

**Statement of
Tom Wheeler
Chairman
Federal Communications Commission
Before the
Committee on Oversight and Government Reform
United States House of Representatives
Hearing on
“FCC: Process and Transparency”
March 17, 2015**

Chairman Chaffetz, Ranking Member Cummings, Members of the Committee, thank you for inviting me to testify today about the Open Internet Order that the Federal Communications Commission (FCC) adopted at our February meeting. I am proud of the process the Commission ran to develop this Order. It was one of the most open and transparent in Commission history, and the public’s participation was unprecedented.

The roadmap we followed to develop this order was a process that Congress established close to 70 years ago in the Administrative Procedure Act. We made a public proposal, we invited interested parties to comment on our proposal – which they did in record numbers – and then we adopted a final rule based on this record. The final result of this year-long process is rules that protect and preserve the open Internet, while promoting continued investment in broadband networks.

Our rulemaking process started last January, after most of the 2010 Open Internet rules were remanded to us by the court. At that point, we were faced with a significant challenge: putting in place Open Internet protections that are legally sustainable and ensure the Internet remains an open platform for innovation, expression, and economic growth.

Last April I circulated a draft Notice of Proposed Rulemaking (NPRM) that included a set of Open Internet protections and also asked questions about the best way to achieve an Open Internet. The Open Internet NPRM adopted in May proposed a solution based on Section 706 of the Telecommunications Act of 1996. It also specifically asked an extensive series of questions as to whether Title II of the Communications Act of 1934 would be a better solution.

A quick point on our procedures. While historically, some NPRMs just asked questions, during my chairmanship I have made it a policy to present draft NPRMs to my colleagues that contain specific proposals as a means to flag key concepts for commenters' attention. I believe this is an important part of an open and transparent rulemaking process. But let's be clear, the proposal is tentative, not a final conclusion, and the purpose of the comment period is to fully test the concept. In this instance, as in others, it worked as desired to focus the debate.

The process of the Open Internet rulemaking was one of the most open and expansive processes the FCC has ever run. Stakeholders – like start-ups, public interest groups, tech companies, think-tanks, and Internet service providers (ISPs) – weighed in like never before. Moreover, the Commission held a series of six public roundtables to explore the legal, technical, and economic facets of Open Internet protections.

We heard from over 140 Members of Congress. We heard from the Administration, both in the form of President Obama's very public statement of November 10 and in the form of the National Telecommunications and Information Administration's formal submission. Here I would like to be clear. There were no secret instructions from the White House. I did not, as CEO of an independent agency, feel obligated to follow the President's recommendation. But I did feel obligated to treat it with respect just as I have with the input I received – both pro and con - from 140 Senators and Representatives.

Most significantly of all, we heard from nearly four million Americans, who overwhelmingly spoke in favor of preserving a free and open Internet.

We listened, and we learned. And on the basis of this tremendous public record, I'm proud to say we did just what Congress envisioned in the APA: we adjusted our proposal along the way.

My initial proposal sought to reinstate the 2010 rules. The tentative conclusion put forth in the NPRM suggested the FCC could assure Internet openness by applying a "commercial reasonableness" test under Section 706 to determine appropriate behavior of ISPs. As the process continued, I listened to countless consumers, innovators, and investors around the country. I also reviewed many of the submissions in the record and became concerned that the relatively untested "commercially reasonable" standard might be subsequently interpreted to mean what was reasonable for ISPs' commercial arrangements, not what was reasonable for consumers. That, of course, would be the wrong conclusion. It was an outcome that was unacceptable.

That's why, over the summer, I began exploring how to utilize Title II and its well-established "just and reasonable" standard. As previously indicated, this was an approach on which we had sought comment in the NPRM and about which I had specifically spoken, saying that all approaches, including Title II, were "very much on the table" for consideration.

You have asked whether there were secret instructions from the White House. Again, I repeat the answer is no.

Now, the question becomes whether the President's announcement on November 10 had an impact on the Open Internet debate, including at the FCC. Of course it did.

The push for Title II had been hard and continuous from Democratic members of Congress. The President's weighing in to support their position gave the whole Title II issue new prominence. Of course, we had been working on approaches to Title II, including a combined Title II/Section 706 solution, for some time. The President's focus on Title II put wind in the sails of everyone looking for strong open Internet protections. It also encouraged those who had been opposing any government involvement to, for the first time, support legislation with bright line rules.

As I considered Title II, it became apparent that rather than being a monolith, it was a very fluid concept. The record contained multiple approaches to the use of Title II. One of those was the Title II/Sec. 706 “hybrid” that bifurcated – some would say artificially – Internet service. Another – the approach we ultimately chose – used Title II/Sec. 706, but without the bifurcation. Still another – the one supported by the President – was only Title II without Section 706. All of these were on the table prior to the President’s statement.

Let me be specific. We were exploring the viability of the bifurcated approach. I had received option papers on using Title II in a manner patterned after its application to the wireless voice industry. And I had, from the outset, indicated a straight Title II was being considered.

A key consideration throughout this deliberation was the potential impact of any regulation on the capital formation necessary for the construction of broadband infrastructure. An interesting result of the President’s statement was the absence of a reaction from the capital markets. When you talk about the impact of the President’s statement, this was an important data point, resulting, I believe, from the President’s position against rate regulation. It was, of course, the same goal I had been looking to achieve from the outset.

As we moved to a conclusion, I was reminded how it was not necessary to invoke all 48 sections of Title II. In this regard, I had been considering the substantial success of the wireless voice industry after it was deemed a Title II carrier pursuant to Section 332 of the Communications Act. In applying Title II, but limiting its applicable provisions, the Congress and the Commission enabled a wireless voice business with hundreds of billions of dollars of investment and a record of innovation that made it the best in the world. This is the model for the ultimate recommendation I put forward to my colleagues.

There were other industry data points that informed my thinking and the Commission’s analysis. One was the recognition of interconnection as an important issue – a topic not covered by the Administration’s position. Another was my letter to Verizon Wireless about its announcement to limit “unlimited” data customers if the subscriber went over a certain

amount of data used in a month, a policy it ultimately reversed. Of particular note was the active bidding (and ultimately overwhelming success) of the AWS-3 spectrum auction at the end of 2014 and the beginning of 2015, which showed that investment in networks – even in the face of the potential classification of mobile Internet access under Title II – continued to flourish. Other industry data points included the work of Wall Street analysts, and the statements of ISPs themselves, including Sprint, T-Mobile, Frontier, and hundreds of small rural carriers, that they would continue to invest under a Title II framework.

Ultimately, the collective findings of the public record influenced the evolution of my thinking and the final conclusion that modern, light-touch Title II reclassification, accompanied by Section 706, provides the strongest foundation for the Open Internet rules. Using this authority, we adopted strong and balanced protections that assure the rights of Internet users to go where they want, when they want, protect the open Internet as a level playing field for innovators and entrepreneurs, and preserve the economic incentives for ISPs to invest in fast and competitive broadband networks.

I stand ready to answer your questions.