

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Notice of Proposed Rulemaking “Restoring Internet Freedom”	WC Docket No. 17-108
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Introduction

Mozilla submits these comments in response to the Commission’s May 23rd 2017 Public Notice regarding the appropriate regulatory framework to ensure that broadband access remains open. We welcome this discussion of the appropriate regulatory framework for protecting net neutrality, but fundamentally believe that the proposed actions in this NPRM are counterproductive and will not maintain the internet as a place where all voices are free to be heard.

Mozilla supports the baseline policy framework as established in the 2015 Open Internet Order including rules against blocking, paid prioritization, and discrimination (subject to reasonable network management). We also support the Order’s reclassification of broadband service as a Title II service. Mozilla advises the Commission not to abandon these core protections through this proceeding.

Our comments outline our support for net neutrality and the importance of broadband internet access service remaining classified under Title II, with appropriate forbearances, to ensure that net neutrality and internet openness can be enforced. We will discuss some of the many benefits of an open internet, including free speech, competition, innovation and user choice. It is

striking to compare the plan in this NPRM with some of the positive developments globally, including in India, Europe, and Latin America. The internet is global, and we need it to be protected everywhere to realize its full economic potential; failing to protect it in the United States would be harmful everywhere, but especially for American internet users and businesses. In order to protect the open internet here in the U.S., we need more than hollow promises and wishful thinking - we must have enforceable rules. And net neutrality enforcement under non-Title II theories has been roundly rejected by the courts.

We are also concerned that the NPRM does not demonstrate a need for this rulemaking, raising the likelihood that any policy changes stemming from it are “arbitrary and capricious.” It seems that this is a politically loaded decision made about rules that have not been tested, either in the courts or in the field. User rights, the American economy, and free speech should not be used as political footballs.

Mozilla

Mozilla is deeply invested in creating a trusted online ecosystem both as a browser maker and also as a stakeholder in the broader online ecosystem.

Mozilla develops and distributes the Firefox web browser, adopted by hundreds of millions of individual Internet users around the world. Mozilla is also a foundation working to educate and empower Internet users to be the Web’s makers, not just its consumers. Mozilla is growing, and owns Pocket, a tool that allows users everywhere to access and save the content they want - providing people everywhere tools to find and use quality content on their own terms. Finally, Mozilla is a global community of technologists, thinkers, and builders who work together to promote openness, innovation and opportunity on the Web.

Through our policy and advocacy work, as a corporation, a foundation, and a global community, we focus on advancing key characteristics of the open internet. The success of the internet is owed, in no small part, to the open, shared structure it has been built on. That makes it easy for to create and build new businesses, new content, and new platforms.

The strength of the internet and its economy rests on a number of core building blocks that make up its foundational DNA. When these building blocks are threatened, the overall health and well-being of the Web are put at risk. Openness and neutrality are some of these building blocks, and Mozilla is dedicated to protecting the open and neutral internet.

The open internet

The internet is a powerful tool for the economy and creators. No one owns the internet – we can all create, shape, and benefit from it. And for the future of our society and our economy, we need to keep it that way – open and distributed. This has created an incredible tool and platform that makes all voices free to be heard.

Internet users rely on network providers – telcos and cable companies – for access to the internet. Those providers are in a position to restrict that access for their own business objectives: favoring their own products, blocking sites or brands, or charging different prices (either to users or to content providers) and offering different speeds depending on content type. Net neutrality prohibits network providers from discriminating based on content, so everyone has equal access - whether you are a powerful incumbent or an up and coming disruptive service.

The open and neutral internet relies both on core technological and legal assumptions around how the internet works. Net neutrality is grounded in three technical principles:

- The best efforts principle: Broadband providers should deliver all internet traffic from point to point as efficiently and quickly as possible, regardless of what that traffic is or where it's coming from.
- The end-to-end principle: All points in the network should be able to connect to all other points in the network.
- Permissionless innovation principle: Everyone and anyone should be able to innovate on the internet without seeking permission from anyone, any entity, or other gatekeeper - including broadband providers.

Building on these are three non-technical principles that ensure all voices are free to be heard:

- Content-agnostic, allowing all voices without discrimination based on content, whether MSNBC, Breitbart, or a Facebook Live stream.
- No pay for play, keeping free access to the entire internet and preventing ISPs from creating curated walled gardens. Internet users pay for internet access, and they should have access to the content that they want to see - rather than only the content that has also paid to get to them.
- Disallowing blocking and throttling ensures all voices can be heard. Now, and in the future, the Commission needs to be able to make sure voices can reach their endpoints.

In practice, net neutrality means that ISPs should treat all data on the internet equally, not discriminating or charging differentially by user, content, site, platform, application, type of attached equipment, or means of communication. We strongly believe that all ISPs should be bound to follow and uphold net neutrality.

Taken together, this definition and these principles are critical to ensuring the continued openness of the internet and ensuring the internet exists as a level playing field that enables and supports innovation, competition, and opportunity.

All voices free to be heard: the importance of net neutrality

Net neutrality isn't an abstract issue - it has significant real-world effects. An absence of strong net neutrality protections has in the past resulted in limits on [who can use FaceTime](#)¹ and [how we stream videos](#),² and other [questionable business practices by telecommunication companies](#).³ Returning to a world where ISPs can charge for access to a given site, or charge more for access to competitor's products, is simply bad policy - unless you're an ISP hoping to charge more money for the same services users currently purchase. Content-based or source-based interference has the potential to impact any number of people.

Net neutrality is fundamental to free speech. Without net neutrality, big companies could censor anyone's voice and make it harder to speak up online. Net neutrality has been called the "First Amendment of the internet" - and it is core to ensuring that all voices are free to be heard.

Net neutrality is fundamental to competition. Without net neutrality, big internet service providers can choose which services and content load quickly, and which move at a glacial pace. That means the incumbent companies can afford to buy their way in, while innovative new services are muscled out - or never get started at all.

Net neutrality is fundamental to innovation. Without net neutrality, creators and entrepreneurs could struggle to reach new users. Investment in new ideas could dry up, and the incredibly successful American innovation wave could slow.

Net neutrality is fundamental to user choice. Without net neutrality, ISPs could decide you've watched too many videos in one day, and throttle your Internet speeds. Or simply throttle the service you prefer, while allowing their competitor to reach you quickly. Very simply, some of the plans that have been floated by ISPs and others would limit user choices in a space where there's not a reason to.

All these are basic traits of the internet that have allowed it to become a critical piece of American lives. If we lose net neutrality and go back to an internet dominated by access providers that are walled gardens, we cannot imagine the impact for our society and our economy, nor how much the U.S. might fall behind the rest of the world. In the face of a global movement to secure net neutrality and innovation in technology, it would put American

¹ David Kravets, "Net Neutrality Groups Challenge AT&T FaceTime Blocking," *Wired* (Sep. 18, 2012), at <https://www.wired.com/2012/09/factime-fcc-flap/>.

² Ryan Singel, "MetroPCS 4G Data-Blocking Plans May Violate Net Neutrality," *Wired* (Jan. 7, 2011), at <https://www.wired.com/2011/01/metropcs-net-neutrality/>.

³ Declan McCullagh, "Telco agrees to stop blocking VoIP calls," *CNET* (Mar. 3, 2005), at <https://www.cnet.com/news/telco-agrees-to-stop-blocking-voip-calls/>.

innovators and internet users behind those in Europe, much of Latin America, and India. As of December 2016, [47 countries](#) currently have laws in place to protect Net Neutrality.⁴

Removing enforceable net neutrality rules is a bad idea - even more so when it is in essence “repeal without replace.” Given broad agreement around the norms of net neutrality, there should be no burden placed on ISPs by staying neutral. Treating user rights as a political battle to be won or lost is a terrible idea, and will hurt American companies and internet users.

Need for enforceable net neutrality rules

To make net neutrality a lasting reality, it must be more than just accepted norms and principles. It must be protected with enforceable rules to balance out the last-mile gatekeeper power held today by network operators over both end users and edge providers. And getting enforceability right has proven difficult.

Over the past several years, the D.C. Circuit Court of Appeals has had three separate opportunities to evaluate the Commission’s authority to adopt and enforce net neutrality rules. In the first case, the court found that using Title I and invoking other sections of the Communications Act via ancillary authority was insufficient to support sanctioning Comcast for blocking Bittorrent. Taking another stab at Title I by using sources of direct authority, the Commission’s next action - a full Order adopting net neutrality rules in 2010 - was similarly struck down by the D.C. Circuit in 2014 on authority grounds. Finally, the Commission got it right by adopting the 2015 Order grounded in Title II authority. The same court that had twice struck down Title I actions in no uncertain terms supported the Title II-based action.

In our [2014](#) initial comments, like now, we argued for the importance of enforceable net neutrality to protecting the internet.⁵ In that filing, we also suggested that the Commission use clear authority under Title II of the Communications Act to adopt enforceable protections. As the D.C. Circuit has since held, Title II authority permits the Commission to protect an established policy baseline of standards widely accepted by industry and public interest alike.

Contrary to the rhetoric espoused by some, Title II authority was also designed to be flexible as new information services evolved or were created. The FCC has already committed not to use particular kinds of authority under Title II - like rate regulation and unbundling - for broadband services. To change that decision would require another NPRM and proceeding, one that no policymakers or advocates are calling for.

⁴ See “Global Net Neutrality Coalition” at <https://www.thisisnetneutrality.org/>.

⁵ Comments of Mozilla, *Protecting and Promoting the Open Internet, Framework for Broadband Internet Service*, GN Docket Nos. 14-28, 10-127 (filed July 15, 2014).

Politics is a terrible way to decide the future of the internet

Protecting the internet should not be a political, or partisan, issue. The internet has long served as a forum where all voices are free to be heard - which is critical to any number of things, including democratic process. But that suffers when the internet itself is used in partisan politics. It also damages the Commission's strong process as an independent agency, typically outside the realm of politics. We don't believe that net neutrality, internet access, or the open internet is - or ever should be - a partisan issue. It is a human issue.

The Commission's process is based on the Administrative Procedure Act (APA) which places basic requirements on how notice and comment rulemaking processes (of which the NPRM process is one) can issue legislative rules. That process that was used in the 2010 and 2015 orders. While this proceeding has any number of flaws, it is important to consider the bar for rulemaking action under the APA and court authority to overturn orders.

Rather than being well considered and based on evidence, this current proceeding appears to be based solely on political circumstance and a change in leadership. With the 2015 rules in place for only two years, there's no clear evidence of a negative impact on *anything*. Especially given that ISPs have argued, for years, that they are respecting net neutrality (often due to merger requirements placed on them under antitrust rules rather than net neutrality), it is hard to imagine that the 2015 order has impacted their business practices. [Verizon](#), [AT&T](#), and [Charter](#) have all said that the order does not impact their business activities and investments.⁶ These and other ISPs have said before the order that they weren't violating net neutrality principles, and presumably they are not now. Indeed, investment models in the 2015 order seem to be tracking actual investment. If there are differences in ISP behavior based on the 2015 order, the FCC should specify them; otherwise, there is no basis for the belief that circumstances have changed, let alone that they have changed enough to merit a new rulemaking process.

The baseline requirements for a rule change require that they be supported by evidence. Under the APA, a standard around "arbitrary or capricious" agency actions or conclusions, or those that lack "substantial evidence," may be overturned by the courts. When a rule does not "[articulate a rational connection between the facts found and the conclusions made](#)" the court

⁶ Brian Fung, "Verizon: Actually, strong net neutrality rules won't affect our network investment," *Washington Post* (Dec. 10, 2014), at <https://www.washingtonpost.com/news/the-switch/wp/2014/12/10/verizon-actually-strong-net-neutrality-rules-wont-affect-our-network-investment/>; Dana Floberg, "AT&T's CEO Admitted That the Net Neutrality Rules Haven't Harmed Investment," *Free Press* (May 5, 2017), at <https://freepress.net/blog/2017/05/05/atts-ceo-admitted-net-neutrality-rules-havent-harmed-investment>; Alina Selyukh, "Charter tells FCC net neutrality has not affected its investments," *Reuters* (June 5, 2015), at <http://www.reuters.com/article/us-charter-net-neutrality-idUSKBN0OL1UP20150605>.

may reverse the order under this standard.⁷ This includes the ability to overturn an order if the agency offers an explanation that runs counter to the evidence submitted. In this proceeding, there is insufficient evidence for a rule change, and we are confident that a court would agree.

Conclusion

Net neutrality - that is enforceable and with clear rules for providers - is critical to the future of the internet. Our economy and society depend on it. The 2015 rules protect access to the internet and helped ensure all voices are free to be heard, while preserving the fundamental principles and assumptions on which the internet - and internet policy - have been rooted. To abandon these core assumptions about how the internet works and is regulated would wreak havoc.

The best way to protect net neutrality and the open internet within this legal model is to keep broadband service classified under Title II, with appropriate forbearances. We have not seen significant evidence of any problems with the 2015 rules. Many provisions of Title II have been forborne, a strong regulatory protection against provisions that don't make sense for the internet. There is also no reason to believe that any alternative net neutrality framework under Title I authority would be legally valid, given the number of times that the courts have rejected that theory. The lack of evidence that enforceable net neutrality will harm consumers, online services, or ISPs leads to only one conclusion: this is a political move that will allow ISPs to create artificial scarcity in order to charge more, and charge more parties, for their services. That will drag American entrepreneurs, innovators, and online users behind those in countries who protect the open internet, and there is no way to do so that benefits America as a whole.

Respectfully submitted,

Chris Riley, Director, Public Policy
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⁷ See, e.g., United States Courts for the Ninth Circuit, Standards of Review (rev. May 2012), at http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/IV_Review_AD.html.