

WORLD WIDE WEB FOUNDATION

World Wide Web Foundation
1110 Vermont Ave NW,
Suite 500
Washington DC 20005,
contact@webfoundation.org

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

Comments of the World Wide Web Foundation

July 17, 2017

Executive Summary

The World Wide Web Foundation wishes to express its support for the rules currently in place, and through this presentation seeks to provide the FCC with arguments to uphold the Open Internet Order of 2015.

This document is structured in five parts, each of which provides a step towards the logical conclusion that the current rules should be kept:

- I. The internet, by original design, relies on a neutral network.
- II. Net neutrality is key to maintaining the internet as an innovative space, capable of protecting freedom of speech, and granting opportunities for everyone.
- III. The Open Internet Order (2015) is aligned with the principles of net neutrality.
- IV. The Open Internet Order has an unprecedented level of legitimacy:
 - A. Rules in place are the result of a highly participatory process of public debate and engagement
 - B. Rules in place are the result of an inter-institutional dialogue between the FCC and the judiciary
- V. There is no conclusive evidence regarding the effects of the current rules that would merit changing them.

Conclusion: The World Wide Web Foundation (WF) believes that the Open Internet Order (2015) should be left as it stands and continue to serve as a good practice model for all countries.

Introduction

We fully welcome the decision of the FCC to carry out a participatory process to gather comments regarding Circ1705-05¹, which proposes reforms to the existing regulatory framework governing broadband. Given that the US population depends directly or indirectly on internet access services for their daily livelihoods, gathering input on how changes to current regulation will affect these people is key to the decisionmaking process, and therefore to the legitimacy of whichever decision is arrived upon.

We call on the FCC to ensure the continuation of these processes and to uphold these as a technical debate. They must remain non-partisan and engage key actors. All comments should be considered and addressed.

We would also like to remind the FCC Chairs that given the internet's borderless nature, whichever decision the FCC arrives to will have downstream effects on the global information ecosystem, and will affect the lives of millions of people who cannot participate in this process. We hope those interests are also taken into consideration.

About the World Wide Web Foundation

The World Wide Web Foundation was established in 2009 by web inventor Sir Tim Berners-Lee to advance the open web as a public good and a basic right. We are an independent, international organization fighting for digital equality — a world where everyone can access the web and use it to improve their lives. To deliver digital equality, we aim to change government and business policies for the better. We believe that everyone has the right to access the internet and use it freely and fully — and these principles underpin all our work. In recent years, we have influenced policies in over a dozen countries, helping to unlock the benefits of the web for hundreds of millions of people.²

¹ FCC (2017). Circ1705-05, Notice of Proposed Rulemaking, "Restoring Internet Freedom" Available in format open to comments here https://web.kamihq.com/web/viewer.html?source=sharedfile&document_identifier=0B4N42uRco2leWkFKQVJoVTIkRU0 (last accessed 7/13/2017)

² For more information regarding our vision and projects, visit our website: <http://webfoundation.org/> (last accessed 7/12/2017)

Part I - The internet, by original design, relies on a neutral network

The key element of this debate is net neutrality, its meaning, and its implications for the lives of millions of people. In the first part of this document, we will provide a brief account of what net neutrality means, and why it is a key principle of the internet as we know it. Part II will explain why it is important to keep the network neutral.

Let's therefore begin with a working definition of net neutrality. Hahn and Wallsten explain that net neutrality "usually means that broadband service providers charge consumers only once for internet access, don't favor one content provider over another, and don't charge content providers for sending information over broadband lines to end users".³

It is important to state that the term *net neutrality* can be used in a descriptive sense (i.e. to explain how a network *as a matter of fact works*), as well as in a prescriptive sense (i.e. to express how it *should work*). This is a relevant clarification given that the term *net neutrality* was only coined in 2003⁴, and yet is used throughout this submission and elsewhere to describe a phenomenon and a principle that pre-date the term and the regulations designed to enforce it.

Net neutrality is a key conceptual pillar upholding the internet's architecture as it was designed. In order for the system to be capable of operating over the infrastructure that existed at the time — and to ensure its ability to evolve over time — those who designed it decided that the system would make the minimum requirements possible of the mid-points in a network.

As part of this process, it was decided that before information was sent over the network it would be broken down into smaller pieces, or *data packets*. As the court explains in the *Verizon* case:

when an edge provider such as YouTube transmits some sort of content – say, a video of a cat – to an end user, that content is broken down into packets of information which are carried by the edge provider's local access provider to the backbone network, which transmits these packets to the end user's local access provider, who then views and hopefully enjoys the cat.⁵

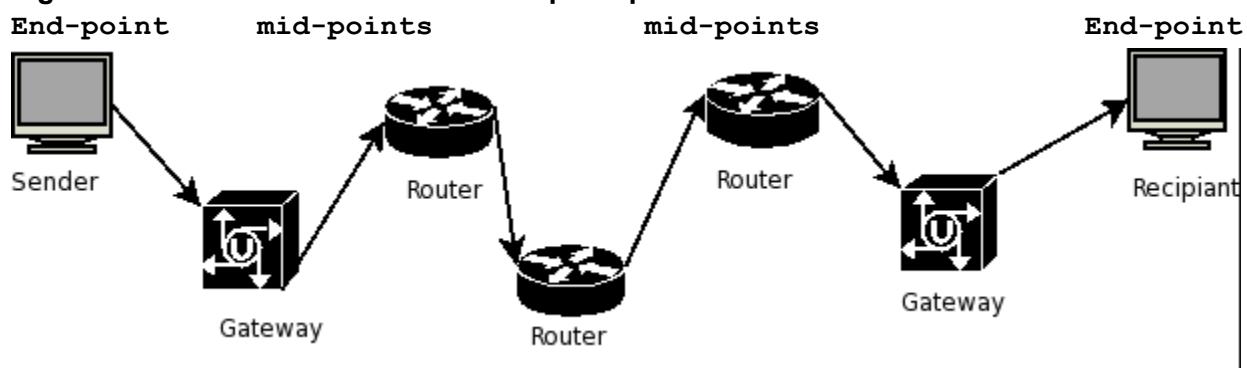
Whereas the network was dealing with standardized packets of data, applications would be designed on the end points to put together the packets of data and present them to the end user in the form of a video, an email, a song, etc.

³ Hahn, R. and Wallsten, S. (2006) 'The Economics of net neutrality', AEI Brookings Joint Center for Regulatory Studies: Washington D.C.

⁴ Tim Wu (2003). 'Network Neutrality, Broadband Discrimination'. Journal on telecom and high tech law. Available at http://www.jthtl.org/content/articles/V2I1/JTHTLv2i1_Wu.PDF (Last accessed 7/12/2017)

⁵ Verizon v. FCC 740 f.3d 623 (d.c. cir. 2014). Available in format open to comments here: <https://goo.gl/6qWfQY> (Last accessed 10/7/2017)

Fig 1. The network and the end-to-end principle⁶



This is often referred to as the *end-to-end principle*, and is summarized as *the network is stupid, and all innovations occurs on the edges*.⁷ This decision was key to fostering the growth of the network, enabling the successful deployment and adoption of innovative products and services on the edges, and a key tool for freedom of speech. We shall explore these benefits in Part II.

Part II - Net neutrality is key to maintaining the internet as an innovative space, capable of protecting freedom of speech, and granting opportunities for everyone.

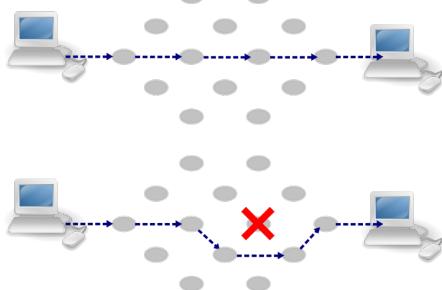
The original design of the internet, which relied on a neutral network, was key to enabling the internet to grow, foster innovation, and serve as a robust tool for free speech.

In terms of network growth, the minimal requirements placed on the network was a key factor in allowing the internet to thrive and to evolve into a robust decentralized medium of communication: there is no central component to the network, making it relatively easy to redirect packets away from nodes that suffer malfunctions, and route subsequent packets through nodes that work or are part of a less congested route. This makes the network more robust and increases the reliability of the internet as a means of communication, therefore attracting new customers.

⁶ Adapted from Wikimedia (2005). Original available created by *Socratesone*, available at https://upload.wikimedia.org/wikipedia/commons/0/06/Internet_packet_path.png

⁷ Isenberg, D. (1997) "Rise of the Stupid Network," Computer Telephony. Available at <http://www.isen.com/stupid.html> (Last accessed 12/7/2017)

Fig 2. Routing packets⁸



In terms of openness to innovation, given that the design required the network to transport generic packets, it was not built to optimize the provision of service of a specific application. Instead, the network optimizes the transportation of data-packets, regardless of the applications it enables on the end-points. In this way, “end user devices would be free to behave flexibly because, in the Stupid Network, the data is boss, bits are essentially free, and there is no assumption that the data is of a single data rate or data type.”⁹

This is a key characteristic of the internet. This flexibility makes the internet *generative*: it has “the ability [...] to create, generate or produce new output, structure or behavior without input from the originator of the system.”¹⁰

Regardless of whether we label this characteristic *openness*, *flexibility*, or *generativity*, this underlying phenomenon allowed for different applications to evolve and grow quickly through the internet: from the World Wide Web to instant messaging. Had the network been fixated on optimizing the service for specific applications, it would have closed the door to many of the innovations that make it the dynamic space it is today. As the inventor of the web, Tim Berners-Lee, has said: “Net neutrality allowed me to invent the web without having to ask for permission.”¹¹

This structural separation between the edges (where applications organize data packets into content) and the network (which transmits content in the form of standardized data packets) was only possible because the network behaved in a neutral way and treated all data packets equally. In this way, the neutral behavior of the network enabled two markets to thrive in parallel: the market of applications and content (on the edges), and the market for connectivity (the provision of access to the network). As Tim Berners-Lee describes in a recent opinion piece:

⁸ Wikimedia (2011), Packetswitching. Created by Pluke. Available at <https://upload.wikimedia.org/wikipedia/commons/thumb/4/43/CPT-internet-packetswitching-reroute.svg/766px-CPT-internet-packetswitching-reroute.svg.png> (Last accessed 7/12/2017)

⁹ Isenberg (1997). Op. Cit.

¹⁰ Zittrain, J. L. (2006). The Generative Internet. Harvard Law Review, 119, 1974-2040.
doi:10.1145/1435417.1435426

¹¹ Tim Berners-Lee (2017, July 12) on Twitter. Available at https://twitter.com/timberners_lee/status/885100007749287936 (last accessed 7/13/2017)

In the early days of the web, ISPs saw demand for their services surge as people encountered content like never before. As more people got connected, they created more content. A virtuous circle of growth and innovation ensued. (...) Connectivity and content saw an explosion in growth as separate markets.¹²

The virtuous circle implies that net neutrality ensures benefits for both the network and the edge providers. As the edges have freedom to experiment and innovative services and content is provided, strong incentives for people to hire internet access services manifest themselves, and as the customer base increases, the network grows and has incentives to innovate on service provision, increasing quality of service. It is important to note that in the *Verizon* and *US Telecom* cases, the courts reviewed the evidence provided by the FCC in favor of this argument and found it compelling.¹³

The same architectural principles of the network that enable a diverse environment of ideas to flourish in the market of products and services on the edges is also replicated in the realm of speech. The same principles that enable anyone with an innovative idea to become a successful entrepreneur also enable anyone with an idea regarding how society, government or companies are or should be behaving to express this idea and to have it heard; if a critical mass joins, a movement can be formed. Furthermore, the internet is a qualitative leap in terms of political communication. Whereas previous means of communication were either massive but unidirectional (radio/television anchor to the masses), or bi-directional but not massive (telephone), the internet enabled a new type of interaction: massive and bidirectional, or *many-to-many*.¹⁴ This communications development strengthens public deliberation and engagement processes, and ultimately enables a more substantive account of democracy.

As long as the internet treats all data packets equally, it treats the voices of everyone in the same way. This makes the internet a particularly powerful tool for those groups that do not have access to media space or time. Advocates for the rights of minorities, for example, view the discussion over Net Neutrality as a racial justice issue:

It is because of Net Neutrality rules that the internet is the only communication channel left where Black voices can speak and be heard, produce and consume, on our own terms¹⁵ - Patrisse Cullors, Co-Creator of #BlackLivesMatter

The Internet is vital to all communities and essential to the political participation of communities of color (...) For Latinos and many low income communities of color, who have long been left out of mega Telecoms corporations' Internet access priorities, a free

¹² Berners-Lee, T. (2017, June 22). In defense of net neutrality. *Wall Street Journal*. Available through <http://webfoundation.org/2017/06/opinion-in-defence-of-net-neutrality-sir-tim-berners-lee/> (last accessed 7/13/2017)

¹³ See Annex

¹⁴ Shirky, C. (2009). *Here comes everybody : How change happens when people come together* (Updated [ed.]. ed.). London: Penguin.

¹⁵ See Center for Media Justice (2017) Fact Sheet: Net Neutrality, Communications Law, and Racial Justice http://centerformediajustice.org/wp-content/uploads/2017/02/FP-NetNeutrality-FactSheet-Voices_Final.pdf (last accessed 7/17/2017)

and open Internet is essential for our participation in everyday life. –Presente.org –
Mariana Ruiz, Managing Director¹⁶

Net Neutrality is a critical step in closing the economic, educational, and other racial equity gaps that disadvantage communities of color. That is why our network of 175 grassroots organizations across the country has been organizing for strong and enforceable Net Neutrality rules at the FCC. It is the only way to ensure our communities can rely on an Internet free from discrimination. - Media Action Grassroots Network – Steven Renderos – National Organizer¹⁷

The Internet and mobile technology platforms have been a crucial tool in our ability not just to speak out against injustice but organize online and offline for equality and dignity. -Color of Change – Brandi Collins, Media Justice Director¹⁸

Net Neutrality allows systemically excluded groups to voice their concerns and to make them available to the broader public. Given these characteristics, net neutrality has been called the first amendment of the internet.¹⁹ It offers everyone the opportunity to be heard, and to forward arguments in defense of their rights and interests.

In Part I, we described the roots of the net neutrality principle and in Part II, we looked at why this principle is relevant. In Part III, we shall explain why the Open Internet Order of 2015 achieves the objective of protecting this relevant principle.

Part III - The Open Internet Order (2015) is aligned with the principles of net neutrality

This section seeks to explain how the Open Internet Order put in place by the FCC in 2015 complies with the principle of net neutrality, and why it is the appropriate vehicle to protect the internet's capacity as a space for innovation and free speech. This section therefore provides comments regarding paragraphs 76 to 87 of the Circ1705-05.²⁰

¹⁶ National Hispanic Media Association (2015, February 15). Racial Justice Leaders Push Congress for Net Neutrality. NHMC

<http://www.nhmc.org/racial-justice-leaders-push-congress-net-neutrality/> (last accessed 17/7/2017)

¹⁷ Ibid

¹⁸ Ibid

¹⁹ See, amongst many others, LSE Media Policy (2011) Net-Neutrality: The First Amendment of the Internet <http://blogs.lse.ac.uk/mediapolicyproject/2011/03/30/net-neutrality-the-first-amendment-of-the-internet/> (last accessed 7/12/2017)

²⁰ FCC (2017). Circ1705-05, Notice of Proposed Rulemaking, "Restoring Internet Freedom" Available in format open to comments here

https://web.kamihq.com/web/viewer.html?source=sharedfile&document_identifier=0B4N42uRco2leWkFKQVJoVTIkRU0 (last accessed 7/13/2017)

The Open Internet Order of 2015 protects the core values of the *end-to end principle*, while making some concessions towards the efficiency of the network through the inclusion of a set of reasonable traffic management practices, in the form of narrowly defined exceptions.²¹

The Open Internet Order manages to protect the core values underlying net neutrality through the following bright line rules:

No Blocking: *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.*

No Throttling: *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.*

No Paid Prioritization: *A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.* “Paid prioritization” refers to the management of a broadband provider’s network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.²²

In this way, the Open Internet Order has empowered the FCC to ensure that the internet remains open. The rules it establishes are in perfect alignment with the net neutrality principle they seek to protect, and in this way they keep the internet open, ensuring that it remains a space of innovation and freedom of speech for everyone.

A point of contention has been the classification of broadband as a Title II service. The Communications Act establishes two sections under which broadband could theoretically be placed: Title I and Title II. Title I services (designed for enhanced “information services”) are subject to fewer regulations, whereas Title II services (designed for the basic “common carrier”) are subject to more regulation.

It is important to underline that net neutrality (having a network that treats all data packets equally) is both consistent with and an integral part of the obligations of common carriage imposed when a service is classified as Title II. As explained in Part I, the original design of the internet relied on the expectation that an agnostic network would treat all packages equally. This

²¹ Open Internet Order, FCC 15-24 (2015). Available at

https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf (Last accessed 7/7/2017)

²² [From the original] Unlike the no-blocking and no-throttling rules, there is no “reasonable network management” exception to the paid prioritization rule because paid prioritization is inherently a business practice rather than a network management practice.

expectation is precisely what became formalized as an obligation the moment broadband was reclassified as a Title II telecommunications service.

In line with this claim, the Court in *Verizon* went further than suggesting it was merely *possible* for the FCC to classify broadband under Title II. In reviewing the Supreme Court's statements in a previous case regarding the FCC's powers, the Court claimed that in the eyes of the judiciary, a Title II classification could be deemed congressional intent, and that reclassifying broadband under Title I was barely within the powers of the FCC:

"When Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the internet.... Indeed, one might have thought, as the Commission originally concluded..., that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously."

The classification of broadband under Title II is therefore consistent with the type of behavior that is expected from the network, and with what Congress was expecting from the FCC, according to the judiciary.

In paragraphs 76 to 87 of the NPRM,²³ the FCC suggests that the enforceable net neutrality rules may not be necessary for the ISPs to treat all traffic equally. In Part IV, we shall explain that the process through which the decision in favor of enforceable rules was decided guarantees that the best arguments were taken into account. That is why the Open Internet Order is an extremely legitimate rule, and at this point it is not necessary to reopen such debate.

Part IV - The Open Internet Order has an unprecedented level of legitimacy

The legitimacy of the rules in place is a key aspect of the debate. Throughout several sections of the NPRM (paragraphs 76 to 87), the FCC questions the need for bright line net neutrality rules. This debate was settled in 2015 when the FCC voted in favor of such rules. For the rules in place to be repealed, the FCC should prove either that the process through which that decision was made was flawed, or that circumstances have changed or otherwise shown that the rule is not having the intended effects.

Whereas in Part V we will show that there is no evidence that the circumstances have changed or that the rule has not delivered the intended results, throughout this section, we will describe how the current rules are the result of a long and robust process. The Open Internet Order was

²³ FCC (2017). Circ1705-05, Notice of Proposed Rulemaking, "Restoring Internet Freedom" Available in format open to comments here https://web.kamihq.com/web/viewer.html?source=sharedfile&document_identifier=0B4N42uRco2leWkFKQVJoVTIkRU0 (last accessed 7/13/2017)

the result of public (the people-FCC) and an inter-institutional (FCC-Judiciary) dialogues.²⁴ The result of this process is a set of rules that has an unprecedented degree of legitimacy.

Through its mandate, the FCC is a technical body — not a political one. The legitimacy of its decisions are grounded in the quality of its technical arguments and the processes through which they reach such arguments.

The FCC adopted the Open Internet Order following the largest public participation in its rulemaking process, and several lawsuits regarding net neutrality that were brought before the judiciary. Public participation guarantees a robust contest of arguments in which the flaws and strengths of different positions are tested in the public arena. In addition, the role of the judiciary in this context of uncertainty becomes paramount. As a non-partisan branch of government, its role is precisely to carry out an objective evaluation of rules and legislation, and provide the affected groups certainty that they are being treated fairly. Throughout the next two subsections, we will explain how public participation and the involvement of the judiciary provide the current rules with robust legitimacy.

a) Rules in place are the result of a participatory process with unprecedented levels of public debate and engagement

The Open Internet Order was the result of a robust participatory process that enabled the people, experts, media, and all interested parties to engage in a public debate through which the arguments for and against the order, as well as the available evidence regarding its need and potential impacts, were evaluated. This process ensured that the FCC's decision was based on the best available arguments and evidence. Throughout this section we will enumerate some figures that show the degree to which this decision was informed by a wide variety and number of arguments.

Among the metrics that show the unprecedented levels of public debate and engagement, it is worth noting that:²⁵

- 40,000+ websites participated in online protests, ensuring public awareness
- 15,660+ media stories looked at the debate, weighing pros and cons

²⁴ This process can be equated to processes of vertical (the people-FCC), and horizontal (FCC-Judiciary) accountability that are key to ensuring that public institutions are being responsive to the communities they are meant to be serving. Reversing rules that have been vouched for through these processes could undermine confidence in government. For more information see World Bank (n.d.) Accountability in Governance. *World Bank*. Available at

<https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> (last accessed 14/7/2017)

²⁵ Figures quoted in this section were taken from Benkler, Y., Faris, R., Roberts, H., Etling, B., & Othman, D. (2015). Score Another One for the Internet? The Role of the Networked Public Sphere in the U.S. Net Neutrality Policy Debate. Berkman Ctr. Res. Pub. No. 2015-4 . Available at

<http://ijoc.org/index.php/ijoc/article/view/4631/1864> (last accessed 7/12/2017)

Furthermore, direct input to the FCC's decision-making process was extensive:

- 300,000+ phone calls to the FCC
- 2 million e-mails sent to the FCC
- Over 3.7 million comments submitted to the FCC, nearly half of which were deemed unique²⁶

It is worth noting that these figures only encompass a portion of the publicly available information, and should be added to the "staff-led roundtables, numerous ex parte presentations, meetings with individual Commissioners and staff" acknowledged by the FCC.²⁷ These metrics provide evidence that the FCC was exposed to a wide range of arguments and evidence before voting on what became the Open Internet Order. An extensive analysis of the online public debate²⁸ suggests that the pro-net neutrality camp managed to sway the general public in favor of strong enforceable rules, and that this public consensus was echoed by the FCC in its decision to support what became the Open Internet Order.

The broad and continuing support for net neutrality rules — as registered in more recent polls — suggests that, after considering the available information, the average person continues to believe these rules are important. According to the polls, support for net neutrality spans across party affiliations, illustrating the degree to which the public has engaged with the issue based on its merits.

IMGE, a Republican consulting firm, conducted a national survey of 1,502 registered voters between June 26-29, 2017 using a mix of online and landline telephone interviews.²⁹ The most notable component of the findings from this survey was the vast cross-party support for net neutrality rules at a citizen level.

"Companies like Comcast, AT&T, Charter/Time Warner Cable, and Verizon provide home internet access. Today those internet service providers are prohibited from slowing or blocking websites or video services like Netflix. Do you agree that it is necessary for internet service providers to continue to follow these rules?"

Agree:

- **All voters: 75%**
- **Republicans: 72%**
- **Trump voters: 75%**

²⁶ Open Internet Order, FCC 15-24 (2015). Available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf (Last accessed 7/7/2017)

²⁷ Ibid.

²⁸ Figures quoted in this section were taken from Benkler, Y., Faris, R., Roberts, H., Etling, B., & Othman, D. (2015). Score Another One for the Internet? The Role of the Networked Public Sphere in the U.S. Net Neutrality Policy Debate. Berkman Ctr. Res. Pub. No. 2015-4 . Available at <http://ijoc.org/index.php/ijoc/article/view/4631/1864> (last accessed 7/12/2017)

²⁹ The margin of error is 2.5%. IMGE (2017). Open Internet Survey. *Incompass*. Available at <http://www.incompas.org/files/IMGEInsights-Presentations-KeyFindings-1c.pdf> (last accessed 7/13/2017)

The results from the May 2017 edition of the Harvard-Harris Poll reinforce the idea of a broad consensus. The survey — conducted online within the United States between May 18-20, 2017 among 2,006 registered voters — reflects a nationally representative sample and underscores vast support for rules against paid prioritization.³⁰

"Do you believe that internet companies should be able to charge differential rates for companies like Netflix and Google based on how much bandwidth they need and the priority their traffic receives, or not be able to charge them differently?"

Should be able to charge differently based on bandwidth and priority of traffic: 40%

Should not be able to charge them differently: 60%

In this section, we have shown that the FCC's decision to enact the Open Internet Order was the result of a robust participatory process through which the FCC and the general public were exposed to wide and vast array of arguments and evidence. As the FCC acknowledged at the time, "this record-setting level of public engagement reflects the vital nature of Internet openness and the importance of our getting the answer right in this proceeding."

b) Rules in place are the result of a long inter-institutional dialogue between the FCC and the judiciary

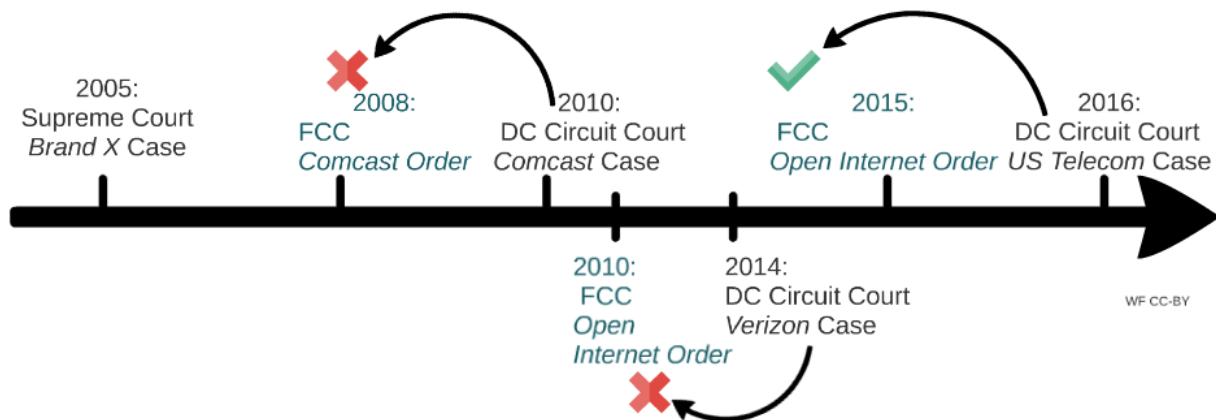
In paragraphs 101-103 of the NPRM, the FCC seeks comments regarding limits to its regulatory authority and mentions a series of judicial proceedings in which these limits were discussed. It is important to underline that, even though the FCC is the agency specializing in communication policy, the judiciary has the responsibility and authority to determine that: i) no rules contradict the fundamental principles enshrined in the Constitution; and ii) the executive branch's outcomes are not only fair in their substance but are also perceived as fair because of the procedure and the expertise of those making the ruling. In this way, the judiciary offers protection against arbitrary decisions by administrative agencies.

This section briefly outlines four key judicial proceedings: *Brand X* (2005), *Comcast* (2010), *Verizon* (2014), and *US Telecom* (2016).

³⁰ The Harris Poll (2017) Monthly Harvard-Harris Poll: May 2017. *Center for American Political Studies, Harvard University & Harris Polls*. http://harvardharrispoll.com/wp-content/uploads/2017/05/HCAPS_HarrisPoll_May-Wave_Top-Line-Memo_Registered-Voters.pdf

Fig 3. The inter-institutional dialogue

The FCC - Judiciary Dialogue



In *Brand X* (2005), the Supreme Court defined the boundaries of the FCC's power. In *Comcast* (2010), a DC Circuit court found that the FCC had not properly grounded its power to enforce net neutrality. In *Verizon* (2014), a DC Circuit Court found that the FCC had provided evidence regarding the need for enforceable net neutrality rules, but found that the FCC was not being consistent in the way it exercised its power. The Court concluded that for the FCC to establish enforceable net neutrality rules, the FCC needed to classify broadband as a common carrier, under Title II of the Communications Act.

After over seven years of inter-institutional dialogue between the FCC and the courts regarding how the FCC could enforce net neutrality, in *US Telecom* (2016), a DC Circuit Court found that the FCC had appropriately reclassified broadband as a common carriage service, and developed a set of net neutrality rules that could be considered an exercise of its legitimate authority.

A more in-depth description of each case is available through the annex. For the narrow purposes of this submission it is enough to state that the FCC and the judiciary have had an extensive dialogue regarding the extent of the FCC's powers, and how the FCC can exercise them. The depth of the analysis of the subject matter included in these judicial rulings provides guarantees that the FCC has not acted in a manner that can be deemed arbitrary. The arguments offered by the judiciary, particularly those expressed in support of the Open Internet Order in the *US Telecom* case, provide further legitimacy to the rules currently in place and therefore, provide further support for keeping them as they stand.

In parts I-III of this submission we established why net neutrality is a necessary aspect of internet openness, how this openness enabled innovation and free speech, and how the rules currently in place protect this openness. In this part, we showed that the process through which these enforceable rules were defined was extremely robust, enabling a vast constellation of arguments to be tested in the public sphere, and ensuring that the FCC Commissioners were

exposed to the best available arguments. This means the rules are extremely legitimate. Given that there is no reason to believe the rules in place were part of a weak or otherwise illegitimate process, if the FCC wants to change the current rules, it needs to provide evidence regarding an external change that renders the rules in place either unuseful or otherwise unworthy. In Part V, we shall explain that the FCC has not provided evidence to support the claim that the Open Internet Order has had negative effects.

Part V - There is no conclusive evidence regarding the effects of the current rules that would merit changing them

Having shown that the process through which the Open Internet Order was adopted was extremely robust, in this part we shall assess the only avenue left for the rules to be repealed and/or replaced: that circumstances have changed or otherwise shown that the rule is not having the intended effects.

In paragraph 109, the FCC claims that "there is evidence that the actions taken by the commission in the Title II order have reduced investments by ISPs."³¹ After observing the available information³², we believe that it is too early to assert that there is a causal link between the implementation of the Open Internet Order (2015) and changes in broadband investment. The person that is being quoted in support of that conclusion does not claim there is a causal link in his publications, and has publicly agreed it is not possible to make such a causal link based on the available information.³³ There are too many variables to account for, and it is not possible to isolate the effects of every other variable in such a short period of time. The evidence presented to date has not sufficiently established even a weak causal claim between the FCC's adoption of the Open Internet Order and investments by ISPs.

Broadband is not a perishable good, and the investments in infrastructure made during one year are exploited in the following years. Broadband has "huge sunk up-front fixed costs".³⁴ Therefore, there is no reason to expect investment rates to be constant. In fact they have varied from year to year, and actually increased during the period between the 2010 Open Internet Order put net neutrality rules in place and the 2014 *Verizon* case that struck them down.³⁵

³¹ Similar claims made in paragraph 45.

³² Interactive graph provided through Tableau (2017) "Broadband and Net Neutrality in the US- Key stats". Available at <https://public.tableau.com/profile/juan.ortiz#/vizhome/KeyStatsUS/Dashboard1> (last accessed 7/13/2017)

³³ "I don't make a causal claim there. Causality is hard. Here's best story. USTelecom broadband data show 2015 was an inflection point." See Twitter of Hal Singer (2017, April 30), available at <https://twitter.com/HalSinger/status/858788661651025920> (Last accessed 7/13/2017)

³⁴ Goldfarb, C., & Resources, S. (2005). Telecommunications Act: Competition, Innovation, and Reform.

³⁵ Interactive graph provided through Tableau (2017) "Broadband and Net Neutrality in the US- Key stats - Interannual". Available at <https://public.tableau.com/profile/juan.ortiz#/vizhome/KeyStatsUS-Interannual/Dashboard1?publish=yes> (last accessed 7/13/2017)

It is also worth mentioning that studies have shown that investment rates can fall during political and electoral cycles. It is important to note that between June 2015 and December 2016, the US navigated an intense electoral period.³⁶ Based on the analysis of data surrounding 248 national elections in 48 countries held between 1980 and 2005, evidence suggests that "during election years, firms reduce investment expenditures by an average of 4.8% relative to non-election years, controlling for growth opportunities and economic conditions".³⁷ Based on the data, the authors claim that "political uncertainty is an important channel through which the political process affects real economic outcomes."³⁸ In the case of the US election, reports from the Wall Street Journal, in March 2016,³⁹ and the Financial Times, in November 2016,⁴⁰ provide evidence of the extent to which there was uncertainty and anxiety regarding the outcome of the 2016 US elections. There are therefore reasons to believe that this uncertainty might have affected the levels of investment by US telecom companies. Given that this electoral period overlaps with the available data regarding investment, it is not possible at this point to isolate the effect of changes in regulation.

Furthermore, figures published by US Telecom⁴¹ have been studied in depth by Free Press⁴², which has concluded that the data published by US Telecom arbitrarily excluded relevant investments from the calculation. According to Free Press, once these investments are considered, the overall investment levels in broadband actually increased during the period following the enactment of the Open Internet Order.

Lastly, it is worth mentioning, as the Court in *US Telecom* does, that ""the Commission found that the virtuous cycle—spurred by the open internet rules—provides an ample counterweight, in that any harmful effects on broadband investment 'are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that [its] core broadband policies will promote.'" It is worth underlining that the court found this argument and the evidence provided

³⁶ See Glenza, J. (2015, June 23). Hillary Clinton on course to win presidential election, poll says. *The Guardian*. Available at <https://www.theguardian.com/us-news/2015/jun/23/hillary-clinton-presidential-election-poll> (last accessed 7/14/2017); and New York Times (Updated 2016, November 8). Latest Election Polls 2016. *New York Times*. Available at

<https://www.nytimes.com/interactive/2016/us/elections/polls.html> (last accessed 7/14/2017)

³⁷ Julio, B., & Yook, Y. (2012). Political Uncertainty and Corporate Investment Cycles. *Journal of Finance*, 67(1), 45-83. Available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2011.01707.x/full> (last accessed 7/13/2017)

³⁸ Ibid

³⁹ Zumbrun, J. (2016, March 10). U.S. Election Turmoil Fuels Economic Uncertainty, WSJ Survey Says. *Wall Street Journal*. New York. Available at <https://www.wsj.com/articles/u-s-election-turmoil-fuels-economic-uncertainty-wsj-survey-says-1457623862> (Last accessed 7/13/2017)

⁴⁰ Samson, A. (2016, November 8) Global markets rocked by US election uncertainty. *Financial Times*. London. Available at <https://www.ft.com/content/cd508eff-c91a-339d-91dc-a15ad9c7afd3> (Last accessed 7/13/2017)

⁴¹ US Telecom (n.d.) Broadband Investment. *US Telecom*. Available at <https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment> (last accessed 7/14/2017)

⁴² Turner, D. (2017) It's Working: How the Internet Access and Online Video Markets Are Thriving in the Title II Era. *Free Press*. Available at <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-ii-era.pdf> (last accessed 7/13/2017)

to it to be reasonable. The FCC, in its current NPRM, in contrast, has failed to provide an analysis of the economic effects over the broader ecosystem, and has chosen to focus on broadband investment. Any attempt to establish the effect of the current rules should provide an analysis of the complete information ecosystem, and not merely that of broadband providers.

On this note, we would like to comment on the FCC's proposal to carry out a cost-benefit analysis (CBA) on the impacts of a change in the rules (paragraph 104). As a matter of principle, the Web Foundation supports any procedure that might provide evidence to support decision-making processes. Given the debate over the accounting procedures relied upon to calculate something as relatively simple as broadband investment, we suggest that steps are taken to ensure the robustness and legitimacy of the results of the CBA.

These should include ensuring that:

- The execution of the CBA is carried out by independent experts (one expert appointed by each FCC Commissioner)
- Each expert is allowed to express a dissenting opinion if necessary
- All the data underlying the analysis is made available to the public in open formats as it is collected (open data and open research standards)
- The report is published in a format open to public comment
- A public presentation is organized no earlier than two weeks after the report's publication, so that the public can ask questions regarding the findings and methodology

To sum up, the NPRM provides underwhelming economic justification for its reconsideration of the Open Internet Order. In it, the FCC cites studies whose authors have publicly dismissed any potential claim of causality between the 2015 Order and investment by ISPs. There are simply too many variables to account for to be able to confidently make the statements included in the NPRM. By demonstrative example, we provide the argument that the presidential election and its consequent impacts on the American economy could explain the disparity in investment levels. However, it is worth noting that other groups have contested the analysis of these investment levels and have suggested that investment has actually increased after the implementation of the Open Internet Order.

Therefore, we believe there are no reasons for the rules currently in place to be questioned. Net neutrality rules are necessary, and the rules currently in place are useful, legitimate, and there is no evidence of them having caused any negative effect.

Conclusion

The internet has become a key element of the everyday lives of millions of Americans. It is part of the way people work, fall in love, learn, engage with their community, and enjoy themselves. The internet only managed to gain this privileged space in people's lives because it was — and still is — a system open to innovation. Any action taken to weaken the Open Internet Order risks ending the virtuous circle of innovation that has made the internet what it is today. We therefore

recommend the FCC keep the current classification of broadband as a Title II service, and keep the current Open Internet Order in place. Any adjustment at this point could weaken the FCC's capacity to enforce net neutrality and, with it, the FCC's capacity to protect the open internet.

Annex

A more detailed account of the key precedents.

Nat.Cable & Telecommunications Association v. Brand X Internet Services(2005)⁴³

In this case *Brand X*, an ISP, argued that internet services should be classified as a telecommunications services, following the Telecommunications Act. The company argued the Chevron doctrine of deference should not be applied, and that the Court should repeal the FCC's classification of broadband as an information service. The majority (6-3) decided in favor of applying the *Chevron deference doctrine*, and upheld the Title I classification.

The *Supreme Court originally developed the Chevron doctrine* in 1984, when ruling a case presented by *Chevron*⁴⁴. The ruling established a *two-step test*:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute...Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

In *Brand X* the Supreme Court therefore established that the FCC was best prepared to interpret Congress' intent regarding how to best regulate broadband. In *Verizon*, below, we will show that this deference was not absolute, and that the judiciary was prepared to strike regulations down when it found them unreasonable.

Comcast v. FCC (2010)

Following a series of alleged throttling of P2P applications by Comcast Corp., the FCC ordered Comcast to desist from such practices. Comcast took the FCC to court, claiming that the FCC had no power to cast such an order. The Court ruled that the FCC had failed to point out an appropriate source for such authority.

⁴³ *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005)

⁴⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

The Court said:

The Commission may exercise this “ancillary” authority only if it demonstrates that its action—here barring Comcast from interfering with its customers’ use of peer-to-peer networking applications—is “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.” (...) The Commission has failed to make that showing⁴⁵

This case determined that the FCC had to develop a more complex framework in its orders if it intended to exercise its authority over broadband providers. Later that year, the FCC developed the broader *Open Internet Order* (2010).

Verizon v FCC (2014)⁴⁶

In this case Verizon took the FCC to court over the 2010 *Open Internet Order* through which the FCC had established net neutrality regulations under the provision of Title I. Verizon considered the FCC was overstepping its powers.

The DC Circuit Court i) applied the deference doctrine adopted by the Supreme Court in *Brand X* regarding the classification of broadband; ii) considered that the FCC had provided "substantial evidence" in support for the need of net neutrality rules; but iii) considered that the Communications Act required that the obligations the FCC imposed on broadband providers were consistent with the way they were being classified. In summary, the Court was telling the FCC that if it wanted to impose net neutrality obligations on broadband (for which the Court found compelling evidence), it first had to classify broadband as a Title II service:

"The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for the specific rules at issue here—that they will preserve and facilitate the “virtuous circle” of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence. That said, even though the Commission has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se

⁴⁵ Comcast Corp. v. FCC, 600 F.3d 642. United States Court of Appeals, District of Columbia Circuit.[https://www.cadc.uscourts.gov/internet/opinions.nsf/EA10373FA9C20DEA85257807005BD63F/\\$file/08-1291-1238302.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/EA10373FA9C20DEA85257807005BD63F/$file/08-1291-1238302.pdf)

⁴⁶ *Verizon v. FCC* 740 f.3d 623 (d.c. cir. 2014). Available in format open to comments here:
<https://goo.gl/6qWfQY> (Last accessed 10/7/2017)

common carrier obligations, we vacate those portions of the Open Internet Order."⁴⁷

At this point, therefore, the Judiciary had already agreed that the FCC had "adequately supported and explained its conclusion that, absent rules such as those set forth in the [2010 Open Internet Order], broadband providers represent[ed] a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."⁴⁸ The only point raised by the Court is the overarching framework within which such rules were being placed. For net neutrality to be enforceable, the court suggesting, the FCC needs to classify broadband under Title II. That is precisely what the FCC did with the Open Internet Order in early 2015. In US Telecom, below, we explore how the court found that the framework was in line with the law, allowing the FCC to finally enforce the net neutrality rules that the courts agreed were necessary.

United States Telecom Ass'n v. FCC (2016)⁴⁹

In this case US Telecom Association took the FCC to court over the 2015 *Open Internet Order*. Through the Open Internet Order (2015) the FCC sought to develop enforceable net neutrality rules, and reclassified broadband services under Title II, as suggested by the district Court in *Verizon*. The Telecom Association, amongst other grievances, claimed that the decision had been arbitrary, and that the FCC had no power to reclassify broadband.

The Court made an extensive review of Verizon precedent, and the rules brought before it in this case, and concluded that the rules were in line with the law, the precedents, and the evidence. The FCC had made a reclassification that was in line with the powers deferred onto it by Congress, and the rules were not found to be unreasonable or arbitrary.

⁴⁷ Ibid, pg 4

⁴⁸ Ibid

⁴⁹ *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016) (USTelecom)