Written Testimony of

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"Legislating to Safeguard the Free and Open Internet"

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INTRODUCTION

It is an honor to be here to speak about the important topic of Net Neutrality rules, and about the bill that will restore them in full and that is the subject of this legislative hearing. Thank you for inviting my organization and me to testify once more on the appropriate legal framework for the FCC's congressional mandate, which is to safeguard a broad suite of essential communications rights with these kinds of rules.

I am Vice President of Policy and General Counsel for both Free Press and Free Press Action, our 501(c)(4) entity. I'm here today on behalf of our 1.4 million members in all fifty states, the District of Columbia, and Puerto Rico, who have consistently called for reinstatement of the FCC's 2015 *Open Internet Order*[1] and the strong legal foundation on which it stood. That means restoring FCC authority to protect internet users both from currently identified and potential new forms of broadband providers' discriminatory or unreasonable conduct, as well as strong FCC authority to promote broadband deployment, affordability, competition, privacy, access, and public safety too.

We are proud to support fully H.R. 1644, the Save the Internet Act of 2019, introduced last week by my hometown and home district Congressman, Chairman Doyle. But lest anyone think this is a bill that only someone from the East End of Pittsburgh could love, it had an astounding 132 original co-sponsors at introduction in the House – from New Jersey to New Mexico; New York to Colorado; Michigan, Iowa and Texas; Florida to California; and Vermont to just down the road in Virginia. Sponsorship for the companion bill in the Senate is just as strong. There's good reason for that support.

[1] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Open Internet Order*").

THE *OPEN INTERNET ORDER* STRUCK THE RIGHT LEGAL BALANCE

This hearing is auspiciously timed. As luck would have it, the FCC released the landmark *Open Internet Order* four years ago today on March 12, 2015. The Save the Internet Act of 2019 works clearly and concisely to restore the provisions of that well-reasoned and successful FCC decision. It reinstates in their entirety the rules adopted in that order, as well as its correct legal conclusions and statutory interpretations.

By doing so, it readily re-establishes what have often been called that order's three "bright-line" rules that prevented broadband providers from engaging in blocking, throttling, or paid prioritization. Those rules say that broadband providers cannot:

- block lawful internet content, applications, services or devices;
- slow down or degrade internet traffic on the basis of its source or type; or
- charge third parties for preferential delivery of their content to the broadband provider's internet access customers, or prioritize delivery for the broadband provider's own affiliated video, voice, or other applications.

With some notable exceptions, many Members of Congress in both parties – and even many cable and phone companies and their lobbying groups – now say they would be willing to enact those rules in statute (after singing a very different tune not so long ago).

Yet as explained below, those three rules alone would not be enough to preserve real Net Neutrality, let alone all of the other rights that internet users and entrepreneurs need. Thankfully, the bill works to revive the *Open Internet Order*'s transparency provisions too, including the enhanced transparency rules wrongly thrown out along with the bright-line rules by the FCC's vote in late 2017.[2]

[2] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (rel. Jan. 4, 2018) ("*2017 Net Neutrality Repeal*").

It also reinstates the 2015 order's critically important "general conduct rule," set forth to assess whether conduct arguably not addressed by the bright-line rules might unreasonably discriminate against, disadvantage, or interfere with internet users and uses. Plus, unlike some legislative vehicles put forward within the last several years and even the last several weeks by members of this subcommittee, the Save the Internet Act of 2019 does not limit or eliminate FCC ability to make rules interpreting, enforcing, expanding, or updating protections as technology and markets evolve.

Perhaps most importantly, the bill operates to fix in place – with this new, separate act of Congress – the statutory interpretations and declaratory rulings put forward by the FCC in 2015. In portions of the *Open Internet Order* restored here, the FCC properly classified broadband internet access as a telecommunications service subject to Title II of the Communications Act, and properly decided to forbear from applying to that service some 27 statutes and 700 agency rules under Title II – using the forbearance authority Congress granted the FCC in the Telecommunications Act of 1996.

This last benefit of the Save the Internet Act may cause the most debate, at least in this building and others like it around Washington, DC. Bill opponents will tell its sponsors that they cannot inoculate undecided Members of this House against people (or, let's be honest, it's really just cable and telecom lobbyists) saying that the Title II framework is a bad thing. Those opponents will say that restoring strong rules and returning to strong laws is bad for broadband business, and unnecessary for reinstating open internet protections. But those naysayers couldn't be more wrong when it comes to understanding the facts, reading the law, or gauging what your constituents want.

The *Open Internet Order* Earns Support from Overwhelming Bipartisan Majorities

The *2017 Net Neutrality Repeal* that jettisoned this framework was wildly unpopular, just the opposite of the widely supported *Open Internet Order* this bill restores. According to a University of Maryland poll from April 2018, a full 82% of Republicans, 90% of Democrats and 85% of Independents opposed that repeal.[3]

That's why the Beltway political debate about the wrongly abandoned rules, order, and legal framework – all of which the Save the Internet Act rightly reinstates – would be comical if it weren't such an obstacle to settling this issue just as well as it was in 2015. That poll is not an outlier by any stretch. As the Open Technology Institute has chronicled, a whole series of polls show broad, well-informed, and longstanding support for strong rules grounded in Title II.[4]

Questing for a bipartisan bill should mean listening to the outpouring of support for the 2015 *Open Internet Order* from voters across the political spectrum. The Congressional Review Act ("CRA") effort to reinstate it passed the Senate on a bipartisan basis in May 2018, but was denied a vote in the House despite support from more than 180 Members. Supporters of the Save the Internet Act realize that bipartisanship does not mean inadequate compromises, driven by exaggerated industry claims of harm, all while those same industries tell the truth to their investors. Bipartisanship means doing the right thing, especially when backed by overwhelming majorities in both parties.

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[3] University of Maryland, School for Public Policy, "Overwhelming Bipartisan Public Opposition to Repealing Net Neutrality Persists" (Apr. 18, 2018), http://www.publicconsultation.org/united-states/overwhelming-bipartisan-public-opposition-to-repealing-net-neutrality-persists/.

[4] Amir Nasr, OTI, "The American People Broadly Support Net Neutrality," (Aug. 30, 2018), https://www.newamerica.org/oti/blog/american-people-broadly-support-net-neutrality/ (citing polls that found support for Net Neutrality and the 2015 version of the rules among at least 75% of Trump voters).

The Repeal Drew on False Claims and Issued from a Fraud-Filled FCC Record

The 2017 repeal suggested that the Title II framework re-established in 2015 was legally unsound and detrimental to broadband investments. As shown below, and in our prior testimony and filings, none of those Pai FCC claims were true. Yet another aspect of the repeal that makes it difficult to accept is that it was built on a tainted record. The FCC ignored the facts, the law, and the consequences of its policies, as well as its duty to consider legitimate comments while weeding out obviously fraudulent ones.

At the outset of the proceeding, before he'd sought public comment, Chairman Pai had already made up his mind. Based on his ideological dissent to the 2015 *Open Internet Order*, it's as if his prejudiced and pre-ordained conclusion was based on revenge. Giving a closed-door speech with industry backers to announce his plan, he said this was "a fight that we are going to win."[5] That's not an open-minded decision-maker.

How else to explain the fatally flawed process the FCC rushed through to repeal the *Open Internet Order*? It could not handle comments first generated in response to its repeal plans, and falsely claimed a cyberattack when really the agency was simply not ready for robust public participation in the docket.[6] It ignored tens of thousands of relevant Net Neutrality complaints submitted under the *Open Internet Order*.[7] And it allowed potentially millions of comments submitted with stolen identities and under false pretenses to remain on the record without so much as a cursory investigation.[8]

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[5] Remarks of FCC Chairman Ajit Pai at the Newseum, Washington, DC (Apr. 26, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0427/DOC-344590A1.pdf.

[6] Chris Mills, "FCC Chairman defends lying about fake DDoS attack – even after admitting he knew the truth," *BGR* (Aug. 16, 2018), https://bgr.com/2018/08/16/fcc-ddos-attack-ajit-pai-congress-testimony/.

[7] "Release: NHMC Challenges the FCC's Repeal of Net Neutrality Rules in Court" (Feb. 23, 2018), http://www.nhmc.org/release-nhmc-challenges-fccs-repeal-net-neutrality-rules-court/.

[8] *See, e.g.*, Dell Cameron & Jason Prechtel, "How an Investigation of Fake FCC Comments Snared a Prominent D.C. Media Firm," *Gizmodo* (Feb. 21, 2019), https://bit.ly/2NiMQMU.

The *Open Internet Order* Protects Unpopular Ideas and Marginalized Communities

The Save the Internet Act would undo the unjustified repeal of the 2015 *Open Internet Order*. We've had the honor of testifying on the importance of that order's rules, and on nondiscrimination rules best preserved under a streamlined Title II framework, on multiple occasions now. And as my colleague Jessica J. González testified earlier this year,[9] losing those rights is devastating for people of color and others all too used to fighting discrimination and fighting for their voices to be heard.

As she explained then, "[m]illions of American activists, creators, small business owners and internet users objected" to the 2017 repeal and "[p]eople of color were among some of the most vocal critics" because "never before in history have barriers to entry been lower for people of color to reach a large audience with our own stories in our own words; to start small businesses; to organize for change."[10]

That kind of nondiscriminatory access to communications tools and pathways is well worth fighting for. And make no mistake: it is not just the placement of the essential safeguards in Title II (or the roman numeral "II" for that matter) that broadband providers dislike, but the vital rights and duties they'd prefer to evade no matter where in the law they reside. As I have said on a few occasions, we have to retain these protections – but if we want the same rights, we'll have the same fights, no matter what legislative vehicle we choose. The Save the Internet Act is the best vehicle by far, but choosing another wouldn't change the debate's contours or the communications rights we demand.

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[9] Jessica J. González, Free Press and Free Press Action Fund, "Preserving an Open Internet for Consumers, Small Businesses, and Free Speech," before Committee on Energy & Commerce, Subcommittee on Communications & Technology (Feb. 7, 2019) ("González Testimony"), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Gonzalez_Testimony.pdf.

[10] *Id.* at 4.

The *Open Internet Order* Safeguards These Crucial Rights With Timeless Laws

Those who try to paint the 2015 *Open Internet Order* and its Title II framework in a bad light purposefully blur the lines with an ahistorical and anachronistic approach. They suggest, sometimes in the same clumsy brush stroke, that the 2015 decision was a wholly new invention of the Obama FCC and simultaneously a relic of a bygone era. These disoriented pictures are inconsistent with one another – and with reality.

Those who say the rules restored by the Save the Internet Act magically sprang into being for the first time in 2015 either ignore or distort the true history of the Communications Act's common carriage provisions and their application to internet access services. Title II with forbearance has long provided a light-touch, tailored framework for (relatively) competitive telecom sectors such as mobile voice, preserving nondiscrimination rights like those implemented in the now-repealed rules here.

Yet it wasn't just voice service that remained under that law. The FCC used its Title II authority to regulate common carrier phone lines over which dial-up internet service was delivered. It treated DSL – the broadband internet access first offered by telephone companies – as a telecom service until 2005, during a time when telecom investment hit a record peak. And long after 2005, Title II applied to more than a thousand rural DSL providers who chose to continue providing broadband as a telecom service. That law still applies to business-grade broadband too, so successfully that AT&T called its use an "unqualified regulatory success story" responsible for spurring "billions of dollars" of investment in "state-of-the-art broadband networks."[11]

[11] Comments of AT&T Inc., WC Docket No. 05-25, at 3 (filed Apr. 16, 2013) (further arguing that Title II with forbearance promoted "the paramount federal policy of fostering deployment of advanced services").

Once we see the facts and true history, the return to Title II in 2015 makes perfect sense. It still would make sense, from a legal perspective, even without that success. As Free Press, and dozens of public interest groups, internet companies, and state attorneys general showed in our current lawsuit to overturn the *2017 Net Neutrality Repeal*, broadband internet access is best defined as a telecom service. It offers "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[12]

In other words, broadband providers deliver our speech and content. They don't (or at least they shouldn't be allowed to) change what we see, say, and read online. And they never have been allowed to, until the Pai FCC abdicated its authority and abandoned the path taken by prior administrations in both parties. While the legal foundation for Net Neutrality shifted over time, the FCC always tried to maintain principles or rules prohibiting network access providers from interfering with their customers' choices.

Between 2002 and 2005, in a misguided attempt to more or less completely deregulate broadband, the FCC said broadband was an "information service," treating a website and the wire over which people access it the same way for regulatory purposes. That approach did not stand up in court. The FCC twice argued it could preserve the open internet without treating broadband as a telecom service under Title II, and twice lost. When millions of people called on it to do so, the FCC in 2015 put Net Neutrality rules back on solid legal footing by restoring the Title II classification for broadband, and this time it won twice in appellate court.

[12] 47 U.S.C. § 153(50).

There Is Nothing Old-Fashioned About Nondiscrimination Law Online

The second part of *Open Internet Order* opponents' time-warped argument against Title II is that the law is old. That's all it boils down to, which is remarkable in its own right. But what these arguments about the age of the provisions in Title II fail to account for are the updates made to the law since its initial passage, to say nothing of its continued suitability for today's broadband internet access market.

It should perhaps go without saying that we rarely discard good laws based on nothing but their age. Nor should we. Yet last month, when my colleague Ms. González was here, the subcommittee was treated to a gameshow interlude featuring a blown-up photo of the Speaker of the House when the Communications Act of 1934 first passed.

With no complaints for the starring role that Speaker Henry Thomas Rainey of Illinois played that day, I wonder if we might also see a photo of Thomas Brackett Reed, Republican of Maine, the Speaker for the Sherman Antitrust Act of 1890. After all, those who oppose strong FCC Net Neutrality rules often hold up antitrust as a sufficient deterrent to harmful conduct by broadband providers. That's what the Pai FCC did in 2017, concluding that antitrust law would preserve the open internet – albeit without sufficient consideration of that law, of the great expense in bringing antitrust lawsuits far beyond the means of any individual internet user, or (apparently) of Speaker Reed's age. And how about a photo of Speaker Champ Clark, Democrat of Missouri? He presided over the passage of the FTC Act of 1914, another source of authority that the *2017 Net Neutrality Repeal* (wrongly) posited as sufficient to protect internet users.[13]

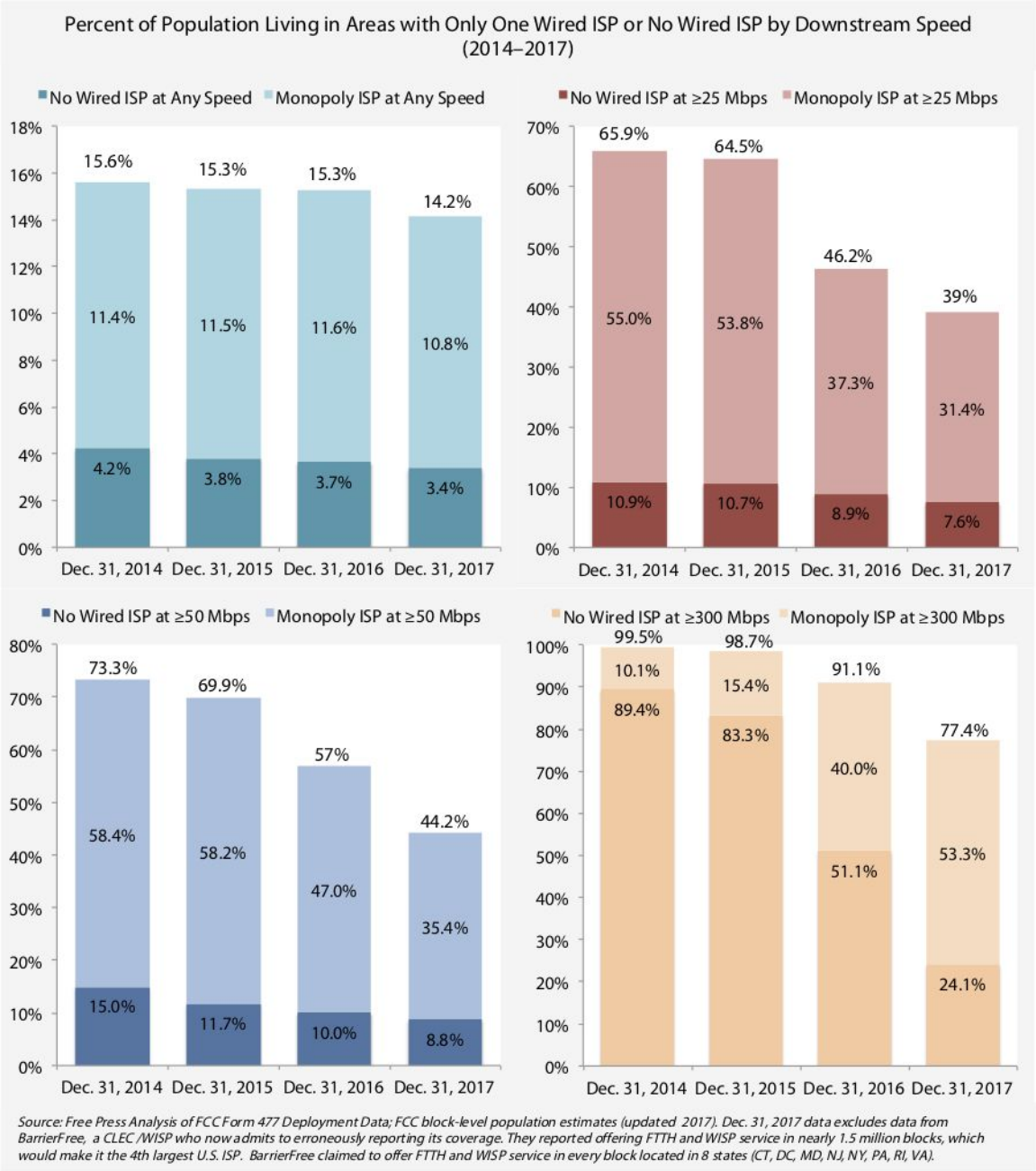
[13] *See 2017 Net Neutrality Repeal* ¶¶ 140, 143 (citing Secs. 1 and 2 of Sherman Act, Sec. 5 of FTC Act).

While history lessons are fun, and apparently beneficial for many Members of Congress, we should turn to a few more facts about the vitality of Title II and the protections it enshrines before returning to the new bill and specific provisions it restores.

The Communications Act received a dramatic overhaul from Congress at the outset of the internet era. That 1996 amendment crafted the "telecommunications service" definition that the 2015 *Open Internet Order* used, and that the Save the Internet Act would ratify. The Speaker of the House in 1996 was Newt Gingrich. Photos of him are still widely available on cable news, so we need not seek one here. But speaking of calls for a bipartisan bill to settle the Net Neutrality debate, it's hard to imagine passing any bill today with the bipartisan margins that Speaker Gingrich saw. The 1996 Telecom Act passed the House by a score of 414 to 16, all without losing a single Republican vote.

Despite that last major update coming far more recently than 1934, some opponents of strong Net Neutrality rules still say that we have no business applying to internet access these rules written for "1930s monopolies." This line of reasoning begs the question: what about present-day monopolies? Do those deserve any scrutiny? For even in 2017, the latest year for which FCC broadband deployment data is available:

- 31.4% of people in the U.S. had just one choice for a broadband provider offering downstream speeds of 25 megabits per second. Another 7.6% had no wired options at that speed.
- At higher speeds, such as a relatively modest in modern times 50 Mbps, the number goes to 44.2% of the population with just one option or no options.
- At 300 Mbps downstream, it's a large majority of people (53.3%) that have only one wired option, while another quarter of the population (24.1%) has none.



Source: Free Press Analysis of FCC Form 477 Deployment Data; FCC block-level population estimates (updated 2017). Dec. 31, 2017 data excludes data from BarrierFree, a CLEC /WISP who now admits to erroneously reporting its coverage. They reported offering FTTH and WISP service in nearly 1.5 million blocks, which would make it the 4th largest U.S. ISP. BarrierFree claimed to offer FTTH and WISP service in every block located in 8 states (CT, DC, MD, NJ, NY, PA, RI, VA).

Just as important as this illustration of the fact that broadband monopolies are all too real for too many people in the U.S., the discussion above about Title II's application to (relatively) competitive telecom services illustrates that there is no truth to the notion of common carrier rules only applying to monopolies.

As we have explained in FCC Net Neutrality proceedings seemingly countless times,[14] the FCC can, does, and should retain the basic building blocks of Title II for transmission services like broadband internet access – as it has in numerous markets and telecom service sectors for approaching three decades.

Think again of mobile wireless. No one thinks Verizon should be able to block phone calls if it wants, merely because customers could switch to AT&T, T-Mobile, or Sprint. Would anyone think those same carriers still ought to be allowed to block emails, instant messages, websites, or apps, just because there may be other mobile providers? That's not how transmission services work, and it's not how they should work.

KEY PROVISIONS RESTORED BY THE SAVE THE INTERNET ACT

In the final section of this testimony, we will add just three more short chapters to our extensive research on broadband investment and deployment with and without Title II and strong Net Neutrality rules in place. But first, we catalogue specific legal underpinnings of the *Open Internet Order* that the Save the Internet Act fortunately restores. For the sake of time, we'll incorporate by reference many arguments presented in our most recent testimony on the need for more than just three bright-line Net Neutrality rules (and also many general observations on investment and deployment). We'll focus first on provisions in Title II that undergird, fortify, and supplement the bright-line rules on which most parties now claim to agree.

[14] *See, e.g.*, Comments of Free Press, GN Docket No. 14-28, at 26-46 (filed July 18, 2014); *see also* Tim Karr, Free Press "The Biggest Lie About Net Neutrality," *HuffPost* (Oct. 7, 2014), https://www.huffingtonpost.com/timothy-karr/the-biggest-lie-about-net_b_5657250.html.

The Save the Internet Act Restores Necessary Nondiscrimination Law Beyond The Three "Bright-Line" Net Neutrality Rules

Reciting the *Open Internet Order* bans on broadband provider blocking, throttling, and paid prioritization has become a somewhat familiar drill for people following this issue. Contrary to the dashed-off conclusions in the *2017 Net Neutrality Repeal* that discarded them, those bans are indeed necessary and address broadband provider behavior clearly harmful to expression, innovation and commerce online. Those three rules, as well as the general conduct rule, largely derive from and implement Congress's mandate in Section 202(a) of the Communications Act.

- **Section 202(a) prohibits "unjust or unreasonable discrimination" in charges, practices, or services, or "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality."**

That authority is also a main source for the 2015 order's good roadmap[15] to addressing interconnection disputes. Broadband providers have deliberately limited capacity at points where they receive traffic from other networks, and during the best-documented period of such behavior effectively throttled the delivery of Netflix content to thousands of U.S. businesses and residential customers across the country, while impacting content and services from other sites and sources too.[16]

The Save the Internet Act's reinstatement of Section 202(a) is critical for allowing the FCC to make rules and weigh broadband provider conduct that violates this statutory prohibition, even if that conduct does not squarely fit within the the bright-line rules.

[15] *See Open Internet Order* ¶ 205.
[16] *See* Josh Stager, Open Technology Institute, "Net Neutrality's Achilles Heel" (Jan. 26, 2015), https://www.newamerica.org/oti/blog/net-neutralitys-achilles-heel/.

Broadband providers sometimes suggest there have been no Net Neutrality violations at all, before conceding there were but saying those either occurred some time ago or were eventually resolved. They try to disappear the role of the FCC in such resolutions, or downplay the necessity for FCC power to update its rules over time.

The best known examples of such behavior are set out in our February testimony[17] and include well-known cases of telephone companies blocking voice-over-IP services, and cable companies blocking or disfavoring streaming video services. Yet the need for residual nondiscrimination authority reserved to the FCC is probably best illustrated by behaviors such as AT&T's attempt to prevent wireless customers from using the FaceTime video chat feature on mobile networks (as opposed to only using it on wi-fi).

In 2012, AT&T said it would disable FaceTime over its customers' cellular connections unless they also subscribed to a more expensive voice plan. Essentially, AT&T separated customers from more of their money by blocking alternatives to AT&T's own products. Yet in discussions with the FCC at the time, as Free Press and other organizations considered filing a complaint regarding this practice, AT&T suggested its behavior was not subject to the then-extant 2010 version of the open internet rules because the carrier was not technically blocking all use of the application. It was merely requiring people to pay more, for a different service, in order to use their data plans as they wished. This kind of evasive argument (that bright-line rules only apply to technical measures and not economic discrimination) is put to rest by the strong protections and language of Section 202(a).

[17] *See* González Testimony at 8-10 (citing Madison River/Vonage, Comcast/BitTorrent, *et al.*).

After adoption of the *Open Internet Order*, there were a series of short FCC inquiries into "zero-rating" schemes, with broadband providers offering not to count data from certain sources against a monthly cap. Advocates tend to agree that not all forms zero-rating may be equally bad. In theory, a relatively neutral form might treat all content or applications of the same kind alike. But in practice that is difficult to ensure, and even if ensured might be suspect under no-throttling rule language in the 2015 order. It risks favoring whole classes of applications and content over others that may be equally beneficial but ultimately disincentivized because they are not "free."

Broadband providers and their friends in Washington took great umbrage at these inquiries, wondering how the FCC could dare to look this Trojan Horse in the mouth. Recent research suggests that zero-rating could in fact increase the price users pay, because broadband providers can and will increase the price for data used on non-exempted sources and applications to steer people towards the favored content.[18] The practice of zero-rating has since changed, and been rather on the decline in the U.S. wireless industry, as carriers move back towards uncapped monthly data plans but then throttle all video back to a lower speed limit when a user exceeds a monthly data amount.

These kinds of selective data "discounting" practices clearly could have a discriminatory impact, however, especially when used to favor the broadband provider's own content as AT&T recently announced it does – even on wired broadband, where data caps are unnecessary for purposes of reasonable congestion management and serve as little but a disincentive to people's use of the internet access service they pay for.

[18] *See* Karl Bode, "Broadband 'Zero Rating' Actually Costs Customers More, Study Finds," *Motherboard* (Feb. 7, 2019), https://bit.ly/2EZFICH.

In fact, AT&T's practice and business plan today bear a striking resemblance to its plan for disincentivizing use of FaceTime in 2012 and instead favoring its own products. AT&T tells broadband customers that they can use as much data as they want without penalty, but only so long as they also subscribe to an AT&T streaming video product.[19] With needlessly narrow bright-line rules alone, AT&T could once again attempt to justify this kind of behavior with the defense that it is not using technical traffic management practices to prevent people sending and receiving the content they choose; it's just penalizing them monetarily for doing so! The FCC should be able to at least question these practices if not uniformly ban every variety of them. The Save the Internet Act restores the authority for the FCC to ask those questions then take action.

The Save the Internet Act Restores the FCC's Essential Mandate to Ensure that Broadband Internet Access Service Is Offered on Just and Reasonable Terms

The second main provision in Title II that the Save the Internet Act rightly restores is Section 201(b), which also provides a foundation for the bright-line rules and for other necessary FCC rulemaking and enforcement authorities as well.

- **Section 201(b) requires all "charges, practices, classifications, and regulations for and in connection with" specified communication services to "be just and reasonable," or declares them unlawful.**

Imprecise calls for the FCC to be prohibited from engaging in "rate regulation" miss the need to keep this Section 201(b) authority in place. They also miss the key distinction between this provision, which the *Open Internet Order* rightly kept for broadband internet access service, and the provisions from which it forbore such as the tariffing statute in Section 203 and the rate-making statute in Section 205.

[19] *See* Karl Bode, "AT&T Lets Users Avoid Broadband Caps...If They Use AT&T's Own Streaming Service," *Techdirt* (Dec. 21, 2018), https://bit.ly/2Sryobf.

The latter section gave the FCC power to not just oversee carriers' practices and prevent abusive ones, as Section 201(b) thankfully does; it gave the agency power to set (or as the statutory text says, to prescribe) the rates that carriers are allowed to charge. That kind of proceeding to determine prices is always complex, can be inefficient, and is difficult to get right. But it's the kind of so-called "utility-style" rate-making power from which the FCC chose to forbear in the *Open Internet Order*, and which the Save the Internet Act now prevents the FCC from exercising.

In light of the chart above, showing just how much of the country still faces a wired broadband monopoly at best, it is curious to hear some lawmakers suggest that the FCC should have no power whatsoever to even consider the rates charged by such monopolies – even when they may engage in price-gouging, impose punitive fees and overage penalties, undertake fraudulent or faulty billing practices, or engage in other such harmful conduct. It is difficult to imagine any lawmaker going home and hearing from their constituents on a regular basis that the price of internet access is just too darn low, and that's why they're glad the FCC gave up (or Congress took away) any and all government oversight of the prices charged by providers of this essential service.

Yet that is the only outcome of the kind of talk one hears inside the Beltway at times, about the need to eliminate any such agency authority to inquire into the reasonableness of broadband provider practices. It makes one wonder, just what "unjust or unreasonable" practices do broadband providers need to engage in? And what unjust and unreasonable practices should we be racing to bless for them?

The public safety ramifications of the FCC abdicating this type of authority were laid bare last year, with revelations that Verizon had throttled Santa Clara County firefighters responding to historically devastating wildfires. The immediate, overly academic (and incomplete) reaction from some opponents of strong Net Neutrality rules and Title II was that this wasn't a "real" Net Neutrality violation. It was just a data cap issue between the wireless broadband provider and its own customer, not discriminatory throttling based on the source or sender of the data, they said.

This fiddling while wildfires burn entirely misses, or wilfully obscures, the point: the few provisions in Title II rightly restored by the Save the Internet Act do more than just prevent discrimination, they allow the FCC to assess and prevent other forms of unjust and unreasonable behavior. And that is a very good thing for internet users, businesses, and public safety too, in times of emergency and otherwise.

The Save the Internet Act Restores the Strongest FCC Authority to Promote Broadband Deployment, Affordability, Choice, Privacy, Access, and Public Safety

In our testimony last month, we listed a broad range of tasks the FCC could best undertake from the solid starting point of Title II authorities retained in the *Open Internet Order*. In addition to the powers under Section 201 and 202 discussed above, we listed[20]:

- Promoting broadband deployment, affordability and competition;
- Modernizing and promoting the Lifeline program;
- Protecting users from privacy invasions by ISPs; and
- Ensuring reasonable access for disabled people.

[20] *See* González Testimony at 6-7.

To explain the benefits of the Save the Internet Act's approach, fixing in place the forbearance decisions made in 2015, I'll briefly discuss here four sets of statutory provisions the prior FCC rightly retained for broadband internet access service in the *Open Internet Order* – plus, one set from which that 2015 order understandably forbore.

➢ **Section 254: Using the Universal Service Fund for broadband internet access.**

Proper treatment of the FCC's jurisdiction to promote universal access to advanced telecommunications services, including broadband internet access service, could fill an entire law review article. Suffice it to say for now that the Commission's express authority for providing Universal Service Fund dollars to broadband providers flows through Title II, with its provisions requiring that support go only to "eligible telecommunications carriers" designated by the FCC or the states.

The current FCC may claim some other power to grant funding for such carriers' broadband networks or Lifeline offerings under other provisions of the law. Yet its abandonment of Title II, Section 254, and the telecom services classification for broadband meant the FCC abandoned its ability to provide funding to new entrants and other entities that may wish to provide a broadband-only service supported by USF.

This decision (along with the Pai FCC's decision to likewise walk away from Section 706 as a grant of substantive authority) leaves no solid mandate in place for incumbent telephone companies to provide broadband service, only the option to do so if they so choose. It also shuts out Lifeline Broadband Providers that were already offering innovative services to program participants before Chairman Pai took the reins at the FCC and almost immediately revoked their eligibility to offer service.

The Save the Internet Act restores application of the telecom services definition to broadband internet access, and with it eligibility for broadband to receive support as a telecommunications service, obviating the need for the house-of-cards the Pai FCC has thrown up to justify its policy preferences in awarding universal service support.

➢ **Section 224: Granting access to infrastructure and rights-of-way.**

The *2017 Net Neutrality Repeal* offers no guarantee that broadband internet access providers can gain access to poles, conduits, and other rights-of-way controlled by power companies or incumbent telecom companies. All it provides is the empty assurance of a finger-wagging warning that the repeal should not be read as encouraging denial of access to such rights-of-way.[21] Unsurprisingly, competitive providers and would-be new entrants prefer legal protections for nondiscriminatory access in Section 224(f), for example, not unenforceable assurances. That is why more than forty broadband providers opposed the FCC's repeal of the Title II framework,[22] and favored retaining Section 224, because without that law they could be shut out of providing service. The Save the Internet Act restores these rights for competitive providers.

➢ **Section 222: Preserving statutory privacy duties for broadband providers.**

The 115th Congress's passage of a Resolution of Disapproval striking down the FCC's 2016 broadband privacy rules undoubtedly complicates, or more likely prohibits, agency re-adoption of rules to implement the mandates of Section 222 for broadband internet access providers once they are reclassified as telecommunications carriers.

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[21] *See 2017 Net Neutrality Repeal* ¶ 186.

[22] *See* Ernesto Falcon, EFF, "More than 40 ISPs Across the Country Tell Chairman Pai to Not Repeal Network Neutrality and Maintain Title II Enforcement" (June 27, 2017), https://www.eff.org/deeplinks/2017/06/isps-across-country-tell-chairman-pai-not-repeal-network-neutrality .

Yet what that CRA vote did not do and could not do was remove the affirmative obligations that all telecom carriers have under Section 222 to safeguard their customers' confidential information, and not to use customers' proprietary network information for purposes other than the provision of telecom service without those individuals' consent.

While some privacy CRA proponents touted removal of those FCC rules as a positive step, internet users took a decidedly different view of that vote, and they have yet to see the new comprehensive internet privacy laws promised to replace those rules.

➢ **Sections 225/255/251(a)(2): Ensuring disabilities access.**

Although the *Open Internet Order* acknowledged the passage of the landmark Twenty-First Century Communications and Video Accessibility Act of 2010 providing new protections for accessibility of communications services, it decided nonetheless to retain three specific sections or paragraphs that provide at least incremental and additional safeguards for individuals with different accessibility needs – along with more robust FCC enforcement capabilities for this entire suite of rights. The Save the Internet Act restores the *Open Internet Order*'s conclusions in this regard, reinforcing disabilities access laws outside of Title II with these longstanding authorities in Title II as well.

➢ **Section 251: Forbearing from inapplicable interconnection and resale duties.**

The *Open Internet Order* did forbear however, from remaining provisions in Section 251, along with what it termed related interconnection and market-opening provisions in Sections 252 and 256. To avoid any confusion from the multiple uses of the term "interconnection" made in both FCC orders subject to this bill, it must be said that the interconnection obligations spelled out in Section 251 (and even Section 201(a))

govern interactions only between telecommunications carriers and other carriers. That means that, even without forbearance from Section 251(a)(1), this specific provision arguably might not govern the types of interconnection disputes referenced above between broadband internet access providers and any non-carriers.

When it comes to the resale provisions in Subsections 251(b) and (c), it must be said that Free Press has long identified (in our 2016 report *Digital Denied* and elsewhere) the lack of resale options in wired broadband as a market failure. That decreases consumer choice, drives up prices, and deprives people of wired broadband service plans on better terms and conditions (*i.e.*, plans that might be more widely available or free of credit checks and other racially discriminatory impediments to adoption). We still advocate that Congress, the FCC, and other policy-makers take steps to assess and then address this market failure. It is nevertheless quite understandable that the *Open Internet Order* chose not to retain the wholesale and interconnection duties in Section 251 that, on their own terms, apply only to local exchange carriers (*see* Section 251(b)), or exclusively to incumbent local exchange carriers' telephone exchange service (*see* Section 251(c)(2)(A)) and ILECs' unbundling obligations.

NEW DATA ON EFFECTS OF THE *OPEN INTERNET ORDER*'S ADOPTION AND REPEAL ON BROADBAND INVESTMENT AND SPEEDS

Our February 2019 testimony reiterated obvious truths about broadband coverage and speed improvements – before, during, and after the *Open Internet Order* and its repeal – shown in broadband providers' own investment and deployment data.[23]

[23] *See* González Testimony at 12-26.

Free Press has long used broadband providers' own SEC disclosures to show the true impact – or, more aptly, lack of any impact – of FCC Net Neutrality rules on broadband provider investment and deployment. Ranking Member Walden said in the last hearing, without challenging them, that Free Press may use our "own figures, . . . or wherever [we] got the data." We got it directly from investment reports of publicly traded companies, and deployment reports that broadband providers file on FCC Form 477.

Beyond claiming (falsely) that the *Open Internet Order* had harmed investment, Chairman Pai and his allies predicted that the 2017 repeal would increase broadband investment. But now we have new data proving that individual broadband providers' capital expenditures have not uniformly skyrocketed since the FCC's repeal vote, even as coupled with massive corporate tax cuts. In fact, many of the largest broadband providers have now reported decreased expenditures in 2018, the year that repeal took effect.

As always, we caution against over-reliance on aggregate investment expenditures, the sheer dollar amount spent by ISPs, or other such blunt metrics easily swayed by temporary changes in either direction at any large firm. Aggregates obscure changes (if any) in investment decisions, cycles, and strategies by all individual firms that make up the total. Those firms' decisions and directions may vary from one another, with broadband providers explaining to their investors the reasons for their individual decisions based on technological upgrade cycles that different companies move through at different times. As AT&T itself concluded, "there is no reason to expect capital expenditures to increase by the same amount year after year. [24]

[24] Comments of AT&T, WT Docket No. 10-133, at 34 (filed July 30, 2010).

Three additional data points and data sets have come to light since the February 2019 hearing on this topic. Because of the persistent unsupported claims and outright falsehoods surrounding this question, we close with summaries of these developments covered more fully in our other articles and filings.

A Broadband Provider Witness Claims at the Subcommittee's Initial Hearing on this Subject Did Not Detail the Full Extent of His Investments Under Title II

Last month in this same hearing room, an Eastern Oregon Telecom ("EOT") executive testified about the supposed chilling impact the Title II framework restored in 2015 had on his business. His testimony was meant to suggest that ratifying that same legal framework, as the Save the Internet Act does, would be bad for small and rural broadband providers. Fortunately for the bill's sponsors – and in fact, fortunately for EOT's business prospects, if not the probative value of its congressional testimony – EOT continued right on investing and improving service under Title II.

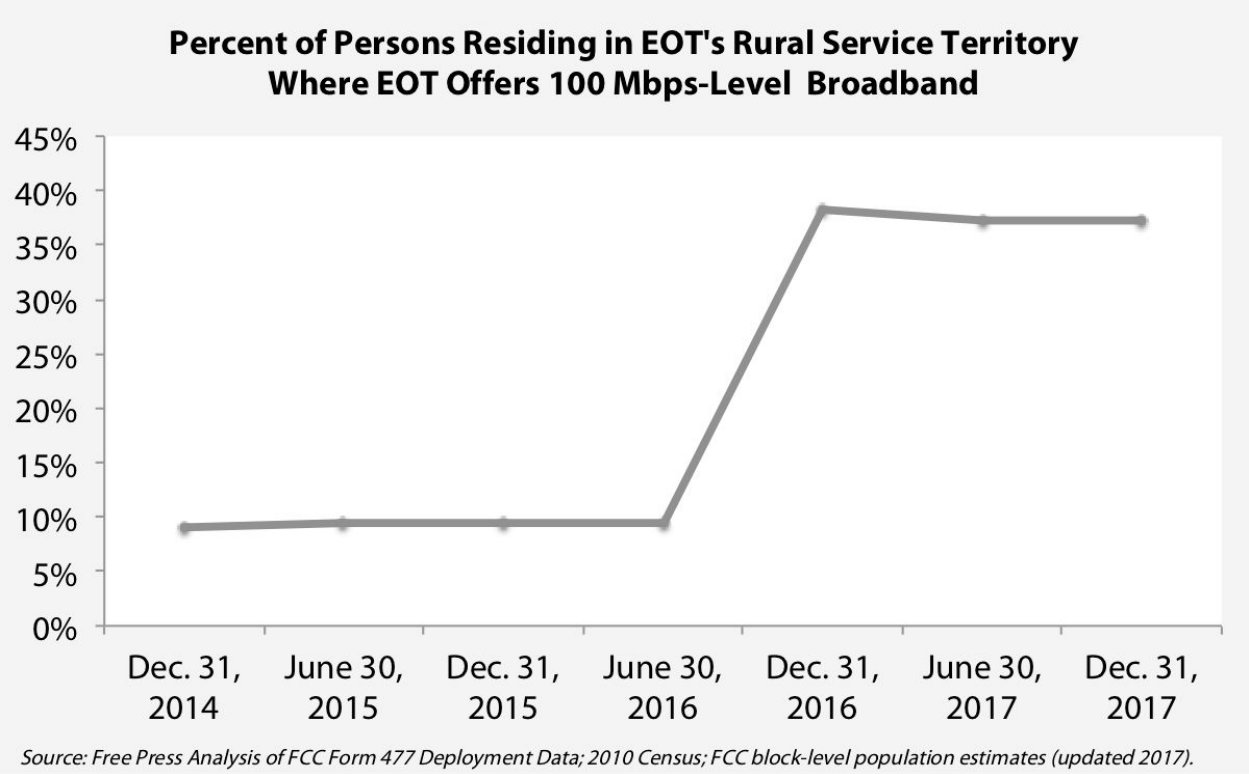
EOT testified last month that during 2015 and 2016, the company "could not get loans from the bank" saying it was "only as we started to hear the commitment from the new FCC to repeal Title II that we started to see the cash open up." Free Press Action has no way of knowing what passed between EOT and its bankers or prospective investors. We can only assume that those specific statements were true, at least in some respect. But here's what we do know now,[25] based on a review of FCC broadband deployment data self-reported by EOT, and based on a cursory internet search.

[25] *See* S. Derek Turner, Free Press "Tale Tales and Title II," (Feb. 15, 2019), https://www.freepress.net/our-response/expert-analysis/insights-opinions/tall-tales-and-title-ii. The post links to EOT's joint press release with Huawei, contemporaneous news stories, and additional sources.

- In March 2015, just a few days after the FCC's historic vote returning to Title II, EOT and Huawei put out a joint press release announcing a new fiber-to-the-premises deployment project that would bring gigabit service to "over 8,000 homes and businesses in Hermiston and the surrounding area." The release announced initial deployment in late 2015, continuing into 2016. A local newspaper report that same day quoted the EOT witness saying that with the new build EOT "expects to invest $2 million" on the project.

- EOT substantially expanded its cable footprint into previously unserved areas; upgraded 100 percent of its cable lines to higher-capacity DOCSIS 3; and more than tripled the marketed downstream speeds of all of these cable-modem lines from 30 Mbps to 100 Mbps. This upgrade occurred predominantly in 2016 as well – that is, long before Donald Trump's election, and before EOT could have "started to hear the commitment from the [Trump] FCC to repeal Title II."

- A substantial number of EOT's deployments and upgrades made during this time were in areas classified as rural or unpopulated blocks as of the 2010 Census. Between the end of 2014 and the end of 2016, EOT expanded its total number of rural blocks served by 24 percent; the number of rural blocks where it offers cable-modem service by 315 percent; and the number of rural blocks where it offers fiber service by 25 percent.



Source: Free Press Analysis of FCC Form 477 Deployment Data; 2010 Census; FCC block-level population estimates (updated 2017).

In the end, this trajectory is not surprising, even for a rural ISP in the briefly restored Title II era. While investment information is harder to find for non-publicly traded companies, we've seen providers before tell a friendly ear at the FCC or in Congress one thing while they did another. Right before the FCC voted to repeal the Net Neutrality rules in 2017, five other small providers trooped in to tell Chairman Pai they were suffering under Title II. On examining their self-reported data, Free Press found all five were "either greatly expanding their service territory, expanding it somewhat more modestly, or deploying new technologies and faster speeds."[26]

FCC Broadband Deployment Data for 2017, the Pai FCC's First Year, Shows Increases at the Same Pace as Before and After the 2015 Title II Vote

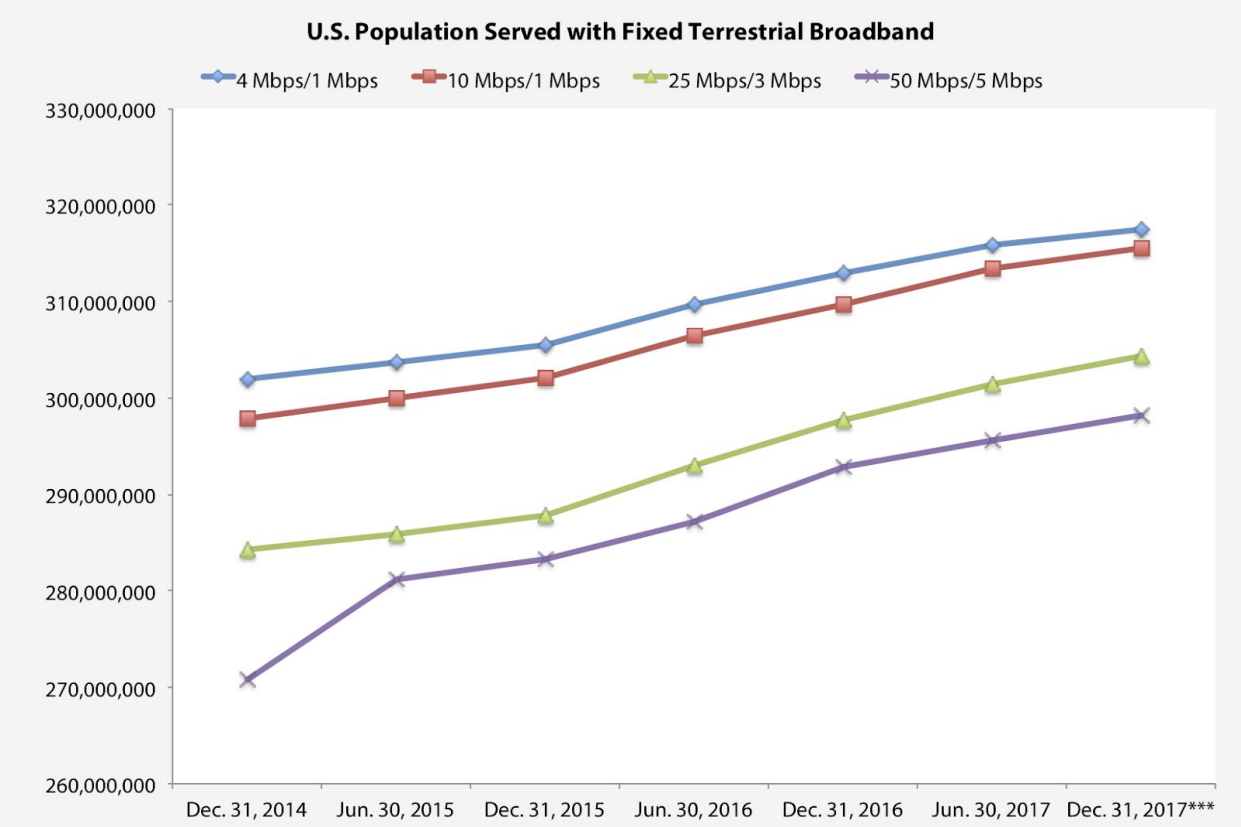
All of the broadband deployment, coverage, speed, and competition data summarized in our February testimony tells a remarkably consistent story on the level of deployment and capacity upgrades during the period that followed the FCC's adoption of the *Open Internet Order*. There is irrefutable evidence that broadband progress continued unhindered by restoration of Title II and adoption of strong rules.

We are now able to analyze FCC Form 477 data for year-end 2017 as well, which of course reflects only a few weeks time after the Pai FCC actually voted in December of that year on the repeal. But to use EOT's framing, if not its false conclusions about that timeframe, broadband providers knew for all of 2017 that the newly installed FCC chairman was likely to make good on his promise of repealing the rules and running away from Title II. Did broadband investments leap in anticipation of that repeal?

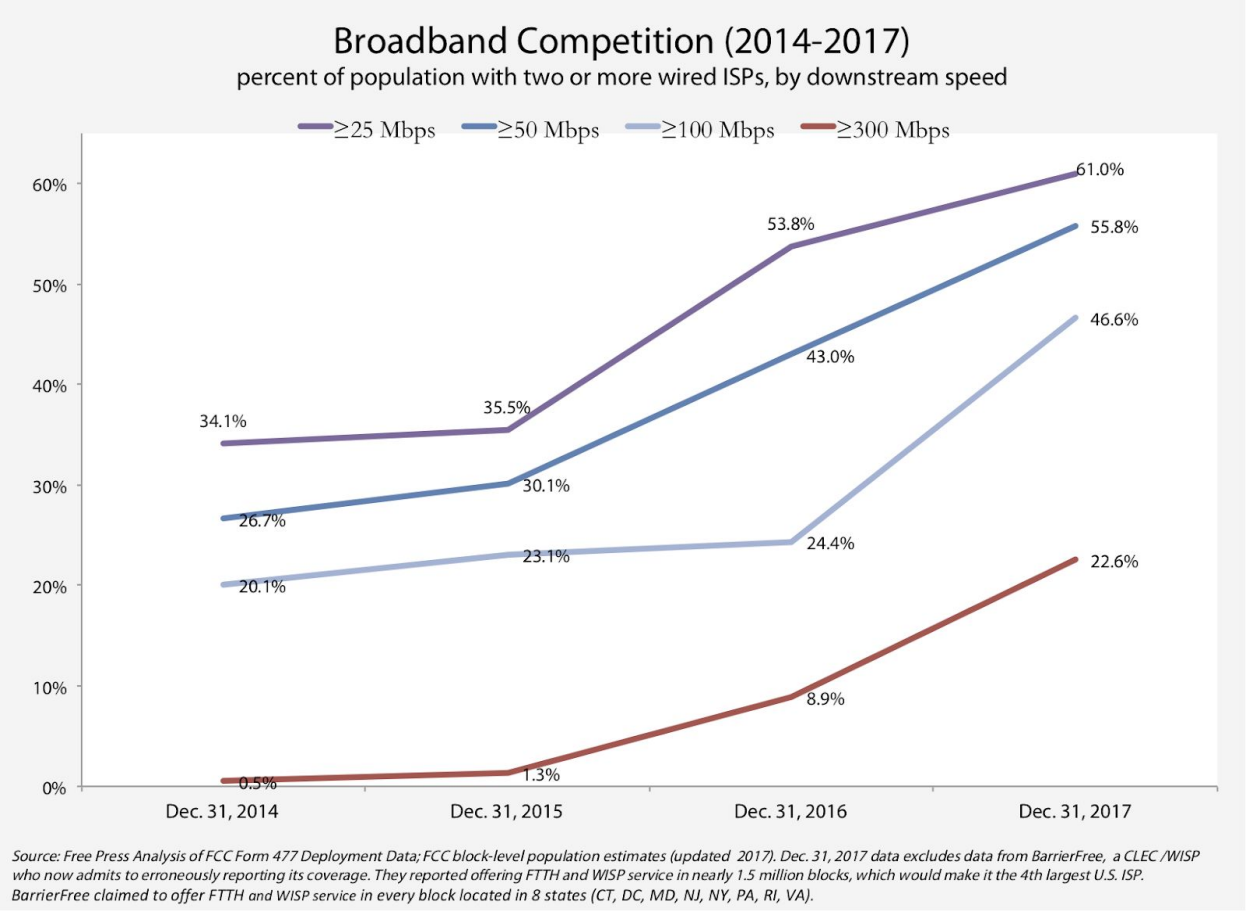
[26] *See* Letter from Matthew F. Wood, Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-108 (filed Dec. 11, 2017), https://www.freepress.net/sites/default/files/legacy-policy/free_press_net_neutrality_investment_ex_parte.pdf.

The short answer is: No. Improvements in wired broadband coverage, speeds, and choices continued on the same trajectory seen from the end of 2014, before the FCC adopted the *Open Internet Order*, through the time that order remained in place and seemed in no jeopardy before the 2016 election. The fact that these continuing upgrades have not yet ensured broadband fast enough or ubiquitous in every rural market, or within each local market, is no reason to believe that repealing the rules will change the trajectories we see holding steady before, during, and after Title II's return.

Two sample charts, updated with 2017 data, illustrate the steady (if by no means sufficient in every congressional district) pace of broadband improvements during this period, unaltered by continued debate over how to preserve Net Neutrality.



Source: Free Press Analysis of FCC Form 477 Deployment Data; FCC block-level population estimates (updated 2017). Dec. 31, 2017 data excludes data from BarrierFree, a CLEC /WISP who now admits to erroneously reporting its coverage. They reported offering FTTH and WISP service in nearly 1.5 million blocks, which would make it the 4th largest U.S. ISP. BarrierFree claimed to offer FTTH and WISP service in every block located in 8 states (CT, DC, MD, NJ, NY, PA, RI, VA).



Source: Free Press Analysis of FCC Form 477 Deployment Data; FCC block-level population estimates (updated 2017). Dec. 31, 2017 data excludes data from BarrierFree, a CLEC /WISP who now admits to erroneously reporting its coverage. They reported offering FTTH and WISP service in nearly 1.5 million blocks, which would make it the 4th largest U.S. ISP. BarrierFree claimed to offer FTTH and WISP service in every block located in 8 states (CT, DC, MD, NJ, NY, PA, RI, VA).

Many Large Broadband Providers Decreased Their Investments in 2017 and 2018, Even After the *2017 Net Neutrality Repeal* Vote

When we testified on this topic last month, we noted that many major ISPs had begun reporting their 2018 revenues and investment numbers.[27] At that point, Verizon already had reported an investment decrease for 2018 when compared to 2017. So had AT&T, which announced that instead of the tax-cut fueled job growth it had promised it would be laying off workers.[28] And Comcast reported that capital expenditures for 2018 likewise decreased, after double-digit growth in the years when Title II was in place.

[27] Timothy Karr, "Pai is No Jedi," Free Press (Jan. 31, 2019), https://www.freepress.net/our-response/expert-analysis/explainers/pai-no-jedi.

[28] Jon Brodkin, "Report: AT&T plans layoffs despite claiming tax cut would create 7,000 jobs," *Ars Technica* (Jan. 9, 2019), https://arstechnica.com/information-technology/2019/01/att-reportedly-plans-layoffs-despite-tax-cut-and-fcc-deregulation/.

Now that numbers are in for almost all publicly traded broadband providers, we can update our chart showing investment changes across all of these large ISPs. As before, we caution against reading too much into aggregate totals, and focus more on individual companies' changes.

We see now even more clearly that the Net Neutrality repeal, coupled with giant corporate tax cuts, didn't even move the needle in a positive direction – despite a series of Commission and broadband provider claims that explosive growth was bound to occur as soon as the repeal appeared on the horizon.

With 2018 in the books, and a year-plus elapsed after the Title II repeal vote, several individual broadband providers are spending less than they did prior to that repeal and other favorable regulatory changes they've obtained from this administration. In fact, many are spending markedly less since Chairman Pai's confirmation than they did in the two years prior to that, with Title II in place.

On an inflation-adjusted basis, Verizon saw a 6.4% decline for the most recent two-year period, while Comcast's growth slowed to 3% compared to 23.7% growth in 2015-2016. Even allowing for accounting complications introduced by the AT&T/DIRECTV merger, and other changes affecting accounting for Sprint's expenditures on leased handsets, the inflation-adjusted aggregate investment total for this collection of publicly traded broadband providers increased by at least 3.6% in 2015-2016, but dropped by 0.3% in the two years thus far of the Pai era.

Capital Expenditures by Publicly Traded Broadband Providers (2012-2018) (Inflation-Adjusted)

Capital Expenditures ($ thousands, 2018 inflation-adjusted dollars)	2012	2013	2014	2015	2016	2017	2018	2015-2016 Change from 2013-2014 (Title II Era)	2017-2018 Change from 2015-2016 (Pai Era)
Comcast (cable segment)	$5,363,890	$5,835,240	$6,586,920	$7,462,400	$7,899,840	$8,111,040	$7,716,000	23.7%	3.0%
Charter (pro forma)	$5,897,990	$6,048,000	$7,545,640	$7,387,140	$7,846,800	$8,854,620	$9,125,000	12.1%	18.0%
Altice USA (pro forma)	$1,415,349	$1,380,040	$1,363,049	$1,372,533	$993,899	$970,376	$1,153,589	-13.7%	-10.2%
Mediacom	$274,641	$285,538	$275,612	$305,540	$348,580	$348,600	$333,726	16.6%	4.3%
Wide Open West	$172,438	$239,652	$269,533	$245,814	$299,000	$307,326	$314,100	7.0%	14.1%
Cable ONE	$170,699	$153,305	$189,818	$171,549	$152,895	$182,950	$217,766	-5.4%	23.5%
GCI	$159,181	$194,998	$188,437	$186,809	$222,745	$193,153	$163,900	6.8%	-12.8%
AT&T (pro forma w/ ATN & Leap)*	$22,052,956	$23,113,012	$22,933,310	$21,215,900	$23,304,320	$21,981,000	$21,251,000	-3.3%	-2.9%
Verizon (total company)	$17,630,750	$17,932,320	$18,394,370	$18,841,500	$17,741,360	$17,591,940	$16,658,000	0.7%	-6.4%
CenturyLink (pro forma)	$3,991,580	$4,112,640	$4,233,990	$4,347,060	$4,487,600	$4,309,500	$3,175,000	5.8%	-15.3%
Frontier	$815,764	$685,460	$736,263	$914,780	$1,457,040	$1,211,760	$1,192,000	66.8%	1.3%
Windstream	$1,200,308	$908,280	$841,555	$1,118,618	$1,029,392	$926,772	$787,600	22.8%	-20.2%
Cincinatti Bell Pro forma)	$484,955	$305,845	$298,536	$405,592	$399,611	$311,912	$265,936	33.2%	-28.2%
TDS Telecom (Wireline and Cable)	$172,858	$160,255	$183,446	$203,526	$168,664	$204,824	$232,000	8.3%	17.4%
US Cellular	$912,055	$796,501	$596,648	$565,036	$463,872	$478,836	$515,000	-26.1%	-3.4%
Consolidated Comm. (pro forma)	$293,181	$284,010	$266,508	$265,099	$251,900	$235,477	$244,816	-6.1%	-7.1%
Shenandoah ((pro forma)	$97,068	$126,390	$73,008	$73,860	$180,160	$149,419	$136,641	27.4%	12.6%
Alaska Comm. System	$64,193	$52,026	$54,823	$51,386	$41,913	$33,237	$40,185	-12.7%	-21.3%
Otelco	$6,929	$6,727	$6,436	$7,009	$7,154	$8,681	$7,994	7.6%	17.7%
Sprint (revised)	$4,639,040	$7,545,960	$6,056,200	$11,632,440	$7,757,360	$9,874,620	$12,261,000	42.5%	14.2%
T-Mobile	$3,162,090	$4,347,000	$4,619,190	$5,007,440	$4,890,080	$5,341,740	$5,541,000	10.4%	10.0%
Aggregate Total	$68,977,915	$74,513,199	$75,713,292	$81,781,030	$79,944,185	$81,627,784	$81,332,253	7.7%	0.8%
Aggregate Total w/ DirecTV	$72,628,325	$78,602,079	$79,164,042	$83,434,630	$79,944,185	$81,627,784	$81,332,253	3.6%	-0.3%
Aggregagtel w/o Sprint and AT&T**	$42,285,919	$43,854,227	$46,723,782	$48,932,690	$48,882,505	$49,772,164	$47,820,253	8.0%	-0.2%

* AT&T did not report pro forma w/ DTV

** We present these results because of the accounting complications introduced by the DTV merger and subsequent accounting standard changes impacting a portion of Sprint's capex. We caution against drawing broad conclusions from industry aggregate capital investment trends, particularly those that do not include 100 percent of the industry, and this removal of 2 of the 21 firms demonstrates how the industry aggregate value is impacted by accounting and post-merger issues.

Source: Free Press analysis of company SEC filings. Values are presented in 2018 inflation-adjusted thousands of dollars. Where possible the most-recent or restated values are presented. Accounting standard changes resulted in Sprint substantially revising its values, but only did so historically begining with June 30, 2016 results. Prior Sprint periods are Free Press' revised estimates. Windstream has yet to report 4Q 2018, thus the value for FY 2018 is estimated.