



New England Cable & Telecommunications Association, Inc.

New England Cable & Telecommunications Association, Inc.
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**WRITTEN COMMENTS OF THE NEW ENGLAND CABLE &
TELECOMMUNICATIONS ASSOCIATION, INC. ON HOUSE BILL 5054**

**AN ACT RELATING TO PUBLIC UTILITIES AND CARRIERS - INTERNET
SERVICE PROVIDERS - NET NEUTRALITY**

February 23, 2021

Good evening Chair Ruggiero, and esteemed Members of the House Innovation, Internet and Technology Committee. My name is Tim Wilkerson, and I am President of the New England Cable and Telecommunications Association (NECTA).

I. Introduction

NECTA is a five-state regional trade association representing substantially all private cable broadband providers in Rhode Island, Connecticut, Massachusetts, New Hampshire, and Vermont. In Rhode Island, NECTA represents Cox Communications. In a recent economic impact study conducted by Dr. Tebaldi of Bryant University it was concluded that Cox produces nearly \$700 million annually in economic output and labor income for the state and employs approximately 800 Rhode Island residents. Cox also generates \$35.6 million in tax revenues for local and state governments and between 2020 and 2023 Cox is targeting to add \$197.5 million in capital investments.

I appreciate the opportunity to testify on Internet service providers' ("ISPs") and their longstanding commitment to the "net neutrality" principles ensuring an open Internet and to call for congressional action to codify these protections at the national level under a clear, modern and enduring law.

In the four years since state policymakers attempted to mandate ISP compliance with "net neutrality" principles through the passage of laws or executive orders, no cable broadband provider has violated these important consumer focused principles. In Rhode Island, similar efforts have been attempted by advocates warning of the potential threats to the customer experience. Despite these warnings, no NECTA member or other major ISP has broken any existing state and federal law by violating "net neutrality" tenets and upending the user experience.

It is quite the opposite. During the past four years—and for decades before—our members have invested billions of dollars into their broadband networks to ensure they exceed ever expanding consumer demand. Data collected during the pandemic demonstrates that our networks are available to all consumers without interruption. Our network strength had the capacity to meet the pandemic driven demand for more Zoom meetings, distance learning, telemedicine, and binge-watching television, among others. NCTA, the Internet and Television Association, recently launched a dashboard of aggregated data from cable Internet service providers to offer

an ongoing depiction of how cable broadband networks are faring.¹ Those robust networks are the byproduct of continuous and intensive capital network investments and upgrades. Providing world class Internet speeds is the hallmark of our companies, and not diminishing their experience through arbitrary or intentional violations of “net neutrality.”

II. NECTA Members’ Ongoing Commitment to Net Neutrality Principles

NECTA members do not block, throttle, or otherwise interfere with the lawful online activity of our customers and have consistently reaffirmed these commitments since the Federal Communications Commission’s (“FCC’s”) first articulation of open Internet principles in 2005. It is important to underscore that these commitments are more than a mere pledge. They are a part of our companies’ operating DNA.

The FCC’s revised Transparency Rule, adopted in its 2017 Restoring Internet Freedom Order (“*RIF Order*”), expressly requires ISPs to disclose any blocking, throttling, or other conduct that might harm the open Internet—and the FCC has made clear that commitments made by ISPs not to engage in such conduct are legally enforceable by state and federal agencies. (See Exhibit A) These mandatory disclosures thus represent robust, clear commitments to their broadband customers to uphold an open Internet. (See Exhibit B)

III. Overview of Existing State and Federal Oversight and Enforcement

Today the State Attorneys General, the Federal Trade Commission (“FTC”), the FCC, and the United States Justice Department (“DOJ”) have well established authority to protect consumers and preserve the open Internet.

The FCC’s *RIF Order* returned online consumer protection authority to the FTC, the “top federal cop on the beat” for the past twenty years. Importantly in 2018, the Court of Appeals for the Ninth Circuit reaffirmed that the FTC may investigate and bring actions against Internet companies for illegal activity. Therefore, the FTC continues to vigorously pursue investigations and enforcement actions against any ISP for unfair, deceptive and anticompetitive practices, including where an ISP engages in conduct that is at odds with its public disclosure notices, marketing, advertising and promotional materials.

Additionally, the FCC, in coordination with the FTC, continues to require ISPs to publicly disclose information about their practices to consumers. Moreover, the DOJ can enforce antitrust laws if ISPs interfere with lawful online content in a manner that harms competition and consumers. And at the state level, Attorneys General can sue ISPs who engage in unfair or deceptive trade practices under existing state consumer protection laws, provided they act in accordance with federal law in doing so.

IV. Federal Law Preempts State Attempts to Impose Net Neutrality Requirements, Including Through Conditions on State Procurement of Contracts or Similar Measures

While states may enforce generally applicable statutes to prevent fraud, deception, and the like, federal law prevents states from imposing their own net neutrality mandates.

In its decision upholding the FCC’s *RIF Order*, the D.C. Circuit held that whether a state law is preempted by federal law must be decided on a case-by-case basis. The court also made clear that, although the FCC could not preempt all state laws in advance on a blanket basis, a specific

¹ <https://www.ncta.com/COVIDdashboard>

state law will be invalidated under the conflict preemption doctrine if it is inconsistent with the FCC's light-touch framework. **(See Exhibit C Prof. Daniel Lyon's examination of the D.C. Circuit Court of Appeals decision on net neutrality and what state actions are permissible or preempted by the RIF Order)** In particular, the D.C. Circuit reaffirmed the well-established principle that, if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress or the FCC, then it will be struck down pursuant to the Supremacy Clause of the Constitution.

State measures that impose net neutrality requirements are highly likely to be struck down under conflict preemption principles. The D.C. Circuit has previously made clear that categorical bans on blocking, throttling, and paid prioritization constitute common carrier requirements. The FCC's *RIF Order* expressly repealed such rules and found that ISPs may not be subject to common carrier requirements, so a state law re-imposing such requirements would necessarily conflict with the FCC's order and federal policy.

Even apart from the prohibition against treating ISPs as common carriers, the Internet is quintessentially interstate in nature, and it is impossible to segregate any distinct intrastate component. That impossibility creates another basis for preemption, and it also means that state regulation would violate the Commerce Clause by unduly burdening interstate commerce and dictating how the Internet would be regulated outside the state.

Federal courts also have found that states may not directly or indirectly circumvent preemption by using their spending powers to regulate broadband service. The Supreme Court has clearly ruled that a state may not use its spending power as a means to regulate indirectly what it is preempted to regulate directly. **(See Exhibit D Prof. Lyon's testimony on the unconstitutionality of a Massachusetts law regulating business activity with the nation of Burma. That case illustrates the power of federal preemption.)** Under the market participant doctrine, the Supreme Court has found that a state may not impose conditions on the procurement of products and services for its own use where such conditions extend to *consumer* services as well. As the Court has explained, such procurement conditions are, for practical purposes, equivalent to state regulation and thus are subject to preemption.

V. Net Neutrality Litigation

Over the course of 2018 and 2019, various states passed net neutrality legislation or issued executive orders instituting net neutrality requirements in state procurement.

There is now litigation in two states over these state-enacted laws – California and Vermont. Within hours of California Governor Jerry Brown signing SB822, the DOJ originally sued to block the law, arguing that it is preempted by federal law. Although DOJ is no longer pursuing the case due to the change in administrations, a broad set of industry participants filed a parallel lawsuit in California, bringing preemption and Commerce Clause claims. Industry also filed a suit to stop Vermont from enforcing its procurement-based net neutrality law and executive order. In both of these cases, the states have agreed not to enforce these laws pending further court action.

VI. NECTA Supports Bipartisan Congressional Action to Establish Enduring Consumer Protections by Codifying the Net Neutrality Principles to Ensure an Open Internet

A wide variety of ISPs, including wired, wireless and satellite providers, support congressional action to enact bipartisan legislation at the national level that preserves the principles of no

blocking, throttling, or unfair discrimination of lawful Internet traffic. ISPs supported the FCC's repeal of the 2015 *Title II Order* to end the ongoing regulatory ping pong of federal oversight between Democratic and Republican controlled FCCs. The four-year-old *Title II Order* reversed two decades of proven bipartisan federal oversight of ISPs and, in its place, imposed an archaic, legacy regulatory scheme that was originally established in the 1930s to regulate telephone companies.

Without congressional action, net neutrality will continue to be a political football that diverts time and resources away from innovation and job creation. By permanently rejecting outdated, 1930s style Title II regulations and adopting a modern federal framework, Congress would achieve the right policy balance of government oversight of ISPs while fostering private investment and market competition.

VII. Overview of Rhode Island's Vibrant and Competitive Internet Ecosystem and the Disruptive Risks and Unintended Consequences of State Regulation of ISPs

Historically, Rhode Island has adopted a modern, light-touch regulatory regime over the communications marketplace that spurred industry competition leading to a convergence of residential and business consumer video, broadband, voice, and wireless offerings from new service providers at lower costs. As a result of this approach, the network quality and diversity of products offered by companies in Rhode Island is virtually unparalleled. This is evidenced by Rhode Island's ranking as the most broadband-ready state in the nation according to the National Broadband Map (broadbandmap.gov). Competition in the state has afforded nearly every Rhode Islander the opportunity to choose from multiple ISPs, and the investment these private companies have made in fiber technology has positioned Rhode Island as, by far, the most fiber-accessible state.

Over the past decade, NECTA members' maximum Internet speeds have increased dramatically. Residential Internet speeds in Rhode Island, delivered through approximately 8,000 network miles and nearly 2,000 miles of fiber, reach speeds of up to a Gigabit. For business services, Rhode Islanders have access to up to 10 Gigabits of speed to meet the needs of any retailer, university research and development facility, financial services company, or hospital. Our provider has also consistently ranked among the highest in customer satisfaction for business services according to JD Power.

Importantly, Rhode Island cable broadband providers completed a DOCSIS 3.1 technology deployment in 2019 resulting in faster, more reliable data speeds and features. The next major upgrade in Rhode Island will be DOCSIS 4.0. This technology is a major step toward reaching the industry's ubiquitous 10 Gigabit or 10G goal resulting in: higher speed, lower latency, increased security, and higher reliability for residential and business customers. Today, Cox already offers Cox Optical Internet state of the art 10G scalable Internet for their enterprise customers.

Because of the predictable regulatory environment and the ISPs' billion dollar investments in the state's world class 1 Gigabit to 10G capable broadband infrastructure, Rhode Island's overall innovation ecosystem is ready for the continued growth in advanced manufacturing, health care and high tech. Our networks serve as the backbone to that future innovation and job growth.

Today NECTA members' advanced networks and operating systems have the capacity to not only meet but exceed consumer demand. Our members' network superiority is highlighted by

the *Netflix ISP Speed Index* ranking Cox as tied for number one ISP for prime-time Netflix performance in the United States during January 2021. (See Exhibit E) As ISPs product offerings evolve to increasingly include mobile services, Internet of Things (“IoT”) products, telehealth options, and other transformative business lines, the consumer experience is becoming hyper personal. These innovations have been powered by the delivery of broadband services under predictable and national and state regulatory schemes. By enacting legislation (like House bill 5054) the state of Rhode Island will disrupt two decades of regulatory certainty and contribute to the creation of a disjointed patchwork of inconsistent state Internet laws. Policing the Internet on a state-by-state basis is fraught with risk, costly to both state governments and the private sector.

Finally, every school district in Rhode Island (with the exception of Block Island as well as many libraries and public buildings are wired and receive free and/or discounted services from the local provider. Additionally, broadband adoption is a top priority and our members are bridging the digital divide for thousands of Rhode Island families with programs like Connect2Compete. Before, during and after the pandemic, Connect2Compete plays a critical role in connecting Rhode Island residents who face financial, cultural, digital literacy or other complex insecurities or barriers, such as immigration status, English fluency or literacy, that would otherwise prohibit them from having high-speed broadband.

VIII. Conclusion

NECTA members strongly support and adhere to the principles of no blocking, throttling, discriminating or otherwise interfering with the lawful online activity of our customers. Rigorous existing state and federal oversight of ISPs protects consumers against any unlawful actions. We believe the best way to achieve lasting consumer protections and an open Internet is by a national policy framework that is established through bipartisan federal legislation.

For the above reasons, NECTA respectfully opposes House bill 5054.

Respectfully,

Timothy O. Wilkerson
President

EXHIBIT A



Consumer Guide

Open Internet Transparency Rule

The FCC is focused on ensuring that every American has access to robust high-speed Internet service – better known as broadband – to harness the benefits of broadband-enabled technology and improve lives. That access includes the right to accurate information so consumers can choose, monitor and receive the broadband Internet services they have been promised.

The FCC's Open Internet Transparency Rule empowers consumers to make informed choices about broadband services. The Rule requires that what providers tell you about their broadband service is sufficient for you to make informed choices – including choices about speed and price. The Rule also requires that providers' information about their broadband service must be accurate and truthful.

The rule covers disclosures about "network management practices, performance, and commercial terms of service." The rule applies to service descriptions, including, for example, expected and actual broadband speed and latency. The rule also applies to pricing, including monthly prices, usage-based fees, and any other additional fees that consumers may be charged. Additionally, it covers providers' network management practices, such as congestion management practices and the types of traffic subject to those practices.

The FCC monitors how well providers disclose the broadband speed they give consumers, and at what price, and is concerned about providers who make false, misleading, or deceptive statements to consumers about the services they provide.

For a report on service providers' broadband performance, see the FCC's Measuring Broadband America report: www.fcc.gov/measuring-broadband-america.

Test your mobile broadband speed

The FCC encourages you to test your broadband speeds using any number of free, online tests, and notify the FCC if your service doesn't measure up to your provider's advertised speed.

To test mobile broadband performance on iPhone and Android devices, use the FCC's Mobile Broadband Speed Test App. Learn more: www.fcc.gov/measuring-broadband-america/mobile.

Notify the FCC about open Internet transparency issues

Providers that violate the transparency rule harm consumers and may be subject to enforcement action, which potentially includes monetary penalties prescribed under the Communications Act. Please notify the FCC about your concerns of possible violations of the Open Internet Transparency Rule.

Filing a complaint

You have multiple options for filing a complaint with the FCC:

- File a complaint online at <https://consumercomplaints.fcc.gov>
- By phone: 1-888-CALL-FCC (1-888-225-5322); TTY: 1-888-TELL-FCC (1-888-835-5322); ASL: 1-844-432-2275



- By mail (please include your name, address, contact information and as much detail about your complaint as possible):

Federal Communications Commission
Consumer and Governmental Affairs Bureau
Consumer Inquiries and Complaints Division
445 12th Street, S.W.
Washington, DC 20554

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EXHIBIT B



COMCAST

PUBLIC POLICY

Reconfirming Comcast's Commitment To An Open Internet And Net Neutrality

By David L. Cohen | Dec 13, 2017



As the FCC prepares to vote http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1121/DOC-347868A1.pdf on new Open Internet rules <https://www.fcc.gov/document/proposal-restore-internet-freedom> that will open the door for increased investment and digital innovation, there is a lot of misinformation that this is the "end of the world as we know it" for the Internet. It's important to take a moment, step back, and make

This is not the end of net neutrality. Despite repeated distortions and biased information, as well as misguided, inaccurate attacks from detractors, our Internet service is not going to change. Comcast customers will continue to enjoy all of the benefits of an open Internet today, tomorrow, and in the future. Period.

Consumers will remain fully protected. We have repeatedly <http://corporate.comcast.com/comcast-voices/comcast-open-internet-commitment> stated <http://corporate.comcast.com/comcast-voices/comcast-customers-will-enjoy-strong-net-neutrality-protections-today-and-in-the-future>, and reiterate today, that we do not and will not block, throttle, or discriminate against lawful content. These fundamental tenets of net neutrality are also key components of our [core network and business practices](http://corporate.comcast.com/comcast-voices/comcast-statement-supporting-a-free-and-open-internet) <http://corporate.comcast.com/comcast-voices/comcast-statement-supporting-a-free-and-open-internet> – they govern how we run our Internet business.

- Will Comcast broadband customers still be able to visit any lawful site they want to? Yes.
- Will Comcast block or throttle access to Internet sites? No.
- Is Comcast creating Internet fast lanes? No, we've said consistently <https://www.cnet.com/news/comcast-denies-plans-to-offer-internet-fast-lanes/> we've not entered into paid prioritization agreements and have no plans to do so.
- Will Comcast still clearly post policies on network management? Absolutely, you can find them here. <https://www.xfinity.com/policies>

Light touch regulation allows for more competition in the marketplace and increased investment and innovation. There's no question that an open Internet is important. There is also no doubt that investment is essential to fostering technological growth. Since its creation, the Internet has opened the door for

tremendous digital advances and innovations. It has changed how we communicate and how we interact on a day to day basis. The politically guided and motivated decision by the Wheeler FCC in 2015 to revert to Title II regulation [slowed http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf](http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf) the pace of advancement and limited choices in the marketplace. For example, it was that misguided thinking that [stunted the rollout http://corporate.comcast.com/comcast-voices/how-to-keep-a-free-and-open-internet-comcasts-fcc-comments](http://corporate.comcast.com/comcast-voices/how-to-keep-a-free-and-open-internet-comcasts-fcc-comments) of Comcast's Stream TV, an in-home, IP-based cable service, which was stalled from a broad consumer rollout because of an unnecessary protracted FCC investigation.

The FCC's order means what its title promises: restoring Internet freedom.

Consumers deserve choice and a thriving, innovative competitive marketplace under light touch regulation. The [contemplated ruling https://www.fcc.gov/document/proposal-restore-internet-freedom](https://www.fcc.gov/document/proposal-restore-internet-freedom) removes the overhang created by Title II and rightfully reclassifies broadband Internet access as an interstate information service. Additionally, the order returns authority to the FTC to regulate data privacy and security for the entire Internet ecosystem under a uniform federal technology-neutral framework. It also requires all Internet providers to disclose their net neutrality practices, and will hold ISPs accountable to these practices. The [inter-agency agreement announced yesterday https://www.fcc.gov/document/fcc-ftc-coordinate-online-consumer-protection-efforts](https://www.fcc.gov/document/fcc-ftc-coordinate-online-consumer-protection-efforts) between the FCC and the FTC should put to rest the fear that there is any confusion about the relative enforcement jurisdictions of the two agencies in the net neutrality context.

Protecting the Internet is critical for the future. We should all agree that the Internet deserves a bright future, regardless of the political party in power. This is not a time for political grandstanding or heated, false rhetoric. Inaccurate cries of Armageddon have done nothing but stoke a partisan political fire that distracts from actually allowing policymakers to come together to develop sensible, transparent, and

endurable Open Internet regulations that protect the consumer, encourage investment, and strengthen the American economy. With the expected FCC action tomorrow, it's time to set aside partisan threats of litigation or legislation. The best interests of consumers, Internet companies, and ISPs are now best served by bipartisan discussions and problem solving. You'll hear more from me on this subject tomorrow.

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COMCAST

PUBLIC POLICY

It's Time for Congress to Act And Permanently Preserve the Open Internet

By David L. Cohen | Dec 14, 2017



Today's vote <https://www.fcc.gov/document/fcc-takes-action-restore-internet-freedom> by the FCC to restore Internet freedom and reverse the burdensome threat of Title II regulation is a positive step toward ensuring that the Internet is governed via sensible, transparent, light-touch regulatory policies and procedures. Despite some of the continued hand wringing, the vote does not represent the end of the Internet.

As I wrote yesterday <http://corporate.comcast.com/comcast-voices/fcc-to-vote-to-restore-internet-freedom-and-innovation>, reiterating a consistent public commitment from Comcast, we will not block, throttle, or discriminate against lawful content on the Internet; we will be fully transparent with respect to our practices; and we have not entered into any paid prioritization arrangements, and we have no plans to do so. Under the FCC's order, these commitments are now legally enforceable <https://www.fcc.gov/document/fccftc-coordinate-online-consumer-protection-efforts> by the Federal Trade Commission – so they aren't "voluntary" commitments, they aren't aspirational, and they aren't hollow. They are binding commitments that we expect to be enforced by regulatory authorities.

Today's FCC action should represent an inflection point in a decade plus debate over net neutrality. We are at a unique moment in time – where the ISP community, edge providers, and consumer groups have reached a general consensus as to the scope of appropriate net neutrality protections (no blocking, no throttling, prohibiting discriminatory treatment of lawful content, and transparency for consumers). That doesn't mean all the wording has been agreed to by all parties, but there is a broad directional agreement.

It's now time for all of us to take advantage of this moment in time and end the cycle of regulatory ping pong we've been trapped in for over a decade and put this issue to rest once and for all. And there's a simple way to do this -- we really must have bipartisan congressional legislation to permanently preserve and solidify net neutrality protections for consumers and to provide ongoing certainty to ISPs and edge providers alike.

The Internet is at the core of America's digital innovation and technological advancement. It is too valuable to be trapped in the middle of a never ending game of politics and regulatory arbitrage depending on the party in power. We should stop

the litigation and legislative threats by the party not in control of the FCC. We need bipartisan congressional legislation to protect the Internet and consumers. Now is the time for both sides of the aisle to come to the table, have a civil discussion, and produce a legislative product that enshrines durable and enforceable net neutrality rules.

Our call for legislative action isn't new. Since at least 2010, Comcast has called for legislation to cement and protect an open Internet. Here are just a few examples:

Comcast Blog Posts

- December 1, 2010 <http://corporate.comcast.com/comcast-voices/fcc-proposes-rules-to-preserve-an-open-internet>: "For many months, we have been working very hard with Chairman Genachowski's office, **the Congress**, and a broad array of stakeholders to try to find a fair and appropriate balance that would enable the FCC to codify a light regulatory approach that would protect the openness of the Internet but that would also protect the continued investment and innovation that has made the Internet the vibrant and dynamic place that it is today."
- February 26, 2015 <http://corporate.comcast.com/comcast-voices/fcc-votes-on-new-open-internet-rules>: "After today, the only 'certainty' in the Open Internet space is that we all face inevitable litigation and years of regulatory uncertainty challenging an Order that puts in place rules that most of us agree with. We believe that the best way to avoid this would be for Congress to act. We are confident this can be done in a bi-partisan manner with a consensus approach that accomplishes the common goals of stakeholders on all sides of the open Internet debate without the unnecessary focus on legal jurisdiction and the unnecessary regulatory overhang from 80 year-old language and provisions that were never intended to be applied to the Internet."

- April 26, 2017 <http://corporate.comcast.com/comcast-voices/comcast-supports-net-neutrality-and-reversal-of-title-ii-classification-title-ii-is-not-net-neutrality>: "In our view, there is no better way to put in place an enduring set of enforceable Open Internet protections than for Congress to act. As telecommunications policy leaders in both the House and the Senate said today, 'it's now time for Republicans and Democrats, internet service providers, edge providers and the internet community as a whole to come together and work toward a legislative solution, <https://energycommerce.house.gov/news-center/press-releases/bicameral-leaders-comment-pai-s-internet-regulations-announcement>' – we wholeheartedly agree. Bipartisan legislation, as was envisioned back in 2010 by then Congressman Henry Waxman and Cliff Stearns, would solve both the authority issue and end the gamesmanship on the substance of net neutrality rules."
- August 30, 2017 <http://corporate.comcast.com/comcast-voices/comcast-files-fcc-reply-comments-to-protect-an-open-internet>: "While the record strongly supports that the FCC can and should classify broadband as an information service and preserve incentives for innovation, investment, and an open Internet, there is also significant and growing consensus that bipartisan legislation can and should provide a permanent resolution to the unhelpful game of regulatory ping pong and the endless Title II loop that have plagued all stakeholders since at least 2010... We stand ready to work with policymakers, legislators, and stakeholders to end this regulatory back-and-forth and craft an effective and enduring solution for consumers and the U.S. economy. Ping pong should be for players, not policy."

Many others agree with this approach. Congressional leaders, Democrats and Republicans alike, recognize that legislation is the right solution – and have similarly called for congressional action:

- **Senator John Thune** said this week <https://www.commerce.senate.gov/public/index.cfm/speeches?ID=319AE9B6-A71E-41A6-B3EF-7F6F6436FF94>: "As I have stated repeatedly, and I will say again today, Congressional action is the only way to solve the endless back and forth on net neutrality rules that we've seen over the past several years...True supporters of an open Internet should be demanding such legislative protections today – not posturing while waiting for years during legal proceedings or waiting for the political winds to turn."
- Sen. Thune also noted bipartisan support for this approach "We're in good discussions with **Senator [Brian] Schatz**...We're hoping there will be other Democrats that will join him and come to the table in an effort to try and codify some open internet principles, the kind of consumer protections that people want but in a way that puts some sort of guardrails against runaway government regulation."
- And today, Sen. Thune reiterated "Congress must take the lead in setting a clear path forward through bipartisan legislation to avoid the risk of regulatory back and forth . . .I call on Democrats and Republicans who want to preserve a free and open internet to work together on permanent consumer protections."
- **Senator Bill Nelson** affirmed <https://www.congress.gov/congressional-record/2017/11/27/senate-section/article/s7319-6?r=35>: "At the end of the day, sometime in the future, there may be an opportunity for a legislative solution, but it has to be a balanced solution that protects the right of the public to a free and open internet." He reconfirmed <https://www.commerce.senate.gov/public/index.cfm/pressreleases?ID=36F0486E-52EB-4FBE-99E8-63E1002C1EC5> his support for a legislative solution today.
- Another Democrat, **Senator Claire McCaskill**, agreed <https://www.mccaskill.senate.gov/media-center/news-releases/highlighting-concerns-of-nearly-450000-missourians-m>

[ccaskill-opposes-changes-to-net-neutrality-rules](#): "I have long said that Congress should settle the issue of net neutrality once and for all with legislation to provide certainty for consumers and providers alike."

- **Majority Leader Mitch McConnell** expressed support <https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=4CF9BC9F-DB74-42E4-87C2-CD648B53E770> ahead of the FCC's vote, looking forward "to Congress' actions in the future to keep the Internet open for consumers in a lasting way."
- **More than 100 House Republicans** signed a letter <https://energycommerce.house.gov/news/press-release/ec-leads-republican-letter-fcc-restoring-internet-freedom/> <https://energycommerce.house.gov/news/press-release/ec-leads-republican-letter-fcc-restoring-internet-freedom/> urging bipartisan Congressional action: "After broadband is restored to its rightful regulatory home, under the light-touch approach that guided federal oversight of the Internet and nurtured its expansive growth for decades, the stage will be set for Congress to determine how to best enact permanent protections for the bipartisan net neutrality principles on which we will agree."
- **Telecommunications Subcommittee Chair Marsha Blackburn** has reiterated <http://docs.house.gov/meetings/IF/IF16/20170725/106312/HHRG-115-IF16-MState-B001243-20170725.pdf> "Let me be clear, Republicans have always supported a free and open Internet. We must move past the partisan rhetoric. Ranking Member Pallone said in 2010 that this is a job for Congress. I agree."
- **House Energy and Commerce Committee Chairman Greg Walden** has continued to call <https://energycommerce.house.gov/news/press-release/walden-comments-internet-day-action/> for bipartisan legislation: "I again call on my Democratic colleagues, edge providers and ISPs, and all those who make up the diverse internet ecosystem that has flourished under light-touch regulation to come to the table and work

with us on bipartisan legislation that preserves an open internet while not discouraging the investments necessary to fully connect all Americans. Too much is at stake to have this issue ping-pong between different FCC commissions and various courts over the next decade."

- And, both **Blackburn and Walden** emphasized the need for legislation today after <https://energycommerce.house.gov/news/press-release/walden-blackburn-fcc-restoring-internet-freedom-vote/> the FCC vote: "Now, the table is set for Congress to provide clear, permanent rules through a bipartisan legislative solution. We hope that all stakeholders, and our Democratic colleagues, will finally engage in serious negotiations soon."
- We've previously noted <http://corporate.comcast.com/comcast-voices/fcc-begins-rule-making-process-to-protect-an-open-internet> multiple other parties – from all sides of the political spectrum, from both politics and industry – who have also previously called for legislation.

Unfortunately, there are others who want to continue engaging in a never ending game of back and forth, creating unnecessary anxiety and contributing to an unneeded level of hysteria. Some will undoubtedly continue threatening litigation that does nothing to protect consumers or freedom of the Internet. Others will say the FCC is shirking its responsibilities, when the real authority truly lies within Congress.

Given the broad agreement as to the content of appropriate net neutrality rules, and a developing consensus that the best road forward is bipartisan congressional legislation, it is hard to make the case that it is not worth a serious attempt by Congress to try to craft a permanent legislative solution. And we should all be a constructive part of such an effort.

As I said yesterday <http://corporate.comcast.com/comcast-voices/fcc-to-vote-to-restore-internet-freedom-and-innovation>, our Internet practices will remain the same: Comcast customers will continue to enjoy the benefits of an open Internet today, tomorrow, and in the future. Our customers are our priority. That is why we want to suggest a moratorium on charged political rhetoric and ask Congress to enact bipartisan legislation to protect consumers and the open Internet in the years to come, regardless of the outcome of any future elections. We look forward to continuing to work with policymakers to develop forward thinking, bipartisan legislation to end this back and forth once and for all.

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Cox Remains Committed to Net Neutrality Rules



ATLANTA - December 14, 2017 - The following statement can be attributed to Cox Communications:

"Today's vote by the FCC to remove the Title II section of the Net Neutrality rules does not impact our commitment to Net Neutrality. We do not block, throttle or otherwise interfere with consumers' desire to go where they want on the Internet. Cox has always been committed to providing an open Internet experience for our customers, and reversing the classification of Internet services does not change our commitment. We applaud FCC Chairman Ajit Pai for his leadership that has overturned the previous Commission's decision to enact Title II, the 1930s-era utility telephone regulations. Reestablishing 'light-touch' regulation returns a level of certainty for consumer protections and future investment and innovation that spur the growth of the Internet."

About Cox Communications

Cox Communications is a broadband communications and entertainment company, providing advanced digital video, Internet, telephone and home security and automation services over its own nationwide IP network. The third-largest U.S. cable company, Cox serves approximately 6 million residences and businesses. Cox Business is a facilities-based provider of voice, video and data solutions for commercial customers, and Cox Media is a full-service provider of national and local cable spot and digital media advertising. Cox is known for its pioneering efforts in broadband, voice and commercial services, industry-leading customer care and its outstanding workplaces. For nine years, Cox has been recognized as the top operator for women by Women in Cable Telecommunications; Cox has ranked among DiversityInc's Top 50 Companies for Diversity 12 times. More information about Cox Communications, a wholly owned subsidiary of Cox Enterprises, is available at www.cox.com and www.coxmedia.com



OPEN INTERNET

Committed to an Open Internet

July 12, 2017

SHARE ARTICLE:

There is a robust debate happening across the country on the future of internet regulation – and today, a “Day of Action,” will spur further discussion about the future of America’s open internet policy.

Charter supports an open internet. Delivering a superior broadband experience to our customers is our core business objective, and that is not possible without an open internet. We don’t slow down, block, or prioritize traffic in an uncompetitive manner. We’re also constantly making investments in and upgrades to our network and interconnection points to avoid congestion.

At Charter, we want our customers to utilize and value our fast broadband by using data-hungry apps and streaming services without worry that they will be charged more. In fact, we don’t have data caps or engage in usage-based billing and we don’t charge a modem fee or require annual contracts. We’re proud to offer an industry-leading base broadband speed of 60 Mbps across our entire national footprint, with 100 Mbps offered in a growing number of markets.

Our priority is to deliver innovative products and services to our customers that enable them to access the content of their choice where and when they want.

Working together with the FCC and Congress, we can build a regulatory framework that actually protects and ensures an open internet while allowing the broadband ecosystem to flourish. In doing so, we’ll protect consumers, unleash innovation, spur greater network investment and create lasting benefits and opportunities for businesses, entrepreneurs and workers across the entire U.S. economy.

But to achieve that framework, we cannot base it on outdated, heavy-handed rules originally designed for monopoly telephone networks. Applying a retrograde framework to the internet hurts consumers, stifles innovation and harms future investment in our infrastructure and the economy.

Just as we no longer use telephone lines to connect to the internet, it is no longer appropriate to use 1930s telephone policy to regulate 21st Century broadband.

Instead, consumers, policymakers and all stakeholders in the Internet ecosystem should embrace a modern regulatory framework that will support the next generation of broadband services, not tie them to the technologies of the past.

While the FCC is once again seeking comment on what that regulatory framework should look like, it is also important for Congress to pass bipartisan legislation that enshrines an open internet and spurs broadband investment and deployment, thereby ensuring regulatory certainty in the marketplace.

Charter recognizes that the importance of this debate and is focused on solutions that would protect an open internet and spur faster and better broadband for more Americans for years to come. We support an open internet and are working every day to provide a great broadband service for our customers.

[Read more about our commitment to an open internet.](#)

Atlantic Broadband Is Committed to an Open Internet

Atlantic Broadband is committed to preserving an open Internet, as it is vital to the success of the economy and our business. We believe that consumers should be able to access any content they want on whatever device they choose. We do not block, throttle or discriminate against lawful content or interfere with our customers' lawful use of the Internet. Further, Atlantic Broadband does not impose data caps or engage in usage-based billing.

We are continually investing in our network to increase broadband speeds for our customers. These infrastructure investments are essential to fostering technological growth and ensuring that more rural areas, like those served by Atlantic Broadband, have access to the same Internet content and speeds as urban areas.

Atlantic Broadband supports the light-touch regulatory approach endorsed by the FCC. This approach will not change our commitment to providing an open Internet experience for our customers. We believe that it will restore certainty for consumer protections that will encourage investment and innovation.

We do not believe state-based net neutrality laws will operate to promote or protect an open Internet. Rather, attempts to regulate the Internet at the state level open the door to the creation of a patchwork of state regulations that will stymie innovation, as well as have the potential to undermine the backbone of the Internet economy.

EXHIBIT C

Blog Post

The FCC wins big on net neutrality: What it means, and what's next

AEIdeas

TECHNOLOGY AND INNOVATIONTELECOMMUNICATIONS

October 2, 2019

The US Court of Appeals for the DC Circuit finally issued its long-awaited net neutrality decision. The result was a significant victory for the Federal Communications Commission (FCC), which saw the court mostly uphold its landmark Restoring Internet Freedom Order.

Unfortunately, the decision does not mark the end of the net neutrality story — just the close of this particular chapter. This blog will summarize the court's decision and discuss what's ahead, including for state net neutrality efforts.

The Mozilla decision

In *Mozilla v. FCC*, the DC Circuit upheld the repeal of Barack Obama-era net neutrality rules and the reclassification of broadband access as an information service. This is perhaps unsurprising: The Supreme Court long ago held that the FCC has authority to determine how best to categorize broadband service, and the countless rounds of litigation since have really only reinforced that point. The court also upheld the agency's transparency rules as an appropriate exercise of its authority under Section 257 of the Communications Act.

Overall, this is good news for FCC Chairman Ajit Pai's vision. The Restoring Internet Freedom Order is premised on the notion that with enhanced transparency protections, consumers can make informed

choices about broadband service, and that such information, coupled with consumer protection and antitrust laws, will address many of the potential harms that net neutrality advocates fear. The Mozilla decision blessed the agency's power to enact this light-touch regulatory approach.

OK, maybe "blessed" is too strong a word. Judges Patricia Millett and Robert Wilkins each concurred separately to note that, while Supreme Court precedent compelled them to affirm the FCC's power under the Communications Act, technological evolution may have undermined the factual underpinnings of that precedent. They suggested that the high court could revisit this holding but that the DC Circuit could not.

The remand order

Despite affirming, the court did not find the agency's reasoning altogether convincing. Specifically, it found that the agency did not sufficiently consider the impact of its decision on three issues raised by commenters: public safety, lifeline eligibility, and pole attachments. In administrative law parlance, this failure to consider important aspects of the problem renders the decision arbitrary and capricious, thus warranting a remand.

But the court chose not to vacate the Restoring Internet Freedom Order as part of its remand. The court recognized that the FCC could address these issues without undermining its overall conclusions, and it recognized that the burden of a likely temporary vacatur would impose unnecessary costs on the regulated parties. So the new rules remain in place, at least while the agency rectifies the order's shortcomings.

I am impressed by the opinion's judicial restraint. The concurrences suggest that, if not for binding Supreme Court precedent, the panel likely would have decided the legal question differently. And at several points, the court found the agency's reasons lacking, even on issues that it declined to remand. But the court recognized that its role is a deferential one, and, while laying bare the agency's faults, it stopped short of imposing its policy preferences. The opinion is fair and, I think, a nice retort to the cries of judicial activism (or, among academics,

legal realism) that sometimes dominate popular discourse about the courts.

Preemption and the future of state net neutrality regulation

Despite this deferential tone, the court did vacate one part of the rule. The Restoring Internet Freedom Order expressly preempted state laws that are inconsistent with its deregulatory order. The court (correctly, I think) found that the agency did not ground this preemption provision in a lawful source of statutory authority. Absent a legal basis, the FCC lacks authority to expressly preempt state law in this fashion.

Net neutrality advocates, seeking a silver lining, have latched onto this portion of the decision, suggesting that it opens the floodgates for states to reimpose the rules that the feds repealed. But this hope is misplaced. The court did not hold that preemption was unwarranted, rather that it must be assessed on a case-by-case basis. As the opinion explains, “If the Commission can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption.”

Conflict preemption occurs when a state regulation conflicts with a federal policy. Under the Supremacy Clause, the state act must yield. Because the preemption flows from the Constitution itself, rather than the federal statute, future courts are free to find conflict preemption despite the Mozilla court’s rejection of express preemption — a fact the Supreme Court clarified in Geier v. American Honda Motor Co.

As I discussed at length [here](#), I predict that most state net neutrality efforts will ultimately be preempted. The Communications Act, as interpreted by brand X, gives the FCC a wide spectrum of regulatory options for broadband, ranging from nonregulation to full common carriage. The agency picked a spot along that spectrum — enhanced transparency coupled with general consumer protection and antitrust law — and explained at length that more intrusive regulation could have an adverse effect on consumers and innovation. State net neutrality laws would conflict with the Restoring Internet Freedom Order’s carefully crafted federal policy in this area — and thus would be preempted under the Supremacy Clause.

Conclusion

The Mozilla decision is a fair and reasonable decision that does not sugarcoat the agency's faults but remains true to the court's narrow role in administrative law cases. There are several proceedings ahead: The parties may seek further review *en banc* or in the Supreme Court, and once that process is complete, the agency must address the remanded issues. And, of course, state preemption decisions loom large, beginning with California and Vermont, whose net neutrality statutes have already been challenged in cases that were stayed pending this case's outcome. One thing is for certain: The net neutrality saga remains far from over.

EXHIBIT D

**Testimony of Associate Professor Daniel Lyons, Boston College Law School
Senate Special Committee on Net Neutrality and Consumer Protection
February 6, 2018**

I'd like to thank the committee for inviting me to testify today. My name is Daniel Lyons, and I am an associate professor with tenure at Boston College Law School, where I teach and write in the areas of telecommunications, Internet law, and federalism.

I want to address two points today. First, it is unlikely that Massachusetts can act on net neutrality in light of the Federal Communications Commission's recent order, and second, there are good reasons why it might not want to do so even if it could.

First, the Commission has expressly preempted state net neutrality efforts. Like the 2015 Open Internet order that it replaced, the recent Restoring Internet Freedom order expressly preempts "any state or local measures that would effectively impose rules or requirements" that the order repealed or rules that would otherwise be "inconsistent with the federal deregulatory approach" taken in the order. The purpose of the Commission's order was to repeal the agency's earlier net neutrality provisions and restore the classification of broadband internet access service as an information service under the Communications Act. For over twenty years, the Commission has consistently said that information services should be not just unregulated but affirmatively deregulated, and this approach has support in the statute.

If challenged, courts are likely to uphold this preemption provision. We saw a similar battle in 2007, when Minnesota sought to regulate voice-over-internet-protocol services like Vonage under state telephone laws. The FCC preempted Minnesota's law, among other reasons, because the state's efforts could interfere with the agency's long-standing national policy of nonregulation of information services. The court upheld that decision and struck down the state law, finding that "deregulation [is a] valid interest[] the FCC may protect through preemption of state regulation." Importantly, the recent order relies on the same finding —broadband is an information service that should be deregulated— so the same result is likely.

Nor, I think, can the state avoid preemption by substituting the power of the purse for the power of regulation. Several states, starting with Montana, recently enacted executive orders refusing to enter contracts with broadband providers unless they guarantee net neutral practices for consumers in the state. But Massachusetts has previously learned the limits on using procurement to skirt federal policies with which it disagreed. In the late 1990s, Massachusetts felt that the federal government was not going far enough to sanction human rights abuses in Burma. So to put additional pressure on the regime, the state refused to contract with companies that did business in Burma. Like the recent Montana order, the goal was to pressure companies to adopt voluntary practices that federal law refused to impose directly. But the Supreme Court ruled unanimously that because the state's action interfered with the federal government's policy toward Burma, and so struck down the law.

There are also questions whether orders like Montana's violate the dormant commerce clause, which limits states' ability to act in ways that burden interstate commerce (a category that includes broadband access). The market participant doctrine gives states more leeway when acting as a purchaser than as a regulator, which is likely the exception upon which Montana and other states are relying. But the Supreme Court has narrowed this exception when states have tried to use their purchasing power to affect other contracts with third parties, rather than just securing terms in their own contracts. And that, of course, is what Montana is trying to do—use its purchasing power to influence other contracts between broadband providers and individual consumers. It's worth noting that the court's dormant commerce clause jurisprudence is murky and turns in part on the factual question of just how much an in-state ban would affect interstate traffic. But at a minimum, I would suggest that it's not clear to me that actions like Montana's will survive such a challenge.

Second, and briefly, even if Massachusetts could enact state net neutrality requirements, it's not clear that it should do so. Unless it's carefully crafted, a prohibition on contracting with networks that prioritize traffic might jeopardize, for instance, Massachusetts's ability to participate in FirstNet, AT&T's public safety network that prioritizes first-responder traffic over all others.

And that raises a larger concern, which is whether it's wise to ban all paid prioritization. Net neutrality proponents are correct that prioritization can be misused for anticompetitive purposes. But the reality is that there are good and bad reasons why a network might prioritize some traffic over others. For example, some applications, like streaming video and teleconferencing, are more susceptible to congestion. So if congestion occurs, a network might want to prioritize those applications ahead of web or email traffic, where a slight delay in delivery would be imperceptible to consumers. This type of engineering would be a net gain for consumers, but net neutrality rules prohibit this, out of fear that companies might abuse the privilege.

Ultimately, the FCC's recent order simply restored the law in place until 2015, under which the Internet flourished. My sense is that antitrust law already protects consumers from the harms that net neutrality advocates fear most, just as it protects consumers from anticompetitive harm everywhere else in American society.

Thank you.

Exhibit E



ISP Speed Index United States Leaderboard

Last Updated: January 2021

Rank	Speed (Mbps)	ISP	Type
1	3.6	Comcast	Cable
		Cox	Cable
		Mediacom	Cable
		Optimum Cable	Fiber
		Optimum Fiber	Cable
		Spectrum	Cable
		Suddenlink	Cable
		Verizon - FIOS	Fiber
2	3.4	AT&T - U-verse	Fiber
		Frontier	Fiber DSL
		Verizon - DSL	DSL
3	3.2	AT&T - DSL	DSL
		CenturyLink	Fiber DSL
		Windstream	DSL