



NET NEUTRALITY: DOING THE SAME THING OVER AND OVER AGAIN AND EXPECTING A DIFFERENT RESULT



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**NET NEUTRALITY: DOING THE SAME THING OVER
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RESULT**

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This paper explores the negative implications of reclassifying broadband as a telecommunications service under Title II of the Communications Act. It provides a brief history of the term "net neutrality" and outlines the Federal Government's past attempts to regulate these services. It then delves into the problems with the recently proposed reclassification rule, specifically that it leaves the door open for regulatory expansion, impedes network resilience, reduces the incentive to invest, stifles competition, and disproportionately affects smaller service providers. It closes by explaining the role each of the three branches of government currently has in supporting net neutrality, further substantiating why the proposed rule is not necessary and would serve only to stifle investment and innovation.

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01

INTRODUCTION

After spending years dormant, the maligned issue of the regulatory classification of broadband internet access service (“BIAS”) — often encapsulated in the concept of “net neutrality” — has emerged from its slumber. This time, the net neutrality hydra has grown several new heads, with the Federal Communications Commission (“FCC”) justifying the newly enacted rule on the grounds of public safety, privacy, national security, and more, intending to transform the internet’s current light-touch regulatory system into a far more heavy-handed one. FCC Commissioner Brendan Carr describes the new rule as “freewheeling micromanagement by government bureaucrats.”²

In this article, we explore this issue through the lens of its complex history and explain the negative implications that reclassifying broadband service would have on internet innovation and investment. We also discuss the role each branch of government might play in resolving this issue.

02

NET NEUTRALITY AND THE HISTORY OF BROADBAND CLASSIFICATION

To understand the current Title II debate, it is important to explore how the concept was established and how it has mutated from principles for an open internet to a regula-

tory takeover of an innovative and competitive sector of the economy. Coined in a 2003 law review article, net (or “network”) neutrality refers to the principle of an internet that does not favor certain content or applications over others.³ Although promoting an open internet is a commendable idea, the FCC’s attempts to codify these principles have instead created a cudgel to restrain and depress broadband investment and innovation.

This evolution is rooted in the challenges the FCC has faced in interpreting the Communications Act of 1934, which established the agency and tasked it with regulating communication services to ensure they were accessible to all Americans.⁴ The act, as amended by the Telecommunications Act of 1996, divided communication services into two categories with different regulatory implications: (1) information services, which are covered under Title I of the act and are more loosely regulated and (2) telecommunications services, which are covered under Title II of the act and are subject to heavier regulation.⁵

In the internet’s infancy, the FCC determined that modern access was part of a “telecommunications service,” but the agency chose not to force the heavier Title II regulations onto the nascent technology in the same way it had done with telephone lines.⁶ As the technology continued to develop, however, and as new technologies and use cases emerged, the FCC began to consider how its authority would cover this increasingly complex technology and which regulatory framework was appropriate for the digital age.

In 2015, the agency issued the Open Internet Order (“OIO”), which reclassified BIAS from a Title I Information Service to a common carrier subject to Title II regulations and implemented “clear, bright-line rules.” This included prohibitions on blocking, throttling, and paid prioritization.⁷

Two years later, the Restoring Internet Freedom (“RIF”) order was passed, overturning the 2015 OIO and once again classifying BIAS as a Title I service with lighter-touch regulation. Of note, during this reclassification, net neutrality advocates crafted an absurd and unfounded misinforma-

2 Office of Commissioner Brendan Carr, Carr Opposes President Biden’s Unlawful Plan for Expanding Government Control of the Internet (Apr. 3, 2024), available at <https://docs.fcc.gov/public/attachments/DOC-401639A1.pdf>.

3 Tim Wu, Network Neutrality, *Broadband Discrimination*, Journal of Telecommunications and High Technology Law, Vol. 2, p. 141, 145, 2003.

4 Promoting and Protecting the Open Internet, GN Docket No. 14-28, FCC Rcd, Report and Order on Remand, Declaratory Ruling and Order. Quoting 47 U.S.C. §151.

5 Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat.

6 Promoting and Protecting the Open Internet, GN Docket No. 14-28, FCC Rcd, Report and Order on Remand, Declaratory Ruling and Order. Quoting 47 U.S.C. §151.

7 Congressional Research Service, FCC Adopts Proposed Net Neutrality Rule (Report No. IF12513, Cong Research Serv., Oct. 19, 2023), available at <https://crsreports.congress.gov/product/pdf/IF/IF12513>.

tion campaign, suggesting that the RIF order would destroy society and the internet.⁸ This campaign even led to death threats and a bomb scare/evacuation at the FCC.⁹ But seven years later, society remains essentially as it was, and the internet is faster, less expensive, and more competitive than ever before.

Today, the FCC is once again considering reclassifying BIAS as a telecommunications service under Title II on the grounds that it is necessary to protect privacy, national security, public safety, network resilience, data security, and net neutrality.¹⁰ But heavy regulatory frameworks alone cannot solve these issues (see example in text box). In the section that follows, we explain the many problems with this reclassification.

03

2018 MENDOCINO WILDFIRE: THE FULL PICTURE OF A FREQUENTLY USED CASE FOR NET NEUTRALITY

One of the most frequently cited examples of net neutrality violations that proponents of reclassification use to support their push to classify BIAS as a Title II service is the 2018 Mendocino wildfire incident.¹¹

In this incident, the Santa Clara Fire Department's command-and-control (primary emergency coordination) vehicle was on an unlimited wireless plan in which the first

25GB of data was provided at full speed, and any additional data use beyond the first 25GB was throttled.¹² In coordinating the department's emergency response to the wildfire event, the vehicle quickly reached its full-speed data cap. Although the carrier had a policy of lifting first responders' data caps in emergencies, it was slow to recognize the situation and first asked the fire department to upgrade its plan. Ultimately, the data cap was lifted, but the delay impeded the fire department's efforts.¹³

Advocates of net neutrality point to this example when asserting that BIAS should be subject to increased regulation to uphold public safety and prevent abuses by internet service providers. But this incident is typically cited without the broader context that even if this incident had occurred in the previous, tightly regulated era of the 2015 OIO, it would not have been avoided because of the scope of the OIO regulations (which were focused more on how internet traffic was treated than on agreements regarding data caps and usage policies between service providers and customers).¹⁴ Thus, heavier regulatory frameworks are not a panacea to prevent these types of issues.

04

THE NEWLY PUBLISHED RULE AND ITS PROBLEMS

On April 25, 2024, the FCC finalized a rule for "Safeguarding and Securing the Open Internet."¹⁵ This 512-page behemoth goes far beyond the scope of its predecessor, serving as a heavy-handed grab bag of regulations under the guise of free and open internet.¹⁶ The rule: (1) classifies BIAS as a

8 Joe Concha, CNN headline declares 'end of the Internet as we know it' after net neutrality, The Hill (Dec. 14, 2017), available at <https://thehill.com/homenews/media/364959-cnn-headline-declares-end-of-the-internet-as-we-know-it-after-net-neutrality>.

9 Federal Communications Commission, Dissenting Statement of Commissioner Brendan Carr, Safeguarding and Securing the Open Internet, WC Docket No. 23-320 NPRM (Oct. 19, 2023), available at <https://docs.fcc.gov/public/attachments/FCC-23-83A3.pdf>.

10 Safeguarding and Securing the Open Internet, 24 C.F.R. 900 (Nov. 3, 2023).

11 Daniel Lyons, One More Time the Verizon Santa Clara Fire Dispute Has Nothing to do With Net Neutrality, American Enterprise Institute (Apr. 5, 2023), available at <https://www.aei.org/technology-and-innovation/one-more-time-the-verizon-santa-clara-fire-dispute-has-nothing-to-do-with-net-neutrality>.

12 *Id.*

13 *Id.*

14 *Id.*

15 Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, WC Docket No. 23-320: 17-108.

16 *Id.*

telecommunications service once again and mobile BIAS as a “commercial mobile service,” (2) prohibits blocking, throttling, and paid prioritization, and (3) creates a general conduct standard.¹⁷ The order does attempt to “narrowly tailor” Title II’s oppressive regulation by forbearing rate regulation, tariffing, unbundling, and cost accounting rules, but the devil is in the details, and the order goes beyond bright-line prohibitions of BIAS conduct.¹⁸

A. Leaves the Door Open for Regulatory Expansion

A key issue with the rule is that although the FCC declined to regulate specific technologies, the order does not foreclose future regulatory expansion. This means that any innovation or new technology could be crushed under a regulatory thumb before its benefits could be felt.¹⁹ Consider the example of network slicing — a novel network technique that could be critical for innovations in self-driving cars, telehealth, and utilizing limited spectrum resources.²⁰ Although the FCC recognizes that the technique is an early stage, “key innovation” for 5G networks and concluded that it is not appropriate to make a specific determination to prohibit or restrict network slicing, the agency nonetheless expanded their rule to include network slicing, keeping the door open to future regulation as the technology evolves.²¹

B. Impedes Network Resilience

Another issue with the order is that it overlooks the negative impact Title II would have on BIAS adaptability, which is perfectly illustrated by comparing the United States and Europe’s experience with broadband during the pandemic. One of the order’s prevailing arguments is that the “forced digitization of the COVID-19 pandemic” underscores the need to reclassify broadband as a Title II service.²² Yet in

an earlier speech, FCC Chairwoman Jessica Rosenworcel noted that, “[a]s a Nation, we responded to this crisis in an extraordinary way. We made a historic commitment to broadband for all.”²³ Indeed, she even highlighted the internet’s open design as “creating without permission.”²⁴ U.S. internet thrived during the pandemic as a result of Title I’s light-touch regulatory framework. However, if we look to the European Union’s experience during the pandemic, we see a sharp contrast: Europe was forced to limit speeds and reduce video quality when their networks were unable to meet the surge in connectivity demand, largely because of their highly regulated framework.²⁵ Moreover, the benefits of the light-touch U.S. regulatory framework and the resulting capital investments extended beyond the pandemic. According to a recent study, significantly more U.S. households have access to next-generation networks than European households.²⁶

“**One of the order’s prevailing arguments is that the “forced digitization of the COVID-19 pandemic” underscores the need to reclassify broadband as a Title II service”**

C. Reduces the Incentive to Invest in New Technologies and Networks

The rule also does not take into consideration how reclassifying BIAS as a Title II service might reduce U.S. providers’

17 *Id.*

18 See *Id.*

19 See R Street Reply Comments, GN Docket 23-320 (Jan. 17, 2024), available at <https://www.fcc.gov/ecfs/document/10117156740045/1>.

20 Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, WC Docket No. 23-320: 199.

21 *Id.*

22 *Id.*

23 Federal Communications Commission, FCC Chairwoman Rosenworcel’s Net Neutrality Remarks, (Sept. 25, 2023), available at <https://www.fcc.gov/document/fcc-chairwoman-rosenworcel-s-net-neutrality-remarks>.

24 *Id.*

25 Hadas Gold, Netflix to lower streaming quality in Europe to reduce strain on internet providers, CNN (Mar. 19, 2020), <https://www.cnn.com/2020/03/19/tech/netflix-internet-overload-eu/index.html>.

26 Christopher S. Yoo, U.S. vs. European Broadband Deployment: What Do the Data Say?, Penn Law Center for Technology, Innovation and Competition (June 2014), <https://www.law.upenn.edu/live/files/3352>.

incentive to continue to invest in new technologies and networks.²⁷ Between 2014 and 2018, U.S. providers invested at a rate 31 percent higher than that of Europe.²⁸ This is because the Title I U.S. framework fosters competition for high-speed broadband.²⁹ Yet even though the U.S. investment rate is higher than that of the European Union, it is still estimated to be lower than it would be without the looming threat of increased regulation. One study estimated that “the persistent prospect of Title II policy reduced [broadband] investment by approximately 10% on average between 2011 and 2020,” resulting in a dramatic negative impact on the economy and labor market that potentially cost 81,500 jobs in the information sector and nearly 200,000 jobs overall.³⁰ Overall, the regulatory uncertainty is estimated to have had an impact of \$145 billion on the U.S. gross domestic product.³¹

D. Stifles Competition

Furthermore, reclassifying BIAS as a Title II service would stifle advances — like increased speeds — that arise from Title I’s more permissive, competitive regulatory environment. For instance, since the repeal of the 2015 OIO in 2017, we have seen tremendous advances in speed and competition in the broadband marketplace.³² One projection suggests that by the end of next year, 90 percent of households will have at least one provider offering broadband with speeds of 100 mbps down, and 20 mbps up, and at least one competitive provider offering at least 25 mbps down and 3 mbps up.³³ The same study projects that 74 percent of households will have access to at least two broadband providers offering 100 mbps down and 20 mbps up.³⁴ Without a competitive environment to drive these advances, consumer choice and product quality will suffer.

E. Affects Smaller Service Providers Disproportionately

Finally, the burden of increased regulation would be felt most by smaller providers — the very providers that are critical to closing the digital divide. As the Wireless Internet Service Providers Association notes, “[a] return to a Title II regulatory regime would impose a disproportionate and unfair burden on the small providers that have gained a foothold in the market ... because of the light touch regulatory environment.”³⁵ While larger carriers can bear the regulatory costs and burdens, smaller carriers could be crushed as they struggle to adjust to the new paradigm.

05

THE THREE BRANCHES’ ROLES IN NET NEUTRALITY AND RECLASSIFYING BROADBAND

A. The Executive Branch

Two executive agencies have roles in upholding net neutrality and addressing the reclassification debate: The Federal Trade Commission (“FTC”) and the FCC. Under the current Title I framework, the FTC is empowered to address consumer harms from service providers under Section 5 (deceptive practices) authority. In addition, the Sherman Antitrust Act grants the FTC authority to protect against “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices.”³⁶ In comments submitted to the FTC, arguments affirm that Section 5 authority is

27 Rick Boucher, Let’s Learn from Europe’s Broadband Mistake, CIO (Apr. 24, 2020), <https://www.cio.com/article/193327/lets-learn-from-europes-broadband-mistake.html>.

28 *Id.*

29 *Id.*

30 George S. Ford, Investment in the Virtuous Circle: Theory and Empirics, Phoenix Center Policy Paper Series (Dec. 2023), <https://www.fcc.gov/ecfs/document/1214841324432/2>.

31 *Id.* at 6

32 ACA Connects, New FCC Data Confirms ACA Connects’ Report’s Finding That Broadband Competition is Thriving (June 23, 2022), <https://acaconnects.org/broadband-competition-is-thriving-across-america>.

33 *Id.*

34 See *Id.*

35 See R Street Reply Comments, GN Docket 23-320 (Jan. 17, 2024), WISPA Comments at 10, GN Docket 23-320 (Oct. 20, 2023).

36 15 U.S.C. §45(a)(1).

sufficient to remedy and address consumer harms caused by broadband providers should they violate net neutrality principles.³⁷ As such, the FCC does not need to actively promulgate rules to uphold net neutrality under the Title I framework.

If BIAS is reclassified as a Title II service, the FCC's role preempts that of the FTC. Among the many reasons the FCC is proposing reclassification, one of the most relevant is its desire to create a unified national framework to avoid a patchwork of state laws. Yet the rule fails to preempt California or other states that may still enforce their own net neutrality laws.³⁸ As one expert recently noted, this will create a situation in which “the FCC establishes a minimum set of rules, and states may add to, but not subtract from, those rules.”³⁹ This would open Pandora's Box by allowing states to adopt rules beyond those established by the FCC, enabling them to limit networks' abilities to innovate and adapt on the state level.

The FCC has also cited privacy and security concerns as a reason to reclassify and increase regulatory oversight on broadband services. Yet as Commissioner Carr has pointed out, the FTC “already regulates ISPs and their privacy practices.”⁴⁰ If broadband were reclassified as a Title II service, the FTC would be preempted from enforcing any federal privacy protections because of a 2017 Congressional Review Act.⁴¹ This would also prevent the FCC from recreating the same or substantially similar rule to address privacy under Title II, thereby leaving a giant regulatory hole with regard to privacy concerns, as neither the FTC nor FCC would have a mechanism to address the issue. Commissioner Carr highlighted the weakness of national-security-related arguments for the net neutrality order, as the administration itself recognizes that other agencies already “exercise substantial authorities with respect to the information and communications sectors.”⁴² As one expert points out, “the FCC will strip the FTC of jurisdiction over broadband, at a time when that agency

has been laser-focused on competition issues in the tech space.”⁴³

B. The Legislative Branch

Although Congress is best suited to resolve the debate over net neutrality, legislators have not yet codified in statute any bright-line net neutrality principles or provided agencies with appropriate legal frameworks to promulgate rules, nor are there any proposed bills or language in the works to do so. Ultimately, Congress can empower either the FCC or FTC to address “net neutrality” violations in an *ex post* or *ex ante* manner without forcing the FCC to unilaterally reclassify internet service as a common carrier subject to more stringent regulation. But absent Congressional action, the FCC will continue to perpetuate the Title I/Title II regulatory ping-pong game as the interests of various administrations change.

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C. The Judicial Branch

The only other remedy to end the reclassification debate is through the courts under *Chevron* deference — a legal precedent established in the landmark Supreme Court ruling (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 1984) that gives deference to executive agencies' interpretations of ambiguous Congressional statutes they are charged with administering.⁴⁴ Under *Chevron* deference, when a court reviews an agency's interpretation of a statute, it must answer two questions:

37 Comments of Americans for Tax Reform, Before the Federal Trade Commission, Competition and consumer protection issues in communication, information and media technology networks (Aug. 20, 2018), available at <https://www.atr.org/wp-content/uploads/2018/08/FTC-21st-Century-Hearings-Topic-21.pdf>.

38 Daniel Lyons, Net Neutrality's Glimmers of Hope and Hidden Timebombs, American Enterprise Institute (Apr. 12, 2024), <https://www.aei.org/technology-and-innovation/net-neutralities-glimmers-of-hope-and-hidden-timebombs>.

39 *Id.*

40 Office of Commissioner Brendan Carr, Carr Fact-Checks President Biden's Myth-Filled Plan for Expanding Government Control of the Internet (Apr. 11, 2024), <https://docs.fcc.gov/public/attachments/DOC-401818A1.pdf>.

41 S.J. Res. 34, 115th Cong. (2017).

42 Office of Commissioner Brendan Carr, Carr Fact-Checks President Biden's Myth-Filled Plan for Expanding Government Control of the Internet (Apr. 11, 2024), <https://docs.fcc.gov/public/attachments/DOC-401818A1.pdf>.

43 Daniel Lyons, Net Neutrality's Glimmers of Hope and Hidden Timebombs, American Enterprise Institute (Apr. 12, 2024), <https://www.aei.org/technology-and-innovation/net-neutralities-glimmers-of-hope-and-hidden-timebombs>.

44 *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); Congressional Research Service, *Chevron* Deference: A Primer <https://crsreports.congress.gov/product/pdf/R/R44954/3>, (Report No. R44954, Cong Research Serv., Sept. 19, 2017).

First, always, is the question of 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 construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous concerning the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁴⁵

With this framework in place, the FCC's authority to reclassify broadband as a Title II service would be more difficult to challenge in the courts.

According to a CRS report, however, "the Supreme Court appears to be moving away from the Chevron framework in favor of an alternative interpretive principle, the 'major questions doctrine.'⁴⁶ Under this doctrine, "the Court has rejected claims of regulatory authority involving issues of 'vast economic and political significance' when there is no clear statutory language establishing that authority."⁴⁷ An upcoming Supreme Court Case *Loper Bright Enterprise v. Raimondo* is expected to directly address the question of whether or not *Chevron* should be "curtailed or overruled," as the petition for certiorari explicitly asked "whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."⁴⁸

Should the Supreme Court overturn or narrow *Chevron* deference and shift toward the major questions doctrine, a future legal challenge to an agency's interpretation would be harder to rebut, unless Congress specifically required an agency to promulgate a specific rule.⁴⁹ Specifically, the FCC would have a more difficult time defending their interpretation of a telecommunications service under Title II, and the task of clearly defining broadband service in statute would only be able to be resolved by Congress.⁵⁰

06 CONCLUSION

Reigniting the tinderbox of heavy-handed Title II broadband regulation would be a costly mistake as a matter of policy, law, and economics. The incentive to reapply this outdated ideology to the internet ecosystem simply lacks merit. The FTC already offers consumers protection from anticompetitive behavior with precedent and case law, and the agency can continue to do so as internet services evolve. *Ex ante* regulation is unnecessary in an ever-evolving ecosystem, and Congress can step in to provide legislative clarity on net neutrality. As we underscored in recent comments in the record, "the FCC cannot act alone to wreak havoc on the internet ecosystem that has become an essential part of our society."⁵¹ ■

45 *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

46 See Comments of R Street, (GN Docket 23-320) Citing Congressional Research Service, FCC Adopts Proposed Net Neutrality Rule (Report No. IF12513, Cong Research Serv., Oct. 19, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF12513>.

47 Congressional Research Service, FCC Adopts Proposed Net Neutrality Rule (Report No. IF12513, Cong Research Serv., Oct. 19, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF12513>.

48 *Id.*; *Loper Bright Enterprises, et al. v. Raimondo*, No. 21-5166, 2022 (U.S. Nov. 10, 2022) (Petition for Writ of Certiorari).

49 Matt Daneman and Howard Buskirk, FCC's Pending Net Neutrality Order Is Seen Facing Similar Legal Fight as 2015's, *Communications Daily* (Apr. 15, 2024), <https://communicationsdaily.com/article/2024/04/15/fccs-pending-net-neutrality-order-is-seen-facing-similar-legal-fight-as-2015s-2404120054>.

50 Safeguarding and Securing the Open Internet, 24 C.F.R. 900 (Nov. 3, 2023) at 76049.

51 Reply Comments of R Street Institute, GN Docket 23-320 (Jan. 17, 2024).

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