

# Net Neutrality: Responses to the FCC's "Restoring Internet Freedom" Order

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[Net Neutrality: Responses to the FCC's "Restoring Internet Freedom" Order](#)

[Summary](#)

[The Order](#)

[Past ISP Behavior](#)

[New York Responds](#)

[Legal Challenges to the Order](#)

[Other State Activity](#)

[Against a Balkanized Regulatory Approach](#)

[Policing Challenges](#)

[FURTHER READING](#)

## Summary

President Obama's Federal Communications Commission ("Commission" or "FCC") worked diligently from 2010 to 2015 to codify net neutrality—the principle that all data on the internet be treated equally by internet service providers—in United States telecommunications regulations.

Ignoring widespread support of the Obama-era rules, on December 14, 2017, the current FCC [voted to reverse the 2015 net neutrality regulations](#). And on January 4, 2018, the Commission released the corresponding order: [Restoring Internet Freedom](#) (the "Order").

The Order does several things. Most significantly, it (1) reclassifies broadband internet access service as an "information service" under Title I of the Communications Act of 1996; (2) removes the net neutrality rules in place since the 2015 FCC Order (the "2015 Order"); and leaves authority for enforcement of privacy practices, unfair and deceptive practices, and antitrust enforcement to the FTC. The Order also preempts state and local laws that attempt to reinstate net neutrality.<sup>1</sup>

Reading the Order, it appears that Chairman Ajit Pai's FCC prioritizes the creation of a deregulated environment purported to encourage ISP broadband investment over robust internet innovation more broadly. As we explain below, we think that's overly myopic and that there are greater net benefits to the United States economy from an open internet than there are in a tiered internet system.

In the months since the new Order, state and local government has sprung into action in response to the Order. In several ways, New York has taken the lead on preserving net neutrality. In late January, New York Governor Andrew Cuomo [issued an executive order](#) that prohibits state agencies from contracting with ISPs who follow the principles of net neutrality. That same week, New York Mayor Bill de Blasio [issued a request for information](#) (RFI), seeking bids from industry and subject matter experts to measure the impact of the Order on ISP quality and performance. In response, New York Attorney General Eric Schneiderman promised to coordinate with the city in data generated from this undertaking to enforce promises ISPs make to customers.

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<sup>1</sup> The Order's repeal of the prior net neutrality rules won't go into effect until later this year because it must be [approved by the Office of Management and Budget](#). This is expected to occur on April 23, 2018.

## Net Neutrality Policy Brief ::: April 2, 2018

Simultaneously, in mid-January, the New York Attorney General and 20 other state attorneys general, as well as several public interest groups, [sued the FCC](#), arguing that the Commission's about-face from its 2015 position is impermissibly arbitrary and capricious under the Administrative Procedure Act, a federal law governing agency rulemaking.

A few days after the Commission's vote, New York Senator Patricia Fahy [introduced a bill](#) that would require state government, state agencies, and local governments (including NYC) to do business only with ISPs that adhere to net neutrality principles (no blocking or throttling). As we explain [below](#), this bill may face legal questions about federal preemption by the FCC's new rules.

In the past few months, roughly half the [states](#) have introduced or signed bills like Fahy's, and seven more are considering doing the same. While these state-level efforts demonstrate how unpopular the FCC's recent actions are, we continue to support long-term policymaking at the national level and a return to the 2015 net neutrality order.

In addition to these state and local efforts, Democrats in the U.S. Senate are one vote away from reversing the Order under the Congressional Review Act (CRA).<sup>2</sup> Not only is this an important effort on its face, but seeing how net neutrality has captured the attention of a sizeable portion of the population, maintaining this Senate debate keeps this issue heightened as we head into the 2018 midterm elections.

With the recent Order, Chairman Pai's FCC has stuck to its ideological, "light-touch" regulatory approach despite massive and concerted opposition. In short, the FCC is making the unsubstantiated argument that consumer interests will best be served through reliance on industry self regulation and *post hoc* FTC enforcement to achieve net neutrality, despite years of ISP behavior supporting a different outcome.

Chairman Pai's FCC believes ISPs can self-regulate and thinks that competition for the provision of broadband services is robust, favoring the "disinfectant of public scrutiny and market pressure."<sup>3</sup> However, the ISPs' track record and the current state of broadband competition leave many in the technology industry with concerns. If history is any

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<sup>2</sup> The CRA, enacted as part of Newt Gingrich's Contract with America, only requires a simple majority in Congress to overturn recent federal agency orders. Prior to 2017, the CRA was only used successfully once. But in 2017, the Republican-controlled Congress passed a series of disapproval resolutions to overturn regulations issued under the Obama administration.

<sup>3</sup> Internet Freedom Order ¶243.

indication, it's likely that some ISPs will find traffic prioritization irresistible, despite public commitments to the contrary.

## The Order

In short, the Order does the following:

1. Reclassifies broadband internet access from Title II back to Title I to avoid common carriage classification, explained [above](#).
2. Eliminates the ISP net neutrality conduct rules (prohibitions on blocking, throttling, and paid prioritization).
3. Requires ISPs to be transparent. Disclosure of network management practices, performance, and commercial terms of service—in essence, a modified 2010 state.<sup>4</sup>
4. Reinstates the private mobile service classification of mobile broadband internet access service and return to the Commission's definition of "interconnected service" that existed prior to 2015, thereby exempting mobile broadband from Title II common carrier regulation.
5. Shifts responsibility to the FTC for ensuring consumer protective business and privacy practices by ISPs by relying on the FTC's subject matter jurisdiction over unfair and deceptive trade practices and anticompetitive behavior.<sup>5</sup>
6. Preempts state and local laws attempting to reinstate net neutrality.

The Commission entered the Order into the Federal Register on February 23, 2018, but the date of repeal of the conduct rules will [depend on how soon the Office of Management and Budget approves the changes](#).<sup>6</sup>

## Past ISP Behavior

Despite Chairman Pai's claims that the ISP net neutrality violations we've seen to date have been *de minimis*, recall that there have been a number of instances of discriminatory ISP

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<sup>4</sup> The Order removes the detailed reporting obligations contained in the 2015 Order, including packet losses, reporting by geographic region, and disclosure of peak usage times. ISPs are now required to disclose publicly (or to the Commission) any blocking, throttling, prioritization (including identification of any affiliate who benefits), congestion management, application-specific behavior (including favoring any protocols or application ports), device attachment rules, security practices, and performance characteristics. ISPs must also provide an accurate description of the service and the key commercial terms, including price (plus all extra fees), privacy policies, and redress options.

<sup>5</sup> Note that the 9th Circuit recently held that the FTC does have jurisdiction over ISPs for claims of unfair business practices. The FCC has exclusive jurisdiction over common carrier "telecommunications services," and the two agencies share jurisdiction over non-telecommunications services.

<sup>6</sup> This appears to be April 23, 2018.

## Net Neutrality Policy Brief ::: April 2, 2018

behavior during the past 10 years that, when taken together, make a fairly strong case for reclassification and conduct rules, including:

- T-Mobile [lying](#) about throttling internet traffic (2016)
- AT&T [favoring](#) their own content over other internet traffic (2016)
- Comcast [holding customers hostage](#) until Netflix paid for more bandwidth (2014)

Pai characterizes these examples as “sparse and often exaggerated.”<sup>7</sup> And he claims that they were all rectified in a matter of months. Regardless, it shows that ISPs have an appetite for discriminatory network behavior. ISPs likely won’t make any drastic moves until the legal and legislative activity described below quiets down.<sup>8</sup> But that may be only a matter of time.

## New York Responds

With its sizable and highly-connected population, New York State and New York City have acted swiftly in response to the Commission’s Order. As mentioned above, New York Senator Fahy [introduced a bill](#) that would require state government, state agencies, and local governments (including NYC) to do business only with ISPs that adhere to net neutrality principles (i.e., no blocking or throttling).<sup>9</sup> Then, New York Attorney General Eric Schneiderman led a multi-state lawsuit against the FCC. The New York City Mayor’s Office then released an [RFI](#) for policing broadband.<sup>10</sup> AG Schneiderman [applauded](#) the mayor’s initiative, suggesting that the AG’s office would use the collected data in its ongoing efforts to hold ISPs accountable to promises they make to consumers.

Finally, Governor Cuomo [signed](#) an [executive order](#) mirroring Fahy’s proposed legislation that requires state agencies to contract only with ISPs that follow the principles of net neutrality. The Order required agencies to do so by March 1, 2018. In announcing his executive order, Governor Cuomo pointed to the FCC’s assertion that violations of net

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<sup>7</sup> Internet Freedom Order ¶ 87, 109.

<sup>8</sup> AT&T may already be throttling certain traffic. See [below](#).

<sup>9</sup> The bill sponsors amended the bill in the third week of March to add a narrow public interest exception to the prohibition on paid prioritization, and an annual reporting requirement. As of the publication of this brief, the bill has not yet gone through committee.

<sup>10</sup> This RFI comes in the midst of citywide efforts to deliver new broadband infrastructure and service across all five boroughs. New York City has prioritized universal access to broadband internet for all its residents. The Mayor’s Office of the Chief Technology Officer is charged with implementing the Mayor’s goal for universal broadband for all New Yorkers by 2025.

neutrality are best addressed through state enforcement of state and federal trade and business practice laws.

At the least, AT&T and Verizon [provide broadband](#) to various organs of New York government. It will be interesting to see whether ISPs decide to offer separate plans to government agencies in response to these efforts by New York and other state governments.

## Legal Challenges to the Order

In response to the FCC's Order, state attorneys general and several public interest groups [filed a flurry of lawsuits](#) to block the agency's action. In one suit, 21 state attorneys general, led by New York AG Schneiderman, argued that the FCC's decision to reverse its net neutrality rules less than three years after adopting them is a violation of the Administrative Procedure Act, which bans federal agencies from making "arbitrary and capricious" rules.<sup>11</sup> More recently, a group of technology companies cooperating under the banner of the Coalition for Internet Openness [filed suit](#) in the D.C. Circuit to reverse the Order. [Free Press](#) and Public Knowledge filed a separate suit. The Internet Association [announced](#) its intention to join the the lawsuits. And Netflix used its [January letter to shareholders](#) to express its ongoing support for a legal challenge to the FCC's repeal of the net neutrality rules:

We believe that a strong internet should have enforceable net neutrality rules, so we and other internet firms are backing the Internet Association's challenge to the FCC's action.

The various plaintiffs in these lawsuits are arguing that the new Order is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act; that it violates federal law, including the Constitution, the Communications Act of 1934; conflicts with the notice-and-comment rulemaking requirements; and is otherwise contrary to law.<sup>12</sup>

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<sup>11</sup> As noted by [Ars Technica](#), all 21 states with Democratic attorneys general joined the suit, while no state with a Republican AG did. Note that the states [refiled their suit](#) on February 22, 2018 in light of the FCC filing its changes in the Federal Register.

<sup>12</sup> The crux of the petitioners' arguments is that Chairman Pai's FCC did not provide sufficient justification supporting the changed rule. Pursuant to court precedent, the FCC need not show that their changed position was reasonable, but it must show that it had "good reasons" for the change.

## Other State Activity

More than half of states have [taken similar actions](#) to ensure some level of net neutrality for their residents. Most notably, Washington State [recently passed](#) a bill prohibiting blocking, throttling, and paid prioritization. In Montana, the governor [issued](#) an executive order to prevent ISPs from blocking or paid prioritization of websites. In Oregon, a bill similar to New York's is [awaiting signature](#) from its governor. And the [California](#) Senate has been busy: [passing](#) one bill that would reinstate net neutrality under existing consumer protection laws and [introducing another](#). All state efforts that contradict the FCC's professed preemption powers will likely face swift legal challenges. This Quartz [piece](#) provides a good overview of the various state efforts.

## Against a Balkanized Regulatory Approach

Net neutrality is a technology policy that benefits all players in the ecosystem, even ISPs. It fosters a healthy startup ecosystem, robust competition among providers, and equal participation in society by all. Although many of the state-level efforts highlighted above do have positive political repercussions and demonstrate to the federal government that net neutrality is an issue that many care deeply about, a patchwork of state regulations is not a workable, long-term solution. Instead, we continue to advocate for a long-term federal solution that reinstates the conduct and rules from the 2015 order. If the courts don't find the new Order arbitrary and capricious, we remain optimistic that shifting political winds will result in corrective action from either the legislative or executive branch.

## Policing Challenges

Aside from the New York mayor's efforts to monitor ISP network neutrality in New York City (see [above](#)), consumers and businesses across New York State may have a hard time determining whether an ISP is favoring certain content or throttling their service. And demonstrating real-world impact is a crucial part of ensuring that consumers are aware of the effects of the Commission's new, *laissez-faire* rules. In regions where there is a competing ISP offering more neutral service, consumers and businesses need to be informed in order to make rational decisions when choosing an ISP. Relying on disclosure requirements and the remote threat of FTC enforcement is not enough. Fortunately, we are starting to see some technological solutions for this. For example, researchers have released a smartphone app called [WeHe](#) that [attempts to tackle this challenge](#).

Some ISPs may already be throttling in violation of net neutrality rules that remain in effect until the new Order is finalized. [Anecdotaly](#), WeHe tests on the AT&T network revealed that AT&T is discriminating against YouTube traffic in violation of the 2015 Order, which remains in effect until the new Order goes into effect this spring.

## FURTHER READING

- New York Times [net neutrality coverage](#), including [a critique from the NYT editorial board](#)
- The Verge [net neutrality coverage](#)
- [The WIRED Net Neutrality Guide](#)
- Public Knowledge [net neutrality coverage](#)
- [ArsTechnica Op-ed](#) on the need for true broadband competition
- Burger King's [surprisingly on-point net neutrality ad](#)
- Quarts [piece](#) on how statehouses are the new arena in the battle
- [Coverage](#) of the fake net neutrality NPRM comments
- US representatives [pile questions on the FCC regarding net neutrality comment process](#)
- San Francisco [seeks universal fiber broadband with net neutrality and privacy](#)
- Apple [temporarily blocked](#) the WeHe iOS app that detects net neutrality violations
- The [letter to FCC Commissioner Pai from more than 1,000 startups](#) (Engine)
- On May 1, 2017, nine Republican senators [introduced a bill](#) that would essentially codify the changes that the FCC is now proposing
- Comcast has [consistently been near the top in lobbying activity and spending](#)