



# **REGULATING THE INTERNET: HOW THE WHITE HOUSE BOWLED OVER FCC INDEPENDENCE**

**A Majority Staff Report of the  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
Senator Ron Johnson, Chairman**



**February 29, 2016**

## EXECUTIVE SUMMARY

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The Federal Communications Commission (FCC or Commission) is an independent federal agency charged with regulating interstate and international communications. Deriving its regulatory authority from Congress, the agency is governed by five presidentially appointed Commissioners from both political parties. This bipartisan structure is intended to ensure that the agency remains free of partisan political pressure, and independent of the policy aims of the Executive Branch. Yet, according to a media report in February 2015, the Obama Administration sought to impose its will on the FCC's so-called Open Internet (OI) proposal. As detailed below, after the Obama White House weighed in, the FCC changed course and executed the President's preference.

On February 4, 2015, FCC Chairman Tom Wheeler announced a plan to reclassify broadband as a telecommunications service subject to Title II of the Communications Act of 1934 (47 U.S.C. 201 et. seq.). This announcement represented a shift from the FCC's previous light-touch approach of classifying broadband as an information service, and Chairman Wheeler's own statement in February 2014 that the FCC would use a roadmap outlined by the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) in the court's ruling in *Verizon v. FCC* (740 F.3d 623 (2014)) that did not involve the reclassification of broadband as a common carrier service.<sup>1</sup> Concurrent with Chairman Wheeler's announcement, the *Wall Street Journal* reported that the White House may have inappropriately influenced the FCC decision to regulate broadband under Title II.<sup>2</sup> Specifically, the *Journal* noted "unusual, secretive efforts inside the White House, led by two aides."<sup>3</sup> Notably, in November 2014, President Obama had weighed in on the debate, imploring the FCC to "reclassify consumer broadband service under Title II ..."<sup>4</sup>

On February 9, 2015, Senator Ron Johnson, Chairman of the Senate Committee on Homeland Security and Government Affairs and a senior member of the Senate Committee on Commerce, Science and Transportation, initiated an inquiry into the FCC's OI Order in light of the information reported by the *Journal*.<sup>5</sup> In response to the Chairman's request, the FCC produced documents over the span of ten months and provided a staff briefing with key FCC staff members involved in the rulemaking. Nonetheless, the FCC withheld drafts of the OI proposal, including the draft that the FCC was in the process of finalizing just prior to the

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<sup>1</sup> FED. COMM'NS COMM'N, Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules (Feb. 19, 2014), *available at* <https://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules>.

<sup>2</sup> Gautham Nagesh & Brody Mullins, *How White House Thwarted FCC Chief on Internet Rules*, WALL ST. J., Feb. 4, 2015.

<sup>3</sup> *Id.*

<sup>4</sup> WHITE HOUSE, November 2014 The President's message on net neutrality, <https://www.whitehouse.gov/net-neutrality> (last visited Feb. 22, 2016).

<sup>5</sup> Appendix C, Ex. 1, Letter from Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Gov't Affairs, to Tom Wheeler, Chairman, Fed. Commc'ns Comm'n (Feb. 9, 2015).



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President's statement. By withholding these key drafts, the FCC unnecessarily slowed and burdened the Committee's fact-finding regarding the process by which the FCC adopted its OI Order.

The investigation initiated by Chairman Johnson uncovered serious concerns with the President's undue influence on the FCC's decision-making process,<sup>6</sup> and also with the agency's compliance with the Administrative Procedure Act (APA). Specifically, the investigation found:

- Although President Obama's statement was filed in the FCC's record along with millions of other commenters, its influence was disproportionate relative to the comments of members of the public.<sup>7</sup> Prior to the White House's announcement, the career, nonpartisan, professional staff at the FCC worked over the weekend to deliver Chairman Wheeler an OI draft order to be considered on the FCC's December 2014 Open Meeting.<sup>8</sup> Immediately after the President's statement, FCC staff expressed confusion as edits were suddenly delayed and the rapid timetable of completing the draft OI Order was "paused."<sup>9</sup> At the conclusion of the pause, Chairman Wheeler instructed FCC staff to change course and draft an order that would follow the President's proposal of a Title II reclassification.<sup>10</sup>
- The FCC staff raised concerns about the agency following proper notice-and-comment procedure, as required under the APA.<sup>11</sup> Specifically, the FCC's career professional staff advised that the record to support Title II reclassification for both fixed and wireless

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<sup>6</sup> As detailed below, while the President may lobby the FCC in favor of a certain policy outcome, the Justice Department cautions the White House to avoid the appearance of influence. *See infra* note 17. From the timeline presented in this report, a reasonable person could conclude that the FCC would not have ultimately chosen a Title II reclassification but for the President's support. *See BLACK'S LAW DICTIONARY* (10th ed. 2014) (defining "undue influence" as "The improper use of power or trust in a way that deprives a person of free will and substitutes another's objective; *the exercise of enough control over another person that a questioned act by this person would not have otherwise been performed, the person's free agency having been overmastered.*" (emphasis added)).

<sup>7</sup> E-mail from Stephanie Weiner, Fed. Commc'ns Comm'n, to Nese Guendelsberger, Fed. Commc'ns Comm'n & Matthew DelNero, Fed. Commc'ns Comm'n (Nov. 17, 2014) (describing the president's announcement as "a significant development") (HSGAC-OI-000149).

<sup>8</sup> E-mail from Claude Aiken, Fed. Commc'ns Comm'n, to Kristine Fargotstein, Fed. Commc'ns Comm'n (Nov. 7, 2014) (HSGAC-OI-032662) ("We're still going to try to get something to OCH on Monday, but folks understand that we can't address everything if we just get edits Monday morning.").

<sup>9</sup> *See e.g.*, E-mail from Paula Blizzard, Fed. Commc'ns Comm'n, to Travis LeBlanc et al., Fed. Commc'ns Comm'n (Nov. 10, 2014) (considering how the President's statement would impact the OI draft) (HSGAC-OI-002796); E-mail from Kristine Fargotstein, Fed. Commc'ns Comm'n, to Thomas Parisi, Fed. Commc'ns Comm'n (Nov. 10, 2014, 9:48AM) (HSGAC-OI-000220);

<sup>10</sup> Briefing by Fed. Commc'ns Comm'n staff with S. Comm. on Homeland Sec. & Gov't Affairs staff (June 29, 2015).

<sup>11</sup> This issue is currently before the U.S. Court of Appeals for the District of Columbia Circuit in *United States Telecom Association v. FCC*, No. 15-1063 (D.C. Cir.).



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broadband was thin and needed to be bolstered.<sup>12</sup> Despite this recommend action, the FCC chose not to seek additional public comment, and proceeded with the President's proposal.

- A draft of the Open Internet Public Notice (PN) dated November 17, 2014, outlined *nine* issue areas of concern.<sup>13</sup> Yet, by November 19, it appears that the FCC's plan to seek further comment changed. Again, career professional staff expressed confusion in this redirection and a media aide pointed out to her colleagues: "NEED MORE ON WHY WE NO LONGER THINK RECORD IS THIN IN SOME PLACES."<sup>14</sup>
- To justify the FCC's sudden change in direction and to "beef up the record," FCC staff were asked if "additional comments filed since early November [2014] address some of the outstanding questions, i.e., mobile and forbearance?"<sup>15</sup> FCC staff were unable to establish an adequate basis to argue that recent public comments provided a sufficient justification for the Chairman's shifting approach.<sup>16</sup> To fill this void, General Counsel Jonathan Sallet solicited meetings with certain outside groups to support a rulemaking process for Title II reclassification.
- Over the course of the Committee's investigation, the FCC refused to provide key responsive documents. Moreover, in the emails that were provided to the Committee, it

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<sup>12</sup> While the FCC's OI Notice of Proposed Rulemaking did pose a question "on the nature and the extent of the Commission's authority to adopt our open Internet rules relying on Title II, and other possible sources of authority, including Title III," it tentatively concluded "that the Commission exercise its authority under section 706, consistent with the D.C. Circuit's opinion in *Verizon v. FCC*, to adopt our proposed rules." Protecting and Promoting the Open Internet, 79 Fed. Reg. 37448, 37467 (May 15, 2014) (to be codified at 47 C.F.R. 8).

<sup>13</sup> E-mail from Claude Aiken, Fed. Commc'ns Comm'n, to Kristine Fargotstein, Fed. Commc'ns Comm'n (Nov. 17, 2014) (Listing issues for the draft public notice to include "classification/reclassification question", "edge service classification issue", "mobile classification issue (reclassify vs. hybrid)", "CMRS definition issue (reclassify vs. hybrid)", "broad forbearance paragraphs", "mobile-specific forbearance para/sentence", "mobile policy – transparency & RNM", "specialized services", "interconnection") (HSGAC-OI-032431-34).

<sup>14</sup> E-mail from Kim Hart, Fed. Commc'ns Comm'n, to Jonathan Sallet, Fed. Commc'ns Comm'n & Ruth Milkman, Fed. Commc'ns Comm'n (Nov. 21, 2014) (HSGAC-OI-18252-53).

<sup>15</sup> E-mail from Kim Hart, Fed. Commc'ns Comm'n, to Jonathan Sallet, Fed. Commc'ns Comm'n & Ruth Milkman, Fed. Commc'ns Comm'n (Dec. 1, 2014) (HSGAC-OI-18251-52).

<sup>16</sup> While the court will look to all of the comments submitted during the notice and comment period, the Majority staff found that FCC staff specifically searched for comments in the November 2014 time frame in order to justify why the record was no longer "thin"—Chairman Wheeler's initial explanation for the delay. *See e.g.*, E-mail from Kim Hart, Fed. Commc'ns Comm'n, to Jonathan Sallet, Fed. Commc'ns Comm'n & Ruth Milkman, Fed. Commc'ns Comm'n (Nov. 21, 2014) (HSGAC-OI-18252-53).



appears that there was an attempt by some to thwart transparency and avoid *ex parte* filings.<sup>17</sup>

These issues, coupled with Chairman Wheeler’s statements to the public and in Congressional testimony, raise real transparency and accountability issues. Specifically, Chairman Wheeler continues to assert “I was looking at a Title II and Section 706 approach before the President filed his position and we came out with a Title II, Section 706 approach.”<sup>18</sup> If it were as simple as Chairman Wheeler implies, then it is logical to assume that the FCC would have voted on its OI Order in December, as the career, nonpartisan, professional staff at the FCC originally targeted (and worked weekends in order to meet). Instead, the FCC moved forward in a completely new direction months later—following the President’s direction and apparently with concern from the career staff that there was insufficient notice to the public and affected stakeholders—with heavy-handed regulations on the broadband industry.

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<sup>17</sup> *Ex Parte Communications During FCC Rulemaking*, 15 Op. O.L.C. 4 (1991) (“White House staff members should avoid even the mere appearance of interest or influence—and the easiest way to do so is to avoid discussing matters pending before the independent regulatory agencies with interested parties and avoid making *ex parte* contacts with agency personnel.”) [hereinafter *O.L.C. Opinion*].

<sup>18</sup> *Oversight of the Federal Communications Commission: Hearing Before the S. Commerce, Sci., and Transp. Comm.*, 114th Cong. (2015).



## OPEN INTERNET ORDER TIMELINE

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**Thursday, Nov. 6, 2014,**  
Jeffrey Zients briefs  
Chairman Wheeler on  
the President's plan to  
push for Title II

**November 1, 2014** Career staff state that they plan to *circulate* the "hybrid approach" OI draft to other Commissioners on Nov. 20, 2014 in preparation for December Open Meeting

**Friday, November 7, 2014** Career staff plan to work through the weekend on the "hybrid" approach in order to get a draft to Chairman Wheeler by Nov. 10, 2014

**Friday, November 7, 2014 – Sunday, November 9, 2014**  
Chairman Wheeler and senior political staff "pause" OI drafting and spend the weekend crafting a response and press strategy that does not "shoot holes" at POTUS and Title II.

**Monday November 10, 2014** POTUS Statement advocating Title II, utility-style regulation of the Internet

**Monday, November 10, 2014** Career staff notice WH influence: "At least the delays in edits from above make sense."

**November 12, 2014** The Chairman's office tasked career staff with drafting a Public Notice to address "serious APA notice problems"

**November 19, 2014**  
FCC press team asks General Counsel for "MORE ON WHY WE NO LONGER THINK THE RECORD IS THIN."

**November 21, 2014** Public Notice canceled

**December 5, 2014** Chairman Wheeler writes about his "Damascus Road experience"—and embraces Title II

**February 26, 2015** FCC adopted the OI Report & Order citing Title II authority



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## I. INTRODUCTION

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The FCC has been grappling with the issue of “net neutrality” for more than a decade. In 2005, the FCC adopted a policy statement that consumers were entitled to access their choice of legal Internet content; use services and run applications of their choosing; and have competition among network, application, service and content providers.<sup>19</sup> In April 2010, after the FCC had tried in 2008 to enforce an alleged violation of this policy statement against a company, its efforts were struck down by the D.C. Circuit in *Comcast v. FCC*.<sup>20</sup>

Despite any evidence of a problem, the FCC spent the rest of 2010 working towards an order that would impose affirmative rules on broadband providers. In December 2010, the FCC adopted, on a party-line 3-2 vote, its “Open Internet Order.”<sup>21</sup> In the 2010 order, the FCC carefully weighed whether or not to classify broadband services under Title II of the Communications Act. Title II regulations were crafted in the 1930s and designed to regulate “common carriers” or “public utilities.”

In the order, the FCC applied a light touch regulatory framework for fixed services, recognized the technical and competitive differences of wireless, and did not touch interconnection agreements.<sup>22</sup> The order specifically required broadband providers to disclose their network management practices and barred them from blocking legal traffic on their networks.<sup>23</sup> The rules also prohibited fixed broadband providers from unreasonably discriminating against Internet traffic, but did not apply this prohibition to wireless broadband providers.<sup>24</sup> Importantly, the FCC did not reclassify broadband as a Title II telecommunications service.

The new rules were challenged in court. On January 14, 2014, the D.C. Circuit upheld the FCC’s transparency rule but struck down the portions of the 2010 order that barred broadband providers from blocking content or unreasonable discrimination on their networks.<sup>25</sup> The court reasoned that the FCC had chosen not to classify broadband providers as common carriers, and therefore could not impose common carrier obligations. At the same time, the court provided the FCC with a roadmap on how to impose rules on broadband providers that would address the type of conduct about which the FCC was purportedly concerned without subjecting

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<sup>19</sup> Fed. Commc’ns Comm’n, *New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet* (Aug. 5, 2005).

<sup>20</sup> 600 F.3d 642 (D.C. Cir. 2010).

<sup>21</sup> Fed. Commc’ns Comm’n, *Report and Order, In re: Preserving the Open Internet Broadband Industry Practices* (Dec. 21, 2010).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Verizon v. Fed. Commc’ns Comm’n*, 740 F.3d 623 (D.C. Cir. 2014).





such providers to common carrier requirements. FCC Chairman Tom Wheeler appeared to accept this direction, and in February 2014 announced that the FCC would pursue a new rulemaking based on this roadmap.<sup>26</sup> Specifically, Chairman Wheeler proposed that broadband providers could charge companies different prices for different services on their networks provided that such deals were “commercially reasonable.”<sup>27</sup> On May 15, 2014 the FCC issued a Notice of Proposed Rulemaking (NPRM) that largely reflected the Chairman’s earlier proposal.<sup>28</sup>

By the end of 2014, it became widely reported that the FCC would move forward on a Final Order adopting a “hybrid approach.”<sup>29</sup> The hybrid approach divided the Internet into “wholesale” and “retail” transactions. Wholesale transactions, or transactions conducted on the “back-end” of the Internet between the content provider and Internet service provider, would be regulated as a public utility. Meanwhile, retail transactions, or the transaction sending data from the Internet service provider to the consumer, would receive a lighter regulatory touch.<sup>30</sup>

The same week the FCC was preparing to circulate a draft proposal on the hybrid approach, the President directly weighed into the debate, stating: “I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act.”<sup>31</sup> On February 4, 2015, Chairman Wheeler revealed his plan to regulate broadband as a Title II utility service, treat wireless the same as fixed broadband, and assert jurisdiction over Internet interconnection agreements for the first time.<sup>32</sup> Not only did this plan constitute a monumental shift from the 2010 FCC order, but it also represented a very large deviation from Chairman

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<sup>26</sup> FED. COMM’NS COMM’N, Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules (Feb. 19, 2014), *available at* <https://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules>; *see also Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. (2015).

<sup>27</sup> *See e.g.*, Fed. Commc’ns Comm’n, Notice of Proposed Rulemaking, In re: Preserving and Promoting the Open Internet (May 15, 2014) (describing broadband providers ability to “serve customers and carry traffic on an individually negotiated basis” to be commercially reasonable).

<sup>28</sup> Fed. Commc’ns Comm’n, Notice of Proposed Rulemaking, In re: Preserving and Promoting the Open Internet (May 15, 2014).

<sup>29</sup> *See e.g.*, Gautham Nagesh, *FCC ‘Net Neutrality’ Plan Calls for More Power Over Broadband*, WALL ST. J., Oct. 30, 2014; Edward Wyatt, *F.C.C. Considering Hybrid Regulatory Approach to Net Neutrality*, N.Y. TIMES, Oct. 31, 2014.

<sup>30</sup> *See* E-mail from Tom Wheeler, Chairman, Fed. Commc’ns Comm’n, to Ruth Milkman et al., Fed. Commc’ns Comm’n (Dec. 5, 2014) (describing the hybrid approach) (HSGAC-OI-031391-97).

<sup>31</sup> WHITE HOUSE, November 2014 The President’s message on net neutrality, <https://www.whitehouse.gov/net-neutrality> (last visited Feb. 22, 2016). Please note that Title II of the Telecommunications Act of 1996 actually deals with broadcast services, but that the President clearly intended to refer to Title II of the Communications Act, which covers common carriers.

<sup>32</sup> *See* FED. COMM’NS COMM’N, *Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet* (Feb. 4, 2015), *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-331869A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-331869A1.pdf); *see also* Tom Wheeler, *This is how we will ensure net neutrality*, WIRED, Feb. 4, 2015.



Wheeler’s original NPRM and the light regulatory touch that had been applied to broadband services since the Clinton Administration.

In an op-ed in *Wired* magazine, Chairman Wheeler explained that this evolution occurred because he became concerned that a commercial reasonableness standard might, down the road, be interpreted to mean what is reasonable for commercial interests, not consumers.<sup>33</sup> However, emails and information obtained by the Committee reveal that undue outside political pressure led the FCC to this decision. Documents produced to the Committee reveal concerns among FCC staff about potential APA violations stemming from Chairman Wheeler’s shift to Title II regulation, as well as serious transparency failures from the FCC in terms of compliance with congressional oversight and *ex parte* requirements.<sup>34</sup>

## **II. THE WHITE HOUSE EXERTED UNDUE INFLUENCE ON THE FCC’S OPEN INTERNET RULEMAKING**

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Congress established the FCC as an independent agency with the mission of regulating interstate and international communications within, from, and to the United States. As an independent agency, the president’s influence over the FCC, by design, should be limited.<sup>35</sup> For example, the president’s power to remove officers is not the same with leaders of an independent agency as it is with subordinate executive branch officers. The President can only remove independent agency heads “for cause,” meaning that they cannot be removed for political disagreements.<sup>36</sup> These statutory limits on the president’s power over independent agencies—like the FCC—demonstrate the importance of maintaining the agency’s independence.<sup>37</sup>

The documents provided to the Committee do not paint the same picture that Chairman Wheeler outlined in his February 2015 *Wired* op-ed. In contrast, these documents suggest that the White House exerted undue influence on the FCC’s decision to abandon its hybrid approach and regulate broadband under Title II.

Emails show that the career, nonpartisan, professional staff at the FCC identified White House influence in the drafting process of the OI Order almost immediately after the President’s

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<sup>33</sup> Wheeler, *supra* note 24.

<sup>34</sup> See O.L.C. Opinion, *supra* note 16.

<sup>35</sup> In an executive agency, the President has many tools at his disposal to exert policymaking influence, one of which is the power to remove an executive officer at-will. See generally *Myers v. United States*, 272 U. S. 52 (1926).

<sup>36</sup> See *Humphrey’s Executor v. United States*, 295 U. S. 602 (1935) (finding that the President’s unrestrained removal power does not extend to heads of independent agencies).

<sup>37</sup> See e.g., *Humphrey’s Executor*, 295 U. S. 602, 629 (“one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will”).



public statement.<sup>38</sup> After President Obama came out in favor of Title II regulations, FCC career staff opined, “[n]ot sure how this will affect the current draft and schedule—but I suspect substantially . . . .”<sup>39</sup> In another instance, an FCC employee who was assisting in drafting the OI Order responded to a news alert about the President’s statement, writing “[t]his might explain our delay.”<sup>40</sup> The staff member, who spent her weekend working on the OI Order, separately wrote, “at least the delays in edits from above make sense . . . .”<sup>41</sup>

**Item 1: Email exchange between FCC employees (Nov. 10, 2014)**

**To:** Travis LeBlanc [REDACTED]; Martha Heller [REDACTED]; Stephen Ruckman [REDACTED]; Gregory Simon [REDACTED]  
**Cc:** Christopher Killian [REDACTED]; Rosemary McEnery [REDACTED]  
**From:** Paula Blizzard  
**Sent:** Mon 11/10/2014 4:02:32 PM  
**Subject:** OI - Obama says make it title II

Chris and Rosemary just alerted me to breaking news – Obama says to make it Title II:

President Obama has come out in support of reclassifying internet service as a utility, a move that would allow the Federal Communications Commission to enforce more robust regulations and protect net neutrality. **"To put these protections in place, I'm asking the FCC to reclassifying internet service under Title II** of a law known as the Telecommunications Act," Obama says in a statement this morning. "In plain English, I'm asking [the FCC] to recognize that for most Americans, the internet has become an essential part of everyday communication and everyday life."

<http://www.theverge.com/2014/11/10/7185933/fcc-should-reclassify-internet-as-utility-obama-says>

Not sure how this will affect the current draft and schedule – but I suspect substantially . . . .

<sup>38</sup> E-mail from Paula Blizzard, Fed. Commc’ns Comm’n, to Travis LeBlanc et al., Fed. Commc’ns Comm’n (Nov. 10, 2014) (HSGAC-OI-002796); E-mail from Kristine Fargotstein, Fed. Commc’ns Comm’n, to Thomas Parisi, Fed. Commc’ns Comm’n (Nov. 10, 2014, 9:48AM) (HSGAC-OI-000220); E-mail from Thomas Parisi, Fed. Commc’ns Comm’n, to Kristine Fargotstein, Fed. Commc’ns Comm’n (Nov. 10, 2014) (HSGAC-OI-007493); E-mail from Kristine Fargotstein, Fed. Commc’ns Comm’n, to Claude Aiken, Fed. Commc’ns Comm’n (Nov. 10, 2014) (HSGAC-OI-032602); E-mail from Melissa Droller Kinkel, Fed. Commc’ns Comm’n, to Claude Aiken et al., Fed. Commc’ns Comm’n (Nov. 10, 2014) (HSGAC-OI-018630).

<sup>39</sup> E-mail from Paula Blizzard, Fed. Commc’ns Comm’n, to Travis LeBlanc et al., Fed. Commc’ns Comm’n (Nov. 10, 2014) (HSGAC-OI-002796).

<sup>40</sup> E-mail from Kristine Fargotstein, Fed. Commc’ns Comm’n, to Thomas Parisi, Fed. Commc’ns Comm’n (Nov. 10, 2014, 9:48AM) (HSGAC-OI-000220).

<sup>41</sup> E-mail from Kristine Fargotstein, Fed. Commc’ns Comm’n, to Claude Aiken, Fed. Commc’ns Comm’n (Nov. 10, 2014) (HSGAC-OI-032602); E-mail from Melissa Droller Kinkel, Fed. Commc’ns Comm’n, to Claude Aiken et al., Fed. Commc’ns Comm’n (Nov. 10, 2014) (HSGAC-OI-018630).



**Item 2: Email exchange between FCC employees (Nov. 10, 2014)**

**Thomas Parisi**

**From:** Thomas Parisi  
**Sent:** Monday, November 10, 2014 9:49 AM  
**To:** Kristine Fargotstein  
**Subject:** RE: Technology Breaking News

It might indeed.

**From:** Kristine Fargotstein  
**Sent:** Monday, November 10, 2014 9:48 AM  
**To:** Thomas Parisi  
**Subject:** RE: Technology Breaking News

Yes. This might explain our delay.

**From:** Thomas Parisi  
**Sent:** Monday, November 10, 2014 9:48 AM  
**To:** Kristine Fargotstein  
**Subject:** RE: Technology Breaking News

Did you mean to send it just to me? But yeah that was interesting. Politico pro breaking news alerts are the best!

**From:** Kristine Fargotstein  
**Sent:** Monday, November 10, 2014 9:46 AM  
**To:** Thomas Parisi  
**Subject:** FW: Technology Breaking News

FYI

**From:** POLITICO Pro [<mailto:politicoemail@politicopro.com>]  
**Sent:** Monday, November 10, 2014 9:39 AM  
**To:** Kristine Fargotstein  
**Subject:** Technology Breaking News

President Barack Obama waded directly into the debate over net neutrality today, calling for stronger regulation of open Internet rules.



**Item 3: Email exchange between FCC employees (Nov. 10, 2014)**

**From:** Kristine Fargotstein [REDACTED]  
**Sent:** 11/10/2014 1:50:10 PM  
**To:** Claude Aiken [REDACTED]  
**Subject:** RE: FCC Daily News Briefing for Monday, November 10, 2014

At least the delays in edits from above now makes sense...

**From:** Claude Aiken  
**Sent:** Monday, November 10, 2014 8:50 AM  
**To:** Melissa Droller Kinkel; Kristine Fargotstein; Thomas Parisi; Zachary Ross  
**Subject:** RE: FCC Daily News Briefing for Monday, November 10, 2014

I saw. Will try to get to the bottom of this this morning.

\*\*\* Non-Public: For Internal Use Only \*\*\*

-----Original Message-----  
**From:** Melissa Droller Kinkel  
**Sent:** Monday, November 10, 2014 07:57 AM Eastern Standard Time  
**To:** Claude Aiken; Kristine Fargotstein; Thomas Parisi; Zachary Ross  
**Subject:** FW: FCC Daily News Briefing for Monday, November 10, 2014

There is also an article about delaying the item in the Wall Street journal but I don't have access to the full article.

Confusion among the career professional staff at the FCC is not surprising after comparing the pace and momentum at which they were working before and after the President's statement on November 10, 2014. An email from Scott Jordan, the FCC's Chief Technology Officer, to Matt Del Nero, Chief of the Wireline Competition Bureau (Deputy Chief at the time in question) and Eric Feigenbaum, a staffer in Office of Media Relations, confirms that, as of November 1, 2014, there was a plan in place to circulate the OI Order on November 20, 2014.<sup>42</sup> According to FCC precedent and common practice, November 20 would have been the last day to circulate the OI Order to FCC commissioners in time for it to appear on the December 2014 Open Meeting agenda and also to stay in compliance with sunshine laws.<sup>43</sup>

<sup>42</sup> E-mail from Scott Jordan, Fed. Commc'ns Comm'n, to Matthew DelNero, Fed. Commc'ns Comm'n (Nov. 1, 2014) (HSGAC-OI-004977).

<sup>43</sup> See, Michael O'Rielly, Commissioner, Fed. Commc'ns Comm'n, *FCC's Pre-Adoption Process Also Needs Work*, FCC Blog (April 1, 2015, 12:55pm), available at <https://www.fcc.gov/news-events/blog/2015/04/01/fcc%E2%80%99s-pre-adoption-process-also-needs-work> ("Commissioners receive meeting items from staff, on behalf of the Chairman, not less than three weeks in advance of a Commission Agenda Meeting .... During the first two weeks, outside parties may meet with Commissioners and staff to advocate their views and seek changes, if necessary. The last week of the three-week period is the Sunshine period."); Government in the Sunshine Act, 5 U.S.C. § 552(b) (1976); 47 C.F.R. § 1.1203 (2016).





As late as Sunday, November 9, career FCC staffers were working diligently to finalize a draft so that the OI Order could be considered by the commissioners at the FCC's Open Meeting scheduled for December 11, 2014. Between November 1 and November 7, professional staff worked on edits with a goal of having a full draft ready for Chairman Wheeler's review by November 10.<sup>44</sup> Emails exchanged among FCC career staff responsible for drafting portions of the OI Order between November 7 and 9 confirm that staff planned to and did work throughout the weekend prior to the President's statement in order to get a draft to "OCH [Office of the Chairman] on Monday."<sup>45</sup>

While career professional staff worked weekend shifts on the draft OI Order for Chairman Wheeler, senior staff at the FCC had already changed directions.<sup>46</sup> At a later hearing of the Senate Committee on Commerce, Science, and Transportation, Chairman Wheeler confirmed to Senator Johnson that he was briefed about the President's speech on Thursday, November 6, 2014 by Jeffrey Zients, Assistant to the President for Economic Policy.<sup>47</sup> During the weekend between Chairman Wheeler's briefing by Jeffrey Zients and the President's statement—the same weekend that career staff worked on the OI Order—the FCC media team and senior staff were focused on damage control. They crafted an internal "Q&A" document, with edits from Chairman Wheeler directly, in preparation for the anticipated media coverage of President Obama's statement.<sup>48</sup> In the Q&A document, FCC media staff posed an anticipated

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<sup>44</sup> See E-mail from Claude Aiken, Fed. Commc'ns Comm'n, to Kristine Fargotstein, Fed. Commc'ns Comm'n (Nov. 7, 2014) (making clear that the goal over the next couple of days, including the weekend, is to get a draft to the Chairman by Monday, November 10) (HSGAC-OI-032662-63); see e.g., E-mail from Claude Aiken, Fed. Commc'ns Comm'n, to Aaron Garza et al., Fed. Commc'ns Comm'n (Nov. 6, 2014) (compiling sections of the OI draft and making style and grammar edits) (HSGAC-OI-032710-12).

<sup>45</sup> E-mail from Kristine Fargotstein, Fed. Commc'ns Comm'n, to Claude Aiken, Fed. Commc'ns Comm'n (Nov. 7, 2014) (HSGAC-OI-032663) (making a chart of staff availability over the weekend); E-mail from Kristine Fargotstein, Fed. Commc'ns Comm'n, to Claude Aiken, Fed. Commc'ns Comm'n (Nov. 8, 2014) (reviewing edits on Saturday (11/8) and Sunday (11/9) in order to make the Monday deadline) (HSGAC-OI-032657); E-mail from Claude Aiken, Fed. Commc'ns Comm'n, to Denise Coca, Fed. Commc'ns Comm'n (Nov. 8, 2014) (soliciting edits from other staff on Saturday afternoon (11/9)) (HSGAC-OI-032546).

<sup>46</sup> Documents show that General Counsel Jonathan Sallet, Chief of Staff Ruth Milkman, Senior Advisor Philip Verveer, and Media Relations Director Shannon Gilson—among others—were already pivoting away from the hybrid approach. Milkman, Verveer, and Sallet joined the FCC the same day Tom Wheeler became Chairman. See Press Release, Fed. Commc'ns Comm'n, FCC Chairman Tom Wheeler Announces Staff Appointments (Nov. 4, 2013), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-323962A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-323962A1.pdf) (describing *senior staff* appointments by Chairman Wheeler).

<sup>47</sup> *Oversight of the Federal Communications Commission: Hearing Before the S. Commerce, Sci., and Transp. Comm.*, 114th Cong. (2015).

<sup>48</sup> E-mail from Tom Wheeler, Chairman, Fed. Commc'ns Comm'n, to Shannon Gilson, Director, Office of Media Relations, Fed. Commc'ns Comm'n, Jonathan Sallet, General Counsel, Fed. Commc'ns Comm'n, Philip Verveer, Senior Counsel to Chairman, Fed. Commc'ns Comm'n, & Ruth Milkman, Chief of Staff, to Chairman, Fed. Commc'ns Comm'n (Nov. 9, 2014) (rationalizing that Wheeler "did not know the specific substance of the President's letter until he read the public document") (HSGAC-OI-031304-07).



question of whether there were discussions between the White House and the FCC leading up to the President's statement. In response to a proposed answer that "there have not been substantive discussions," the document drafter asked incredulously: "IS THIS RIGHT?"<sup>49</sup>

**Item 4: Q&A document prepared for Chairman Wheeler (Nov. 9, 2014)**

**Q. Has there been discussions between the WH and the FCC leading up to this rollout?**

**A. The FCC kept the WH apprised of the process thus far, but there have not been substantive discussions. (IS THIS RIGHT?)**

While Chairman Wheeler claims that "he did not know the specific substance of the President's letter" until Monday, November 10 when it was made public,<sup>50</sup> the editing process revealed deliberate efforts to avoid "shoot[ing] holes into POTUS'[s] proposal and taking a swing at Title II."<sup>51</sup> At a minimum, the weekend emails demonstrate that Chairman Wheeler was personally aware *prior* to the President's statement that the President would advocate for full Title II, utility-style regulation, which was presumably a topic of conversation at his November 6 meeting with Jeffrey Zients.<sup>52</sup>

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<sup>49</sup> E-mail from Kim Hart, Press Secretary, Fed. Commc'ns Comm'n, to Tom Wheeler et al., Fed. Commc'ns Comm'n (Nov. 9, 2014) (HSGAC-OI-031064).

<sup>50</sup> E-mail from Tom Wheeler, Fed. Commc'ns Comm'n, to Shannon Gilson, et al., Fed. Commc'ns Comm'n (Nov. 9, 2014) ("Q: How did the Chairman find out about the POTUS' letter? A: The Chairman was informed Thursday evening in the broadest possible terms. He did not know the specific substance of the President's letter until he read the public document") (HSGAC-OI-031304-07); E-mail from Jonathan Sallet, Fed. Commc'ns Comm'n, to Tom Wheeler et al., Fed. Commc'ns Comm'n (Nov. 9, 2014) (editing Wheeler's response to the President's Nov. 10, 2014 statement in favor of regulating the Internet as a utility) (HSGAC-OI-031067-72).

<sup>51</sup> E-mail from Shannon Gilson, Fed. Commc'ns Comm'n, to Tom Wheeler, Fed. Commc'ns Comm'n (Nov. 9, 2014) (HSGAC-OI-031068).

<sup>52</sup> Compare E-mail from Kim Hart, Press Secretary, Fed. Commc'ns Comm'n, to Shannon Gilson, Fed. Commc'ns Comm'n (Nov. 9, 2014, 7:43PM) (Kim Hart drafting a press Q&A document including the following: "Q: The Chairman says he shares the same position as the President, but POTUS is calling for Title II and the Chairman has called for 706 and a hybrid approach. So how can they share the same position if they are calling for different legal solutions? A: The Chairman and the President share the same goals – keeping the Internet open as[a] platform for innovation, expression and economic growth. The Chairman has said all options are on the table and no final decision has been made.") (HSGAC-OI0031063-66) with E-mail from Tom Wheeler, Fed. Commc'ns Comm'n, to Shannon Gilson et al., Fed. Commc'ns Comm'n (Nov. 9, 2014, 9:17PM) (Tom Wheeler editing the Q&A document, including the following: "Q: The Chairman says he shares the same position as the President, but POTUS is calling for Title II and the Chairman has called for 706 and a hybrid approach. So how can they share the same position if they are calling for different legal solutions? A: The Chairman and the President share the same goals – keeping the Internet open as [a] platform for innovation, expression and economic growth. The Chairman has often said he is opposed to Internet fast lanes and to accomplish that all options are on the table and no final decision has been made.") (HSGAC-OI-031304-07).





It is also clear from documents obtained by the Committee that President Obama's advocacy for Title II prompted the FCC to immediately pull the OI Order from the December 2014 meeting agenda. In subsequent testimony, Chairman Wheeler admitted that the OI Order was scheduled for the December Opening meeting.<sup>53</sup> When asked for the reason of the delay, Chairman Wheeler stated "it was a bridge too far" and "you can whip the horse, but you can't make it go faster sometimes," and ultimately blaming "the staff" who "just couldn't get the work done."<sup>54</sup> Based on emails, however, the career FCC staff was prepared and on schedule, albeit by working on the weekends, to move forward with the OI Order at the December Open Meeting. The only impediment to getting the work done appears to be the White House's intervention.

In June 2015, Committee staff received a briefing about the process of drafting the OI Order from Roger Sherman, then Chief of the Wireless Telecommunications Bureau, and Matt DelNero, Chief of the Wireline Competition Bureau (Deputy Chief at the time in question).<sup>55</sup> They informed Committee staff that, in the fall of 2014, FCC career professional staff wrote a draft OI Order that utilized the hybrid approach.<sup>56</sup> FCC staff apparently prepared several drafts of the order, all of which incorporated the hybrid approach.<sup>57</sup> According to the briefing, Chairman Wheeler was aware of—and supported—this effort as late as October 2014.<sup>58</sup>

While it is true that the stock values of broadband providers did not crash immediately after the President's announcement, the FCC's OI Order has had a clear impact on the market. According to the Progressive Policy Institute, in the first half of 2015, capital expenditures by major Internet Service Providers (ISPs) dropped an average of 12 percent. (See L. Gordon Covitz, *Obamanet Is Hurting Broadband*, Wall St. J. (Sept. 13, 2015)). As Commissioner Pai testified to Chairman Johnson at a Senate Commerce Committee hearing, "You have to pay the piper when it comes to Title II. And the proof is going to be in the pudding in the months to come, not in the ephemeral stock variations." (*Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. (2015)).

Mr. Sherman and Mr. DelNero confirmed that there was a "pause" of a few weeks after Chairman Wheeler met with Mr. Zients on November 6th so that the FCC could reconsider the merits of its hybrid approach and assess how the President's announcement affected the

<sup>53</sup> *FCC: Process and Transparency: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2015).

<sup>54</sup> *Id.*

<sup>55</sup> Briefing provided by Fed. Commc'ns Comm'n staff for Comm. on Homeland Sec. & Gov't Affairs staff (June 29, 2015).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



market.<sup>59</sup> During this time, career professional staff working on the OI Order also recognized that the “Open Internet is on pause.”<sup>60</sup> On November 21, 2014, Jonathan Sallet, FCC General Counsel, began drafting written testimony for Chairman Wheeler regarding the OI Order.<sup>61</sup> The draft testimony pointed to “the aftermath of the President’s statement”—stability in the markets after the announcement—as “convincing proof that the application of Title II need not deter future investment.”<sup>62</sup> With this justification in mind, at the conclusion of the few week “pause,” Chairman Wheeler instructed FCC staff to follow a pure Title II reclassification.<sup>63</sup>

Chairman Wheeler in Congressional hearings and in public statements denies that the White House dictated the agency’s decision on net neutrality. When questioned by Chairman Johnson in April 2015, Chairman Wheeler stated: “I was looking at a Title II and Section 706 approach before the President filed his position and we came out with a Title II, Section 706 approach.” However, if it were that simple, it strains credulity to believe that Chairman Wheeler was unable to “whip the horse” (that is, the FCC’s professional career staff) to get the OI Order on the December meeting agenda as planned.<sup>64</sup> This is particularly puzzling when it is clear that professional career staff worked weekends to stay on track and deliver Chairman Wheeler’s original proposal in a timely manner.

A review of the documents provided to the Committee demonstrates that the FCC was actively drafting an OI Order using the hybrid approach prior to President Obama’s November 10, 2014 statement in favor of Title II, utility-style regulation. It is clear that once Chairman Wheeler was aware of the President’s imminent statement, Chairman Wheeler and senior staff “paused” drafting the OI Order even though career, professional staff were prepared and willing to get the draft finished. When the “pause” was over, Chairman Wheeler directed staff to draft an OI Order embracing Title II. Chairman Wheeler even alluded to the White House’s influence on the rulemaking during a speech at the Federal

“The FCC has approved President Obama’s plan to ensure a free and open internet.” - Email from the Democratic National Committee, February 27 2015. (*Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. (2015)).

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<sup>59</sup> *Id.*

<sup>60</sup> E-mail from Claude Aiken, Fed. Commc’ns Comm’n, to Alexis Johns, Fed. Commc’ns Comm’n (Nov. 10, 2014, 2:35PM) (HSGAC-OI-009105).

<sup>61</sup> E-mail from Jonathan Sallet, Fed. Commc’ns Comm’n, to Philip Verveer, Senior Counsel to the Chairman, Fed. Commc’ns Comm’n (Nov. 21, 2014) (HSGAC-OI-018370).

<sup>62</sup> *Id.*

<sup>63</sup> Briefing provided by Fed. Commc’ns Comm’n staff for Comm. on Homeland Sec. & Gov’t Affairs staff (June 29, 2015).

<sup>64</sup> *Oversight of the Federal Communications Commission: Hearing Before the S. Commerce, Sci., and Transp. Comm.*, 114th Cong. (Mar. 2015).



Communications Bar Association’s “Chairman Dinner,” where he joked, “I would like to thank Mozilla Foundation for the first draft of my remarks tonight, and President Obama for his edits.”<sup>65</sup> His jest had more than a kernel of truth to it: FCC staff was actively preparing a hybrid draft order up until the President’s announcement in favor of Title II.

### **III. FCC STAFF RECOGNIZED DEFICIENCIES IN THE RECORD AND WORRIED ABOUT POTENTIAL VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT**

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Following the President’s statement on November 10 urging the FCC to regulate broadband under Title II, the FCC shifted to a Title II approach. In doing so, however, documents show that career FCC staff worried that the sudden change would violate federal law governing agency rulemaking.<sup>66</sup> In particular, the APA requires federal agencies to provide for “notice and comment” of proposed action.<sup>67</sup> Here, due to swift change in course, FCC career staff worried that the agency could be violating federal law.

Under the APA, an agency is authorized to promulgate rules through a notice-and-comment process.<sup>68</sup> Because final agency orders are binding, proposals that go through notice-and-comment rulemaking are designed to give stakeholders and the public the opportunity to weigh in on how proposed rules would affect their interests. Typically, the agency proposes a rule, stakeholders and the public comment, and the agency considers those comments as it drafts a final rule. The process is not supposed to serve as a means for an agency to justify a predetermined outcome.<sup>69</sup> Courts have invalidated agency rules for not allowing the public sufficient opportunity to comment.<sup>70</sup>

Only two days into the “pause” period that resulted from the President’s statement on net neutrality, Chairman Wheeler’s office directed career professional staff at the FCC to identify

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<sup>65</sup> Brooks Boliek et al., *The FCC chair’s Internet pivot*, POLITICO (Feb. 2, 2015, 5:36 AM), <http://www.politico.com/story/2015/02/tom-wheeler-net-neutrality-114785>.

<sup>66</sup> See e.g., E-mail from Matthew DelNero, Fed. Comm’n Comm’n, to Jim Schlichting, Fed. Comm’n Comm’n (identifying the application of Title II to mobile and the redefinition of CMRS as “a serious APA notice problem”) (HSGAC-OI-032539).

<sup>67</sup> Administrative Procedure Act (APA), 5 U.S.C. §553 (1946).

<sup>68</sup> Administrative Procedure Act (APA), 5 U.S.C. §551 et seq. (1946).

<sup>69</sup> See *HBO, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (finding that the agency must provide notice to the public before the final rule is adopted or the opportunity to comment is meaningless).

<sup>70</sup> See *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014) (vacating a rule because it was not a logical outgrowth and the agency “did not provide adequate notice and opportunity to comment”).



issues that would be covered in a Further Notice of Proposed Rulemaking (FNPRM), sometimes referred to as a Public Notice (PN).<sup>71</sup> The issues were to be separated into three buckets:

1. “areas where there is *a serious APA notice problem* with substantial litigation risk,”
2. “areas where we could expect to *have to argue that our actions were a logical outgrowth* of the NPRM,” and
3. “areas we are confident that we have adequate notice but would be better informed by more targeted comment.”<sup>72</sup>

Responses poured in from FCC staff working on the OI Order.<sup>73</sup> One career professional staffer in the Wireline Competition Bureau suggested “[w]e would want to seek further comment on changing the definition of ‘public switched network,’ including proposing a revised definition that would expand the term to refer to broadband Internet access networks.”<sup>74</sup> Scott Jordan, Chief Technology Officer, wrote to General Counsel Jonathan Sallet warning that “[r]egarding discriminatory practices, refusals to upgrade capacity, and access fees, *the notice is fairly poor*, consisting mainly of a single general question.”<sup>75</sup> With respect to forbearance—the process of determining which provisions of Title II would not apply—Mr. DelNero identified “forbearance for mobile generally” and “forbearance for re/classification of a service that reaches interconnection” as issues which “likely need more comment in the record.”<sup>76</sup>

A draft of the Open Internet PN dated November 17, 2014, outlined *nine* issue areas of concern.<sup>77</sup> Career professional staff compiled this draft for review by Roger Sherman and Julie

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<sup>71</sup> See e.g., E-mail from Matthew DelNero, Fed. Commc’ns Comm’n, to Jim Schlichting, Fed. Commc’ns Comm’n & Joel Taubenblatt, Fed. Commc’ns Comm’n (Nov. 12, 2014) (making clear that the request for FNPRM topics was coming from “OCH”) (HSGAC-OI-008311).

<sup>72</sup> E-mail from Matthew DelNero, Fed. Commc’ns Comm’n, to Jim Schlichting, Fed. Commc’ns Comm’n (putting the application of Title II to mobile and the redefinition of CMRS in the category of “a serious APA notice problem”) (HSGAC-OI-032539).

<sup>73</sup> See e.g., E-mail from Scott Jordan, Fed. Commc’ns Comm’n, to Jonathan Sallet, Fed. Commc’ns Comm’n (Nov. 12, 2014) (analyzing gaps in the OI proceeding by comparing the notice and the record) (HSGAC-OI-024547).

<sup>74</sup> E-mail from Jennifer Salhus, Fed. Commc’ns Comm’n, to Joel Taubenblatt, Fed. Commc’ns Comm’n (Nov. 12, 2014) (HSGAC-OI-028347).

<sup>75</sup> E-mail from Scott Jordan, Fed. Commc’ns Comm’n, to Jonathan Sallet, Fed. Commc’ns Comm’n (Nov. 13, 2014) (HSGAC-OI-037046 (emphasis added)).

<sup>76</sup> E-mail from Matthew DelNero, Fed. Commc’ns Comm’n, to Jonathan Sallet, Fed. Commc’ns Comm’n (Nov. 12, 2014) (HSGAC-OI-008312); see also Email from Thomas Parisi, Fed. Commc’ns Comm’n, to Melissa Droller Kinkel, Fed. Commc’ns Comm’n (Nov. 14, 2014) (HSGAC-OI-032465-66).

<sup>77</sup> E-mail from Claude Aiken, Fed. Commc’ns Comm’n, to Kristine Fargotstein, Fed. Commc’ns Comm’n (Nov. 17, 2014) (drafting a Public Notice to seek additional comment on “classification/reclassification question”, “edge service classification issue”, “mobile classification issue (reclassify vs. hybrid)”, “CMRS definition issue (reclassify vs. hybrid)”, “broad forbearance paragraphs”, “mobile-specific forbearance para/sentence”, “mobile policy – transparency & RNM”, “specialized services”, “interconnection”) (HSGAC-OI-032431-34).



Veach, former Wireline Competition Bureau Chief.<sup>78</sup> Under FCC drafting procedures, after review by the Bureau Chiefs, the document was sent to the Chairman's office.<sup>79</sup> Career professional staff began preparations to release the PN to the federal register on November 21, 2014.<sup>80</sup>

The FCC press team worked with the Chairman's senior staff to draft a media prep document on Tuesday, November 18, 2014 for a Friday press conference.<sup>81</sup> The document makes clear that FCC staff believed additional comment to be necessary.<sup>82</sup> Specifically, the draft prep document references the need for additional public comment several times:

**Q:** Does the President's letter affect the timing of the rules? Previously you said you'd have rules by the end of the year.

**A:** [W]e have recently come to the conclusion that more work will be needed on these complex issues, including possibly additional public comment.

**Q:** What sorts of questions have arisen that will require additional public comment?

**A:** There are a number of substantive issues that would benefit from more public comment. Questions regarding forbearance and the application of Open Internet rules to mobile, for example.

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**Q:** Do you plan on a Further Notice to strengthen the record?

**A:** It's definitely one of the options we are currently considering to develop a strong legal record.

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<sup>78</sup> E-mail from Claude Aiken, Fed. Commc'ns Comm'n to Joel Taubenblatt et al., Fed. Commc'ns Comm'n (Nov. 17, 2014) (HSGAC-OI-013519-20).

<sup>79</sup> See WCB Weekly Planning (summarizing items under consideration and the deadlines for drafting and consideration by Chairman Wheeler) (HSGAC-OI-028231).

<sup>80</sup> E-mail from Kristine Fargotstein, Fed. Commc'ns Comm'n, to Zachary Ross, Fed. Commc'ns Comm'n (November 14, 2014) (HSGAC-OI-032489).

<sup>81</sup> E-mail from Kim Hart, Fed. Commc'ns Comm'n, to Daniel Alvarez et al., Fed. Commc'ns Comm'n (Nov. 18, 2014) (HSGAC-OI-13562-73).

<sup>82</sup> *Id.*



**Q:** The WSJ reported that the record was thin and you would seek additional comment? Is that true and how *do you need to beef up the record?* (emphasis added).

**A:** *Yes.* The Commission has been examining a number of legal options, including a hybrid approach and Title II reclassification. Over the past few weeks, a number of substantive questions have been raised and it has become clear that Commission staff need more time to study the legal, technical and policy implications of different legal theories and that the Commission record needs to be beefed up in multiple areas, including whether the FCC has the current authority to cover mobile under Title II. (emphasis added).

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**Q:** How does Title II affect the FCC's ability to apply Open Internet rules to mobile? Do you plan to expand new neutrality rules to mobile carriers?

**A:** The use of Title II authority . . . raises questions that are less than fully developed in the record, specifically whether current laws and regulations give the FCC jurisdiction over mobile IP under Title II.<sup>83</sup>

Yet, by November 19, it appears that the FCC's plan to seek further comment had changed. Career professional staff expressed confusion upon receiving feedback on the draft PN, writing "my sense is that the scope of this PN is going to be narrowed substantially, potentially to include solely the 332 CMRS [commercial mobile radio service] definition issue."<sup>84</sup> Two days later, on November 21, General Counsel Jonathan Sallet and Chairman Wheeler's Chief of Staff, Ruth Milkman, discussed with the FCC media team how best to defend the decision not to issue a PN.<sup>85</sup> A media aide pointed out to her colleagues that the FCC needed a better answer for why additional public comments were unnecessary, writing: "NEED MORE ON WHY WE NO LONGER THINK RECORD IS THIN IN SOME PLACES."<sup>86</sup> Mr. Sallet responded, referring to small group meetings conducted by FCC staff: "I think you want to point to recent ex partes and potentially we should consider whether some group meetings would be helpful."<sup>87</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> E-mail from Joel Taubenblatt, Fed. Commc'ns Comm'n, to Jennifer Salhus, Fed. Commc'ns Comm'n & Daniel Ball, Fed. Commc'ns Comm'n (Nov. 19, 2014) (HSGAC-OI-013599). The definition of CMRS relates to the classification decision for mobile broadband Internet.

<sup>85</sup> E-mail from Kim Hart, Fed. Commc'ns Comm'n, to Jonathan Sallet, Fed. Commc'ns Comm'n (Nov. 21, 2014) (HSGAC-OI-18251-53).

<sup>86</sup> *Id.*

<sup>87</sup> E-mail from Jonathan Sallet, Fed. Commc'ns Comm'n, to Kim Hart, Fed. Commc'ns Comm'n (Nov. 23, 2014) (HSGAC-OI-18251-53).





**Item 5: Q&A document prepared by FCC media team and general counsel for press inquiries (Dec. 1, 2014)**

Q: You indicated that parts of the record were thin and needed to be beefed up. The Chairman also said at the last press conference that he wants to make sure he has a fulsome record to support whatever rules he puts forward. Are you now saying you don't need more comment in the record?

A: We of course welcome all comments and feedback from all parties on this important issue. [NEED MORE ON WHY WE NO LONGER THINK RECORD IS THIN IN SOME PLACES – I think you want to point to recent ex partes and potentially we should consider whether some group meetings would be helpful]

Q: I hear staff has been calling some outside parties asking them to submit more comment on specific question. That seems like you're hand-selecting the comments you need to bolster the case for the rules you plan to propose. Why didn't you pose those questions for everyone to provide feedback?

A: The ex parte process is helpful, of course; the staff is also taking meetings that are requested by outside parties to discuss substantive issues.

In an effort to “beef up the record,” General Counsel Jonathan Sallet solicited meetings with certain outside groups such as the Center for Democracy and Technology.<sup>88</sup> He also solicited a meeting in November 2014 with Marvin Ammori, an outspoken net neutrality activist.<sup>89</sup> Reflecting the importance of the meeting—it had been solicited by General Counsel Sallet—another meeting attendee asked for “a list of questions you’d like to cover in our conversation, or some other sort of agenda.”<sup>90</sup> In the normal course of business, the request would typically be the reverse—the meeting request would originate from an outside party and the FCC employee would ask for an agenda. Yet, the FCC solicited these meetings to “beef up the record” to support a rulemaking process for Title II regulations.

Looking for evidence to justify the scrapped PN to the press, on December 1, the FCC’s media team asked senior FCC staff if “additional comments filed since early November address some of the outstanding questions, i.e., mobile and forbearance?”<sup>91</sup> Staff was only able to identify seven “OI mobile filings from the past two months.”<sup>92</sup> In other words, the FCC staff

<sup>88</sup> E-mail from Jonathan Sallet, Fed. Commc’ns Comm’n, to Nuala O’Connor, President & CEO, Center for Democracy & Technology (Nov. 26, 2014) (writing “[i]t would be great if CDT staff could come in to meet with Stephanie on OI issues, as we discussed”) (HSGAC-OI-014730).

<sup>89</sup> E-mail from Jonathan Sallet, Fed. Commc’ns Comm’n, to Marvin Ammori, Ammori Group (Nov. 11, 2014) (“Marvin: Would you be able to come in to see us next week to talk about how the Commission might move forward on its Open Internet proceeding? Thanks, Jon”) (HSGAC-OI-008120).

<sup>90</sup> E-mail from Alan Davidson, Vice President, New America, to Jennifer Tatel, Associate General Counsel, Fed. Commc’ns Comm’n (Nov. 14, 2014) (HSGAC-OI-010130-31).

<sup>91</sup> E-mail from Kim Hart, Fed. Commc’ns Comm’n, to Jonathan Sallet, Fed. Commc’ns Comm’n & Ruth Milkman, Fed. Commc’ns Comm’n (Dec. 1, 2014) (HSGAC-OI-18251-52).

<sup>92</sup> *Id.*; E-mail from Jennifer Salhus, Fed. Commc’ns Comm’n, to Michael Janson, Fed. Commc’ns Comm’n & Daniel Ball, Fed. Commc’ns Comm’n (HSGAC-OI-18366); E-mail from Michael Janson, Fed. Commc’ns Comm’n, to Daniel Ball, Fed. Commc’ns Comm’n (HSGAC-OI-18366-67).





could not establish an adequate basis to argue that recent public comments—that is, comments filed around the time of the President’s statement—provided a sufficient justification for shifting approaches.<sup>93</sup>

The FCC’s Public Notice was never submitted to the Federal Register. The FCC never issued an FNPRM. Instead, after identifying nine separate areas in which additional comments were required, Chairman Wheeler chose to leave the record inadequate, abandon the PN that was carefully drafted by career professional staff, and forge ahead with the reclassification of broadband as a telecommunications service. He did so with the FCC staff aware of “serious” APA concerns, sacrificing regulatory certainty for political expediency.

#### **IV. THE FCC EXHIBITED A LACK OF TRANSPARENCY RELATING TO ITS OPEN INTERNET ORDER**

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Federal law contains a number of provisions designed to ensure transparency in government. Congressional oversight of executive branch activities is another mechanism for ensuring the integrity of government processes. In promulgating its OI Order, the FCC burdened congressional oversight efforts and appeared to err on the side of secrecy with *ex parte* filings instead of transparency.

##### ***A. The FCC withheld drafts of the Open Internet Order requested by Chairman Johnson***

In February 2014, Chairman Johnson requested that the FCC produce the draft OI Order that was under consideration by the FCC in the fall of 2014—at the time of the President’s statement.<sup>94</sup> On April 8, 2015, FCC Chairman Wheeler responded by suggesting that no such draft existed. He wrote: “[T]here was not a draft net neutrality proposal that was finalized for circulation to my fellow Commissioners in late November or early December.”<sup>95</sup>

Although this carefully scripted answer may indeed be true—in that there was no proposal circulated to the commissioners in that period—it conveniently ignores the fact that the FCC possesses drafts of the OI Order from that timeframe.<sup>96</sup> (See Appendix A) As discussed above, it was not due to a lack of hard work by the career professional staff at the FCC that these drafts did not make it to the commissioners. Instead, a draft was never circulated among the

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<sup>93</sup> See *supra* note 16.

<sup>94</sup> Appendix C, Ex. 1, Letter from Ron Johnson, S. Comm. on Homeland Sec. & Gov’t Affairs, to Tom Wheeler, Fed. Commc’ns Comm’n (Feb. 9, 2015).

<sup>95</sup> Appendix C, Ex. 3, Letter from Tom Wheeler, Fed. Commc’ns Comm’n, to Ron Johnson, S. Comm. on Homeland Sec. & Gov’t Affairs (Apr. 8, 2015).

<sup>96</sup> E-mail from Claude Aiken, Fed. Commc’ns Comm’n, to Jonathan Sallet et al., Fed. Commc’ns Comm’n (Nov. 5, 2014, 10:35PM) (HSGAC-OI-006693) (emphasis added).



commissioners because the Chairman opted to change course and abandoned his original plan after the White House’s intervention.

Several documents produced to the Committee reference the existence of drafts of the Open Internet proposal prior to the President’s statement in support of Title II. For example, in one email to General Counsel Jonathan Sallet and other senior FCC leaders dated November 5, 2014, an FCC employee wrote: “[H]ere is an updated version of the OI draft that includes all of the outstanding component parts. While still a work in progress, this is the most comprehensive and complete draft to date.”<sup>97</sup> Mr. Sallet forwarded this e-mail to another FCC employee, asking him to print a hard copy.<sup>98</sup> Although this e-mail included an attachment with the draft proposal, the attachment was withheld from the Committee when the FCC produced documents.

Other documents similarly show that the FCC considered additional drafts of its Open Internet proposal.<sup>99</sup> FCC staff even prepared summary documents to compare the changes made in various drafts of the proposal.<sup>100</sup> Neither the drafts nor the summary documents were produced to the Committee despite being responsive to Chairman Johnson’s initial request. The majority staff repeatedly tried to obtain these documents from the FCC.<sup>101</sup> However, the FCC indicated that it would prefer to offer a briefing on the subject, rather than provide responsive documents.<sup>102</sup> In addition to the drafts of the proposal, the FCC also circulated drafts of a potential PN in November 2014 requesting further comment

**“I’m proud of the process that the commission ran to develop the Open Internet Order. It was one of the most open and most transparent in commission history.”**  
– Chairman Wheeler, Testimony before the House Oversight and Gov’t Reform Comm., March 17, 2015

<sup>97</sup> *Id.*

<sup>98</sup> E-mail from Jonathan Sallet, Fed. Commc’ns Comm’n, to Richard Williams, Fed. Commc’ns Comm’n (Nov. 6, 2014) (HSGAC-OI-006693).

<sup>99</sup> *See, e.g.*, E-mail from Daniel Ball, Fed. Commc’ns Comm’n, to Joel Taubenblatt, Fed. Commc’ns Comm’n (Nov. 7, 2014) (HSGAC-OI-002721); E-mail from Claude Aiken, Fed. Commc’ns Comm’n, to Jonathan Sallet et al., Fed. Commc’ns Comm’n (Oct. 31, 2014) (HSGAC-OI-005003–04).

<sup>100</sup> E-mail from Thomas Parisi, Fed. Commc’ns Comm’n, to Claude Aiken, Fed. Commc’ns Comm’n (Nov. 5, 2014) (HSGAC-OI-029491).

<sup>101</sup> E-mail from staff of the S. Homeland Sec. & Gov’t Affairs Comm., to staff of the Fed. Commc’ns Comm’n (April 17, 2015); E-mail from staff of the S. Homeland Sec. & Gov’t Affairs Comm., to staff of the Fed. Commc’ns Comm’n (May 21, 2015); E-mail from staff of the S. Homeland Sec. & Gov’t Affairs Comm., to staff of the Fed. Commc’ns Comm’n (June 2, 2015).

<sup>102</sup> E-mail from staff of the Fed. Commc’ns Comm’n, to the staff of the S. Homeland Sec. & Gov’t Affairs Comm. (June 5, 2015).



on select policy issues.<sup>103</sup> Portions of the draft PN were provided to the Committee; however, the FCC failed to produce a full draft of the PN.<sup>104</sup>

### ***B. The FCC circumvented ex parte communication requirements***

The FCC must obey the requirements of notice-and-comment rulemaking, which includes ensuring that the public has access to a record of all *ex parte* communications related to an agency proceeding.<sup>105</sup> The intention of these requirements is to bring transparency and accountability into the regulatory process. Throughout the FCC's process of drafting its OI Order, the Commission circumvented transparency by avoiding compliance with *ex parte* communication requirements.

By definition, an *ex parte* communication is “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.”<sup>106</sup> A general exclusion exists for “status report” requests.<sup>107</sup> “At the FCC, ‘*ex parte*’ describes a communication directed to the merits or outcome of a proceeding” but which was not said or written to the public.<sup>108</sup> Any communication from a Member of Congress or the executive branch of the federal government is considered *ex parte* if it is “of substantial significance and clearly intended to affect the ultimate decision.”<sup>109</sup> Although a 1991 opinion from the Justice Department's Office of Legal Counsel opines that White House officials may advocate for a particular policy position in FCC rulemakings, the opinion also cautions that “White House staff members should avoid even the mere appearance of interest or influence—and the easiest way to do so is to avoid discussing matters pending before the independent regulatory agencies.”<sup>110</sup>

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<sup>103</sup> See E-mail from Claude Aiken, Fed. Commc'ns Comm'n, to Kristine Fargotstein, Fed. Commc'ns Comm'n (Nov. 17, 2014) (seeking additional comments because “[t]he response to the NPRM has brought to light additional issues that warrant further comment.”) (HSGAC-OI-032431-32).

<sup>104</sup> See e.g., E-mail from Melissa Krikell, Fed. Commc'ns Comm'n, to Claude Aiken, Fed. Commc'ns Comm'n (Nov. 17, 2014) (describing the need for additional comment on forbearance “on the extent to which forbearance should apply if the Commission were to classify mobile broadband Internet access service as a CMRS service subject to Title II.”) (HSGAC-OI-032465-66); E-mail from Kristine Fargotstein, Fed. Commc'ns Comm'n, to Claude Aiken, Fed. Commc'ns Comm'n (Nov. 17, 2014) (outlining additional questions related to Interconnection for the PN) (HSGAC-OI-032431); *But see*, E-mail from Claude Aiken, Fed. Commc'ns Comm'n, to Julie Veach et al., Fed. Commc'ns Comm'n (Nov. 17, 2014, 10:25PM) (describing an attached draft Public Notice “that is due to go to OCH on 11/19”, which was not provided to the Committee) (HSGAC-OI-032423).

<sup>105</sup> 47 CFR 1.1206(b)(2) (2016).

<sup>106</sup> 5 U.S.C. 551; *see also*, 47 C.F.R. 1.1202.

<sup>107</sup> 5 U.S.C. 551; *see also*, 47 C.F.R. 1.1202(a).

<sup>108</sup> Fed. Commc'ns Comm'n., Ex Parte Resources, <https://www.fcc.gov/proceedings-actions/ex-parte/general/ex-parte-resources> (last visited Feb. 5, 2016); 47 CFR 1.1202 (2016).

<sup>109</sup> 47 C.F.R. 1.1206(b)(3).

<sup>110</sup> O.L.C. Opinion, *supra* note 16 at 4 (emphasis added).



At the FCC, a summary of the written or oral *ex parte* communication must be filed in the record so that the public and stakeholders have the opportunity to review and comment.<sup>111</sup> For instance, after President Obama's statement supporting Title II regulation of the Internet and after senior White House official Jeffrey Zients met with Chairman Wheeler, the FCC entered *ex parte* filings into the record for both communications.<sup>112</sup> During the course of the OI Order drafting process, however, documents produced to the Committee revealed other examples in which FCC senior staff either did not file an *ex parte* notice or reasoned that one was not necessary.<sup>113</sup>

In one instance, a reporter questioned why *ex parte* notices had not been filed for Chairman Wheeler's dozen or more meetings at the White House.<sup>114</sup> In response to this inquiry, the FCC media team conferred with senior staff in Chairman Wheeler's office. In an effort to justify the decision not to file *ex parte* notices, Philip Verveer, Senior Counsel to the Chairman asserted, "I assume the answer is that there literally was no advocacy" during the meetings between Chairman Wheeler and White House personnel.<sup>115</sup> The reporter responded that he found that "hard to believe."<sup>116</sup>

The documents reviewed by the Committee make clear that Chairman Wheeler regularly communicated with presidential advisors. None of the communications reviewed by the Committee were submitted to the FCC's formal record in the form of *ex parte* notices although the OI Order was clearly discussed.<sup>117</sup> One email between Chairman Wheeler and Jeffrey Zients

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<sup>111</sup> 47 C.F.R. 1.1206(b)(1)-(2); *see e.g.*, Protecting and Promoting the Open Internet, 79 Fed. Reg. 37448, 37472 (proposed May 15, 2014) (to be codified at 47 C.F.R. 8) (requiring that *ex parte* filings be submitted to the record within two days of the communication).

<sup>112</sup> *Ex Parte* for President Barack Obama and Jeffrey Zients, Protecting and Promoting the Open Internet (GN Docket No. 14-28) (Nov. 10, 2014).

<sup>113</sup> E-mail from Stephanie Weiner, Fed. Commc'ns Comm'n, to Markham Erickson, Partner, Steptoe & Johnson LLP (Nov. 19, 2014) (discussing OI process but no *ex parte* was filed) (HSGAC-OI-013618); E-mail from Matthew DelNero, Fed. Commc'ns Comm'n, to Praveen Goyal, Counsel, Hogan Lovells US LLP (Nov. 12, 2015) (rationalizing that no *ex parte* was necessary) (HSGAC-OI-009711).

<sup>114</sup> E-mail from Brooks Boliek, Reporter, Politico, to Kim Hart, Press Secretary, Fed. Commc'ns Comm'n (Nov. 19, 2014) (HSGAC-OI-013791).

<sup>115</sup> E-mail from Philip Verveer, Fed. Commc'ns Comm'n, to Kim Hart, et al., Fed. Commc'ns Comm'n (Nov. 19, 2014) (HSGAC-OI-013791).

<sup>116</sup> E-mail from Kim Hart, Fed. Commc'ns Comm'n, to Philip Verveer, et al., Fed. Commc'ns Comm'n (Nov. 19, 2014) (HSGAC-OI-013791).

<sup>117</sup> E-mail from Tom Wheeler, Fed. Commc'ns Comm'n, to David Edelman, Fed. Commc'ns Comm'n (April 23, 2014) (HSGAC-OI-001232); E-mail from Tom Wheeler, Fed. Commc'ns Comm'n, to Jeffrey Zients, Exec. Office of the President, John Podesta, Exec. Office of the President, Jason Furman, Exec. Office of the President, Tom Power, Exec. Office of the President, & David Edelman, Exec. Office of the President (April 24, 2014) (HSGAC-OI-001223); E-mail from Tom Wheeler, Fed. Commc'ns Comm'n, to Jeffrey Zients, Exec. Office of the President & Jason Furman, Exec. Office of the President (April 29, 2014) (HSGAC-OI-001227); E-mail from Tom Wheeler, Fed. Commc'ns Comm'n, to Jeffrey Zients, Exec. Office of the President, Jason Furman, Exec. Office of the



and Jason Furman makes reference to a prior conversation about the OI Order.<sup>118</sup> *Ex parte* notices were not filed for either the email or the conversation.

**Item 6: Email from Chairman Wheeler to Jeffrey Zients & Jason Furman (Apr. 29, 2014)**

**From:** TW  
**To:** Jeffrey Zients@who.eop.gov; Jason Furman@cea.eop.gov  
**Subject:** Fw: FINAL NCTA  
**Date:** Tuesday, April 29, 2014 4:38:00 PM  
**Attachments:** OI blog 4.29 FINAL FOR POSTING.docx

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As per our discussion: this is this afternoon's blog post on the Open Internet NPRM.

All options on the table...we are seeking comments and input...following the court's blueprint.

T

**Item 7: Email from Chairman Wheeler to Jeffrey Zients, Jason Furman, & Tom Power (Apr. 23, 2014)**

**From:** TW  
**Sent:** Wednesday, April 23, 2014 10:15 PM  
**To:** Jeffrey Zients@who.eop.gov; Jeff Zients@who.eop.gov; Jason Furman@cea.eop.gov; Jason Furman@cea.eop.gov; Tom Power@ostp.eop.gov; Tom Power@ostp.eop.gov  
**Subject:** NYT story is wrong

The NYT is moving a story that the FCC is gutting the Open Internet rule. It is flat out wrong. Unfortunately, it has been picked up by various outlets without checking.

Tomorrow we will circulate to the Commission a new Open Internet proposal that will restore (and in the case of transparency which was allowed to stand by the court, expand) the concepts in the original Net Neutrality Order in a manner consistent with the court's ruling in January.

There is no "turnaround in policy." We are implementing the same policies in a manner that will pass court scrutiny. We have told the NYT they have it wrong.

The same rules will apply to all Internet content. As with the original Open Internet rules, and consistent with the court's decision, behavior that harms consumers or competition will not be permitted.

We are moving a statement containing these points to the media right now.

Please call me if you have any questions. [REDACTED] is my mobile.

T

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President, Tom Power, Exec. Office of the President, & John Podesta, Exec. Office of the President (April 29, 2014) (HSGAC-OI-001233).

<sup>118</sup> E-mail from Tom Wheeler, Fed. Comm'n's Comm'n, to Jeffrey Zients, Exec. Office of the President & Jason Furman, Exec. Office of the President (April 29, 2014) (HSGAC-OI-001227).



**Majority Staff Report**  
**Committee on Homeland Security and Governmental Affairs**  
**United States Senate**



**Item 8: Email from Chairman Wheeler to White House Advisors (Apr. 24, 2014)**

**From:** TW  
**Sent:** Thursday, April 24, 2014 06:17 PM  
**To:** Jeff Zients @who.eop.gov; Jeff Zients @who.eop.gov; John Podesta @who.eop.gov; John Podesta @who.eop.gov; Jason Furman @cea.eop.gov; Jason Furman @cea.eop.gov; Tom Power @ostp.eop.gov; Tom Power @ostp.eop.gov; David Edelman @who.eop.gov; David Edelman @who.eop.gov  
**Subject:** Fw: CNET: Calm down: FCC's position on Net neutrality hasn't changed

Gentlemen -

This is the most thoughtful explanation of what has been going on with the Open Internet. I thought you'd want to see it. She is exactly right.

We have been spending the day with congressional calls, and editorial board and reporter calls.

I just wanted you to have this so you'd see a realistic analysis of what's really going on.

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**From:** Meribeth McCarrick  
**Sent:** Thursday, April 24, 2014 05:52 PM  
**To:** Gigi Sohn; TW; Shannon Gilson; Neil Grace; Mark Wigfield; Sara Morris; Jonathan Sallet; Maria Kirby; Renee Gregory; Daniel Alvarez; Ruth Milkman; Stephanie Weiner; Rochelle Cohen; Julie Veach  
**Subject:** CNET: Calm down: FCC's position on Net neutrality hasn't changed

**Calm down: FCC's position on Net neutrality hasn't changed**  
There's been a lot of confusion about what the FCC is or is not proposing for its rewrite of its Open Internet rules. CNET's Marguerite Reardon breaks it down.  
by Marguerite Reardon  
April 24, 2014 2:10 PM PDT  
<http://www.cnet.com/news/fccs-position-on-net-neutrality-hasnt-changed/>  
When it comes to discussing the FCC's recent proposal for rewriting its Net neutrality rules, everyone needs to take a deep breath, slow down and check their facts, according to FCC chairman Tom Wheeler, whose agency seems to have a knack for inadvertently exciting the public over its proposed policy plans.



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**Committee on Homeland Security and Governmental Affairs**  
**United States Senate**

**Item 9: Email from Chairman Wheeler to Jeffrey Zients, Jason Furman, Tom Power, & John Podesta (Apr. 29, 2014)**

**From:** TW  
**Sent:** Tuesday, April 29, 2014 7:52 PM  
**To:** 'Jeff Zientz'; 'Jason Furman'; 'Tom Power'; 'John D. Podesta'  
**Subject:** Open Internet update  
**Attachments:** NCTA Final4-29.docx

Gentlemen -

Below is the link to today's blog further explaining the Open Internet NPRM. The press reaction has been what we'd hoped, that I have clarified previous misconceptions about how the proposal would somehow gut the Open Internet.

Attached is my speech to NCTA tomorrow. The first two pages are about Open Internet - a message delivered to the broadband providers as to what will be expected.

Message in both: (1) it is a proposal on which we seek comment, (2) all options are on the table, including Title II, and (3) I have flat out expressed skepticism that we'd find "commercial reasonableness" to be a route to exceptions to the rule for special deals and prioritization.

As I have said since February, the proposal is designed to deliver on the goals of the 2010 Open Internet Order (which, you'll recall, included a reasonableness test) and to do so in a manner that follows the D.C. Circuit's roadmap (and hopefully thus avoids litigation).

The President has supported the Open Internet and anti-discrimination. Just like he supported the 2010 order with its reasonableness test there is no need to no change with this proposal. I believe he can say that we are using current law to its fullest (and in a manner that was prescribed by the court) to assure an Open Internet and anti-discrimination. The next step is to change the law, even Title II has a "just and reasonable" test.

Hope this is helpful.

The initial coverage has been helpful and the feedback from the public interest groups better. I'll send you some clips in a moment.

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While neither the OLC Opinion nor the FCC rules further define the threshold for requiring an *ex parte* filing—beyond the communication being of “substantial significance and clearly intended to affect the ultimate decision”—emails between Chairman Wheeler and White House senior staff show the FCC’s efforts to justify and further explain actions taken in relation to the OI Order.<sup>119</sup> Clearly, given the importance of this issue, the FCC and the White House should have taken great pains to even avoid the appearance that the White House influenced the FCC’s independent rulemaking. As it is, the lack of transparency surrounding these communications is troubling and raises further questions about the development of the FCC’s order.

<sup>119</sup> See e.g., E-mail from Tom Wheeler, Fed. Commc’ns Comm’n, to David Edelman, Fed. Commc’ns Comm’n (April 23, 2014) (clarifying that there is “no ‘turnaround in policy’”) (HSGAC-OI-001232); E-mail from Tom Wheeler, Fed. Commc’ns Comm’n, to Jeffery Zients, Exec. Office of the President, Jason Furman, Exec. Office of the President, Tom Power, Exec. Office of the President, & John Podesta, Exec. Office of the President (April 29, 2014) (justifying that the FCC’s proposed OI rule can still be supported by the President) (HSGAC-OI-001233).





## V. CONCLUSION

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In February 2015, the *Wall Street Journal* reported that the President’s “vision for regulating high-speed Internet traffic” “swept aside more than a decade of light-touch regulation of the Internet and months of work by [FCC Chairman] Wheeler toward a compromise.”<sup>120</sup> Chairman Wheeler shortly thereafter “lined up behind Mr. Obama” and announced that the FCC would follow the President’s orders—it would classify the Internet under Title II of the Communications Act.<sup>121</sup> The documents that inform the Committee’s inquiry confirm this report.

An analysis of documents produced to the Committee in response to Chairman Johnson’s request shows that the FCC bent to the political pressure of the White House, abandoning its work on a hybrid approach to “pause” and then pivot to reclassify broadband as a telecommunications service, subjecting broadband providers to regulation under Title II of the Communications Act. The FCC’s staff worried that the process to adopt President Obama’s preferred policy approach violated the Administrative Procedure Act. Most fundamentally, throughout this process—as the FCC shifted to a Title II approach and then responded to congressional oversight—it failed to live up to standards of transparency.

It should be highly concerning that an independent agency like the FCC could be so unduly influenced by the White House, particularly on an issue that touches the lives of so many Americans and has such a significant impact on a critical sector of the United States economy. Documents produced to the Committee clearly show that the career professional staff at the FCC worked diligently on the Commission’s OI Order, despite its significant and last-minute change in direction. It is also clear that career professional staff worked expeditiously and thoroughly on the Commission’s planned Public Notice, despite its ultimate abandonment by FCC leadership. Had the White House not inserted itself into the formal FCC rulemaking process, it is probable that the Open Meeting in December would have included the OI Order. At the very least, if the FCC had issued a Public Notice, the record would presumably have been much more informed. Politics should never trump policy, especially not when an agency, like the FCC, was created for the expressed purpose of being independent and above the political fray.

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<sup>120</sup> Nagesh *supra* note 1.

<sup>121</sup> See Nagesh *supra* note 1.

