



To justify scrapping the net neutrality rules properly adopted under Title II, the Notice of Proposed Rulemaking posits a mythic Golden Era in which innovation and many other wonderful things were permitted to thrive – an era ostensibly brought to a screeching halt by the adoption of the Title II Order in 2015. Leaving aside the awkward fact that it is impossible to make such a sweeping judgment of the effect of the Title II Order in such a short period of time, this re-imagining of the pre-2015 era ignores the inconvenient truth that the Commission’s net neutrality rules were in effect for years before that. The FCC skirmished in court with the giant telecommunications companies for years before the DC Circuit upheld its authority under Title II, but during that period all of the major actors took the cautious and prudent path of *obeying net neutrality rules*. Indeed, net neutrality was such the order of the day that Comcast and NBC Universal agreed to incorporate them into their merger agreement<sup>1</sup>.

In any event, it is rather odd to square the NPM’s revisionist history with our actual experience. Throughout the years in which net neutrality was the *de facto* regulatory framework, innovation has in fact flourished. This is precisely when high-speed Internet connections (which permit streaming of high-quality video programming written by WGAE members) expanded most dramatically, when tens of millions of Americans transformed their interactions with one another through social media, when mobile devices became vastly more powerful and prevalent. In other words, the most profound innovations in Internet history were made possible precisely because of net neutrality, not despite it.

If anything, our concern is that these rapid, useful developments have made it imperative to strengthen the net neutrality rules, to enhance their application and enforcement. This period of enormous growth and innovation has enabled a few high-tech companies to grow to enormous size and power. Comcast controls a huge portion of the cable market and it owns one of the biggest content production entities in the nation – NBC Universal. Telecom giant AT&T owns DirecTV and Yahoo. Companies like Facebook, Amazon, and Apple control hundreds of billions of dollars of market share and have more than enough market power to expand their dominance should the Commission drop its commitment to maintaining and enforcing non-discrimination rules – including rules against paid prioritization.

The NPR suggests that paid prioritization might actually be a good thing. This is true: paid prioritization would be a very good thing for giant technology companies that have the market power to extract rent because of their dominance – in the case of ISPs, rent for access to the pipelines they control; in the case of content aggregators and distributors, rent for access to the content they control.

Paid prioritization might be economically rational for the giant technology companies. For example, Netflix’ willingness to pay Comcast/NBCU a huge fee to ensure swift and smooth streaming is economically rational for both entities (and therefore commercially reasonable); Netflix’ product is made substantially more attractive to customers as a result,

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<sup>1</sup> We note that the Commission adopted its order requiring the companies to adhere to strict net neutrality principles in January 2011, further undermining the notion that these rules arose for the first time with the Title II Order in 2015.

and Comcast/NBCU gains enhanced revenues. Unfortunately, this also means that customers face upward price pressure and content creators who do not pay for this prioritization have a substantially more difficult time attracting viewers.

The distribution market in most areas is controlled by a monopoly or duopoly. In many parts of the country there is only one ISP – the cable company. In some areas, there are two – the cable company and the telecom. In a perfectly competitive marketplace squeezing access to the Internet pipes into Americans’ homes through paid prioritization or otherwise would be very difficult to accomplish. Content creators and distributors could do business with any number of ISPs, as could edge providers and consumers. We are unaware of any economic theory in which a market is considered competitive if there is only one supplier, or at best two.

Let us underscore what is at stake. As the Internet has developed in recent years, all data reaches consumers through a single pipe. Email, social media, television, feature films after their theatrical releases, made-for-digital programs, news in text form and in video form, land-line telephony. Permitting powerful gatekeepers to control and prioritize what flows through this single pipe, at what rate and quality, has an enormous effect on what Americans watch and read and learn and write and communicate. Equal and open access is essential. Eliminating the Title II order will deprive the American people of precisely that equal and open access.

We urge the Commission to maintain – indeed, to strengthen – the Title II Order.