How to Regulate the Internet

By Kathleen Q. Abernathy

Note from the Editor:

This article traces the history of the FCC's approach to regulating the internet and favorably reports on the changes the new FCC Chairman Ajit Pai is making.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Reed Hastings, *Internet Tolls And The Case For Strong Net Neutrality*, Netflix Media Center (Mar. 20, 2014), https://media.netflix.com/en/company-blog/internet-tolls-and-the-case-for-strong-net-neutrality.

• Willmary Escoto, *Net Neutrality: The Social Justice Issue of Our Time*, Public Knowledge (July 19, 2017), https://www.publicknowledge.org/news-blog/blogs/net-neutrality-the-social-justice-issue-of-our-time.

• *Net Neutrality: What You Need to Know Now*, Save the Internet, https://www.savetheinternet.com/net-neutrality-what-you-need-know-now.

• Todd Shields, *Microsoft, Google Back Strong Net Neutrality Rules*, Bloomberg Politics (July 17, 2017), https://www.bloomberg.com/news/articles/2017-07-17/microsoft-google-back-strong-net-neutrality-on-broadband-firms.

About the Author:

Kathleen Q. Abernathy recently returned to Wilkinson Barker Knauer LLP as special counsel. She was previously elected to the Board of Directors of Frontier Communications as an independent director in 2006 following her term as a Commissioner at the Federal Communications Commission from 2001 to 2005. In 2010 she joined the company as Chief Legal Officer and Executive Vice President, Regulatory and Governmental Affairs. Prior to her term as an FCC Commissioner, Ms. Abernathy worked for a number of different telecommunications companies and law firms. She has received numerous awards in recognition of her professional accomplishments and has taught as an adjunct professor at Georgetown University Law Center and Catholic University's Columbus School of Law. She received her B.S. from Marquette University and her J.D. from Catholic University's Columbus School of Law.

For more than two decades, the internet has flourished in an environment that was, until recently, essentially devoid of heavy-handed regulatory oversight. The Federal Communications Commission (the Commission or FCC) primarily focused its efforts on ensuring that consumers had access to broadband infrastructure and gingerly asserted regulatory oversight to ensure that internet service providers (ISPs) did not unlawfully discriminate or block lawful content. Notably, the FCC's legal authority to regulate the internet remained somewhat questionable given that its statutory authority was last updated in 1996, prior to the growth of broadband. But as the internet flourished, as companies developed business models dependent on free access to internet infrastructure, as smartphones and tablets replaced traditional stand-alone computers, and as the public embraced life-changing broadband applications, government regulators, public interest groups, elected officials, and some corporations decided the internet marketplace required more direct government oversight and should be regulated more comprehensively.

In the early days of the debate over the extent to which the internet should be regulated, internet start-up companies such as Google and Netflix, whose businesses were built around free access to ISP infrastructure, sought regulatory protection to avoid potential financial obligations to contribute to network costs. As more and more companies thrived in the internet space and as ISPs looked for ways to recover broadband infrastructure investments—other than through direct charges to their end user customers—the net neutrality debate was launched. While there is little disagreement regarding the importance of a free and open internet, there is extensive disagreement regarding the proper scope and scale of "network neutrality" laws and principles and the FCC's legal authority to regulate the internet. Over the past ten years, the debate has intensified, and lawyers and courts have spent countless hours dissecting the scope of the FCC's statutory authority.

A tipping point occurred in 2015, when the FCC, on a party-line vote, dramatically changed course through a *Report and Order on Remand, Declaratory Ruling, and Order* (2015 Open Internet Order).[1] In the 2015 Open Internet Order, the FCC reclassified broadband as a common carrier service regulated under Title II of the Communications Act of 1934 (the "1934 Act"), instead of continuing to rely on the Supreme Court-approved Title I regime that had been in place since the dawn of the broadband era.[2] At the time, then-FCC Commissioner Ajit Pai called the Order an "unprecedented attempt to replace [internet] freedom with government control."[3] Following President Trump's appointment of Pai as FCC Chairman, the FCC swiftly initiated a new proceeding called "Restoring Internet Freedom," and it once again sought comment on the FCC's authority to regulate the

1 *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (2015 Open Internet Order).

2 *Id.*

3 *Id.* (dissenting statement of Commissioner Ajit Pai).

internet. This article explores the ongoing debate over internet freedom and the current political gridlock.

I. The Long and Winding Road of Internet Freedom

A. The Two-Decade Debate Over the Classification of Broadband

Much of the legal debate that has occupied the courts arises from the lack of any explicit, clearly articulated FCC authority in the 1934 Act to regulate the internet. There is specific statutory authority for the FCC to regulate common carrier "telecommunications services" under Title II of the Act. And the agency has additional authority to impose regulation on "information services" under Title I of the Act, but the scope of that authority is unclear. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[4] The Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."[5] And "telecommunications" is defined by the Act as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[6]

Section 706 of the Telecommunications Act of 1996 was inserted by Congress under Title I and directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[7] Since 1996, a debate has raged as to whether this provision gives the FCC specific authority on its own, or merely tells the FCC to exercise authority granted by other statutory provisions. Title II of the 1934 Act, in contrast, undisputedly gives the Commission the authority to regulate entities classified as common carriers. It contains hundreds of pages of regulation with an emphasis on price regulation and, among other things, specifically prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."[8] At various times over the course of the Open Internet debate, parties have lined up either in the Title I camp or the Title II camp, with Title I proponents generally urging light-touch regulatory oversight and Title II proponents embracing a more heavy-handed common carrier form of regulation.

In 2000, the Ninth Circuit ruled in *AT&T Corp. v. City of Portland* that cable modem service is a "telecommunications service" under the Act.[9] Two years later, the FCC issued a *Declaratory Ruling and Notice of Proposed Rulemaking* (2002 Cable Modem Order) reclassifying cable modem service as a Title I "interstate information service."[10] And in July 2005, the Supreme Court upheld the classification of cable modem service as an "interstate information service" after it was challenged in *NCTA v. Brand X*.[11] In a 6-3 decision, the Court found that the FCC's interpretation of the meaning of "telecommunications service" under the Act was entitled to *Chevron* deference.[12] Following that decision, in August 2005, the FCC adopted a *Report and Order and Notice of Proposed Rulemaking* similarly classifying wireline broadband service as a Title I "information service."[13] And in 2007, the FCC issued a *Declaratory Ruling* classifying wireless broadband, like cable modem service and wireline broadband, as an "information service."[14]

Following the D.C. Circuit's decision in *Comcast v. FCC*, which held that the FCC did not have Title I ancillary jurisdiction over Comcast under the 1934 Act,[15] the FCC, led at that time by Chairman Julius Genachowski, adopted a *Notice of Inquiry* seeking comment on whether to reclassify broadband from a Title I service to a Title II service.[16] The Commission ultimately rejected this approach and instead adopted a new net neutrality framework that principally relied on Section 706 of the Act, which it implemented in a *Report and Order* adopted in 2010 (2010 Open Internet Order).[17] Although the D.C. Circuit, in *Verizon v. FCC,* ultimately struck down most of the rules adopted in the 2010 Open Internet Order, the decision affirmed that Section 706 did constitute affirmative authority for the FCC to promulgate regulations.[18] Indeed, the court called Sections 706(a) and (b) "independent and overlapping grants of authority that give the Commission the flexibility to encourage deployment of broadband internet access service through a variety of regulatory methods."[19] But because the

4 47 U.S.C. § 153(20).

5 47 U.S.C. § 153(46).

6 47 U.S.C. § 153(43).

7 47 U.S.C. § 1302(a).

8 47 U.S.C. § 202.

9 *See generally* AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

10 *In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802 (2002).

11 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

12 *Id.*

13 *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

14 *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

15 *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

16 *In re Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, 7867 ¶ 2 (2010) ("[W]e seek comment on whether our 'information service' classification of broadband Internet service remains adequate to support effective performance of the Commission's responsibilities.").

17 *See In re Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17906 (2010), *affirmed in part and vacated in part by, remanded by* Verizon v. FCC, 740 F.3d 623 (2014) (2010 Open Internet Order).

18 740 F.3d at 628.

19 *Id.* at 637.

Commission had classified broadband as an information service exempt from Title II common carrier regulation, the no-blocking and non-discrimination rules were found to be unlawful.

B. The Origin of the Internet Freedoms

Law professor Tim Wu coined the term "network neutrality" in a 2003 paper, "Network Neutrality, Broadband Discrimination."[20] Wu argued for the protection of online traffic through both general anti-discrimination regulations and self-policing by providers.[21] Relying on the FCC's decisions in *Hush-A-Phone Corp. v. United States*[22] and *Use of the Carterfone Device in Message Toll Telephone Service*,[23] he pointed out that the "principle behind a network anti-discrimination regime is to give users the right to use non-harmful network attachments or applications, and give innovators the corresponding freedom to supply them."[24] He argued, however, that the threat of anti-discrimination regulation alone can "force broadband operators to consider whether their restrictions are in their long-term best interests."[25] Wu ultimately suggested that an anti-discrimination principle, combined with self-policing, would be a sufficient proposal for solving the issue of network neutrality.[26]

In 2004, then-FCC Chairman Michael Powell articulated four principles of "Internet Freedoms" in a speech delivered at the University of Colorado.[27] Before articulating these principles, Powell acknowledged arguments made by Professors Phil Weiser and Joe Farrell that network owners may be incentivized to restrict some uses of their networks.[28] In order to address this potential problem, while also "giv[ing] the private sector a clear road map by which it can avoid future regulation on this issue" Powell announced the four freedoms network owners should preserve for consumers when developing their business practices: the freedom to access content, the freedom to use applications, the freedom to attach personal devices, and the freedom to obtain service plan information.[29] These principles served as precursors to the Commission's regulatory efforts.

In August 2005, the FCC issued a non-binding three-page *Internet Policy Statement*, generally adopting Powell's four freedoms.[30] That document stated that consumers were entitled to access all legal content, to use the applications and services of their choice, to connect legal devices to the network as long as they do not cause harm, and to have competition among network, application, service, and content providers.[31] The FCC emphasized that the principles were to be incorporated into "ongoing policymaking activities" while stressing that it was "not adopting rules."[32] In 2008, however, the FCC issued a *Memorandum Opinion and Order* attempting to use its ancillary Title I authority to penalize Comcast for violating federal policy by allegedly impeding and blocking certain traffic over Comcast's network.[33] The *Memorandum Opinion and Order* would have required Comcast to disclose certain network management practices, submit a compliance plan to stop these practices by the end of the year, and disclose to the FCC and the public future network management practices.[34] In April 2010, the FCC's *Memorandum Opinion and Order* was vacated by the D.C. Circuit in *Comcast v. FCC* on the grounds that the agency had not cited an appropriate basis for its exercise of ancillary authority to impose rules on a non-common carrier.[35]

Several months later, in the 2010 Open Internet Order, the FCC attempted to put more legal force behind, and expand, the internet principles. The Commission barred fixed broadband providers from blocking or unreasonably discriminating;[36] barred mobile broadband providers from blocking certain kinds of traffic; and adopted reporting and transparency requirements for fixed and mobile providers, once again declining to deem broadband a Title II common carrier service.[37] In *Verizon v. FCC*, however, the D.C. Circuit struck down the majority of the 2010 Open Internet Order, finding that the anti-discrimination and anti-blocking provisions impermissibly imposed Title II common carriage obligations on Title I non-common carriage information

20 Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. on Telecomm. & High Tech. L. 141 (2003).

21 *See id*. at 144, 167-68.

22 Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956).

23 Use of the Carterfone Device in Message Toll Tel. Serv., 31 F.C.C.2d 420 (1968).

24 Wu, *supra* note 20, at 142-43.

25 *Id*. at 157.

26 *Id*. at 167-68.

27 Michael Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks at the University of Colorado School of Law (Feb. 8, 2004), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf. The author was Commissioner at the FCC at this time and supported the approach proposed by FCC Chairman Powell.

28 *Id*. at 4.

29 *Id*. at 5.

30 *In re 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*; Policy Statement, 20 FCC Rcd 14986 (2005).

31 *Id*. at 14987-88 ¶ 4.

32 *Id*. at 14988 ¶ 5 & n.15.

33 *In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

34 *Id.*

35 *See generally* 600 F.3d 642.

36 2010 Open Internet Order at 17906.

37 *Id.*

services.[38] The transparency rules, which did not impose common carrier obligations, were upheld by the court.

C. The Saga Continues: The 2015 Open Internet Order

In May 2014, following the decision in *Verizon v. FCC*, the Commission launched a new rulemaking on "Protecting and Promoting the Open Internet."[39] Then-FCC Chairman Tom Wheeler proclaimed that he would "not allow the national asset of an Open Internet to be compromised."[40] Following a notice and comment period, during which the rallying cry of "net neutrality" replaced popular concerns about crime, health care, and jobs, four million Americans submitted comments to the FCC.[41] The end product was the 2015 Open Internet Order that prohibited blocking, throttling, and paid prioritization by ISPs.[42] The FCC also enhanced the 2010 Open Internet Order's transparency requirements[43] and adopted a vague case-by-case "general conduct" standard prohibiting broadband providers from "unreasonably interfer[ing]" with user and edge provider activity. Finally, the Commission reclassified broadband internet access as a telecommunications service under Title II of the 1934 Act.[44]

The 2015 Open Internet Order has been criticized for many reasons, including its legal reliance on outdated statutory authority and the lack of a cost-benefit analysis. The primary flaw of the Order is the FCC's conclusion that a legal framework created for a price-regulated monopoly telephone service provider can be repurposed to address potential problems in the internet space. Secondary flaws include its failure to take into account the economic burdens imposed by the new rules, the assumption of a market failure, and the fact that it was designed to fix purely hypothetical problems.

Since the Clinton era, agencies have been directed to "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify."[45] In other words, agencies should not impose unnecessary regulatory costs that greatly outweigh any potential benefits. The 2015 Open Internet Order, however, failed to consider potential costs and burdens; the FCC's chief economist at the time the order was written, Tim Brennan, called it "an economics-free zone."[46] Brennan also acknowledged that "the agency failed to conduct the cost-benefit analysis the Supreme Court requires for regulatory agencies to justify their rules."[47] The costs of the 2015 Open Internet Order are now apparent. Between 2011 and 2015, just the threat of reclassification of broadband internet access as a Title II common carrier service created a disincentive to investment of nearly $30 to 40 billion annually.[48] Following the reclassification under Title II in 2015, capital expenditures from the nation's twelve largest ISPs alone fell 5.6 percent, or $3.6 billion.[49]

In *USTelecom v. FCC*, the D.C. Circuit upheld the 2015 Open Internet Order,[50] finding that the FCC's interpretation of the 1934 Act was entitled to deference, whether or not the court agreed with its conclusions. The court declined to rehear *USTelecom* en banc in May 2017.[51]

II. Changes at the FCC

The political shift that accompanied the election of President Trump resulted in the selection of then-Commissioner Ajit Pai as the new FCC Chairman.[52] At the end of April 2017, Chairman Pai vowed to "reverse the mistake of Title II and return to the light-touch regulatory framework" that existed during the Clinton and Bush administrations, and for most of President Obama's term in office.[53] He subsequently released a draft *Notice of Proposed Rulemaking* (2017 NPRM) in a newly opened "Restoring Internet Freedom" docket. At the May 2017 open meeting, the FCC adopted a slightly modified version of the 2017 NPRM on a 2-1 party line vote.[54] The item proposes to reclassify broadband from a Title II telecommunications service to a Title I information service and eliminate the vague "general conduct standard." It also seeks comment on how to approach the existing bright line

38 *Verizon*, 740 F.3d 623.

39 *In re Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).

40 *Id.* (statement of Chairman Tom Wheeler).

41 Soraya Nadia McDonald, *John Oliver's net neutrality rant may have caused FCC site crash*, Washington Post (June 4, 2014) https://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash/?utm_term=.2eacf62c9a43; *see also* 2015 Open Internet Order.

42 *See* 2015 Open Internet Order.

43 *Id.*

44 *Id.*

45 Executive Order 12866 (Sept. 30, 1993), https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf.

46 L. Gordon Crovitz, *'Economics-Free' Obamanet*, Wall Street Journal (Jan. 31, 2016), https://www.wsj.com/articles/economics-free-obamanet-1454282427.

47 *Id.*

48 *Id.* (citing George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, at 2, http://www.phoenixcenter.org/perspectives/Perspective17-02Final.pdf).

49 2017 NPRM at ¶ 45 (citing Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2016), https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era).

50 United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 1541517 (D.C. Cir. May 1, 2017).

51 *Id.*

52 Mike Snider, *FCC's New Chairman No Fan of Net Neutrality*, USA Today (Jan. 23, 2017) https://www.usatoday.com/story/tech/news/2017/01/23/new-fcc-chairman-ajit-pai-no-net-neutrality-fan/96967372/.

53 FCC Chairman Ajit Pai, The Future of Internet Freedom, Remarks at the Newseum, Washington, D.C. (Apr. 26, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344590A1.pdf.

54 2017 NPRM.

rules banning blocking, throttling, and paid prioritization, and the transparency rule.[55]

Reactions of elected officials and scholars to the 2017 NPRM have broken down along party lines. Senators such as Kamala Harris of California have posted forms on their websites to enable visitors to submit pro-Title II comments to the FCC.[56] Some public interest organizations have also loudly voiced opposition. For example, Free Press published a blog post attacking Chairman Pai for using "lobbyists[']" data on broadband investment, including multiple charts and linking to a previously published study to argue that capital expenditure investment in "internet access" has thrived under the Title II classification.[57] Others, such as Wisconsin Senator Ron Johnson, USTelecom, and Oracle applauded the Chairman's efforts to step away from heavy-handed, burdensome regulation. The general public has also engaged; comedian John Oliver, who helped drive public interest prior to the 2015 decision, commented on the 2017 NPRM, stating "net neutrality is in trouble" and encouraging his viewers to "take the matter into [their] own hands."[58] Since the release of the draft 2017 NPRM, the Commission has received almost 5 million comments from the public. In response to the criticism, Chairman Pai has stated that the Commission will "rely not on hyperbolic statements about 'the end of the Internet as we know it' and 140-character commentary, but on the data."[59]

The 2017 NPRM proposes to return to the classification of broadband service as a Title I information service[60] as opposed to a Title II common carrier service. Although Title I statutory authority is a catch-all section of the 1934 Act, it previously sufficed to support a framework that both encouraged investment and protected consumers. As discussed above, Title II regulation, even for companies historically categorized as common carriers, is an outdated and cumbersome regulatory framework.

For almost twenty years, the internet has flourished under the successful bipartisan framework adopted in the Telecommunications Act of 1996,[61] a framework that enables the government to lightly manage the internet. Pursuant to Title I regulation, ISPs have invested more than $1.5 trillion in the internet ecosystem.[62] In that time, the internet has become intertwined in every part of our daily lives as a result of the government's willingness to step back from heavy-handed regulation. The Title I light-touch approach also allows for regulatory flexibility as new technologies, content, and applications are introduced into the internet ecosystem.

III. The Future of Net Neutrality

Congressional action may be the only permanent solution to the issue of "internet freedom" because the 1934 Act is an outdated tool incapable of addressing the regulatory challenges of 2017 and beyond. Of course, bipartisan legislation has been in short supply lately, and Congress is focused on numerous other issues. In the meantime, despite conflicting regulatory approaches, we have the benefit of living in a country that embraces innovation and competition, and so the internet is alive and well. Although misguided regulation can deter investment, drive up costs, and be used to advantage some business models over others, markets ultimately tend to respond to consumer demands and deliver products and services valued by customers.

55 *See id.*

56 *See* Kamala Harris, *Submit an Official Comment to the FCC*, http://go.kamalaharris.org/page/s/net-neutrality?source=em170522-nn-full (last visited July 10, 2017).

57 Dana Floberg, *FCC Chairman Pai Doesn't Know How to Measure Investment*, Free Press (May 24, 2017), https://www.freepress.net/blog/2017/05/24/fcc-chairman-pai-doesnt-know-how-measure-investment.

58 Net Neutrality II: Last Week Tonight with John Oliver (HBO), YouTube (May 7, 2017), https://www.youtube.com/watch?v=92vuuZt7wak.

59 2017 NPRM (statement of Chairman Ajit Pai).

60 *In re Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (May 23, 2017) (2017 NPRM).

61 Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

62 2017 NPRM at ¶ 2 (citing USTelecom, Broadband Investment, Historical Broadband Provider Capex (2017) (data through 2015), https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment).