7, 2017, John Oliver did [another segment on net neutrality](#) covering the recent developments described above, and asked viewers to submit comments. Anticipating this kind of public outcry—in light of the last net neutrality rulemaking in which the FCC received more than 4 million comments on its last proposal—Pai has already stated that they will not use the number of comments to the NPRM as a factor in determining the outcome.⁹

The Internet Association, which represents companies like Google, Facebook, Netflix, Amazon, Airbnb, Pinterest, Snapchat, Spotify, Dropbox, Twitter, Pandora, Etsy, eBay, PayPal, and Reddit, issued a [statement condemning the proposed plan](#): "Consumers pay for access to the entire internet

⁷ Internet providers are thrilled with the FCC's plan for weaker regulations, [The Verge](#), April 26, 2017.

⁸ You can find [the full list on The Verge](#).

⁹ "The comments process does not function as the equivalent of a public opinion survey or poll, and what matters if the quality of the argumentation presented, the facts that are entered into the record, the legal arguments that are placed into the record. It's not a counting procedure where you decide which side has placed more comments into the record and that side wins. That is not the way the Administrative Procedure Act works." Senior FCC officials during a call with reporters.

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free from blocking, throttling, or paid prioritization.” Facebook issued its own statement, saying it will continue to fight for an open internet.¹⁰

In addition, more than 1,000 startups, investors, and industry organizations from across the country joined Engine, Y Combinator, and Techstars in [sending a letter to Commissioner Pai](#) asking him to preserve the existing net neutrality framework.

Anticipating what’s already shaping up to be a tough battle over net neutrality, Pai is allegedly building a “conservative army” to fortify his position. As part of his political strategy, Pai has been “granting interviews with right-wing media outlets and holding private meetings with groups like the Heritage Foundation and Americans for Prosperity”, [Politico reports](#). In addition, [Recode interviewed Pai on May 3, 2017](#).

As of the publication of this brief, Pai has yet to meet with House Energy and Commerce Committee members to discuss his proposal.

Rep. Mike Doyle (D-Pa.), the new ranking member of House energy and commerce telecom subcommittee, [doesn't think it's going to be easy](#) for Pai’s FCC to simply repeal and replace net neutrality rules: “People said the day after the president was sworn in, we were going to repeal the health care bill. That’s not going to happen for a while. And I don’t know that this is going to be repealed so easy. Remember, the FCC received millions of contacts from the public, the grassroots, when this was first being looked at, and you know I’m sure we’re going to see people weigh in on that aspect, too.”

The FCC will vote on the full text of Pai’s Notice on May 18th. The FCC is accepting comments until July 17th and reply comments until August 16th.

Tech:NYC will continue to work with its members and the wider industry to support efforts to influence the FCC’s decision and bring the importance of net neutrality to the fore. After all, similar efforts in 2010–14 were instrumental in the FCC imposing net neutrality on ISPs in the first place.

BACKGROUND

- The FCC’s net neutrality efforts from 2010 through 2015 were heavily influenced by the efforts of a well-organized and persistent tech community, including a [letter from 150 tech companies](#) in 2014, and more than 4 million comments on the FCC’s prior NPRM, in large part resulting from a [feature segment on the Last Week Tonight with John Oliver](#)
- The FCC originally attempted to establish net neutrality rules under Title I, §706 but was repeatedly thwarted by the courts. For example, their 2010 [Order](#) was challenged by

¹⁰ Email from Facebook to Verge staff April 26, 2017.

telecoms arguing that §706 was not sufficient. The D.C. Circuit, in essence, told the FCC to reclassify under Title II.

- In 2015, the FCC finally reclassified wired and wireless internet providers as common carriers under Title II, a classification repeatedly upheld by the courts. The rules established by the FCC included:
 - No blocking of legal content, applications, services, or non-harmful devices
 - No throttling of lawful internet traffic on the basis of content, applications, services, or non-harmful devices
 - No paid prioritization, including prioritization of affiliate content
- Under the 2015 rules, the FCC also has oversight over “interconnect” agreements between internet providers and content companies like Netflix.
- The practice known as “zero rating,” in which providers exempt some data from counting against data caps, falls within a legal gray area. The FCC has not ruled on this practice specifically.
- Comcast has [consistently been near the top in lobbying activity and spending](#)
- 96% of U.S. consumers have access to two or fewer broadband providers¹¹
- On May 1, the full panel of the D.C. Circuit Court of Appeals [declined to hear an appeal](#) challenging the ruling of a three-judge panel in 2016 upholding the FCC’s net neutrality rules.

FURTHER READING

- The [letter to FCC Commissioner Pai from more than 1,000 startups](#) (Engine)
- The [Public Knowledge Net Neutrality page](#)
- The New York Times’ [net neutrality coverage page](#), including [a critique from the NYT editorial board](#)
- The Verge’s Nilay Patel [dissects a recent net neutrality video from Verizon](#)
- On May 1, 2017, nine Republican senators [introduced a bill](#) that would essentially codify the changes that the FCC is now proposing.

¹¹ Akamai State of the Internet Report, [Q4 2016](#).