



Thomas A. Schatz  
*President*

July 14, 2017

Chairman Ajit Pai  
Commissioner Mignon Clyburn  
Commissioner Michael O'Rielly  
Commission Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, DC 20554

RE: Restoring Internet Freedom (WC Docket No. 17-108)

Dear Chairman Pai, Commissioner Clyburn, and Commissioner O'Rielly:

On behalf of the more than one million members and supporters of Citizens Against Government Waste, I submit the attached public comments to the Federal Communications Commission in reference to the Notice of Proposal Rulemaking in the Matter of Restoring Internet Freedom (WC Docket No. 17-108).

If you have any questions or concerns, please contact either myself or Deborah Collier at (202) 467-5300. Thank you for your consideration of our remarks.

Sincerely,

President  
Citizens Against Government Waste

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of )  
 )  
Restoring Internet Freedom ) WC Docket No. 17-108  
 )

Comments of  
Thomas A. Schatz  
President  
Citizens Against Government Waste

July 14, 2017

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government. On behalf of the more than one million members and supporters of CAGW, I offer the following comments in support of restoring internet freedom to the countless Americans who use this vital service.

On February 8, 1996, when President Bill Clinton signed the Telecommunications Act of 1996, which was the first major overhaul of the Communications Act in more than 60 years, he stated that the law would “help connect every classroom in America to the information superhighway by the end of the decade. It will protect consumers by regulating the remaining monopolies for a time and by providing a roadmap for deregulation in the future.”<sup>1</sup> The 1996 Act, which classified the internet as an information service under Title I of the Communications Act of 1934, subjected the online world to a light-touch regulatory regime, which allowed the internet and the economy to grow and flourish.

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<sup>1</sup> William J. Clinton: “Statement on Signing the Telecommunications Act of 1996,” February 8, 1996, online by Gerhard Peters and John T. Woolley, *The American Presidency Project*.  
<http://www.presidency.ucsb.edu/ws/?pid=52289>.

The Federal Communications Commission (FCC) voted on February 26, 2015 to adopt the Open Internet Order (OIO) on a 3-2 party-line vote, reclassifying the internet as a telecommunications/telephone service under Title II of the Communications Act of 1934.<sup>2</sup> This utility-style big brother approach to regulating the internet was a problem in search of a solution, and a massive overreach of authority by the agency.

CAGW believes the adoption of the OIO was a misguided attempt to solve a crisis that didn't exist. Proponents of net neutrality want the online world to be forced "open" at the expense of successful internet providers, but fail to recognize the many tradeoffs to "openness," such as increased spam, fewer privacy controls, slower service, and, perhaps most importantly, decreased incentives for investment and innovation.

In 2004, then-FCC Chairman Michael Powell offered four guiding principles of internet freedom: the freedom to access lawful content on the internet; the freedom to use applications; the freedom to attach personal devices to the network; and, the freedom to obtain service plan information.<sup>3</sup> The FCC unanimously adopted these four reasonable principles in its Internet Policy Statement in 2005.<sup>4</sup> The principles provided internet service providers (ISPs) with direction devoid of the heavy hand of government that could have stymied innovation, and provided a truly open internet to all without burdensome regulations.

The notion of equality on the internet may sound reasonable, but the concept of net neutrality has been reinterpreted to mean a government-managed internet at the expense of private-sector business models. This does little to promote investment in infrastructure development, nor does it promote a truly free and open internet by failing to recognize the many

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<sup>2</sup> In the Matter of Protecting and Promoting the Open Internet (GN Docket No. 14-28), Federal Communications Commission, FCC 15-24, February 26, 2015, [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf).

<sup>3</sup> Michael K. Powell, Chairman, Federal Communications Commission, Preserving Internet Freedom: Guiding Principles for the Industry, Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law, Boulder, Colorado, February 8, 2004, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

<sup>4</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review-Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-010, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-05-151A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf).

tradeoffs to “openness,” such as increased spam, fewer privacy controls, slower service, and, perhaps most importantly, decreased incentives for investment and innovation.

The reclassification of the internet under the OIO was not about net neutrality. It was instead a decision to apply several provisions of Title II to ISPs (renamed in the OIO as “broadband internet access service [BIAS] providers”). An April 25, 2017 study by Dr. George Ford, an economist at the Phoenix Center for Advanced Legal & Economic Public Policy Studies (Phoenix Center), found that had Title II reclassification not been imposed on internet providers, an additional \$150-200 billion would have been invested in infrastructure.<sup>5</sup> In a follow-on to this study, Dr. Ford further reiterated on May 16, 2017 that “Investment in telecommunications is below expectations by about 25 percent since the FCC’s introduction of Title II reclassification.”<sup>6</sup>

As noted by the Free State Foundation in its comments to the FCC regarding the Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services (WT Docket No. 17-69), the “correlation between the Commission’s decision to impose common carrier-like regulation on wireless broadband for the first time and declines in wireless broadband infrastructure investment should not be dismissed lightly.”<sup>7</sup>

CAGW fully supports reinstating the classification of ISP/BIAS services as “information services” under Title I of the Communications Act of 1934, and work towards a meaningful solution to reduce the regulatory burdens on ISPs/BIAS providers. CAGW also urges the commission to review the adverse effects reclassifying the internet under Title II has had on investment and innovation.

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<sup>5</sup> Dr. George S. Ford, “Net Neutrality, Reclassification and Investment: A Counterfactual Analysis,” Perspectives, Phoenix Center for Advanced Legal & Economic Public Policy Studies, April 25, 2017, <http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf>.

<sup>6</sup> Dr. George S. Ford, “Net Neutrality, Reclassification and Investment: A Further Analysis,” Perspectives, Phoenix Center for Advanced Legal & Economic Public Policy Studies, May 16, 2017, <http://www.phoenix-center.org/perspectives/Perspective17-03Final.pdf>.

<sup>7</sup> In the Matter of Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services (WT Docket No. 17-69), Comments of The Free State Foundation, May 8, 2017, [http://www.freestatefoundation.org/images/FSF\\_Comments\\_-\\_Annual\\_Report\\_and\\_Analysis\\_of\\_Competitive\\_Market\\_Conditions\\_with\\_Respect\\_to\\_Mobile\\_Wireless\\_050817.pdf](http://www.freestatefoundation.org/images/FSF_Comments_-_Annual_Report_and_Analysis_of_Competitive_Market_Conditions_with_Respect_to_Mobile_Wireless_050817.pdf).

In addition, CAGW supports Section IV, Part C of the NPRM, which proposes to conduct a cost-benefit analysis (CBA). On April 5, 2017, Chairman Pai announced that he would be creating a new Office of Economics and Data.<sup>8</sup> Economic analysis is critical to determine the impact of new regulations on broadband deployment and the economy. Had a cost-benefit analysis of the OIO been done prior to adoption, the outcome of the rulemaking may have been quite different. CAGW encourages the FCC to perform a CBA on each provision of the NPRM, as well as the overall cost of the entire NPRM.

Another consequence of reclassifying the internet as a Title II public utility was the removal of the jurisdiction of the Federal Trade Commission (FTC) over privacy enforcement for ISPs/BIAS. Consumer information privacy for data held by ISPs/BIAS became subject to the provisions of Title II, Section 222 of the Communications Act of 1934, which states in section (c)(1), “Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.”<sup>9</sup> Section (c)(2) states, “A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.”<sup>10</sup>

This means that an ISP/BIAS must receive a customer’s consent before it can sell, or otherwise disseminate any personal information. The NPRM, if adopted, would have the effect of restoring internet privacy enforcement to the FTC.

FCC Chairman Ajit Pai and Acting FTC Chairman Maureen Ohlhausen issued a joint statement on March 1, 2017, that noted they would work together to bring a consistent approach

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<sup>8</sup> FCC Chairman Ajit Pai, “The Importance of Economic Analysis at the FCC,” Speech before the Hudson Institute, Federal Communications Commission, April 5, 2017, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344248A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344248A1.pdf).

<sup>9</sup> U.S. Code, Title 47, Chapter 5, Subchapter II, Part I, U.S. Code § 222 – Privacy of Customer Information, Legal Information Institute, Cornell University Law School, viewed May 4, 2017, <https://www.law.cornell.edu/uscode/text/47/222>.

<sup>10</sup> Ibid.

to regulating internet privacy.<sup>11</sup> They said that jurisdiction over privacy and data security related to broadband providers should go back to the FTC, and that every actor “in the online space should be subject to the same rules, enforced by the same agency.” They added, “The federal government shouldn’t favor one set of companies over another ... we will work together to establish a technology-neutral privacy framework for the online world. Such a uniform approach is in the best interests of consumers and has a long track record of success.”

With respect to the use of authority granted under Section 706 of the Telecommunications Act of 1996 as a basis for regulating the internet, that section specifically grants the FCC authority to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms).” That “capability” has further been defined as broadband. The Merriam-Webster dictionary defines the word “encourage” as “to help the growth or development of.”<sup>12</sup> CAGW believes that Section 706 does not grant the commission broad authority to mandate its will on telecommunications by requiring providers to deploy services, but instead is intended to help clear a pathway for deployment by removing barriers.

In January, 2014, the D.C. Circuit Court of Appeals, in Verizon v. FCC, upheld certain FCC prerogatives, including provisions requiring transparency from industry partners and an affirmation of FCC authority to regulate ISPs, including broadband.<sup>13</sup> Based on rulemaking adopted by the commission under former Chairman Wheeler, it appears that section 706 has been broadly interpreted in order to justify an expansionist view of the FCC’s power, including adding to the agency’s authority the ability to preempt state laws.<sup>14</sup> However, in his dissent to the

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<sup>11</sup> “Joint Statement of Acting FTC Chairman Maureen K. Ohlhausen and FCC Chairman Ajit Pai on Protecting Americans’ Online Privacy,” Federal Trade Commission, March 1, 2017, <https://www.ftc.gov/news-events/press-releases/2017/03/joint-statement-acting-ftc-chairman-maureen-k-ohlhausen-fcc>.

<sup>12</sup> “Synonyms and Antonyms of ENCOURAGE,” Merriam-Webster, viewed June 29, 2017, <https://www.merriam-webster.com/thesaurus/encourage>.

<sup>13</sup> United States Court of Appeals for the District of Columbia Circuit, Verizon, Appellant v. Federal Communications Commission, Appellee, Argued September 9, 2013, Decided January 14, 2014, No. 11-1355, [http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf).

<sup>14</sup> Remarks of Tom Wheeler, Chairman, Federal Communications Commission, National Cable & Telecommunications Association, April 30, 2014, <http://www.fcc.gov/document/chairman-tom-wheeler-remarks-ncta>.

Verizon decision, Senior Circuit Judge Laurence Silberman wrote the following, with specific emphasis on section 706:

Nevertheless, the Commission justifies its aggressive, prophylactic regulation by asserting that the negative consequences of regulation (preserving the status quo) are likely to be minor, while the consequences of allowing the broadband market to evolve without regulation could be drastic and permanent. 25 F.C.C.R. at 17909 ¶ 12. I think this is quite wrong, but in any event, the agency's judgment about the propriety of leaping before looking cannot displace the judgment of Congress which, in enacting section 706, did not so broadly empower the Commission. Rather, Congress required the agency to identify an actual barrier to infrastructure investment or a threat to competition, and the agency must have evidence that the barrier or threat exists.<sup>15</sup>

Both Chairman Ajit Pai and Commissioner Michael O'Rielly presented dissenting statements regarding using section 706 to justify over-regulating the internet during the rulemaking period for the OIO, echoing Judge Silberman in challenging the majority's reliance on section 706 in such matters.

As stated by Commissioner O'Rielly, "I have already expressed my views that Congress never intended section 706 to be an affirmative grant of authority to the Commission to regulate the internet. At most, it could be used to trigger *deregulation*."<sup>16</sup> Chairman Pai directly countered former Chairman Wheeler's proposition that the FCC should expand broadband regulation in order to improve competition: "...pursuing net-neutrality regulations under section 706 or Title II places in jeopardy every other goal of this Commission in the communications marketplace ... threatening the \$60 billion a year that private companies invest in their broadband networks.... This brave new world will deter new entrants and reduce competition in the broadband market."<sup>17</sup>

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<sup>15</sup> Verizon v. Federal Communications Commission, p. 64, [http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf).

<sup>16</sup> Dissenting Statement of Commissioner Michael O'Rielly, FCC 14-61, Federal Communications Commission, May 15, 2014, <http://www.fcc.gov/article/fcc-14-61a6>.

<sup>17</sup> Dissenting Statement of Commissioner Ajit Pai, FCC 14-61, Federal Communications Commission, May 15, 2014, <http://www.fcc.gov/article/fcc-14-61a5>.

Finally, the OIO created a general Open Internet conduct standard that ISPs cannot harm consumers or edge providers. The vaguely-worded general conduct rule is designed to protect consumers against neutrality violations that are not classified as blocking, throttling, or paid prioritization.<sup>18</sup> On February 26, 2015, former Chairman Wheeler described the role of the FCC under the general conduct standard as that of a referee when disagreements occur, stating, “We don’t really know ... where things go next.”<sup>19</sup> This creates a dangerous precedent for overly strict interpretation by an activist commission for regulating new innovations and consumer offerings on the internet. CAGW believes these vague standards create confusion for providers and customers on what practices are and are not permitted under the current rules. CAGW recommends that this language be dropped from the final rule, and consumer protection enforcement returned to the Federal Trade Commission and individual state attorneys general.

CAGW supports the FCC’s reconsideration of the OIO, and is encouraged by the NPRM for Restoring Internet Freedom (WC Docket No. 17-108). Should the order be approved by the commission, a free and open internet will be reinstated, while economic growth will flourish through a light-touch regulatory approach to internet governance.

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<sup>18</sup> Jon Healey, “New FCC net neutrality standard leaves ISPs guessing,” *Los Angeles Times*, March 13, 2015, <http://www.latimes.com/opinion/opinion-la/la-ol-net-neutrality-wireless-zero-rating-data-caps-20150312-story.html>.

<sup>19</sup> “Clip of Federal Communications Commission News Conference, Wheeler on General Conduct Standard,” C-SPAN, February 26, 2015, <https://www.c-span.org/video/?c4534447/wheeler-general-conduct-standard>.