

Hearing of the United States House of Representatives' Committee on Energy and Commerce Subcommittee on Communications and Technology

“Preserving An Open Internet For Consumers, Small Businesses, And Free Speech”

February 7, 2019

Statement of Tom Wheeler

Mr. Chairman, Ranking Member Latta, Members of the Committee, it is a privilege to once again appear before you. I've lost count of how many times I have appeared before this committee over the years, first as an advocate for the cable and wireless industries, and then as Chairman of the Federal Communications Commission (FCC). Today I appear before you as an American citizen representing only myself and almost 40 years of experience at the intersection of new technology and public policy.

I have represented the industries whose activities the Open Internet Order regulates. As Chairman, I sought to advance the public interest, under the Communications Act adopted by Congress, by ensuring that American consumers and businesses would have access to a fast, fair and open internet. I respect the challenge the digital era presents to the members of this committee.

The early digital era's "permissionless innovation" was made possible by an absence of gatekeepers. The policy challenge today is the rise of digital gatekeepers – both telecommunications networks and the information services that ride on them. Today, however, we focus on the behavior of the networks as the *sine qua non* of the 21st century.

Throughout history the charting of new territory has resulted in the pioneer making the early rules for the new territory. When the great network revolutions of the mid-19th century – the railroad and telegraph – spawned the industrial revolution, the rules that had governed agrarian mercantilism became insufficient. In the absence of relevant behavioral standards, those who controlled the industrial activities made rules that not surprisingly benefitted themselves. Ultimately, the representatives of the people stepped in to develop a set of policies that served the common good, not just the interests of industry.

In 1860 Congress passed the Pacific Telegraph Act. A hallmark of that act was the requirement that the telegraph company carry all traffic without preference. Section 3 of that act provided, “That messages received from any individual, company, or corporation, or from any telegraph lines connecting with this line at either of its termini, shall be impartially transmitted in the order of their reception, excepting that the dispatches of the government shall have priority.”¹

This was a seminal moment. At the dawn of the electronic communication era, the Congress recognized that the party controlling the conduit should not be allowed to discriminate in access to that conduit. It was the Original Net Neutrality.

In 1887 the Congress created the Interstate Commerce Commission (ICC), the first federal regulatory agency. Its job was to oversee the dominant network of the time: the railroads. Early efforts by the ICC, like early open internet efforts, were often false starts. In the early 20th century, thanks to the leadership of the Republican Roosevelt, the powers of the ICC were redefined to include the power to determine whether the actions of the carriers were just and reasonable. The railroads' response was an early iteration of what we would see when the FCC imposed similar just and reasonable standards on the dominant network of the 21st century. The railroads launched what a Roosevelt biographer described as, "a sweeping propaganda campaign to turn the country against regulation." The network giants of the time made the same kind of arguments we hear today, including that "disaster would follow if the government 'should meddle' in the complex business of network decisions." As they have today, the dominant networks of the time argued that "laws already on the books were sufficient to deal with any difficulties."²

When the telephone came along, these two network oversight concepts were applied to it: non-discriminatory access to the network, and the requirement to act in a just and reasonable manner. It was the existence of those requirements that allowed the internet to come into existence. We all remember the screeching modems that would connect computers to the telephone line. Because the phone carriers were common carriers, they were required to allow such access and were prohibited from unreasonably discriminating as to what was carried. The early iterations of the internet, such as ARPANET-connected university computers, and later consumer services such as AOL, relied upon the ubiquitous and open telephone network. Absent that open and non-discriminatory access, it is questionable if and how the internet might have developed.

Let's recognize that point: had the telecommunications networks of the early internet era been able to exercise the powers now given to ISPs by the current FCC they would have been able to ban modems, except the ones they owned. They would have been able to determine which computers could talk to other computers. We hear much about how "permissionless innovation" created the current cornucopia of the internet – had it not been for the telephone network being a common carrier, there would have been no permissionless innovation in the early internet as terms and conditions would have been set by the network.

The 2015 Open Internet Order of the FCC was simply the extension of these proven regulatory concepts to the most important network of the 21st century. In fact, while we can trace these concepts to the network revolutions of the 19th century, their history is even more seminal. Over 600 years ago, as civilization was struggling to escape the Dark Ages and feudalism, English common law developed to protect the people from the powerful. One of its concepts was the "duty to deal." A traveler could not be denied or discriminated against in using the ferry crossing the river, for instance. Nor could that traveler be denied shelter and food at the tavern along the roadway. That duty to deal concept found continued life in the Pacific Telegraph Act, the Interstate Commerce Act, the Communications Act, and the 2015 Open Internet Order.

Last week the U.S. Court of Appeals for the District of Columbia heard oral arguments in the lawsuit challenging the 2017 decision of the Trump FCC to repeal the Open Internet Order's

embodiment of the traditions of common law and congressional precedent. This was, of course, the same court that twice struck down FCC attempts at securing those principles, before ultimately upholding the 2015 Open Internet Order - twice. Those who opposed the openness and non-discrimination of the 2015 Order lost their appeal in both the initial panel's decision as well as in the *en banc* review. When the U.S. Supreme Court refused to grant *certiorari* on the companies' appeal the lower court's decision was confirmed.

The policies articulated by the FCC prior to 2017, and crystalized in the 2015 Order, are backbone concepts for the oversight of networks. They reflect the accumulated wisdom of both Anglo-Saxon common law and congressional deliberations. Any further policy considerations should use the 2015 concepts as the starting point to securing the public's critical interest in a free and open internet.

One of the ways in which the Trump FCC has attempted to cloud the issue is to conflate the activities of a network with the content carried on that network. Since the Telecommunications Act of 1996 created a classification of "information services" as opposed to "telecommunications services," the networks have been trying to shoehorn themselves into the more deregulatory "information services" classification. The Trump FCC went along. Just because an ISP carries content, however, does not mean it should be regulated as though it is a content company. That's like saying that the road leading to Macy's should be regulated like Macy's. To paraphrase Justice Scalia on this topic, the delivery of a pizza is a different activity than the making of a pizza and the two should not be conflated.

The consequence of such a misapplication of the concepts of how a digital network functions was the Trump FCC's decision to walk away from responsibility for the most important network of the 21st century and pass that responsibility to the Federal Trade Commission (FTC). This, of course, has been a long-desired goal of the telecommunications carriers. In September 2013 a *Washington Post* article headlined, "Here's how the telecom industry plans to defang their regulators." The article reported, "telecom giants including Verizon, AT&T and Comcast have launched multiple efforts to shift regulation of their broadband businesses to other agencies that don't have nearly as much power as the FCC."³

The Trump FCC did not simply eliminate an open internet, they also delivered on the carriers' long-sought wish by renouncing its jurisdiction and turning it over to the FTC. Now, the FTC is a fine agency, but, as Chairman Simons repeatedly has testified, it lacks the resources and rulemaking authority, and it also lacks the engineering expertise required for dealing with internet service providers. And remember, the idea of Net Neutrality is not just based on antitrust or marketplace behavior, it preserves diversity of speech and freedom of speech, important values that are beyond the substantive reach of the FTC. Moreover, as was the goal of the companies all along, there is the risk that America's essential networks get lost amidst the FTC's crowded responsibility for all the activities occurring across the entire economy.

Because of the decision by the Trump FCC to walk away from its responsibilities, when California firefighters couldn't use their mobile phones during the Mendocino Complex fire, they could not turn to the FCC for help. When researchers discovered that mobile carriers were throttling streaming services – something the carriers had promised not to do – the agency that should be responsible for the nation's networks did nothing. And when it was revealed that mobile carriers were selling their customers' GPS location information to third parties who then sold the information to bounty hunters, where is the cop on the beat?

Let me be clear, the operators of America's digital networks are not bad actors – but they preside over the most powerful and pervasive platform in the history of the planet. Occupying such a crucial position, they cannot simply be allowed to make rules to serve their own interests. Similarly, the agency Congress has appointed to oversee the nation's networks cannot wash its hands and be subsumed into a new digital industrial complex. There was a realization with the telegraph, the railroad, and the telephone networks that these networks possessed the economic incentive and technical capability to engage in abusive behavior. That reality is as true in today's internet revolution as it was in the industrial revolution...or for that matter the feudal era.

The public interest that is inherent in open and non-discriminatory networks has been well established for over half a millennium. The Congress of the United States has historically protected the public interest over the self-interest of the powerful. The 2015 Open internet Order attempted to carry forward that mandate, based on existing statutory authority. To walk away from that responsibility, regardless of the rationale concocted as justification, is to walk away from what is not only a basic responsibility to the consumers of America and the function of a competitive and innovative marketplace, but also to turn your back on the lessons of history.

¹ [http://cpr.org/Museum/Pacific Telegraph Act 1860.html](http://cpr.org/Museum/Pacific_Telegraph_Act_1860.html)

² Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism*, Simon & Schuster, 2013, p. 448.

³ https://www.washingtonpost.com/news/the-switch/wp/2013/09/12/heres-how-the-telecom-industry-plans-to-defang-their-regulators/?utm_term=.3e90f4486b49